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CONVERGENCE & DIVERGENCE IN DIGITAL TRADE REGULATION: A COMPARATIVE ANALYSIS OF CP-TPP, RCEP, AND EJSI

Andrew D. Mitchell and Vandana Gyanchandani***

ABSTRACT

The article provides an in-depth comparative legal analysis of the fundamental digital trade provisions in three modern trade agreements: the Comprehensive and Progressive Trans-Pacific Partnership Agreement (CP-TPP), Regional Comprehensive Economic Partnership Agreement (RCEP), and Joint Statement Initiative on electronic commerce (eJSI) draft text. It features new, diverse regulatory priorities and approaches to govern digital trade. The comparative analysis will enable policymakers and civil society to appreciate the underlying regulatory concerns in negotiating digital trade agreements. The analysis aims to support an advancement of such digital trade provisions and make these deliberations more inclusive in future.

INTRODUCTION

Digital trade, as enabled by cross-border data flows, is the main catalyst of an exponential form of economic globalization which is led by rapid digitalization and emerging new digital technologies. The COVID-19 global pandemic, since March 2020, has led to an exponential shift towards the economic digitalization which has accentuated physical distancing along with the swift proliferation of digital communications to support the global economy and society. The global or regional digital trade regulation is coordinated by specific international trade institutions and agreements, e.g., the WTO Joint Initiative on e-commerce (eJSI).

The article provides a comparative legal analysis of the three significant digital trade agreements: the Comprehensive and Progressive Trans-Pacific Partnership (CP-TPP) Agreement, Regional Comprehensive Economic Partnership (RCEP) Agreement, and the Joint Statement Initiative on e-commerce (eJSI) to rationalize the current regulatory environment. The legal analysis will help the stakeholders understand key opportunities and challenges to regulate digital trade in future.

This article is a significant addition to the existing scholarship on digital trade law¹ because it is a novel attempt to comparatively assess digital trade provisions in three prominent

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¹ See, e.g., Andrew D. Mitchell & Neha Mishra, *Data at the Docks: Modernising International Trade Law for the Digital Economy*, 20 VAND. J. OF ENT. & TECH. L. 18 (2018); Andrew D. Mitchell, *Regulating Cross-Border Data Flows in a Data-Driven World: How WTO Law Can Contribute*, 22 J. OF INT. ECON. L. 3 (2019); Neha Mishra, *International Trade, Internet Governance and the Shaping of the Digital Economy*, UNESCAP ARTNET WORKING PAPER SERIES No. 168 (2017); Neha Mishra, *Privacy, Cybersecurity, and GATS Article XIV: A New Frontier for Trade and Internet Regulation*, 19 WORLD TRADE REV. 3 (2019); Neha Mishra, *Building Bridges: International Trade Law, Internet Governance, and the Regulation of Data Flows*, 52 VAND. J. TRANSNAT'L L. 2 (2021); Andrew D. Mitchell & Neha Mishra, *A New Digital Economy Collaboration in the Indo-Pacific: Negotiating Digital Trade in the Australia-India CECA*, 57 J. OF WORLD TRADE 1 (2023); Andrew D. Mitchell & Jarrod Hepburn, *Don't Fence Me In: Reforming Trade and Investment Law to Better Facilitate Cross-Border Data Transfer*, 19 YALE J. OF L. AND TECH. 192 (2017); Andrew D. Mitchell & Neha Mishra, *WTO Law and*

trade agreements. It discusses the impact of Joint Statement Initiative on e-commerce (eJSI) draft text in relation to the most relevant regional digital trade agreements. The article systematically tracks and examines these new regulatory approaches to regulate digital trade. It aims to make these deliberations intelligible and inclusive for all policymakers and civil society members.

The article consists of five sections. This introduction is the first section. The second section provides a general background to the three covered digital trade agreements. The third section provides a uniform general classification of all digital trade provisions to streamline the discussions among stakeholders. The fourth section provides a substantive comparative legal analysis on the most pertinent digital trade provisions. The fifth section concludes this article.

I. GENERAL BACKGROUND

A complex political process to reach agreements on “digital trade” in the multilateral context has been the main catalyst for the rise in cross-regional FTA networks as the principal alternative to steer the global regulatory deliberations.² It has motivated the policymakers to value strategic and efficacious “minilateral approaches” as compared to the traditionally-established but detrimentally protracted “multilateral approach.”³

The RTAs have become the most effective forum to promote digital trade liberalization.⁴ The RTAs act as “regional trade regulatory incubators” to experiment with the distinct regulatory approaches and cooperation models as prompted by diverse policy considerations of member states.⁵ International deliberations and negotiations in the sphere of digital trade have been mainly led by such RTAs, especially, the Comprehensive and Progressive Trans-Pacific Partnership (CP-TPP) Agreement and the Regional Comprehensive Economic Partnership (RCEP) Agreement as followed by the new WTO Joint Statement Initiative on electronic commerce (eJSI). These RTAs with varied membership cover the most pertinent legal, political, and economic considerations in the governance of digital trade.

Cross-Border Data Flows: An Unfinished Agenda in Mira Burri (ed.) *Big Data and Global Trade Law*, CAMBRIDGE UNIV. PRESS 83-112 (2021);

Andrew D. Mitchell, *Towards Compatibility: The Future of Electronic Commerce within the Global Trading System*, 4 J. OF INT. ECON. L. 683-723 (2001); Neha Mishra, *Digital Trade in the Australia-EU FTA: A Future-Forward Perspective*, EUROPEAN YEARBOOK OF INT'L ECON. L. (2021); Henry Gao & Gregory C. Shaffer, *The RCEP: Great Power Competition and Cooperation over Trade*, UC IRVINE SCH. OF L. RSCH. PAPER No. 2021-09 (2021); Henry Gao, *Digital or Trade? The Contrasting Approaches of China and US to Digital Trade*, 21 J. OF INT'L ECON. L. 2 (2018); Henry Gao, *Data Regulation with Chinese Characteristics in Mira Burri (ed.) Big Data and Global Trade Law* (2021); Henry Gao, *Across the Great Wall: E-commerce Joint Statement Initiative Negotiation and China* (2020); Henry Gao, *Data Sovereignty and Trade Agreements: Three Digital Kingdoms*, HINRICH FOUND. (2022); Henry Gao, *Regulation of Digital Trade in US Free Trade Agreements: From Trade Regulation to Digital Regulation*, 45 LEGAL ISSUES OF ECON. INTEGRATION 1 (2017).

² *What is at stake for developing countries in trade negotiations on e-commerce? The case of the Joint Statement Initiative*, UNCTAD (Feb. 19, 2021), https://unctad.org/system/files/official-document/ditctncd2020d5_en.pdf.

³ Lior Herman, *Multilaterlising Regionalism: The Case of E-Commerce*, OECD TRADE POL'Y WORKING PAPER No. 99 (2010), <https://www.oecd-ilibrary.org/docserver/5kmbjx6gw69x-en.pdf?expires=1648094649&id=id&accname=guest&checksum=3440E6A3DB4704075CAD1B421D7EB517>.

⁴ JEAN-BAPTISTE VELUT ET AL. EDS., UNDERSTANDING MEGA FREE TRADE AGREEMENTS (Routledge Taylor & Francis Group, 1st ed. 2018).

⁵ *Id.*

The CP-TPP and RCEP mainly center on the Asia-Pacific region. The TPP prior to CP-TPP was an endeavour by the US to increase its market presence in the Asia-Pacific region vis-à-vis China.⁶ However, with the US's withdrawal from TPP and China's active engagement in RCEP, the economic presence of China has increased, as compared to the US, who is not a party to any of the two RTAs.⁷ We should appreciate that any regulatory coherence achieved with or within the Asia-Pacific region will be definitive for multilateral consensus on digital trade.⁸ Lastly, the co-conveners of WTO eJSI negotiations are from the Asia-Pacific region: Australia, Japan, and Singapore.⁹ The Asia-Pacific region plays a leading role in regional and global digital trade negotiations.

The CP-TPP is a mega-regional agreement which was concluded on January 23, 2018, and signed on March 8, 2018, by Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore, and Vietnam, constituting a population of 500 million and 13% of the global economy.¹⁰ The US, Colombia, South Korea, Taiwan, Thailand, Philippines, and China indicated their interest to join the same.¹¹ Of the list of countries, UK, China, and Taiwan have already applied to join the CP-TPP.¹² The USTR Katherine Tai, in response¹³ to a question whether the US aims to join the CP-TPP, said:

I will review CP-TPP to evaluate its consistency with the Build Back Better agenda and whether it would advance the interests of all American workers. I commit to consulting closely with Congress on any trade agreement negotiations.

The basic formulation of working closely with like-minded countries in the Asia-Pacific with shared strategic and economic interests is a sound one, but much has changed in the world since the TPP was signed in 2016. If confirmed, I commit to working closely with like-minded countries in the Asia-Pacific region to deepen our trade relationship in ways that benefits America broadly, including our workers, manufacturers, service providers, farmers, ranchers, and innovators.

Cutler outlines four ways to re-engage the US with the CP-TPP parties: “(1) returning to the original TPP agreement; (2) acceding to the CP-TPP; (3) seeking a broader renegotiation;

⁶ Henry Gao & Gregory Shaffer, *The RCEP: Great Power Competition and Cooperation over Trade*, LEGAL STUDIES RSCH. PAPER SERIES No. 2021-09 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3777604.

⁷ *Id.*

⁸ See *Embracing the E-Commerce Revolution in Asia and the Pacific*, U.N. ESCAP & ADB (2018), https://www.unescap.org/sites/default/files/Embracing%20E-commerce_0.pdf.

⁹ *E-commerce co-convenors release update on the negotiations, welcome encouraging progress*, WTO (Dec. 14, 2020), https://www.wto.org/english/news_e/news20_e/ecom_14dec20_e.htm.

¹⁰ Hiroshi Matsuura, *Why joining the CP-TPP is a smart move for the UK?*, CHATHAM HOUSE (Mar. 19 2021), <https://www.chathamhouse.org/2021/03/why-joining-cptpp-smart-move-uk>.

¹¹ Christopher F. Corr et al., *The CPTPP Enters into Force: What Does it Mean for Global Trade?*, WHITE & CASE (Jan. 21 2019), <https://www.whitecase.com/publications/alert/cptpp-enters-force-what-does-it-mean-global-trade>.

¹² Matsuura, *supra* note 10; Shannon Tiezzi, *Wendy Cutler on China, Taiwan and the CP-TPP*, THE DIPLOMAT (Oct. 5, 2021), <https://thediplomat.com/2021/10/wendy-cutler-on-china-taiwan-and-the-cptpp/>.

¹³ *Hearing to Consider the Nomination of Katherine C. Tai, of the District of Columbia, to be United States Trade Representative, with the rank of Ambassador Extraordinary and Plenipotentiary*, SENATE FINANCE COMM. (2021), <https://www.finance.senate.gov/imo/media/doc/Katherine%20Tai%20Senate%20Finance%20Committee%20QFRs%202.28.2021.pdf>.

or (4) pursuing a narrow sectoral agreement as a first step.”¹⁴ She provides that the 3rd and 4th options are better aligned to re-establish the US’s leadership in setting the trade policy agenda for the trans-Pacific region.¹⁵ The third option’s approach to re-negotiate the CP-TPP will restore the US’s role in trade negotiations and allow it to leverage its market size as well as to push for more extensive revisions than accession would permit.¹⁶ The fourth option provides that the US needs to engage bilaterally on an issue specific agreement, e.g., the US-Japan Digital Trade Agreement, as effective from January 1, 2020.¹⁷

In recent times, the US trade diplomacy has been inclined towards specific sectoral or bilateral issues, e.g., the US-EU large aircrafts dispute resolution,¹⁸ the US-EU Trade and Technology Council,¹⁹ or the recent review of the US-China phase I deal.²⁰ President Biden stated that the US intends to pursue the “Indo-Pacific Economic Framework (IPEF)”²¹ as a novel means to strengthen ties with the Asia-Pacific region on key strategic issues individually, i.e., through defined modular economic pacts rather than an integrated FTA framework.²² The new IPEF initiative is a response by the USTR to meet the current economic and geopolitical pressures by re-engaging and cooperating with the Asia-Pacific region on strategic areas.²³ One of the strategic areas of negotiations is “digital and emerging technologies-related issues.”²⁴ The US will host APEC 2023, and it will likely announce IPEF-related agreements during the final APEC ministerial conference.²⁵ While the IPEF is different from an all-encompassing and integrated FTA, it offers opportunities for both the US and Asia-Pacific region, especially in the field of digital trade. The study undertaken in this article will be informative for future deliberations on achieving regional and international regulatory cooperation on digital trade, especially in the context of a plausible US – Indo-Pacific Digital Economy Agreement (USIP DEA).

Alternatively, the RCEP, as concluded and signed on November 15, 2020, is a regional trade agreement between Australia, Brunei Darussalam, Cambodia, China, Indonesia, Japan, Korea, Lao PDR, Malaysia, Myanmar, New Zealand, Philippines, Singapore, Thailand,

¹⁴ Wendy Cutler, *Reengaging the Asia-Pacific on Trade: A TPP Roadmap for the Next US Administration*, ASIA SOC’Y POL’Y INST. (2020), <https://asiasociety.org/sites/default/files/2020-09/A%20TPP%20Roadmap%20for%20the%20Next%20U.S.%20Administration.pdf>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *EU and US take decisive step to end aircraft dispute*, EUR. COMM’N (June 15, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3001.

¹⁹ *US-EU Trade and Technology Council (TTC)*, OFF. OF THE U.S. TRADE REP., <https://ustr.gov/useuttc>.

²⁰ Chad P. Bown, *Why Biden will try to enforce Trump’s phase one trade deal with China*, PIIE (Dec. 15, 2021), <https://www.piie.com/blogs/trade-and-investment-policy-watch/why-biden-will-try-enforce-trumps-phase-one-trade-deal-china>.

²¹ Joint Statement from United States, Australia, Brunei Darussalam, India, Indonesia, Japan, Republic of Korea, Malaysia, New Zealand, Philippines, Singapore, Thailand, and Vietnam, Launch of the Indo-Pacific Economic Framework for Prosperity (IPEF) (2022) (www.dfat.gov.au/news/media-release/launch-indo-pacific-economic-framework-prosperity-ipef-joint-statement). See also Hiroyuki Tanaka & Hiroshi Tajima, *First in-person IPEF talks to be held in LA next week*, THE NATION THAI. (Sept. 2, 2022), <https://www.nationthailand.com/international/ann/40019678>.

²² Eric C. Emerson, *The Indo-Pacific Economic Framework: How the United States intends to re-engage with Asia on Trade*, LEXOLOGY (Mar. 14, 2022), <https://www.lexology.com/library/detail.aspx?g=a51bed8f-9c38-46e3-9b9e-f24be6986999>.

²³ *Indo-Pacific Strategy of the United States*, WHITE HOUSE (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/02/U.S.-Indo-Pacific-Strategy.pdf>.

²⁴ *Id.*

²⁵ *Id.*

Vietnam.²⁶ India withdrew before the conclusion of negotiations, citing the adverse impact of RCEP on sensitive sectors, especially agriculture and MSMEs.²⁷ However, India can join later without waiting 18 months for a new accession as per the protocol.²⁸ The Indian officials have hinted that India will not join the agreement as it currently stands.²⁹

The RCEP encompasses a population of around 2.3 billion people, making up 30% of the world's population with a total GDP of \$38,813 billion or 30% of the global GDP.³⁰ As we can note in figure 1, there is common membership among certain countries in both the CP-TPP and RCEP. Australia, Brunei Darussalam, Japan, Malaysia, New Zealand, Singapore, and Vietnam being parties to both of the RTAs. It doubles the benefit for them with access to both the North America and Asia-Pacific economic region.³¹ In economic terms, the RCEP has a larger market share than CP-TPP given the membership base, so the trade liberalization impact of RCEP will be more widespread than CP-TPP.³² However, in light of new applications to join CP-TPP by the UK, China, Taiwan, and South Korea, the economic impact of CP-TPP and RCEP is now relatively at par.

Table 1: State parties to the CP-TPP vs. RCEP

CP-TPP		RCEP	
1.	Australia	1.	Australia
2.	Brunei Darussalam	2.	Brunei Darussalam
3.	Japan	3.	Japan
4.	Malaysia	4.	Malaysia
5.	New Zealand	5.	New Zealand
6.	Singapore	6.	Singapore
7.	Vietnam	7.	Vietnam
8.	Canada	8.	Cambodia
9.	Chile	9.	China
10.	Mexico	10.	Indonesia ³³
11.	Peru	11.	Korea

²⁶ *Regional Comprehensive Economic Partnership (RCEP)*, AUSTL. GOV'T. DEP'T OF FOREIGN AFF. AND TRADE, <https://www.dfat.gov.au/trade/agreements/in-force/rcep>.

²⁷ *Regional Comprehensive Economic Partnership: Overview and Economic Impact*, ADB BRIEFS No. 164 (2020), <https://www.adb.org/sites/default/files/publication/664096/adb-brief-164-regional-comprehensive-economic-partnership.pdf>.

²⁸ *Id.*

²⁹ Suhasini Haidar, *India storms out of RCEP, says trade deal hurt Indian farmers*, THE HINDU (Dec. 3, 2021), <https://www.thehindu.com/news/national/india-decides-against-joining-rcep-trade-deal/article29880220.ece>. See also Piyush Goyal, Minister of Commerce & Industry, "Personally, entering the RCEP would have been the death knell for Indian manufacturing and other sectors. RCEP was a free trade agreement with China. On 4th November 2019, PM Modi declined to join the RCEP because it does not meet the principles on which it was first conceptualised. We already have a free trade agreement with all the ASEAN countries, with Japan and Korea, so 12 countries are covered. Today, Australia gets covered."

³⁰ *Id.*

³¹ Frank Ko-Ho Wong, *What the CPTPP and RCEP Mean for China and Asia-Pacific Trade*, CHINA BRIEFING (Dec. 10, 2018), <https://www.china-briefing.com/news/cptpp-rcep-impact-china-asia-pacific-trade/>.

³² Kate Whiting, *An expert explains: What is RCEP, the world's biggest trade deal?*, WORLD ECON. FORUM (May 18, 2021), <https://www.weforum.org/agenda/2021/05/rcep-world-biggest-trade-deal/>.

³³ Sebastian Strangio, *Indonesian Parliament Ratifies RCEP Free Trade Mega-Pact*, THE DIPLOMAT (Aug. 31, 2022), <https://thediplomat.com/2022/08/indonesian-parliament-ratifies-rcep-free-trade-mega-pact/> ("Indonesia's parliament passed a law formalizing the country's membership of the Regional Comprehensive Economic Partnership (RCEP) trade pact.").

12. UK (formally applied to join on February 1, 2021) ³⁴	12. Lao PDR
13. China (formally applied to join on September 16, 2021) ³⁵	13. Myanmar
14. Taiwan (formally applied to join on September 22, 2021) ³⁶	14. Philippines
15. South Korea (actively and seriously considering joining as per reports on October 8, 2021) ³⁷	15. Thailand
16. Ecuador (applied to join on December 17, 2021) ³⁸	16. India (dropped-out in November 4, 2019 before the conclusion citing the RCEP's economic impact on Indian farmers MSMEs and the dairy sector. India can join again without waiting for 18 months as required for accessions per the protocol). ³⁹ The Indian government has hinted that it will not join the agreement as it currently stands. ⁴⁰
17. Costa Rica (formally applied to join the CP-TPP on August 11, 2022 as per reports) ⁴¹	17. Hong Kong ⁴²
18. Guatemala (expressed interest to join the CP-TPP) ⁴³	

Source: Australian Government, Department of Foreign Affairs and Trade (DFAT), 'About Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CP-TPP)' <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership>; 'About the Regional Comprehensive Economic Partnership Agreement (RCEP)' <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/rcep>.

³⁴ Chris Smith, *In Focus: UK membership of the trans-Pacific trade agreement*, UK PARLIAMENT, HOUSE OF LORDS LIBRARY (Jan. 26 2022), <https://lordslibrary.parliament.uk/uk-membership-of-the-trans-pacific-trade-agreement/#:~:text=On%201%20February%202021%2C%20the,objectives%20for%20the%20accession%20negotiations>.

³⁵ Mireya Solis, *Order from Chaos: China moves to join the CPTPP, but don't expect a fast pass*, BROOKINGS (Sept. 23, 2021), <https://www.brookings.edu/blog/order-from-chaos/2021/09/23/china-moves-to-join-the-cptpp-but-dont-expect-a-fast-pass/>.

³⁶ Bernie Lai, *Taiwan's bid to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)*, PARLIAMENT OF AUSTRALIA (Dec. 20 2021), [https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2021/December/Taiwan_CPTPP_bid#:~:text=Taiwan's%20bid%20to%20join%20the,Trans%2DPacific%20Partnership%20\(CPTPP\)&text=On%2022%20September%202021%2C%20Taiwan,CPTPP\)%20following%20years%20of%20preparation](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2021/December/Taiwan_CPTPP_bid#:~:text=Taiwan's%20bid%20to%20join%20the,Trans%2DPacific%20Partnership%20(CPTPP)&text=On%2022%20September%202021%2C%20Taiwan,CPTPP)%20following%20years%20of%20preparation).

³⁷ Jeffrey J. Schott, *Policy Brief: China's CPTPP bid spurs South Korea to act on Asia-Pacific trade pacts*, PIIIE (June 2022), <https://www.piiie.com/publications/policy-briefs/chinas-cptpp-bid-spurs-south-korea-act-asia-pacific-trade-pacts>.

³⁸ Hidetake Miyamoto, *Ecuador applied for CPTPP membership to diversify trade*, NIKKEI ASIA (Dec. 29, 2021), <https://asia.nikkei.com/Economy/Trade/Ecuador-applies-for-CPTPP-membership-to-diversify-trade2>.

³⁹ Suhasini Haider & T.C.A Sharad Raghavan, *India storms out of RCEP, says trade deal hurts India farmers*, THE HINDU (Dec. 3, 2021), <https://www.thehindu.com/news/national/india-decides-against-joining-rcep-trade-deal/article61623346.ece>.

⁴⁰ Surupa Gupta & Sumit Ganguly, *Why India Refused to Join the World's Biggest Trading Bloc: New Delhi chose protectionism over the RCEP. History suggests it made the wrong call*, FOREIGN POLICY (Nov. 23, 2020), <https://foreignpolicy.com/2020/11/23/why-india-refused-to-join-rcep-worlds-biggest-trading-bloc/>.

⁴¹ *Eyes on Asia: Costa Rica finalizes petition to join CPTPP*, WORLD TRADE ONLINE (Aug. 11, 2022), <https://insidetrade.com/trade/eyes-asia-costa-rica-finalizes-petition-joincptpp#:~:text=Costa%20Rica%20has%20formally%20applied,announced%20the%20move%20on%20Wednesday>.

⁴² *Belt and Road Summit: Hong Kong seeks early accession to RCEP*, ZAWYA (Sept. 1, 2022), <https://www.zawya.com/en/projects/bri/belt-and-road-summit-hong-kong-seeks-early-accession-to-rcep-etdasto5>.

⁴³ Deborah Elms, *Asia Trade: What's in store for Asia-Pacific Trade Agreements in 2023*, BORDERLEX (Jan. 18, 2023), <https://borderlex.net/2023/01/18/asia-trade-whats-in-store-for-asia-pacific-trade-agreements-in-2023/>.

The WTO discussions on digital trade began in May 1998 with the Second Ministerial Conference in Geneva, whereby the ministers adopted the Declaration on Global Electronic Commerce, initiating a comprehensive work program to examine the “trade-related issues on global electronic commerce”.⁴⁴ The Declaration stated that the work program will involve all the relevant WTO bodies, taking into account the economic, financial, and developmental needs of countries as well as recognizing the work undertaken in other international forums.⁴⁵ In MC11 2017, a group of countries proposed to convert the work program with a new ministerial declaration into negotiations without any success.⁴⁶ Failure to pursue their negotiating agenda within the multilateral context led the group of WTO members to opt for alternate ways.⁴⁷ The alternate ways to approach the issue led to the Joint Statement Initiative on e-commerce (eJSI) in 2017, as presented by seventy-one WTO members representing 77% of global trade.⁴⁸ The eJSI stated that the participating WTO members aim to initiate “exploratory work toward building foundations for future WTO negotiations on trade-related aspects of digital trade, open to all WTO members without prejudice to their negotiating stance in the future.”⁴⁹

The eJSI is one of the four open-ended plurilateral initiatives, wherein the other three covered issues are investment facilitation, MSMEs, and service domestic regulation.⁵⁰ Subsequently, at the 11th Ministerial Conference in Buenos Aires on December 13, 2017, seventy-one WTO Members confirmed their intention to initiate exploratory work towards the WTO negotiations on trade-related aspects of e-commerce.⁵¹ Consequently, seventy-six WTO member states issued a joint statement in Davos on January 5, 2019, promulgating their intention to begin the exploratory negotiations on digital trade.⁵²

The current eJSI has eighty-eight participating member states.⁵³ These negotiations are being undertaken outside the ambit of the WTO legal framework.⁵⁴ These are exploratory digital trade negotiations, which may become part of the WTO legal framework as either a plurilateral agreement or as a supplement to the GATS schedules of the participating WTO member states.⁵⁵ The current eJSI draft text is a stocktaking exercise, as it has square brackets throughout the text that represent areas of no agreement —specifically areas like privacy, cybersecurity, and other regulatory issues.⁵⁶ Future negotiations aim to enable alliances of like-minded member states on key regulatory issues, even though the actual conclusion of an

⁴⁴ *Declaration on Global Electronic Commerce*, WORLD TRADE ORG. DOC. W/L/274 (1998), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/274.pdf&Open=True>.

⁴⁵ *What is at stake...*, *supra* note 2; see also Michael Kende & Nivedita Sen, *Cross-border e-commerce: WTO discussions and multi-stakeholder roles – stocktaking and practical ways forward*, GENEVA GRADUATE INS. Working Paper CTEI-2019-01 (2019), <https://repository.graduateinstitute.ch/record/297080?ln=en>; Yasmin Ismail, *E-commerce joint Statement Initiative Negotiations Among World Trade Organization Members: State of Play and the impacts of COVID-19*, INT’L INST. FOR SUSTAINABLE DEV. (April 29, 2021), <https://www.iisd.org/system/files/2021-06/e-commerce-negotiations-wto-members-covid-19-en.pdf>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *What is at stake...*, *supra* note 2; see also Kende & Sen, *supra* note 45; Ismail, *supra* note 45.

⁵² *Id.*

⁵³ *Id.*; see, e.g., *E-commerce negotiations enter final lap, Kyrgyz Republic joins initiative*, WTO (Feb. 16, 2023), https://www.wto.org/english/news_e/news23_e/ecom_17feb23_e.htm.

⁵⁴ UNCTAD, *supra* note 45.

⁵⁵ *Id.*

⁵⁶ *Id.*

agreement, and its insertion into the WTO legal framework, may take a long time in part due to the consensus principle.⁵⁷

A group of countries led by India and South Africa have persistently expressed objections against the eJSI plurilateral negotiations specifically on digital trade outside the multilateral context.⁵⁸ They emphasize that such plurilateral negotiations can lead to the marginalization or exclusion of other difficult trade-related issues that remain critical for the future of WTO negotiations, especially on agriculture and development.⁵⁹ They provide that plurilateral negotiations undermine the political and economic balance in agenda setting, negotiation processes, and outcomes within the multilateral trade forum to the detriment of developing and least-developed countries (LDCs).⁶⁰

Jane Kelsey discusses the challenges of JSIs, as raised by India and South Africa vis-à-vis the eJSI.⁶¹ Kelsey argues that, although the main aim of eJSI is “restoring the functionality of the WTO negotiating arm,”:

. . . it risks triggering an almost irresolvable internal fracturing of its Members.⁶² Developing countries that rely on issue linkage to secure some concessions from economically and geopolitically more powerful states will be disenfranchised.⁶³ Already marginalized developing and least-developed countries will become even more so.⁶⁴ With no obvious limit to what might be done in the name of ‘open plurilateralism’, the rule takers will lose any effective voice at the WTO.⁶⁵

There is no simple answer to the dilemma of “plurilateralism” versus “consensus-based multilateralism.” Plurilateralism reinforces multilateralism and vice versa. The WTO Member states, especially the developing and LDCs, should consider the opportunities that the eJSI negotiations offer in terms of a global regulatory understanding on e-commerce. Further, they should weigh the pros and cons of a plurilateral e-commerce agreement “within versus outside” the WTO.

II. GENERAL CLASSIFICATION OF DIGITAL TRADE PROVISIONS

We classify all the digital trade provisions in CP-TPP,⁶⁶ RCEP,⁶⁷ and eJSI⁶⁸ into three regulatory themes. These regulatory themes are classified as: (a) market access (tariff-related measures); (b) regulatory (non-tariff-related measures); and (c) cooperation, development, and

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ UNCTAD, *supra* note 45.

⁶¹ Jane Kelsey, *The Illegitimacy of Joint Statement Initiatives and Their Systematic Implications for the WTO*, 25 J. INTL. ECON. L. 11 (2022), <https://academic.oup.com/jiel/article/25/1/2/6533600?login=false>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ THE COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP (CP-TPP) (2018), <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents>.

⁶⁷ THE REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP (RCEP) (2020), <https://www.dfat.gov.au/trade/agreements/in-force/rcep/rcep-text>.

⁶⁸ WTO ELEC. COMM. NEGOT.: CONSOLIDATED NEGOTIATING TEXT – DECEMBER 2020 (eJSI) (2020), https://www.bilaterals.org/IMG/pdf/wto_plurilateral_ecommerce_draft_consolidated_text.pdf.

facilitation measures. These three regulatory themes encapsulates all the digital trade provisions. This classification is equally applicable to other digital trade agreements.

Table 2: General classification of digital trade provisions

S.NO.	GENERAL CLASSIFICATION OF DIGITAL TRADE PROVISIONS	CP-TPP	RCEP	eJSI
1.	MARKET ACCESS (TARIFF-RELATED MEASURES)			
1.1.	Customs Duties	◦	◦	◦
1.2.	Goods Market Access			◦
1.3.	Services Market Access			◦
1.4.	Taxation			◦
1.5.	Temporary Entry and Sojourn of Electronic Commerce-related Personnel			◦
2.	REGULATIONS (NON-TARIFF-RELATED MEASURES)			
2.1.	Unsolicited Commercial Electronic Messages	◦	◦	◦
2.2.	Competition			◦
2.3.	Cross-Border Transfer of Information by Electronic Means	◦	◦	◦
2.4.	Cybersecurity	◦	◦	◦
2.5.	Domestic Electronic Transactions Framework	◦	◦	◦
2.6.	General & Security Exceptions	◦	◦	◦
2.7.	ICT Products that use Cryptography			◦
2.8.	Location of Computing Facilities	◦	◦	◦
2.9.	Location of Financial Computing Facilities for Covered Financial Service Suppliers			◦
2.10.	Non-Discriminatory Treatment of Digital Products	◦		◦
2.11.	Online Consumer Protection	◦	◦	◦
2.12.	Personal Information Protection	◦	◦	◦
2.13.	Principles on Access to and Use of the Internet for Electronic Commerce	◦		◦
2.14.	Prudential Measures			◦
2.15.	Source Code	◦		◦
2.16.	Updating the WTO Reference Paper on Telecommunications Services			◦
3.	COOPERATION, DEVELOPMENT & FACILITATION MEASURES			
3.1.	Access to and Use of Interactive Computer Services			◦
3.2.	Access to Government Data			◦
3.3.	Capacity-Building and Technical Assistance			◦
3.4.	Committee on Trade-related aspects of Electronic Commerce			◦
3.5.	Customs Procedures			◦
3.6.	De Minimis			◦
3.7.	Electronic Authentication and Signature	◦	◦	◦
3.8.	Electronic Availability of Trade-related Information			◦
3.9.	Electronic Contracts			◦
3.10.	Electronic Invoicing			◦
3.11.	Electronic Payments Service			◦
3.12.	Enhanced Trade Facilitation			◦
3.13.	Improvements to Trade Policies			◦
3.14.	Interactive Computer Services (Infringement)			◦
3.15.	Interactive Computer Services (Limiting Liability)			◦
3.16.	Internet Interconnection Charge-Sharing	◦		
3.17.	Logistics Services			◦
3.18.	Paperless Trading			◦
3.19.	Provision of Trade Facilitating and Supportive Services	◦	◦	◦
3.20.	Single Windows Data Exchange and System Interoperability			◦
3.21.	Transparency, Cooperation and Dialogue	◦	◦	◦
3.22.	Use of Technology for the Release and Clearance of Goods			◦

Source: *See supra* notes 66-68 and accompanying text.

Future trade agreements should have the same three classification measures for digital trade provisions to streamline the discussions among stakeholders.

III. COMPARATIVE REGULATORY APPROACHES FOR DIGITAL TRADE REGULATION IN CP-TPP, RCEP, AND EJSI

The main purpose behind digital trade regulation is to manage the cross-border data flows under a common legal framework for trade-led economic development. Digital trade regulations govern three main layers of digital communications: (a) the physical layer (network plus the hardware attached); (b) the logical layer (software, applications, and protocols); and (c) the content layer (actual human-readable content).⁶⁹ Whilst exponential economic digitalization blurs the boundaries between regulating economy or society, the digital trade regulations need to be anticipatory in nature.

In the following sections, the article provides a comparative analysis of fundamental digital trade provisions in the CP-TPP, RCEP, and eJSI.

A. INTRODUCTORY PROVISIONS

The scope of digital trade provisions in the CP-TPP, RCEP, and eJSI are legally defined through a specific list of applicable legal definitions, exclusions, and country-specific annexes listing certain measures or activities that are excluded from specific obligations in certain chapters, also known as non-conforming measures. In the legal interpretation of any particular provision within a digital trade agreement, we need to appreciate the applicable legal scope and preamble as relevant legal context.

A.I. PREAMBLE

The three trade agreements relevant to our analysis, CP-TPP, RCEP, and eJSI, consist of preambles that outline specific larger goals and objectives behind the agreement. There are various goals mentioned in the preambles, highlighting issues of pertinent interest to the parties. However, instead of reading them individually, when we take a step back it is apparent that the list of goals or objectives are designed to essentially balance specific economic and non-economic objectives. Although the nature of trade agreements is primarily to achieve certain basic economic objectives, they cannot and do not function in isolation from impending socio-political and economic challenges nationally and globally. This realization has led to an emphasis on achieving “deep trade agreements,” which encompasses separate chapters on sustainable development goals relevant to trade policy, e.g., the US and the EU’s trade agreement chapters on trade and sustainable development.⁷⁰

Generally, the principal economic objectives of trade agreements are, according to the CP-TPP, RCEP, and eJSI: economic integration, growth and all the social benefits that it brings

⁶⁹ MIRA BURRI, UNDERSTANDING AND SHAPING TRADE RULES FOR THE DIGITAL ERA in THE SHIFTING LANDSCAPE OF GLOBAL TRADE GOVERNANCE Ch. 4, 73-106 (Manfred Elsig, Michael Hahn, and Gabriele Spilker eds., Cambridge Univ. Press 2019).

⁷⁰ Vandana Gyanchandani, *Soft vs Hard Governance for Labour and Environmental Commitments in Trade Agreements: Comparing the US and EU Approaches*, CTEI WORKING PAPERS (Aug. 1 2018), <https://ssrn.com/abstract=3324950>.

forth, e.g., decline in poverty, support to MSMEs, improved living standards, ensured employment or business opportunities, as well as more diverse choices for consumers.⁷¹ Non-economic values, as highlighted by the preambles, include appropriate regulatory autonomy to set national legislative or regulatory priorities in areas such as environment, conservation of living and non-living exhaustible natural resources, and the integrity of financial systems and public morals. Non-economic values also include transparency, good governance, eliminating corruption, and promoting cultural diversity and identity.⁷²

Specifically, the digital trade chapters in CP-TPP, RCEP, and eJSI provide dedicated preambular objectives.⁷³ They categorically list three preambular objectives for digital trade: (1) to promote economic growth and development through digital trade opportunities, (2) ensure regulatory frameworks that provide for consumer confidence in digital trade, and (3) assist in avoiding unnecessary and disguised barriers to its use and development.⁷⁴

The RCEP additionally provides that the digital trade chapter aims to “enhance cooperation among the Parties regarding development of digital trade.”⁷⁵ The eJSI uniquely adds that digital trade can be used as a tool for social and economic development.⁷⁶ In pursuance, the member states emphasize on promoting: “(a) clarity, transparency, and predictability of their domestic regulatory framework in facilitating to the maximum extent possible the development of digital trade; (b) interoperability, innovation and competition and (c) increased participation in digital trade by MSMEs.”⁷⁷ Lastly, it is only the eJSI that highlights the importance of open and free internet for all legitimate, commercial, and development purposes including “by allowing increased access to information, knowledge and new technologies.”⁷⁸

Below, we highlight the main economic and non-economic objectives of digital trade agreements which will be useful for future research.⁷⁹

Table 3: Preambular economic and non-economic objectives for digital trade

Preambular Objectives	
Economic Objectives	
1.	Economic integration, growth, and development
2.	Increased trade opportunities
3.	Development of digital trade
4.	Consumer confidence
5.	Interoperability
6.	Innovation
7.	Competition
8.	Increased participation by MSMEs

⁷¹ See Comprehensive and Progressive Agreement for Trans-Pacific Partnership [hereinafter CP-TPP] preamble, Dec. 30, 2018; Regional Comprehensive Economic Partnership Agreement [hereinafter RCEP] preamble, Jan. 1, 2022; WTO Electronic Commerce Negotiations Stocktake Text [hereinafter eJSI] preamble, Aug. 19, 2020.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See CP-TPP, *supra* note 71; RCEP, *supra* note 71; eJSI *supra* note 71.

⁷⁸ *Id.*

⁷⁹ *Id.*

Non-Economic Objectives	
1.	Reasonably open internet
2.	Necessary regulatory autonomy
3.	Transparency
4.	Good governance
5.	Eliminating corruption
6.	Cultural diversity and identity
7.	Inclusive socio-economic development

Source: Collection from the legal texts by authors.

Generally, the CP-TPP has an extensive set of preambular objectives promoting a broader set of economic and non-economic values as relevant legal context.⁸⁰ The RCEP has a moderate set of objectives as compared to CP-TPP.⁸¹ The eJSI, which is very specific to digital trade and does not delve into any other issue, has a set of targeted objectives for the digital trade liberalization.⁸² Although not very elaborate, it is wise to underline the relevance of preambular recitals in GATT 1994 and GATS in order to appreciate the larger economic and non-economic objectives of trade liberalization in general.⁸³

Here we list the general preambular objectives of the CP-TPP vs. RCEP to decipher central comparative preambular trade values:

Table 4: Preambular goals - CP-TPP vs. RCEP

PREAMBULAR GOALS	CP-TPP	RCEP
1. Raise living standards	◦	◦
2. Account for different levels of economic development	◦	◦
3. Special and Differential Treatment		◦
4. Build upon rights and obligations as provided in the WTO's Marrakesh Agreement	◦	◦
5. Right to regulate to secure public welfare objectives	◦	◦
6. Good governance	◦	◦
7. Legal stability and predictability of business environment	◦	◦
8. Sustainable development goals	◦	◦
9. Promote bonds of friendship and cooperation among people	◦	
10. Promote participation in regional and global supply chains	◦	◦
11. Promote competition	◦	
12. Development of MSMEs	◦	
13. Efficient and effective customs to enable seamless trade	◦	
14. Inherent right to regulate health care system	◦	
15. Establish rules for SOEs to ensure fair and level playing field in trade	◦	
16. High levels of environmental protection	◦	
17. Promote enforcement of labour rights	◦	
18. Promote rule of law	◦	
19. Eliminate corruption and bribery	◦	
20. Recognise relevant macroeconomic regulatory decisions	◦	
21. Promote cultural diversity and identity	◦	
22. Contribute to broader cooperation at the regional and global level	◦	◦
23. Address future trade and investment regulatory concerns	◦	
24. Promote state accession to build a foundation for future FTA in the Asia-Pacific	◦	

Source: Segregation from the original texts by authors.

Future digital trade agreements should provide for broad socioeconomic goals which are related to digital economy. It is a positive development that the preambular recitals outlined in

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ See CP-TPP, *supra* note 71; RCEP, *supra* note 71; eJSI *supra* note 71.

this article have broad coverage of socioeconomic goals, especially in the CP-TPP. The preambular recitals in trade agreements should specifically express support for the development of indigenous data governance issues. It should aim to build effective cooperation mechanism to support the vulnerable communities affected by digital trade as this will ensure that the policymaking is inclusive given the extreme polarities between winners and losers in the context of digital trade.

A.II. DEFINITIONS

A.II.1. DEFINITION OF “DIGITAL TRADE OR E-COMMERCE”

The eJSI defines “digital trade or e-commerce” as “the production, distribution, marketing, sale or delivery of goods and services by electronic means.”⁸⁴ However, the CP-TPP and RCEP do not provide any definition of digital trade or e-commerce. The CP-TPP, RCEP, and eJSI provide that the digital trade or e-commerce chapter “shall apply to measures adopted or maintained by a Party” that affects trade by “electronic means” (CP-TPP and eJSI) or “electronic commerce” (RCEP).⁸⁵ We note that the definition of “digital trade or e-commerce” as provided by the eJSI is specific and detailed. The definition of “digital trade or e-commerce” is a critical provision as it weighs in on the scope of e-commerce or digital trade activities covered in a trade agreement. The definition provided by the eJSI is specific as it includes digital activities encompassing “production, distribution, marketing, sale or delivery” of goods and services as compared to simply “trade by electronic means” in the CP-TPP and RCEP.

The definition of “digital trade or e-commerce” should be given careful thought in trade negotiations because digital trade goes beyond traditional trade in many ways.⁸⁶ Digital trade regulates “cross-border data flows including personal data” that create and enable different forms of goods and services which are seamlessly produced, distributed, and delivered in many innovative ways than conventionally understood.⁸⁷ For example, technology-enabled instrument that allows for a virtual or augmented reality experience to access education, work, or entertainment services in a digital space at any place and time.⁸⁸ The amalgamation of experiences as derived from digitally-delivered goods and services within a given time or space highlights the complexity of defining “e-commerce or digital trade” in trade agreements. In this regard, the specific definition as proposed by the eJSI is more supportive of this complexity than the general and vague definition in the CP-TPP and RCEP.

Lack of a specific definition of “e-commerce or digital trade” can lead to an erroneous assumption that any economic activity in an electronic form will be covered by the digital trade agreement. This erroneous assumption is detrimental to support future accessions by developing and least-developed countries who are already hesitant to liberalize their digital economies.

⁸⁴ eJSI, *supra* 68, at Annex 1: Scope and General Provisions.

⁸⁵ *RCEP Agreement, Chapter 12: Electronic Commerce, Article 12.3: Scope*, AUSTL. GOV'T DEP'T OF FOREIGN AFF. AND TRADE, <https://www.dfat.gov.au/sites/default/files/rcep-chapter-12.pdf>.

⁸⁶ *The impact of digitalisation on trade*, OECD, <https://www.oecd.org/trade/topics/digital-trade/>.

⁸⁷ *Id.*

⁸⁸ *Previous Global Future Council on Augmented Reality and Virtual Reality*, WORLD ECON. FORUM, <https://www.weforum.org/communities/gfc-on-virtual-reality-and-augmented-reality>.

A.II.2. DEFINITION OF “DIGITAL PRODUCT”

Both the CP-TPP and eJSI define “digital product” as “computer programme, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically.”⁸⁹ Both the CP-TPP and eJSI clarify that the digital product does not include a “digitized representative of a financial instrument including money.”⁹⁰ Further, it provides that the definition of digital product should not reflect any Party’s view on whether trade in digital products should be categorized as trade in services or goods.⁹¹ No such definition of digital product is provided by the RCEP. The lack of definition of digital product in the RCEP leaves it open to diverse interpretation by parties or adjudicatory panels on a case-by-case basis.

The definition of digital product is pertinent to decipher the specific legal scope of the digital trade obligations. The definition provided by the CP-TPP and eJSI covers various forms of digital goods and services that are or can be enabled through the cross-border data flows. The lack of specific definition of digital products in RCEP leaves it open to legal interpretation by the parties as to whether the new forms of digital goods or services are foreseen or covered by the agreement or not. As discussed previously, there are new forms of digital experiences enabled by future technologies that challenge one’s previous understanding of goods vs. services at any given time and space. Any erroneous assumption that the scope of digital trade chapter is either too broad or narrow due to lack of a clear definition of digital products will be counter-effective to the viability of such agreements for future accessions by developing or least-developed countries. There needs to be sustained deliberations on the definition of digital products to make it relevant in the evolving context of digital trade.

A.II.3. DEFINITION OF “COVERED PERSONS”

The CP-TPP and RCEP specifically provide that the digital trade obligations apply to select “covered persons” only: “covered investment,” “investor of a Party,” and “service supplier.”⁹² The CP-TPP, RCEP, and eJSI exclude “financial institutions, financial service suppliers or investors from any e-commerce obligations.”⁹³

The CP-TPP, RCEP, and eJSI further specifically exclude “government procurement.”⁹⁴ The eJSI provides that government procurement includes “service supplied in the exercise of governmental authority.”⁹⁵ The CP-TPP, RCEP, and eJSI elaborate that the exclusion of government procurement encompasses “information held or processed by or on behalf of a Party, or measures related to such information, including measures related to its collection.”⁹⁶ However, it is only the eJSI that clarifies that there are general obligations pertaining to the protection of personal information which applies to any government activity in the digital trade sector.⁹⁷

⁸⁹ CP-TPP, *supra* note 66.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² CP-TPP, *supra* note 71, at art. 14.1: Definitions. RCEP, *supra* note 71, at art. 12.1: Definitions. eJSI, *supra* note 71, at B.2.: Flow of Information by electronic means/Cross-border data flows.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

The practical application of government procurement provision, specifically in the context of third-party involvements, will depend on the facts of a given case. We need to be careful to not emphasize on too broad or too narrow scenarios and appreciate that the correct legal application will fall somewhere in between the two extremes. Although it is hard to pinpoint the precise application of the exclusion in abstract, we should be guided by indicia such as whether the Party would ordinarily have access to the information being processed or held by a private entity, whether the processing or holding of the information is in pursuit of a public purpose, and whether the nature of the information is such that it would ordinarily be processed and held by the private entity.

We propose that the negotiators pay special attention in defining the concepts “digital trade or e-commerce”, “digital products”, and “covered persons” to design the legal scope of digital trade chapters. These concepts help delineate the legal scope and application of digital trade obligations. A clear definition of such concepts will generate requisite support for developing and least-developed countries as regards future accessions to these agreements. We submit that a general or ambiguous definition leaves the interpretation of legal scope or applicability to a trade panel. It is not the most effective way to promote legal predictability as it only induces legal speculation than a firm common understanding. Specifically we note that, given the increasingly blurred distinction between goods vs. services with the rise of new digital technologies, for example Metaverse,⁹⁸ it is wise to define “digital products” in digital trade agreements by being thoughtful about the nature of evolving digital technologies at play. It is practical to ensure an active discussion forum within digital trade agreements to regularly assess and debate key technological developments affecting digital trade and update the relevant definitions accordingly.

A.II.4. CO-APPLICATION

The CP-TPP and RCEP emphasize on a harmonious co-existence between the obligations of each respective agreement and any other multilateral or regional trade agreement involving at least two member states being party to the same agreement.⁹⁹ It provides that in the case of a conflict between any obligation under either the CP-TPP or RCEP and a multilateral or regional trade agreement, the parties upon request should aim to resolve the conflict with a mutually satisfactory solution.¹⁰⁰ The RCEP further provides that if the parties reach an agreement resulting in a more favorable treatment than that provided for under the RCEP, it is not an inconsistency.¹⁰¹

⁹⁸ “The metaverse is an integrated network of 3D virtual worlds. ... This is the popular conception of the metaverse: a VR-based world independent of our physical one where people can socialize and engage in a seemingly unlimited variety of virtual experiences, all supported with its own digital economy. ... To see the metaverse in action, we can look at popular massively multiplayer virtual reality games such as Rec Room or Horizon Worlds, where participants use avatars to interact with each other and manipulate their environment. But the wider applications beyond gaming are staggering. Musicians and entertainment labels are experimenting with hosting concerts in the metaverse. The sports industry is following suit, with top franchises like Manchester City building virtual stadiums so fans can watch games and, presumably purchase virtual merchandise. Perhaps the farthest-reaching opportunities for the metaverse will be in online learning and government services.” Adrian Ma, *What is the metaverse, and what can we do there?*, THE CONVERSATION (May 23 2022, 8:23 AM), <https://theconversation.com/what-is-the-metaverse-and-what-can-we-do-there-179200>.

⁹⁹ CP-TPP, *supra* note 66; RCEP CHAPTER 20: FINAL PROVISIONS, *supra* note 67; EJSI, *supra* note 68.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

The eJSI provides that the plurilateral digital trade agreement under annexes 1a–1c of the WTO agreement builds on the existing WTO legal framework. Wherever there is a conflict between the plurilateral agreement and the provisions of agreements under annex 1 of the Marrakesh Agreement, the latter shall prevail.¹⁰² The eJSI lays out commonly shared principles and values for digital trade.¹⁰³ The RCEP also provides specific guiding objectives for the digital trade chapter.¹⁰⁴ No such provision is found in the CP-TPP.¹⁰⁵

Specifically, the CP-TPP and RCEP provide for the co-application of obligations under the chapter on investment, trade in services, and financial services. This includes any specific exceptions or non-conforming measures applicable to services which are delivered or performed electronically.¹⁰⁶ The eJSI provides that “nothing in the agreement should be construed to diminish the rights and obligations under the agreements in annex 1 to the Marrakesh Agreement establishing the WTO. If there is any inconsistency between the eJSI and the agreements in annex 1, then the latter shall prevail.”¹⁰⁷

The underlying rationale for co-applicability is to promote a harmonious co-existence of all trade-related regulatory provisions, as well as to ensure that the underlying WTO framework is complemented with new plurilateral agreements on digital trade.¹⁰⁸ However, such co-application can promote harmonious co-existence and raise new interpretative conflicts.¹⁰⁹ Thus, it will become necessary to establish a common understanding among different regulatory agreements—as they aim to govern digital trade activities in different contexts—in order to avoid divergent practices, enforcement, or outcomes.¹¹⁰ For example, a legitimate public policy which is protected by the digital trade chapter should not be negated by a parallel ISDS or related trade in services dispute.¹¹¹

A defined anticipatory approach needs to be taken on the issue of co-applicability. It is helpful to have common legal principles, because when different trade regulations are applied in the sphere of digital trade it may raise issues that impact the regulatory autonomy of states.¹¹² The current approach to promote co-application between digital trade and other trade provisions, especially trade-in services, and investment is vague. Any legal clarity in relation to the co-application of trade regulations is entirely dependent on treaty interpretation by a given panel of experts on a case-by-case basis. Given the importance of digital trade regulations vis-à-vis other trade issues, specific guidance, or a common approach to resolving plausible conflicts must be considered and elaborated in trade agreements.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ CP-TPP, *supra* note 66; RCEP CHAPTER 20: FINAL PROVISIONS, *supra* note 67; EJSI, *supra* note 68.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ CP-TPP, *supra* note 66; RCEP CHAPTER 20: FINAL PROVISIONS, *supra* note 67; EJSI, *supra* note 68.

¹¹¹ *Id.*

¹¹² *Id.*

B. NON-DISCRIMINATORY TREATMENT OF DIGITAL PRODUCTS

The CP-TPP and eJSI provide for the non-discriminatory treatment of digital products.¹¹³ The main provision that provides for the non-discriminatory treatment of digital products is similar in both the CP-TPP¹¹⁴ and eJSI,¹¹⁵ except that the CP-TPP uses “digital products” and eJSI uses “digital product”:

No Party/Member shall accord less favourable treatment to digital products (CP-TPP)/a digital product (eJSI) created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party/Member, or to a digital product of which the author, performer, producer, developer or owner is a person of another Party/Member, than it accords to other like digital products. For greater certainty, to the extent that a digital product of a non-Party/non-Member is a ‘like digital product’, it will qualify as any ‘other like digital product’ for the purposes of this paragraph.¹¹⁶

Simon Lester explains that there is a difference between “digital product” and “digital products”¹¹⁷ as it concerns the GATT/WTO debate over whether to compare the entire group of foreign and domestic products or to compare individual foreign and domestic products.¹¹⁸ He gives an example:

...imagine a hypothetical world where there are ten search engines, five Canadian and five American. Canada then passes a law which adversely effects in a *de facto* way, without targeting nationality, explicitly – one of the American search engines and one of the Canadian search engines. Common sense would tell you that this law does not have a discriminatory effect on the basis of nationality, as the number of adversely affected products is equal between the two countries. For each country, four products are not adversely affected, while one is adversely affected. However, under the strain of thinking that says there is an adverse treatment of any individual foreign product under a measure is enough to count as a discriminatory effect, a violation can be found. If the one adversely affected American company fares worse under the measure than any one of the Canadian companies, there will be a violation, even if overall the American and Canadian companies come out the same for each country. 20 percent of the companies get worse treatment.¹¹⁹

The legal phrase “digital product(s) ‘development and developers’” in the context of a non-discriminatory treatment obligation is quite broad, encompassing any digital product so “created, produced, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or to digital products of which the author, performer, producer, developer or owner is a person of another Party.”¹²⁰

¹¹³ CP-TPP, *supra* note 71, at art. 14.4: Non-Discriminatory Treatment of Digital Products; eJSI, *supra* note 71, at B.1: Non-Discrimination and Liability.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Simon Lester, *Digital Trade Agreements and Domestic Policy*, CATO INSTITUTE (Apr. 14, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3828112.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

Essentially, it protects both the “development and developers of digital products” as GATS protects both “like services and service suppliers” from discrimination.¹²¹ The fact that they use the term “digital products” and not “digital services” makes it obvious why they could not use the term “like digital services and service suppliers.”¹²² Instead, they use “digital products” as a common term to clarify the non-discrimination obligation on both the “development and developers of digital products” in the participating member states.¹²³

The non-discrimination obligation encompasses both the MFN and national treatment obligations for digital products with the use of phrase “than it accords to other like digital products.”¹²⁴ The definition for “like digital products” is not specifically provided in the CP-TPP and eJSI.¹²⁵ A clarification is provided which states: “. . . to the extent that a digital product of a non-Party/non-Member is a “like digital product”, it will qualify as any “other like digital product.”¹²⁶ It implies that the definition is flexible and it accepts degrees of “likeness” (“to the extent”) between digital products. Such varied likenesses can qualify two digital products as “like” for the purposes of this provision.¹²⁷ In the WTO jurisprudence, the concept of “likeness” has a narrow scope, applying to “directly competitive and substitutable products”.¹²⁸ The “likeness” is determined between the products by assessing four essential factors: “(a) product’s end-uses in a market; (b) consumers’ tastes and habits in a market; (c) product’s properties, nature and quality and (d) tariff classification of the product.”¹²⁹

The definition of “like digital products” is not clearly delineated. The only clarification provided is “to the extent that a digital product of a non-Party/non-Member is a like digital product, it will qualify as any other like digital product.” Although any effort to define “like digital products” is useful, we do not consider that the present clarification is sufficient. Further, the “likeness” debate in the context of WTO jurisprudence has noticed various disagreements in the past.¹³⁰ Therefore, we need a deliberate approach to tackle this complex issue in the context of digital trade by assessing how “likeness” should be legally assessed in the new context of digital trade.

C. CROSS-BORDER TRANSFER OF INFORMATION BY ELECTRONIC MEANS

The CP-TPP and RCEP provide that the parties recognize that each may have its own regulatory requirements concerning the transfer of information by electronic means.¹³¹ Both mandate all member states to allow the cross-border transfer of information, however they use varied language to express the obligation.¹³²

¹²¹ *Id.*

¹²² Lester, *supra* note 117.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Lester, *supra* note 117.

¹²⁹ *Id.*

¹³⁰ Joost Pauwelyn, *The Unbearable Lightness of Likeness*, GRADUATE INST. OF INT’L AND DEV. STUD. (2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2030940. See also Mirelle Cossy, *Determining “likeness” under the GATS: Squaring the circle?*, WORLD TRADE ORGANIZATION ECONOMIC RESEARCH AND STATISTICS DIVISION STAFF WORKING PAPER ERS2006-08 (2006), https://www.wto.org/english/res_e/reser_e/ersd200608_e.pdf.

¹³¹ RCEP, *supra* note 71, at art. 12.15, fn. 13-14.

¹³² *Id.*

Firstly, both the CP-TPP and RCEP consist of a similar legal provision on cross-border transfer of information by electronic means.¹³³ However, the RCEP does not specify that “cross-border transfer of information” includes “personal information” when compared to the CP-TPP:

CP-TPP, Article 14.11.2

Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person.

RCEP, Article 12.15.2

A Party shall not prevent cross-border transfer of information by electronic means where such activity is for the conduct of the business of a covered person.

Secondly, out of the three eJSI proposals, the proposal by Japan, Brazil, Singapore, and UK is identical to the CP-TPP article 14.11.2 as described above.¹³⁴

Thirdly, the eJSI proposal by US, Central African Republic, Korea, and Canada is different, as it adds “if/where this activity is for the consumers to access, distribute and use services and application” beyond the “conduct of an enterprise/business of a covered person/business”.¹³⁵

eJSI B.2. Flow of Information

(1) Cross-border transfer of information by electronic means/cross-border data flows

“(5) (Alt 1) No Party shall prohibit or restrict/prevent the cross-border transfer of information, including personal information, by electronic means, (if/where) this activity is for the conduct of an enterprise/the business of a covered person/the business or for the consumers to access, distribute and use services and applications.”

This expands the scope of the obligation beyond the business activities of member states to include “consumers” who aim to “access, distribute, and use services or applications” in any member state party to the agreement.¹³⁶

Fourthly, the last eJSI proposal by the EU is very different from the CP-TPP, RCEP, as well as the two eJSI proposals discussed above.¹³⁷ The EU’s eJSI proposal underlines that the “parties/members are committed to ensuring cross-border data flows to facilitate trade in the digital economy.”¹³⁸ Then, very critically, it provides that “to that end, cross-border data flows ‘shall’ not be restricted” by a list of four specific data localization requirements:

¹³³ *Id.*

¹³⁴ eJSI, *supra* note 71, at B.2: Flow of Information, (1) Cross-Border Transfer of Information by Electronic Means/Cross-Border Data Flows. Alt 2 is based on text proposals by Japan, Brazil, Singapore, and the UK.

¹³⁵ *Id.* Alt 1 is based on text proposals by the US, China, Korea, and Canada.

¹³⁶ *Id.* Alt 3 is based on text proposals by the EU.

¹³⁷ *Id.*

¹³⁸ *Id.*

- requiring the use of computing facilities or network elements in the Party's/Member's territory for the processing, including by imposing the use of computing facilities or network elements that are certified or approved in the territory of a Party;
- requiring the localization of data in the Party's/Member's territory for storage or processing;
- prohibiting storage or processing in the territory of other Parties/Members;
- making the cross-border transfer of data contingent upon use of computing facilities or network elements in the Party's/Member's territory or upon localization requirements in the Party's/Member's territory.¹³⁹

A digital network infrastructure is constituted by four basic elements: hardware, software, protocols, and a connection medium.¹⁴⁰ The restrictions on cross-border data flows relating to network elements mean mandatory requirements to use specified network elements related to those four basic elements.¹⁴¹ Essentially, there are three types of specific restrictions on data flows provided by the EU: (1) mandatory requirement to use specified network elements or computing facilities; (2) requirement of data localization for storage and processing in a member's territory; and (3) prohibiting storage or processing of data in another jurisdiction.¹⁴² The EU's eJSI text proposal is specific but narrow in scope as compared to other provisions on cross-border data flows given the specific identification of a mandatory list of restrictions on cross-border data flows.¹⁴³

C.I. 'LEGITIMATE PUBLIC POLICY OBJECTIVES' & 'NECESSITY' VS. 'GREATER THAN REQUIRED' TEST

The CP-TPP, RCEP, and eJSI proposals provide for varied provisions as regards to the legitimate policy space.¹⁴⁴ Essentially, they provide that nothing in this agreement "shall" prevent any member state from "adopting or maintaining" measures "to achieve legitimate public policy objectives".¹⁴⁵ However, the specific provisions do not provide "legal definition, clarification or any specific illustrative list of concerns" relating to the "legitimate public policy objectives." Only the eJSI proposal by Korea includes protection of privacy.¹⁴⁶ Therefore, it is dependent upon a legal interpretation of the phrase "legitimate public policy objective", given the relevant WTO jurisprudence which can help decipher the list of domestic policy concerns.

The interpretation of term "legitimate" in the context of CP-TPP, RCEP or eJSI can be based on the interpretation of the term "legitimate objective" in the analogous context of the TBT Agreement. Article 2.1 of the TBT Agreement requires a WTO panel to examine whether the detrimental impact that a measure has on imported products stems exclusively from

¹³⁹ *Id.*

¹⁴⁰ eJSI, *supra* note 71, at B.2: Flow of Information, (1) Cross-Border Transfer of Information by Electronic Means/Cross-Border Data Flows.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*; CP-TPP, *supra* note 71, at art. 14.11.3: Cross-Border Transfer of Information by Electronic Means; RCEP, *supra* note 71, at art. 12.15.3.

¹⁴⁵ *Id.*

¹⁴⁶ eJSI, *supra* note 71, at B.2: Flow of Information, (1) Cross-Border Transfer of Information by Electronic Means/Cross-Border Data Flows. Alt 3 is based on text proposals by Korea.

legitimate regulatory distinction rather than from discrimination against a group of imported products.¹⁴⁷

Article 2.1 of the TBT Agreement provides that the legitimate regulatory distinction will account for the detrimental impact on imported products.¹⁴⁸ The term “legitimate” in relation to an “objective” refers to “an aim or target that is lawful, justifiable, or proper”, including by reference to objectives protected elsewhere in the agreements. If an impugned measure can be explained and substantiated in terms of protecting “cultural identity”, preserving “traditional knowledge and cultural expressions”, and promoting “indigenous rights”, such a measure would highly likely qualify as “achieving a legitimate public policy objective.”

The CP-TPP, RCEP, and eJSI provide for an obligation that the member states adopt or maintain measures to achieve legitimate public policy objectives.¹⁴⁹

CP-TPP, Article 14.11

Cross-Border Transfer of Information by Electronic Means

Nothing in this Article shall prevent a party from adopting or maintaining measures inconsistent with Paragraph 2 to achieve a legitimate public policy objective, provided that the measure: (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and (b) does not impose restrictions on transfer of information greater than are required to achieve the objective.¹⁵⁰

The CP-TPP provides that member states shall not be prevented from adopting or maintaining measures to achieve a legitimate public policy objective given that the measure “is not applied in a manner” which would constitute a “means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.”¹⁵¹ It further adds that such measures should not impose restrictions on transfers of information “greater than are required to achieve the objective.”¹⁵²

¹⁴⁷ World Trade Organization, Technical Barriers to Trade Agreement, art. 2.1: Preparation, Adoption and Application of Technical Regulations by Central Government Bodies, Jan. 1, 1995. “Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.”

¹⁴⁸ *Id.*

¹⁴⁹ CP-TPP, *supra* note 71, at art. 14.11: Cross-Border Transfer of Information by Electronic Means; RCEP, *supra* note 71, at art. 12.15: Cross-Border Transfer of Information by Electronic Means; eJSI, *supra* note 71, at B.2: Flow of Information, (1) Cross-Border Transfer of Information by Electronic Means/Cross-Border Data Flows. Alt 1 is based on text proposals by Japan, the US, China, Canada and the UK. Alt 2 is based on text proposals by Singapore and Brazil. Alt 3 is based on text proposal by Korea. Alt 4 is based on text proposals by the EU.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

RCEP, Article 12.15Cross-Border Transfer of Information by Electronic Means

(2) Nothing in this Article shall prevent a party from adopting or maintaining:

Any measure inconsistent with Paragraph 2 that it considers necessary to achieve a legitimate public policy objective, provided that the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; or any measure it considers necessary for the protection of its essential security interests. Such measures shall not be disputed by other parties.¹⁵³

The RCEP clarifies that the member states “shall” not be prevented from adopting or maintaining measures that are necessary to achieve a legitimate public policy objective.¹⁵⁴ However, such measures should not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.”¹⁵⁵ Further, it provides that the member states can adopt “any measures it considers necessary” for the protection of its “essential security interests.”¹⁵⁶ The provision does not define “essential security interests.”¹⁵⁷ However, under Article 29.2, it provides an indicative list of measures which can be classified as necessary to protect “essential security interests.”¹⁵⁸ Specifically, such measures include “protection of critical public infrastructures”, incorporating communications, power and water infrastructure, and whether such infrastructure is publicly or privately owned.¹⁵⁹ Lastly, it provides such measures that are considered necessary for the protection of essential security interests “shall” not be disputed by other member states of RCEP.¹⁶⁰

The eJSI proposal by Japan, U.S., Canada, U.K. (Alt 1), Singapore, Brazil (Alt 2), and Korea (Alt 3) provides that nothing in the obligation on cross-border data flows “shall” prevent any member to adopt or maintain any measure “that is necessary to achieve a legitimate public policy objective.”¹⁶¹ However, such a measure should not be applied “in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.”¹⁶² It further provides that such a measure “does not impose restrictions on transfers of information greater than necessary or required to achieve the objective.”¹⁶³

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ CP-TPP, *supra* note 71, at art. 14.11: Cross-Border Transfer of Information by Electronic Means; RCEP, *supra* note 71, at art. 12.15: Cross-Border Transfer of Information by Electronic Means; eJSI, *supra* note 71, at B.2: Flow of Information, (1) Cross-Border Transfer of Information by Electronic Means/Cross-Border Data Flows.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ CP-TPP, *supra* note 71, at art. 14.11: Cross-Border Transfer of Information by Electronic Means; RCEP, *supra* note 71, at art. 12.15: Cross-Border Transfer of Information by Electronic Means; eJSI, *supra* note 71, at B.2: Flow of Information, (1) Cross-Border Transfer of Information by Electronic Means/Cross-Border Data Flows.

¹⁶² *Id.*

¹⁶³ *Id.* In comparison to the eJSI proposal by Japan, the US, Canada, and the UK, the eJSI proposal by Singapore and Brazil provides that “such a measure should not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade or barrier to the transfer of information and to trade through electronic means.”

The eJSI proposal by Korea uniquely specifies that any member state can adopt or maintain measures “it considers necessary for the protection of its essential security interests.”¹⁶⁴

None of the eJSI proposals discussed above define or explain the phrase “legitimate public policy objectives”, “essential security interests” with clear examples, nor provides for an “illustrative list of public policy objectives.”¹⁶⁵ However, the eJSI proposal by Korea distinctively states that the “legitimate public policy objectives” include “the protection of privacy.”¹⁶⁶

In contrast to the three eJSI proposals discussed above, the proposal by the EU is quite different.¹⁶⁷ It provides that the members “may”, as appropriate, adopt or maintain measures to “ensure the protection of personal data and privacy.”¹⁶⁸ Further, such measures or safeguards “may” include the “adoption and application of rules for cross-border transfer of personal data.”¹⁶⁹ Specifically, it states that: “...[N]othing in the agreed disciplines and commitments shall affect the protection of personal data and privacy afforded by the members’ respective safeguards.”¹⁷⁰ Here, we note that the language is different, there is no mention of “legitimate public policy objective” or “essential security interests” instead the EU’s eJSI proposal provides “... safeguards ... appropriate to ensure the protection of personal data and privacy.”¹⁷¹ The EU’s eJSI proposal falls short of the larger expectations to consider or define purposefully the importance of the phrase “legitimate public policy objectives” beyond data privacy.¹⁷²

The legal scope of “necessary” is narrow in the CP-TPP, compared to “greater than required”, as provided in the RCEP.¹⁷³ According to the principle of effectiveness in treaty interpretation, when treaty terms have been intentionally differentiated in this way, they need to be given different meaning.¹⁷⁴ As the parties deliberately chose the word “necessary” rather than “required”, given that the WTO jurisprudence ascribes different meaning to the measures that use “necessary” with regard to “essential” to achieve an objective or those described as simply “relating to” an objective.¹⁷⁵

In this regard, it is noteworthy that the term “required” is also used in Article 5.6¹⁷⁶ of the Agreement on the Application of Sanitary and Phytosanitary (SPS agreement) in a similar

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ CP-TPP, *supra* note 71, at art. 14.11: Cross-Border Transfer of Information by Electronic Means; RCEP, *supra* note 71, at art. 12.15: Cross-Border Transfer of Information by Electronic Means; eJSI, *supra* note 71, at B.2: Flow of Information, (1) Cross-Border Transfer of Information by Electronic Means/Cross-Border Data Flows.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ CP-TPP, *supra* note 71, at art. 14.11: Cross-Border Transfer of Information by Electronic Means; RCEP, *supra* note 71, at art. 12.15: Cross-Border Transfer of Information by Electronic Means; eJSI, *supra* note 71, at B.2: Flow of Information, (1) Cross-Border Transfer of Information by Electronic Means/Cross-Border Data Flows.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ World Trade Organization, Sanitary and Phytosanitary Agreement, art. 5: Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection, Apr. 15, 1994. “Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to

context, namely “measures being not more restrictive than required to achieve the legitimate public policy objectives.”¹⁷⁷ Further, it is clarified in the footnote to Article 5.6 of the SPS agreement that this language is intended to afford a higher degree of deference to regulators.¹⁷⁸ Specifically, a measure is only more trade-restrictive than required if there is evidence of a significantly less trade-restrictive alternative.¹⁷⁹ Accordingly, the use of the term “required” instead of “necessary” indicates an intention to afford a margin of deference to the government or regulatory authority adopting the measure at issue.¹⁸⁰ This is not to suggest that the existence of a less trade-restrictive alternative is irrelevant.¹⁸¹ On the contrary, the language: “...greater...than...” in these provisions points to the comparative nature of the legal test.¹⁸² A comparative test necessarily requires the impugned measure to be assessed against a comparator, which, in the context of provisions, would be a less trade-restrictive means of achieving the legitimate objective.¹⁸³

C.II. “APPLIED IN A MANNER WHICH WOULD CONSTITUTE A MEANS OF ARBITRARY OR UNJUSTIFIABLE DISCRIMINATION OR A DISGUISED RESTRICTION ON TRADE”

A measure will be considered “arbitrary, unjustifiable or disguised” if it bears no rational connection with the legitimate public policy objective at issue. The contextual elements of CP-TPP, RCEP, and eJSI shed light on what will comprise an arbitrary and unjustifiable discrimination in any specific instance. In WTO parlance, similar legal issue is concerned mainly with the application and implementation of the measure. The principle of good faith is the essence wherein the state is obliged to exercise its rights in a bona fide manner and not in an abusive manner. Essentially, the test aims to find a thin line of equilibrium between rights and obligations of the states in the agreement so that neither completely cancels out the other. The line of equilibrium is not fixed but is subject to the context of a given case. In understanding the constituents of “arbitrary, unjustifiable and disguised restriction on trade”, we need to appreciate whether the measure is not unreasonable to certain states and whether a good faith approach was undertaken in the application of such measures so that any inadvertent discrimination was reasonably and amicably resolved.

The US has a broader approach as compared to the EU on the protection of cross-border data flows.¹⁸⁴ Although a prohibited list of data localization measures as proposed by the EU

achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.”

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² WTO Sanitary and Phytosanitary Agreement at art. 5.

¹⁸³ *Id.*

¹⁸⁴ We note the divergent approaches to provide cross-border transfer of information by electronic means in the CP-TPP, RCEP, and three eJSI proposals. We specially note the two eJSI proposals that are different than the CP-TPP and RCEP. These two eJSI proposals, as led by the US and the EU, provide an innovative clue into the future design of provisions on cross-border transfer of information by electronic means in digital trade agreements. The eJSI proposal by the US covers activities of “consumers” alongside “businesses” for the protection of the cross-border transfer of information in digital trade: “if/where this activity is for the consumers to access, distribute and use services and application” beyond the “conduct of an enterprise/business of a covered person/business.” We should appreciate that the consumers create an enormous amount of digital activity which supports both the private and public sector in generating economy of scales by supplying necessary digital goods in the economy. The eJSI proposal by the US should be understood in this context and considered by future digital trade negotiations. Lastly, as noted above, the eJSI proposal by the EU on the protection of cross-border transfer of information specifically

will support better cross-border data flows, the importance of a broad regulatory foresight as supported by the US is even better because it covers digital activity of consumers as the main catalyst for cross-border data flows.

D. PERSONAL INFORMATION PROTECTION

D.I. “DEFINITION OF PERSONAL INFORMATION/DATA”

The CP-TPP and RCEP provides for an identical legal definition of “personal information” as “any information, including data, about an identified or identifiable natural person.”¹⁸⁵ The eJSI provides for the legal definition of “personal information” in three proposals.¹⁸⁶

The eJSI proposal by the US, Hong Kong, Korea, and Canada provides for an identical definition of “personal information” to the CP-TPP and RCEP.¹⁸⁷ However, the definition provides a bracket, i.e., an indecision among the members on whether to use “about” or “relating to” to provide that the “personal information” should be connected to an “identifiable or identified person”.¹⁸⁸ The use of legal terminology “about” is narrower in scope than “relating to”, which is broad in scope. It has an impact on the actual scope of personal information covered by the obligation.

The eJSI proposal by the EU, Russia, and Brazil uses the phrase “personal data” instead of “personal information” to define the concept.¹⁸⁹ Further, it clarifies that the types of information include both direct and indirect information “about or relating to” an “identified or identifiable person.”¹⁹⁰ It is pertinent for two reasons. First, it is understood that the term “data” is different from “information.”¹⁹¹ The term “data” does not serve any purpose unless given to something, whereas the term “information” is arrived at when specific data points are interpreted and assigned to a meaning or process.¹⁹² Secondly, federal agencies in the US are accustomed to a definition of “personally identifiable information”, which is a broad term, but it is interpreted in a narrow manner to include only “reasonable risks to individual privacy”, as compared to the widely known definition of “personal data” that is a specific term but broadened by the EU’s GDPR to recognize all plausible risks or concerns relating to individual privacy.¹⁹³

restricts four types of data localization measures: (1) mandatory requirement to use specified network elements or computing facilities; (2) requirement for data localization for storage and processing in a member’s territory; (3) prohibiting storage or processing in the territory of other Parties/Members; and (4) making cross-border transfer of data contingent upon use of computing facilities or network elements in the Party’s or Member’s territory or upon localization requirement in the Party’s territory. None of the three CP-TPP, RCEP, or eJSI clearly delineate an illustrative list of legitimate public policy objectives to regulate cross-border data flows. South Korea’s eJSI proposal provides an attempt by stating that legitimate public policy objective includes protection of privacy. We submit that the legal contours of “legitimate public policy objectives” should be clearly delineated in the context of digital trade, specifically per key regulatory provision as well as comprehensively in the general and security exceptions.

¹⁸⁵ CP-TPP, *supra* note 71; RCEP, *supra* note 71; eJSI, *supra* note 71.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ CP-TPP, *supra* note 71; RCEP, *supra* note 71; eJSI, *supra* note 71.

¹⁹² *Id.*

¹⁹³ *Id.*

The eJSI proposal by China is very different from the two proposals as led by the US and the EU.¹⁹⁴ The eJSI proposal by China provides that “personal information” means “various types of information.”¹⁹⁵ It can either be “recorded by electronic or other means.”¹⁹⁶ Further, such information can be used “individually or in combination” with other information for “identifying the identity of natural person.”¹⁹⁷

The phrase “various types of information” clarifies that China wishes to have a broad coverage of all kinds of personal data within the ambit of personal information.¹⁹⁸ Instead of stating “personal information”, China provides “various types of information”, which can impact right to privacy of any person.¹⁹⁹ It is broad terminology to use in the context of personal information protection.²⁰⁰ Further, it clarifies that such information can either be recorded through electronic means or non-electronic means for the purposes of digital trade activities.²⁰¹ This clarification is not provided in the US and the EU’s eJSI proposals: CP-TPP or RCEP.²⁰² Lastly, the most critical addition in the definition of personal information by China is the recognition that such information “individually or in combination” has the capability to violate the privacy of a person.²⁰³ This clarification is provided neither in the EU or US eJSI proposals nor in CP-TPP or RCEP.²⁰⁴

There are distinct approaches by the US, EU, and China in regard to the definition of “personal information or data.”²⁰⁵ In the context of digital trade, the US has a narrow approach, as compared to the broader approach to define personal data or information by the EU and China.²⁰⁶

D.II. ECONOMIC AND SOCIAL BENEFITS OF DATA PRIVACY

The CP-TPP and eJSI proposal by Japan, Singapore, Hong Kong, Korea, China, Russia, Canada, and UK provide that there is a general recognition among member states in regard to the economic and social benefits relating to the protection of personal information or data to enhance consumer confidence and trust in digital trade.²⁰⁷

The eJSI proposal by the EU expresses its approach to personal information protection in general.²⁰⁸ It is worth restating the same:

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ CP-TPP, *supra* note 71; RCEP, *supra* note 71; eJSI, *supra* note 71.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ CP-TPP, *supra* note 71; RCEP, *supra* note 71; eJSI, *supra* note 71.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ CP-TPP, *supra* note 71, at art. 14.2: Scope and General Provisions; eJSI, *supra* note 71, at C.2: Privacy, (1) Personal Information Protection/Personal Data Protection, (3). Alt 1 is based on text proposals by Japan, Singapore, Hong Kong, China, Russia, Canada and the UK. Alt 2 is based on text proposal by the EU. Alt 3 is based on text proposal by the US.

²⁰⁸ *Id.*

...Parties/Members recognize that the protection of personal data and privacy is a fundamental right and that high standards in this regard contribute to trust in the digital economy and to the development of trade.²⁰⁹

It frames the subject-matter of privacy as protecting a “fundamental right”, underlying the democratic constitutional and human rights framework, generally.²¹⁰ Critically, it underlines that protection of privacy is a matter of fundamental human right to ensure “trust” in the digital economy, which is important for the development of digital trade.²¹¹

The eJSI proposal by the US differs from the EU on its legal approach to personal information protection.²¹² It states that “the Parties/Members recognize the importance of ensuring compliance with measures to protect personal information and ensuring that any restrictions on cross-border flows of personal information are necessary and proportionate to the risks presented.”²¹³

The eJSI proposal by the US provides that, although compliance with measures to protect privacy are important, any such measure needs to be “necessary and proportionate” to the risks to data privacy.²¹⁴ It is a different approach as compared to the EU’s eJSI proposal, which frames the issue of data privacy protection as respecting fundamental human rights of citizens, i.e., such rights should be properly considered against the need for cross-border data flows in case of conflict,²¹⁵ whereas the US’s eJSI proposal aims to invoke the requirements of “necessity and proportionality.”²¹⁶

D.III. LEGAL FRAMEWORK FOR DATA PRIVACY

The CP-TPP provides that it is mandatory for the member states to adopt or maintain a legal framework for personal information protection of digital trade users.²¹⁷ It further clarifies that in developing such legal framework the states “should” consider relevant international principles and guidelines of international bodies.²¹⁸ Thus, the obligation to adopt or maintain a legal framework for personal information protection is mandatory, but following internationally-recognized principles or guidelines is only a recommendation.²¹⁹

Importantly, footnote 6 to article 14.8.2 of the CP-TPP states:

For greater certainty, a Party may comply with the obligation in this paragraph by adopting or maintaining measures such as a comprehensive privacy, personal information or personal data protection laws, sector-specific laws covering privacy, or

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ CP-TPP, *supra* note 71, at art. 14.2: Scope and General Provisions; eJSI, *supra* note 71, at C.2: Privacy, (1) Personal Information Protection/Personal Data Protection, (3).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ CP-TPP, *supra* note 71, at art. 14.8 fn. 5.

²¹⁸ *Id.*

²¹⁹ *Id.*

laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy.²²⁰

It clarifies that the legal framework adopted or maintained by a state to comply with the obligation can include a “comprehensive privacy, personal information or personal data protection laws, sector-specific laws covering privacy, or voluntary undertakings by enterprises.”²²¹

In contrast, the RCEP provides for a legally mandatory requirement for both obligations.²²² It mandates the states to adopt or maintain a legal framework for the protection of personal information as well as mandatorily follow “international standards, principles, guidelines, and criteria of relevant international organisations or bodies’ in pursuance of the same.”²²³

It is important to note the difference in the obligations under CP-TPP and RCEP on abiding by internationally recognized principles, i.e., the former recommends whereas the latter mandates the states to follow them.²²⁴ In pursuance, the RCEP clearly elaborates that such principles include “international standards, principles, guidelines, and criteria of relevant international organisations or bodies”.²²⁵

Importantly, the RCEP under footnote 8 of article 12.8.1 states that the obligation to adopt or maintain a legal framework on personal information protection can be complied with the adoption of a “comprehensive privacy or personal information protection law, sector-specific laws or laws which provide for the enforcement of contractual obligations assumed by juridical persons.”²²⁶

The eJSI provides three proposals to require that the states need to maintain a legal framework for the protection of personal information or data.²²⁷ The eJSI proposal by Japan, US, Singapore, Hong Kong, Brazil, Ukraine, Korea, China, Canada, and UK mandates that the states “shall’ adopt or maintain ‘a legal framework or measures’” for the protection of personal information.²²⁸ The states can either have a national regulatory framework or various sector-wise regulations in pursuance of same.²²⁹

As noted earlier, the US’s approach is different from the EU, as the former considers it necessary to legally balance the data privacy-related measures with the requirement for cross-border data flows by employing terms such as “necessity and proportionality”, whereas the

²²⁰ *Id.*

²²¹ *Id.*

²²² RCEP, *supra* note 71, at art. 12.8: Online Personal Information Protection.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ eJSI, C.2. Privacy, *supra* note 68, (1) Personal information protection/personal data protection, (4) [Alt 1 based on text proposals by Japan, US, Singapore, Hong Kong, Brazil, Ukraine, Korea, China, Canada and UK]. [Alt 2 based on text proposal by EU]. [Alt 3 based on text proposal by Russia].

²²⁸ *Id.*

²²⁹ *Id.*

latter wishes to ensure “highest standards” for data privacy protection as a fundamental constitutional and human rights principle to promote consumer trust in digital trade.²³⁰

The eJSI proposal by the EU in the context of “legal framework for the protection of personal information/data” provides that the states “may” adopt and maintain “safeguards” for the protection of personal information.²³¹ These safeguards may include rules on cross-border transfer of personal data.²³² It provides for a mandatory exception which states that “nothing in this agreement ‘shall’ affect the protection of personal data and privacy afforded by Parties/Members’ respective safeguards.”²³³ It aims to provide an exception for the chosen level of protection by the states in order to protect personal data.²³⁴ As it uses the phrase “afforded by Parties’ respective safeguards.”²³⁵

The eJSI proposal by Russia provides a legal mandate for the states that they ‘*shall* adopt or maintain measures to ensure protection of personal data.’²³⁶ It further provides that such measures include rules on cross-border transfer and processing of personal data to promote “fundamental values of respect for privacy and protection of personal data.”²³⁷

Importantly, sub-paragraph 6 of the eJSI provides that the states can comply with the obligation to have a legal framework on personal information protection by adopting a “comprehensive privacy, personal information or personal data protection laws, sector-specific laws covering privacy, or laws that provide for the enforcement of voluntary undertaking by enterprises.”²³⁸ The flexibility to have a *national or sector-specific data protection laws or voluntary undertaking by enterprises* is constructive for countries with distinct legal systems to efficaciously regulate data protection issues.

D.IV. INDICATIVE LIST OF INTERNATIONAL FRAMEWORKS FOR DATA PRIVACY

The eJSI proposals provide for the list of international frameworks which can be used as guidance by the member states to develop their respective legal frameworks on data privacy.²³⁹ The eJSI proposal by Japan, Hong Kong, Brazil, Korea, China, Canada, and UK provides that the states should take into consideration principles, guidelines, standards or criteria of relevant international bodies or organisations, e.g. the *OECD recommendation of the council concerning guidelines governing the protection of privacy and transborder flows of personal data (2013)*.²⁴⁰ The obligation can either be recommendatory or mandatory in nature as the proposal is finalized.²⁴¹

²³⁰ eJSI, C.2. Privacy *supra* note 68, (1) Personal Information Protection/Personal Data Protection, (4) (Alt 1) [Alt 1 based on text proposals by Japan, US, Singapore, Hong Kong, Korea, China, Russia, Canada and UK]. (Alt 2) [Alt 2 based on text proposal by EU]. (Alt 3) [Alt 3 based on text proposal by Russia].

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ eJSI, C.2. Privacy, (1) Personal Information Protection/Personal Data Protection, *supra* note 68.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ eJSI, C.2. Privacy, *supra* note 68 ((1) Personal Information Protection/Personal Data Protection, (5) (Alt 1) [Alt 1 based on text proposals by Japan, Hong Kong, Brazil, Korea, China, Canada and UK.] (Alt 2) [Alt 2 based on text proposals by Singapore].

²⁴⁰ *Id.*

²⁴¹ *Id.*

The eJSI proposal by Singapore provides that the states “to the extent possible” shall consider the “principles and guidelines of relevant international bodies” in developing a legal framework for protection of personal information.²⁴² Only the EU’s eJSI proposal provides that the subjection of national legal regulations to international legal framework or guidance is not mandatory.²⁴³ The eJSI proposal by Japan, US, Singapore, Hong Kong, Brazil, Ukraine, Korea, Canada, and UK provide a bracket “[should/may/shall]” for the member states to follow international legal principles or guidance to formulate domestic legal framework on personal data protection.²⁴⁴

The CP-TPP provides that “in the development of its legal framework for the protection of personal information each Party ‘should’ consider principles and guidelines of relevant international bodies.”²⁴⁵

The RCEP under article 12.8.2 states that: “...in the development of its legal framework for the protection of personal information, each Party ‘shall’ consider international standards, principles, guidelines, and criteria of relevant international organizations or bodies.”²⁴⁶

We propose that digital trade agreements should promote a mandatory requirement for member states to design their national data protection regulations in consideration of internationally accepted data protection principles. Further, the digital trade agreements should regularly update the list of applicable international guidelines on data protection, e.g., the *OECD Declaration on Government Access to Personal Data Held by Private Sector Entities, 2022*.²⁴⁷

D.V. NON-DISCRIMINATORY PRACTICES FOR PERSONAL DATA PROTECTION

The CP-TPP and two eJSI proposals provide that the states should consider non-discriminatory practices when protecting personal information or data of e-commerce users.²⁴⁸ Comparatively, the RCEP does not provide for a similar obligation.²⁴⁹ The CP-TPP and two eJSI proposals provide that the states “shall endeavor” to adopt non-discriminatory practices to protect users of digital trade from privacy violations.²⁵⁰ The eJSI proposals by Japan, Hong Kong, Ukraine, Korea, China, Singapore, Canada and the UK further provide that the protection is from either personal information or data protection violations or criminal acts (link to cybersecurity crimes involving personal data and information) occurring within the jurisdiction.²⁵¹ The eJSI proposal by Brazil additionally elaborates that the “protection is meant for the citizens, consumers, and medical patients from any privacy violations.”²⁵²

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ eJSI, C.2. Privacy, (1) Personal Information Protection/Personal Data Protection, *supra* note 68 (5)(Alt 1) (Alt 1 based on text proposals by Japan, Hong Kong, Brazil, Korea, China, Canada and UK.) (Alt 2) (Alt 2 based on text proposal by Singapore).

²⁴⁵ CP-TPP, Chapter 14 – Electronic Commerce, Article 14.8: Personal Information Protection, *supra* note 66 at Sub-clause 2.

²⁴⁶ RCEP, Chapter 12 – Electronic Commerce, Article 12.8.2, *supra* note 67.

²⁴⁷ OECD Legal Instruments, ‘Declaration on Government Access to Personal Data Held by Private Sector Entities, 2022’ (OECD/LEGAL/0487) <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0487>.

²⁴⁸ CP-TPP, Article 14.8, *supra* note 66.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

Non-discrimination practices in protecting users of digital trade from personal data violations is a substantive legal obligation even though in some instances on a best endeavor basis. It implies that in implementing personal data protection regulations, the member states should protect both citizens and non-citizen residents (users) of digital trade equally within their jurisdiction.²⁵³ Any discrimination among users based on their nationality within a jurisdiction restricts digital trade. Generally, the data protection laws comply with this obligation as the GDPR apparently applies to both the EU citizens (home or abroad) and non-EU natural persons residing within EU's jurisdiction²⁵⁴; the new proposed (not yet adopted) American Data Privacy and Protection Act (ADPPA) applies to all natural persons residing in the US²⁵⁵; and the Personal Information Protection Law (PIPL) applies to all "natural persons" residing within China.²⁵⁶ However, the obligation should be supported with practical explanations given complex data protection practices by countries.

D.VI. CONSENT

The eJSI proposal by Russia provides that the states "shall ensure" that "directly expressed consent" is obtained for cross-border transfer and processing of personal data.²⁵⁷ Neither the CP-TPP nor RCEP provides for obtaining consent for cross-border transfer or processing of personal data.²⁵⁸ "Consent" is an important data protection principle, especially in relation to cross-border data flows. It should be properly articulated in the context of cross-border data flows in digital trade agreements.

D.VII. TRANSPARENCY AND COOPERATION MECHANISMS FOR INTEROPERABILITY

Article 14.8.4 of CP-TPP provides that states "should" publish information on the protections of personal information of digital trade users.²⁵⁹ It includes the legal remedies available to individuals as well as how business can comply with the legal requirements.²⁶⁰ Article 12.8.3 of RCEP provides for the same obligation, however, makes it mandatory with the use of term "shall" instead of "should."²⁶¹

The eJSI proposal provides for the same obligation under subparagraph 9 as proposed by Japan, US, Singapore, Hong Kong, Brazil, Korea, China, Canada and UK.²⁶² However, it uses

²⁵³ Jane Drake-Brockman et al., *Digital Trade and the WTO: Negotiation Priorities for Cross-border Data Flows and Online Trade in Services*, Jean Monnet TISA Network Working Paper No. 11-2011, September 2021, page 7, <https://iit.adelaide.edu.au/ua/media/1551/wp-2021-11-j.drake-brockman-et-al.pdf>.

²⁵⁴ GDPR, Article 3: Territorial Scope ("This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.") <https://gdpr-info.eu/art-3-gdpr/>.

²⁵⁵ H.R. 8152 – *American Data Privacy and Protection Act*, (Section 2: Definitions, (19) Individual: The term "individual" means a natural person residing in the United States.) <https://www.congress.gov/bill/117th-congress/house-bill/8152/text#toc-H0299B60817D742978DC3C447CD110A88>.

²⁵⁶ DigiChina, Stanford University, *Translation: Personal Information Protection Law of the People's Republic of China – Effective Nov. 1, 2021*, (Article 3: "This Law applies to the activities of handling the personal information of natural persons within the borders of the People's Republic of China") <https://digichina.stanford.edu/work/translation-personal-information-protection-law-of-the-peoples-republic-of-china-effective-nov-1-2021/>.

²⁵⁷ eJSI, C.2. Privacy, (1) Personal Information Protection/Personal Data Protection, *supra* note 68 at 8.

²⁵⁸ *Id.*

²⁵⁹ CP-TPP, Article 14.16: Cooperation on Cybersecurity Matters, *supra* note 66.

²⁶⁰ *Id.*

²⁶¹ RCEP, Article 12.8.3: Online Personal Information Protection, *supra* note 67

²⁶² eJSI, C.2. Privacy, (1) Personal Information Protection/Personal Data Protection, *supra* note 68,.

a bracket that means the proposal is not finalized whether the obligation is mandatory or recommendatory with the use of term “shall” or “should.”²⁶³ Further, the proposal provides that the personal information/data protections of “users or digital trade or e-commerce, citizens, consumers and medical patients” is covered by the obligation.²⁶⁴

Specifically, article 12.7 of RCEP, subparagraph 3 mandates that the states “shall” encourage “juridical persons”, e.g., businesses, or entities to “publish, including on the internet, their policies and procedures related to the protection of personal information.”²⁶⁵ The obligation to “publish” information relating to personal information protection enhances regulatory transparency in digital trade.²⁶⁶ The obligation to publish policies and procedures relating to the protection of personal information must be made mandatory for all the member states as well as specific juridical persons.²⁶⁷ Cooperation through dedicated platforms, especially among the key multistakeholder and inter-governmental organisations is critical in this sphere. Significant developments and information should be collated and published online for transparency in a coordinated manner.²⁶⁸ The information should provide meticulous update on various regulatory policies or procedures per jurisdiction.²⁶⁹ A dedicated platform on personal information protection policies and procedures will be critical for long-term capacity-building, enabling trust among digital trade stakeholders, and effective negotiated outcomes among states to promote regulatory coherence.²⁷⁰

D.VIII. INTEROPERABILITY OF DOMESTIC MECHANISMS

The CP-TPP, RCEP, and eJSI emphasize on cooperation among states to protect personal information.²⁷¹ The cooperation is envisaged along with the development of mechanisms for mutual recognition of regulatory outcomes.²⁷² The CP-TPP additionally clarifies that such regulatory recognition mechanisms can be awarded autonomously, by mutual arrangement, or a broader international framework.²⁷³ In pursuance, the states “shall endeavour” to exchange information on such mechanisms and explore ways to promote compatibility between the same.²⁷⁴ The eJSI provides for similar obligation and further states that such mechanisms of mutual regulatory recognition may include: “...appropriate recognition of comparable protection afforded by their respective legal frameworks, national Trustmark or certification frameworks, or other avenues of transfer of personal information among states.”²⁷⁵

D.IX. TARGETED DISCRIMINATION OF COMMUNITIES THROUGH PERSONAL INFORMATION

The eJSI proposal by Canada provides that the states “shall” not use personal information as obtained from enterprises in a manner which constitutes targeted discrimination on

²⁶³ CP-TPP, 65, Article 14.8.4, *supra* note 66; RCEP, Article 12.8.3, *supra* note 67; eJSI, C.2. Privacy, (1) Personal Information Protection/Personal Data Protection, *supra* note 68 at 9.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ CP-TPP, 65, Article 14.8.4, *supra* note 66; RCEP, Article 12.8.3, *supra* note 67; eJSI, C.2. Privacy, (1) Personal Information Protection/Personal Data Protection, *supra* note 68 at 9.

²⁷⁰ *Id.*

²⁷¹ CP-TPP, Article 14.16: Cooperation on Cybersecurity Matters, *supra* note 66.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

manifestly unlawful grounds.²⁷⁶ These unlawful grounds include race, colour, sex, sexual attributes, gender, language, religion, political or other opinion.²⁷⁷ It further provides that the states shall endeavour to ensure that personal information accessed from an enterprise is protected against “loss, theft, unauthorized access, disclosure, copying, use or modification.”²⁷⁸ Lastly, it clarifies that the personal information so accessed by any state from an enterprise should not be accessed, disclosed, used or modified by a government authority in a manner which can cause significant harm to an individual.²⁷⁹ A footnote to this obligation provides that any public disclosure of personal information which can be reasonably expected to cause significant harm does not constitute a violation of the obligation provided that it is done for the purposes of legitimate law enforcement activities, judicial proceedings, compliance with regulatory requirements, or national security.²⁸⁰ The eJSI under subparagraph 2 defines “significant harm” to include “bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on the credit record and damage to or loss of property.”²⁸¹

The obligation that state access to personal data from private entities within their jurisdiction is not used in a manner that constitutes targeted discrimination or any such activity which causes significant harm to an individual is a novel data protection obligation by the eJSI proposal of Canada. We note that these obligations are incorporated in the new data protection laws such as the proposed (unadopted) American Data Protection and Privacy Act (ADPPA) 2022 that provides for a novel obligation titled “Civil Rights and Algorithms”. It states that personal data should not be used “*in a manner which discriminates on the basis of race, color, religion, national origin, sex, or disability.*”²⁸² The personal data protection provisions in digital trade should be updated by appropriately studying such novel obligations.

E. CYBERSECURITY

Article 14.16 of CP-TPP provides that the states should recognize the importance of “building capabilities” of their national cybersecurity response mechanisms which enables identification and mitigation of malicious intrusions or dissemination of malicious code affecting the electronic networks of other CP-TPP states.²⁸³ Article 12.13 of RCEP provides that the states should recognize the importance of building capabilities of national cybersecurity response mechanisms through the exchange of best practices and cooperate using the existing collaboration mechanisms on relevant matters.²⁸⁴

The eJSI proposal on cybersecurity revolves around three broad topics: (a) recognizing the cybersecurity threat; (b) build capabilities and best practices; and (c) adopt risk-based approaches.²⁸⁵

²⁷⁶ eJSI, C.2. Privacy, (1) Personal Information Protection/Personal Data Protection, *supra* note 68, at 45.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² H.R. REP. NO. 117-669 (2022), Section 207: Civil Rights Obligations, *supra* note 256, ADPPA, Section 207: Civil Rights Obligations.

²⁸³ CP-TPP, Article 14.16: Cooperation on Cybersecurity Matters, *supra* note 66.

²⁸⁴ *Id.*

²⁸⁵ eJSI, D.2. Cybersecurity, *supra* note 68, at 58.

On the first topic of recognizing the cybersecurity threat, the eJSI proposal by the US and UK provides that the ‘threats to cybersecurity undermines digital trade.’²⁸⁶ The eJSI proposal by Ukraine provides that the states should recognize the increasing number of information systems which are processing personal data and consequently the risk in cybercrime and fraud.²⁸⁷ It emphasizes that the impact of such activities should be minimized.²⁸⁸

As regards the second topic relating to “build capabilities and best practices”, the eJSI proposal by Korea, Japan, US, Ukraine and UK emphasizes on capacity-building of national entities responsible for the evolving nature of cybersecurity incident and enabling or strengthening existing collaboration mechanisms to address transnational cybersecurity threats as well as to share information for raising awareness and promoting best practices.²⁸⁹ These existing cybersecurity threats include malicious intrusions or dissemination of malicious code that affect electronic networks.²⁹⁰

The eJSI proposal by Brazil provides that the states “shall endeavour” to build capacities to “prevent and respond” to cybersecurity threats with the adoption of “risk-based” approaches which help to mitigate threats and avoid trade restrictive and distortive outcomes.²⁹¹

The eJSI proposal by China provides that the states “should”, as a recommendation, respect “internet sovereignty”, “exchange best practices”, “enhance electronic commerce security”, “deepen cooperation” as well as “safeguard cybersecurity.”²⁹²

The eJSI proposal by the US and UK provides that in light of the “evolving nature of cybersecurity threats”, the states need to recognize that “risk-based approaches” are more effective than “prescriptive regulatory approaches.”²⁹³ Therefore, it states that the member states “shall endeavour to employ” and “shall encourage enterprises within its jurisdiction” to use “risk-based” approaches which relies on open and transparent industry standards or consensus-based standards as well as risk-management best practices to identify, detect and respond to the cybersecurity threats.²⁹⁴

We submit that the eJSI proposal on cybersecurity reflects the best cooperation and risk-based cautious approach. It builds on cooperation-led approaches in the CP-TPP and RCEP to incorporate risk-based shared capability development *via*: (a) early recognition of cybersecurity threats; (b) building capabilities and best practices; and (c) adopt risk-based approaches. We support the main message that risk-based cybersecurity policies are better than prescriptive ones.

It is interesting to note that China’s eJSI text proposal specifically mentions “to respect internet sovereignty” in the context of cybersecurity which has its own unique context in relation to China’s national approach on data protection and cybersecurity in general.²⁹⁵

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ eJSI, D.2. Cybersecurity, *supra* note 68, at 58.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ See, e.g., Justin Sherman, How much Cyber Sovereignty is Too Much Cyber Sovereignty? (2019) Council on Foreign Relations, <https://www.cfr.org/blog/how-much-cyber-sovereignty-too-much-cyber-sovereignty>.

F. SOURCE CODE

F.I. DEFINITION OF “ALGORITHM” VS. “SOURCE CODE”

The eJSI proposal by Canada, Central African Republic, Japan, Mexico, Peru, Ukraine, US, and UK provides that “algorithm” “means a defined sequence of steps taken to solve a problem or obtain a result.”²⁹⁶ No definition of source code is provided in the eJSI.²⁹⁷ No such definition is provided in the CP-TPP either of “source code” or “algorithm.” The RCEP does not have a provision on “source code.” The eJSI proposal, and other relevant trade agreements on the USMCA and Singapore-Australia Digital Economy Agreement (SADEA) makes a distinction between “source code” and “algorithms” – suggesting that in trade negotiations they are different things, that an “algorithm” is embedded or expressed in a “source code.”²⁹⁸

The oxford learner’s dictionaries provides that “source code” means “a computer program written in text form that must be translated into another form such as machine code before it can run on a computer” and “algorithm” means “a set of rules that must be followed when solving a particular problem.”²⁹⁹ An “algorithm” is a more sensitive information than a “source code” at a commercial level although both types of information contain certain commercial value and therefore are commercially valuable and confidential for digital entrepreneurs.³⁰⁰

F.II. PROHIBITION AGAINST TRANSFER OF SOURCE CODE

The eJSI mandates that:

“[N]o Party ‘shall’ require the transfer of, or access to, source code of software owned by a person/natural or juridical person of another Party/Member, or the transfer of, or access to an algorithm expressed in that source code, as a condition for the import, distribution, sale, or use of that software, or of products containing that software, in its territory.”³⁰¹

Firstly, the obligation is mandatory.³⁰² The key obligation being that the states are prohibited from requiring “transfer or access” of “source code” or an “algorithm expressed in that source code” from a “person/natural or juridical person” of another member state as a prerequisite for the “import, distribution, sale or use of that software, or products containing

²⁹⁶ eJSI, C.3 Business Trust, (1) Source Code, (1) ‘Algorithm’ means a defined sequence of steps, taken to solve a problem or obtain a result, *supra* note 68, at 48.

²⁹⁷ *Id.*

²⁹⁸ eJSI, *Supra* note 68 at C.3. Business Trust: (1) Source Code);

USTR, *US-Mexico-Canada (USMCA)*, <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/19-Digital-Trade.pdf>.

Department of Foreign Affairs and Trade of Australia, ‘Singapore-Australia Digital Economy Agreement’, <https://www.dfat.gov.au/trade/services-and-digital-trade/australia-and-singapore-digital-economy-agreement>.

²⁹⁹ Oxford Learner’s Dictionaries, ‘Source Code’, <https://www.oxfordlearnersdictionaries.com/definition/english/source-code?q=source+code>.

³⁰⁰ Oxford Learner’s Dictionaries, ‘Algorithms’, <https://www.oxfordlearnersdictionaries.com/definition/english/algorithm?q=algorithm>.

³⁰¹ eJSI, *supra* note 68 at C.3 Business Trust [Paragraph 2, is based on text proposals by Canada, CT, Japan, Mexico, Korea, PE, UA, US, Singapore, UK and EU].

³⁰² *Id.*

the software in its territory.”³⁰³ Clearly, it prohibits the member states from requiring the “source code” or “algorithm” from the owner of a digital product as a condition for its “import, distribution, sale or use within its territory.”³⁰⁴ Importantly, the use of different terms “import distribution, sale or use” of the digital product requires that such an obligation is adhered to at the time of importation of such a digital product to its commercial dissemination, sale and use within a jurisdiction.³⁰⁵ Lastly, the provision provides terms for “software” or “of products containing the software” which means that any kind of digital product having a software with source code and algorithm is covered by the obligation.³⁰⁶

A similar obligation is provided in the CP-TPP under:

Article 14.17, Source Code: (1) No Party shall require the transfer of, or access to, source code of software owned by a person or another Party, as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory.³⁰⁷

However, the definition does not refer to “algorithm” as separate commercially confidential information, rather it uses the word “source code” only.³⁰⁸

In essence, both the provisions on “source code” aim to prevent the states from forcing technology transfers in exchange for market access.³⁰⁹ The firms which sell software or operate on digital platforms generally will have invested significant resources in developing the “source code” underpinning their products.³¹⁰ Considering this investment, the “source code” will often represent a major part of the value of such products, and any requirement to disclose it will either deter those firms from entering a market or erode their competitive advantage significantly by exposing them to the potential that other firms may gain access to their source code.³¹¹

An example involves IBM and Microsoft’s agreement with the China Information Technology Security Certification Center (CNITSEC) to share source code against security risks to Chinese citizens and clients.³¹² Both IBM and Microsoft agreed to the demands for examination of source code by the Chinese government in order to secure their market space in China’s economy for a long-term basis.³¹³ Microsoft announced opening of a software review lab in partnership with the Chinese government in Beijing.³¹⁴ The IBM clarified that the agreement with China was “carefully constructed which allowed only the capability to

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷, CP-TPP, *supra* note 66 at Article 14.17: Source Code, (1) *No Party shall require the transfer of, or access to, source code of software owned by a person of another Party, as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ CP-TPP, *supra* note 66 at Article 14.17: Source Code, (1) *No Party shall require the transfer of, or access to, source code of software owned by a person of another Party, as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory.*

³¹⁴ *Id.*

conduct limited demonstrations of specific aspects of our technology in highly secure, controlled IBM environments without external communication links”.³¹⁵ Similarly, Microsoft clarified that: “...the opening of CNITSEC Source Code Review Lab is a significant step in fulfilling Microsoft’s long-term commitment in China. To create a trustworthy computing environment is the goal of Microsoft.”³¹⁶

F.III. LIMITATION OF MASS-MARKET SOFTWARE PRODUCTS

The eJSI proposal by Korea states that: “...for the purposes of this Article, software subject to paragraph 2 is limited to ‘mass-market’ software or products containing such software and does not include software used for critical infrastructure.”³¹⁷ The CP-TPP has an identical obligation.³¹⁸

The eJSI proposal by Korea and CP-TPP provides that the obligation prohibiting transfer of source code is “limited to ‘mass-market’ software or products containing such software” only.³¹⁹ Further, it explicitly excludes software meant for “critical infrastructure.”³²⁰

Firstly, the term “mass-market”, implies digital products which are “produced for very large numbers of people.”³²¹ There is no defined *de minimis* margin which can clarify what percentage of market constitutes or fulfils “limited to mass-market” condition.³²²

Secondly, the obligation does not apply to digital products meant for “critical infrastructure.”³²³ Generally, the term critical infrastructure refers to such “infrastructure sectors whose assets, systems, and networks, whether physical or virtual, are considered so vital that their incapacitation or destruction would have a debilitating effect on national security, economic security, national public health or safety, or any combination therefore.”³²⁴ Examples of such critical infrastructure may include: “defence industrial base sector”, “energy sector”, “health and public health sector”, “transportation systems sector”, “emergency services sector”, “financial services sector”, “food and agriculture sector”, “government facilities sector”, “nuclear reactors”, “materials sector”, “critical manufacturing sector”, “information technology sector”, etc.³²⁵

The eJSI and CP-TPP does not exclusively define the legal contours of the term critical infrastructure. As different states will have their own specific policy perspective or an understanding on what sectors constitute critical infrastructure, if the terminology is given into

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ eJSI, *supra* note 68 at C.3. Business Trust, (1) Source Code, (3) *For the purposes of this Article, software subject to paragraph 2 is limited to mass-market software or products containing such software and does not include software used for critical infrastructure.* [Paragraph 3 is based on text proposals by Korea].

³¹⁸ CP-TPP, *supra* note 66 at Article 14.17, Source Code, (2) *For the purposes of this Article, software subject to paragraph 1 is limited to mass-market software or products containing such software and does not include software used for critical infrastructure.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ Australian Government, *Protecting Critical Infrastructure and Systems of National Significance: Draft Critical Infrastructure Asset Definition Rules*, CRITICAL INFRASTRUCTURE CENTRE (April 2021) <https://www.homeaffairs.gov.au/reports-and-pubs/files/critical-infrastructure-asset-definition-rules-paper.pdf>.

³²⁵ *Id.*

the subjective proposals by the states at any given time, then it can dilute the legal effectiveness of such obligations on prohibition against transfer of source code in the long run. Hence, it is proposed that a proper legal definition of the term “critical infrastructure” in the context of digital trade is proposed by member states as well as discussed in the eJSI negotiations with its legal contours properly delineated. These developments are pertinent to the future revision of digital trade chapters in RTAs.

F.IV. EXEMPTIONS

There are exemptions applicable to the obligation against transfer of source code in the CP-TPP, RCEP, and eJSI. These exemptions provide that any judicial authority can require transfer of source code or algorithm in pursuance of a specific legal investigation or proceedings.³²⁶ Voluntary transfer or grant of access to source code of software, or an algorithm expressed in that source code is acceptable. We only highlight here that there are applicable exemptions beyond the General and Security Exceptions to the obligation against transfer of source code in trade agreements. Due to space constraint, we do not attempt to discuss further relevant legal provisions in this article.

G. LOCATION OF COMPUTING FACILITIES

The two eJSI proposals, CP-TPP and RCEP provide a mandatory prohibition with the use of word “shall” on “location of computing facilities as a condition for conducting business in a jurisdiction.”³²⁷ All the three digital trade agreements clarify that the states can only do so to achieve a legitimate public policy objective.³²⁸ However, they provide for the exception of legitimate public policy objective supported with different legal terms as provided in the table below.

Table 5: Location of Computing Facilities - CP-TPP vs. RCEP vs. eJSI

CP-TPP – Article 14.13.3	RCEP – Article 12.14.3	eJSI Section B Openness and Electronic Commerce, B.2.: Flow of Information: (1) Cross-Border Transfer of Information by Electronic Means/Cross-Border Data Flows
'Nothing in this Article shall prevent a Party/Member <u>from adopting or maintaining any measure that it considers necessary for the protection of its essential security interests.</u> '	'Nothing in this Article <u>shall</u> prevent a Party from adopting or maintaining: (a) any measure inconsistent with paragraph 2 that <u>it considers necessary to achieve a legitimate public policy objective - (FN 12: for the purposes of this subparagraph, the Parties affirm that the necessity behind the implementation of such legitimate public policy shall be decided by the implementing Party) – provided that the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; or (b) any measure that it considers necessary for the protection of its essential</u>	'Nothing in this article <u>shall</u> prevent a Party/Member from adopting or maintaining <u>measures</u> inconsistent with paragraph 5 'necessary' to achieve a legitimate public policy objective, provided that the measure: (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and (b) does not impose restrictions on the use or location of computing facilities greater than are necessary/required to achieve the objective.'

³²⁶ The eJSI subparagraph 5 (Alt 1) as proposed by Canada, Japan, Mexico, US, and UK. CP-TPP, Article 14.7.3. The eJSI subparagraph 5 (Alt 2) as proposed by the EU. The eJSI proposal by Korea and Singapore. A similar provision under Article 14.17.4 of the CP-TPP. The eJSI, subparagraph 4, Alt 2 based on the text proposal by the EU and UK.

³²⁷ CP-TPP, Article 14.13: Location of Computing Facilities, *supra* note 66,

³²⁸ *Id.*

	<u>security interests. Such measures shall not be disputed by other Parties’.</u>	
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The CP-TPP provides an exception against the obligation on the prohibition against location of computing facilities.³²⁹ The exception applies to measures which the state considers “necessary for the protection of its essential security interests.”³³⁰ There is a narrow scope for an exception as compared with “necessary to achieve a legitimate public policy objective” which is provided by the RCEP and eJSI.³³¹ The RCEP provides that any measure which the members consider to be necessary to protect both the “legitimate public policy objectives” and “essential security interests” are allowed within the scope of the exceptions.³³² It additionally provides that such measure should not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.”³³³ Critically, it provides under footnote 12 that “the necessity behind the implementation of such legitimate public policy shall be decided by the implementing Party – provided that the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; or (b) any measure that it considers necessary for the protection of its essential security interests. Such measures shall not be disputed by other Parties.”³³⁴ This gives an overarching policy space to the states when compared to the CP-TPP and eJSI.³³⁵ If a state considers any measure to be necessary to achieve a legitimate public policy objective or essential security interest, then as per footnote 12, the decision by the member state satisfies the necessity requirement.³³⁶ Further, given that the RCEP states that “such measures shall not be disputed by Parties”, it is clearly not subject to formal dispute settlement between the Parties or an objective adjudication scrutiny.³³⁷

The eJSI finds a middle-path between the narrow scope of CP-TPP and the broad scope of RCEP by clarifying that such measures which are “necessary to achieve a legitimate public policy objective” are covered within the scope of the exception.³³⁸ However, it does not specifically provide for the phrase “essential security interest” like the CP-TPP or RCEP.³³⁹ Similar to the RCEP, eJSI clarifies that any such measure “is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.”³⁴⁰ Additionally, it clarifies that such measures can be applied “provided that it does not impose restrictions on the use or location of computing facilities ‘greater than are necessary/required to’ achieve the objective.”³⁴¹ We note in the last subparagraph that the member states are undecided on whether to include “necessary” or “required to achieve the legitimate objective test” for any restrictions on the use or location of computing facilities.³⁴² Clearly, “necessity” is a narrow test as compared to “greater than required to achieve” test.³⁴³

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ CP-TPP, Article 14.13: Location of Computing Facilities, *supra* note 66.

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ CP-TPP, Article 14.13: Location of Computing Facilities, *supra* note 66.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

The “greater than required test” gives a higher margin of deference to regulators as compared to the necessity test.³⁴⁴ The “greater than” implies a comparative legal test.³⁴⁵ This comparative test necessarily requires the impugned measure to be assessed against a comparator, which in this context would be a less trade restrictive means of achieving the legitimate objective.³⁴⁶

On the location of computing facilities provision there are divergences among the CP-TPP, RCEP, and eJSI proposals. We understand that the CP-TPP provides that location of computing facilities is only allowed for the protection of essential security interests whereas the RCEP and eJSI provides that it covers protection of “legitimate public policy objectives.” We highlight a recurring issue that there is no clear definition of such core concepts such as essential security interests, critical infrastructure, and legitimate public policy objectives, which can help stakeholders be certain of the practical meaning of such provisions in the digital trade domain.

H. CUSTOMS DUTIES

The CP-TPP, RCEP, and eJSI provides for prohibition against the imposition of customs duties on electronic transmissions.³⁴⁷ The CP-TPP and eJSI proposal by Japan, U.S., Singapore, Hong Kong, Brazil, Korea, New Zealand, Canada, E.U., Ukraine, Russia, and U.K. provides a mandatory prohibition against the imposition of customs duties on both “electronic transmission and content transmitted electronically.”³⁴⁸ We note that Japan, Canada, New Zealand, and Singapore are also members of the CP-TPP, so they naturally support an identical obligation in the eJSI negotiations.³⁴⁹

On the contrary, the eJSI proposal by Indonesia does not use the word “shall” to indicate that the obligation against imposition of customs duties is mandatory.³⁵⁰ Rather, it provides that the “parties agree to maintain the current practice of not imposing customs duties.”³⁵¹ Further, it specifically excludes “content transmitted electronically” from the obligation apart from electronic transmission.³⁵² It clarifies that the member states can adjust their practice as per developments in the WTO ministerial meetings or agreements relating to the work program on e-commerce.³⁵³ Critically, it provides that the member states “shall not” be precluded from applying customs procedures for public policy purposes.³⁵⁴

Importantly, the eJSI proposal by China and RCEP does not widen the scope of the moratorium to include “content transmitted electronically” like Indonesia.³⁵⁵ The 1998 Declaration on Global Electronic Commerce’s operative text provides that: “Members will

³⁴⁴ *Id.*

³⁴⁵ CP-TPP, Article 14.13: Location of Computing Facilities, *supra* note 66.

³⁴⁶ *Id.*

³⁴⁷ CP-TPP, Article 14.3: Customs Duties, *supra* note 66,

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ CP-TPP, Article 14.3: Customs Duties, *supra* note 66.

³⁵⁴ *Id.*

³⁵⁵ *Id.*

continue their current practice of not imposing customs duties on electronic transmissions.”³⁵⁶ Subsequent decisions on moratorium has replicated the operative text.³⁵⁷

There is a disagreement among the WTO members as to whether the scope of moratorium includes “content transmitted electronically” apart from “electronic transmission.”³⁵⁸ Indonesia has submitted its interpretation to the WTO MC11 on the scope of the moratorium as follows:

“In regard to the discussion on the moratorium on customs duties on electronic transmissions, it is our understanding that such moratorium shall not apply to electronically transmitted goods and services. In other words, the extension of the moratorium applies only to the electronic transmission and not to products or content which are submitted electronically.”³⁵⁹

This interpretation implies that member states can impose custom duties on content transmitted electronically and not electronic transmission (bits and bytes).

India and South Africa have collaboratively questioned the economic viability of a broad scope of the moratorium.³⁶⁰ They clarify that the scope of digitized and digitizable goods can be classified into five broad categories: “films, printed matter, video games, software, sound and music.”³⁶¹ This list is expected to expand with new digital technologies.³⁶² They underline that during 1998 when the moratorium was agreed, the digital economy was not as developed as it is today.³⁶³ Specifically, with the advent of the 3D printing, big data, and artificial intelligence, the need to reconsider moratorium on digital products becomes necessary.³⁶⁴ They argue that without a proper delineation of the scope of moratorium, the developing countries will lose the policy tool of tariffs for their economic development.³⁶⁵ Specifically, with the 3D printing technology apart from new technologies in the industry 4.0, the meticulously negotiated GATT bound rates, which are traditionally higher in developing countries, will become zero for their digitized counterparts.³⁶⁶

An UNCTAD research paper estimated that on a mere identification of five types of digitizable goods as provided above, the tariff revenue loss of more than \$10 billion will be borne by the WTO member states—95% of it will impact the developing countries.³⁶⁷ Apart from their concerns on the scope of moratorium on content transmitted electronically, they

³⁵⁶ World Trade Organization, *Ministerial Declaration on Global Electronic Commerce* of 20 May 1998, WTO Doc. WT/MIN(98)DEC/2 (May 25, 1998), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/MIN98/DEC2.pdf&Open=True>.

³⁵⁷ Committee on Trade and Development 118th Session, *Note on the Meeting of 20 June 2022*, WTO Doc. WT/COMTD/M/118 (July 15, 2022), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/COMTD/M118.pdf&Open=True>.

³⁵⁸ *Id.*

³⁵⁹ WTO General Council, *Work Programme on Electronic Commerce*, WTO Doc. WT/GC/W/833 (November 8, 2021), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W833.pdf&Open=True>.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ Rashmi Banga, *Should digitally delivered products be exempted from customs duties*, UNCTAD (July 16, 2020), <https://unctad.org/news/should-digitally-delivered-products-be-exempted-customs-duties>.

explicitly reject any interpretation to broaden the scope of the moratorium which includes “services”:

“The moratorium covering digitizable goods is already a major challenge since it is about bringing a large portion, and in time, maybe even the majority of NAMA tariffs to zero. For this reason, according to the submissions by India and South Africa, the moratorium must be reconsidered as digitization becomes the mode of commerce. It would be unthinkable for the scope to go beyond this to also include other forms of digitized trade, an issue which has not been discussed.”³⁶⁸

The CP-TPP and RCEP clarify that this obligation “shall not preclude” any member state from imposing “internal taxes, fees or other charges.”³⁶⁹ However, the CP-TPP states that this exemption is applicable for charges on content transmitted electronically whereas the RCEP provides “charges on electronic transmissions.”³⁷⁰ Clearly, the RCEP does not prohibit customs duties on electronic transmissions contrary to CP-TPP.³⁷¹

The eJSI proposal by Singapore, Hong Kong, Ukraine, Korea, New Zealand, Canada, Brazil, Russia, Indonesia, China and UK states that the member states “shall not be precluded” from imposing “internal taxes, fees[,] or other internal charges” or “electronic transmissions which include the/any content transmitted electronically.”³⁷² Additionally, it states that such duty, fee, or charge is applicable to “revenue and profit generated from digital trade” as well.³⁷³ In both instances, the duty, fees, or charges need to be in compliance with the “WTO Agreement/eJSI” and “on a non-retroactive basis.”³⁷⁴

It is a novel provision. Firstly, both electronic transmission and content transmitted electronically are subject to duties, fees, or charges. Secondly, it subjects revenue and profit generated from digital trade to plausible duties, fees or charges as well. It clarifies that any such charges on covered issues should be in compliance with the obligations under the WTO agreement and eJSI. Critically, it provides that this provision applies on a non-retroactive basis. The eJSI proposal by the US provides for the same obligation—“member states shall not be precluded from imposing internal taxes on electronic transmissions which include content transmitted electronically.”

There is a divergence among states within and outside the WTO on customs duties which should be levied on content transmitted online vs. electronic transmissions. Indonesia, India, and South Africa have raised serious concerns that if the WTO moratorium on e-commerce includes content transmitted online then the various physical goods which are being digitalized will be able to cross borders without any customs duties which can be levied by developing and least-developed countries.³⁷⁵ This has a serious consequence for the ability of developing and least-developed countries to use tools such as tariffs.³⁷⁶

³⁶⁸ *Id.*

³⁶⁹ CP-TPP, *supra* note 66; RCEP, *supra* note 67; eJSI, *supra* note 68.

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ Banga, *supra* note 367.

³⁷⁶ *Id.*

We noted above that the CP-TPP and eJSI proposal by Japan, US, Singapore, Hong Kong, Brazil, Korea, New Zealand, Canada, EU, Ukraine, Russia, and UK provide a mandatory prohibition against customs duties on both electronic transmissions and content transmitted electronically. The RCEP and eJSI proposal by China as discussed above does not broaden the scope of moratorium to include content transmitted electronically. The eJSI proposal by Indonesia understandably makes the prohibition against customs duties non-binding and provides that the members should follow the developments and accordingly practice their imposition of customs duties in the digital domain. Further, the CP-TPP and RCEP provide for exemptions against the prohibition. However, the CP-TPP expressly limits the applicability of exemptions to content transmitted electronically whereas the RCEP broadly covers charges on electronic transmissions. The RCEP's approach is supported by the eJSI proposal as led by China, Singapore, and UK.

We submit that the customs duties in the field of digital trade is a very sensitive issue. There is no simple solution, and we don't presume to know the best solution. It is an issue which needs collaboration and dialogue based on good faith within and outside the WTO so that the essential goals of digital trade liberalization are secured with necessary policy space for the economic development of developing and least developed countries.

I. GENERAL AND SECURITY EXCEPTIONS

I.I. GENERAL EXCEPTIONS

The GATT 1994 and GATS provide for general exceptions under the WTO legal framework.³⁷⁷ The RTAs have usually incorporated the provisions *mutatis mutandis* or adapted to the design of the general exceptions under the GATT 1994 and GATS. In a similar manner, the CP-TPP digital trade chapter provides that paragraphs (a), (b), and (c) of article XIV GATS are incorporated and made part of the digital trade chapter.³⁷⁸ The RCEP digital trade chapter as well as the eJSI incorporates both the Articles XX GATT 1994 and XIV GATS *mutatis mutandis*.³⁷⁹ Hence, it is essential to understand the general exceptions under GATT 1994 and GATS in the WTO framework before we discuss the specific general and security exception provisions in the CP-TPP, RCEP, and eJSI.

The general exceptions under GATT 1994 and GATS provide for a chapeau which outlines the critical test that a measure "is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the countries where the ('same' - GATT)/('like' - GATS) conditions prevail, or a disguised restriction on ('international trade' - GATT)/('trade in services' - GATS)".³⁸⁰ We note that the legal test of chapeau under both the GATT 1994 and GATS is similar but not identical. The evenhandedness test to ensure no discrimination "between countries" where "same or like conditions prevail" is narrow in scope in GATS as compared to GATT 1994. As the GATT 1994 uses the term "same" and GATS uses the term "like" for the even-handedness test.³⁸¹

The various subparagraphs below the main chapeau of both the GATT 1994 and GATS provide for an illustrative list of legitimate public policy objectives which are covered within

³⁷⁷ GATT 1994, Article XX: General Exceptions. GATT 1994, Article XXI: Security Exceptions.

³⁷⁸ CP-TPP, Chapter 29, Exceptions and General Provisions, Section A: Exceptions, Article 29.1, *supra* note 66.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *Id.*

the scope of the general exceptions.³⁸² The list of such objectives differ in their expression between the GATT 1994 and GATS.³⁸³ Specifically, in the subparagraph on measures “necessary to protect public morals”, we see that the GATT 1994 does not include “to maintain public order” as compared to GATS.³⁸⁴ Further, the footnote five to GATS clarify that “the public order exception may be invoked only where genuine and sufficiently serious threat is posed to one of the fundamental interests of the society.”³⁸⁵ Thus, we note that the illustrative list of legitimate public policy objectives is clearly defined in the GATS as compared to GATT 1994.³⁸⁶ The subparagraph (c) of GATS Article XIV is the most relevant legitimate public policy objective after “public morals” and “public order” for digital trade.³⁸⁷ The subparagraph (c) provides that all measures which are “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this agreement - are covered within the scope of general exceptions.”³⁸⁸ Specifically, it outlines three kinds of laws or regulations which are explicitly covered: (a) prevention of deceptive and fraudulent practices or to deal with the effects of a default on service contracts, (b) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts, and (c) safety.³⁸⁹

The GATS clearly supersedes GATT for its relevance in the context of digital trade as it includes within the scope of general exception, all measures which are necessary “for the protection of privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts.”³⁹⁰ This specific topic of legitimate policy objective is very pertinent in the sphere of digital trade.³⁹¹ Overall, the illustrative list of legitimate public policy objectives under GATS have an applicable and relevant list of legitimate public policy objectives vis-à-vis GATT on digital trade.³⁹²

The CP-TPP incorporates subparagraph (a), (b), and (c) of GATS *mutatis mutandis* whereas the RCEP and eJSI as proposed by Canada, China and Japan incorporates the whole provision on general exceptions under GATT 1994 and GATS *mutatis mutandis*.³⁹³ However, we note that the eJSI proposal by Canada, China, and Japan provides a set list of legitimate public policy concerns in the context of digital trade as follows:

- a) cybersecurity;
- b) safeguarding cyberspace sovereignty;
- c) protecting the lawful rights and interests of its citizens;
- d) juridical persons and other organisations; and
- e) achieving other legitimate public policy objectives.³⁹⁴

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ CP-TPP, Chapter 29, Exceptions and General Provisions, Section A: Exceptions, Article 29.1, *supra* note 66.

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ CP-TPP, Chapter 29, Exceptions and General Provisions, Section A: Exceptions, Article 29.1, *supra* note 66.

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ eJSI, (6) General Exceptions, (Alt 1), *supra* note 68.

It provides for a test similar to the chapeau test under the GATS excluding the even-handedness test by stating:

“ . . . provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade and are no more than necessary to achieve the objectives”.³⁹⁵

Contrary to the above proposal, the eJSI proposal by Brazil provides for a chapeau test similar to the GATS including the even-handedness test by stating:

“Subject to the requirement that such measures are ‘not applied in a manner’ which would constitute a means of arbitrary or unjustifiable discrimination between countries where ‘like conditions prevail’, or a disguised restriction on trade”.³⁹⁶

In providing the phrase “disguised restriction on trade”, the eJSI proposal by Brazil adds “and cross-border transfer of information by electronic means.”.³⁹⁷ Hence, we note that Brazil’s eJSI proposal is very different from other proposals.³⁹⁸ The Brazil’s eJSI proposal provides an illustrative list of legitimate public policy measures: “(a) necessary to protect public morals or to maintain public order; (b) necessary to ensure the equitable or effective imposition or collection of direct taxes in respect of trade through electronic means; (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this agreement including those relating to: (i) the prevention of deceptive and fraudulent practices; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; and (iii) safety.”³⁹⁹ We note that the two list of legitimate public policy objectives are directly adopted from the GATS.⁴⁰⁰

Overall, we note that the eJSI proposals are more innovative and elaborate in design as even after incorporating the general exceptions from both GATT 1994 and GATS *mutatis mutandis*, the eJSI proposals refine the provisions to suit the context of digital trade. It is relevant to list all the legitimate public policy objectives from the above discussion which are highly pertinent for the regulation of digital trade in international economic law.

Table 6: List of pertinent legitimate public policy objectives for digital trade – GATT 1994 vs. GATS vs. eJSI

GATT 1994	GATS	e-JSI
<i>Necessary to protect public morals.</i>	<i>Necessary to protect public morals or to maintain public order (FN 5: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society).</i>	<ul style="list-style-type: none"> • <u>Text proposal by Canada, China, and Japan:</u> <i>Guaranteeing cybersecurity;</i>

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

		<p>Safeguarding cyberspace sovereignty;</p> <p>Protecting the lawful rights and interests of its citizens, juridical persons, and other organizations;</p> <p>Achieving other legitimate public policy objectives.</p>
Necessary to protect human, animal or plant life or health.	Necessary to protect human, animal or plant life or health.	<ul style="list-style-type: none"> • <u>Text proposal by Brazil:</u> <p>Necessary to protect public morals or to maintain public order.</p> <p>Necessary to ensure the equitable or effective imposition or collection of direct taxes in respect of trade through electronic means.</p> <p>Necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:</p> <p>(i) the prevention of deceptive and fraudulent practices;</p> <p>(ii) the protection of the privacy of individuals in relation to the proceeding and dissemination of personal data and the protection of confidentiality of individual records and accounts; and</p> <p>(iii) safety.</p>
Necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices.	Necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on service contracts; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; (iii) safety.	
Relating to the products of prison labour.	(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of	

	services or service suppliers of other Members.	
Relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.	(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.	
Involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials is held below the world price as part of a government stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination.		

Source: Author's compilation from the legal texts⁴⁰¹.

The legitimate public policy objective as per the WTO jurisprudence refers to “an aim or target that is lawful, justifiable, or proper” inclusive of objectives mentioned and protected elsewhere in the treaty.⁴⁰² In the context of the WTO, there are far fewer explicit endorsement of values and objectives as compared to the CP-TPP.⁴⁰³ The term endorsement of values and objectives refers to the preambular recitals.⁴⁰⁴ It needs to be emphasised that we should not conflate ambiguity with abstract, as the abstract nature of preambular values does not make them ambiguous.⁴⁰⁵ The term finds application in particular fact patterns and in the abstract it would be difficult to delineate every single objective which could conceivably qualify as legitimate.⁴⁰⁶ This difficulty does not necessarily make the language ambiguous.⁴⁰⁷

It is difficult to apply these tests in abstract as they depend on the detail of a given measure.⁴⁰⁸ The test works so that a measure will be considered arbitrary or disguised if it bears no rational connection to the legitimate objective.⁴⁰⁹ The contextual elements of the CP-TPP can shed light on what comprises arbitrary or unjustifiable discrimination in any given instance. For example, discrimination in the form of a competitive advantage to an indigenous community which directly results from the application of a given measure in pursuit of the legitimate objective would appear unlikely to be arbitrary, unjustifiable, or disguised, particularly if there is no less trade-restrictive alternative.⁴¹⁰

⁴⁰¹ *Id.*

⁴⁰² Ministry of Justice, *The Report on the Comprehensive and Progressive Agreement for TPP* (2021) 135-137, https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_178856069/CPTTP%20W.pdf.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ Ministry of Justice, *supra* note 402.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

I.II. SECURITY EXCEPTIONS

The CP-TPP, RCEP, and eJSI provide that the agreement “shall not be construed” to require a “party to furnish any information the disclosure of which it considers contrary to its essential security interests.”⁴¹¹ Further, they provide that nothing in this agreement “shall preclude” any member state from taking any “action” which it considers necessary for the protection of its “essential security interests.”⁴¹² The concept of essential security interests is then further elaborated in GATT 1994, GATS, RCEP, and eJSI.⁴¹³ The CP-TPP does not elaborate the concept of essential security interest compared to other agreements.⁴¹⁴ “Maintenance of international peace and security” is excluded or treated as a different concept from essential security interest.⁴¹⁵ An elaboration of essential security interest is provided in the comparative table below to appreciate the varied expressions.

Clearly, the RCEP has an elaborate legal provision for a “security exception” as compared to both the CP-TPP and, specifically, eJSI proposals by China and Brazil. The RCEP is more advanced than GATT 1994 and GATS on outlining the concept of “essential security interests” by including “critical public infrastructure” whether publicly or privately-owned.⁴¹⁶ Critically, the RCEP expands the scope of “essential security interest” to expressly include public or private critical public infrastructure by stating “so as to protect critical public infrastructures” including “communications, power, and water infrastructures”, both public and privately-owned.⁴¹⁷ Further, the RCEP provides that measures relating to “fissionable and fusionable materials or the material from which they are derived, relating to the traffic in arms, ammunition and implements of war and to such traffic in goods and materials, or relating to the supply of services, as carried on directly or indirectly for the purpose of supplying or provisioning a military establishment” are also covered within the scope of the “essential security interests”.⁴¹⁸ This elaboration is found in GATT 1994 and Article XIV*bis* in GATS.⁴¹⁹

The eJSI proposal by Brazil provides an illustrative list of security measures on transfer of information or taking any action in pursuance of essential security interests.⁴²⁰ It states that:

Nothing in this Agreement shall be construed: (a) to require any [Party/Member] to furnish any information, the disclosure of which it considers (b) contrary to its essential security interests; or (c) to prevent any [Party/Member] from taking any action which it considers necessary for the protection of its essential security interests: (i) relating to the cross-border transfer of information carried out directly or indirectly for military

⁴¹¹ CP-TPP, Chapter 29, Exceptions and General Provisions, Article 29.2: Security Exception, <https://www.dfat.gov.au/sites/default/files/29-exceptions-and-general-provisions.pdf>; RCEP, Chapter 17: General Provisions and Exceptions, 17.13: Security Exceptions, <https://www.dfat.gov.au/sites/default/files/rcep-chapter-17.pdf>; eJSI, Annex 1: Scope and General Provisions, (7) Security exception, https://www.bilaterals.org/IMG/pdf/wto_plurilateral_ecommerce_draft_consolidated_text.pdf.

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *supra* note 416.

⁴¹⁸ *Id.*

⁴¹⁹ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; General Agreement on Trade in Services, Apr. 15, 1994, art. XIV, 1869 U.N.T.S. 183 [hereinafter GATS].

⁴²⁰ Comprehensive and Progressive Agreement for Trans-Pacific Partnership, ch. 29, Exceptions and General Provisions, art. 29.2 [hereinafter CP-TPP]. <https://www.dfat.gov.au/sites/default/files/29-exceptions-and-general-provisions.pdf>.

communication; (ii) taken in time of war or other emergency in international relations; or (iii) to prevent any [Party/Member] from taking any action under the United Nations Charter for the maintenance of international peace and security.

We note that the eJSI proposal further expands the scope of essential security interests beyond RCEP to include measures “relating to the cross-border transfer of information carried out directly or indirectly for military communication.”⁴²¹ All the digital trade agreements include within the security exceptions, the measures taken in pursuance of maintaining international peace and security.⁴²²

The CP-TPP security exception is not as specific as RCEP or eJSI. As eJSI applied the security exception under Article XXI GATT 1994 and Article XIV*bis* of the GATS *mutatis mutandis*.⁴²³ The important legal phrases in eJSI include: (a) essential security interest in all the three digital trade agreements; (b) critical public infrastructure in RCEP and eJSI; (c) in pursuance of its obligations under the UN Charter for the maintenance of peace and security in RCEP and eJSI, and (d) time of war or other international emergencies in international relations.⁴²⁴

The RCEP and eJSI’s security exception proposal by China and Brazil provides that the member states are not required to furnish any information “the disclosure of which it *considers* contrary to its essential security interests.” The CP-TPP similarly provides “disclosure of which it *determines* to be contrary to its essential security interests.”⁴²⁵ Similarly, Article XXI:(a) GATT 1994 and Article XIV*bis* GATS also provide for a provision similar to RCEP and two eJSI proposals by China and Brazil.⁴²⁶

The CP-TPP, RCEP, and eJSI proposals by China and Brazil provide that the security exception allows members to “take action which it considers ‘necessary’ for the protection of its essential security interests.”⁴²⁷ However, they provide a varied list of measures which are specifically covered by the phrase “essential security interests”.⁴²⁸ Importantly, the RCEP is unique as it clarifies under footnote 7 that “for greater certainty, this includes critical public infrastructure whether publicly or privately owned, including communications, power, and water infrastructures.”⁴²⁹ The CP-TPP, RCEP, and eJSI do not provide a specific legal definition of the term “essential security interests.” The CP-TPP does not elaborate the term “essential security interests”, rather after providing that the members can take actions “necessary”, it states “for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”⁴³⁰

⁴²¹ GATT, Oct. 30, 1947, art. XXI, 55 U.N.T.S. 194; GATS, Apr. 15, 1994, art. XIV *bis*, 1869 U.N.T.S. 183.

⁴²² CP-TPP, ch. 29, Exceptions and General Provisions, art. 29.2. <https://www.dfat.gov.au/sites/default/files/29-exceptions-and-general-provisions.pdf>.

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ GATT, Oct. 30, 1947, art. XXI, 55 U.N.T.S. 194; GATS, Apr. 15, 1994, art. XIV *bis*, 1869 U.N.T.S. 183.

⁴²⁷ CP-TPP, ch. 29, Exceptions and General Provisions, art. 29.2. <https://www.dfat.gov.au/sites/default/files/29-exceptions-and-general-provisions.pdf>.

⁴²⁸ *Id.*

⁴²⁹ Regional Comprehensive Economic Partnership, Nov. 15, 2020, art. 17.13, 2689 U.N.T.S. 3 [hereinafter RCEP].

⁴³⁰ CP-TPP, ch. 29, Exceptions and General Provisions, art. 29.2. <https://www.dfat.gov.au/sites/default/files/29-exceptions-and-general-provisions.pdf>.

The RCEP, on the contrary, provides a list of specific measures and actions which can be taken by the member if it is necessary for the protection of its essential security interests, specifically: (a) “relating to fissionable and fusionable materials or the materials from which they are derived”; (b) “relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials, or relating to the supply of services, as carried on directly or indirectly for the purposes of supplying or provisioning a military establishment”; (c) “taken so as to protect critical public infrastructures”; or (d) “taken in time of national emergency or war or other emergency in international relations” or “to prevent any Party from taking any action in pursuance of its obligations under the UN Charter for the maintenance of international peace and security.”⁴³¹ The list of specific contexts elaborated in RCEP is adopted from the GATT 1994 and GATS; however, the novelty is found in RCEP with “taken so as to protect critical public infrastructures” and the explanatory footnote 7.⁴³²

In similar fashion, the eJSI proposals by Brazil also elaborates specific context for the applicability of the security exception as regards the protection of essential security interests.⁴³³ It provides that such measures include: “relating to the cross-border transfer of information carried out directly for military communication”; “taken in time of war or other emergency in international relations”; or “to prevent any Party/Member from taking any action in pursuance of its obligations under the UN Charter for the maintenance of international peace and security.”⁴³⁴ The text proposal by Brazil is similar to the security exceptions we note under the GATT 1994 and GATS, except with new additions like “relating to cross-border transfer of information carried out directly for military communication.”⁴³⁵ The eJSI proposal by China does not provide elaboration on the application of essential security interests, rather it provides a subparagraph (c)(iii) to add nothing in this agreement shall be construed “to prevent any [Party/Member] from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.”⁴³⁶

The CP-TPP incorporates paragraphs (a), (b), and (c) of Article XIV*bis* GATS into its digital trade chapter and RCEP as well as eJSI incorporates both Article XX GATT 1994 and XIV GATS, *mutatis mutandis*. The CP-TPP has a brief provision on security exceptions. In this article, we have outlined and tabulated the most pertinent list of legitimate public policy objectives covered by various provisions on general and security exceptions provided by the GATT 1994, GATS, CP-TPP, RCEP as well as eJSI proposals. We underline the relevance of GATS general and security exceptions which provide significant legal content in the context of digital trade for future deliberations, especially on the protection of personal data/information. The eJSI proposal by Canada, China, and Japan provide a relevant list of legitimate public policy concerns in the context of digital trade, e.g., cybersecurity policies, cyberspace sovereignty safeguards, etc. We specifically recommend the eJSI proposal by Brazil, China, and Japan on general and security exceptions for digital trade. It is highly innovative and relevant for future deliberations on digital trade.

In the context of security exceptions, the RCEP has a more elaborate legal provision for security exception as compared to the CP-TPP and eJSI proposals by China and Brazil. The

⁴³¹ RCEP, Nov. 15, 2020, art. 17.13, 2689 U.N.T.S. 3.

⁴³² *Id.*

⁴³³ CP-TPP, ch. 29, Exceptions and General Provisions, art. 29.2. <https://www.dfat.gov.au/sites/default/files/29-exceptions-and-general-provisions.pdf>.

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ *Id.*

RCEP is advanced in that it defines the concept of “essential security interests” by including “critical public infrastructure whether publicly or privately owned.” We commend the eJSI proposal by Brazil on security exception as it goes further than the RCEP to expand the scope of essential security interests by including measures “relating to the cross-border transfer of information carried out directly or indirectly for military communications.” We note that all the digital trade agreements include security exception measures taken in pursuance of maintaining international peace and security which is relevant in light of the cyberwarfare threats in the context of the recent Ukraine crisis.

The trade negotiators should properly define and clarify essential conceptual terms such as “essential security interests”, “legitimate public policy objectives”, “critical public infrastructure”, and maybe even “international peace and security”, as although these terms have a traditionally established meaning we need to appreciate the new digital context in which such established legal principles should operate.

J. TREATY OF WAITANGI WAIVER

The Treaty of Waitangi waiver⁴³⁷ is an important provision in both the CP-TPP and RCEP in terms of indigenous community data governance issues. The eJSI does not have such a provision. It provides flexibility to New Zealand to adopt measures to accord more favourable treatment to the indigenous community – “Māori relating to issues covered by the obligations under the digital trade chapter provided that such measures are not adopted as a means of arbitrary or unjustified discrimination against persons of other Parties or as a disguised restriction on trade in goods, trade in services or investment.”⁴³⁸ The waiver clarifies that any matter relating to the interpretation of rights and obligations under the Treaty of Waitangi arising under the agreement shall not be subject to the dispute settlement mechanism.⁴³⁹ A trade panel can only be established to determine whether the measure is inconsistent with the rights of any member state.⁴⁴⁰ Lastly, the provision on “traditional knowledge and traditional cultural expression”, unique to the CP-TPP, emphasizes that each member state may establish appropriate measures to respect, preserve, and promote traditional knowledge and cultural expressions.⁴⁴¹

In the context of the Waitangi Tribunal findings which revolve around this specific provision on the Treaty of Waitangi waiver there was a genuine concern raised by the indigenous community on the lack of an informed and shared policy decision-making in the context of digital trade. The tribunal emphasised that there needs to be voluntary steps taken by the state vis-à-vis its indigenous communities to protect them against material risks in the digital sphere.

The issue of indigenous data governance warrants a holistic investigation altogether. In this article, we propose that there is scope for indigenous data governance in digital trade chapters. Given the novelty of digital trade negotiations, the stakeholders need to be realistic yet optimistic enough to take a concerted effort at national as well as international forums to make the discussions more inclusive. The inclusivity principle for digital trade negotiations

⁴³⁷ CP-TPP, *supra* note 66, at art. 17.16.

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ CP-TPP, ch. 29, Exceptions and General Provisions, art. 29.2. <https://www.dfat.gov.au/sites/default/files/29-exceptions-and-general-provisions.pdf>.

underscores the importance of vulnerable communities or underrepresented sections of society who are impacted by digitalisation of trade yet have found it hard to voice their opinion or concern on the same.

This inclusivity will deliver results if it is maintained for a sustainable period of time. It will ensure a carve-out of pertinent issues relating to indigenous data governance and help garner political support for digital trade negotiations by vulnerable communities. It will help such communities to better understand the value and purpose of digital trade agreements so as to fruitfully utilise such arrangement than criticize them in oblivion.

Both the CP-TPP and RCEP provides for the Treaty of Waitangi waiver for New Zealand, no such provision is provided in eJSI. This provision enables New Zealand to take policy measures which allows preferential treatment to its Māori indigenous community. However, it is subject to the requirement that such measures are not adopted as a means of arbitrary or unjustified discrimination against persons of other Parties or as a disguised restriction on trade in goods, services, or investment.

There is an additional provision in the CP-TPP on “traditional knowledge and traditional cultural expression” which provides that the states may establish appropriate measures to respect, preserve and promote traditional knowledge and cultural expressions.

These are positive developments as digital trade needs to operate within a diverse socio-economic context. It cannot merely delve into economic issues and overlook social issues relevant to digital trade by arguing that such issues will be managed by concerned individual states or international organizations. Indigenous data governance is a new theme emerging within states and debated in the United Nations. It is a complex and rich topic which warrants a whole separate research agenda.

The states need to be sensitive to their indigenous and other minority communities impacted from digitalization of international trade. Digital trade can be disruptive to the societal fabric compared to traditional trade in unique ways. The states need to take a cautious approach from the beginning to make stakeholder deliberations for digital trade highly inclusive, especially for the vulnerable and indigenous communities. The digital trade agreements should enable special domestic mechanisms for capacity-building to help such communities to make such stakeholder deliberations more meaningful and inclusive both nationally and internationally. These stakeholder forums will help such communities to rationally utilize the value and purpose of such digital trade agreements or arrangements and not be swayed by unfounded criticisms.

V. CONCLUSION

Digital trade agreements are a necessary tool to ensure legal predictability and stability in the global economy. This comparative analysis is a novel attempt to encapsulate key features of the fundamental regulatory provisions in the most pertinent digital trade agreements. It highlighted that there are diverse interests and approaches to regulate digital trade. Especially as it relates to the need for clear and updated definition of “digital trade/e-commerce”, “digital products”, “covered persons” to core regulatory deliberations on “cross-border data flows”, “non-discriminatory treatment of digital products – likeness test” in the context of digital trade, regulatory clarity on “personal information protection”, “cybersecurity”, “source code”, “location of computing facilities”, “custom duties”, “general and security exceptions” and “treaty of Waitangi exception”. The article argues for a careful and balanced

deliberation among stakeholders to improve digital trade regulations as per new economic and technological realities. It requires a sustained deliberation as rapid technological advancement requires continued vigilance with an optimistic anticipation for change.

The article proposes important recommendations to policymakers. They include the need to clearly define “digital trade/e-commerce”, “digital products” in consonance with new technological developments for legal stability and predictability. The concept of “like digital products” cannot be interpreted in the context of GATT 1994 or GATS due to vastly different legal and technological context. The policymakers need to clearly define the concept of “like digital products” in the context of digital trade. Further, the concepts of “legitimate public policy objective”, “essential security interests” and “critical infrastructure” should be specifically supported with an illustrative list of covered objectives, especially in relation to the general and security exceptions.

The digital trade agreements should promote new international guidelines to design national personal data/information and cybersecurity regulatory frameworks by member states. It will support a relative convergence of regulatory priorities and enable interoperability of mechanisms for cross-border data flows. Policymakers should make a clear legal distinction between “source code” and “algorithm” in the context of digital trade as well as the concept of “mass-market digital products” that are subject to the obligation against transfer of source code/algorithm as a condition for imports.

There is a political divergence among states on the application of custom duties on digital trade. It has led to a distinct interpretation of the legal scope of the WTO moratorium on e-commerce. It is advised that the policymakers should ensure a constructive national and international dialogue to enable a mutually beneficial agreement on this issue. Lastly, we believe that the indigenous community data governance will become an important economic and socio-political issue in the context of digital trade which needs constructive discussions among policy makers as well as a dedicated discussion forum for civil society organizations to reasonably voice their concerns and help shape socially viable digital trade policies.

ON AN AMERICAN STRATEGY TO FORGE GLOBAL SPACE LAW TO CURTAIL ORBITAL DEBRIS IN THE NEW SPACE AGE

*Michael B. Runnels**

As the Ukrainian army enters its second year defending itself against the Russian Federation's criminal war,¹ the military communications vital for organizing the Ukrainian defense are powered by Starlink,² Earth's largest satellite constellation³ and a product of the American corporation SpaceX.⁴ Satellite constellations are networks of dozens to tens of thousands of mass-produced satellites that net the Earth like an exoskeleton⁵ to perform everyday tasks like providing global broadband internet.⁶ While the Russians violate international human rights law on the one

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¹ See, e.g., Robbie Gramer, *Ukraine's 'Nuremberg Moment' Amid Flood of Alleged Russian War Crimes*, FOREIGN POLICY MAGAZINE (June 10, 2022), <https://foreignpolicy.com/2022/06/10/ukraines-nuremberg-moment-amid-flood-of-alleged-russian-war-crimes/> (detailing the aftermath of Russia's withdrawal from the Kyiv region in April 2022, Gramer notes that the Russians "left in their wake nightmarish scenes of bodies strewn along the roads of Bucha . . ." and that Russian war crimes during this conflict are so numerous that he advocates for the creation of a new court similar to the Nuremberg Court, convened in the aftermath World War II).

² See Vivek Wadhwa & Alex Salkever, *How Elon Musk's Starlink Got Battle-Tested in Ukraine: Fast Expanding Satellite Broadband Services are Proving Decisive During War and Other Emergencies*, FOREIGN POLICY MAGAZINE (May 4, 2022), <https://foreignpolicy.com/2022/05/04/starlink-ukraine-elon-musk-satellite-internet-broadband-drones/> (quoting a Ukrainian soldier regarding the centrality of Starlink to Ukraine's defense against Russia, the soldier argues that "Starlink is what changed the war in Ukraine's favor. Russia went out of its way to blow up all our comms. Now they can't. Starlink works under Katyusha fire, under artillery fire. It even works in Mariupol"); Yaroslav Trofimov, Micah Maidenberg, & Drew FitzGerald, *Ukraine Leans on Elon Musk's Starlink in Fight Against Russia*, WASH. ST. J. (July 16, 2022), <https://www.wsj.com/articles/ukraine-leans-on-elon-musks-starlink-in-fight-against-russia-11657963804> (describing how the Starlink internet service provider has kept front-line Ukrainian troops connected when regular cell networks failed); Volodymyr Verbyany & Daryna Krasnolutska, *Ukraine to Get Thousands More Starlink Antennas, Minister Says*, BLOOMBERG (Dec. 19, 2022), <https://www.bloomberg.com/news/articles/2022-12-20/ukraine-to-get-thousands-more-starlink-antennas-minister-says?leadSource=verify%20wall> (noting that there "is no alternative to satellite connections," Ukrainian Minister for Digital Transformation, Mykhailo Fedorov, characterizes the importance of Starlink early in the war and its ongoing critical importance as Russia continues their attempts to cut off Ukraine's internet access).

³ See, e.g., *World's Most Advanced Broadband Satellite Internet*, SPACE X, <https://www.starlink.com/technology> (describing Starlink as "the world's first and largest satellite constellation using a low Earth orbit to deliver . . . high-speed, low-latency internet to users all over the world").

⁴ See, e.g., *Engineered by SpaceX*, SPACE X, <https://www.starlink.com/> (noting that "SpaceX is leveraging its experience in building rockets and spacecraft to deploy the world's most advanced broadband internet system").

⁵ See Marina Koren, *Private Companies are Building an Exoskeleton Around Earth*, ATLANTIC (May 24, 2019), <https://www.theatlantic.com/science/archive/2019/05/spacex-satellites-starlink/590269/> [hereinafter Koren, *Private Companies*] (noting the development of satellite constellations by several companies and quoting the CEO of SpaceX, Elon Musk, regarding how its Starlink satellite constellation will unfurl. Once thousands of these satellites are in LEO, Musk notes that they will fan out across LEO "like spreading a deck of cards on the table").

⁶ Starlink, for example, is a broadband internet service provider specializing in the expansion of coverage to rural and remote communities. It accomplishes this task by launching a constellation of satellites into LEO. See Michelle Shen & Elizabeth Pattman, *What is Starlink? Inside the Satellite Business that Could Make Elon Musk a Trillionaire*, USA TODAY (Dec. 5, 2021), <https://www.usatoday.com/story/tech/2021/12/05/elon-musk-starlink-satellites-spacex-broadband-internet-globe/8881858002/>.

hand,⁷ they violate international space law on the other by intentionally destroying their satellites in low Earth orbit (LEO)⁸ through anti-satellite missile strikes (ASAT),⁹ which they implicitly threatened to do again—but to Starlink,¹⁰ which owns nearly half of all satellites orbiting Earth.¹¹ Through their November 2021 LEO ASAT,¹² what the Russians have done already has created hundreds of pieces of “orbital debris”¹³ that sent astronauts scrambling for safety aboard the

⁷ See, e.g., Alex Leff, Michele Kelemen, & Charles Maynes, *The International Criminal Court Issues an Arrest Warrant for Putin*, NATIONAL PUBLIC RADIO (Mar. 17, 2023), <https://www.npr.org/2023/03/17/1164267436/international-criminal-court-arrest-warrant-putin-ukraine-alleged-war-crimes> (detailing that Russian President, Vladimir Putin, was issued a warrant for “war crimes involving accusations that Russia has forcibly taken Ukrainian children”); Kenneth Roth, *How Putin and Xi Are Trying to Break Global Human Rights*, FOREIGN POLICY MAGAZINE (Oct. 27, 2022), <https://foreignpolicy.com/2022/10/27/putin-xi-russia-china-human-rights-united-nations/> (noting that the “International Criminal Court has opened an investigation in Ukraine and is expected to charge the Russian leadership for directing or overseeing war crimes there”).

⁸ LEO is defined as the region from Earth’s edge to 2000 kilometers of altitude, or roughly 1200 miles above Earth’s edge. See *LEO Economy FAQs*, NASA (Feb. 18, 2022), <https://www.nasa.gov/leo-economy/faqs>; Thomas G. Roberts, *Aerospace 101: Popular Orbits 101*, CTR. FOR STRATEGIC & INT’L STUD. (2022), <https://aerospace.csis.org/aerospace101/popular-orbits-101/>. The majority of all orbital debris is located in LEO. See *NASA’s Efforts to Mitigate the Risks Posed by Orbital Debris*, NASA OFF. OF INSPECTOR GEN., REP. NO. IG-21-0113 (2021), <https://oig.nasa.gov/docs/IG-21-011.pdf>.

⁹ Press Release, United States Space Command, Russian Direct-Ascent Anti-Satellite Missile Test Creates Significant, Long-Lasting Space Debris (Nov. 15, 2022), <https://www.spacecom.mil/Newsroom/News/Article-Display/Article/2842957/russian-direct-ascent-anti-satellite-missile-test-creates-significant-long-last/> (explaining that “Russia has demonstrated a deliberate disregard for the security, safety, stability, and long-term sustainability of the space domain for all nations,” U.S. Army Gen. James Dickinson, U.S. Space Command commander, further argued that the LEO “debris created by Russia’s [ASAT] will continue to pose a threat to activities in outer space for years to come, putting satellites and space missions at risk, as well as forcing more collision avoidance maneuvers. Space activities underpin our way of life and this kind of behavior is simply irresponsible”).

¹⁰ See generally Michael Kan, *Russia Makes Veiled Threat to Destroy SpaceX’s Starlink*, PCMAG (September 19, 2022), <https://www.pcmag.com/news/russia-makes-veiled-threat-to-destroy-spacexs-starlink> (noting that Russia issued a veiled threat to “retaliate” against SpaceX’s satellite constellation for aiding the Ukrainian military); Christiaan Hetzner, *Putin Could Try to Shoot Down Elon Musk’s Starlink Satellites*, FORTUNE (October 28, 2022), <https://fortune.com/2022/10/28/russia-putin-elon-musk-starlink-satellites-ukraine-war-target/>; Lonnie Lee Hood, *Elon Musk: SpaceX Can Launch Satellites Faster Than Russia Can Shoot Them Down*, THE BYTE (March 27, 2022), <https://futurism.com/the-byte/elon-musk-spacex-satellites-russia> (commenting on Russian threats to destroy Starlink in orbit, SpaceX CEO, Elon Musk, argued that “I hope we do not have to put this to a test, but I think we can launch satellites faster than they can launch anti-satellites missiles”).

¹¹ See generally Rebecca Heilweil, *Elon Musk’s Starlink is Only the Beginning*, VOX (January 10, 2023), <https://www.vox.com/recode/2023/1/10/23548291/elon-musk-starlink-space-internet-satellites-amazon-oneweb> (detailing the advent of satellite constellations in LEO and how the increasing congestion of LEO with these projects exacerbates Earth’s orbital debris problem).

¹² See Kan, *supra* note 10 and accompanying text; see Hetzner, *supra* note 10 and accompanying text; see Hood, *supra* note 10 and accompanying text.

¹³ See, e.g., United Nations Off. for Outer Space Aff., *Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space*, at 1, U.N. Doc. V.09-88517 (2010), http://www.unoosa.org/pdf/publications/st_space_49E.pdf (defining “space debris” as “all man-made objects, including fragments and elements thereof, in Earth orbit or re-entering the atmosphere, that are non-functional”); Orbital Debris Program Off., *Frequently Asked Questions*, ARES, <https://www.orbitaldebris.jsc.nasa.gov/faq/#> (defining “orbital debris” as “any human-made object in orbit about the Earth that no longer serves any useful purpose”); see also David Tan, *Towards a New Regime for the Protection of Outer Space as the “Province of All Mankind,”* 25 YALE J. INT’L L. 145, 151 n.21 (2000) (noting space debris can be defined as “any man-made earth-orbiting object which is non-functional with no reasonable expectation of assuming or resuming its intended function or any other function for which it is or can be expected to be authorized”); Jennifer M. Seymour, *Note, Containing the Cosmic Crisis: A Proposal for Curbing the Perils of Space Debris*, 10 GEO. INT’L ENV’T L. REV. 891, 892 (1998) (“There is no internationally accepted definition of the

International Space Station in October 2022.¹⁴ Orbiting at speeds of up to 17,500 mph,¹⁵ this debris remains in Earth orbits for years until it decays, deorbits, explodes, or collides with another object, thus creating more debris.¹⁶ If one were to imagine how perilous sailing the high seas would be if all the ships ever lost in history were still drifting atop the water, then one would understand the current situation in LEO, which cannot be allowed to persist.¹⁷

For these reasons, the Russian-created orbital debris is causing a “harmful interference” with other countries’ sustainable “use of outer space” in a likely violation of Article IX of the 1967 Outer Space Treaty (OST),¹⁸ which is the foundation of all international space regulation and which proclaims space as the “province of all mankind.”¹⁹ Indeed, as sustainable Earth orbits are indispensable to the operation of GPS, electronic commerce, weather forecasting, climate

term ‘space debris.’ However, the term’s popular meaning is any non-functional human-made object or objects in outer space”).

¹⁴ See W. Robert Pearson, *2022 Is the Year for a Space Summit*, FOREIGN POLICY MAGAZINE (January 1, 2022), <https://foreignpolicy.com/2022/01/01/space-russia-anti-satellite-test-debris/> (describing that “immediately after the satellite was destroyed, NASA told ISS personnel to conduct shelter-in-place drills to prepare for a potential collision. NASA implemented further procedures to duck and dodge danger based on a calculation that the ISS would pass ‘through or near the cloud every 90 minutes.’” Similarly, Russia’s debris’ close proximity to Starlink also forced individual satellites, within the satellite constellation, to take evasive action); see also Press Release, *supra* note 9 (noting that the U.S. government’s “initial assessment is that the debris will remain in orbit for years and potentially for decades, posing a significant risk to the crew on the International Space Station and other human spaceflight activities, as well as multiple countries’ satellites.” The Press Release goes on to quote the commander of the U.S. Space Command’s argument that “Russia is developing and deploying capabilities to actively deny access to and use of space by the United States and its allies and partners” . . . and that “Russia’s tests of direct-ascent anti-satellite weapons clearly demonstrate that Russia continues to pursue counterspace weapon systems that undermine strategic stability and pose a threat to all nations”).

¹⁵ See *NASA’s Efforts to Mitigate the Risks Posed by Orbital Debris*, NASA OFF. OF INSPECTOR GEN., REPORT NO. IG-21-011 3 (2021), <https://oig.nasa.gov/docs/IG-21-011.pdf> (characterizing the orbital mechanics of debris, NASA explains that “the average speed at which one object impacts another in space is approximately 10 km per second—more than 10 times faster than a bullet. At these speeds, even millimeter-sized debris pose a threat . . . [to human space flight and robotic missions]”).

¹⁶ *Id.*

¹⁷ See Jeremy Miller, *December Stargazing: Trashing Space – Humans Treat Space Like We Treat the Planet*, SIERRA CLUB (Dec. 1, 2021), <https://www.sierraclub.org/sierra/december-stargazing-trashing-space> (quoting the then Director General of the European Space Agency, Jan Wörner, characterizing the hazardous state of LEO environment).

¹⁸ See Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205 [hereinafter the OST] (The OST was the first international space law treaty, which was originally negotiated between the United States and the Soviet Union).

¹⁹ *Id.* at art. I. Regarding the sustainable use of the outer space environment requirement arising from Article IX of the OST, Article IX provides, in relevant part, that:

[i]n the exploration and use of outer space . . . States Parties to the Treaty . . . shall conduct all their activities in outer space . . . with due regard to the corresponding interests of all other States Parties to the Treaty. States Parties to the Treaty shall pursue studies of outer space, including the Moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination . . . If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space . . . would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space . . . it shall undertake appropriate international consultations before proceeding with any such activity or experiment.

research,²⁰ internet access,²¹ national security,²² and human spaceflight safety,²³ to name only a few critical Earth services, the failure to mitigate the risks posed by orbital debris threatens both the functioning of Earth's information infrastructure²⁴ and the scientific investigation of outer space.²⁵ Yet, it is not just the Russians operating as if they live in a lawless void of space, as the People's Republic of China also casually explodes their satellites in LEO²⁶ while allowing the spent rocket stages from their launches to fall uncontrollably back to Earth.²⁷

Within this geopolitical context, we are also experiencing a golden age of scientific discovery,²⁸ particularly regarding our access to the economic bounties of outer space,²⁹ which

²⁰ See USC Global Security Staff, *What Are Satellites Used For?*, UNION CONCERNED SCIENTISTS (Jan. 15, 2015), <https://www.ucsusa.org/nuclear-weapons/space-weapons/what-are-satellites-used-for#.XDfGNM9Kiu4>.

²¹ See Nathan Hurst, *Why Satellite Internet Is the New Space Race*, PCMAG (July 30, 2018), <https://www.pcmag.com/article/362695/why-satellite-internet-is-the-new-space-race>.

²² See Jeff Foust, *U.S. Air Force Releasing More Data on Orbits of Military Satellites*, SPACENEWS (Dec. 17, 2018), <https://spacenews.com/u-s-air-force-releasing-more-data-on-orbits-of-military-satellites/>.

²³ See Pearson, *supra* note 14 and accompanying text; see Press Release, *supra* note 9 and accompanying text.

²⁴ See Owen Brown, Travis Cottom, Michael "Mick" Gleason, Matthew Hallex, Andrew Long, Edgar Rivera, David Finkleman, Theresa Hitchens, Moriba Jah, David Koplou & Ray Sedwick, *Orbital Traffic Management Study: Report on Space Traffic Management Assessments, Frameworks and Recommendations*, SCI. APPLICATIONS INT'L CORP. 1, 4 (2016), <https://spacepolicyonline.com/wp-content/uploads/2016/12/Orbital-Traffic-Mgmt-report-from-SAIC.pdf>.

²⁵ See Marit Undseth, Claire Jolly & Mattia Olivari, *Space Sustainability: The Economics of Space Debris in Perspective*, OECD SCI., TECH. AND INDUS. POL'Y PAPERS, No. 87 1, 22–23 (2020), https://read.oecd-ilibrary.org/science-and-technology/space-sustainability_a339de43-en#page1 (detailing the dangers of unchecked orbital debris in Earth orbits); see also Clement Hearey, *When You Wish Upon a "Starlink": Evaluating the FCC's Actions to Mitigate the Risk of Orbital Debris in the Age of Satellite "Mega-Constellations,"* 72 ADMIN. L. REV. 751, 770 (2020) (arguing that the failure to mitigate the risks posed by orbital debris would render "satellite systems unreliable, if not completely useless. . . . GPS would become unreliable or unusable, and military and scientific research would stall"); see also Paul Ratner, *How the Kessler Syndrome Can End All Space Exploration and Destroy Modern Life*, BIG THINK (Aug. 29, 2018), <https://bigthink.com/paul-ratner/how-the-kessler-syndrome-can-end-all-space-exploration-and-destroy-modern-life>; see Pearson, *supra* note 14 and accompanying text; see Press Release, *supra* note 9 and accompanying text; see, e.g., the OST, *supra* note 18, at art. I (providing that the "exploration and . . . scientific investigation" of outer space, the Moon, and other celestial bodies "shall be carried out for the benefit and in the interests of all countries" and "be the province of all mankind").

²⁶ See, e.g., Bates Gill and Martin Kleiber, *China's Space Odyssey: What the Antisatellite Test Reveals About Decision-Making in Beijing*, FOREIGN AFFAIRS (2007), <https://www.foreignaffairs.com/articles/china/2007-05-01/chinas-space-odyssey> (arguing that China's 2007 ASAT test has "cast doubt on China's reliability as a global partner . . ." as this test, as of 2007, created more orbital debris "than any other single human event, putting at risk China's own satellites and those of other countries for decades to come." In detailing the effects on satellites in LEO from China's ASAT, the authors argue that "Beijing not only demonstrated its capacity to threaten U.S. military assets in space but also showed a lack of concern for other countries' interest in the safe operation of satellites for day-to-day civilian activities, such as weather forecasting, financial transactions, and telephone calls").

²⁷ See Andrew Jones, *Chinese Rocket Stage Crashes to Earth Over Texas*, SPACE.COM (Mar. 14, 2023), <https://www.space.com/chinese-rocket-stage-crashes-earth-over-texas>.

²⁸ See George Musser, *Our Fate Is in the Stars*, THE AMERICAN SCHOLAR (June 3, 2019), <https://theamericanscholar.org/our-fate-is-in-the-stars/> (advocating for a revitalization of America's space program, Musser argues that future generations "will see today as a golden age of discovery in many areas of science and technology, but especially in astronomy").

²⁹ See, e.g., *Space: Investing in the Final Frontier*, MORGAN STANLEY (July 24, 2020), <https://www.morganstanley.com/ideas/investing-in-space> (estimating that the global space industry could generate revenue of more than \$1 trillion or more in 2040, up from the current \$447 billion); *Capital Flows as Space Opens for Business*, MORGAN STANLEY (July 21, 2020), <https://www.morganstanley.com/ideas/future-space-economy> (describing the nascent space economy as demonstrable fertile grounds for private investment). The article notes that this new "space race is being powered not just by government but by a new crop of startups and visionaries.

cannot be accessed if LEO is enshrouded in a near impenetrable maelstrom of orbital debris moving at speeds faster than a bullet.³⁰ While ASATs can cause this catastrophe, the likeliest source of this debris field does not come from the ASATs of rogue authoritarian states, but rather from the exponential growth of the commercial satellite constellation industry and the regulatory void within which it thrives.³¹ Indeed, several recent studies highlight how the risk of LEO collisions will be exponentially increased by the deployment of satellite constellations.³² Notwithstanding these risks, companies are launching satellites at an unprecedented rate to build satellite constellations in LEO.³³ Clearly, Earth is one planet and, equally as clear, orbital debris in LEO is a planetary problem demanding a planetary solution.³⁴ What is less clear, however, is

...[E]ntrepreneurs, strategic partnerships, and venture capital have been leading the charge on funding” for these ventures and that, for some of these investments, “the exit plans can be 50 years out.” The article further discusses that “[we’re] seeing a tremendous amount of interest in this area from angel investors, venture capital and private-equity firms...” and that much of this is real passion in the industry, though “some of it is simply fear of being late to the party. Things are changing at such a rapid pace that investors are saying they have to keep up with the times... [and] [b]ecause success in space promises to be a multidecade endeavor - with returns on some lofty endeavors that could be many years away - this new economy requires patient investors. One sign of investors’ willingness to wait is the increasing reliance on permanent and long-term capital funds.” *Id.*; *ESA Space Resources Strategy*, EUROPEAN SPACE AGENCY (May 23, 2019), https://sci.esa.int/documents/34161/35992/1567260390250-ESA_Space_Resources_Strategy.pdf (concluding that 88 billion to 206 billion dollars over the 2018–2045 period are expected from space resource utilization). *Id.* at 5; *Opportunities for Space Resources Utilization: Future Markets & Value Chains*, LUXEMBOURG SPACE AGENCY (Dec. 2018), <https://space-agency.public.lu/dam-assets/publications/2018/Study-Summary-of-the-Space-Resources-Value-Chain-Study.pdf> (noting that the nascent space resources utilization industry is expected to generate a market revenue of 88 billion to 206 billion dollars over the 2018–2045 period, supporting a total of 845,000 to 1.8 million full time employees). *Id.* at 9. The report further notes that the “[i]ncorporation of space resources into exploration missions will reduce costs and improve their economic viability” and that, as such, “[s]pace resources will play a foundational role in the future of in-space economies;” *Space: The Next Investment Frontier*, GOLDMAN SACHS EQUITY RESEARCH REPORT (April 4, 2017) at 4, <http://www.fullertreacymoney.com/system/data/files/PDFs/2017/October/4th/space%20-%20the%20next%20investment%20frontier%20-%20gs.pdf> (noting that “[w]hile relatively small markets today, rapidly falling costs are lowering the barrier to participate in the space economy, making new industries like space tourism, asteroid mining, and on-orbit manufacturing viable”).

³⁰ See, e.g., Donald J. Kessler & Burton G. Cour-Palais, *Collision Frequency of Artificial Satellites: The Creation of a Debris Belt*, 83 J. GEOPHYSICAL RSCH. 2637, 2637 (1978) (characterizing this scenario as the “Kessler Syndrome,” Donald Kessler, the NASA astrophysicist who helped assess the International Space Station’s vulnerability to orbital debris, was the first person to understand this reality of debris as a form of high-speed environmental damage and is credited with developing the first credible theory that characterizes this damage).

³¹ See, e.g., Michael B. Runnels, *On Clearing Earth’s Orbital Debris & Enforcing the Outer Space Treaty in the U.S.*, AM. BAR. ASS’N (Jan. 13, 2022), <https://perma.cc/3GYE-SNES> (detailing that as the OST does not “compellingly disincentivize debris creation in orbit,” Runnels argues that this lack of clear regulation “enable[s] the creation of orbital debris”).

³² See Chuan Chen & Wulin Yang, *The Impact of Large Constellations on Space Debris Environment and its Countermeasures*, 8TH EUROPEAN CONFERENCE FOR AERONAUTICS AND SPACE SCIENCES, 2019, at 2–6; S. Le May et al., *Space Debris Collision Probability Analysis for Proposed Global Broadband Constellations*, 151 ACTA ASTRONAUTICA 445, 445–55 (2018); Jonas Radtke et al., *Interactions of the Space Debris Environment with Mega Constellations—Using the Example of the OneWeb Constellation*, 131 ACTA ASTRONAUTICA 55, 55– 68, (2017); see also, e.g., Mitre Corp., *supra* note 54 and accompanying text.

³³ See Samantha Masunaga, *A Satellite’s Impending Fiery Demise Shows How Important it is to Keep Space Clean*, L.A. TIMES (June 27, 2021), <https://www.latimes.com/business/story/2021-06-27/satellites-self-destruct-clean-up-space-junk>.

³⁴ See Pearson, *supra* note 14 (characterizing the Russian ASAT that created a harmful debris field in LEO as a disturbing manifestation of the escalating geopolitical tensions that occur as “space becomes more intensely used,” Pearson argues that “the establishment of regulatory norms for space activities is a global challenge requiring a multilateral approach”).

how one might achieve this desired outcome. As America leads the world in the total number of satellites in space per country³⁵ and SpaceX will own more satellites than each country in the world combined once it fully deploys Starlink,³⁶ America is uniquely positioned to begin filling this regulatory void.

Arguing that the “satellite industry is growing at a record pace, but here on the ground our regulatory frameworks for licensing them have not kept up,”³⁷ the Federal Communications Commission (FCC) voted unanimously to reorganize its International Bureau into a “Space Bureau”³⁸ (Bureau) in January 2023. The purpose of the Bureau will be to “develop, recommend, and administer policies, rules, standards, and procedures for the authorization and regulation of domestic and international satellite systems.”³⁹ The adoption of this reorganization was preceded by the FCC’s September 2022 adoption of a new rule changing the deorbiting timeframe for satellites ending their missions in LEO from a twenty-five year recommendation⁴⁰ to a five year legal requirement.⁴¹ In explaining the rationale for this rule, FCC Chairwoman, Jessica Rosenworcel, argued that “[we] are [taking] action to care for our skies ... [o]ur space economy is moving fast. The second space age is here. For it to continue to grow, we need to do more to clean up after ourselves so space innovation can continue to expand.”⁴² These rules are consistent with the 2020 National Space Policy of the United States of America (National Space Policy), which declared that “[t]o preserve the space environment for responsible, peaceful, and safe use, and with a focus on minimizing space debris, the United States shall: [c]ontinue leading the development and adoption of international and industry standards and policies... .”⁴³

The FCC’s recent regulatory activity also followed on the heels of the July 2022 unveiling of the United States’ National Orbital Debris Implementation Plan (Orbital Debris Plan),⁴⁴ declaring that “the challenges posed by orbital debris to the sustainability of outer space have

³⁵ See, e.g., Kelly Kizer Whitt, *Who Owns all the Satellites?*, EARTHSKY (Feb. 8, 2022), <https://earthsky.org/space/who-owns-satellites-company-country/>.

³⁶ *Id.*

³⁷ See *Chairwoman Rosenworcel Announces Plan to Modernize the FCC by Establishing a Space Bureau and Office of International Affairs*, FCC (2022), <https://docs.fcc.gov/public/attachments/DOC-387720A2.pdf>.

³⁸ See *Commission Votes to Establish a Space Bureau and Office of International Affairs*, FCC (2023), <https://docs.fcc.gov/public/attachments/DOC-390599A1.pdf>.

³⁹ See *Establishment of the Space Bureau and the Office of International Affairs and Reorganization of the Consumer and Governmental Affairs Bureau and the Office of the Managing Director*, FCC 23-1, 12 (2023), <https://docs.fcc.gov/public/attachments/FCC-23-1A1.pdf>.

⁴⁰ See Debra Werner, *Will Megaconstellations Cause a Dangerous Spike in Orbital Debris*, SPACE NEWS (Nov. 15, 2018), <https://spacenews.com/will-megaconstellations-cause-a-dangerous-spike-in-orbital-debris/> (explaining that the 25-year rule is voluntary UN guideline, published in 2007 by the Inter-Agency Space Debris Coordination Committee, recommending that satellites in LEO be deorbited no more than 25 years after the end of operations to minimize the risk of collisions that would create debris); *Id.*

⁴¹ See FCC Adopts New ‘5-Year Rule’ for Deorbiting Satellites to Address Growing Risk of Orbital Debris, September 29, 2022, <https://www.fcc.gov/document/fcc-adopts-new-5-year-rule-deorbiting-satellites>.

⁴² See STATEMENT OF CHAIRWOMAN ROSENWORCEL, September 29, 2022, <https://docs.fcc.gov/public/attachments/DOC-387720A2.pdf>.

⁴³ See The National Space Policy, 85 Fed. Reg. 81,755, 81,671–72 (Dec. 16, 2020); see also, e.g., Exec. Off. of the President, United States Space Priorities Framework 7 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Space-Priorities-Framework--December-1-2021.pdf>.

⁴⁴ See NATIONAL ORBITAL DEBRIS IMPLEMENTATION PLAN, July 28, 2022, <https://www.whitehouse.gov/wp-content/uploads/2022/07/07-2022-NATIONAL-ORBITAL-DEBRIS-IMPLEMENTATION-PLAN.pdf>.

inherent similarities to other human-made global environmental challenges,”⁴⁵ and tasking several Federal agencies, including the FCC,⁴⁶ with reviewing the effectiveness of United States policies regarding the expanding risks of orbital debris in LEO. Consistent with both the National Space Policy and the Orbital Debris Plan, the FCC’s new rules are expected to be among the first of several draft rules regarding orbital debris from the FCC.⁴⁷ However, while FCC rules may appear to substantively address the risks posed by orbital debris, they continually fail to do so in three critical areas.

First, they do not adopt specific requirements from their applicants for sharing the data that is key to establishing a safe space traffic management (STM) system.⁴⁸ Second, they do not enforce the National Environmental Policy Act (NEPA)⁴⁹ in their commercial satellite application process by not requiring that their applicants prepare an Environmental Assessment (EA)⁵⁰ on LEO orbits, which would assess the impacts of satellite constellation projects on the creation of orbital debris.⁵¹ Third, regarding the FCC’s compliance with the OST, the FCC’s regulatory practice of assigning orbital regions to satellite constellation operators on a first-come, first-served basis,⁵² without

⁴⁵ *Id.* at 5.

⁴⁶ *Id.* at 7 (explaining that the Orbital Debris Plan details several Federal agencies as engaged in orbital debris risk management, specifically numerous U.S. Government departments and agencies are involved in orbital debris risk management. The National Aeronautics and Space Administration (NASA) uses radars, telescopes, and in situ measurements to statistically sample debris too small to be tracked but still large enough to threaten human spaceflight and robotic missions. NASA also leads the development of the U.S. Government Orbital Debris Mitigation Standard Practices (ODMSP), which are directly applicable to U.S. Government operators. NASA also maintains an office to monitor the space environment for its own satellites. The Department of Defense (DOD) collects data on and tracks space objects and notifies spacecraft operators of possible collision. DOD is transitioning the responsibility of providing notifications for civil and commercial operators to the Department of Commerce (DOC). The Federal Aviation Administration (FAA) and the Federal Communications Commission (FCC) have policies or regulations that are intended to limit the creation or accumulation of debris.

⁴⁷ See FCC OPENS PROCEEDING ON SERVICING, ASSEMBLY, AND MANUFACTURING IN SPACE, August 5, 2022, <https://www.fcc.gov/document/fcc-opens-proceeding-servicing-assembly-manufacturing-space>.

⁴⁸ See, e.g., Mitigation of Orbital Debris in the New Space Age, 35 FCC Rcd. 4156, at 4184, 4188–89 (2020) (explaining that the Commission declined to adopt specific requirements because it wanted to provide flexibility to operators); see also Theodore J. Muelhaupt, Marlon E. Sorge, Jamie Morin & Robert S. Wilson, *Space Traffic Management in the New Space Era*, 6 J. OF SPACE SAFETY ENG’G 80, 80–81 (2019) (discussing the importance of tracking and data accuracy in assessing collision alerts and noting that current practices and tracking accuracy may leave satellite operators having to “sort through an enormous haystack to find the needles”); see also Hearey, *supra* note 25, at 761–64 (providing a detailed analysis of how the FCC created its Guidelines).

⁴⁹ NEPA, 42 U.S.C. § 4321 (2018) (requiring “federal agencies to take a hard look at the environmental consequences of their projects before taking action”) (requiring an agency be responsible for NEPA review of its actions if it is reasonably foreseeable that those actions could lead a third party to engage in activity that could significantly impact the environment). See, e.g., Brady Campaign to Prevent Gun Violence v. Salazar, 612 F.Supp. 2d 1, 13 (D.D.C. 2009).

⁵⁰ See 40 C.F.R. § 1508.9(a)(1) (indicating an EA is a “concise public document” that provides evidence and analysis as to whether the agency’s action will have a significant impact on the environment) (explaining the process either concludes in a “finding of no significant impact,” or a requirement to complete an Environmental Impact Statement (EIS)).

⁵¹ See, e.g., Michael B. Runnels, *On Launching Environmental Law into Orbit in the Age of Satellite Constellations*, J. AIR L. & COMM. 88 J. Air L. & Com. 181 (2023) (arguing that LEO should qualify as a “human environment” under the National Environmental Protection Act, Runnels provides draft legislation that codifies this argument, which will ensure that commercial satellite applicants perform an EA on LEO orbits as a requirement for receiving a license to launch.

⁵² See, e.g., FCC, IB DOCKET NO. 16-408, FACT SHEET, UPDATING RULES FOR NON-GEOSTATIONARY-SATELLITE ORBIT FIXED-SATELLITE SERVICE CONSTELLATIONS, 17 (2017),

either formally assessing the effects on the use of LEO orbits by other nations⁵³ or the likely orbital debris-related environmental impacts to those orbits,⁵⁴ likely violates Article I of the OST, declaring that outer space must be explored and used “for the benefit and in the interests of all countries,”⁵⁵ Article II, prohibiting States from claiming a “national appropriation” of outer space “by means of use or occupation, or by other means,”⁵⁶ and Article IX, requiring nations to conduct their activities in outer space in a way that does not cause “potentially harmful interference” with the use of outer space by other nations.⁵⁷

Such concerned arguments regarding the environmental sustainability of LEO orbits are seemingly not lost on the Government Accountability Office (GAO), which was tasked in 2020 with reviewing whether the FCC’s practices of excluding satellite applicants from NEPA review are appropriate, and whether Congress should revoke them.⁵⁸ In its resulting September 2022 report,⁵⁹ the GAO found that the FCC “has not sufficiently documented its decision to apply its categorical exclusion when licensing large constellations of satellites”⁶⁰ and recommended that the FCC “(1) review and document whether licensing large constellations of satellites normally does not have significant effects on the environment, ... [and] (2) establish a timeframe and process for a periodic review of its categorical exclusion under NEPA”⁶¹ In developing their recommendations, the GAO presumed, without opining on the intent of NEPA’s text, that satellite operations in LEO do have an environmental effect due to “orbital debris and risk to satellites [in LEO] ... [explaining that] [a]lthough these effects might be small for single satellites, the effects of many satellites operating in large constellations are larger, or in some cases, unknown.”⁶² The GAO report then noted that the FCC agreed with their recommendations.⁶³ Nonetheless, given the

https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0907/DOC-346584A1.pdf; *see generally supra* note 31 (discussing how the FCC’s “first-come, first-served” allocation practice may violate the OST).

⁵³ *See supra* note 31 (noting the FCC’s lack of consideration of how its LEO assignment procedures interferes with the use of outer space by other nations).

⁵⁴ *Id.*; *see also, e.g.* Mitre Corp., *The Impacts of Large Constellations of Satellites* 101–2 (2021), https://www.nsf.gov/news/special_reports/jasonreportconstellations/#:~:text=review%20the%20full-,PDF%20report [hereinafter JASON]. (noting that the only real FCC regulations that constrain the growth of mega-constellations regard the availability of radio spectrum, arguing that the FCC’s 2020 orbital debris guidelines are mere requirements for disclosure rather than mandated thresholds, and concluding that FCC regulations fail to effectively mitigate orbital debris in LEO orbits and “fall well short of what the FCC evidently thinks are required for safe traffic management in space. . . .”). JASON was asked by the National Science Foundation and Department of Energy to assess the possible growth and impact of future mega-constellations on orbital debris, mega-constellation impacts on optical astronomy generally, infrared astronomy, radio astronomy, cosmic microwave background studies, and laser guide-star observations. *Id.* at 1.

⁵⁵ *See* the OST, *supra* note 18, at art. I.

⁵⁶ *Id.*; *see also* the OST, *supra* note 18, at art. II.

⁵⁷ *See supra* note 19 and accompanying text.

⁵⁸ *See* Jonathan O’Callaghan, *Satellite Constellations Could Harm the Environment, New Watchdog Report Says*, SCIENTIFIC AMERICAN, available at <https://www.scientificamerican.com/article/satellite-constellations-could-harm-the-environment-new-watchdog-report-says/> (detailing that the GAO report notes that Elon Musk’s Starlink and other satellite constellation projects are sources for orbital debris and, thus, should face an environmental review).

⁵⁹ *See, e.g. Satellite Licensing: FCC Should Reexamine Its Environmental Review Process for Large Constellations of Satellites*, U.S. GOV’T ACCOUNTABILITY OFFICE, ii (2022), <https://www.gao.gov/products/gao-23-105005>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 6.

⁶³ *See supra* note 59

United States Supreme Court's June 2022 ruling in *West Virginia v. EPA*,⁶⁴ which reversed Environmental Protection Agency (EPA) carbon dioxide regulations by arguing that the Clean Air Act⁶⁵ does not explicitly authorize the EPA to regulate carbon dioxide emissions,⁶⁶ FCC rulemaking in the area of orbital debris may not survive judicial scrutiny as the FCC is similarly not explicitly authorized by Congress to regulate orbital debris.

Given the increasing probability that the current unfettered growth of orbital debris will compromise the exploration and scientific investigation of outer space, enforceable global space laws are needed to curtail this possible outcome. While the geopolitical will to forge a new global treaty does not seem forthcoming,⁶⁷ the current geopolitical context provides an opportunity for an American-led strategy for establishing foundational global space laws consistent with the text of the OST. Because Article VI of the OST provides that “[p]arties to the treaty shall bear international responsibility for [their] activities in outer space” whether “carried on by governmental agencies or by non-governmental entities,”⁶⁸ it requires the “authorization and continuing supervision”⁶⁹ of their commercial actors. Furthermore, Article VIII of the OST provides that nation signatories “on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object . . . while in outer space.”⁷⁰ For these reasons, when the United States creates regulations concerning the commercial space industry, it also implements domestic legislation of the OST.⁷¹

Given the central role that the FCC plays in licensing commercial satellite constellations, and given the purpose of its newly-created bureau, this American-led strategy should be rooted in (1) Congress first adopting domestic implementing legislation of the OST that is responsive to both the looming threats of LEO orbital debris and the Supreme Court's recent EPA ruling, which will then; (2) serve as the basis for bilateral and multilateral treaty negotiations with both current and potential space-faring nations. This resulting network of treaties would provide the basis for a customary international law that will mitigate orbital debris that poses potentially harmful

⁶⁴ *West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2610–16 (June 30, 2022) (reversing EPA carbon dioxide regulations and articulating that the Clean Air Act does not explicitly authorize the EPA to regulate carbon dioxide emissions in a manner that triggers a nationwide transition away from the use of coal, and that Congress must speak clearly on the subject in order for the EPA to exercise this power).

⁶⁵ 42 U.S.C. § 7401 (1963).

⁶⁶ See *supra* note 64 and accompanying text.

⁶⁷ See generally Matthew G. Looper, *International Space Law: How Russia and the U.S. are at Odds in the Final Frontier*, 18 S.C. J. INT'L L. & BUS. 111, 120–25 (noting how initial U.S-Russian relationships helped forge the OST, Looper goes on to argue that the Russian-Chinese geopolitical alignment, which is occurring at the expense of both countries' relationship with the U.S. hinders the further pursuit of global space governance).

⁶⁸ See the OST, *supra* note 18, at art. VI.

⁶⁹ *Id.*

⁷⁰ *Id.* at art. VIII. The issue of each nation's jurisdiction is addressed under a transnational law through a system of registration. The 1976 Registration Convention requires a launching nation to maintain a registry of launched space objects. The convention provides that “[w]hen a space object is launched into earth orbit . . . the launching State shall register the space object by means of an entry in an appropriate registry which it shall maintain.” See Convention on Registration of Objects Launched into Outer Space art. II, ¶ 1, Nov. 12, 1974, S. Treaty Doc. No. 94-18, 1023 U.N.T.S. 15.

⁷¹ See Major John S. Goehring, *Properly Speaking, the United States Does Have an International Obligation to Authorize and Supervise Commercial Space Activity*, 78 A.F. L. Rev. 101, 104 (2018) (identifying the need for Congress to fill in regulatory mechanisms in order to fulfill U.S. obligations pertaining to “authorization and continuing supervision” of outer space activities under the OST).

interference with the use of outer space by other nations. In contrast to the general principles enshrined in the American-led Artemis Accords,⁷² this strategy would seek the inclusion of specific requirements within enforceable OST domestic implementing legislation that will enhance the sustainability of LEO orbits. This legislation should (1) require commercial satellite operators to disclose data that is key to establishing a safe STM system;⁷³ (2) require commercial satellite operators to prepare an EA on LEO orbits;⁷⁴ and (3) require commercial satellite operators to pay an orbital use fee that will fund orbital debris remediation and research.⁷⁵

Indeed, under Article VI, new rules can and should be formulated in conformity with the OST.⁷⁶ Moreover, consistent with the National Space Policy and the purpose of the FCC's newly-created bureau, taking a leadership position in implementing new policies for in-orbit environmental impacts will allow America to influence other nations positively and engage them in an internationally constructive approach.⁷⁷ Such a legislative and diplomatic strategy would meet these challenges by helping to operationalize the OST's proclamation establishing space as the "province of all mankind,"⁷⁸ and promoting its peaceful use and exploration for the "benefit and in the interests of all countries."⁷⁹

⁷² The Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes, § 1, Oct. 13, 2020, NASA, <https://www.nasa.gov/specials/artemis-accords/img/Artemis-Accords-signed-13Oct2020.pdf>.

⁷³ See, e.g., Michael B. Runnels, *Protecting Earth and Space Industries from Orbital Debris: Implementing the Outer Space Treaty to Fill the Regulatory Vacuum in the FCC's Orbital Debris Guidelines*, *Am Bus Law J.* 60, 175-229 (2023) (arguing that the FCC's current regulatory regime certainly violates the spirit the OST, while likely violating the letter of the OST, Runnels provides draft legislation to amend Title 51 of the United States Code to require commercial satellite operators to disclose the data vital to establishing a safe STM system as a requirement for receiving a license to launch).

⁷⁴ See, e.g., *supra* note 51 and accompanying text.

⁷⁵ See, e.g., *supra* note 31 (providing draft legislation to amend Title 51 of the United States Code to create an orbital use fee, which will be levied on commercial satellite operators as a requirement for receiving a license to launch).

⁷⁶ See the OST, *supra* note 18, at art. I.

⁷⁷ See generally Richard Green et al., *SATCON2: Policy Working Group Report*, in *REP. OF THE SATCON2 WORKSHOP 1*, 81 (2021), <https://baas.aas.org/pub/q099he5g> (noting arguments concerning how satellites negatively impact ground-based astronomy, SATCON2 argues that the U.S. should demonstrate leadership on such matters through implementing domestic legislation based on the OST).

⁷⁸ See the OST, *supra* note 18, at art. I.

⁷⁹ *Id.*

INTERNATIONAL RISE OF CRYPTOCURRENCY: A COMPARATIVE REVIEW OF THE UNITED STATES, MEXICO, SINGAPORE, AND SWITZERLAND’S ANTI-MONEY LAUNDERING (AML) REGULATION

Michael G. Lindsay

INTRODUCTION

In his July 2022 address to the G20 Summit in Bali, Indonesia, Financial Action Task Force (FAFT) President T. Raja Kumar directly addressed the “failure” of G20 members and other countries to “lead by example” in regulating money laundering across the global financial market.¹ According to President Kumar, less than 12% of surveyed countries are enforcing the FAFT’s ‘travel rule’—guidance that encourages the application of customer due diligence (CDD) and know your customer (KYC) mechanisms.² The failure to implement timely and proportional anti-money laundering (AML) regulations, warned President Kumar, exposes countries and financial markets to fraud, money laundering, and terrorism—“failure to [implement these regulations] will allow criminals to profit from these gaps, at the expense of governments and their people.”³

The Financial Action Task Force, an international body that offers financial guidance on the increased risks associated with money laundering, is comprised of thirty-seven member jurisdictions and two regional jurisdictions.⁴ As with most other international bodies, these FATF members bring different perspectives, policies, and opinions on how to minimize money laundering risks—including those associated with cryptocurrencies. For example, China has instituted an outright ban on the sale of cryptocurrencies through initial coin offerings.⁵ In comparison, Japan embraces cryptocurrencies by classifying several companies as “registered cryptocurrency exchange operators.”⁶ Once given this designation, companies are required by Japan’s Financial Services Agency to “build a ‘strong’ computer system to support the cryptocurrency and check the identity of users to prevent money laundering.”⁷ In recent years, this crypto policy led to Japan’s recognition of Bitcoin as legal tender.⁸ Hence, each country has a

¹ T. Raja Kumar, President, Fin. Action Task Force, FATF President at the G20 Finance Ministers and Central Bank Governors’ Meeting, 15-16 July 2022 (Jul. 16, 2022) (transcript available at <https://www.fatfgafi.org/en/publications/Fatfgeneral/Speech-g20-fmcbg-july-2022.html>) (accessed 25 Oct. 2022).

² *Id.*

³ *Id.*

⁴ *FATF Members and Observers*, FIN. ACTION TASK FORCE (last visited 25 Oct. 2022), <https://fatfgaf.org/about/membersandobservers/index.html>. The current membership, as of 25 Oct. 2022, of the FATF includes Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, European Commission, Finland, France, Germany, Greece, Gulf Cooperation Council, Hong Kong, Iceland, India, Ireland, Israel, Italy, Japan, the Republic of Korea, Luxembourg, Malaysia, Netherlands, New Zealand, Norway, Portugal, Russia, Saudi Arabia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States.

⁵ SETH C. ORANBURG, *A HISTORY OF FINANCIAL TECHNOLOGY AND REGULATION: FROM AMERICAN INCORPORATION TO CRYPTOCURRENCY AND CROWDFUNDING* 140 (Oxford Univ. Press, 2022). This statement was jointly extended by the China Securities Regulatory Commission, China Banking Regulatory Commission, People’s Bank of China, and the China Insurance Regulatory Commission, explaining that this constitutes “illegal fund-raising activity.” Initial Coin Offerings (ICOs), by definition, are “transactions in securities according to the SEC and fall under relevant securities laws.”

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

unique and tailored approach to how it regulates cryptocurrencies within its jurisdiction. This is where the problem lies.

In recent years, there have been growing calls from international bodies and domestic jurisdictions for the regulation of cryptocurrencies on an international scale. In comparison to traditional payment systems, such as credit and debit card transactions, cryptocurrencies are transmitted across jurisdictions with increased speed and anonymity. Many countries, according to policymakers and regulators, continue to rely on outdated monitoring frameworks that do not account for these characteristics. In response to this concern, this paper seeks to propose a common, international framework—one that is grounded in the effective regulations of FATF member countries. By establishing an international regulation to mitigate and combat the increasing rise of money laundering via cryptocurrencies, countries would not only help minimize the regulatory gap between the fast-developing virtual asset market and lagging regulatory structures, but they would also increase consumer confidence in participating in the international cryptocurrency market.

The Article consists of four parts. Part II explains the history of the cryptocurrency market, introduces the Financial Action Task Force, and explains the relationship between the two. Given that international regulation does not exist, Part III examines the domestic regulations of four countries—the United States, Mexico, Switzerland, and Singapore. These countries were selected by considering: 1) their willingness and ability to implement AML regulation of cryptocurrencies, 2) the effectiveness of the regulation, and 3) the justifications for enacting domestic AML crypto regulation. Part IV examines the characteristics drawn from the four selected countries and considers their application on an international scale. In addition, this paper will consider ways in which domestic regulations appear inadequate for direct application on the international scale; as a result, the findings suggest ways in which the applied regulations can be enhanced in order to best address international risks.

II. BACKGROUND

While the concept of encrypting messages is a relatively ancient practice, modern cryptographic theory is relatively new. In 2008, a nine-page paper was sent out under the pseudonym Satoshi Nakamoto that detailed a “new cash system that’s fully peer-to-peer.”⁹ This email led to the emergence of Bitcoin—one of the world’s most prevalent forms of cryptocurrency.¹⁰ With the use of a pseudonym and numeric identifiers to complete transactions, criminals are attracted to holding Bitcoin and other cryptocurrencies.¹¹ While pseudonymity may prevent a buyer or seller from knowing an actor’s true identity, it allows criminals to develop their own reputation over time while remaining virtually anonymous.¹²

⁹ ORANBURG, *supra* note 5, at 133.

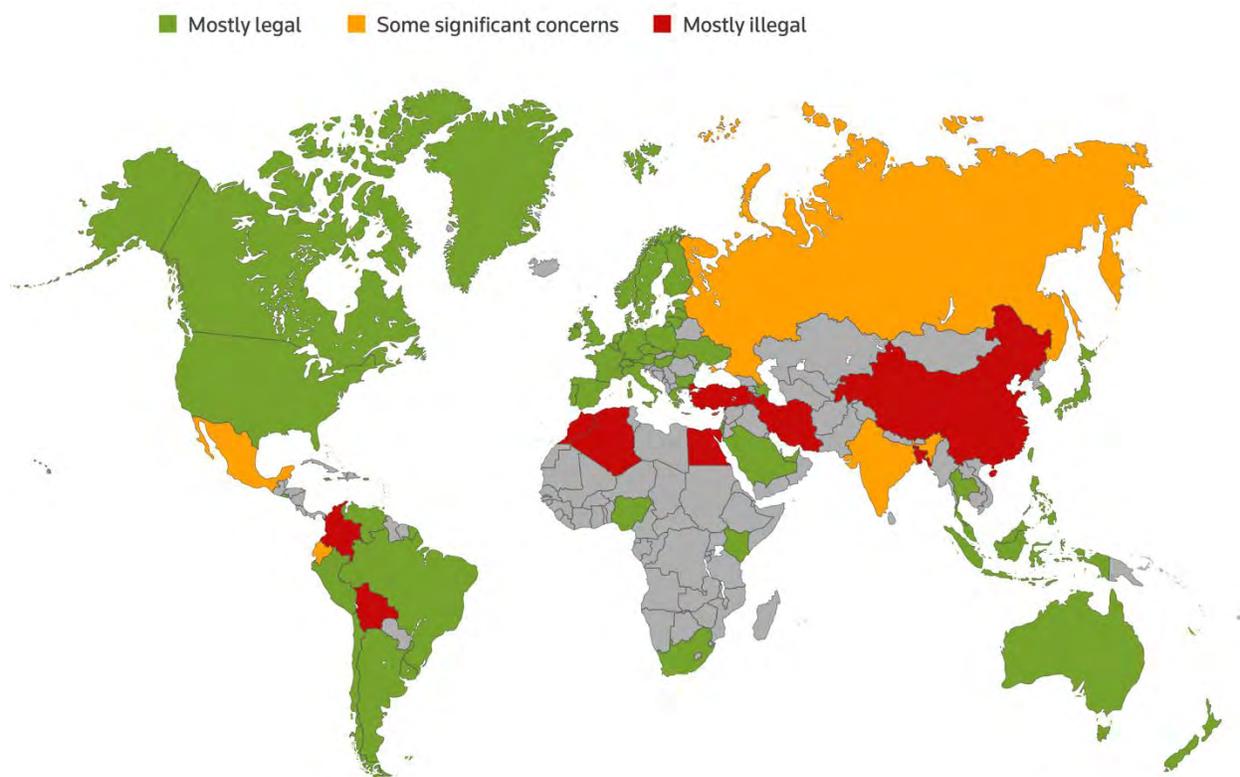
¹⁰ *Id.* “Cryptocurrency,” by definition, is “a digital asset created and designed to be a means of exchange utilizing advanced cryptographical procedures to verify and secure the transfer the value between users – Bitcoin, Litecoin, Ether, to name a few.”

¹¹ *Id.* at 116-17.

¹² *Id.* at 117.

FIGURE 1. CRYPTOCURRENCY REGULATIONS BY COUNTRY¹³

With the emergence of various cryptocurrencies, countries continue to grapple with regulatory implementation for which federal agencies are primarily responsible.¹⁴ Additionally, foreign government agencies (FGAs), national government agencies (NGAs), and nongovernmental organizations (NGOs) play a role in issuing guidance and assessments on a federal government's handling of cryptocurrency.¹⁵ However, it is important to note that at both the domestic and international level, application of regulation to cryptocurrencies becomes



Source: Thomson Reuters 2022

difficult—these assets were “invented and designed to avoid regulation.”¹⁶ Thus, the efforts of many countries to regulate cryptocurrencies are ineffective—leaving the virtual instruments largely unregulated.

A. MONEY LAUNDERING

Money laundering is a mechanism used by criminal actors and groups to conceal the origins of funds used in illegal activities. The money laundering process, as defined in the Vienna and

¹³ *Cryptos on the rise 2022, Compendium: Cryptocurrency regulations by country*, THOMSON REUTERS 2 (2007), <https://www.thomsonreuters.com/en-us/posts/wp-content/uploads/sites/20/2022/04/Cryptos-Report-Compendium-2022.pdf>.

¹⁴ ORANBURG, *supra* note 5, at 130.

¹⁵ *Id.*

¹⁶ *Id.*

Palermo Conventions, is comprised of three steps—conversion, concealment, and acquisition.¹⁷ Through conversion, the proceeds of illegal activities are transferred to a third party—oftentimes a person, a group of persons, an organization, or a business—with the understanding and knowledge that said proceeds originate from illegal activities.¹⁸ Conversion occurs when the ill-gotten gains are first introduced into the financial system; depending upon their value, the transferred funds may be subject to reporting requirements. By undertaking concealment, individuals or groups can cloud the “true nature, source, location, disposition, movement or ownership or right” of illicit funds.¹⁹ Also referred to as “layering,” a criminal will shift money and conduct a series of transactions in an effort to distort and complicate any paper trail. For example, an individual may conduct an international wire transfer between banks accounts—with multiple account holders—at different banks. Lastly, a second buyer acquires the proceeds of illicit funds—these buyers may or may not know that these funds are ill-gotten.²⁰ On both domestic and international levels, money laundering can produce severe economic, social, and security concerns.²¹ For example, cumulative money laundering actions can undermine the legitimacy and integrity of financial market operations from consumers and the government; in extreme cases, money launderers engage in these activities with the purpose to disrupt and overthrow a jurisdiction’s government through terrorist-like monetary tactics.²² Due to these concerns, international leaders created the Financial Action Task Force to minimize, mitigate, and manage these risks.

B. THE FINANCIAL ACTION TASK FORCE (FATF)

In 1989, leaders of the G-7 Summit in Paris, France, established the FATF, an international organizational body with the intent to establish a global standard on the prevention of money laundering.²³ Developed out of an urgency to address the increasing risk of money laundering, the G-7 leaders, the President of the European Commission, and eight other countries developed *Forty Recommendations*—a comprehensive plan to fight money laundering—in April of 1990.²⁴ The original *Forty Recommendations* covered a number of key elements, including: the scope of the criminal offense of money laundering, measures to be taken by financial institutions (such as

¹⁷*Anti-Money Laundering/Combating the Financing of Terrorism*, INT’L MONETARY FUND, <https://www.imf.org/external/np/leg/amlcft/eng/aml1.htm#moneylaundering> (last visited 25 Oct. 2022).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ John McDowell & Gary Novis, *Consequences of Money Laundering and Financial Crime*, 6 ECON. PERSP. 6, 6-8 (2001), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/consequences-money-laundering-and-financial-crime>. McDowell and Novis point to effects including: the undermining of the financial sector and the integrity of financial markers, loss of control over financial policy, “economic distortion and instability,” revenue loss, and risks of reputation loss and privatization efforts.

²² *Id.*; see also Press Release, Fed. Bureau of Investigation (FBI): Las Vegas Division, Member of Anti-Government Movement Pleads Guilty to Laundering Money for FBI Undercover Agents (Mar. 25, 2011), <https://archives.fbi.gov/archives/lasvegas/press-releases/2011/lv032511.htm>. The alleged money launderers were “heavily involved in the Sovereign Movement, an extreme anti-government organization whose members attempt to disrupt and overthrow government and other forms of authority by using ‘paper terrorism’ tactics, intimidation and harassment, and violence.”

²³ INT’L MONETARY FUND, *supra* note 17.

²⁴ *History of the FATF*, FIN. ACTION TASK FORCE, <https://www.fatf-gafi.org/en/the-fatf/history-of-the-fatf.html>; *FATF 40 Recommendations*, FIN. ACTION TASK FORCE (2004), <https://www.fatfgafi.org/en/publications/Fatfrecommendations/The40recommendationspublishedoctober2004.html#:~:text=The%2040%20Recommendations%20provide%20a,adopted%20by%20many%20international%20bodies>.

customer due diligence and reporting suspicious activity), institutional measures to be taken by each country, and the need for international cooperation. Over the last thirty years, the FATF has continued to issue additional standards and guidelines to address innovations in technology, increased sophistication of the global financial network, and the expansion of money laundering threats.²⁵ Through the issuance of these *Recommendations*, the FATF encourages member and non-member countries to implement “essential measures” to counterattack and mitigate money laundering risks.²⁶

These “essential measures” are designed, per the FATF, to:

- (i) “identify the risks, and develop policies and domestics coordination;
- (ii) pursue money laundering, terrorist financing and the financing of proliferation;
- (iii) apply preventative measures for the financial sector and other designated sectors;
- (iv) establish powers and responsibilities for the competent authorities (e.g., investigative, law enforcement and supervisory authorities) and other institutional measures;
- (v) enhance the transparency and availability of beneficial ownership information of legal persons and arrangements; and
- (vi) facilitate international cooperation.”²⁷

In addition to encouraging countries to comply with the *Recommendations*, the FATF provided language that encourages countries to take a more tailored approach in addressing specific high-risk areas.²⁸ In recent years, the FATF has increased its guidance on money laundering within the international cryptocurrency industry. Importantly, there does not exist a centralized regulatory or oversight body specifically for the mitigation and investigation of cryptocurrencies.²⁹ Due to the lack of this type of body, the efficiency and effectiveness of prosecuting criminals is complicated.³⁰ This decentralized approach to monitoring cryptocurrency transactions also complicates the ability of law enforcement and regulatory agencies to access pertinent records as they are often held amongst multiple entities across multiple jurisdictions.³¹

III. REGULATION FROM AROUND THE WORLD

A. THE UNITED STATES

As one of the most proactive countries to regulate money laundering, the United States is frequently observed as a guide to countries developing and implementing money laundering regulation. In the United States, the regulation of cryptocurrency is largely administered by the Financial Crimes Enforcement Network (FinCEN), the Securities and Exchange Commission

²⁵*Id.*; see also *International Standards on Combating Money-Laundering and the Financing of Terrorism & Proliferation*, FIN. ACTION TASK FORCE (2012), <https://www.fatf-gafi.org/content/dam/recommendations/pdf/FATF%20Recommendations%202012.pdf>.coredownload.inline.pdf.

²⁶ International Standards, *supra* note 25, at 7.

²⁷ *Id.*

²⁸ *Id.* at 8.

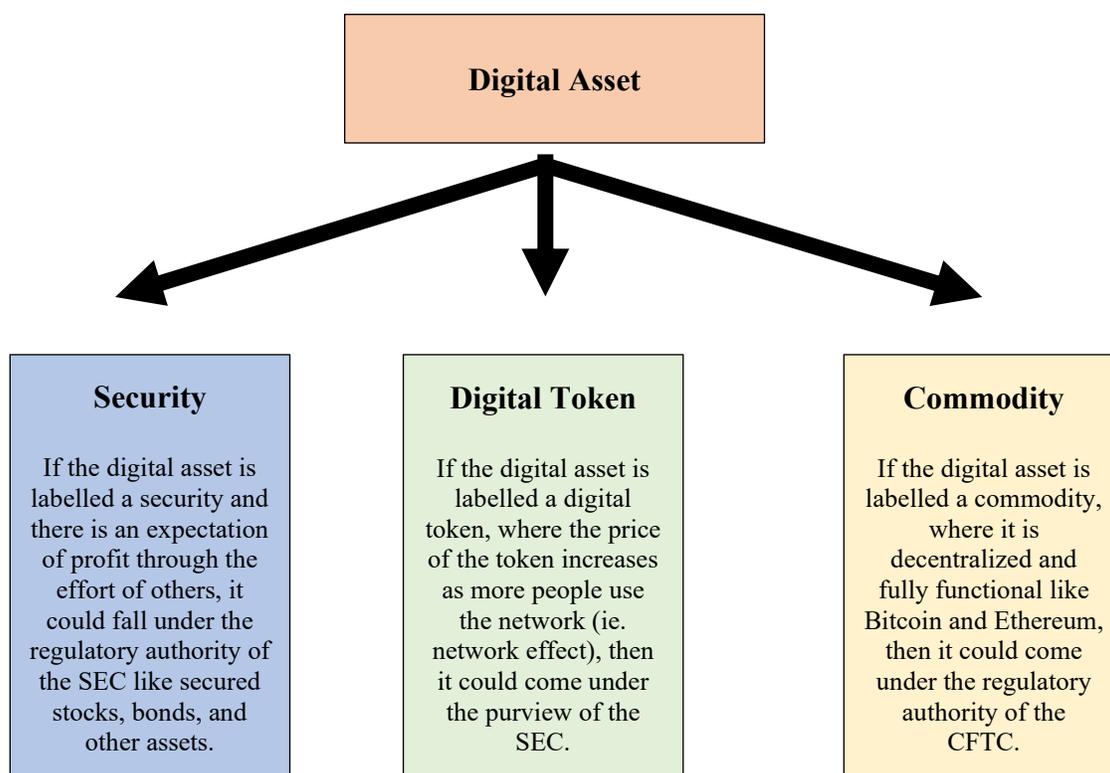
²⁹ *Virtual Currencies—Key Definitions and Potential AML/CFT Risks*, FIN. ACTION TASK FORCE 9 (2014), <https://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf>.

³⁰ *Id.*

³¹ *Id.* at 9-10.

(SEC), the Federal Trade Commission (FTC), and the Commodity Futures Trading Commission (CFTC)—all of which implement guidance, policy, and rules incorporating the Bank Secrecy Act (BSA).³² BSA was passed to address money laundering risks, to improve regulatory oversight, and to ensure financial certainty within the United States' jurisdiction.³³ Despite efforts undertaken by regulators and the federal government to implement policies and laws to combat money laundering, some digital investors and policymakers are concerned that the exponential growth of the digital assets sector will produce unanticipated consequences and an increased exposure to new and developing money laundering risks.³⁴

FIGURE 1. REGULATION OF DIGITAL ASSETS³⁵



1. REGULATORY BODIES

As its mission, FinCEN works to “safeguard the financial system from illicit use, combat money laundering and its related crimes including terrorism, and promote national security through the strategic use of financial authorities and the collection, analysis, and dissemination of financial

³² Katherine A. Lemire, *Cryptocurrency and anti-money laundering enforcement*, REUTERS (Sept. 26, 2022, 11:06 AM), <https://www.reuters.com/legal/transactional/cryptocurrency-anti-money-laundering-enforcement-2022-09-26/>; see also ORENBURG, *supra* note 5, at 130.

³³ *The Bank Secrecy Act*, FIN. CRIMES ENF'T NETWORK (1970), <https://www.fincen.gov/resources/statutes-and-regulations/bank-secrecy-act>.

³⁴ Press Release, U.S. Dep't of the Treasury, Remarks from Secretary of the Treasury Janet L. Yellen on Digital Assets, Univ. Kogod Sch. Bus. Ctr. Innovation (Apr. 7, 2022) <https://home.treasury.gov/news/press-releases/jy0706>.

³⁵ ORENBURG, *supra* note 5, at 130.

intelligence.”³⁶ In an effort to fulfill its mission, FinCEN requires that money services businesses (MSBs) “develop, implement, and maintain” measures that satisfy AML regulatory requirements.”³⁷ Money transmitters, such as PayPal and MoneyGram, exist as a subcategory of MSBs and transmit currencies or funds from one person or business to another. Additionally, FinCEN administered guidance indicating that money laundering obligations also extend in part to the cryptocurrency industry through the BSA.³⁸

The SEC is responsible for the regulation of securities and, therefore, regulates cryptocurrencies when they fall into the legal definition of a security. Cryptocurrencies are considered securities for regulatory application if they meet the “*Howey Test*,” which was set out in *Securities and Exchange Commission v. W.J. Howey Co. et al.*³⁹ The Supreme Court outlined the four factors of the *Howey Test*: (i) an investment of money, (ii) an expectation of profit from the investment, (iii) the investment of money into a common enterprise, and (iv) profits generated from the efforts of a promoter or third party.⁴⁰ Though the *Howey Test* does provide parameters for the regulation of cryptocurrencies by the SEC, it is limited—there are “many” cryptocurrencies that fall outside of the *Howey Test*.⁴¹ A bitcoin investment, for example, does not interact with a third party to ensure profits and does not require the collective efforts of a group. In fact, bitcoin transactions are commonly conducted by an individual investor. Cryptocurrencies that do fall under the definition of a security under the *Howey Test* are subject to securities laws and rules, as well as general oversight.⁴²

Additionally, the Federal Bureau of Investigation (FBI) plays an important role in mitigating the risks of money laundering. As a body that acquires and conducts domestic and international intelligence, the FBI functions to prevent the illegal use of cryptocurrency in crimes such as domestic terrorism, drug trafficking, and organized crime.⁴³ While the FBI does play a role in the cryptocurrency sector, there is not yet a comprehensive strategy that addresses the increased risks of cryptocurrency—particularly anti-money laundering.⁴⁴ However, the United States Department of Justice has, as recent as 2020, encouraged the FBI to implement protocols, plans, and strategies that directly target the increasing risks associated with cryptocurrencies.⁴⁵

2. AMERICAN REGULATORY INSTRUMENTS

The BSA, passed in 1970 by Congress, outlines guidelines and requirements that hold financial institutions and federal agencies accountable in their respective roles to prevent money

³⁶ *Mission*, FIN. CRIMES ENF’T NETWORK, <https://www.fincen.gov/about/mission>.

³⁷ Lemire, *supra* note 32. See also *Definition of Money Transmitter (Merchant Payment Processor)*, FIN. CRIMES ENF’T NETWORK, <https://www.fincen.gov/resources/statutes-regulations/administrative-rulings/definition-money-transmitter-merchant-payment>.

³⁸ *Id.*

³⁹ ORANBURG, *supra* note 5, at 131. See also *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 116.

⁴³ *Id.* at 137.

⁴⁴ ORANBURG, *supra* note 5, at 137.

⁴⁵ *Id.* at 116.

laundering.⁴⁶ Importantly, the BSA requires financial institutions to record and report cash transactions that exceed a daily aggregate of \$10,000 and to report activities—through completion of a Suspicious Act Report (SAR)—that are indicative of “money laundering, tax evasion, or other criminal activities.”⁴⁷ Section 5318A of the BSA provides specific actions for “jurisdictions, financial institutions, international transactions, or types of accounts of primary money-laundering concern,” which also applies to cryptocurrencies.⁴⁸ The Section outlines anti-money laundering requirements, including reporting and record-keeping, as well as additional jurisdictional and institutional factors in reaching a suspicion of money laundering activity.⁴⁹ These jurisdictional factors not only outline how domestic federal agencies are to assess jurisdictions outside of the United States, but they also serve as a general model for other countries to adopt.

These jurisdictional factors include:

- (i) evidence that organized criminal groups, international terrorists, or entities involved in the proliferation of weapons of mass destruction or missiles have transacted business in that jurisdiction;
- (ii) the extent to which that jurisdiction or financial institutions operating in that jurisdiction offer bank secrecy or special regulatory advantages to nonresidents or nondomiciliaries of that jurisdiction;
- (iii) the substance and quality of administration of the bank supervisory and counter-money laundering laws of that jurisdiction;
- (iv) the relationship between the volume of financial transactions occurring in that jurisdiction and the size of the economy of the jurisdiction;
- (v) the extent to which that jurisdiction is characterized as an offshore banking or secrecy haven by credible international organizations or multilateral expert groups;
- (vi) whether the United States has a mutual legal assistance treaty with that jurisdiction, and the experience of United States law enforcement officials and regulatory officials in obtaining information about transactions originating in or routed through or to such jurisdiction; and
- (vii) the extent to which that jurisdiction is characterized by high levels of official or institutional corruption.⁵⁰

In January 2021, Congress enacted the National Defense Authorization Act (NDAA)—a bill that brought significant updates and revisions to the Corporate Transparency Act (CTA) and the Anti-Money Laundering Act of 2020 (AMLA) as well as significant reforms to the BSA and

⁴⁶ The Bank Secrecy Act, *supra* note 33.

⁴⁷ *Id.*

⁴⁸ Bank Secrecy Act, 31 U.S.C. § 5318A (2020).

⁴⁹ *Id.* at 451-52.

⁵⁰ 31 U.S.C. § 5318A(c)(2)(A).

the USA PATRIOT Act of 2001.⁵¹ Under the NDAA, the United States is obligated to streamline and update SAR by considering: (i) whether reporting threshold requirements should be adjusted, (ii) the ability to streamline the process for filing continuous SARs, and (iii) applying threshold requirements to a broader range of activities.⁵² Additionally, the NDAA tasks the United States Treasury with testing its AML compliance technology in an effort to anticipate and determine the “impact of financial technology on financial crimes compliance.”⁵³ With the passage of the NDAA, definitions within the language of BSA were expanded to apply to virtual currencies, and codified applicable FinCEN guidance associated with virtual currencies.⁵⁴ This need to update SAR reporting is partly due to the fact that the process was not originally designed with cryptocurrency in mind. Thus, while cryptocurrencies are subject to SAR reporting, financial officers often find it difficult to answer questions—causing further delay in transaction reporting. With further delays in reporting suspicious cryptocurrency transactions, criminals can conduct further criminal activity.

B. MEXICO

Virtual assets, as defined by the Mexican Government in its Anti-Money Laundering Law, is any representation of value registered electronically and used as payment for legal acts and transfers that can only be carried out electronically.⁵⁵ The Mexican AML Law points out, however, that virtual assets are prohibited from being considered legal tender or currency.⁵⁶ Thus, the Mexican government and financial regulatory authorities have taken a more conservative view of cryptocurrencies despite an international—and even domestic—increase in popularity.⁵⁷

I. GOVERNING BODIES

According to the *Comisión Nacional Bancaria y de Valores* (CNBV), the Mexican AML regulatory system directs “one of the most comprehensive and sophisticated financial systems in the world.”⁵⁸ The CNBV is responsible for regulating and supervising financial institutions on a variety of topics, including anti-money laundering and combating the financing of terrorism (AML and CFT).⁵⁹ The *Procuraduría General de la República* (PGR) is the prosecutorial arm of the Mexican government; as the Attorney General’s Office of Mexico, the PGR is responsible for investigating and prosecuting individuals connected to money laundering and terrorist financing

⁵¹ *Anti-Money Laundering Act of 2020 ICBA Summary*, INDEP. CMTY. BANKERS OF AMERICA 1 (2021), https://www.icba.org/docs/default-source/icba/advocacy-documents/summaries/icba-summary---anti-money-laundering-act-of-2020.pdf?sfvrsn=78ac0d17_0.

⁵² *Id.* at 2.

⁵³ *Id.* at 3.

⁵⁴ *Id.* at 4.

⁵⁵ LEY FEDERAL PARA LA PREVENCIÓN E IDENTIFICACIÓN DE OPERACIONES CON RECURSOS DE PROCEDENCIA ILÍCITA (FEDERAL LAW FOR THE PREVENTION AND IDENTIFICATION OF OPERATIONS WITH RESOURCES OF ILLICIT ORIGIN) [LFPIORPI] art. 16; Diario Oficial de la Federación [DOF] 17-10-2012, últimas reformas DOF 20-05-2021 (Mex.), https://www.diputados.gob.mx/LeyesBiblio/pdf/LFPIORPI_200521.pdf.

⁵⁶ *Id.* at art. 17.

⁵⁷ CRYPTOS ON THE RISE 2022, *supra* note 13, at 4.

⁵⁸ Comisión Nacional Bancaria y de Valores [Mexican Nat’l Banking Sys. and Sec. Comm’n] & Secretaría de Hacienda y Crédito [Ministry of Fin. and Public Credit], *Overview of the Mex. Fin. Sys. and its AML/CFT Regul. and Supervision* 2, https://www.gob.mx/cms/uploads/attachment/file/196042/SFM_230217.pdf.

⁵⁹ *Id.* at 6. Translated, the CNBV is the Mexican National Banking and Securities Commission.

(ML and TF).⁶⁰ The *Unidad de Inteligencia Financiera* (UIF) plays an important role in AML regulation and supervision.⁶¹ Of its responsibilities, the UIF “receiv[es], analyz[es], and disseminat[es] to the competent authorities the information contained in the different types of AML and CFT reports;” requests AML and CFT-related “information, documentation, data and images... from financial institutions;” drafts regulations relating to AML and CFT; works with the PGR to initiate cases on AML and CFT violations; and informs financial entities of non-compliance in accordance with reporting requirements under AML regulation.⁶² The *Secretaria de Hacienda y Crédito* (hereinafter referred to as SHCP) serves as the Ministry of Finance and Public Credit. Under its authority, the SHCP is responsible for drafting and issuing AML and CFT regulation; in addition, the SHCP also monitors financial institutions and entities to ensure that they are complying with AML and CFT laws and regulations. The *Unidad de Banca, Valores y Ahorro* (hereinafter referred to as the UBVA) serves as the Banking, Securities, and Savings Unit—responsible for the interpretation of AML and CFT regulation.⁶³ Through a collaborative and multi-agency approach, the Mexican financial system enhances their ability to monitor and investigate suspicious cryptocurrency transactions. By sharing information across agencies and across financial markets, this approach contributes to the knowledge base of regulators, policymakers, and investors. Together, these entities are best situated to address money laundering activities.

2. *LEY FEDERAL PARA LA PREVENCIÓN E IDENTIFICACIÓN DE OPERACIONES CON RECURSOS DE PROCEDENCIA ILÍCITA (AML ACT)*

Originally enacted in 2013, the Congress of Mexico enacted *Ley Federal para la Prevención e Identificación de Operaciones con Recursos de Procedencia Ilícita*—the Federal Law for the prevention and Identification of Operations with Resources of Illicit Origin.⁶⁴ Commonly referred to as the AML Act, its outlined purposes are to protect the Mexican economy and financial system, to implement procedures that detect and prevent transactions involving resources from illicit origin, and to promote inter-agency collaboration to investigate and prosecute money laundering.⁶⁵

The AML Act outlines the roles of financial institutions and what constitutes “vulnerable activities” for purposes of the Mexican financial system.⁶⁶ Financial institutions must establish measures that detect and prevent money laundering acts and implement customer identification mechanisms.⁶⁷ The AML Act lists sixteen different vulnerable activities that must be monitored by financial institutions.⁶⁸ Listed last are cryptocurrency exchanges—a transaction of virtual assets

⁶⁰ *Id.* at 10.

⁶¹ *Id.* at 11.

⁶² *Id.*

⁶³ OVERVIEW OF THE MEX. FIN. SYS. AND ITS AML/CFT REGUL. AND SUPERVISION, *supra* note 58, at 12-13.

⁶⁴ FED. LAW FOR THE PREVENTION AND IDENTIFICATION OF OPERATIONS WITH RES. OF ILLICIT ORIGIN (Mex.), <https://www.global-regulation.com/translation/mexico/560553/regulation-of-the-federal-act-for-the-prevention-and-identification-of-operations-with-resources-of-illicit-origin.html> (Aug. 16, 2013).

⁶⁵ *Id.* at art. 2.

⁶⁶ *Id.* at art. 17.

⁶⁷ *Id.* at art. 15.

⁶⁸ FED. LAW FOR THE PREVENTION AND IDENTIFICATION OF OPERATIONS WITH RES. OF ILLICIT ORIGIN, *supra* note 64, at art. 17.

occurring on electronic platforms that manage, operate, facilitate, or carry out these purchases or sales.⁶⁹ This definition applies to those who own these virtual assets and to those who guard, store, or transfer virtual assets.⁷⁰ Thus, financial institutions are required by law to monitor cryptocurrency transactions.⁷¹ Once a customer engages in the exchange or sale of an amount equal to or greater than 605 units of a virtual asset, the financial institution is subject to a Notice from the Secretariat General's Office informing them that the consumer meets the transaction threshold.⁷² Even if a customer does not engage in a sale or exchange that is equal to or greater than 605 units of a virtual asset, the financial institution may still be subject to the obligations under Article 18 if the sum is reached over a six-month period. These obligations include customer identification and document and information retention associated with the vulnerable activity (for a period of five years).⁷³

Article 18 outlines the obligations of financial institutions if a customer satisfies both the definitional and activity requirements of virtual assets under Article 17. First, the financial institution must identify the customer that is engaged in vulnerable activities; to do this, financial institutions may rely upon their internal documentation and can obtain copies of needed documentation for identification purposes.⁷⁴ The Article also outlines information acquisition procedures when the transactions involve a business relationship or the existence of a beneficial owner.⁷⁵ The financial institution must also ensure that adequate safeguards are in place to securely store and protect vulnerable activity information and documents—including personal identifiable information.⁷⁶ According to Article 18, this information must be physically or electronically retained for five years—beginning from when the vulnerable activities end.⁷⁷ These obligations are nearly identical to those required for traditional transactions. By extending this language to virtual currencies, Mexican financial regulators recognize that these provisions are necessary to mitigate associated security risks.

Articles 13-33 outline the method by which the Secretariat General's Office should be notified of vulnerable activity.⁷⁸ Under Article 40, the Secretariat General's Office must report all money laundering information to the appropriate prosecutorial office regardless of whether the vulnerable activity occurred inside or outside of Mexico's jurisdiction.⁷⁹ The Act also authorizes the Secretariat to collaborate with other federal authorities and agencies to the extent necessary and within the scope of the investigation. Through this, the Secretariat may exchange information,

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ FED. LAW FOR THE PREVENTION AND IDENTIFICATION OF OPERATIONS WITH RES. OF ILLICIT ORIGIN, *supra* note 64, at art. 18.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at art. 13-33.

⁷⁹ *Id.* at art. 40.

conclude agreements, and verify information with the appropriate agencies.⁸⁰ The Secretariat is authorized to exchange information and documentation with the Bank of Mexico.⁸¹

Under the Act, the Secretariat General's Office may impose sanctions if a financial institution fails to cooperate with an investigation regarding virtual assets.⁸² Fines are imposed against financial institutions for failing to comply with obligations or participating in prohibited acts under the AML Act.⁸³ These fines increase based upon the statutory violation; for instance, failing to comply with Articles 17, 18, and 24 of the AML Act result in a fine between the equivalent of two hundred and two thousand days' wages.⁸⁴ Under Article 63, according to the Mexican Federal Criminal Code, a person associated with any of the investigatory agencies may face imprisonment of four to ten years if he or she inappropriately shares information, data, or images related to an investigation of vulnerable activities.⁸⁵ Now extended to cryptocurrencies, these articles ensure that criminal activities involving virtual assets are investigated and prosecuted thoroughly. By adhering to these regulations, Mexican officials are better equipped to quickly and effectively address illicit transactions—characteristics critical in reducing crypto money laundering. In addition, these Articles also hold financial institutions accountable for complying with cryptocurrency reporting regulations. By attaching fines and penalties to financial institutions, Mexican regulators underscore the importance of accurate, timely, and adequate reporting. Holding financial institutions to these standards ensures that investigative authorities, including the Secretariat General's Office, can swiftly act against criminals—a critical element of preventing money laundering through cryptocurrencies.

3. *LEY PARA REGULAR LAS INSTITUCIONES DE TECNOLOGIA FINANCIERA (FINTECH LAW)*

Enacted in March of 2018, the Financial Institutions Law ("Fintech Law") was established to regulate and provide guidance on operational practices for financial technologies.⁸⁶ The Fintech Law aimed to "promote financial inclusion," "provide legal security to technological financial services users," "trigger greater competition in the financial services market," "increase the number of participants in the financial sector," "prevent money laundering activities through electronic means," and "regulate the transactions with digital assets."⁸⁷ Digital assets, which include cryptocurrencies, are defined under Article 30 of the Fintech Law as "the representation of value recorded electronically and used by the public as a means of payment for all types of legal acts and whose transfer can only be carried out by electronic means, without the virtual asset being understood as a legal tender currency in the national territory, a foreign exchange or any other asset denomination in legal tender or foreign currency."⁸⁸ Assets are considered digital assets under the Fintech Law if they (i) represent a value, (ii) are electronically registered, (iii) are a

⁸⁰ FED. LAW FOR THE PREVENTION AND IDENTIFICATION OF OPERATIONS WITH RES. OF ILLICIT ORIGIN, *supra* note 64, at art. 40-47.

⁸¹ *Id.* at art. 51.

⁸² *Id.* at art. 52-61.

⁸³ *Id.* at art. 53.

⁸⁴ *Id.* at art. 54.

⁸⁵ *Id.* at art. 63.

⁸⁶ *Decree Enacting the Financial Technology Institutions Law ("Fintech Law")*, DELOITTE LEGAL (2018), <https://www2.deloitte.com/content/dam/Deloitte/mx/Documents/legal/2018/Fintech-Law-Decree.pdf>.

⁸⁷ *Id.* at 1-2.

⁸⁸ *Id.* at 3.

means of payment used by the public, and (iv) are only transferable via electronic means.⁸⁹ Under the Fintech Law, the Bank of Mexico plays an active role in the use, conditions, and restrictions on digital assets.⁹⁰ The Bank is given the authority to define what constitutes a “digital asset” and the types of transactions that are authorized and limited with those assets that fall within its terms.⁹¹ Before conducting these transactions, however, the individual or entity engaged in digital asset transactions must apply for authorization by the CNBV.⁹² While these conditions and restrictions may first appear as a sensible protective measure, they have largely limited the number of entities and individuals that constitute digital assets under the FinTech Law. Thus, a more careful review is necessary to determine whether the overprotective measures—possibly based on protecting the Mexican financial system—are proportional to the potential benefits, such as increased market participation, that relaxing these regulations may bring.

The Fintech Law also brought reforms to the Anti-Money Laundering Law—most notably to reporting requirements and to what constitutes “vulnerable activity.” Article 17 of the Law was amended to incorporate virtual asset exchanges by those other than financial institutions “carried out through electronic, digital, or similar platforms which manage or operate, facilitating or carrying out the purchase or sale transactions of such assets owned by their clients or provide means of custody, to store or transfer virtual assets other than those recognized by the Bank of Mexico in terms of the Fintech Law.”⁹³ Additionally, the Financial Intelligence Unit of the Ministry of Finance and Public Credit must be notified of “transactions involving digital assets” that are greater than or equal to “six hundred and forty-five UMA Measure Units.”⁹⁴ With the passage of the Fintech Law, Mexican lawmakers could address several of the regulatory gaps not addressed by AML Act while making necessary updates.

While it appears that the Mexican government has implemented appropriate mechanisms to detect, prevent, and investigate money laundering involving cryptocurrencies, some aspects greatly restrict the ability to conduct transactions with cryptocurrencies. Multi-agency collaboration, robust reporting requirements, and the imposition of fines and penalties are all characteristics that should reflect international regulation; however, strict language that limits what constitutes “digital assets” would be hard to implement. Different countries have different interpretations of what constitutes a digital asset, and this diversity must be incorporated into international regulation.

C. SINGAPORE

1. REGULATORY BODIES

Singapore, an early participant in cryptocurrency, is viewed by financial markets worldwide as a frontrunner in developing and creating cryptocurrency regulation. Unique to Singapore is that all cryptocurrency regulation is handled through one agency, the Monetary

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Fintech Law*, *supra* note 86, at 3.

⁹³ *Id.* at 4.

⁹⁴ *Id.*

Authority of Singapore (MAS). Additionally, crypto service providers are tasked with going through the MAS licensing process—a system that is unlike that of the United States, Switzerland, or Mexico. When considering crypto service providers, MAS requires applicants to demonstrate robust governance structures and a good board of directors and examines the applicant’s history to ensure that the provider is capable of managing the money laundering risks of cryptocurrencies. This licensing process, per the MAS, is designed to make Singapore a “responsible global crypto hub . . . with strong risk management capabilities.”⁹⁵ It is Singapore’s hope, per the Monetary Authority, that international regulators do more to address and monitor each risk individually—including those associated with AML—rather than viewing them as “a basket of risks.”⁹⁶

While the Parliament of Singapore is responsible for the passage of legislation, the financial market of Singapore is regulated by the MAS under the Monetary Authority of Singapore Act.⁹⁷ Not only does the MAS regulate the financial sector, but it also serves as the central bank of Singapore.⁹⁸ Part of the MAS’s function is to draft and implement monetary policy as well as regulate and oversee payment systems and payment service providers. Payment service providers, by definition, are systems that are licensed under the Payment Services Act of 2019 (PS Act) to facilitate funds transfers, including cryptocurrencies, between parties. PayPal, Square, and Stripe are examples of popular payment service providers. To “encourag[e] innovation and growth of payment services and FinTech,” the MAS assisted in Parliament’s passage of the Payment Services Act—one that provides “a forward looking and flexible framework for the regulation of payment systems and payment service providers in Singapore.”⁹⁹

2. REGULATORY GOVERNANCE

The PS Act, which became effective January 28, 2020, was enacted as a “necessary” step to address the fast emergence of payment service risks.¹⁰⁰ According to the Monetary Authority of Singapore, the PS Act provides a “flexible regulatory framework that reduces the impact of a failure of a payment service provider while promoting a progressive payments sector in Singapore.”¹⁰¹ As discussed below, the MAS considers cryptocurrencies (also referred to as digital payment tokens) a payment service that falls under the PS Act.

In crafting the PS Act, the MAS focused on two areas of regulation—designation and licensing.¹⁰² Under the designation framework, payment systems are given a particular designation

⁹⁵ Ravi Menon, Managing Director, Monetary Auth. Sing., MAS’s Approach to the Crypto Ecosystem, Keynote Interview at the Financial Times’ Crypto & Digital Assets Summit (Apr. 27, 2022) (transcript available at [mas.gov.sg/news/speeches/2022/mas-approach-to-the-crypto-ecosystem](https://www.mas.gov.sg/news/speeches/2022/mas-approach-to-the-crypto-ecosystem)).

⁹⁶ *Id.*

⁹⁷ Monetary Authority of Singapore Act, 1970 (Sing.).

⁹⁸ MONETARY AUTH. OF SING., *What We Do*, <https://www.mas.gov.sg/who-we-are/what-we-do> (last visited Oct. 27, 2022).

⁹⁹ Monetary Authority of Singapore Payment Services Act, 2019 (Sing.); MONETARY AUTH. OF SING., *Payments*, <https://www.mas.gov.sg/regulation/payments> (last visited Jan. 2, 2023).

¹⁰⁰ *Payment Service Act: A Guide to the Essential Aspects of the Payment Services Act*, MONETARY AUTH. OF SING. 2 (2019), <https://www.mas.gov.sg/-/media/MAS/Regulations-and-Financial-Stability/Regulations-Guidance-and-Licensing/Payment-Service-Providers/Guide-to-the-Payment-Services-Act-2019.pdf?la=en&hash=B03712F4EEEE907C39BA2C12DE63A545495EE1C2>.

¹⁰¹ *Id.*

¹⁰² *Id.* at 3.

to promote financial stability and “to ensure efficiency or competition” within the payment system market.¹⁰³ The MAS outlines its basis for designation, including the effect that any one payment system may have on the Singapore financial system if its operations temporarily or permanently fail.¹⁰⁴ Given the risks associated with money laundering and terrorist financing (ML and TF), crypto financial crimes could cause systemic problems if left unaddressed. Payment service providers, on the other hand, would argue that crypto ML and TF risks would not cause a failure of the Singapore financial system but merely isolated disruptions on a case-by-case basis. The licensing regime, in comparison, aims to manage risks by aligning “regulation of payment services to mitigate risks according to the scope and scale of payment service providers.”¹⁰⁵ The Act outlines seven key payment services, namely: account issuance, domestic money transfer, cross-border money transfer service, merchant acquisition, e-money issuance, digital payment tokens (DPTs), and money-changing service.¹⁰⁶ DPTs, also known as cryptocurrencies, are defined by the MAS as “digital representations of value that do not have a physical form.”¹⁰⁷ By capturing DPTs in the PS Act, the MAS is prescribed the regulatory power to mitigate associated risks. As briefly described by the MAS, DPT services regulate the purchasing and selling of DPTs as well as platforms that provide spaces for individuals in Singapore to purchase and sell DPTs.¹⁰⁸ DPTs, as recognized by the MAS in its June 2019 consultation paper, have increased risks due to their anonymous nature as well as the ease with which they facilitate rapid cross-border transactions.¹⁰⁹

Absent an exception, all payments service providers under the PS Act are classified into three different licensee categories.¹¹⁰ Money-changing licenses only give providers the ability to engage in “money-changing services;” thus, these businesses and entities have a smaller risk due to their narrowed scope of services.¹¹¹ Standard Payment Institution (SPI) licenses, which can provide any combination of the key payment services, are subject to lighter regulatory oversight as they encourage businesses to engage in innovation and small business enterprise.¹¹² Major Payment Institution (MPI) licenses, which allow providers to extend services beyond regulatory thresholds, produce higher risk exposure and require enhanced and comprehensive regulation.¹¹³

One of the primary objectives of the PS Act is to address and mitigate key risk areas in regard to the payment services industry.¹¹⁴ These areas are enumerated in the PS Act as ML and TF risks, user protection, interoperability, and technology and cyber security risks.¹¹⁵ By

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Payment Service Act, supra* note 100, at 4.

¹⁰⁷ *What Are Digital Payment Tokens*, MONETARY AUTH. SING. (2021), <https://www.mas.gov.sg/-/media/MAS-Media-Library/who-we-are/mas-gallery/MAS-Gallery/Digital-Payment-Tokens.pdf>.

¹⁰⁸ *Payment Service Act, supra* note 100, at 4-5.

¹⁰⁹ Consultation Paper on the Proposed Payment Service Notices on Prevention of Money Laundering and Countering the Financing of Terrorism, June 6, 2019, in *Payment Service Act, supra* note 100, at 5.

¹¹⁰ *Payment Service Act, supra* note 100, at at 6.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Payment Service Act, supra* note 100, at 15.

¹¹⁵ *Id.* Per the MAS in the Guide, “user protection” refers to the ability to safeguard customer money that is invested with payment service providers. “Interoperability” is defined as the extent of “fragmentation of payment solutions” and the ability for payment solutions to access and exchange information. “ML/TF” refers to money laundering and

identifying and measuring these risks, the MAS is better equipped to address the inherent risks of cryptocurrency transactions such as their anonymous and cross-border nature. The MAS promulgates the AML and CFT risk mitigation measures that apply to all three licensee classes—the money-changing license, the SPI license, and the MPI license. However, the MAS notes that “a licensee does not need to comply with ... AML/CFT requirements if it only provides payment services that meet the low-risk criteria for ML/FT.”¹¹⁶

Key AML and CFT requirements under the PS Act include:

- (i) taking appropriate steps to identify, assess, and understand the licensee’s ML and TF risks;
- (ii) developing and implementing policies, procedures, and controls—including those in relation to the conduct of CDD, transaction monitoring, screening, suspicious transaction reporting, and record keeping, in accordance with PSN01 or PSN02—to enable the licensee to effectively manage and mitigate their ML and TF risks;
- (iii) monitoring the implementation of those policies, procedures and controls, and enhancing them as necessary; and
- (iv) performing enhanced measures where there are higher ML and TF risks to effectively manage and mitigate those higher risks.¹¹⁷

Since the emergence of the PS Act, Singapore has recognized that innovation of crypto technologies will require “international work” on developing cryptocurrencies as well as continued vigilance in monitoring trends and developments in the payment services market.¹¹⁸

To supplement the PS Act, the Monetary Authority of Singapore issued the Notice PSN02 on the Prevention of Money Laundering and Countering the Financing of Terrorism—Digital Payment Token Service.¹¹⁹ The PSN02 outlines the risk management steps that digital payment service providers should take in combatting money laundering—including risk mitigation, customer

terrorist financing in financial regulatory parlance. “Technology and cyber security” refer to risks associated with data breaches, fraud, and disruption.

¹¹⁶ *Payment Service Act*, *supra* note 100, at 16-17. Criteria for what constitutes “low risk criteria for ML/FT” can be found in paragraph 3.2 of Payment Services Note 01 (PSN01).

¹¹⁷ *Id.* at 17. “CDD” denotes “customer due diligence,” “PSN01” refers to the MAS Notice “Prevention of Money Laundering and Countering the Financing of Terrorism – Specified Payment Services,” and “PSN01 refers to the MAS Notice “Prevention of Money Laundering and Countering the Financing of Terrorism – Digital payment Token Service.”

¹¹⁸ *Id.* at 5.

¹¹⁹ The Monetary Authority of Singapore also issued Notice PSN01 (Prevention of Money Laundering and Countering the Financing of Terrorism—Specified Payment Services). This notice, per the MAS, is framed to provide anti-money laundering measures for payment service providers other than digital payment token service provider. For further information, *see* MONETARY AUTH. OF SING., NOTICE PSN02 PREVENTION OF MONEY LAUNDERING AND COUNTERING THE FINANCE OF TERRORISM – SPECIFIED PAYMENT SERVICE (last revised Mar. 1, 2022) (Sing.).

due diligence, record keeping, and transaction document retention and reporting.¹²⁰ The MAS based its issuance of the Notice in three main principles: the exercise of due diligence, providers acting “in conformity with high ethical standards,” and “to the fullest extent possible, assist and cooperate with the relevant law enforcement authorities in Singapore to prevent money laundering and terrorism financing.”¹²¹ In accordance with these principles, PSN01 outlines guidance on how payment service providers should address the risk assessment.¹²² “Risk Assessment,” as defined in the Notice, requires payment service providers to take the proper steps to “identify, assess and understand” the threats associated with money laundering—this assessment must apply to the provider’s customers, the customer’s jurisdiction or country, countries or jurisdictions where the provider operates, and to “products, services, transactions and delivery channels” associated with the provider.¹²³ To ensure that risk assessment is adequate and complete, the Notice provides that payment providers must document their assessment, consider all risk factors before making a determination on risk mitigation, ensure that assessments are routinely updated as needed, and provide risk assessments to the Monetary Authority.¹²⁴

The PSN02 Notice also outlines risk mitigation steps that providers should take—including the implementation of effective policy, the monitoring of high risks, and the routine assessment of whether policy measures are adequately covering high risks.¹²⁵ As part of its 2022 Amendment, the Monetary Authority of Singapore expressly outlined that providers “shall identify and assess” the risks associated with money laundering in relation to new products and practices—“including new delivery mechanisms” and “new or developing technologies for both new and existing products.”¹²⁶ The Notice also outlines in Article 6 the circumstances that trigger CDD: (i) the establishment of a business relationship with a customer, (ii) transactions with those who have not established a business relationship, (iii) receipt of digital payment tokens when a business relationship is not established, (iv) suspicion of money laundering and terrorism financing, and (v) instances when the provider has “doubts about the veracity or adequacy of any information previously obtained.”¹²⁷ By verifying the identity of their customers, payment service providers are able to ascertain their customers’ behavior and can better anticipate potential money laundering risks associated with their DPT transactions. If the initial relationship or transaction in question produces “any reasonable grounds to suspect that the assets or funds of a customer are proceeds of drug dealing or criminal conduct . . . or are property related to the facilitation or carrying out of any terrorism financing offenses,” the providers must file a Suspicious Transaction Report (STR) with the Monetary Authority.¹²⁸ PSN02 also provides language that allows for digital service providers to rely on third parties.¹²⁹ While a payment service provider cannot have the third party conduct their transaction monitoring, these third parties can assist in customer due diligence as long as they

¹²⁰ MONETARY AUTH. OF SING., NOTICE PSN02 PREVENTION OF MONEY LAUNDERING AND COUNTERING THE FINANCE OF TERRORISM – SPECIFIED PAYMENT SERVICE (last revised Mar. 1, 2022) (Sing.).

¹²¹ *Id.* at art. 3.1.

¹²² *Id.* at art. 4.1.

¹²³ *Id.*

¹²⁴ *Id.* at art. 4.2.

¹²⁵ *Id.* at art. 4.3.

¹²⁶ NOTICE PSN02, *supra* note 120, at art. 5.1.

¹²⁷ *Id.* at art. 6.3.

¹²⁸ *Id.* at art 6.2.

¹²⁹ *Id.* at art. 11.1.

satisfy requirements, including that they “intend to rely upon” and are “subject to and supervised for compliance with AML/CFT requirements consistent with standards set by the FATF.”¹³⁰

In addition to identifying and reporting suspicious transactions, PSN02 requires continued monitoring of transactions with customers suspected of money laundering.¹³¹ This vigilance includes continued attention to all transactions—big, small, and complex—as well as irregular patterns in a customer’s transaction behavior.¹³² Following careful monitoring and documentation, payment service providers should follow their international risk mitigation policies and procedures if money laundering activities are ongoing.¹³³ If these transactions are non-face-to-face, similar risk mitigation and monitoring steps should be taken by the provider.¹³⁴ Additionally, the provider must provide an assessment report to the Monetary Authority within a year after their first non-face-to-face contact with the customer.¹³⁵

Under the PSN02, the Monetary Authority lists circumstances that indicate when an individual or group poses a high risk to engage in money laundering. Two of these circumstances are “where a customer or any beneficial owner of a customer is from or in a country or jurisdiction in relation to which the FATF has called for countermeasures” and “where a customer or any beneficial owner of the customer is from or in a country or jurisdiction known to have inadequate AML/CFT measures, as determined by the payment service provider for itself, or notified to payment service providers generally by the Authority or other foreign regulatory authorities.”¹³⁶ Thus, these regulations take into consideration cross-jurisdictional attributes and the relative nature of other jurisdictional frameworks.

¹³⁰ *Id.* at art. 11.2; *see also* NOTICE PSN02, *supra* note 120, art. 6-8.

¹³¹ *Id.* at art. 6.25-6.27.

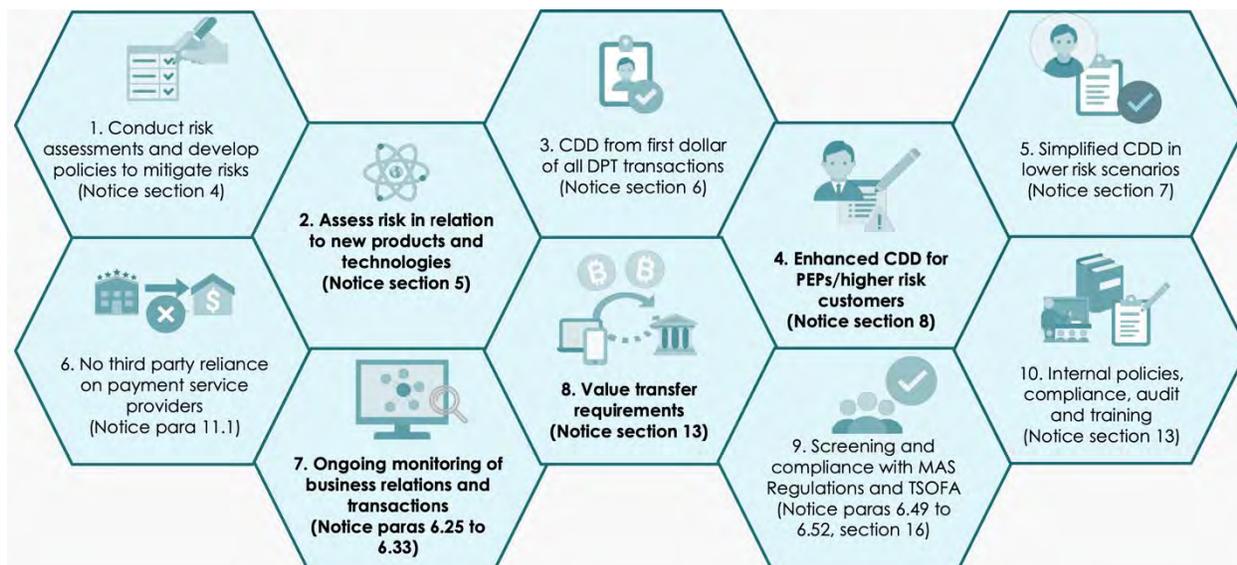
¹³² NOTICE PSN02, *supra* note 120, at art. 6.28-.29.

¹³³ *Id.* at art. 6.27.

¹³⁴ *Id.* at art. 6.34 – 6.39.

¹³⁵ *Id.* at art. 6.38.

¹³⁶ *Id.* at art. 7.4.

FIGURE 3. KEY AML/CFT CHARACTERISTICS FROM PSN02¹³⁷

D. SWITZERLAND

Switzerland is seen by most as having one of the largest and most crypto-friendly legal regulations in the world. In fact, Switzerland is home to the “crypto valley” in Zug—an active community of entrepreneurs and businesspeople in the cryptocurrency industry that was founded in 2013.¹³⁸ Swiss crypto regulation is primarily enforced by the Swiss Financial Market Supervisory Authority (FINMA) through the Swiss Anti-Money Laundering Act and the Distributed Ledger Technology (DLT) Act. The FINMA established regulation to combat money laundering and terrorist financing, and this law applies to cryptocurrencies as well.¹³⁹ Swiss regulation is comprised of three different pieces of legislation—the Anti-Money Laundering Act, the Anti-Money Laundering Ordinance, and the FINMA Anti-Money Laundering Ordinance.¹⁴⁰ The Anti-Money Laundering Ordinance, issued in 2015 by the Swiss Federal Council, regulates financial intermediation, due diligence requirements, and reporting requirements promulgated under the AMLA.¹⁴¹

However, some crypto investors and regulators are concerned that Switzerland’s progressive regulatory reforms chip away at some of the key characteristics of cryptocurrencies—

¹³⁷ *Strengthening AML/CFT Controls of Digital Payment Token Service Providers*, MONETARY AUTH. SING. 7 (2021), <https://www.mas.gov.sg/-/media/MAS/Regulations-and-Financial-Stability/Regulations-Guidance-and-Licensing/Payment-Service-Providers/Strengthening-AMLCFT-Controls-of-Digital-Payment-Token-Service-Providers.pdf>.

¹³⁸ *About the Association*, CRYPTO VALLEY ASSOCIATION (2022), <https://cryptovalley.swiss/about-the-association/>.

¹³⁹ *Rechtsgrundlagen für die Geldwäschereibekämpfung [Legal Basis for Combating Money Laundering]*, EIDGENÖSSISCHE FINANZMARKTAUFSICHT [SWISS FINANCIAL MARKET SUPERVISORY AUTHORITY] (2022), [finma.ch](https://www.finma.ch).

¹⁴⁰ *Id.*

¹⁴¹ *Verordnung über die Bekämpfung der Geldwäscherei und der Terrorismusfinanzierung [Decree on the Fight Against Money Laundering and Terrorist Financing]*, Schweizerische Bundesrat [Swiss Federal Council] art. 1 (Switz.).

deregulation and anonymity. Thus, Swiss regulators must consider regulating cryptocurrencies in a way that not only increases consumer participation and addresses money-laundering risks, but also remains crypto-friendly and recognizes the interfering role regulations may have on entrepreneurs who are setting up business in Switzerland in order to ensure long-term success in the global markets. For the same reason, all of these should be considered when forming an international cryptocurrency regulation.

1. SWISS CRIMINAL CODE

Under Article 305 of the Swiss Criminal Code, anyone who “carries out an act that aimed at frustrating the identification of the origin, the tracing or confiscation of assets which he knows or must assume originate from a felony” may be subject to monetary penalties or a punishment of up to three years in prison.¹⁴² In cases where a person participates in organized crime, commits a crime within a group created for the purpose or money laundering, or gains “a large turnover or substantial profit through commercial money laundering,” the perpetrator faces monetary penalties or a punishment of up to five years in prison.¹⁴³ Article 305 also extends liabilities to offenses committed outside of Swiss jurisdiction “provided that such act is also an offence at the place of commission.”¹⁴⁴ These penalties not only apply to traditional money laundering activities involving cash, but also to those involving cryptocurrencies. Given that the traditional money laundering elements of conversion, concealment, and acquisition also apply to cryptocurrencies, Swiss authorities may also prosecute these criminals under Article 305.

2. ANTI-MONEY LAUNDERING ACT

The Anti-Money Laundering Act (AMLA), first enacted in 1997 by the Federal Assembly of the Swiss Confederation, was designed to “regulate[] the combating of money laundering...., the combating of terrorist financing..., and the due diligence required in financial transactions.”¹⁴⁵ The Act primarily pertains to financial intermediaries, defined as “persons who on a professional basis accept or hold on deposit assets belonging to others who assist in the investment or transfer of such assets.”¹⁴⁶ In its August 2019 press release, the Swiss Financial Market Supervisory Authority (FINMA) recognized that it has “always applied the Anti-Money Laundering Act to blockchain service providers.”¹⁴⁷ The Anti-Money Laundering Act requires that blockchain service providers—financial entities licensed by FINMA to conduct payment transactions on the blockchain—implement customer and beneficial owner identification verification, employ risk

¹⁴² Schweizerisches Strafgesetzbuch [Swiss Criminal Code] art. 305 (Switz.), *translated by* Eidgenössische Finanzmarktaufsicht [Swiss Financial Market Supervisory Authority (FINMA)].

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Bundesgesetz über die Bekämpfung der Geldwäscherei und der Terrorismusfinanzierung [Federal Act on Combating Money Laundering and Terrorist Financing] art. 1 (Switz.), *translated by* Eidgenössische Finanzmarktaufsicht [FINMA].

¹⁴⁶ *Id.* at art. 3.

¹⁴⁷ *FINMA Aufsichtsmittteilung 02/2019: Zahlungsverkehr auf der Blockchain* [FINMA Guidance 02/2019: Payments on the Blockchain], EIDGENÖSSISCHE FINANZMARKTAUFSICHT [FINMA] 1 (2019), <https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/4dokumentation/finma-aufsichtsmittteilungen/20190826-finma-aufsichtsmittteilung-02-2019.pdf>.

mitigation strategies when engaging in business relationships, and report suspicions of money laundering activity to the Money Laundering Reporting Office of Switzerland (MROS).¹⁴⁸

3. *FINMA ANTI-MONEY LAUNDERING ORDINANCE*

The FINMA Anti-Money Laundering Ordinance, issued in 2015 by FINMA, explains how financial intermediaries are to implement policies and practices in order to monitor and combat money laundering and terrorist financing.¹⁴⁹ Article 6 of the Ordinance emphasizes the role of global risk monitoring—including those that arise with money laundering.¹⁵⁰ Under the Ordinance, financial intermediaries with international offices or that operate with foreign entities “shall record, limit, and monitor [their] legal and reputational risks related to money laundering and terrorist financing on a global level.”¹⁵¹ To monitor these international risks, the Ordinance outlines that financial intermediaries should complete consolidated risk analysis periodically, complete an annual assessment that qualifies and quantifies consolidated risks, “inform [] on their own and in a timely manner... the acceptance and continuation of business relationships that are globally significant from a risk perspective,” as well as perform routine visits to sites in order to best implement internal risk controls.¹⁵² In 2020, FINMA revised the Ordinance by incorporating Article 51(a), “Transactions with virtual currencies.”¹⁵³ Financial intermediaries involved in virtual currency transactions, under the Article, must identify transactions with parties that appear “interconnected,” meet or exceed CHF 1,000, or are suspected to be potential money laundering or terrorist financing.¹⁵⁴ Article 74 of the Ordinance enumerates the documents that must be retained, which includes business relationship documents, investigation documents, and anti-money laundering report documents.¹⁵⁵

4. *DISTRIBUTED LEDGER TECHNOLOGY (DLT) ACT*

In 2019, the Federal Assembly of the Swiss Confederation passed the Federal Act on the Adaptation of Federal Law to Developments in Distributed Ledger Technology—often referred to as the DLT Act.¹⁵⁶ Generally, distributed ledger technologies, such as blockchain, use independent computers to “record, share and synchronize transactions” into an electronic ledger.¹⁵⁷ These recorded transactions are organized into “blocks” and “chained” together unlike that of a

¹⁴⁸ *Id.*

¹⁴⁹ *Bundesgesetz über die Bekämpfung der Geldwäscherei und der Terrorismusfinanzierung [Anti-Money Laundering Ordinance]*, KPMG (2015), translated in Ordinance of the Swiss Financial Market Supervisory Authority on the Prevention of Money laundering and the Financing of Terrorist Activities, <https://assets.kpmg/content/dam/kpmg/ch/pdf/swiss-anti-money-laundering-ordinance-finma-en.pdf>.

¹⁵⁰ *Id.* at art. 6.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at art. 51(a).

¹⁵⁴ *Id.*

¹⁵⁵ Anti-Money Laundering Ordinance, *supra* note 149, at art. 74.

¹⁵⁶ *Bundesgesetz zur Anpassung des Bundesrechts an Entwicklungen der Technik verteilter elektronischer Register [Federal Act on the Adaptation of Federal Law to Developments in Distributed Ledger Technology]*, translated by SCHWEIZERISCHE BUDENSTRAT [FEDERAL COUNCIL] (2019), <https://www.newsd.admin.ch/newsd/message/attachments/60601.pdf>.

¹⁵⁷ THE WORLD BANK, *Blockchain & Distributed Ledger Technology (DLT)* (Apr. 12, 2018), <https://www.worldbank.org/en/topic/financialsector/brief/blockchain-dlt>.

traditional centralized ledger.¹⁵⁸ As the full name suggests, the DLT Act's goal was to modernize a series of federal laws into better alignment with innovation and emerging risks of the Swiss financial market system.¹⁵⁹ Of these, the Anti-Money Laundering Act of October 10, 1997, was revisited in order to account for innovation in crypto technologies.¹⁶⁰ The DLT Act revised the definition of "financial intermediaries" under Article II, Paragraph II of the AML Act.¹⁶¹ This revised definition applied to central "counterparties" and "securities depositories in accordance with the Financial Market Infrastructure Act."¹⁶² This definition revision allowed DLTs to fall under the authority of the AML Act; thus, distributed ledgers are held to the same risk mitigation, monitoring, and reporting requirements as other physical and digital assets under the Act.¹⁶³

IV. APPLICATION ON THE INTERNATIONAL SCALE

The United States, Mexico, Singapore, and Switzerland have all enacted measured and directed regulation that attempts to address the increasing risk of money laundering via digital assets. After examining the four selected countries, one can see the diversity and complexities of domestic cryptocurrency regulation. While each country has implemented regulation to address the money laundering risks associated with cryptocurrency, some of these regulations would scale nicely on an international level whereas others would not. This part examines the aspects of the United States, Mexico, Singapore, and Switzerland's respective regulations and considers their international application. By such comparison, international regulators can begin to put together potential global regulations of money laundering.

A comparative analysis provides valuable insight for the future of the cryptocurrency regulation—countries may be encouraged to adopt anti-money laundering regulation that has operated successfully in other countries. On the other hand, jurisdictions may wish to revise or reconsider their current regulations considering another country's failures and experiences. Fortunately, the respective regulations of the United States, Mexico, Singapore, and Switzerland are worth implementing on an international scale. However, certain characteristics are unique to their own jurisdictions—specifically tailored to address cryptocurrency risks through a lens of domestic political, social, economic, and ideological factors. Additionally, each country viewed has undergone significant regulatory reform in recent years; while these changes were arguably necessary, the question remains as to the quality and adequacy of currently enacted laws. As such, these gaps on the domestic level will only be magnified as these policies and regulations are implemented on an international scale. Thus, policymakers, lawmakers, and stakeholders should be cognizant of their roles to address any regulatory gaps as cryptocurrencies continue to develop.

A. ACCOMMODATING DIFFERENCES

In addressing the regulation of cryptocurrencies, each relationship amongst a country's federal agencies and financial institutions are different. For example, while Mexico has banned

¹⁵⁸ *Id.*

¹⁵⁹ Federal Act on the Adaptation of Federal Law to Developments in Distributed Ledger Technology, *supra* note 156. For a list of other legislative instruments amended by the DLT act, *see generally id.*

¹⁶⁰ *Id.* at 9.

¹⁶¹ *Id.* at 10.

¹⁶² *Id.*

¹⁶³ *Id.*

cryptocurrency transactions within its borders, several federal agencies work together to monitor, prosecute, and investigate cryptocurrency transactions.¹⁶⁴ On the other hand, the Monetary Authority of Singapore is the sole regulatory authority of one of the most crypto-friendly environments in the world.¹⁶⁵ Given that these countries have successfully monitored and mitigated crypto risks with these relationships, international regulation should encourage similar types of relations. Financial institution and federal agency collaboration, when supported on an international level, would encourage other countries to do the same. This collaboration, as seen in this paper, would improve a country's ability to efficiently monitor and investigate illicit cryptocurrency transactions.

By providing an impressive regulatory baseline on an international scale, crypto money launderers would be less inclined to forum shop and move to jurisdictions that have relaxed regulatory regimes. However, countries must be willing to address domestic effects resulting from illicit cryptocurrency transactions within their jurisdictions. While this would include transactions that are fully completed domestically, countries would also be held accountable for cryptocurrency transactions that originated there. The rationale behind this is, had the country implemented sufficient regulatory monitoring and reporting requirements, these transactions would not have occurred. Doing so will not only relieve the international body from being too burdening, but will also encourage and allow countries to create a crypto regulatory structure tailored to their respective risks.

While it may be more efficient and easier for international regulation to apply a uniform approach, this may create tension with domestic policy objectives and notions of security. However, centralization would likely allow the regulation to better fluctuate with international developments in AML and the cryptocurrency market—regulations would not necessarily need to be enacted on a country-by-country basis. As risk factors grow and fade over time as a result of proper risk mitigation measures, an international body would be best able to address the trend on an international level. This would ideally eliminate some of the delays to implementation that nearly all jurisdictions have faced in reaction to cryptocurrency risks.

Additionally, an international regulation must be able to reconcile that many countries have enacted complete bans on cryptocurrencies and others do not appear to have adequate enforcement mechanisms to apply international regulation. For instance, Mexico has banned cryptocurrencies. From the global perspective, it appears that cryptocurrencies are here to stay, notwithstanding bans across the world. Thus, international regulation should be mindful of ways to encourage and incentivize countries to allow cryptocurrency transactions within their financial markets; however, international regulation should provide provisions that allow for accommodations in the short-term. Implementing regulations that preserve security and minimize risk in cross-border crypto transactions would likely reduce some of the concerns held by countries that ban cryptocurrency.

¹⁶⁴ See *supra* notes 58-63.

¹⁶⁵ See *supra* note 95.

B. INFORMATION SHARING

Each country's regulation emphasized the importance of information sharing.¹⁶⁶ As all countries alluded to, the exchange of information is necessary in order to effectively investigate and prosecute those suspected of money laundering. This aligns with the FAFT's essential recommendation that countries should make efforts to facilitate cooperation and the availability of information.¹⁶⁷ By exchanging information in a multi-jurisdictional format, countries are able to better identify criminals and reduce anonymity. In the international setting, this information may be best shared in a centralized secured space. This space would likely take the form of an international information exchange body—organized and governed in similar ways to the International Monetary Fund (IMF). This would allow for a more streamlined and efficient process; specifically, it allows investigative bodies to better investigate and prosecute money launderers. In addition, the FATF as the international regulatory body should consider imposing uniform reporting requirements while acknowledging any disparity in enforcement abilities by countries.

The licensing requirement of Singapore's PS Act, on an international scale, would ensure that essential information is acquired that both verifies the identity of the customer and establishes risk requirements for each customer and service provider. The issuance of a license could be granted through an international body, composed of membership from countries from across the world. International regulation would allow for the formation of this international licensing body. By forming this body through international regulation, this would create a uniform verification system across jurisdictions and would, thus, minimize anonymity and increase clarity regarding an individual's ability to engage in cryptocurrency transactions.

C. Interpretation Versus Creation

Another consideration for policy makers to think about is whether international regulation should be interpreted from existing international policy or created from existing domestic regulation. While each country has made efforts to implement its own cryptocurrency regulations, each country has done so in slightly different ways. Switzerland and the United States based their regulation upon the risks associated with traditional payment systems and currencies.¹⁶⁸ Mexico, on the other hand, enacted its anti-money laundering regulation in 2013; however, Mexican lawmakers created the FinTech law five years later to more directly address financial technologies.¹⁶⁹ Singapore, by comparison, initiated its cryptocurrency regulation with the Payment Services Act of 2019 as a stand-alone authority.¹⁷⁰ Thus, regulators and policymakers will want to consider whether an international regulation should be an amalgamation of existing digital asset regulations from across the globe or an entirely new model derived upon currently faced risks. Whichever way internal regulation is designed, lawmakers must be cautioned not to conflate the money laundering practices of tangible assets to those of digital assets. While there

¹⁶⁶ See *supra* notes 50, 74-75, 117-18, 148, 151.

¹⁶⁷ See *supra* notes 26-27.

¹⁶⁸ See *supra* notes 54, 147, 153.

¹⁶⁹ See *supra* notes 64, 86.

¹⁷⁰ See *supra* note 97.

are certainly many similar qualities in the associated risks, digital assets are particularly difficult to track and monitor due to accelerated transaction time and increased anonymity. International crypto regulation will need to accommodate diverse approaches and perspectives while adopting universal necessities in order to effectively combat these illicit activities. While implementing these accommodations will certainly be a challenge given that international cryptocurrency regulations is new and emerging, acknowledging these differences is a critical step in the formation process.

V. CONCLUSION

The cryptocurrency market is changing quickly, and criminals are keeping pace. Transactions occur much easier and the number of individuals that participate in the market rapidly increases daily. At the same time, the risks associated with cryptocurrency exchanges are continuing to rise. Domestic regulation become antiquated as the development of financial technologies continues at an alarming rate. The ability to regulate cryptocurrencies is at a crossroads: whether to allow the cryptocurrency market to become the “Wild West” of finance or to create an effective international solution.

The article has shown that jurisdictions have begun to recognize the risks associated with international cryptocurrency transactions while acknowledging that international success is nearly impossible without international coordination and guidance. Regulations can take on numerous characteristics of countries and acknowledge that international regulation must consider the complicated and unique contexts of each country. The creation and application of international regulation is not one that will be easy, but it is one, in this time of anonymity and transnationality, that is necessary.

NAVIGATING THE SOUTH CHINA SEA: ANALYZING THE CURRENT DISPUTE OVER SOVEREIGNTY, MARITIME ZONES, AND MARITIME RIGHTS

Chase M. Seymour

INTRODUCTION

This note serves two purposes regarding the South China Sea dispute. The first purpose is to explain and analyze the claims that the People's Republic of China (PRC) has made concerning the waters, land features, and resources in and near the South China Sea. These explanations and analyses are divided into three sections based on the PRC's claims. The first section explains the PRC's "historic rights" claim and analyzes how Chinese history, the third United Nations Convention for the Law of the Sea (UNCLOS III), and the 2016 *South China Sea Arbitration* (the Arbitration) do not support the basis for this claim. This section further implements a factual background to the Cod Wars of the twentieth Century and draws parallels from that dispute and the current dispute in the South China Sea.

The next section explains the PRC's assertion of jurisdictional zones and maritime rights within twenty-four nautical miles from land features in the South China Sea. This section also analyzes how land features the PRC claims sovereignty over cannot generate jurisdictional waters or maritime rights under UNCLOS III based on the status of these land features and the inability to draw baselines around these them. Plus, this section includes the facts and ruling from *The Corfu Channel Case*, and how that ruling could be applied similarly to the idea of innocent passage in the South China Sea.

Finally, the third section explains the PRC's claims to jurisdictional waters beyond twenty-four nautical miles from land features in the South China Sea, the construction of artificial islands, and the maritime rights associated with both. Further, this section analyzes how these jurisdictional waters and maritime rights beyond twenty-four nautical miles are also invalid under UNCLOS III and how the PRC's construction of artificial islands is not permitted based on the provisions of UNCLOS III. Additionally, this section describes the importance of maritime rights beyond twenty-four miles by providing background on the Beagle Channel Conflict, which echoes similar sentiments when compared to the current South China Sea dispute.

The second purpose of this note is to analyze the issues that have arisen in international relations between the PRC and other countries both regionally and globally because of the PRC's claims in the South China Sea. This analysis will explore the regional effects these claims have on the Association of Southeast Asian Nations (ASEAN), specifically as it relates to ASEAN countries' abilities to fish and drill for oil and gas in their respective exclusive economic zone (EEZ) within the South China Sea. Additionally, this note will analyze the international relations between the PRC and countries outside of Southeast Asia, such as the United States (US) and its allies. However, the concerns the US and its allies have stem predominantly from a military and national security perspective, rather than an economic one. With both regional economic concerns and global national security concerns at play, actions must be taken at both the regional and global levels. ASEAN countries must work together if they wish to stand firm against the PRC's continuous intrusion into their waters, and the US must generate stronger ties through strategic

partnerships with other nations within the Indo-Pacific region to deter the PRC's aggression in the region.

THE PRC'S HISTORIC RIGHTS CLAIM

To first understand the PRC's claims to sovereignty and maritime rights in the South China Sea, it is important to note the historic root from which these claims stem.¹ The PRC has asserted that more than 2,000 years ago there were "activities of the Chinese people in the South China Sea," and through China's initial discovery and exploration of the South China Sea islands and waters, "territorial sovereignty and relevant rights and interests" were established.² Chinese scholars also contend the Chinese first discovered the islands in the South China Sea during the Han dynasty³ (206 BCE—220 CE).⁴ Additionally, during the Song dynasty (960—1279 CE)⁵ and the Yuan dynasty (1271—1368 CE)⁶ many Chinese accounts showed "the South China Sea [was] within China's national boundaries."⁷

Then, after the end of Japan's occupation of the South China Sea islands in World War II, China again took control over the islands and drew a map marked with "an eleven-dash line" around these islands and the majority of the South China Sea in 1947.⁸ Once the PRC "declared itself the sole legitimate representative of China" in 1949, the PRC "inherited all the nation's maritime claims in the region."⁹ This included recognizing the map with the Chinese eleven-dash line.¹⁰ This eleven-dash line would eventually become what is now commonly referred to today as the "nine-dash line" after two dashes were removed "to bypass the Gulf of Tonkin" as a favorable action towards North Vietnam, a fellow communist State,¹¹ in 1952.¹²

¹ See generally Ministry of Foreign Affairs, People's Republic of China, *Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea*, July 12, 2016, https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/201607/t20160712_679472.html [hereinafter Ministry of Foreign Affairs Sovereignty Statement].

² *Id.*

³ Srijan Shukla, *What is nine-dash line? The basis of China's claim to sovereignty over the South China Sea*, THE PRINT (July 28, 2020, 1:48 PM), <https://theprint.in/theprint-essential/what-is-nine-dash-line-the-basis-of-chinas-claim-to-sovereignty-over-south-china-sea/469403/> (last visited Oct. 24, 2022).

⁴ The Editors of Encyclopedia Britannica, *Han dynasty*, BRITANNICA (Sep. 2, 2022), <https://www.britannica.com/topic/Han-dynasty> (last visited Oct. 24, 2022).

⁵ The Editors of Encyclopedia Britannica, *Song dynasty*, BRITANNICA (Aug. 30, 2022), <https://www.britannica.com/topic/Song-dynasty> (last visited Oct. 24, 2022).

⁶ Mark Cartwright, *Yuan Dynasty*, WORLD HISTORY ENCYCLOPEDIA (Oct. 29, 2019), https://www.worldhistory.org/Yuan_Dynasty/ (last visited Oct. 24, 2022).

⁷ Shukla, *supra* note 3.

⁸ Liu Zhen, *What's China's 'nine-dash line' and why has it created so much tension in the South China Sea?*, SOUTH CHINA MORNING POST (July 12, 2016, 12:00 AM), <https://www.scmp.com/news/china/diplomacy-defence/article/1988596/whats-chinas-nine-dash-line-and-why-has-it-created-so> (last visited Oct. 24, 2022).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Hannah Beech, *Just Where Exactly Did China Get the South China Sea Nine-Dash Line From?*, TIME (July 19, 2016, 2:30 AM), <https://time.com/4412191/nine-dash-line-9-south-china-sea/> (last visited Oct. 24, 2022).

It was not until 2009 that attention was again brought to the nine-dash line.¹³ During a dispute with Vietnam, the PRC attached a map containing the nine-dash line in its submission to the United Nations (UN).¹⁴ However, the dashes on the 2009 map differed from the dashes on the 1947 map.¹⁵ Several of the new dashes gave the PRC “an even more expansive claim to the waterway” because the new dashes were located closer to the coasts of other Southeast Asian nations compared to the 1947 map.¹⁶ The PRC then “incorporate[d] a tenth dash line off Taiwan” onto an officially published map in 2013,¹⁷ to ensure that Taiwan “[was] counted as Chinese territory.”¹⁸

Although the PRC has asserted claims for historic rights to the South China Sea and asserted claims of sovereignty based on the nine-dash line, these claims appear to have substantial historical flaws.¹⁹ First, there were two official maritime bans during the Ming dynasty (1368—1644 CE).²⁰ The first sea ban during the Ming dynasty lasted from 1371 to 1509 CE, and the second sea ban during the Ming dynasty lasted from 1521 to 1529 CE.²¹ Because China’s emperors largely withdrew from seafaring exploration during the Ming dynasty, there is only “scarce cartographic proof of China’s claims to the South China Sea.”²² Furthermore, there was also a sea ban during the Qing dynasty (1644—1911), which was formalized in 1656 and “imposed a ban on all maritime activity.”²³ This sea ban during the Qing dynasty would not be lifted until 1684 CE.²⁴ With the restrictions put in place by Chinese emperors during these sea bans, the Chinese people were effectively cut off completely from asserting any maritime rights or interests in the South China Sea.²⁵ Therefore, these multiple sea bans implemented over the course of hundreds of years of dynasties cast doubt upon the PRC’s claims that the Chinese people established territorial sovereignty during China’s history.

Additionally, when analyzing the PRC’s historic rights claim and the nine-dash line under UNCLOS III, the PRC’s position is invalid.²⁶ The PRC, a signatory to UNCLOS III that ratified

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Euan Graham, *China’s new map: just another dash?*, THE STRATEGIST (Sep. 17, 2013), <https://www.aspistrategist.org.au/chinas-new-map-just-another-dash/> (last visited Oct. 30, 2022).

¹⁸ Beech, *supra* note 13.

¹⁹ See Capt. Aaron S. Wood, *Historically Mine: The (Potentially) Legal Basis for China’s Sovereignty Claims to Land in the South China Sea*, AIR UNIVERSITY J. OF INDO-PACIFIC AFFAIRS (Mar. 8, 2021), <https://www.airuniversity.af.edu/JIPA/Display/Article/2528218/historically-mine-the-potentially-legal-basis-for-chinas-sovereignty-claims-to/> (last visited Oct. 30, 2022).

²⁰ Yew Seng Tai, et al., *The impact of Ming and Qing dynasty maritime bans on trade ceramics recovered from coastal settlements in northern Sumatra, Indonesia*, ARCHEOLOGICAL RESEARCH IN ASIA, Vol. 21, (March 2020), <https://www.sciencedirect.com/science/article/pii/S2352226719300340>.

²¹ *Id.*

²² Beech, *supra* note 12.

²³ See Yew Seng Tai, et al, *supra* note 20.

²⁴ *Id.*

²⁵ See *Id.*

²⁶ See *The South China Sea Arbitration (The Republic of the Philippines v. The People’s Republic of China)*, Permanent Court of Arbitration (PCA) Case No. 2013-19, Award of July 12, 2016, para. 4, <https://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf> [hereinafter *The South China Sea Arbitration*].

the convention on June 7, 1996,²⁷ asserts that their claimed historic rights are consistent with international law under UNCLOS III.²⁸ However, this assertion is also incorrect.²⁹ UNCLOS III, which “forms the corpus of international law as it pertains to the oceans,”³⁰ does not have a provision that “preserv[es] or protect[s] historic rights that are at variance with [UNCLOS III].”³¹

The Philippines eventually brought a case to an arbitral tribunal under UNCLOS III (the Tribunal) and argued against the PRC for its historic rights and other maritime claims,³² which led to the Arbitration.³³ The issues that the Philippines asked the Tribunal to resolve included, among other things (which will be discussed later), that the PRC’s historic rights claim was invalid, and that any of the PRC’s “rights and entitlements in the South China Sea must be based on [UNCLOS III].”³⁴ The Tribunal determined in their findings that the PRC’s historic rights claims from the nine-dash line were “contrary to [UNCLOS III] and without lawful effect to the extent that they exceed the geographic and substantive limits of [the PRC’s] maritime entitlements.”³⁵

In making its determination, the Tribunal pointed out “that the exercise of freedoms permitted under international law cannot give rise to a historic right.”³⁶ The Tribunal further noted how the navigation, trade, and fishing that China engaged in throughout history “represented the exercise of high seas freedom” and that there was no basis for historic rights based on “[h]istorical navigation and fishing[] beyond the territorial sea.”³⁷ The Tribunal also stated that if the PRC wanted to assert a historic rights claim, it would have to have engaged in activities in the South China Sea that were not allowed under international law, such as restricting the exploitation of resources, while other States acquiesced the restrictions.³⁸

Although the findings from the Tribunal ruled in favor of the Philippines, the PRC has refused to accept or recognize the award.³⁹ In its response to the Tribunal’s awards, the PRC has stated that the awards “ha[ve] no binding force,” and that the PRC’s “territorial sovereignty and maritime rights and interests in the South China Sea” will not be affected by the awards granted from the Tribunal.⁴⁰ Despite the refusal to accept the awards granted by the Tribunal, the PRC has

²⁷ *Id.*

²⁸ Ministry of Foreign Affairs Sovereignty Statement, *supra* note 1.

²⁹ Oriana Skylar Mastro, *How China is Bending the Rules in the South China Sea*, STANFORD UNIVERSITY FREEMAN SPOGLI INSTITUTE FOR INT’L STUDIES (Feb. 17, 2021), <https://fsi.stanford.edu/news/how-china-bending-rules-south-china-sea>.

³⁰ JOSHUA EAGLE & SHI-LING HSU, OCEAN AND COASTAL RESOURCES LAW 11 (Rachel E. Barkow et al. eds., 3d ed. 2020).

³¹ *The South China Sea Arbitration*, *supra* note 26, at para. 246.

³² *Id.* at para. 7-10.

³³ *See Id.* at para. 1-2.

³⁴ *Id.*

³⁵ *Id.* at para. 278.

³⁶ *Id.* at para. 268.

³⁷ *Id.* at para. 269.

³⁸ *Id.* at para. 270.

³⁹ Ministry of Foreign Affairs, People’s Republic of China, *Statement of the Ministry of Foreign Affairs of the People’s Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines*, July 12, 2016, https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/201607/t20160712_679470.html. [hereinafter Ministry of Foreign Affairs Arbitration Statement].

⁴⁰ *Id.*

stated that it “will continue to abide by international law and basic norms governing international relations.”⁴¹ However, this assertion by the PRC appears to contradict its actions within, and even outside, the South China Sea.⁴² As the PRC appears to be increasing efforts to enforce its historic rights claims in the South China Sea, it is facing increasing counter measures from surrounding ASEAN countries.⁴³

Countries such as the Philippines and Vietnam have protested the PRC’s “incremental moves in the South China Sea” involving military transports and unilateral fishing bans.⁴⁴ Even Malaysia has summoned a Chinese ambassador to protest the PRC’s encroachment into Malaysia’s EEZ off the coast of Borneo in October 2021.⁴⁵ However, of particular note is the response from Indonesia to the PRC’s actions near the edge of the South China Sea.⁴⁶

Over the past two years, Indonesia and the PRC have both “summoned their envoys to” protest the other country’s activities in the Natuna Sea.⁴⁷ The PRC’s “Coast Guard and law enforcement ships” have restricted and harassed Indonesian fishermen in Indonesian fishing grounds in the North Natuna Sea.⁴⁸ Moreover, armed Chinese coast guard ships have provided protection for Chinese fishing fleets to raid the waters that are recognized by international law as exclusively belonging to Indonesia.⁴⁹ The PRC has recognized the Natuna Islands themselves as belonging to Indonesia but has asserted the nearby sea is “China’s traditional fishing grounds.”⁵⁰ There were clashes between Indonesian and Chinese boats in 2010 and 2013, but the dispute in the Natuna Sea began escalating shortly before the Tribunal’s decision in the 2016 Arbitration.⁵¹

In 2016, Indonesian authorities were involved in an incident approximately three miles from Indonesia’s Natuna Islands.⁵² Indonesian authorities discovered a Chinese trawler illegally fishing in Indonesian waters and “attempted to capture the trawler and arrest the crew.”⁵³ However, the Indonesian authorities were stopped by a Chinese coast guard ship, which demanded the Indonesian authorities release the Chinese fishermen before it rammed the Chinese trawler,

⁴¹ *Id.*

⁴² See Huynh Tâm Sáng, *Indonesia Seeks Local Partners to Offset Beijing in South China Sea*, THE MARITIME EXECUTIVE (Jan. 23, 2022, 5:11 PM), <https://maritime-executive.com/editorials/indonesia-seeks-local-partners-to-offset-beijing-in-south-china-sea>. (last visited Oct. 24, 2022).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ RFA Staff, *Chinese troops drive away fishing vessels from disputed waters*, RFA (Sep. 13, 2022), <https://www.rfa.org/english/news/china/chinese-troops-drive-away-fishing-vessels-09132022052956.html> (last visited Oct. 24, 2022).

⁴⁹ Hannah Beech & Muktita Suhartono, *China Chases Indonesia’s Fishing Fleets, Staking Claim to Sea’s Riches*, THE N.Y. TIMES (Mar. 31, 2020), <https://www.nytimes.com/2020/03/31/world/asia/Indonesia-south-china-sea-fishing.html> (last visited Oct. 24, 2022).

⁵⁰ *Id.*

⁵¹ Stuart Leavenworth, *South China: Indonesia summons Chinese ambassador as fishing dispute escalates*, THE GUARDIAN (Mar. 21, 2016, 12:34 AM), <https://www.theguardian.com/world/2016/mar/21/south-china-sea-indonesia-summons-chinese-ambassador-as-fishing-dispute-escalates> (last visited Oct. 24, 2022).

⁵² *Id.*

⁵³ *Id.*

pushing “it back into the South China Sea.”⁵⁴ This has not been the only run-in with Chinese coast guard and fishing vessels for Indonesia though.⁵⁵ In December 2019, several Chinese coast guard ships accompanied Chinese fishing boats in at least thirty different locations within Indonesian waters in the Natuna Sea.⁵⁶ This led to Indonesia issuing a diplomatic protest and summoning the Chinese ambassador to Jakarta before a weeks-long standoff began between Indonesian military warships and fighter jets and the Chinese coast guard.⁵⁷ It was not until mid-January 2020 that “the Chinese vessels had largely cleared” the North Natuna Sea.⁵⁸

This dispute between Indonesia and the PRC echoes all too similar of the Cod Wars between the United Kingdom (UK) and Iceland between the 1950s and 1970s.⁵⁹ The First Cod War began in 1958 when Iceland expanded its EEZ from four miles to twelve miles out of concern that foreign fishermen would overexploit Iceland’s fisheries.⁶⁰ However, the UK decided not to adhere to this new EEZ and continued fishing the original four-mile zone.⁶¹ Icelandic patrol boats then began firing at British trawlers within this four-mile EEZ, and as tensions escalated, the UK sent its warships to protect the British trawlers.⁶² The UK eventually recognized the new twelve-mile EEZ, but tensions spurred again during the Second and Third Cod Wars when Iceland expanded its EEZ two more times, eventually increasing its EEZ limit to the current 200 miles.⁶³ During the Second and Third Cod Wars, both countries’ vessels rammed and fired upon one another.⁶⁴ Icelandic patrol boats also cut British trawler nets and even went as far as impounding a British trawler and jailing its captain in one instance.⁶⁵ Finally, talks between the two countries took place in Oslo, Norway, and an agreement was reached in May 1976.⁶⁶

When comparing the historic Cod Wars and the current fishing dispute between Indonesia and the PRC in the South China Sea, the latter dispute appears to have more of a maritime sovereignty rights flavor rather than a dispute over pure customary fishing rights. Because the PRC has made clear that it will continue to assert its historical right claim⁶⁷ and has expressed a willingness to negotiate with Indonesia over the overlapping maritime rights and interests between the two countries,⁶⁸ the fishing rights seem less like a separate claim, and more like one that is part of the PRC’s overarching historical rights claim. Additionally, one of Indonesia’s foreign ministers

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Evan A. Laksmanna, *Indonesia, China, and the Natuna Linchpin*, THE DIPLOMAT (Mar. 1, 2020), <https://thediplomat.com/2020/02/indonesia-china-and-the-natuna-linchpin/> (last visited Oct. 24, 2022).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See *The Cod Wars*, BRITISH SEA FISHING, <https://britishseafishing.co.uk/the-cod-wars/>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See Ministry of Foreign Affairs Arbitration Statement, *supra* note 39.

⁶⁸ ANI, *Indonesia rejects any negotiations, says China’s ‘nine-dash line’ puts economic interest at risk*, ANI (Oct. 31, 2022, 2:46 AM), <https://www.aninews.in/news/world/asia/indonesia-rejects-any-negotiations-says-chinas-nine-dash-line-puts-economic-interest-at-risk20221026065901/> (last visited Nov. 1, 2022).

expressed earlier in 2022 that the PRC's nine-dash line threatened Indonesian economic interests,⁶⁹ which also signals Indonesia might not view the fishing rights as a standalone issue either.

However, Indonesia has refused to even entertain the PRC's negotiation offer and has flatly rejected any negotiation efforts by the PRC regarding its nine-dash line.⁷⁰ Indonesia asserts that the PRC's claims have no bearing under UNCLOS III, so there are no overlapping claims between the two countries.⁷¹ Plus, since the Tribunal already determined that the PRC's historic rights claim conflicted with UNCLOS III in 2016, this ruling under international law would bolster Indonesia's position.⁷² Further, eleven other littoral countries around the world have publicly rejected the PRC's historic rights claim.⁷³ Given the "geographic and substantive scope" of this historic rights claim, and a lack of foundation based on international law, the PRC's unlawful attempts to base its maritime entitlements under international law in this historic rights claim "gravely undermines the rule of law in the oceans."⁷⁴

SOVEREIGNTY OF "ISLANDS" AND MARITIME RIGHTS WITHIN TWENTY-FOUR NAUTICAL MILES

The PRC has asserted sovereignty over islands and other features in the South China Sea, which the PRC collectively calls "Nanhai Zhudao."⁷⁵ This is sometimes referred to in English as the "Four Sha."⁷⁶ Nanhai Zhudao consists of four "island groups" (or qundao), named: Dongsha Qundao (which contains Pratas Island); Xisha Qundao (which contains the Paracel Islands); Zhongsha Qundao (which contains the Scarborough Reef); and Nansha Qundao (which contains the Spratly Islands).⁷⁷ Although the name "island groups" might imply that all features of these groups are in fact islands, each of the island groups contains features that do not fit within the definition of "island" under UNCLOS III.⁷⁸ However, the PRC still asserts that other features such as reefs, shoals, and cays should be considered as a whole in regard to each island group.⁷⁹ The PRC believes that when all of these features are considered as one archipelago within the island group, sovereignty applies to all features within that archipelago.⁸⁰

This interpretation by the PRC completely ignores the definitions established by UNCLOS III though.⁸¹ For example, when looking specifically at Nansha Qundao, the PRC claims sovereignty to more than "200 features, most of which are submerged."⁸² This would include

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Laksmana, *supra* note 56.

⁷³ U.S. Dep't of State Bureau of Oceans and Int'l Env't and Sci. Aff., *Limits in the Seas No. 150 (People's Republic of China: Maritime Claims in the South China Sea)* 28-9 (Jan. 2022).

⁷⁴ *Id.* at 30.

⁷⁵ *Id.* at 11.

⁷⁶ Pham Ngoc Minh Trang, *Lawfare in the South China Sea: The Latest US Moves*, USALI PERSPECTIVES, Vol. 2, No. 15, Feb. 17, 2022, <https://usali.org/usali-perspectives-blog/lawfare-in-the-south-china-sea-the-latest-us-moves> (last visited Oct. 24, 2022).

⁷⁷ U.S. Dep't of State Bureau of Oceans and Int'l Env't and Sci. Aff., *supra* note 73, at 11.

⁷⁸ *Id.* at 12.

⁷⁹ *Id.* at 13.

⁸⁰ *Id.*

⁸¹ *Id.* at 29-30.

⁸² *Id.* at 13.

“entirely submerged features” like James Shoal and Reed Bank, as well as features that have “low-tide elevations in their natural state” like Mischief Reef and Second Thomas Shoal, all of which lie beyond the PRC’s territorial seas.⁸³ Article 121(1) of UNCLOS III defines an island as “a naturally formed area of land, surrounded by water, which is above water at high tide.”⁸⁴ Islands are considered land territory and “can be subject to lawful sovereignty claim[s],”⁸⁵ but the same cannot necessarily be said for low-tide elevations and submerged features.⁸⁶ Article 13(1) of UNCLOS III defines a low-tide elevation as “a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide,”⁸⁷ while submerged features are submerged at both low and high tides.⁸⁸

A coastal state (such as the PRC) can only exercise sovereignty over low-tide elevations and submerged features if the low-tide elevations and submerged features lie within the territorial sea limit.⁸⁹ The territorial sea is a limit of twelve nautical miles that is “measured from baselines determined in accordance with [UNCLOS III].”⁹⁰ Under Article 7(1) of UNCLOS III, a coastal state can draw straight baselines “if there is a fringe of islands in the immediate vicinity of the coast.”⁹¹ Additionally, Article 47(1) states:

An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.⁹²

Despite these definitions laid out in UNCLOS III, the PRC has applied straight baselines in areas that straight baselines should not be applied.⁹³ The PRC formally promulgated straight baselines around Xisha Qundao.⁹⁴ Plus, it appears that the PRC has not yet formally claimed straight baselines around Dongsha Qundao, Zhongsha Qundao, and Nansha Qundao, but has expressed that straight baselines apply to these three island groups as well.⁹⁵

When analyzing the validity behind the PRC’s straight baseline assertion regarding Xisha Qundao, there are two unfavorable facts that the PRC is unable to overcome. First, Xisha Qundao

⁸³ *Id.* at 13.

⁸⁴ U.N. Convention on the Law of the Sea art. 121(1), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS III].

⁸⁵ U.S. Dep’t of State Bureau of Oceans and Int’l Env’t and Sci. Aff., *supra* note 73, at 6

⁸⁶ See UNCLOS III, *supra* note 84, art. 7, 13, & 47.

⁸⁷ *Id.* at art. 13(1).

⁸⁸ U.S. Dep’t of State Bureau of Oceans and Int’l Env’t and Sci. Aff., *supra* note 73, at 7.

⁸⁹ *Id.* at 6.

⁹⁰ UNCLOS III, *supra* note 84, art. 3.

⁹¹ *Id.* at art. 7(1).

⁹² *Id.* at art. 47(1).

⁹³ U.S. Dep’t of State Bureau of Oceans and Int’l Env’t and Sci. Aff., *supra* note 73, at 1.

⁹⁴ *Id.* at 14.

⁹⁵ *Id.* at 14-5.

lies over 200 miles southeast of Hainan Island, China,⁹⁶ an island province of the PRC.⁹⁷ The distance from the PRC's mainland coast to Xisha Qundao would certainly not be "in the immediate vicinity" of the PRC's coastline under Article 7(1).⁹⁸ Second, the PRC is not an archipelagic state.⁹⁹ This would render it incapable of drawing straight baselines around these islands and other features.¹⁰⁰

The same analysis used for Xisha Qundao can be applied to the other three island groups, even though the PRC has not officially claimed straight baselines around those island groups.¹⁰¹ Xisha Qundao, Zhongsha Qundao, and Nansha Qundao all exceed the water-to-land ratio (with estimates being 37-to-1, 1282-to-1, and 951-to-1, respectively).¹⁰² Although Dongsha Qundao has a water-to-land ratio of 5-to-1,¹⁰³ it still does not satisfy Article 7 in regard to straight baselines.¹⁰⁴ Features within Dongsha Qundao, like North Vereker Bank and South Vereker Bank, which are submerged and are not "a fringe of islands in the immediate vicinity" under Article 7(1), would fail to meet the requirements for straight baselines.¹⁰⁵ Therefore, straight baselines could not be applied to Dongsha Qundao either.¹⁰⁶

In addition to the territorial seas surrounding each island group, the PRC believes it has rights to the contiguous zones beyond its territorial seas and rights to internal waters inside the straight baselines drawn around Nanhai Zhudao.¹⁰⁷ According to Article 33(2) of UNCLOS III, the contiguous zone includes waters that extend no more than "24 nautical miles from the baselines from which the territorial sea is measured."¹⁰⁸ Internal waters are defined under Article 8(1) of UNCLOS III as being the "waters on the landward side of" a coastal state's baseline.¹⁰⁹ Additionally, under Article 8(2), waters within straight baselines can be internal waters but are only considered internal waters if the straight baselines are drawn in accordance with UNCLOS III.¹¹⁰ However, because the PRC's straight baselines have not been drawn in accordance with UNCLOS III (as discussed previously), the PRC's claims to internal waters and the contiguous zone surrounding Nanhai Zhudao are invalid under UNCLOS III.¹¹¹

After analyzing how straight baselines determine the breadth of a coastal state's internal waters, territorial seas, and contiguous zones, it is also important to note the rights carried with

⁹⁶ The Editors of Encyclopaedia Britannica, *Paracel Islands*, BRITANNICA (Sep. 10, 2020), <https://www.britannica.com/place/Paracel-Islands> (last visited Oct. 24, 2022).

⁹⁷ Victor C. Falkenheim, *Hainan*, BRITANNICA, <https://www.britannica.com/place/Hainan> (last updated Oct 14, 2022).

⁹⁸ See UNCLOS III, *supra* note 84, at art. 7(1).

⁹⁹ Mastro, *supra* note 29.

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² U.S. Dep't of State Bureau of Oceans and Int'l Env't and Sci. Aff., *supra* note 73, at 23.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 16.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Ministry of Foreign Affairs Sovereignty Statement, *supra* note 1.

¹⁰⁸ UNCLOS III, *supra* note 84, at art. 33(2).

¹⁰⁹ *Id.* at art. 8(1).

¹¹⁰ *Id.* at art. 8(2).

¹¹¹ U.S. Dep't of State Bureau of Oceans and Int'l Env't and Sci. Aff., *supra* note 73, at 24, 30.

each of these zones. In addition to the PRC's claims to internal waters, territorial seas, and contiguous zones surrounding and within the straight baselines of Nanhai Zhudao, the PRC has asserted entitlement to the rights within each of these jurisdictional zones.¹¹² First, a coastal state's internal waters are "subject to the jurisdiction and the laws of the coastal [State]" to which these waters belong.¹¹³ Moreover, a coastal state also has "complete control and sovereignty" over its territorial seas.¹¹⁴ Finally, a coastal state can prevent and punish "infringement of its customs, fiscal, immigration or sanitary laws and regulations within" their contiguous zone.¹¹⁵

However, there are two important exceptions regarding a coastal state's ability to regulate its territorial seas – the transit passage and innocent passage exceptions.¹¹⁶ In order for passage to exist at all, navigation by a vessel must be "continuous and expeditious."¹¹⁷ Transit passage "applies to straits which are used for international navigation" between high seas or EEZs.¹¹⁸ Further, Article 19(1) of UNCLOS III defines innocent passage as passage that "is not prejudicial to the peace, good order or security of the coastal State."¹¹⁹ Also, there is no distinction between commercial ships and warships in this article.¹²⁰ Additionally, Article 21 of UNCLOS III provides that "coastal State[s] may adopt laws and regulations" for innocent passage in its territorial seas,¹²¹ and that foreign ships must comply "with all such laws and regulations."¹²² Most importantly though, a coastal state is able to temporarily suspend innocent passage by foreign ships in its territorial seas for "protection of its security, including weapons exercises" if the coastal state publishes the suspension.¹²³

The maritime rights associated with these jurisdictional waters are important to the PRC, as it has expressed that it firmly opposes activities that infringe on its "rights and interests in relevant maritime areas."¹²⁴ This firm opposition extends to the freedom of navigation operations (FONOPs) the US has been conducting since 2015.¹²⁵ In 2015, the US began sending its warships, without any announcement or prior permission, through what the PRC would consider its twelve nautical mile territorial seas.¹²⁶ The US has continuously asserted that this navigation by its warships is innocent passage, the warships have not conducted any other activities while passing through the alleged jurisdictional waters, and have "among other things, turn[ed] off fire-control

¹¹² See Ministry of Foreign Affairs Sovereignty Statement, *supra* note 1.

¹¹³ EAGLE & HSU, *supra* note 30, at 15.

¹¹⁴ *Id.* at 16.

¹¹⁵ UNCLOS III, *supra* note 84, at art. 33(1).

¹¹⁶ EAGLE & HSU, *supra* note 30, at 16.

¹¹⁷ UNCLOS III, *supra* note 84, at art. 18.

¹¹⁸ *Id.* at art. 37.

¹¹⁹ *Id.* at art. 19(1).

¹²⁰ See *Id.* at art. 19.

¹²¹ *Id.* at art. 21(1).

¹²² *Id.* at art. 21(4).

¹²³ *Id.* at art. 25(3).

¹²⁴ Ministry of Foreign Affairs Sovereignty Statement, *supra* note 1.

¹²⁵ See David B. Larer, *In challenging China's claims in the South China Sea, the US Navy is getting more assertive*, DEFENSE NEWS (Feb. 5, 2020), <https://www.defensenews.com/naval/2020/02/05/in-challenging-chinas-claims-in-the-south-china-sea-the-us-navy-is-getting-more-assertive/>.

¹²⁶ Annie Kowaleski, *FONOPs in the South China Sea*, INST. FOR CHINA-AMERICA STUDIES (Nov. 1, 2016), <https://chinaus-icas.org/research/fonops-in-the-south-china-sea/> (last visited Oct. 24, 2022).

radars and refrain[ed] from operating helicopters” during the passage.¹²⁷ Through its so called “innocent passage,” the US has framed its passage as a challenge to “excessive claims by all powers in the region,” and has specifically challenged the belief that innocent passage requires prior notification.¹²⁸

However, the PRC has viewed these FONOPs “as irritating and unlawful intrusions into its waters.”¹²⁹ The PRC believes it has the ability to regulate its territorial seas by requiring “prior approval for warships.”¹³⁰ Plus, in response to these FONOPs, Chinese officials have contended that the PRC’s “sovereignty and security interests” have been threatened.¹³¹ During one specific FONOP in January 2020, the PRC sent two fighter-bombers to intimidate the *USS Montgomery* as it sailed within the claimed territorial seas of the Spratly Islands.¹³² Since this incident, the US has continued to send warships through these disputed waters despite the PRC’s continued complaints.¹³³ Although there has not been actual armed conflict yet, and only the threat of armed conflict,¹³⁴ the tension between the two nations appears similar to *The Corfu Channel Case* between the UK and Albania shortly after World War II.¹³⁵

The Corfu Channel is a body of water that separates the Greek island of Corfu from the coast of Albania.¹³⁶ “In May 1946 British warships passed through the Corfu Channel,” which is Albanian territorial waters, causing Albanian batteries to begin firing upon the British warships.¹³⁷ In response to this, the UK sent more British warships through the Corfu Channel on October 22, 1946, but during the passage through the Corfu Channel two of the ships struck mines.¹³⁸ This resulted in the deaths of forty-four British sailors and injured another forty-two.¹³⁹ Following this disaster, the British sent minesweepers through the Corfu Channel in November 1946, and discovered that the channel had been recently mined.¹⁴⁰

This incident led to a case that was subsequently brought before the International Court of Justice (ICJ), which rendered a decision in April 1949.¹⁴¹ The UK argued that its passage through

¹²⁷ *Id.*

¹²⁸ Larter, *supra* note 125.

¹²⁹ *Id.*

¹³⁰ Kowaleski, *supra* note 126.

¹³¹ *Id.*

¹³² Larter, *supra* note 125.

¹³³ See Sam Lagrone, *U.S. Destroyer Performs South China Sea FONOP; China Says it Expelled Warship*, U.S. NAVAL INST. (July 13, 2022, 7:35 AM), <https://news.usni.org/2022/07/13/u-s-destroyer-performs-south-china-sea-fonop-china-says-it-expelled-warship>.

¹³⁴ Larter, *supra* note 128.

¹³⁵ See *The Corfu Channel Case* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, Gen. List No. I (Apr. 9) [hereinafter *The Corfu Channel Case*].

¹³⁶ EAGLE & HSU, *supra* note 30, at 16.

¹³⁷ *The Corfu Channel Case, United Kingdom of Great Britain and Northern Ireland v. the People’s Republic of Albania*, INFORMEA, <https://www.informea.org/en/court-decision/corfu-channel-case-united-kingdom-great-britain-and-northern-ireland-v-people%E2%80%99s> (last visited Oct. 24, 2022).

¹³⁸ *The Corfu Channel Case*, *supra* note 135, at 12-3.

¹³⁹ *Id.* at 10.

¹⁴⁰ *Id.* at 13.

¹⁴¹ A judgment was also rendered in March 1948, but this judgment related to a jurisdictional question Albania had raised. The second judgment, which is relevant to purposes of this article, focuses on the questions of innocent passage and sovereign rights relating to the Corfu Channel. See generally *Id.* at 4-6.

the Corfu Channel had been innocent passage, and that Albania's failure to notify the British warships of the minefield "was a violation of the right of innocent passage."¹⁴² Conversely, Albania argued that the British warships' passage in October 1946 was not innocent, Albania had no knowledge of the mines in the Corfu Channel, and British warships were not entitled to sweep for mines in Albania's territorial waters.¹⁴³

The ICJ concluded that the British warships' passage through the Corfu Channel in October 1946 was in fact innocent, and that States had the right to send warships through international straits during peace time if the passage was innocent.¹⁴⁴ Further, the ICJ determined that the mines that were laid in the Corfu Channel "could not have been accomplished without the knowledge of the Albanian government."¹⁴⁵ However, the ICJ also found that the sweeping of mines by British warships in November 1946 "violated the sovereignty of Albania" because the act of sweeping for mines meant that the warships were no longer engaging in innocent passage.¹⁴⁶

By following the decision set forth in *The Corfu Channel Case*, along with application of UNCLOS III, which now serves as a governing body of international law,¹⁴⁷ the situation in the South China Sea with US FONOPs is clearer. First, since US warships do not conduct any military activity while passing through the PRC's alleged territorial seas, the US is complying with UNCLOS III¹⁴⁸ and appears to be following the ruling set forth in *The Corfu Channel Case*.¹⁴⁹ Next, by applying the rules set forth under UNCLOS III to the all the features of Nanhai Zhudao, the PRC does not have a solid claim to sovereignty to various features within the South China Sea, nor can it claim straight baselines with all of these features.¹⁵⁰ Furthermore, this failure to establish sovereignty and straight baselines was also determined during the 2016 Arbitration, as many of the features within Nanhai Zhudao were found to be incapable generating any maritime zones or rights.¹⁵¹ The US shares the position that, because many of the features the PRC has claimed in the South China Sea "are not subject to a lawful sovereignty claim," many of these features are not capable of producing maritime zones under UNCLOS III.¹⁵²

Other countries have also protested the PRC's baselines as unlawful under UNCLOS III, including: Australia, Japan, New Zealand, the Philippines, Vietnam, France, and Germany.¹⁵³ These countries that have publicly protested "the PRC's legal position" has shown to be "a particularly forceful rejection" to the PRC's claims of sovereignty and maritime rights.¹⁵⁴ Despite this "particularly forceful rejection" by several countries against the PRC's sovereignty and maritime rights claims,¹⁵⁵ there are several countries that agree with the PRC's position that

¹⁴²*Id.*, at 10.

¹⁴³*Id.* at 11-2.

¹⁴⁴*Id.* at 10..

¹⁴⁵*Id.*

¹⁴⁶*Id.*

¹⁴⁷ See generally UNCLOS III, *supra* note 84, Preamble.

¹⁴⁸ Kowaleski, *supra* note 126.

¹⁴⁹ See *The Corfu Channel Case*, *supra* note 135, at 15-35.

¹⁵⁰ Mastro, *supra* note 29.

¹⁵¹ *The South China Sea Arbitration*, *supra* note 26, at 643-7.

¹⁵² U.S. Dep't of State Bureau of Oceans and Int'l Env't and Sci. Aff., *supra* note 73, at 1.

¹⁵³ *Id.* at 16 & 20.

¹⁵⁴ *Id.* at 20.

¹⁵⁵ *Id.*

warships do not have an “an automatic right of innocent passage through [a State’s] territorial seas.”¹⁵⁶ The countries that share this view with the PRC include: “Argentina, Brazil, India, Indonesia, Iran, Malaysia, the Maldives, Oman, and Vietnam.”¹⁵⁷

Although some ASEAN countries reject Nanhai Zhudao’s baselines under UNCLOS III¹⁵⁸ yet share the same view of innocent passage as the PRC,¹⁵⁹ this shared view of innocent passage is not because the ASEAN countries align themselves with the PRC.¹⁶⁰ This view on innocent passage stems from ASEAN interpretations of UNCLOS III¹⁶¹ and their regional commitments.¹⁶² The regional commitments include the Zone of Peace, Freedom and Neutrality (ZOPFAN) Declaration and the Treaty on the Southeast Asia Nuclear Weapon-Free Zone,¹⁶³ also known as the Bangkok Treaty.¹⁶⁴ The ZOPFAN Declaration, which was signed by the original five ASEAN countries in 1971, declared that they would ensure Southeast Asia remains “free from any form or manner of interference by outside Powers” so that it can “achiev[e] a lasting peace in South East Asian Nations.”¹⁶⁵ The Bangkok Treaty, created later in 1995, reaffirmed ASEAN countries’ commitment to preserving Southeast Asia as a neutral and peaceful zone and declared that it was “a region free of nuclear and other weapons of mass destruction.”¹⁶⁶

Because of the ASEAN commitment to preserve neutrality and peace in the region, the US FONOPs may not appear as “peaceful” as the US believes these FONOPs are. Plus, with ASEAN interpretation of innocent passage differing from the US-Australia view,¹⁶⁷ the US lacks the regional support it needs in the South China Sea. However, the US still has strength in its assertion that the PRC’s baselines are invalid. The failure to establish lawful baselines and jurisdictional waters under UNCLOS III,¹⁶⁸ the rejection of its asserted baselines by numerous countries,¹⁶⁹ and the Arbitration’s adverse ruling regarding maritime zones around many land features,¹⁷⁰ still presents the PRC with a challenging threshold to overcome.

¹⁵⁶ Mastro, *supra* note 29.

¹⁵⁷ *Id.*

¹⁵⁸ U.S. Dep’t of State Bureau of Oceans and Int’l Env’t and Sci. Aff., *supra* note 73, at 16 & 20.

¹⁵⁹ Mastro, *supra* note 29.

¹⁶⁰ Event Report, *Understanding Freedoms of Navigation – ASEAN Perspectives*, S. RAJARATNAM SCH. INT’L STUD. (Mar. 7, 2021), https://www.rsis.edu.sg/wp-content/uploads/2017/08/ER170808_Freedom-of-Navigation_WEB.pdf.

¹⁶¹ *Id.*

¹⁶² See William Choong & Ian Storey, *Southeast Asian Responses to AUKUS: Arms Racing, Non-Proliferation and Regional Stability*, ISEAS YUSOF ISHAK INST. 3 (2021).

¹⁶³ See *Id.*

¹⁶⁴ Overview, *Southeast Asia Nuclear Weapon-Free Zone (SEANWFZ)*, ASS’N OF SE. ASIAN NATIONS, (last visited Feb. 19, 2023), <https://asean.org/our-communities/asean-political-security-community/peaceful-secure-and-stable-region/southeast-asia-nuclear-weapon-free-zone-seanwfz/#:~:text=On%2015%20December%201995%2C%20ASEAN,known%20as%20the%20Bangkok%20Treaty> [hereinafter SEANWFZ].

¹⁶⁵ Zone of Peace, Freedom and Neutrality Declaration, Nov. 27, 1971, Kuala Lumpur, Malaysia, (Nov. 27, 1971).

¹⁶⁶ SEANWFZ, *supra* note 164.

¹⁶⁷ Mastro, *supra* note 29.

¹⁶⁸ *Id.*

¹⁶⁹ U.S. Dep’t of State Bureau of Oceans and Int’l Env’t and Sci. Aff., *supra* note 73, at 20.

¹⁷⁰ *The South China Sea Arbitration*, *supra* note 26, at para. 571-6.

MARITIME RIGHTS BEYOND TWENTY-FOUR NAUTICAL MILES AND ARTIFICIAL ISLANDS

In addition to the jurisdictional zones and maritime rights within twenty-four nautical miles of a coastal state's baseline, a coastal state has sovereignty over more jurisdictional zones and rights beyond its twenty-four nautical mile boundary as well.¹⁷¹ These jurisdictional zones are known as the EEZ and continental shelf, and each of these jurisdictional zones carries with it certain maritime rights.¹⁷² In addition to the maritime zones and rights within twenty-four nautical miles of Nanhai Zhudao, the PRC has also claimed maritime zones and rights to an "[EEZ] and continental shelf[]" based on Nanhai Zhudao.¹⁷³

UNCLOS III allows coastal States to have an EEZ, which is defined under Article 57 as a zone that "shall not extend beyond 200 nautical miles from the baselines from which the [end] of the territorial sea is measured."¹⁷⁴ However, if two coastal states' EEZs are close enough to overlap, "the boundary is drawn halfway in between the competing EEZ lines."¹⁷⁵ Additionally, Article 56(1) of UNCLOS III states that a coastal state has sovereign rights to explore and exploit natural resources within the waters and seabed of its EEZ, construct artificial islands, and produce energy "from the water, currents and winds" of its EEZ.¹⁷⁶ Coastal states can also "establish reasonable safety zones . . . to ensure the safety of both navigation and of [its] artificial islands, installations and structures."¹⁷⁷ However, other states (whether land-locked or coastal) have the freedom "of navigation and overflight," to lay "submarine cables and pipelines,"¹⁷⁸ and for "submarines [to] pass without surfacing" through another state's EEZ.¹⁷⁹

Furthermore, UNCLOS III allows for a coastal state to have rights to claim a continental shelf.¹⁸⁰ Article 76(1) defines a continental shelf as "the seabed and subsoil of the submarine areas that extend[s]" to the natural extension "of its land territory to the outer edge of the continental margin," or 200 nautical miles from the end of baselines of the territorial sea.¹⁸¹ A coastal state "can claim a larger continental shelf"¹⁸² though if the coastal state can establish "the outer edge of the continental margin" extends beyond 200 nautical miles from the edge of the territorial sea.¹⁸³ Within the limits of the continental shelf, a coastal state can exercise sovereignty to explore and exploit the natural resources "of the seabed and subsoil."¹⁸⁴ This sovereignty exercised by a coastal

¹⁷¹ See UNCLOS III, *supra* note 84, art. 56-8, 60, 76-7, 79, & 80-1.

¹⁷² See *id.*

¹⁷³ Ministry of Foreign Affairs Sovereignty Statement, *supra* note 1.

¹⁷⁴ UNCLOS III, *supra* note 84, art. 57.

¹⁷⁵ EAGLE & HSU, *supra* note 30, at 23.

¹⁷⁶ UNCLOS III, *supra* note 84, art. 56(1).

¹⁷⁷ *Id.* at art. 60(4).

¹⁷⁸ *Id.* at art. 58(1).

¹⁷⁹ EAGLE & HSU, *supra* note 30, at 25.

¹⁸⁰ See UNCLOS III, *supra* note 84, art. 77.

¹⁸¹ *Id.* at art. 76(1).

¹⁸² EAGLE & HSU, *supra* note 30, at 26.

¹⁸³ UNCLOS III, *supra* note 84, art. 76(4).

¹⁸⁴ *Id.*

state does not need to be expressly proclaimed to apply¹⁸⁵ and is exclusive, so “no one may undertake these activities without the express consent of the coastal State.”¹⁸⁶

However, the PRC’s claims to an EEZ and continental shelf extending from the natural features of Nanhai Zhudao are inconsistent with UNCLOS III as well.¹⁸⁷ Many of the features within Nanhai Zhudao’s island groups are not considered islands under Article 121 and do not have straight baselines that comply with Article 7.¹⁸⁸ Without the ability to have sovereignty over these natural features and to produce straight baselines around these island groups, maritime zones like internal waters, territorial seas, contiguous zones, EEZs, and continental shelves cannot be generated.¹⁸⁹ Despite this inability for the PRC to possess sovereignty over the natural features within Nanhai Zhudao and to draw straight baselines around the Four Sha,¹⁹⁰ this still leaves a lingering question: Does this apply to artificial islands?

In 2014 the PRC began constructing artificial islands around reefs within Nansha Qundao and Xisha Qundao.¹⁹¹ Some of the artificial islands that have since been “transformed into significant military facilities”¹⁹² include “Mischief Reef, Subi Reef, and Fiery Cross [Reef]” in Nansha Qundao, and Woody Island in Xisha Qundao.¹⁹³ This construction has included building climate controlled hangars¹⁹⁴ and runways “used for the deployment of Chinese fighter jets,” as well as putting “anti-ship cruise missiles and long-range surface-to-air missiles on the [] Spratly Islands.”¹⁹⁵ Not only has the PRC claimed these artificial islands as its own territory,¹⁹⁶ but also that its military buildup on these islands is defensive and not provocative.¹⁹⁷

Although Article 60(1) of UNCLOS III provides that coastal states have “the exclusive right to” build artificial islands, installations, and structures,¹⁹⁸ there are still limitations to building artificial islands and limitations on the maritime rights associated with artificial islands.¹⁹⁹ First, a coastal state’s building of artificial islands, installations, and structures must take place *within its*

¹⁸⁵ *Id.* at art. 77(3).

¹⁸⁶ *Id.* at art. 77(2).

¹⁸⁷ U.S. Dep’t of State Bureau of Oceans and Int’l Env’t and Sci. Aff., *supra* note 73, at 30.

¹⁸⁸ *Id.* at 29.

¹⁸⁹ *Id.* at 30.

¹⁹⁰ *Id.*

¹⁹¹ Luis Martinez, *Why the US Navy sails past dispute artificial islands claimed by China*, ABC NEWS (May 6, 2019, 11:19 AM), <https://abcnews.go.com/Politics/us-navy-sails-past-disputed-artificial-islands-claimed/story?id=60993256> (last visited Oct. 30, 2022).

¹⁹² *Id.*

¹⁹³ See Associated Press, *China has fully militarized three islands in South China Sea, US admiral says*, THE GUARDIAN (Mar. 20, 2022, 9:47 PM), <https://www.theguardian.com/world/2022/mar/21/china-has-fully-militarized-three-islands-in-south-china-sea-us-admiral-says#:~:text=2022%2021.47%20EDT-,China%20has%20fully%20militarized%20at%20least%20three%20of%20several%20islands,a%20top%20US%20military%20commander> (last visited Oct. 30, 2022).

¹⁹⁴ Report N°315, *Competing Visions of International Order in the South China Sea*, INT’L CRISIS GROUP (Nov. 29, 2021), <https://www.crisisgroup.org/asia/north-east-asia/china/315-competing-visions-international-order-south-china-sea> (last visited Oct. 30, 2022).

¹⁹⁵ Martinez, *supra* note 191.

¹⁹⁶ *Id.*

¹⁹⁷ Report N°315, *supra* note 194.

¹⁹⁸ UNCLOS III, *supra* note 84, art. 60(1).

¹⁹⁹ See *Id.*

own EEZ²⁰⁰ (emphasis added). Plus, coastal states are permitted to regulate “customs, fiscal, health, safety and immigration laws and regulations” regarding these artificial islands under Article 60(2).²⁰¹ However, states are not permitted to “construct artificial islands and structures for military purposes.”²⁰² Additionally, Article 60(8) makes clear that “[a]rtificial islands, installations and structures do not possess the status of islands.”²⁰³ This means that artificial islands, installations, and structures cannot have their own territorial sea, “and their presence does not affect the delimitation of the territorial sea, the [EEZ] or the continental shelf.”²⁰⁴ Finally, Article 80 notes that “Article 60 applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf.”²⁰⁵

After reviewing the UNCLOS III provisions associated with artificial islands, it is also beneficial to look to the 2016 Arbitration to gain a deeper understanding on the artificial islands the PRC built in the South China Sea. In the 2016 Arbitration decision, first the Tribunal found that Fiery Cross Reef, Mischief Reef, and Subi Reef are all “547.7 nautical miles. . . 616.2 nautical miles. . . [and] 502.2 nautical miles” from the PRC’s baseline that is adjacent to Hainan.²⁰⁶ This meant that Fiery Cross Reef, Mischief Reef, and Subi Reef, all lied beyond the PRC’s EEZ.²⁰⁷ The Tribunal even concluded that Mischief Reef lied “125.4 nautical miles from the archipelagic baseline” of an island in the Philippines,²⁰⁸ so Mischief Reef actually fell within the Philippines’ EEZ.²⁰⁹ Since Mischief Reef fell within the Philippines’ EEZ, the PRC breached Article 60 “with respect to the Philippines’ sovereign rights in its [EEZ] and continental shelf” because the PRC was not allowed to build on this feature to begin with.²¹⁰ Plus, the Tribunal noted that the “[Article 60] provisions speak for themselves” and that only the Philippines had “exclusive decision-making and regulatory power” to construct and operate artificial islands, installations, and structures on Mischief Reef.²¹¹ Since the PRC’s construction on Mischief Reef made it “undoubtedly” an artificial island, the PRC should have sought permission from the Philippines before constructing this artificial island.²¹²

Despite this analysis using UNCLOS III, the PRC still refused to accept the Tribunal’s 2016 determination and has continued to assert that it has maritime rights to its EEZ, and continental shelf based on Nanhai Zhudao.²¹³ This has also led the PRC to claim that not only can it hold the rights of EEZs that are granted to coastal states,²¹⁴ but that it is also able to regulate foreign military activity within its claimed EEZ,²¹⁵ even though UNCLOS III has no such

²⁰⁰ *Id.*

²⁰¹ *Id.* at art. 60(2).

²⁰² EAGLE & HSU, *supra* note 30, at 26.

²⁰³ UNCLOS III, *supra* note 84, art. 60(8).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at art. 80.

²⁰⁶ *The South China Sea Arbitration*, *supra* note 26, at para. 286 & 289-90.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at para. 290.

²⁰⁹ *Id.* at para. 1043.

²¹⁰ *Id.*

²¹¹ *Id.* at para. 1035 & 1041.

²¹² *See id.* at para. 1037.

²¹³ Ministry of Foreign Affairs Arbitration Statement, *supra* note 39.

²¹⁴ Ministry of Foreign Affairs Sovereignty Statement, *supra* note 1.

²¹⁵ Mastro, *supra* note 29.

provision.²¹⁶ “Twenty other developing countries (including Brazil, India, Malaysia, and Vietnam)” also share the view that military activities within another country’s EEZ are not protected “under freedom of navigation.”²¹⁷ This comes into stark contrast with the US and Australian views that countries cannot limit “navigation or exercise any control” in EEZs for security purposes.²¹⁸

Military activities are not the only concern the PRC wishes to regulate in what it believes is its EEZ based on Nanhai Zhudao though.²¹⁹ In 2011, the PRC accused “Vietnam of violating its sovereignty” and severed submarine cables that belonged “to Vietnamese oil survey vessels.”²²⁰ More recently though, from July 2019 to October 2019, a Chinese survey vessel conducted surveys in Vietnam’s EEZ while being escorted by Chinese “Coast Guard and militia,” which harassed Vietnamese oil drilling operations in the area.²²¹ This same Chinese survey vessel then “conducted a survey off Malaysia in response to exploratory drilling” in Malaysia’s EEZ in 2020 and again in 2021.²²²

In 2021, the PRC also demanded Indonesia halt its extraction of oil and gas near the Natuna Islands,²²³ which was discovered in Indonesia’s Tuna block in 2014.²²⁴ Indonesia refused to comply with the PRC’s request though, which led to patrols from both countries around the “oil and gas fields.”²²⁵ Indonesian Navy corvettes shadowed Chinese Coast Guard cutters and a Chinese research ship for several weeks as the Chinese ships surveyed the seabed around the drilling location.²²⁶ Though no official protest was made by Indonesia, it recently announced it would construct new military facilities in the Natuna Islands and make the North Natuna Sea a special economic zone (SEZ), which will give tax breaks to foreign investment in oil and gas in the region.²²⁷

The emphasis the PRC has placed on its disputed EEZ appears to be similar to the emphasis Argentina and Chile put on a disputed EEZ in the south Atlantic Ocean, which came to be known

²¹⁶ See Cdr. Jon Marek, *US-China International Law Disputes in the South China Sea*, AIR UNIVERSITY WILD BLUE YONDER ONLINE J. (July 9, 2021), <https://www.airuniversity.af.edu/Wild-Blue-Yonder/Article-Display/Article/2685294/us-china-international-law-disputes-in-the-south-china-sea/> (last visited Oct. 30, 2022).

²¹⁷ Mastro, *supra* note 29.

²¹⁸ *Id.*

²¹⁹ Cdr. Jon Marek, *supra* note 216.

²²⁰ Louisa Lim, *A Dispute At Sea Escalates China, Vietnam Tensions*, NPR (June 14, 2011, 3:00 PM), <https://www.npr.org/2011/06/14/137182730/tensions-escalate-between-china-vietnam> (last visited Oct. 30, 2022).

²²¹ *What Lies Beneath: Chinese Surveys in the South China Sea*. ASIA MARITIME TRANSPARENCY INITIATIVE (Mar. 1, 2022), <https://amti.csis.org/what-lies-beneath-chinese-surveys-in-the-south-china-sea/> (last visited Nov. 24, 2022).

²²² *Id.*

²²³ Global Strat View Analysis, *China’s Tensions With Indonesia Over Natuna Islands*, GLOBAL STRAT VIEW (Aug. 22, 2022), <https://www.globalstratview.com/chinas-tensions-with-indonesia-over-natuna-islands/> (last visited Oct. 30, 2022).

²²⁴ John McBeth, *China spiking Indonesia’s off-shore oil and gas risk*, ASIA TIMES (Sep. 2, 2022), <https://asiatimes.com/2022/09/china-spiking-indonesias-offshore-oil-and-gas-risk/> (last visited Oct. 30, 2022).

²²⁵ Global Strat View Analysis, *supra* note 223.

²²⁶ McBeth, *supra* note 224.

²²⁷ *Id.*

as the Beagle Channel Dispute.²²⁸ In 1881, a treaty established that the Beagle Channel was to be the international border between Argentina and Chile.²²⁹ However, “the treaty did not specify the exact location of the channel,” and the issue became determining which country had sovereignty over the barren islands in the area.²³⁰ Should Chile claim sovereignty over the islands, it would be able to “establish an [EEZ] 200 miles into the South Atlantic” which would inhibit Argentina from projecting its influence in the region, the Falkland Islands, and Antarctica.²³¹

In 1971, the UK agreed to arbitrate the issue but after Argentina failed to accept the award of the islands to Chile in 1977,²³² both nations appeared to prepare for “large-scale military actions in four potential theaters of operation.”²³³ Before hostilities broke out, the two nations agreed to a mediation by the Vatican in 1978.²³⁴ This led to the “Treaty of Peace and Friendship” in 1984.²³⁵ The treaty awarded Chile the islands, “but prohibited Chile from claiming sovereignty or establishing an [EEZ] in the South Atlantic.”²³⁶

There appears to be parallels between Chile’s attempt to keep Argentina out of the South Atlantic waters it considered its EEZ,²³⁷ just as Indonesia has attempted to keep the PRC out of its EEZ.²³⁸ Although it does not yet appear that the situation in the South China Sea has escalated to near full-blown hostilities like in the Beagle Channel Dispute, tensions are certainly rising in the region between the PRC and Indonesia.²³⁹ In 2017, Indonesia renamed its EEZ near “the Natuna Islands in a bid to reassert its claims in the area.”²⁴⁰ Further, in August 2022, Indonesia conducted joint military drills with the US, “which saw the participation of more than 4,500 troops and personnel.”²⁴¹ Shortly after this joint military exercise, Indonesia deployed five navy vessels and air patrol “to ward off a growing Chinese paramilitary and coast guard presence in the area.”²⁴² Though neither the PRC or Indonesia have appeared to engage in full-scale military hostilities, there has been a “clear show of force” with Indonesia expanding “its naval footprint in” its EEZ to protect its interests.²⁴³

²²⁸ See generally Cengage, *Beagle Channel Dispute*, ENCYCLOPEDIA.COM (Oct. 20, 2022), <https://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/beagle-channel-dispute> (last visited Oct. 30, 2022).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ Alert Memorandum from The Dir. of the CIA to the Nat. Sec. Council (Dec. 8, 1979) (on file at https://www.cia.gov/readingroom/docs/DOC_0005617746.pdf).

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ See Cengage, *supra* note 238.

²³⁸ See generally Richard Javad Heydarian, *Malaysia, China go head to head in South China Sea*, ASIA TIMES (Oct. 5, 2021), <https://asiatimes.com/2021/10/malaysia-china-go-head-to-head-in-south-china-sea/> (last visited Oct. 30, 2022).

²³⁹ See *id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

THE PRC'S IMPACT ON ASEAN NEIGHBORS AND AROUND THE GLOBE

Despite the pushback from Indonesia against the PRC's aggression in the South China Sea, Indonesia is not the only country in Southeast Asia that is standing against the PRC's claims.²⁴⁴ In recent years, Malaysia adopted "a tougher stance amid maritime disputes" in the South China Sea by openly criticizing the PRC's "expansive 'nine-dash line' claims as 'ridiculous'" and on one occasion threatened to file an arbitration case against the PRC.²⁴⁵ Further, in 2019, Malaysia also began increasing its energy exploration activities and has since committed to protecting its interests in the South China Sea.²⁴⁶ In June 2021, the PRC flew sixteen military aircraft in a tactical formation²⁴⁷ within sixty nautical miles of a state in Malaysia, which the Malaysian foreign ministry called "a 'serious threat to national sovereignty.'"²⁴⁸ Malaysia then conducted a week-long navy exercise in August 2021 to make a "demonstration of its growing defensive capability," which included firing "three live anti-ship missiles."²⁴⁹

Additionally, Vietnam appears to be solidifying its stance against the PRC as well.²⁵⁰ In March 2022, Vietnam held "a ceremony led by the prime minister" which "commemorated the 34th anniversary of a battle against the Chinese navy in the South China Sea."²⁵¹ This ceremony was held in tribute for the "64 Vietnamese soldiers who were killed" during an incident in March 1988.²⁵² During this incident, Vietnamese soldiers, most of whom were unarmed, "were moving construction material" and raising a flag on Johnson South Reef when Chinese troops opened fire on the Vietnamese soldiers.²⁵³ Despite Vietnam not wanting to offend the PRC by speaking publicly about this incident in the past, this sentiment appears to be changing as "the Communist Party's official newspaper" in Vietnam ran three articles on the battle and the dispute in the Spratly Islands during March 2022.²⁵⁴

Vietnam has also felt the PRC's aggression as the latter nation attempts to encircle Vietnam with a Chinese military presence.²⁵⁵ Vietnam's neighbor to the west, Cambodia, reportedly may allow the PRC to station its troops at Ream Naval Base, "which opens into the Gulf of Thailand and could potentially provide [the PRC] a southern flank on the South China Sea."²⁵⁶ This has led to a concern that this posting of Chinese troops could be used "for surveillance of Vietnam's naval

²⁴⁴ *See id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *South China Sea dispute: Malaysia accuses China of breaching airspace*, BBC (June 2, 2021), <https://www.bbc.com/news/world-asia-57328868> (last visited Oct. 30, 2022).

²⁴⁹ Heydarian, *supra* note 238.

²⁵⁰ *See* RFA Staff, *Breaking from the past, Vietnam marks South China Sea battle anniversary*, RFA (Mar. 14, 2022), <https://www.rfa.org/english/news/vietnam/china-anniversary-03142022141317.html> (last visited Oct. 30, 2022).

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ David Hutt, *China stokes encirclement fear in next-door Vietnam*, ASIA TIMES (Sep. 13, 2022), <https://asiatimes.com/2022/09/china-stokes-encirclement-fear-in-next-door-vietnam/> (last visited Oct. 30, 2022).

²⁵⁶ *Id.*

forces” nearby.²⁵⁷ Because of this concern, Vietnam has “avoided any direct military alliance” and has begun attempting to modernize its armed forces.²⁵⁸ Additionally, Vietnam has tried to entice Cambodia with economic rewards and increased its investment in Cambodia in 2021.²⁵⁹ Vietnam has also tried to grow its relationship with its other neighboring country,²⁶⁰ Laos, by pledging to build new infrastructure projects in Laos to help combat the PRC’s influence in the region.²⁶¹

Furthermore, Vietnam has felt the PRC’s aggression regarding Vietnam’s fishing in the South China Sea.²⁶² The PRC has rammed and destroyed Vietnamese fishing boats fishing in the South China Sea, as well as shot down “Vietnamese flags that flutter over the cabin[s]” of some of the fishing boats.²⁶³ Additionally, Vietnam once again rejected the PRC’s unilateral fishing ban in 2022.²⁶⁴ This unilateral fishing ban was implemented by the PRC in 1999 and runs from May 1 to August 16 every year.²⁶⁵ According to the PRC, the ban was implemented to prevent overfishing, promote sustainability, and “let fish stocks recover and regenerate.”²⁶⁶ However, this ban “doesn’t apply to Chinese fishing vessels with official licenses to fish in contested waters.”²⁶⁷ Vietnam has viewed this unilateral fishing ban as a violation under UNCLOS III and has requested the PRC to respect Vietnam’s sovereignty and rights over the maritime zones it lawfully has under international law.²⁶⁸

Moreover, Vietnam along with the Philippines, Malaysia, and Indonesia have all made clear that each country does not support the PRC’s historic rights claims to the South China Sea.²⁶⁹ Vietnam, the Philippines, and Malaysia have even gone as far as banning *Abominable*, an animated children’s movie, simply because the nine-dash line was depicted in one scene of the movie.²⁷⁰ Though the scene was “for no more than several seconds total,” it was long enough to identify the nine-dash line.²⁷¹ Other movies and television series, such as *Uncharted*, *Pine Gap*, *Put Your Head On My Shoulder*, and *Madam Secretary*, have also been banned or had complaints lodged against them in Vietnam and the Philippines.²⁷² These two ASEAN countries also refuse to “stamp new

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² See Agence France-Presse, *Vietnam fisherman recounts attacks by China coast guard South China Sea*, SOUTH CHINA MORNING POST (Oct. 14, 2022, 7:46 PM), <https://www.scmp.com/news/asia/southeast-asia/article/3196026/vietnam-fisherman-recounts-attacks-china-coast-guard-south> (last visited Oct. 30, 2022).

²⁶³ *Id.*

²⁶⁴ Sebastian Strangio, *Vietnam Protests China’s Imposition of Annual South China Sea Fishing Ban*, THE DIPLOMAT (May 6, 2022), <https://thediplomat.com/2022/05/vietnam-protests-chinas-imposition-of-annual-south-china-sea-fishing-ban/> (last visited Oct. 30, 2022).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ U.S. Dep’t of State Bureau of Oceans and Int’l Env’t and Sci. Aff., *supra* note 73, at 28-9.

²⁷⁰ Capt. Aaron S. Wood, *supra* note 19.

²⁷¹ *Id.*

²⁷² Bec Strating, *China’s Nine-Dash Line Proves Stranger Than Fiction*, THE INTERPRETER (Apr. 12, 2022), <https://www.lowyinstitute.org/the-interpreter/china-s-nine-dash-line-proves-stranger-fiction> (last visited Oct. 30, 2022).

Chinese e-passports featuring the nine-dash line.”²⁷³ With this type of resistance against the PRC’s historic claim, it appears that the PRC’s ASEAN neighbors are trying to dispel the PRC’s attempt to bolster strategic narratives through “[t]he use of popular media.”²⁷⁴

These ASEAN countries are not the only countries that have rejected the PRC’s historic claims though,²⁷⁵ as other countries outside this region have concerns about the dispute in the South China Sea.²⁷⁶ Of particular note is Japan, which “has deepened security ties with several of the [ASEAN] nations in recent years.”²⁷⁷ This has included signing “onto joint offshore energy projects” and setting up “a defense export agreement” with Vietnam, as well as selling “coast guard vessels and radar systems” to the Philippines and participating in exercises with the Philippines.²⁷⁸ Although Japan does not claim any land within the South China Sea, Japan’s decision to stand against the PRC’s claims may stem from its dispute with the PRC over the Senkaku Islands in the East China Sea²⁷⁹ and whether the PRC will use force “to bring Taiwan under its control.”²⁸⁰

Though the Senkaku Islands are occupied by Japan,²⁸¹ the PRC views the islands “as part of ‘Taiwan Province,’” and there are concerns the PRC might seize the Senkaku Islands as well should the PRC forcefully bring Taiwan under its control.²⁸² If the PRC seized the Senkaku Islands, not only could it expand its military installations, but it could also curtail Japan’s access to the market by disrupting shipping lanes.²⁸³ With an economy that is import-dependent like Japan’s, this could severely weaken the nation’s economy.²⁸⁴ However, Japan has felt some relief with President Joe Biden’s recent comments about the US’s willingness “to use force to defend Taiwan,” which appeared to dispel some ambiguity on the US’s position.²⁸⁵

Along with Japan, the US has its own concerns regarding the PRC and its claims in the South China Sea.²⁸⁶ The US wants to ensure that shipping lanes are maintained in the region, and that no nation obstructs access or leverages control to gain an advantage over other regional

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ U.S. Dep’t of State Bureau of Oceans and Int’l Env’t and Sci. Aff., *supra* note 73, at 28-9.

²⁷⁶ Capt. Aaron S. Wood, *supra* note 19.

²⁷⁷ Radio Free Asia, *Japan Latest Nation to Contest Beijing’s South China Sea Claims*, VOA NEWS (Jan. 23, 2021), https://www.voanews.com/a/east-asia-pacific_japan-latest-nation-contest-beijings-south-china-sea-claims/6201116.html (last visited Oct. 30, 2022).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ David Sacks, *The United States and Japan Should Prepare for Chinese Aggression Against Taiwan*, COUNCIL ON FOREIGN RELS. (Jan. 18, 2022), <https://www.cfr.org/blog/united-states-and-japan-should-prepare-chinese-aggression-against-taiwan> (last visited Oct. 30, 2022).

²⁸¹ Radio Free Asia, *supra* note 277.

²⁸² Sacks, *supra* note 280.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ Tim Kelly, *Behind The Scenes in Japan, A Welcome For Biden’s Defence of Taiwan*, REUTERS (May 24, 2022), <https://www.reuters.com/world/us/behind-scenes-japan-welcome-bidens-defence-taiwan-2022-05-24/> (last visited Oct. 30, 2022).

²⁸⁶ Capt. Aaron S. Wood, *supra* note 19.

countries.²⁸⁷ Additionally, the PRC presently “has the biggest maritime force on the globe,”²⁸⁸ and has continued to combine its “growing military power with its economic, technological, and diplomatic clout to strengthen [Chinese Communist Party] rule.”²⁸⁹ Further, the US wants to reduce the PRC’s overall global influence.²⁹⁰

The US is feeling the pressure particularly from the PRC’s global influence, especially in the wake of the security agreement between the Solomon Islands and the PRC²⁹¹ and the denial of a US Coast Guard cutter from entering port.²⁹² This agreement between the PRC and the Solomon Islands gives the PRC “the ability to send Chinese security personnel to Solomon Islands to protect Chinese nationals and property there.”²⁹³ It also allows “the Chinese navy to dock and replenish in the Solomon Islands.”²⁹⁴ With the Solomon Islands being a strategic location “1,000 miles from Australia’s mainland,” a Chinese military presence could disrupt “maritime traffic between other parts of the Pacific to Australia.”²⁹⁵ This in turn, would thwart “a key component of the U.S. Indo-Pacific Strategy.”²⁹⁶

As part of its strategy for reinforcing and updating alliances in the Indo-Pacific region, the US announced a deal in 2021 “to help Australia deploy nuclear-powered submarines.”²⁹⁷ Under this agreement, Australia would be able to purchase “at least eight submarines from either the US or the [UK].”²⁹⁸ Though not equipped with nuclear weapons, the nuclear-powered submarines in this agreement would be harder to detect underwater.²⁹⁹ However, despite the importance of the deal, this agreement came at the expense of Australia “withdrawing from a \$66 billion deal to buy” submarines from one of the US’s oldest allies, France.³⁰⁰ This move polarized France, even though it was supposed to help create a stronger geopolitical alliance in the Indo-Pacific.³⁰¹ To highlight its fury after the Australia, UK, and US (AUKUS) deal, “France canceled a gala” at its Washington

²⁸⁷ *Id.*

²⁸⁸ Mallory Shelbourne, *China Has World’s Largest Navy With 355 Ships and Counting, Says Pentagon*, USNI NEWS (Nov. 3, 2021), <https://news.usni.org/2021/11/03/china-has-worlds-largest-navy-with-355-ships-and-counting-says-pentagon> (last visited Oct. 30, 2022).

²⁸⁹ U.S. OFF. OF THE DIR. OF NAT’L INTEL., ANNUAL THREAT ASSESSMENT OF THE U.S. INTELLIGENCE COMMUNITY 6 (Feb. 7, 2022).

²⁹⁰ *See Id.* at 7-8.

²⁹¹ Ambassador Judith Cefkin, *U.S. Steps Up Diplomacy in Pacific Amid Solomon Islands-China Pact*, U.S. INST. OF PEACE (May 4, 2022), <https://www.usip.org/publications/2022/05/us-steps-diplomacy-pacific-amid-solomon-islands-china-pact> (last visited Oct. 30, 2022).

²⁹² Frances Mao, *Solomon Islands halts naval visits after US, UK ships denied entry*, BBC NEWS (Aug. 30, 2022), <https://www.bbc.com/news/62720432>.

²⁹³ Ambassador Judith Cefkin, *supra* note 291.

²⁹⁴ Brian Harding & Camilla Pohle-Anderson, *China’s Search for a Permanent Military Presence in the Pacific Islands*, U.S. INST. OF PEACE (July 21, 2022), <https://www.usip.org/publications/2022/07/chinas-search-permanent-military-presence-pacific-islands> (last visited Oct. 30, 2022).

²⁹⁵ Ambassador Judith Cefkin, *supra* note 291.

²⁹⁶ *Id.*

²⁹⁷ Roger Cohen, *In Submarine Deal with Australia, U.S. Counters China but Enrages France*, N.Y. TIMES (Sep. 16, 2021), <https://www.nytimes.com/2021/09/16/world/europe/france-australia-uk-us-submarines.html>.

²⁹⁸ Tory Shepherd, *Australia almost no chance to buy any submarine from current US building program, experts say*, THE GUARDIAN (July 20, 2022), <https://www.theguardian.com/world/2022/jul/20/australia-almost-no-chance-to-buy-any-submarine-from-current-us-building-program-experts-say>.

²⁹⁹ Cohen, *supra* note 297.

³⁰⁰ *Id.*

³⁰¹ *Id.*

D.C. embassy that marked “the 240th anniversary of a Revolutionary War battle.”³⁰² However, despite the polarization of France, the US has continued forward with the deal³⁰³ and recently unveiled legislation that would allow a small number of Royal Australian Navy officers train with US Navy every year.³⁰⁴ The training of these Royal Australian Navy officers could begin as early as 2023 and continue to build the AUKUS alliance.³⁰⁵

CONCLUSION

As the South China Sea dispute continues to raise tensions, the actions being taken by nations both within the region and across the globe may not be enough. Although it appears that some of the ASEAN countries like Vietnam, the Philippines, Malaysia, and Indonesia are standing against the PRC’s claims, these countries have failed to show unity while defying the PRC’s excessive claims. Vietnam, the Philippines, and Malaysia asserting overlapping claims to features within the South China Sea,³⁰⁶ and Indonesia sinking Vietnamese, Malaysian, and Filipino trawlers that illegally fish in Indonesian waters³⁰⁷ hurt the ASEAN countries in their stance against the PRC. These countries must end the disputes amongst themselves so that they may assert a stronger, more unified message to the PRC. Plus, these countries could focus their efforts and resources to stand against the armed Chinese fishermen and Chinese coast guard ships patrolling the South China Sea, rather than on each other’s fishing trawlers.

Additionally, these four ASEAN countries must take a larger, more hardline approach against the PRC. Though the Philippines, Vietnam, Malaysia, and Indonesia stand against the PRC’s historic rights claim,³⁰⁸ this stance is not enough. For example, Indonesia, Malaysia, and Vietnam share the PRC’s view that warships do not have “automatic right of innocent passage” through territorial seas.³⁰⁹ Plus, Malaysia and Vietnam do not believe that military activities by another country should be permitted in another country’s EEZ.³¹⁰ Given the nature of the PRC’s aggression, it is not enough for these four countries to agree with the PRC regarding any views on maritime rights. These four ASEAN countries should adopt the US and Australia’s position on these two above-mentioned issues to bolster their stance against the PRC without concern from how the PRC might view this alignment. Although the US has still not ratified UNCLOS III,³¹¹ the US’s position has been consistent under international law and would thus lend more legal support to the ASEAN countries’ position.

³⁰² *Id.*

³⁰³ *See Id.*

³⁰⁴ Mallory Shelbourne, *New AUKUS Caucus Bill Calls for U.S.-Australia Sub Training Pipeline*, USNI NEWS (June 15, 2022, 6:26 PM), <https://news.usni.org/2022/06/15/new-aukus-caucus-bill-calls-for-u-s-australia-sub-training-pipeline> (last visited Oct. 30, 2022).

³⁰⁵ *Id.*

³⁰⁶ SCMP Reporter, *Why are tensions running high in the South China Sea dispute?*, SOUTH CHINA MORNING POST (Feb. 16, 2019, 5:30 PM), https://www.scmp.com/week-asia/article/2186449/explained-south-china-sea-dispute?module=perpetual_scroll_0&pgtype=article&campaign=2186449 (last visited Oct. 30, 2022).

³⁰⁷ *Indonesia sinks 51 foreign boats to fight against poaching*, ASSOCIATED PRESS, May 4, 2019, <https://apnews.com/article/a09d2b989b9243e0a6c5c9f106efa61d>.

³⁰⁸ U.S. Dep’t of State Bureau of Oceans and Int’l Env’t and Sci. Aff., *supra* note 73, at 28-9.

³⁰⁹ Mastro, *supra* note 29.

³¹⁰ *Id.*

³¹¹ Report N°315, *supra* note 194.

However, any alignment from ASEAN countries with the US position will likely be slow to occur, if at all. First, the ongoing ASEAN commitment to maintaining a ZOPFAN and a prohibition on nuclear weapons in the region does not appear to be ending anytime soon. Plus, the announcement of the AUKUS deal has caused assorted reactions amongst ASEAN countries. Certain ASEAN countries like Vietnam,³¹² Thailand,³¹³ and the Philippines³¹⁴ have not expressed vehement opposition to the AUKUS deal but still do not seem to embrace the deal with open arms by any means.³¹⁵ Other ASEAN countries, however, like Malaysia and Indonesia, have expressed their opposition to the deal and how it will affect the stability of the region.³¹⁶ Malaysia's Prime Minister has expressed that the AUKUS deal "could be a catalyst for a nuclear arms race in the region" and provoke more tension in the South China Sea.³¹⁷ Meanwhile, Indonesia has expressed concern about "the 'continuing arms race and power projection in the region'"³¹⁸ (emphasis added). Because the response from ASEAN countries has been at best a mix of concerns and assertions of peace and neutrality, it is likely that only the passage of time will show whether these countries change or solidify their positions.

If ASEAN countries were to adopt the US and Australia's position on innocent passage in territorial seas and military activities in EEZs though, it would require a more proactive campaign on the US's part. Even though the US has strengthened geopolitical ties with the UK and Australia for more freedom through the nuclear submarine agreement,³¹⁹ the deal brokered between the Solomon Islands and the PRC was a devastating blow for the US in the region. To maintain strategic strongholds in the region, the US needs to start strengthening its alliances with more than just its traditional post-World War II allies. If the US wants to end the PRC's expansion into other countries, it must facilitate more proactive engagement with countries in the region and strategic nations like India before the PRC does. However, this would require the US to break away from the traditional isolationist approach it has historically taken with most international issues.

In addition to the US being proactive in building relationships, the US must also recognize that it cannot build or strengthen relationships at the expense of others. The AUKUS deal that was brokered in 2021 may have been beneficial for the Indo-Pacific region; however, the deal was damaging for the centuries old US-France alliance.³²⁰ With the PRC having the military, economic,

³¹² After the announcement of the AUKUS deal, Vietnam's Ministry of Foreign Affairs released a statement noting "that all countries should work towards the same goals of peace, stability, cooperation and development in the region." See Choong & Storey, *supra* note 162, at 6.

³¹³ Not wanting to fuel tensions between the US and the PRC, Thailand's response intended to preserve cordial ties with both countries. Though there has been no official response from the Thai government, ten days after the AUKUS deal was announced, the Thai Prime Minister released a pre-recorded speech that "pledged Thailand's support for the Treaty on the Prohibition of Nuclear Weapons." *Id.* at 7.

³¹⁴ Following the announcement of the AUKUS deal, a spokesperson for Filipino President Rodrigo Duterte voiced concern over whether the deal could begin a nuclear arms race. However, prior to the announcement of the deal, key members of the President's cabinet "c[a]me out in full support of AUKUS" and supported "Australia's right to improve its defen[s]e capabilities." With these mixed responses, it is hard to determine exactly where the Philippines falls in its position. *Id.* at 6-7.

³¹⁵ See *id.* at 3-7.

³¹⁶ *Id.* at 3-4.

³¹⁷ *Id.* at 3.

³¹⁸ *Id.* at 4.

³¹⁹ Cohen, *supra* note 297.

³²⁰ *Id.*

and diplomatic power that it does in the world, the US cannot afford to damage alliances that could be crucial in leveraging the US's power move against the PRC. This rings true especially when France has aligned itself with the US position and expressed its opposition to the PRC's historic rights and straight baselines claims in the South China Sea.³²¹

Furthermore, the proactive measures the US must take also applies to the US's military buildup as well. The US has identified that the PRC "is accelerating the development of key capabilities...to confront the [US] in a large-scale, sustained conflict."³²² Although the US aims to build sixty nuclear powered submarines, it appears the US "will struggle to meet this target for decades," with estimates of "between 60 and 69" submarines being built by 2052.³²³ With this estimate, and the possibility of building eight nuclear submarines for Australia under the AUKUS deal, there are doubts as to how long it will actually take the US to construct these submarines.³²⁴ This military buildup is also crucial as the US continues to undertake FONOPs in the South China Sea. If the Chinese navy continues to grow and develop new technologies, the US must be prepared to maintain or surpass the PRC's advancements. Actions like sending the *USS Zumwalt*, "[t]he US Navy's most advanced surface warship,"³²⁵ to Japan to be closer to any potential armed conflict could be beneficial. However, the PRC has the "biggest maritime force on the globe with an inventory of about 355 vessels" and has intentions to expand its navy to 460 ships by 2030.³²⁶ With the PRC's intent to modernize its navy with "new anti-submarine warfare capabilities and long-range strike capabilities,"³²⁷ the US can no longer rely on its technological edge alone, as numbers could become a more determinative factor in naval power.

Because of the aggression on behalf of the PRC and the expansiveness of the claims in the South China Sea, this dispute must be taken with the utmost seriousness and urgency. Though the claims themselves appear to have virtually no basis under international law, these claims must be addressed. It appears the PRC has no intention of backing down from its South China Sea claims in the foreseeable future. As tensions continue to escalate, a strong, proactive, and unified approach would be the best solution to handle this legally simple, yet diplomatically complex issue. Though this traditional alignment pitting groups of nations against a rising world power appears World War III-ish to an extent, this may very well be the best chance any country has if it wishes to end the PRC's claims in the South China Sea. If the PRC continues preparing to force countries to align with it through economic, military, and diplomatic pressure without opposition, there may become a point when it is too late to again try to take a stance against the PRC in the South China Sea.

³²¹ U.S. Dep't of State Bureau of Oceans and Int'l Env't and Sci. Aff., *supra* note 73, at 20 & 28.

³²² U.S. OFF. OF THE DIR. OF NAT'L INTEL., *supra* note 289, at 7.

³²³ Shepherd, *supra* note 298.

³²⁴ *Id.*

³²⁵ Brad Lendon, *US Navy sends its most advanced surface warship to east Asia*, CNN (Sep. 27, 2022, 1:32 PM), <https://www.cnn.com/2022/09/26/asia/uss-zumwalt-warship-us-navy-deployment-intl-hnk-ml> (last visited Oct. 30, 2022).

³²⁶ Shelbourne, *supra* note 288.

³²⁷ *Id.*

THE LONG VOYAGE HOME

India M. Whaley

ABSTRACT

This research paper (“Paper”) examines the international, constitutional, legal history, and current rights to housing in the United States (U.S.), Jamaica, and South Africa. This Paper addresses the federal and sub-national systems regarding affordable housing initiatives that drive policies associated with poverty and homelessness. Moreover, the following thesis addresses the need for affordable housing and discusses the substantive right to housing. It examines the legal avenues and obstacles that must be overcome given the division of powers in each country. This Paper will discuss significant influences such as colonialism that shape current housing policies to eradicate poverty and homelessness. Colonial domination has triggered tremendous changes economically in the U.S. while others have remained disenfranchised (Jamaica and South Africa). This Paper calls for a transformed focus on housing law and poverty, specifically in the housing sector where low-income families live.

INTRODUCTION

The U.S., Jamaica, and South Africa are distinct, diverse countries. Jamaica and South Africa make up a portion of the Commonwealth, while the U.S. is an independent nation.¹ These three countries are among the world’s largest and smallest; the most prosperous and poorest. This Paper compares the U.S. to the two Commonwealth countries because each country works together as members of the Commonwealth to pursue common goals and values.² Although Jamaica is relatively small compared to South Africa, all the countries are equal within the Commonwealth.³ The U.S. is the outlier in size and economic status of the three countries. However, all three countries face significant difficulties in providing adequate, affordable housing for their homeless and low- to moderate-income populations.

Interestingly, each country operates under a completely different statutory framework that guides each government’s efforts to provide adequate, affordable housing. Each of these frameworks has pros and cons that limit the ability of citizens to apply for and receive aid. This Paper will address each framework and the different levels of success. Understanding the challenges of providing adequate, affordable housing to citizens requires a deep understanding of the overall housing framework in each country. One must understand the specific limitations present in the states, cities, towns, and villages that make up each country.

Part I of this Paper discusses the need for affordable housing in the U.S. and explains the need from a human rights perspective. Section A examines the legal context concerning the right

¹ The Commonwealth is a voluntary association of fifty-six independent and equal countries. It includes both advanced economies and developing countries. Thirty-two of the fifty-six are small countries, including island nations. Each country’s government has agreed to shared goals like development, democracy, and peace. These values are memorialized in the Commonwealth Charter. The Commonwealth began in 1884 in Britain as the “Commonwealth of Nations,” *About Us*, THE COMMONWEALTH, <https://thecommonwealth.org/about-us>.

² *Commonwealth Charter*, THE COMMONWEALTH, <https://thecommonwealth.org/charter>.

³ “Small states are especially vulnerable to issues ... All Commonwealth members have an equal say regardless of size or wealth.” *Id.* at Member countries.

to adequate housing. Section B examines the history and legal mechanisms to provide affordable housing. Section C discusses various housing programs and initiatives.

I. THE RIGHT TO HOUSING IN AMERICAN LAW

A. THE HISTORICAL, CONSTITUTIONAL, AND LEGAL CONTEXTS IN THE U.S. WITH RESPECT TO THE RIGHT TO ADEQUATE HOUSING

1. HUMAN RIGHTS, GOVERNMENTAL SYSTEM, AND LEGAL IMPLICATIONS

As previously noted, understanding the challenges of providing adequate, affordable housing to residents requires an understanding of the overall housing framework in the U.S. There is no formal state, federal, or constitutional right to housing in the U.S., nor are there avenues for housing assistance through the court system. Although the federal government can affect the supply of affordable housing through various funding mechanisms or substantive legislation, the government and court systems leave these concerns to states and municipalities. Thus, limitations on land use regulations and actions are most often imposed under either federal or state constitutions or state laws.

Under the federal Constitution, many land regulations may be subjected to the Equal Protection Clause of the Fourteenth Amendment, but the principal grounds on which land use regulations are challenged fall under either the Due Process Clause of the Fourteenth Amendment or the Takings Clause of the Fifth Amendment.⁴

For example, in 1972 the United States Supreme Court rejected a class action landlord-tenant suit and the tenants' interpretation of the Equal Protection Clause as a right to adequate housing.⁵ The Supreme Court stated that they "do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guaranteed of access to dwellings of a particular quality..."⁶

Many housing advocates believe a right to housing should be incorporated in American law like other countries' national law (i.e., French law).⁷ The idea that adequate housing should be

⁴ Although Equal Protection may apply to land use regulations, most courts defer to local classifications unless a protected constitutional right (such as speech or religion) or a protected class (distinguished by race, religion, or color) is involved. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Absent these exceptions, challenges to land use regulations under the Equal Protection Clause have been examined under a deferential "rational basis" standard. See Doug Linder, *Levels of Scrutiny Under the Equal Protection Clause*, EXPLORING CONSTITUTIONAL CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/epscrutiny.htm>.

⁵ *Lindsey v. Normet*, 405 U.S. 56 (1972).

⁶ *Id.* at 74.

⁷ French law provides a "right to housing" called DALO, which was passed March 5, 2007. Under DALO, the French central government has the primary responsibility of carrying out the housing law. In France, individuals do not need to be homeless to exercise their right to housing. Persons in need of housing are eligible to appeal for housing to a committee made up of central, regional, and local government authorities; social landlords; and representatives from temporary housing and hostel associations, among others. If this committee deems the case to be a priority, a local government representative must devise a housing solution within three to six months—depending on the housing supply in the relevant market—or within six weeks for short-term accommodations. If any of these deadlines are not met, the individual in need of housing may seek relief under DALO in an administrative court. The administrative

recognized as a fundamental human right in the U.S. has been an issue for years. In his 1944 State of the Union address, President Franklin Delano Roosevelt stated that the U.S. had adopted a “second Bill of Rights,” which President Roosevelt said included “the right of every family to a decent home.”⁸ Shortly after, the U.S. led the effort to draft the United Nations 1948 Universal Declaration of Human Rights, which states that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”⁹ However, the 1948 declaration was a non-binding declaration never codified into U.S. law, thus it was never enforceable.¹⁰ Eighteen years later, the United Nations again tried to recognize the fundamental right to housing in its 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR).¹¹ The U.S. signed the ICESCR, but the treaty was never ratified.¹² As a result, the U.S. is not held to the treaty’s standards on enforcing the fundamental right to housing, the U.S. is only required to uphold the “object and purpose” of the treaty.¹³ The United Nations’ efforts to recognize housing as a fundamental right failed to translate into an enforceable American right.

While there was a Due Process Clause in the Bill of Rights that amended the original 1787 Constitution, those provisions were enacted to limit only the federal government’s powers rather than those of the states or local governments.¹⁴ Following the adoption of the Fourteenth Amendment, which contained its own Due Process Clause applying specifically to the states, the United States Supreme Court determined that most provisions of the Bill of Rights applied to the states as well, a process referred to as “incorporation.”¹⁵

Several approaches have been utilized to provide adequate housing to those in need. U.S. courts have reviewed legislation to effectively second guess the policy decisions made by federal,

judge may then order the state to provide housing. The individual in need of housing can also seek compensation from the regional representative for “material, physical or moral damage issuing from the lack of an offer of rehousing.” Jean Michel David, *The DALO Law is 10 Years Old*, HOUS. RTS. WATCH (June 26, 2017), <http://www.housingrightswatch.org/content/dalo-law-10-years-old>; see also Thomas Byrne & Dennis P. Culhane, *The Right to Housing: An Effective Means for Addressing Homelessness?*, 14 U. OF PA. J. OF L. & SOC. CHANGE, 379 (2011).

⁸ President Franklin Delano Roosevelt, State of the Union Address to Cong. (Jan. 11, 1944), http://fdrlibrary.marist.edu/archives/address_test.html.

⁹ *Universal Declaration of Human Rights*, G.A. Res. 217 (III)A, art. 25 (Dec. 10, 1948).

¹⁰ Eric Tars, *Housing as a Human Right*, NAT’L L. INCOME HOUS. COAL. (2016), http://nlihc.org/sites/default/files/2016AG_Chapter_1-6.pdf.

¹¹ International Covenant on Economics, Social and Cultural Rights art. 11(1), Dec. 16, 1966, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3.

¹² Tars, *supra* note 12.

¹³ See Byrne & Culhane, *supra* note 9.

¹⁴ See U.S. CONST.

¹⁵ *The Fourteenth Amendment and Incorporation*, BILL OF RTS. INST., <https://billofrightsinstitute.org/essays/the-fourteenth-amendment-and-incorporation>.

state, and local governments under a peculiar interpretation of the Due Process Clause, which gave them the power to declare those decisions “unreasonable.”¹⁶

2. HISTORICAL CONSTITUTIONAL AND LEGAL CONTEXTS

The Fifth Amendment States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived* of life, liberty, or *property*, without due process of law; *nor shall private property be taken for public use*, without just compensation.¹⁷

The Fourteenth Amendment states that:

All persons born or naturalized in the U.S., and subject to the jurisdiction thereof, are American citizens and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of American citizens; nor shall any state deprive any person of life, liberty, or *property*, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁸

Since *Penn Central Transportation Co. v. City of New York*¹⁹ in 1978, the Takings Clause of the Fifth Amendment has become the primary instrument for challenging government overreach in the field of land use regulation.²⁰ The Takings Clause became an effective substitute for landowners to challenge land use regulations.²¹ A “taking” is more readily found when interference with property can be characterized as a physical invasion by the government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.²²

Penn Central has been the default test for evaluating takings claims under the Fifth Amendment in land use regulation for over forty years. However, there are two situations in which courts will almost always find that a taking has occurred. These are known as per se or categorical takings.²³ In *Pennsylvania Coal Co. v. Mahon*,²⁴ a coal company which retained mining rights

¹⁶ *Fourteenth Amendment- Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process and Equal Protection*, GOVINFO (1992), <https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-15.pdf>.

¹⁷ U.S. CONST. amend. V (emphasis added).

¹⁸ U.S. CONST. amend. XIV, § 1 (emphasis added).

¹⁹ *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ David L. Callies & David A. Robyak, *The Categorical (Lucas) Rule: “Background Principles,” Per Se Regulatory Takings, and the State of Exceptions*, 30 TOURO L. REV., 371 (2014), <https://digitalcommons.tourolaw.edu/lawreview/vol30/iss2/10>.

²⁴ *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

beneath a residence challenged a state statute prohibiting the exercise of those rights.²⁵ The Supreme Court found that the statute violated the Takings Clause as applied to the subject property since the only property interest held by the coal company was the right to mine.²⁶

A trilogy of Supreme Court cases sets out Takings Clause limitations on the use of development conditions. *Nollan v. California Coastal Commission*²⁷ requires an “essential nexus” between the condition imposed and the purpose of the restriction that would justify the denial of the permit.²⁸ Using a condition to obtain an easement that the government would otherwise be constitutionally obligated to pay for where the easement does nothing to alleviate the government’s concerns regarding the development converts the permit proceeding into an “out-and-out plan of extortion.”²⁹ In *Dolan v. City of Tigard*,³⁰ there was arguably an essential nexus for conditions requiring a plumbing supply store to dedicate property for a bike path and flood protection along an adjacent creek. However, degree of connection between the purpose of the conditions and the burden on the individual landowner was at issue.³¹ In that case, the Supreme Court required a showing of “rough proportionality” to justify conditions that do not arise from a general requirement under local land use regulations.³² *Koontz v. St. Johns River Water Management District*³³ reaffirmed the essential nexus and rough proportionality holdings of *Nollan* and *Dolan* but extended their application to conditions involving money and the undertaking of public works.³⁴

Nollan, *Dolan*, and *Koontz* might apply to conditions requiring the provision of affordable housing as part of development approval.

1. AN OVERVIEW OF AFFORDABLE HOUSING

The U.S. designates housing units for low or moderate income occupancy, which means that housing is based on household income and eligible applicants may occupy the housing while they remain eligible. Affordable housing requires three P’s: (1) *preserving* the affordable housing we already have; (2) *producing* more affordable housing; and (3) *protecting* tenants from abuse and an unregulated market.³⁵ However, the U.S. is in a major housing crisis, especially with the availability of affordable units. The federal government has laid out ground rules and qualifications for affordable housing,³⁶ but there is a shortage of affordable, accessible, and available housing.³⁷

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Nollan v. Cal. Coastal Comm’n.*, 483 U.S. 825 (1987).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

³¹ *Id.*

³² *Id.*

³³ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013).

³⁴ *Id.*

³⁵ See Bruce Katz, et al., *Rethinking Local Affordable Housing Strategies: Lessons From 70 Years of Policy and Practice*, BROOKINGS INST. (2003), <https://www.brookings.edu/wp-content/uploads/2016/06/housingreview.pdf>.

³⁶ Qualification as Affordable Housing, 42 U.S.C. § 12745.

³⁷ *The Gap: A Shortage of Affordable Homes*, NAT’L. LOW INCOME HOUS. COAL. (Apr. 21, 2022), <http://www.nlihc.org/news/nlihc-releases-gap-shortage-affordable-homes>.

i. HISTORY OF HOUSING

The federal government has been heavily promoting housing affordability since the 1930s.³⁸ The notion of providing public housing was created from President Roosevelt's New Deal as a part of the U.S. Housing Act of 1937.³⁹ There were three goals: to eliminate unsafe, unsanitary housing and eradicate slums; to provide safe, sanitary dwellings; and to reduce unemployment by stimulating economic growth. These measures provide critical short-term relief for the minority of genuinely needy households who receive assistance, but the federal government has inadequately invested in long-term solutions for housing instability.⁴⁰ The federal government's responsibility to address persistent housing inequity arises partly from decades of its harmful, racist housing policies.⁴¹ Although housing markets are local, the responsibility for ensuring fair access to quality housing ultimately lies with the federal government.⁴²

Federal programs helped to level entire urban communities and replace them with concrete mega-block public housing structures, simultaneously concentrating poverty and entrenching racial housing segregation.⁴³ Half of the low-income households cannot afford their housing costs.⁴⁴ Affordable housing need is critical and increasing, but funding is inconsistent.⁴⁵ Impoverished neighborhoods and neighborhoods of color face disparate residential realities regarding the quality of schools, transportation, and community services.⁴⁶ In many areas, unaffordable housing is primarily a symptom of poverty.⁴⁷ Different housing problems require different strategic responses and the specific challenges a given locality faces are likely best understood and addressed at the local level.

ii. HOUSING DEFICITS

The U.S. Department of Housing and Urban Development (HUD) estimated that 568,000 people were experiencing homelessness in 2019,⁴⁸ though both the difficulty of identifying that population and the events of 2020 mean the accurate count is likely even higher now.⁴⁹ The real shortage of affordable rental homes for extremely low-income households is closer to 3.8 million.⁵⁰ In contrast, there is a cumulative *surplus* of affordable homes for higher-income households.⁵¹

³⁸ A.J. Boyack, *Responsible Devolution of Affordable Housing*, 46 FORDHAM URBAN L. J. 5, 1183 (2019).

³⁹ BARRY C. JACOBS, HANDBOOK OF HOUSING AND DEVELOPMENT LAW ¶ 2.01 (2001 ed.).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *The Problem*, NAT'L LOW INCOME HOUS. COAL., <https://nlihc.org/explore-issues/why-we-care/problem>.

⁴⁵ *Id.*

⁴⁶ U.S. DEP'T. OF HOUS. & URB. DEV. OFFICE OF POL'Y DEV. AND RSCH., *Breaking Down Barriers: Housing, Neighborhoods, and Sch. of Opportunity* (Apr. 2016), <https://www.huduser.gov/portal/sites/default/files/pdf/insight-4.pdf>.

⁴⁷ *Id.*

⁴⁸ *Homelessness: Better HUD Oversight of Data Collection Could Improve Estimates of Homeless Population*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-433, 25 (2020), <https://www.gao.gov/assets/gao-20-433.pdf>.

⁴⁹ *Id.*

⁵⁰ *The Gap: A Shortage of Affordable Rental Homes*, NAT'L LOW INCOME HOUS. COAL., <https://nlihc.org/gap>.

⁵¹ *Id.*

No state has an adequate supply of affordable rental housing that is available for extremely low-income households.⁵² The states where extremely low-income renters face the greatest challenges in finding affordable homes are Nevada, California, Oregon, Arizona, and Florida.⁵³ Even the states with the greatest relative supply of affordable and available rental homes for extremely low-income renters still have significant shortages.⁵⁴ A majority of extremely low-income renters are severely housing cost-burdened in every state.⁵⁵

A significant factor in explaining these severe housing cost burdens is the lack of subsidized affordable homes for extremely low-income households.⁵⁶ HUD assistance includes public housing, housing choice vouchers, and project-based rental assistance.⁵⁷ Housing today is unaffordable for one-third of all U.S. households and nearly half of Americans who rent.⁵⁸ Half of all renter households cannot afford to pay their rent and have sufficient income remaining for food, healthcare, childcare, transportation, and other necessities.

Low-income households, those earning less than 80% of the local area median income (AMI), are often further categorized into very low-income (earning between 30% and 50% of AMI) and extremely low-income (earning below 30% of AMI).⁵⁹ Low-income households are disproportionately comprised of seniors, disabled persons, and adult caregivers.⁶⁰ Minority households (such as Native American, black, and Hispanic) are more likely to be lower-income than white households.⁶¹

Many commentators and scholars focus on the challenges of housing affordability in urban areas, but affordable housing shortages plague populations in all areas of the country. These shortages are driven by different factors depending on the location. Rural areas are relatively less cost-burdened. However, rural America does not escape the housing affordability crunch, even in places where housing costs are relatively low.⁶²

An associated housing problem connected to both lack of affordable units and lack of income is the problem of uninhabitable home quality. In addition to facing the problem of uninhabitable housing units, lower-income households are more likely situated in poor-quality

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *The Gap: A Shortage of Affordable Rental Homes, March 2021 Report*, NAT'L LOW INCOME HOUS. COAL. (Mar. 2021), https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2021.pdf.

⁵⁷ *Supra* note 48, at 32-33; Laura Sullivan, *Affordable Housing Program Costs More, Shelters Fewer*, NAT'L PUB. RADIO (May 9, 2017), <https://www.npr.org/2017/05/09/527046451/affordable-housing-program-costs-more-shelters-less>.

⁵⁸ *2022 State of the Nation's Housing Report*, HABITAT FOR HUMANITY, <https://www.habitat.org/costofhome/2022-state-nations-housing-report-lack-affordable-housing> (last visited May 1, 2023).

⁵⁹ *Income Limits*, U.S. DEP'T OF HOUS. & URB. DEV., (2022) <https://www.huduser.gov/portal/datasets/il.html>.

⁶⁰ *Id.*

⁶¹ Margaret C. Simms, Karina Fortuny, et al, *Racial and Ethnic Disparities Among Low-Income Families*, THE URB INST. (2009), <https://www.urban.org/sites/default/files/publication/32976/411936-racial-and-ethnic-disparities-among-low-income-families.pdf>.

⁶² *Housing Need in Rural America*, NAT'L RURAL HOUS. COAL., <https://ruralhousingcoalition.org/overcoming-barriers-to-affordable-rural-housing/> (last visited May 1, 2023).

neighborhoods. Affordable housing is predominantly located in areas of concentrated poverty, many of which are unsafe, unsupported, and even toxic.⁶³ Most residents of such neighborhoods are people of color, condemned to live in poor quality neighborhoods by a history of systemic housing segregation, persistent poverty, and inequitable opportunities for advancement—all of which directly resulted from federal policies over the past several decades.⁶⁴

Crime is higher in areas of concentrated poverty, threatening area inhabitants' financial and physical well-being.⁶⁵ Residents of low-income neighborhoods lack access to quality jobs; stores with fresh, healthy foods; and adequate healthcare.⁶⁶ There are few neighborhood amenities in low-income tracts, and more locally undesirable land uses create significant health and environmental harm.⁶⁷ Living in poor-quality neighborhoods perpetuates intergenerational poverty and results in lower quality and duration of life.⁶⁸

Housing programs and incentives today are often necessarily responsive to immediate and dramatic housing needs, but Congress must take a longer view and invest funds in improving neighborhood quality, affordable housing location, the sufficiency of gap funding, and residential desegregation.⁶⁹ Addressing these issues helps cure the disease of housing unaffordability, not just treat its symptoms. Improving neighborhood quality, residential racial integration, and housing instability among low-income households will lead to improved household outcomes now and in future generations, eventually reducing the number of cost-burdened households and the intensity of their unmet housing needs. Residential segregation, for example, is rampant and limits economic potential, both individually and as a society. Segregation also reduces social cohesion and intergroup trust, increases prejudice, and erodes democratic participation.⁷⁰ It will take committed, consistent investment to undo residential segregation, deconcentrate poverty, and improve deficient neighborhood infrastructure. Nevertheless, such investments are necessary for the lasting improvements to housing affordability that are the federal government's responsibility to achieve.⁷¹

i. RACIAL DISPARITIES AND AFFORDABLE HOUSING

America's history of Jim Crow-segregation, redlining, and exclusionary zoning-in combination with its present-day zoning laws and siting processes has created toxic communities in predominately black and poor neighborhoods.⁷² The connection between historical segregation,

⁶³ See Jacobs, *supra* note 41.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Sullivan, *supra* note 59.

⁶⁹ *Gentrification and Neighborhood Revitalization: What's the Difference?*, NAT'L LOW INCOME HOUS. COAL. (Apr. 5, 2019), <https://nlihc.org/resource/gentrification-and-neighborhood-revitalization-whats-difference>.

⁷⁰ Miles Hewstone, *Consequences of Diversity for Social Cohesion and Prejudice: The Missing Dimension of Intergroup Contact*, 71 J. OF SOC. JUST. 417 (2015).

⁷¹ *Id.*

⁷² *Id.*

present-day zoning, and siting processes that harm communities of color should be used to inform advocates and lawmakers of the need to make the housing justice landscape more equitable.⁷³

Black, Native American, Latino, and Asian households are more likely than white households to be extremely low-income renters.⁷⁴ 20% of black households, 18% of American Indian or Alaska Native households, 14% of Latino households, and 10% of Asian households are extremely low-income renters.⁷⁵ In contrast, only 6% of white non-Latino households are extremely low-income renters.⁷⁶

Non-Latino white households account for 64% of all U.S. households (including homeowners and renters), 50% of all renters, and 43% of all extremely low-income renters.⁷⁷ Black households, by comparison, account for only 12% of all households, yet they account for 19% of all renters and 26% of all extremely low-income renters.⁷⁸ Latino households account for 12% of all U.S. households, 19% of all renters, and 21% of extremely low-income renters.⁷⁹ Historical and ongoing injustices have systematically disadvantaged people of color.⁸⁰ One reason white households are more likely than people of color to be homeowners is the immense racial wealth gap, which is the product of centuries of slavery, Jim Crow laws, and ubiquitous anti-black discrimination.⁸¹

Decades of racial discrimination by real estate agents, banks and insurers, and the federal government also have made homeownership difficult to obtain for people of color.⁸² Many factors kept people of color from being able to purchase homes through the middle of the twentieth century: pervasive refusal of whites to live in racially integrated neighborhoods, physical violence toward people of color who tried to integrate (which was often tolerated by the police), restrictive covenants forbidding home sales to blacks that would integrate neighborhoods (some of which were mandated by the Federal Housing Administration), and federal housing policy that denied borrowers access to credit in minority neighborhoods.⁸³

While overt discrimination was outlawed by the Fair Housing Act of 1968,⁸⁴ more subtle forms of housing discrimination continue to constrain the options of people of color. More recent local fair housing investigations show similar unfavorable treatment of people of color, including

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ 42 U.S.C. § 3604 (1968).

being shown fewer homes and not given the same information as whites.⁸⁵ Today's credit scoring system and lending practices remain barriers to minority homeownership.⁸⁶

Racial disparities in socioeconomic status are one reason people of color are more likely than white people to become infected with diseases, to be hospitalized, and to die as a result.⁸⁷ Fixing the chronic shortage of affordable and available housing for the lowest-income renters requires long-term commitments.⁸⁸ Permanently addressing the shortage of affordable and available housing for the lowest-income households in America requires increasing the supply and properly preserving the affordable housing stock.⁸⁹ Households enjoy better health, educational opportunities, and economic mobility when they can afford decent, stable housing.⁹⁰

i. TO ZONE OR NOT TO ZONE?

All zoning is not created equally. Exclusionary zoning has existed in varying forms since the early 1900s when it was a vehicle for blatant racial discrimination.⁹¹ Prior to the Supreme Court's *Buchanan v. Warley* decision in 1917, city zoning ordinances across the country legally prohibited minorities from occupying blocks where most residents were white.⁹² *Buchanan* was the first in a series of cases and actions by the federal government that limited legal housing discrimination.⁹³ Cities began hiring professional planners to "prepare racial zoning plans and to marshal the entire zoning process to create completely separate black communit[ies]."⁹⁴ Following *Buchanan* in 1926, the Supreme Court decided in *Village of Euclid v. Ambler Realty Corporation* that the municipal zoning ordinances were a valid form of state police power.⁹⁵ These court decisions gave other cities ammunition and free control to permit exclusionary zoning, which led to high racial discrimination and segregation levels.⁹⁶ By the 1970s and '80s, populations began to grow and cities began employing land use restrictions to limit the housing density. By the late '90s and early 2000s, zoning continued to be a systemic issue for people of color in urban neighborhoods.

⁸⁵ See Hewstone, *supra* note 70.

⁸⁶ *Racial Disparities Among Extremely Low-Income Renters*, NAT'L LOW INCOME HOUS. COAL. (2019), <https://nlihc.org/resource/racial-disparities-among-extremely-low-income-renters>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Nabihah Maqbool, Janet Viveiros, & Midy Ault, *The Impacts of Affordable Housing on Health: A Research Summary*, CENT'R FOR HOUS. POL'Y (2015), <https://nhc.org/wp-content/uploads/2017/03/The-Impacts-of-Affordable-Housing-on-Health-A-Research-Summary.pdf>.

⁹¹ Sara Zeimler, *Exclusionary Zoning, School Segregation, and Housing Segregation: An Investigation into a Modern Desegregation Case and Solutions to Housing Segregation*, 48 HASTINGS CONST. L. Q. 205 (2020).

⁹² *Id.* at 206. See also *Buchanan v. Warley*, 245 U.S. 60, 82 (1916).

⁹³ Zeimler, *supra* note 93, at 207.

⁹⁴ *Id.*

⁹⁵ *Village of Euclid*.

⁹⁶ Zeimler, *supra* note 93, at 207.

SEPARATE AND NOT EQUAL: EXCLUSIONARY ZONING

The term “exclusionary zoning” applies to regulations that prevent certain kinds of development and raise housing costs above what low-income families can afford to pay.⁹⁷ Hundreds, if not thousands, of scholarly works outline how these policies affect low-income families.

Local governments have established and enforced zoning policies and land use regulations to effectively prevent the construction of affordable housing, commonly known as exclusionary zoning.⁹⁸ These development regulations include mechanisms that often limit residential development to single-family homes at low overall residential densities with little to no opportunity to develop a variety of affordable housing types to low-to middle-income residents.⁹⁹ As a result, exclusionary zoning has contributed to high concentrations of low-income people and people of color in certain metropolitan areas, municipalities, and neighborhoods.¹⁰⁰ Zoning limits the amount of housing that can be built, and zoning can increase the housing prices due to non-residential uses, such as industrial, agricultural, recreational, and environmental uses.¹⁰¹

Exclusionary zoning also limits the building density by setting minimum lot sizes, which means minimum lot size requirements can force low-income households to buy more land than they can afford.¹⁰² This form of zoning also creates concerns with setback requirements.¹⁰³ Exclusionary zoning keeps out lower-income households by raising the cost of housing, restricting the supply of low-income housing types, mandating minimum land and housing purchases, and zoning out families with school-aged children. For example, some municipalities in northeast New Jersey have imposed restrictions or exactions on developers based on the number of schoolchildren in the development.¹⁰⁴

Although some municipalities uphold exclusionary zoning, there is a great deal of controversy regarding the effects. Some municipalities may follow the Standard State Zoning Enabling Act, which states permissible goals for zoning.¹⁰⁵ This Act also states that decreasing congestion promotes health and general welfare while facilitating adequate provisions of transportation, water, sewage, schools, parks, and other public requirements.¹⁰⁶ However, most

⁹⁷ John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y R. 91, 91-92 (2014), https://law.stanford.edu/wp-content/uploads/2018/03/mangin_25_stan_1_poly_rev_91.pdf.

⁹⁸ See Molly Rockett & Noah M. Kazis, *Addressing Challenges to Affordable Housing in Land Use Law: Recognizing Affordable Housing as a Right*, 135 HARV. L. REV. 1104, 1104-05 (2022).

⁹⁹ Jenny Schuetz, *To Improve Housing Affordability, We Need Better Alignment of Zoning, Taxes, and Subsidies*, BROOKINGS INST., (Jan. 7, 2020), <https://www.brookings.edu/policy2020/bigideas/to-improve-housing-affordability-we-need-better-alignment-of-zoning-taxes-and-subsidies/>.

¹⁰⁰ See Susan R. Jones, et al., *An Annotated Bibliography of Affordable Housing and Community Economic Development Law*, 7 J. AFFORDABLE HOUS. & COMM. DEV. L. 340, 340-84 (1998).

¹⁰¹ See Janai S. Nelson, Commentary, *Residential Zoning Regulations, and the Perpetuation of Apartheid*, 43 UCLA L. REV. 1689, 1699-704 (1996).

¹⁰² *Id.* at 1699.

¹⁰³ *Id.* at 1700 n.49.

¹⁰⁴ Constance Perin, *EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA* 181-82 (Princeton Legacy Library, 1977).

¹⁰⁵ *Id.*

¹⁰⁶ U.S. Department of Commerce, Standard State Zoning Enabling Act § 3 (1926), *reprinted in* Alan C. Weinstein, *ANDERSON'S AMERICAN LAW OF ZONING* § 32.01 (4th ed. 1997).

exclusionary zoning practices create concentrated poverty areas congested with a lack of transportation, schools, parks, and other public requirements.¹⁰⁷ Enacting zoning raises many obstacles to the construction of affordable housing. In other words, exclusionary zoning aims to prevent externalities through nuisance laws. But research has connected nuisance laws with people of color, creating a greater disparity in measurable outcomes.¹⁰⁸ Research also shows that exclusionary zoning contributes to the racial wealth gap in America.¹⁰⁹ For example, suppose black families are excluded from higher priced neighborhoods and put in less valuable neighborhoods. In that case, the homes purchased by these black families will have a lower return on investment, diminishing generational wealth.¹¹⁰

a. THE CONSTITUTIONALITY OF EXCLUSIONARY ZONING

NEW ORLEANS: AMERICA'S WORST NIGHTMARE

It is common to hear arguments and debates over development and land use. One argument is the NIMBY, "Not in My Backyard," which argues against affordable housing because of fear of blight, crime, and lowered property values.¹¹¹ Governmental officials and most individuals tend to associate poor persons of color with historical failures. As a result, many associated neighborhoods are socioeconomically homogeneous and block government-assisted housing to maintain that homogeneity.¹¹²

For example, rental bans proliferated throughout New Orleans, primarily in communities that had previously served as affordable suburban alternatives for lower- and moderate-income whites in prior decades,¹¹³ sought to prevent the development of new rental housing but also limit the repair of rental housing that pre-existed the 2008 storm Hurricane Katrina.¹¹⁴ At the same time, other communities in metropolitan New Orleans that were the least affordable, most homogenous, and nationally recognized desirable places to live were not targeted for government-assisted housing and thus did not pass the rental bans.¹¹⁵ Therefore, rather than using recovery efforts to minimize racially biased housing patterns, the region took steps to exacerbate them.¹¹⁶ New Orleans exemplifies the exclusionary dynamic in which government-assisted housing operates throughout America and the fundamental failure of the American housing policy at the federal, state, and local levels to prevent racial segregation.¹¹⁷ Rental affordability and the exclusionary-zoning activity need more targeted intervention in the housing market by HUD to ensure that states provide government-assisted housing.¹¹⁸

¹⁰⁷ *Id.*

¹⁰⁸ Douglas S. Massey & Jonathan Rothwell, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFF. REV. 779, 779-80 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4083588/#S6title>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Julia Mizutani, Note, *In the Backyard of Segregation Neighborhoods: An Environmental Justice Case Study of Louisiana*, 31 GEO. ENVTL. L. REV. 363, 370 (2019).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Mizutani, *supra* note 113, at 370.

¹¹⁸ *Id.*

b. ZONING MANDATES

As previously noted, exclusionary zoning in New Orleans is different compared to other regions in the U.S. Only a handful of states have tackled the issue of exclusionary zoning—Pennsylvania, New York, New Hampshire, and New Jersey.¹¹⁹ This section will provide details of state supreme court actions in Pennsylvania, New York, and New Jersey. Other states have refused to make exclusionary zoning unconstitutional or statutorily illegal; therefore, these states continue enacting zoning ordinances. New Jersey mandated municipal zoning to provide realistic opportunities for the construction of low- and moderate-income housing.¹²⁰ New Jersey's experiences illustrate issues posed by an aggressive judicial approach to policy, capacity, and legitimacy. Although New Jersey has an unusual socioeconomic and racial integration stand, the approach has not greatly impacted other states.¹²¹ This section will also explore state legislative agendas concerning affordable housing in Oregon and California. Oregon has shown promise of a state agency with a broad but vague mandate that gives interest groups, including advocates, a significant opportunity to influence land-use policy.¹²² Lastly, this section addresses implementation concerns and selects California as a useful case study. California's anti-exclusionary zoning program suggests that administrative/legislative agencies should have greater responsibility for producing affordable housing and zoning laws.¹²³

PENNSYLVANIA

The Pennsylvania Supreme Court has focused on landowner's rights; however, the court has determined that a desire to keep people out of land cannot justify denying the landowner's right to build on their land.¹²⁴ The court system has struck down a number of cases dealing with large-lot zoning and exclusion of certain housing types, particularly multifamily housing because they are less expensive.¹²⁵ Pennsylvania's constitution did not focus on substantive due process concerns that restricted property rights until 1977 in *Surrick v. Zoning Hearing Board*.¹²⁶ After *Surrick*, the state saw a substantial relationship between restrictions on property rights and legitimate state interests.¹²⁷ The case involves the exclusion of housing types that included both total exclusions and partial exclusions. In this case, the court held that it would not uphold a complete ban on multifamily housing.¹²⁸ The court stated that municipalities must have some zoning for multifamily housing.¹²⁹ As such, the court addressed an appropriate remedy of approving the proposed development and leaving the burden on the municipality to show that the

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See OR. ADMIN. R. § 660-007-0035 (2000).

¹²³ *Inclusionary Zoning: Legal Issues*, CALIFORNIA AFFORDABLE HOUSING LAW PROJECT AND WESTERN CENTER ON LAW & POVERTY, THE SAN FRANCISCO FOUNDATION (2002).

¹²⁴ *Legal Basis for Inclusionary Zoning*, CENTRE COUNTY, PA, https://centrecountypa.gov/DocumentCenter/View/422/legal_basis?bidId=

¹²⁵ *Id.*

¹²⁶ *Surrick v. Zoning Hous. Bd.*, 476 Pa. 182, 382 A.2d 105 (1977).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

development was “incompatible with the site or reasonable health and safety codes and regulations relating to lands, structures, or their emplacement on lands.”¹³⁰

In *Surrick*, the court used the multifactor test from *Mt. Laurel I*¹³¹ to determine whether a municipality had provided its “fair share” of multifamily housing.¹³² The test focused on the percentage of land available for multifamily housing, the current population pressure within the town and the region, and the amount of undeveloped land in the town.¹³³ This test was applied only to partial exclusions and not to cases involving total exclusions.¹³⁴ Thus, it made things difficult for a developer to win using this methodology.¹³⁵ Several cases were heard over time that defined the exclusion as partial, and the developer lost because the Pennsylvania Supreme Court ruled that there was a “clear distinction between restrictions on uses of property and exclusions of classes of people... It is a constitutionally protected right to own and enjoy [the] property.”¹³⁶

In 1988, the Pennsylvania General Assembly added two clauses to its general zoning enabling provisions that sought to incorporate its supreme court’s standards.¹³⁷ The first clause states that each municipality’s zoning ordinance shall provide for residential housing of various dwelling types encompassing all basic forms of housing, including single-family and a reasonable range of multifamily dwellings in various arrangements, mobile homes, and mobile home parks.¹³⁸ The second clause requires that municipalities accommodate reasonable community growth and opportunities for developing residential dwelling types and nonresidential uses.¹³⁹ These clauses assure that multifamily housing is being built, however there may be better mechanisms for reducing the minimum lot sizes for single-family homes.¹⁴⁰

Pennsylvania should examine the pros and cons of its approach because some scholars believe that multifamily units are not a good proxy for affordable housing. It is clear why multifamily was a big stressor for the state because they are cheaper than single-family housing; however, it is unclear whether the Pennsylvania approach has impacted the development of affordable housing. Research shows that the housing market frequently intertwines with zoning and building regulations to create upscale multifamily housing, which creates more profit for developers but does not filter down into developing affordable housing.

¹³⁰ *Fernley v. The Bd. Of Supervisors of Schuylkill Twp.*, 509 Pa. 413, 502 A.2d 585, 591 (Pa. 1985) (the court previously held in *Casey v. Zoning Hearing Bd.*, 459 Pa. 219, 328 A.2d 464 (Pa. 1974) that a municipality could not cure a challenge defect in a way that excluded the developer-plaintiff).

¹³¹ *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 67 N.J. 151, 154, 336 A.2d 713, 724 (N.J. 1975) [hereinafter *Mt. Laurel I*] (the court held that once a plaintiff showed that municipal land-use regulations did not make low- and moderate-income housing available, there was a violation of substantive due process or equal protection under the state constitution. The burden shifts to the municipality to establish a valid bases for its action or no action); 382 A.2d at 183; 336 A.2d at 729.

¹³² *Surrick*, 382 A.2d at 111.

¹³³ *Id.*

¹³⁴ *See Fernley*, 502 A.2d.

¹³⁵ *Id.*

¹³⁶ *In re Appeal of M.A. Kravitz Co.*, 501 Pa. 200, 460 A.2d 1075 (Pa. 1983); *BAC, Inc. v. Board of Supervisors of Millcreek Twp.*, 633 A.2d 144, 534 Pa. 381 (Pa. 1993).

¹³⁷ PA STATE. ANN. TIT. 53 § 10604(4) (West 2022).

¹³⁸ *Id.*

¹³⁹ PA STATE. ANN. TIT. 53 § 10604(5) (West 2022).

¹⁴⁰ *Id.*

NEW YORK: NOT IN MY BACKYARD SYNDROME

The New York Court of Appeals has set precedents limiting municipalities' ability to exclude affordable housing by forcing them to consider the general welfare.¹⁴¹ Racial and economic segregation patterns contribute to a substantial regional imbalance in housing.¹⁴² Therefore, New York cases utilize substantive due process analysis.¹⁴³ The landmark case in New York was *Berenson v. Town of New Castle*, where the court was confronted with a zoning ordinance that excluded multifamily housing from its list of permitted uses.¹⁴⁴ The court implemented a two-part test—whether the zoning ordinance provides for current residents and future housing needs and whether the ordinance gave due consideration to regional needs and requirements.¹⁴⁵ The court held that “the local desire to maintain the status quo must be balanced against the greater public interest that regional needs met.”¹⁴⁶ Therefore, if a town’s neighbors supply enough multifamily housing to meet the regional housing need, the town need not permit any multifamily housing unless a local need exists.¹⁴⁷

Although the *Berenson* decision is the original landmark case, there are later decisions that moved the court’s focus to the provision of affordable housing. Later appeals held that the remedy needed to be tailored only to the housing needs of low- and moderate-income people.¹⁴⁸ The court asked the state legislature to take responsibility for the fight for affordable housing.¹⁴⁹ The court attempted to shift from court-focused to legislative regulations because there is a substantial relation to the citizens' public health, safety, morals, or general welfare.¹⁵⁰

NEW JERSEY: THE MT. LAUREL SAGA

The New Jersey Supreme Court has a landmark opinion known as *Mt. Laurel I* where the court laid out the principle that no municipality in the state could ban the opportunity for low- and moderate-income housing, and its regulations must affirmatively afford that opportunity at least to the extent of the municipality’s fair share of the present and prospective regional need.¹⁵¹ In *Mt. Laurel I*, the Township of Mount Laurel allowed some multifamily housing to be planned and developed, but the projects were designed to be beyond the reach of low- and moderate-income families and deliberately contained very few apartments with more than one bedroom to keep out school-aged children.¹⁵² The court required Mount Laurel and other towns with similar zoning to amend their zoning ordinances following the court’s decision.¹⁵³ However, there were issues with the execution of the amendments because the requirement was too ambiguous. The court required

¹⁴¹ *Addressing Challenges to Affordable Housing in Land Use Law: Recognizing Affordable Housing as a Right*, 135 HARVARD L. REV. 1104 (2022).

¹⁴² *Id.*

¹⁴³ See *Britton v. Town of New Castle*, 341 N.E.2d 236 (N.Y. 1975) (The constitutional validity of zoning ordinances depends on whether it is really designed to accomplish a legitimate public purpose).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 242.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 242-43.

¹⁴⁸ *Berenson v. Town of New Castle*, 415 N.Y.S.2d 669, 678 (N.Y. App. Div. 1979).

¹⁴⁹ *Berenson*, 341 N.E.2d at 243.

¹⁵⁰ *Id.* at 240.

¹⁵¹ *Supra* note 134.

¹⁵² *Id.* at 166-70, 336 A.2d at 721-22.

¹⁵³ *Id.*

a fair share of regional low-income housing but failed to provide any housing procedures.¹⁵⁴ The court also did not state consequences if the municipalities did not comply with the order or remedies.¹⁵⁵

Due to issues with the first proceeding, the New Jersey Supreme Court advanced to *Mount Laurel II* to formulate broad principles and rules of implementation.¹⁵⁶ The New Jersey Supreme Court began the *Mount Laurel II* decision by acknowledging and reaffirming its commitment to *Mount Laurel I* and its holding that municipal land-use regulations provide a realistic opportunity for low- and moderate-income housing.¹⁵⁷ In response to the ineffectuality of *Mount Laurel I*, the New Jersey Supreme Court created guidelines according to the designated specific fair share number for each municipality in the state.¹⁵⁸ The court constituted the enabling legislation for three regional zoning agencies and adopted the State Development Guide Plan as a way of determining which municipalities were in the path of development and had a fair share of obligations.¹⁵⁹ Three judges would determine housing regions, the need for low and moderate income housing in each region, and the municipal fair share.¹⁶⁰

The court established accuracy and numerical requirements, along with remedial powers.¹⁶¹ In addition, municipalities could be ordered to revise their zoning ordinances.¹⁶² The court acted based on its constitutional obligation.¹⁶³ The court also advised towns that they could meet their *Mt. Laurel* obligations by removing excessive restrictions and exactions.¹⁶⁴ Additionally, municipalities could promote state and federal subsidies and implement inclusionary zoning techniques.¹⁶⁵ The court recognized that positive inducement was necessary to get affordable housing built.¹⁶⁶ These positive inducements meant that exclusionary zoning ordinances needed to end and there was a need for the provision of public or private subsidies.¹⁶⁷ However, legislative and executive functions are the best way of protecting the constitutional interest of its citizens. New Jersey does not go without notice, with the New Jersey Supreme Court being able to combine activism with independence and authority. Other courts should follow in the footsteps of the New Jersey Supreme Court.

OREGON: A CHANGE IS COMING LEGISLATIVELY

In Oregon, the state legislature passes laws intended to fight exclusionary zoning. Oregon's exclusionary zoning was created by its legislation, which suggests ways courts can set guidelines

¹⁵⁴ *Id.* at 190, 336 A.2d at 730-31.

¹⁵⁵ *Id.* at 190, 336 A.2d at 733.

¹⁵⁶ *S. Burlington Cnty. NAACP v Mount Laurel Twp.*, 92 N.J. 158, 199, 456 A.2d 3910, 410 (N.J. 1983) [hereinafter *Mt. Laurel II*].

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 198, 456 A.2d at 410.

¹⁶⁰ *Id.* at 249-59, 456 A.2d. at 436-41.

¹⁶¹ *Id.* at 279-80, 456 A.2d. at 452.

¹⁶² *Mt. Laurel II* at 279-280, 456 A.2d at 452.

¹⁶³ *Id.* at 280-86, 456 A.2d at 453-55.

¹⁶⁴ *Id.* at 287, 456 A.2d at 456.

¹⁶⁵ *Id.* at 259-75, 456 A.2d at 442-50.

¹⁶⁶ *Id.* at 261, 456 A.2d at 442.

¹⁶⁷ N.J. STAT. ANN. § 52:27D-311 (West 2022).

and regulations.¹⁶⁸ As an agency-enforced state,¹⁶⁹ this section of the paper focuses on the state's experiences with administering anti-exclusionary programs. Oregon's program provides a broad, vague land-use control mandate with adequate enforcement powers.¹⁷⁰ In Oregon Bill 100, one of the goals adopted was Goal 10-Housing, which stated that plans should encourage the availability of needed housing units at price ranges and rent levels that reflect Oregon's households.¹⁷¹ Another goal, Goal 14, was creating "urban growth boundaries."¹⁷²

An important precedent for affordable housing was set in *Seaman v. City of Durham*.¹⁷³ This decision suggested that municipal plans must consider regional needs for affordable housing. The Land Conservation and Development Commission (LCDC) review board found that the City of Durham increased its minimum lot size requirements and did not consider its residents' and workers' low-cost housing needs.¹⁷⁴ In 1979, the LCDC issued a Housing Policy Statement specifying that municipal plans had to zone sufficient buildable land for housing types designed to meet the demonstrated need for housing at particular price ranges and rent levels.¹⁷⁵ The Housing Policy Statement also included government-assisted housing as a separate needed housing type. This was evaluated along with multifamily housing, both owner and renter; mobile homes; and manufactured homes, both in dwelling parks and on individual lots planned for single-family homes.¹⁷⁶

In summary, the evidence suggests that Oregon significantly impacts zoning within the metropolitan areas, including the LCDC. Evidence also shows that Oregon is concerned with constructing high-density housing and housing affordability, demonstrating that fighting exclusionary zoning extends to the court and other government agencies.

CALIFORNIA DREAMING

Like Oregon, California has an oversight scheme for affordable housing; however, it does not have an enforcement agency. California's scheme has often been blamed due to its high poverty and homeless ratings. Like the Oregon statute, the California statute requires municipalities to adopt a long-term comprehensive plan whose housing element includes a strategy for meeting the locality's share of the regional need at various income levels.¹⁷⁷ California has a Department of Housing and Community Development (HCD) that determines each region's housing needs while the regional Councils of Government (COG) determine each locality's share of the regional need.¹⁷⁸ HCD reviews the local housing elements for compliance but does not have the power to

¹⁶⁸ Comprehensive Land Use Planning Coordination, 1973 OR. LAWS 80 (codified as amended at OR. REV. STAT. §§ 197.005-197.860 (1999)).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Oregon's Statewide Planning Goals & Guidelines, Goal 10: Housing, LAND CONSERVATION AND DEV. COMM'N (1996); OR. REV. STAT. §§ 197.295-197.314 (1999).

¹⁷² Oregon's Statewide Planning Goals & Guidelines, Goal 14: Urbanization, LAND CONSERVATION AND DEV. COMM'N (2000).

¹⁷³ LCDC No. 77-025 (Apr. 19, 1979).

¹⁷⁴ *Id.* at 9-10.

¹⁷⁵ Sandra Smith Gangle, Note, *LCDC Goal 10: Oregon's Solution to Exclusionary Zoning*, 16 WILLAMETTE L. REV. 873, 880 (1990) (citing LCDC, Housing Policy Statement (July 12, 1979) as codified at Or. Rev. Stat. § 197.307 (1999)).

¹⁷⁶ OR. REV. STAT. § 197.303(1)(b) (1999).

¹⁷⁷ CAL. GOV'T CODE § 65583 (West 2022).

¹⁷⁸ CAL. GOV'T CODE § 65584 (West 2022).

force localities to implement the housing elements.¹⁷⁹ The statute does allow court action by private parties.¹⁸⁰ California courts have broad enforcement powers.¹⁸¹ However, various external factors make going through the court system unsatisfying. Another problem with the court system is the judicial reluctance to enforce anti-exclusionary zoning laws. Some California judges defer to local land use decisionmakers, especially those judges who are elected and not appointed. Research has shown that although California is legislatively mandated, California courts show substantial deference to local land use decision making, limiting themselves to reviewing local housing elements for facial compliance with the housing element law rather than enforcing it.¹⁸²

This paper will not go into depth with other states, but it is noted that Connecticut and Massachusetts have Appeals Acts concerning affordable housing and units built.¹⁸³ States should determine if there is a chance to vest a state agency with authority to override municipal land-use decisions or follow New Jersey with the court activism to provide the court with power rather than a state takeover of local government.

Exclusionary zoning problems are complex and have substantial implications. The problem is that zoning often excludes lower-income families without serving legitimate and vital state interests. Courts should aim to place the issue on the state legislature as a public choice but concisely. It is hard for courts to implement and force other branches of government to take action with exclusionary zoning problems. There can be a theme of overreaching and usurping power even though the purpose is for the greater good. This could lead to more harm than good for undermining state police authority. The best solution for states is to emulate Oregon and its LCDC tactic.

iii. MISSED OPPORTUNITIES? INCLUSIONARY ZONING

Inclusionary zoning began in the 1960s and 1970s as a governmental method to require or encourage developers to create affordable residential units as a part of new developments.¹⁸⁴ Inclusionary zoning policies encourage developers to provide a percentage of affordable units below market rate.¹⁸⁵ Inclusionary zoning has only existed as a viable land use control for approximately fifty years.¹⁸⁶ The movement became a viable option to fight against exclusionary zoning and promote the creation of affordable housing.¹⁸⁷ There are two forms of inclusionary zoning ordinances: mandatory and voluntary.¹⁸⁸ Mandatory programs require a developer who constructs a project over a certain size to reserve a portion of units as affordable, also known as a

¹⁷⁹ *Id.*; see also HUD ADVISORY COMM. ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, <https://www.huduser.gov/portal/taxonomy/term/2437>.

¹⁸⁰ CAL. GOV'T CODE § 65587 (West 2022).

¹⁸¹ CAL. GOV'T CODE § 655755 (West 2022).

¹⁸² Ben Field, *Why Our Fair Share Housing Laws Fail*, 34 SANTA CLARA L. REV. 35, 54-61 (1993).

¹⁸³ See Connecticut Affordable Land Use Appeals Procedure Act, CONN. GEN. STAT. ANN. § 8-30g; see also "Anti-Snob" Zoning Appeals Act, MASS. GEN. LAWS ANN. ch. 40B §§ 20-23.

¹⁸⁴ Brian R. Lerman, *Mandatory Inclusionary Zoning—The Answer to Affordable Housing Problem*, 33 B.C. ENV'T. AFF. L. REV. 383, 385 (2006).

¹⁸⁵ See Emily Hamilton, *Inclusionary Zoning and Housing Market Outcomes*, 23 CITYSCAPE, 161, 161-94 (2021).

¹⁸⁶ *Id.*

¹⁸⁷ Alastair McFarlane, *Inclusionary Zoning and the Development of Urban Land*, U.S. DEP'T. OF HOUS. & URB. DEV. (2009), https://www.huduser.gov/portal/publications/pdf/awm_rep_0902.pdf.

¹⁸⁸ *Id.*

set-aside.¹⁸⁹ The mandatory provisions are often included with incentives such as a density bonus.¹⁹⁰ Unlike mandatory programs, voluntary programs allow the developer to opt-in to create affordable units.¹⁹¹ The discretion, afforded by the police power to exclude land uses that facilitate affordable housing, has been circumscribed somewhat by constitutional and statutory limitations, as discussed below.

a. THE CONSTITUTIONALITY OF INCLUSIONARY ZONING

When a locality adopts—either by ordinance, general plan, policy, or other regulatory mechanisms—a program that requires new developments to include housing that is affordable to and reserved for households of a certain income, a variety of legal issues may be raised.¹⁹² The legal issues raised most often are whether inclusionary zoning constitutes a taking and whether inclusionary requirements as applied to rental housing violate property rights.¹⁹³

A program that encourages rather than mandating inclusion of affordable units in developments, usually through a system of regulatory concessions or incentives such as density bonuses or fee waivers, will raise fewer legal questions because it is voluntary.¹⁹⁴ However, these programs are becoming the exception precisely because they are voluntary. Regardless of the value of the concessions and incentives offered, developers without experience developing affordable housing would develop market-rate housing, notwithstanding the critical societal need for affordable housing.¹⁹⁵

LAND USE ORDINANCE ANALYSIS

The authority for local governments in each state to adopt zoning ordinances and other land use policies and regulations, such as inclusionary zoning, is the “police power.”¹⁹⁶ This power emanates from the Tenth Amendment to the United States Constitution, which reserved to the states their inherent powers.¹⁹⁷ The police power entitles communities to take action and adopt laws and policies that protect the public’s health, safety, and welfare.¹⁹⁸

In 2016, the California Supreme Court declined to decide whether the construction of additional housing created a need for affordable housing.¹⁹⁹ In *California Building*, the issue before the court was about the federal and state constitutional issues surrounding inclusionary zoning or set-asides. The court was tasked with deciding which method involved a facial challenge to an

¹⁸⁹ See *Defining Housing Affordability*, OFF. OF POL’Y DEV. & RSCH., U.S. DEP’T OF HOUS. & URB. DEV., (Aug. 14, 2017), <https://www.huduser.gov/portal/pdredge/pdr-edge-featd-article-081417.html>.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U. OF SAN FRANCISCO L. REV. 971 (2002), <https://repository.usfca.edu/cgi/viewcontent.cgi?article=1060&context=usflawreview>.

¹⁹³ *Id.*

¹⁹⁴ James S. Burling, *Do Inclusionary Zoning Laws Violate Nollan, Dolan, and the Doctrine of Unconstitutional Conditions?*, THE FEDERALIST SOC’Y (2007), <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/ZrigK6VMhYm3opFAr3UoTfWQVC0mpo9kJNiSCIPf.pdf>.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See *Village of Euclid*, *supra* note 6.

¹⁹⁹ *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 61 Cal. 4th 435, 351 P.3d 974 (Cal. 2015).

ordinance that required all new residential developments of twenty or more units to sell at least fifteen percent of them at a price affordable to low- or moderate-income households.²⁰⁰ The principal challenge was based on the Fifth Amendment of the U.S. Constitution and a similar provision of the state constitution. The landowner in the case specifically raised the “unconstitutional conditions” language used in *Dolan* and *Koontz*.²⁰¹ The argument advanced by the landowner-development community against inclusionary zoning is that the construction of additional housing does not, by itself, create the need for affordable housing and, therefore, inclusionary zoning does not pass muster under *Nollan*, *Dolan*, and *Koontz*.²⁰² The California Supreme Court rejected these challenges because of the regulatory nature of the ordinance.

EXACTION ANALYSIS

Since 1926 when the U.S. Supreme Court declared the practice constitutionally permissible, a municipality has been able to utilize its police powers to utilize zoning regulations within its jurisdiction to protect public health, safety, and general welfare.²⁰³

To make significant changes to the existing use of their land—changes like subdividing parcels, initiating major construction projects, or shifting the type of use from residential to commercial or to more intense residential or commercial uses—property owners typically must seek one or more discretionary approvals from the jurisdiction’s zoning authority or legislative body.²⁰⁴ Local governments approve or deny development proposals after considering a specific project for a particular piece of land.²⁰⁵ In this process, local governments and property owners often negotiate over the concessions that an applicant will agree to as the condition for issuance of the approval necessary to change the existing land use on the subject parcel. State courts, which early on tended to condemn flexible, negotiated land use regulatory practices as impermissible efforts by municipalities to contract away their police powers,²⁰⁶ have increasingly upheld such agreements, especially when states have granted the municipalities authority to do so.²⁰⁷

Exactions are a type of conditional zoning by which local governments, as a condition for issuing a discretionary approval for development of land, require property owners and developers to finance or provide public facilities.²⁰⁸ The typical exaction requires that, in exchange for the required regulatory approval by the local government for a proposed new land use, the property owner provides or pays for some concession or package of concessions based on the anticipated impacts of the proposed new land use and the actions (to be provided either by the landowner or the local government) required to mitigate those impacts. Such concessions may include the

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *See Village of Euclid.*

²⁰⁴ Jessica Owley & Stephen J. Tulowiecki, *What Exactly are Exactions?*, 33 N.Y. ENV’T L. 30 (2013).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

dedication of land for the siting of public services or amenities (such as schools or parks), fees in lieu of dedication, and impact fees to fund the provision of public services.²⁰⁹

Exactions require the financial or in-kind provision of needed or desired infrastructure; as such, they shape the physical environment, generate revenue, force the internalization of external costs where private ordering is unlikely to do so, and resolve political conflict.²¹⁰ Given the variety of ends they promise to meet and their role in shaping the conditions for development, exactions are fraught with political, legal, and emotional controversy not only for landowners but also for other affected parties, including neighbors, interest groups, residents of the jurisdiction and possibly the entire region, as well as the regulatory agency itself.²¹¹

Prior to the U.S. Supreme Court's entrance into the field in *Nollan* and *Dolan*, state courts had applied various state statutory and constitutional doctrines to develop differing standards of review for land use exactions.²¹² When it articulated its pair of federal constitutional standards to evaluate the permissibility of exactions under the Takings Clause, the Supreme Court established a uniform floor of property rights on what had previously been a diverse, experimental patchwork of state law.²¹³ State legislatures played an important role in limiting exactions before *Nollan* and *Dolan* and continue to do so today.²¹⁴ By providing municipalities explicit authority to impose exactions, state statutes have limited exactions that require the dedication of land and impose impact fees.²¹⁵ Prior to *Nollan*, state courts often invalidated exactions that lacked or exceeded statutory authority.²¹⁶

Nollan and *Dolan* established two tests that the Supreme Court described as reflecting the mainstream of state court precedent for the relationship between a development proposal and exaction conditions.²¹⁷ These tests evaluate the degree of relationship between the exaction to the proposed development's anticipated harms by imposing a heightened judicial scrutiny on exactions—one based on a rule-like command that lower courts must apply.²¹⁸ In *Nollan*, the plaintiffs sought to demolish and replace a small, worn-down bungalow on their beachfront property and replace it with a three-bedroom house similar to those of their neighbors.²¹⁹ The California Coastal Commission, from whom the Nollans needed a discretionary permit to build their new beach house, made issuance of the permit conditional on the Nollans' dedication of a public easement across the portion of their beachfront property that lay between the high tide line.²²⁰

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Supra* note 205 at 31.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Nollan* at 827-28.

²²⁰ *Id.* at 828.

The Supreme Court held that the commission's imposition of this condition violated the Takings Clause on the grounds that the easement, which if required outside the context of a permit application would have affected a taking for which compensation would unquestionably have been due, lacked an "essential nexus" to the harm created by the proposed building.²²¹ *Nollan* thus settled two issues: whether exactions as a general matter are constitutionally permissible and what a specific exaction could require, such as a concession bearing an essential nexus or substantive relationship, to the proposed land use damages.²²²

In *Dolan*, the Court considered a property owner's challenge to two conditions the city of Tigard, Oregon, placed on its approval of the property owner's application to expand her hardware store.²²³ Establishing a test it claimed to divine from the variety of prior state supreme court exactions cases, the Court held that the city had failed to show that the required concessions were in "rough proportionality . . . both in nature and extent to the impact of the proposed development."²²⁴ The Court placed the burden of proof on the government entity to establish, with some rough degree of precision and with more than simply conclusory statements, that its proposed exactions on land development would remediate the effects of the proposed development.²²⁵

To summarize the Court's particularized approach to exactions: *Nollan* established the constitutionally required logic of exactions, a logic that limits concessions to those that address and seek to internalize the harms and costs of the proposed project. That logic's constitutional minimum is an essential nexus. *Dolan* established the constitutionally required metric of exactions—extending *Nollan*'s logic to a quantitative measure of rough proportionality to the extent of the project's expected harms.

REGULATORY TAKINGS ANALYSIS

In establishing separate, heightened scrutiny of certain categories of alleged takings, the Supreme Court carved out exceptions to the ad hoc, fact-intensive balancing approach established as the dominant test for regulatory acts that require compensation. *Penn Central* established alleged regulatory takings,²²⁶ which require courts to balance three factors—(1) economic impact, (2) reasonable investment backed expectations, and (3) the character of the government's action.²²⁷ Also known as "the economic impact of the regulation on the claimant."²²⁸ The two most widely recognized categorical exceptions to the *Penn Central* test concern government acts that effect a permanent physical occupation of land, and those that deny an owner all economically beneficial use of their land, as established in *Lucas v. South Carolina Coastal Council*.²²⁹ *Lucas* focuses on

²²¹ See *id.* at 837; Owley & Tulowiecki, *supra* note 205, at 31.

²²² *Id.*

²²³ *Dolan*.

²²⁴ *Id.* at 391; accord Owley & Tulowiecki, *supra* note 205, at 31.

²²⁵ *Id.*

²²⁶ Owley & Tulowiecki, *supra* note 205, at 31.

²²⁷ *Penn Central Transp. Co., et al. v. N.Y.C., et al.*, 438 U.S. 104, 124 (1978).

²²⁸ *Penn Central Transp. Co., et al. v. N.Y.C., et al.*, 438 U.S. 104, 124 (1978) (citing *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)).

²²⁹ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

the permanent physical occupation category which constitutes a boundary of land use regulations that constitute a takings violation.²³⁰

STATE IMPLEMENTATIONS

a. NEW JERSEY

State courts have taken the lead in the constitutional realm with the New Jersey Supreme Court holding that the New Jersey constitution obligated local governments to use their land use powers to affirmatively plan for and make available the reasonable opportunity for low and moderate cost housing to meet the needs of people desiring to live within the community.²³¹ The court dispensed with the strict presumption of validity afforded local zoning ordinances since *Euclid* and recognized a regional concept of the general welfare.²³² Striking down a zoning ordinance limiting density, the court found that to survive a constitutional attack, a community must demonstrate that its zoning scheme serves the welfare of the region, not just its own parochial desires.²³³

3. ASSESSMENT OF NATIONAL HOUSING INITIATIVES AND PROGRAMS

Federal programs play a huge and vital role in helping to fund the production costs and encouraging the growth of affordable housing supply.²³⁴ The various federal programs providing financial incentives designed to increase the supply of affordable housing are legion, and a description of all the various methods and specifics is beyond the scope of this Paper.

Subsidy and incentive programs exist for both saleable homes and rental units.²³⁵ Financial assistance delivered may be in the form of tax credits or grants. Financial assistance decreases the cost of capital.²³⁶ There are countless financial structures such as: low-cost government financing, direct funding of specific production or rehabilitation costs, or public-private partnerships.²³⁷ The essential goal and impact of all these incentive programs are similar: the government offers a financial incentive in exchange for a commitment to produce a certain number of housing units, rented at specified affordable levels for specified periods.²³⁸ The various supply-enhancing programs, mostly federally funded, have created a significant number of affordable rental units, without which the affordable housing crisis would be far worse.²³⁹

²³⁰ *Id.*

²³¹ *See Mount Laurel II.*

²³² Robert H. Freilich & Derek B. Guemmer, *Removing Artificial Barriers to Public Participation in Land-Use Policy: Effective Zoning and Planning by Initiative and Referenda*, 21 URB. L. 511, 511-56 (1989), <https://www.jstor.org/stable/27894623>.

²³³ *Id.*

²³⁴ *See Jacobs, supra* note 41.

²³⁵ *Id.*

²³⁶ *See Sullivan, supra* note 60.

²³⁷ *See* Stephen B. Friedman, *Successful Public/Private Partnerships from Principles to Practices*, ULI (2016), <https://uli.org/wp-content/uploads/ULI-Documents/Successful-Public-Private-Partnerships.pdf>.

²³⁸ Lance Freeman, *Americas Affordable Housing Crisis: A Contract Unfulfilled*, AM. J. PUBLIC HEALTH 709-12 (2002).

²³⁹ *Id.*

a. VOUCHERS

The Housing Choice Voucher Program is the largest rental-assistance program administered by HUD.²⁴⁰ The program was created in 1998 as a tenant-based housing-subsidy program run by HUD.²⁴¹ The program had the potential to provide greater housing mobility to an individual because the subsidy can be used to rent an apartment in the private market.²⁴² Consistent with national averages, black families are the highest level of participants using the voucher program.²⁴³ Systematically these families are positioned in high-poverty neighborhoods compared to their white counterparts. New Orleans is a great example of concentrated poverty having twice the percentage of voucher families living in neighborhoods with poverty concentration about 30% compared to voucher users living in neighborhoods in the top fifty metropolitan areas in the U.S.²⁴⁴

b. PUBLIC HOUSING AND PROJECT-BASED SECTION 8 SUBSIDIES

The idea of public housing in the U.S. was created pursuant to a policy of *de jure* racial segregation.²⁴⁵ Yet there are many cases and publications which demonstrate that developers and governmental agencies have turned a blind eye to racial discrimination and segregation.²⁴⁶ This includes selecting land and sites in highly concentrated areas, an implied segregation due to low housing supply, cost, and community concerns.²⁴⁷

Project-Based Section 8 Subsidies is an umbrella term for several housing subsidy programs authorized in 1974 as an amendment to the U.S. Housing Act of 1937.²⁴⁸ Most federal housing expenditures benefit homeowners rather than renters, but the federal government does spend a substantial amount of money each year subsidizing low-income rental housing costs. This is often done through Section 8 voucher programs. Housing vouchers obligate the government to pay the difference between the rental amount that would be affordable to a given renter, based on that renter's income, and the lesser of the actual rent charged and a reasonable market rent for the unit in question.²⁴⁹ There are several different types of housing voucher programs, the two most significant being project-based vouchers (PBVs) and housing choice vouchers (HCVs), both authorized under Section 8.²⁵⁰ Because federal funding for vouchers decreased (or at least

²⁴⁰ OFFICE OF POLICY DEV & RESEARCH, U.S. DEPT OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHER LOCATION PATTERNS: IMPLICATIONS FOR PARTICIPANT AND NEIGHBORHOOD WELFARE, at x (2003). Foreword to HUD VOUCHER LOCATION PATTERNS REPORT.

²⁴¹ *Id.*

²⁴² See ALAN BERUBE & BRUCE KATZ, KATRINA'S WINDOW: CONFRONTING CONCENTRATED POVERTY ACROSS AMERICA 3 & tbl.1 (Brookings Institution 2005), available at http://www.brookings.edu/~media/Files/re/reports/2005/10poverty_berube/20051012_Concentratedpoverty.pdf.

²⁴³ *Id.*

²⁴⁴ HUD VOUCHER LOCATION PARTTTTERNS REPORT at vii.

²⁴⁵ Stacy E. Seicshnaydre, How Government Housing Perpetuates Racial Segregation: Lessons from Post- Katrina New Orleans, 60 Cath. U. L. Rev. 661, 664 (2011).

²⁴⁶ *Id.*

²⁴⁷ Elliot Rigsby., *Understanding Exclusionary Zoning and Its Impact on Concentrated Poverty* (2016), available at <https://tcf.org/content/facts/understanding-exclusionary-zoning-impact-concentrated-poverty/?session=1>.

²⁴⁸ Molley Rockett, *Private Property Managers, Unchecked: The Failures of Federal Compliance Oversight in Project-Based Section 8 Housing*, 134 HARV. L. REV. 286, 288 (2021).

²⁴⁹ *Id.*

²⁵⁰ The Section 8 voucher system was created by passage of the Housing and Community Development Act of 1974. Pub. L. No. 93-383, tit. II § 201(a), 88 Stat. 662-66 (codified as amended at 42 U.S.C. 1437f (2012); see also JACOBS, *supra* note 42.

insufficiently increased) as the intensity of cost-burdens increased among an ever-growing number of renters, the percentage of low-income households receiving federal subsidies has declined over the past 20 years.²⁵¹ In 2000, HUD provided housing assistance to about one third of needy low-income renter households; today, HUD only has funding to assist one fourth. Waitlists for available vouchers can be long and wait times can exceed two years.²⁵²

PBVs attach to a specific unit and are not portable, whereas tenant recipients of HCVs can move and take their vouchers with them.²⁵³ PBVs apply to designated units, they could be deliberately sited in higher opportunity areas, but most of them are not and, instead, are in low-income neighborhoods.²⁵⁴ HCVs are more numerous than PBVs and avoid some of the siting problems that PBVs face because they can be used anywhere a tenant finds housing as long as the landlord agrees to accept the vouchers.²⁵⁵ In most states, landlords are free to refuse payment of rent in the form of HCVs.²⁵⁶ Landlords are virtually guaranteed payment from the government for the amount represented by an HCV but sometimes refuse to accept vouchers, perhaps because of conscious or unconscious discrimination, based on source of income, socio-economic class, or other factors.²⁵⁷

A handful of states have outlawed source-of-income-based discrimination in rental housing,²⁵⁸ and Congress periodically proposes expanding the Fair Housing Act protections to cover people who are denied housing because they pay with a voucher. The HCV program should be expanded so that every income-eligible household can receive assistance. A federal ban on source-of-income discrimination is also needed since the refusal by some landlords and property owners to accept vouchers and other forms of rental assistance makes the process of finding adequate housing much more difficult for many renters.

c. SWEAT EQUITY

Sweat Equity Programs provide an alternative to cash outlays; such programs allow families and individuals to purchase a home in return for their labor. Sweat Equity Programs are generally offered through the U.S. Department of Agriculture (USDA) Rural Development,²⁵⁹ Freddie Mac, HUD, and Habitat for Humanity under the Self-Help Housing Program.²⁶⁰

²⁵¹ JACOBS, *supra* note 42.

²⁵² Ingrid Gould Ellen, *What Do We Know About Housing Choice Vouchers?* NYU FURMAN CENTER (2018), https://furmancenter.org/files/fact-sheets/HousingChoiceVouchers_ige.pdf.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ Since 1971, USDA has helped build more than 50,000 houses across the nation. Through the Self-Help Housing Program, homeowners save money and earn “sweat equity” toward their homes by completing 65% of the labor. The sweat equity qualifies as the down payment. Once completed, the USDA Rural Development provides the families with mortgages through the Single-Family Housing Direct Loan Program.

²⁶⁰ See Michele Lerner, *Sweat Equity Can be a Pushup to Homeownership*, Washington Post (January 2020), available at <https://www.washingtonpost.com/realestate/sweat-equity-can-be-a-pushup-to-homeownership/>. 2020/01/14/0aa01054-0a3c-11ea-8397-a955cd542d00_story.html.

Sweat Equity Programs provide grants to public and private nonprofit organizations and community housing development organizations to provide technical and supervisory assistance to low-income and very-low-income families, including the homeless, in acquiring, rehabilitating, and constructing housing by the self-help housing method.²⁶¹ This program targets rehabilitation properties which are acquired by the Federal, State, or local governments to promote homeownership and rental opportunities.²⁶²

One of the most cost-effective ways to support supply adequacy in affordable housing is to preserve and maintain existing affordable housing units, many of which are aging and rapidly exiting the national rental unit inventory.²⁶³ The goal of this program is to help expand the stock of affordable housing by providing low- to very-low-income families with training and skill sets in exchange for acquisition of the property.²⁶⁴ This program is used to facilitate and encourage innovative homeownership opportunities.²⁶⁵ Homeowners in the program gain a feeling of belonging and accountability because they help construct a quality dwelling that complies with local building and safety codes and is priced below the prevailing market.²⁶⁶ This program also establishes and fosters partnerships between the Federal Government and organizations resulting in efficient development of affordable housing with minimal governmental intervention, limited governmental regulation, and significant involvement by private entities.²⁶⁷ The program is also a great opportunity to connect with diverse demographics because the dwellings are included in areas having high housing costs, rural areas, and areas underserved by other homeownership.²⁶⁸ Some scholars believe that sweat equity can increase and improve homeownership among low- and moderate-income households.²⁶⁹

d. HOUSING INVESTMENT TRUST FUNDS

The Housing Trust Fund (HTF) is one source of federal money that can be used for preservation and rehabilitation of existing affordable housing.²⁷⁰ The HTF was established in 2008 under the Housing and Economic Recovery Act to provide annual block grants to build, rehabilitate, or preserve housing affordable to extremely low income households.²⁷¹ In 2015, Congress finally authorized funding.²⁷² States use most of the HTF funds they have and will receive for projects serving “people experiencing homelessness, people with disabilities, elderly people, or other special needs populations.”²⁷³ The distribution of HTF funds to each state and the District of Columbia is determined by the shortage of rental housing affordable and available to extremely low-income and very low-income renters in a given locality and the extent to which

²⁶¹ 42 U.S.C.A. § 12805.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ Laura M. Schwarz, *The 2007 National Affordable Housing Trust Fund Act: A National Fund for a National Need*, J. OF AFFORDABLE HOUSING & COMM. DEV'T L. 395-422 (2008), <https://www.jstor.org/stable/25782830>.

²⁷² *Id.*

²⁷³ *Id.*

these renters are severely housing cost-burdened.²⁷⁴ Many projects funded in part by the HTF employ other affordable housing resources as well, particularly the LIHTC, the HOME program, in addition to state or local funds.²⁷⁵

e. LOW-INCOME HOUSING TAX CREDIT

The Low-Income Housing Tax Credit Program (LIHTC)²⁷⁶, which was launched in 1986, is the nation's largest low-income housing production program created to counteract high-poverty concentration existing in all the other government-assisted housing programs.²⁷⁷ However, like other government-assisted housing programs, LIHTC often falls short by following the same patterns of concentration and segregation.²⁷⁸ The tax credit provides investors in rental housing developments a credit against their federal income tax obligations.²⁷⁹ State agencies receive an allocation of tax credit each year from U.S. Treasury, which they in turn allocate to developers of rental housing.²⁸⁰ These developers must reserve a percentage of units for households with incomes ranging from 30-60% of the area's median income.²⁸¹

Although the LIHTC program has been a successful tool for promoting affordable housing supply, it faces challenges. The LIHTC program faces objections primarily for its location of units, not its affordability duration. Only 29% of LIHTC units are located in neighborhoods that offer their residents enhanced economic opportunity through local labor markets, high-quality educational opportunity, transit access, and a healthy environment, and only 9% of these are in mixed-income (as opposed to low-income) neighborhoods.²⁸² Like many other federal programs, LIHTC seems to have increased the affordable housing supply primarily in impoverished, poor-quality neighborhoods, thus concentrating and perpetuating poverty in addition to the housing need that federal affordable housing funding is supposed to address.²⁸³

f. HOME INVESTMENT PROGRAM

Home Investors Partners Program (HOME), is a grant program designed to fund state and local efforts to create housing affordable to low-income households, and the Community Development Block Grant (CDBG), is a HUD program with broader housing objectives that has been active since 1975.²⁸⁴ HOME is the largest federal block grant used to create affordable housing and provides flexible funding for states and localities that can be used for "building, buying, and/or rehabilitating affordable housing for rent or homeownership or providing direct

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ LIHTC was created under the Tax Reform Act of 1986, (Pub. L. No. 99-514, 100 Stat. 2085 (codified at 26 U.S.C. § 1 et seq.) (1986).

²⁷⁷ Jill Khadduri, et al., *What Happens to Low-Income Housing Tax Credit Properties at Year 15 and Beyond?* (2012).

²⁷⁸ Kirk McClure, *Are Low-Income Housing Tax Credit Developments Locating Where There Is a Shortage of Affordable Units?*, 20 HOUSING POL'Y DEBATE 153, 153 (2010).

²⁷⁹ *Id.*

²⁸⁰ Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low-Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1749-50 (2005).

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ An Overview of the HOME Investment Partnerships Program, Congressional Research Service CRS Report (updated Jan. 4, 2021), <https://sgp.fas.org/crs/misc/R40118.pdf>.

rental assistance to low-income people.” HOME provides both housing grants to local governments and tenant-based rental assistance (subsidizing demand) and requires matching grants from other sources.²⁸⁵ HOME provides participating jurisdictions with an account for the sole use to invest in affordable housing within the participating jurisdiction’s boundaries or within the boundaries of contiguous jurisdictions in joint projects which serve residents from both jurisdictions.²⁸⁶ CDBG funds are allocated to create and rebuild low-cost housing for sale or rent in areas with particular needs, including locations that have faced significant destruction due to disaster or financial collapse, but these grants also can be used for demand subsidies such as down-payment assistance. Federal funding for CDBG grants has been significantly reduced over time, and in 2018, the Trump administration threatened to eliminate the program before finally agreeing to retain CDBG under lower funding levels than previously provided.²⁸⁷

g. RAD

Other preservation efforts have attempted to revitalize poorly maintained public housing units by leveraging private capital. A series of programs have created public-private partnerships to improve the quality of public housing units.²⁸⁸ Some of these programs have reduced the number of publicly held units or converted some publicly held units into privately held low-income units (or both) in exchange for improvements to unit and neighborhood quality.²⁸⁹ From 1992 to 2011, HUD’s primary public-private partnership program was the controversial HOPE VI program.²⁹⁰ Beginning in 2010, HOPE VI was gradually replaced by the Choice Neighborhoods program, which focused on rehabilitating severely distressed public housing and improving the energy efficiency of such units.²⁹¹

In 2012, HUD launched the Rental Assistance Demonstration (RAD) program, which enabled the government to “leverage public and private debt and equity” to preserve and update public housing units.²⁹² RAD allows for public housing units to become privately owned, albeit subject to long-term, mandatorily renewable contracts with HUD providing project-based Section 8 rental assistance.²⁹³ Such public-private partnerships allow for more flexible financing arrangements and may be able to achieve rehabilitative goals with a smaller outlay of public funds.²⁹⁴ Congress initially capped the RAD program at 60,000 units but later authorized an additional 225,000 units.²⁹⁵ The RAD program uses private equity and debt funding, albeit in concert with public funds and government credit, the program is ostensibly more “cost neutral”—

²⁸⁵ *Id.*

²⁸⁶ 42 U.S.C.A. § 12748—Each participating jurisdiction has a line of credit in the HOME Investment Trust Fund. This line of credit is subject to no interest or fee. To participate each jurisdiction is under binding commitment to create affordable housing opportunities.

²⁸⁷ *See infra* note 348.

²⁸⁸ Diana Hernandez, Tiana Moore, et al, *The ‘Projects’ Are Nice Now: Resident Perspectives on the Rental Assistance Demonstration (RAD) Program*, Taylor & Francis Online (2019), <https://www.tandfonline.com/doi/abs/10.1080/10511482.2019.1586746?journalCode=rhpd20>.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *See infra* note 353.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

a politically attractive selling point.²⁹⁶ Involving private money and control in previously public housing saves the government money and potentially allows for improvements that may not otherwise have been funded by Congress, but partnering with private developers comes at a cost.²⁹⁷

There have been troubling instances of HUD delegating control of RAD housing to private entities to the detriment of the low-income occupants.²⁹⁸ Moreover, RAD redevelopments often result in a net loss of affordable housing units, even though the quality of remaining units typically improves. Protections built into the RAD system ensure that additional housing vouchers replace publicly owned units lost.²⁹⁹

h. PERMANENT SUPPORTIVE HOUSING

This model provides affordable housing with health care and supportive services for disabled individuals.³⁰⁰ This model has been impactful of housing status, and results in cost savings to various public service systems. Residents live independently in an apartment property with the same standard residential lease and community rules that one would find in any other apartment complex.³⁰¹ Wraparound services are offered including case management, service coordination, substance abuse services, links to vocational training, and health and wellness programming.³⁰²

The U.S. needs significant and sustained federal investments in the national Housing Trust Fund, public housing, and the preservation of the existing affordable housing stock; expansion of the Housing Choice Voucher program to all eligible households; a National Housing Stabilization Fund to prevent evictions and homelessness; and stronger renter protections to help families stay stably housed.

Part II of this Paper discusses the transnational and comparative perspective of housing. Research has shown a profound connection with human rights and adequate housing. Part II examines two distinct categories of international governmental responses to the problem of housing affordability. Section A focuses on Jamaica's history and implementation of affordable housing. In this subsection, I highlight the constitutions, ordinances, statutes, and laws that create the legal right for individuals in Jamaica. Section B focuses on South Africa's history and implementation of affordable housing. In this subsection, I highlight the constitutions, ordinances, statutes, and rules that create the legal right for individuals in South Africa. I discuss the effects of colonialism and housing deficits.

II. THE RIGHT TO HOUSING IN INTERNATIONAL LAW

Housing the low-to-moderate income majority of the population of developing countries remains one of the greatest socioeconomic challenges which several efforts/interventions in the

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ Tim Aubry et al, *Effectiveness of Permanent Supportive Housing and Income Assistance Interventions for Homeless Individuals in High-Income Countries: A Systematic review*, *The Lancet Public Health*, [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(20\)30055-4/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30055-4/fulltext).

³⁰¹ *Id.*

³⁰² *Id.*

form of housing projects schemes have evolved to address.³⁰³ Housing is one of the three basic needs of humankind, a pre-requisite to survival of man and yet housing is short in supply in the world.³⁰⁴ In spite of the fundamental role of housing in the life of an individual, society or nation and in spite of the United Nation's realization of the need to globally attain adequate shelter/housing for all, the housing situation in the world is at a crisis level and remains a global problem.

The ever-increasing crisis in the housing sector in the world is evident in the fact that there is an absolute housing unit shortage, growing emergence and proliferation of slum and squatter settlements, rising cost of housing rent and growing inability of the average citizens to own their own houses or procure decent accommodation of their taste in the housing market.³⁰⁵

At the core of United Nations action to protect and promote human rights and fundamental freedoms is the International Bill of Rights. The International Bill of Rights consists of the following:

The Universal Declaration of Human Rights (1948); The International Covenant on Economic, Social and Cultural Rights (1966); and The International Covenant on Civil and Political Rights (1966).³⁰⁶ These three documents define and establish human rights and fundamental freedoms. They form the foundation for the more than 50 additional United Nations human rights conventions, declarations, sets of rules and principles.³⁰⁷

The Covenants are international legal instruments.³⁰⁸ This means that members of the United Nations, when they become parties to a Covenant or other conventions by ratifying or acceding to them, accept major obligations grounded in law.³⁰⁹ Countries voluntarily bind themselves to bring national legislation, policy, and practice into line with their existing international legal obligations.³¹⁰

By ratifying these and other binding texts, Countries become accountable to their citizens, other Country parties to the same instrument and to the international community at large by solemnly committing themselves to respect and ensure the rights and freedoms found in these documents.³¹¹ Many of the major international human rights treaties also require Country parties to report regularly on the steps they have taken to guarantee the realization of these rights, as well as on the progress they have made towards this end.³¹²

³⁰³ Bruce Ferguson, *A Value Chain Framework for Affordable Housing in Emerging Countries*, Global Urb. Dev't Magazine (2008), <https://www.globalurban.org/GUDMag08Vol4Iss2/FergusonValueChain.htm>.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *International Covenant on Economic, Social and Cultural Rights* (United Nations Human Rights 1996).

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

A. THE HISTORICAL CONSTITUTIONAL AND LEGAL CONTEXT IN JAMAICA WITH RESPECT TO THE RIGHT TO ADEQUATE HOUSING

Jamaica joined the Commonwealth in 1962 after its independence from Britain.³¹³ As a member of the Commonwealth, Jamaica is bound by the Commonwealth Charter.³¹⁴ The Charter expresses the commitment of member states to the development of free and democratic societies and the promotion of peace and prosperity to improve the lives of all the people of the Commonwealth.³¹⁵ The Charter also acknowledges the role of civil society in supporting the goals and values of the Commonwealth.³¹⁶ Specifically, the Commonwealth Charter recognizes the commitment to Universal Declaration of Human Rights and other relevant human rights covenants and international instruments.³¹⁷ As such the members are committed to:

[E]quality and respect for the protection and promotion of civil, political, economic, social, and cultural rights, including the right to development, for all without discrimination on any grounds as the foundations of peaceful, just and stable societies. We note that these rights are universal, indivisible, interdependent and interrelated and cannot be implemented selectively. We are implacably opposed to all forms of discrimination, whether rooted in gender, race, [color], creed, political belief, or other grounds.³¹⁸

The members of the Commonwealth also recognize the necessity of access to affordable health care, education, clean drinking water, sanitation, and *housing for all citizens*.³¹⁹

Located in the Caribbean Sea, Jamaica is one of the largest islands in the Caribbean, belonging to a group of Islands known as the Greater Antilles.³²⁰ After the arrival and conquest of the native Arawak Indians by Christopher Columbus in 1494, Jamaica was occupied by Spanish rule until 1655, when it was captured by the British.³²¹ Jamaica, like many islands in the rest of the region, became an economically viable colony through the development of plantations for the cultivation of sugar cane.³²² From 1655-1838 the importation of slaves proved lucrative to the Jamaican sugar trade and the British-Jamaican economy.³²³ After 1938 and the emancipation of slaves in Jamaica, it was not until 1962 that Jamaica gained independence.³²⁴ This independence is still heavily influenced by the original British governmental systems which ruled the island, and

³¹³ Jamaica, The Commonwealth, <https://thecommonwealth.org/our-member-countries/jamaica>.

³¹⁴ See *supra* note 4.

³¹⁵ Commonwealth Charter, The Commonwealth, <https://thecommonwealth.org/charter>.

³¹⁶ *Id.*

³¹⁷ *Id.* at art. 2.

³¹⁸ *Id.*

³¹⁹ *Id.* at art. 11.

³²⁰ See *infra* note 402.

³²¹ Avery Laird, The Fight to Freedom: Arawaks and the Maroons (2009), <https://debate.uvm.edu/dreadlibrary/A%20Laird.htm>.

³²² *Id.*

³²³ *Id.*; see also Trevor Burnard, *Slaves and Slavery in Kingston, 1770-1815*, Cambridge Core (2020), <https://www.cambridge.org/core/journals/international-review-of-social-history/article/slaves-and-slavery-in-kingston-17701815/A7E958558A63A7DC296C3892960B09ED>.

³²⁴ *Id.*

was used as the basis for the island's current government system.³²⁵ The same year of independence, Jamaica joined the Commonwealth.³²⁶

Jamaica has a highly developed economy, which supports numerous financial institutions and a vibrant stock exchange, compared to that of most Caribbean islands; nonetheless, because of a high national debt to income ratio and a devaluing currency the country continues to be inhibited in its economic growth.³²⁷ Despite this fact, some efforts are being made through various public and private entities to provide more housing opportunities for the poor in Jamaican society every year. In researching Jamaica and its endeavors to combat the housing shortage, a comparative perspective of the economic similarities and differences of other developing nations, their politics, housing policies, and current efforts to provide low-income housing will prove essential.

1. HUMAN RIGHTS, GOVERNMENTAL SYSTEM, AND LEGAL IMPLICATIONS

Jamaica operates under a parliamentary democratic government system with a Prime Minister as the head of state.³²⁸ Jamaica is governed under a parliamentary democracy.³²⁹ The Prime Minister is the Head of the Jamaican Government, with the Governor General representing the Chief of State, Queen Elizabeth II.³³⁰ Neither the Queen nor the Governor General has any real authority in the administration of the country which rest solely in the hands of the elected leaders.³³¹ The Jamaican Parliament is two-tier, consisting of two Houses, the Senate and the House of Representatives.³³² The Senate functions mainly as a review chamber for legislation passed by the House of Representatives.³³³

Jamaican government business is conducted under ministries, each headed by a minister selected by the Prime Minister from the House of Parliament.³³⁴ Each minister is designated a central office, with assignment for specific departments, statutory bodies and agencies.³³⁵ The principal legal advisor of the Government of Jamaica is the Attorney General, who is appointed on the recommendation of the Governor General.³³⁶ Jamaica is divided into three counties; Cornwall, Middlesex and Surrey, and fourteen parishes for administrative purposes, with two

³²⁵ See *infra* note 402.

³²⁶ *Id.*

³²⁷ Grace A. Daley Williams, *An Evaluation of the Low-Income Housing Sector in Jamaica*, GA Institute of Technology (2006), https://smartech.gatech.edu/bitstream/handle/1853/13950/williams_grace_d_200612_mast.pdf.pdf.

³²⁸ *Id.*

³²⁹ Government of Jamaica, <https://jis.gov.jm/media/GovernmentOfJamaica.pdf>.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

³³⁵ Government & Politics, Country Studies, <http://countrystudies.us/caribbean-islands/34.htm>.

³³⁶ *Id.*

parishes, Kingston and St Andrew, amalgamated and administered by the Kingston and St Andrew Corporation (KSAC).³³⁷ Each parish is represented by an elected Parish Council.³³⁸

2. AN OVERVIEW OF AFFORDABLE HOUSING

In the 1970's, as a result of a growing population and the inability of the public and private sectors to provide adequate houses, Jamaica experienced a housing shortage.³³⁹ Lower and middle income groups were unable to afford mortgages through the traditional private sector financial agencies, but also did not qualify for government subsidized housing.³⁴⁰ The realization of this social restriction in Jamaica's programs highlighted another housing need that called for the government's attention.³⁴¹ In Jamaica, poverty is assessed by a person's position relative to the national poverty line, which is calculated on annual consumption, using standards established by the Planning Institute of Jamaica (PIOJ)³⁴² and the Statistical Institute of Jamaica (STATIN).³⁴³ The poverty line is computed for a reference family of five, which includes one adult male, one adult female, an infant, a teenager and a pre-teen child.³⁴⁴

Jamaica is a society where persons with no-income or low income have limited access to societal resources such as money, property, medical care, and education.³⁴⁵ In order to create an equitable environment, governments subsidize these basic resources to provide a standard of living for people with lower income levels in society.³⁴⁶ For the purpose of this Paper affordable housing refers to housing provided for the sole purpose of meeting the needs of no- and low income persons in the Jamaican society.³⁴⁷ In Jamaica lower income levels are determined in relation to the Poverty line.³⁴⁸

a. EFFECTS OF COLONIALISM

There is a stereotype that European powers did little to improve the housing of those they colonized.³⁴⁹ The late colonial experience of Jamaica probes and challenges this view. In a poor and isolated colony dominated by conservative white planters, a miserly colonial administration

³³⁷ *Parish Councils*, Jamaica Social Investment Fund, <https://www.jsif.org/content/parish-councils/>.

³³⁸ *Id.*

³³⁹ *See infra* note 417.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *National Policy on Poverty and National Poverty Reduction Programme*, Gov't of Jamaica, Planning Institute of Jamaica (2017), [Phttps://www.pioj.gov.jm/wp-content/uploads/2019/09/NationalPolicyOnPovertyNationalPovertyReductionProgramme.pdf](https://www.pioj.gov.jm/wp-content/uploads/2019/09/NationalPolicyOnPovertyNationalPovertyReductionProgramme.pdf).

³⁴³ STATIN, Gov't of Jamaica, <https://statinja.gov.jm>; STATIN was established under the Statistics (Amendment) Act 1984 on April 9, 1984. The Institute has been invested with all the powers formerly vested in the Department of Statistics previously the Bureau of Statistics (which came into existence in 1946) along with other powers. <https://jis.gov.jm/government/agencies/statistical-institute-of-jamaica-statin/>.

³⁴⁴ Jaslin U. Salmon, *Poverty Eradication: The Jamaican Experience*, Social and Economic Studies (2002), <https://www.jstor.org/stable/27865303>.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ Richard Harris, *From Miser to Spendthrift: Public Housing and the Vulnerability of Colonialism in Barbados, 1935 to 1965*, J. OF URB. HISTORY (2007), <https://journals.sagepub.com/doi/abs/10.1177/0096144206297144>.

had for decades done little or nothing to improve housing.³⁵⁰ Faced with local unrest and international pressure from the U.S., however, and enabled by colonial development funds as well as a levy on sugar exports to Britain, it developed a range of government (public) housing programs in the 1940s.³⁵¹ By 1960, the colony had directly improved housing for about 30 percent of the island's population.³⁵² Its building program was efficiently run, but influenced by a rising group of nationalist politicians, its financial viability was undermined by a lax approach to rent collection. The policy shift from miser to spendthrift reflects the growing vulnerability of colonial rule.³⁵³

a. HOUSING DEFICIT

When Jamaica became independent in 1962, the country thrived in urban centers, which attracted rural migrations in search of better opportunities and quality of life.³⁵⁴ Mass migration quickly resulted in overpopulated towns and urban centers throughout Jamaica.³⁵⁵ The poorly designed and maintained infrastructure and basic urban services strained under the increased pressure.³⁵⁶ The mass migration also led to a burgeoning of unplanned growth in squatter communities island wide.³⁵⁷ Inadequate physical planning and oversight contributed to growing urban sprawl, dilapidated housing, environmental degradation, and worsened urban slums.³⁵⁸

In 1997, the housing deficit for Jamaica was estimated at 647,194 homes, 228,588 for the Kingston metropolitan region, and 418,606 for all other parishes.³⁵⁹ As of January 2022, the population is 2.96 million.³⁶⁰ Jamaica's economy is unstable, slow, weakened by low economic growth, high levels of public debt, and vulnerability to natural disasters such as hurricanes and flooding, which can wreak havoc with several sectors of the economy and public services.³⁶¹ Jamaica is also plagued with gang violence, high inflation rates, and high unemployment rates. The country also increases its deficit by spending about half of its income on imported goods for necessities such as gasoline and food.³⁶²

3. ASSESSMENT OF HOUSING INITIATIVES AND PROGRAMS

The National Housing Trust (NHT) was established in 1976 to address the housing need and to serve as a financial institution that could mobilize additional funds for housing.³⁶³ The new government entity was also to ensure that funding be made available to more Jamaican families at rates below the traditional markets rates.³⁶⁴

³⁵⁰ See *infra* note 435.

³⁵¹ *Id.*

³⁵² See *infra* note 435.

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Poorest Countries in North America 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/poorest-countries-in-north-america>.

³⁶² See Williams, *infra* note 417.

³⁶³ *Id.*

³⁶⁴ *Id.*

The NHT, though having experienced amendments to the original act which varied its charter since 1989, has readily accepted its dual roles of housing development and a mortgage financier.³⁶⁵ The NHT is the largest provider of residential mortgages in Jamaica.³⁶⁶ As of 2003, there were over 60,000 active mortgages, of which about 16 percent were in arrears, and to tackle the arrears problem prospective borrowers were required to have a monthly combined loan repayment of no more than 33 percent of their gross income.³⁶⁷

Although the government of Jamaica has been providing a variety of shelter solutions through its agencies³⁶⁸ the demands for housing, particularly for the poor, have continued to increase.³⁶⁹

The explanation for this is three-fold: (i) high costs of existing housing solutions, which the poor cannot afford; (ii) limited capital in the formal sector, which undermines its capacity to provide housing solutions for the country as a whole; and (iii) the inability of the poor to access mortgages through existing sources because they lack the required credit.³⁷⁰

The government initiated a unique tool called Operation PRIDE to make land legally accessible to low-income groups at affordable price through some government subsidies.³⁷¹ These groups are responsible for saving and depositing their money into building societies, commonly known as provident societies.³⁷² Once the money is collected, it is used to pay legal costs and to develop needed infrastructure near respective provident society.³⁷³

OPERATION PRIDE

The Programme for Resettlement and Integrated Development Enterprise (Operation Pride) is an enabling approach for housing the poor that was adopted by the UN General Assembly in 1988.³⁷⁴ The central tenet of the enabling approach is to mobilize the people concerned and to give them the necessary resources and the opportunity to improve their housing condition according to their needs and priorities.³⁷⁵ By providing subsidized land to the poor and by mobilizing them into provident societies that define the priorities of their respective members in relation to housing solutions, Operation PRIDE has successfully made a good attempt at the central tenet of the enabling approach.³⁷⁶

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ For example, the NHT and the National Housing Development Corporation (NHDC).

³⁶⁹ Jimmy Tindigarukayo, *An Attempt to Empower Jamaican Squatters*, 16 ENV'T & URB. 206 (2004), <https://journals.sagepub.com/doi/pdf/10.1177/095624780401600116>.

³⁷⁰ Jimmy Tindigarukayo, *A Program for Housing the Poor in Jamaica*, CENTRE FOR URB. & COMM. STUDIES (2004), http://www.urbancentre.utoronto.ca/pdfs/housingconference/Tindigarukayo_Programme_Poo.pdf.

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.*

In May of 1994, the Jamaican government decided to accelerate its land divestment program to address the inequities in land distribution. This land divestment was to be carried out by Operation PRIDE, which was launched by the then Jamaican Prime Minister P.J. Patterson.³⁷⁷ The main objective of the program was to facilitate the ability of lower income households to acquire affordable and legally accessible lands through the regularization of illegal settlements (squatting) or parcels in new settlements.³⁷⁸ Beneficiaries would gain access to the program through legally constituted community organizations, known as provident societies, which would manage the activities of their communities, effect legal transfer of land, and ensure the implementation of ongoing upgrading processes.³⁷⁹

The Habitat Agenda was adopted by 171 governments at the Habitat II Conference in Istanbul in 1996, and emphasized partnerships and participatory approaches to achieving adequate shelter for all.³⁸⁰ Although Jamaica is far from attaining adequate shelter for all, the vital elements of Operation PRIDE include government as an enabling partner and the people as active participants in the development of housing solutions.³⁸¹ Members of each provident society are expected to elect their own officials and to establish their own internal procedures that enable them and implement solutions to their housing problems. Thus, Operation PRIDE as a facilitating partner builds on the initiative and resourcefulness of the people.³⁸²

NEW SOCIAL HOUSING PROGRAMME

The National Social Housing Programme (NSHP) is an extension of the Housing, Opportunity, Production, and Employment (HOPE) unit, which aims to improve the housing conditions of the country's indigent.³⁸³ NSHP was established in 2018 as the housing component of the HOPE programme.³⁸⁴ The Programme was developed to improve the housing condition of the country's poor and disadvantaged population by providing quality, affordable, and sustainable housing.³⁸⁵ The Programme is being implemented through the Ministry of Economic Growth and Job Creation (MEGJC) with the HOPE unit providing administrative and technical support being.³⁸⁶

The NSHP is implemented under the Housing Act³⁸⁷ and is governed by key pieces of legislative instruments and policies to include:

- The Financial Administration and Audit (FAA) Act³⁸⁸

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ Garfield L. Angus, *Gov't Enabling Society's Most Vulnerable to Own a Home*, JAMAICA INFO. SERV. (2021), <https://jis.gov.jm/features/govt-enabling-societys-most-vulnerable-to-own-a-home/>.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *New Social Housing Programme, HOPE: Housing, Opportunity, Production & Employment*, MEGJC, <https://megjc.gov.jm/new-social-housing-programme/>.

³⁸⁸ Operational date: June 15, 1959, last amended: April 7, 2014,

https://moj.gov.jm/sites/default/files/laws/The%20Financial%20Administration%20and%20Audit%20Act_0.pdf.

- The Natural Resources Conservation Authority (NRCA) Act³⁸⁹
- Government of Jamaica Procurement Guidelines³⁹⁰
- The building regulations for the respective municipalities³⁹¹
- Local Improvements (Community Amenities) (LICA) Act³⁹²

B. THE HISTORICAL CONSTITUTIONAL AND LEGAL CONTEXT IN SOUTH AFRICA WITH RESPECT TO THE RIGHT TO ADEQUATE HOUSING

South Africa is the southernmost country of the African continent.³⁹³ South Africa is a large plateau, which dominates the center of the country with rolling hills falling to plains and the coast.³⁹⁴

1. HUMAN RIGHTS, GOVERNMENTAL SYSTEM, AND LEGAL IMPLICATIONS

South Africa is the leader of the modern Commonwealth.³⁹⁵ South Africa initially joined the Commonwealth in 1931 after its independence from Britain but left the Commonwealth in 1961.³⁹⁶ Thirty-three years later the country rejoined the Commonwealth.³⁹⁷ As a member of the Commonwealth, South Africa is bound by the Commonwealth Charter.³⁹⁸

³⁸⁹ Operational date: July 5, 991; last amended: January 1, 1991.

Natural Resources Conservation Authority, <https://moj.gov.jm/sites/default/files/laws/Natural%20Resources%20Conservation%20Authority%20Act.pdf>. (explaining that this is an act to provide for the management, conservation and protection of the natural resources of Jamaica, to establish a Natural Resources Conservation Authority, to make consequential amendments to certain enactments and to provide for matters incidental thereto or connected therewith).

³⁹⁰ *Handbook of Public Sector Procurement Procedures*, GOV. OF JAMAICA,

https://ncc.gov.jm/website_files/gpphandbook_ver5/GOJ_Handbook-V1_March2014.pdf.

³⁹¹ The Building Act, 2018, Jamaica Honourable House of Representatives & Honorable Senate, <https://japarliament.gov.jm/attachments/article/339/The%20Building%20Act,%202018.pdf>.

³⁹² Operational date: August 5, 1977; last amended: January 1, 1977, <https://moj.gov.jm/sites/default/files/laws/Local%20Improvements%20%28Community%20Amenities%29%20Act.pdf> (explaining that this is an act to make provision for the declaration of certain defined areas comprising certain lands as special improvements (infrastructure) areas, the compulsory acquisition by the Government of a leasehold interest in such lands, the carrying out of improvements in such lands in accordance with special improvements (infrastructure) schemes and for matters incidental thereto or connected therewith).

³⁹³ *South Africa*, The Commonwealth, <https://thecommonwealth.org/our-member-countries/south-africa>.

³⁹⁴ *Id.*

³⁹⁵ *Id.* (noting the declaration defined the Commonwealth as a “free association” of independent member countries).

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ See *supra* note 4; see also *Commonwealth Charter*, The Commonwealth, <https://thecommonwealth.org/charter> (noting Charter expresses the commitment of member states to the development of free and democratic societies and the promotion of peace and prosperity to improve the lives of all the people of the Commonwealth. The Charter also acknowledges the role of civil society in supporting the goals and values of the Commonwealth. Specifically, the Commonwealth Charter recognizes the committed to Universal Declaration of Human Rights and other relevant human rights covenants and international instruments. As such the members are committed to equality and respect for the protection and promotion of civil, political, economic, social, and cultural rights, including the right to development, for all without discrimination on any grounds as the foundations of peaceful, just and stable societies. We note that these rights are universal, indivisible, interdependent and interrelated and cannot be implemented selectively. We are implacably opposed to all forms of discrimination, whether rooted in gender, race, colour, creed, political belief, or other grounds).

2. AN OVERVIEW OF AFFORDABLE HOUSING

a. HISTORY OF HOUSING

South Africa's first national Housing Act came into effect on August 19, 1920, to provide public money loans for the construction of dwellings.³⁹⁹ The Housing Act created a fund which towns could borrow to support construction of houses at a lower interest rate.⁴⁰⁰ It created a housing subsidy system.⁴⁰¹

The South African public housing practice pre-democracy, including the 1920 Act and the Native Urban Areas Act of 1923⁴⁰², have been described as fundamentally racist.⁴⁰³ South African history is one of racial oppression; a crime against humanity in the resolution of the United Nations in 1973.⁴⁰⁴ South Africa was already a divided country by the early twentieth century. The 1920 Act, made only one reference to race, which was in Section 7(3) and required "reasonable provision for dwellings for the poorest section of the population including the [colored] and native people."⁴⁰⁵ The history of publicly subsidized housing in the country used public funds to divide and segregate groups categorized by government.⁴⁰⁶

At the time of the 1920 Act, parliament was elected almost exclusively by male white citizens who made up about a tenth of the population of the Union of South Africa created in 1910 from several settler colonies.⁴⁰⁷ The housing question began to receive direct attention due to the impact of the war and the fear that bad housing conditions formed a key factor in the spread of flu.⁴⁰⁸ Municipalities did not have the financial resources to solve the housing problem. Before the Union of South Africa in 1910, colonial governments funded various kinds of housebuilding in several parts of the country including Ndabeni, in Cape Town.⁴⁰⁹ In a few cases, municipalities also built houses that were occupied by colored and white municipal employees (e.g., Maitland Garden Village, Cape Town).⁴¹⁰

National government had ignored housing questions, except for accommodation for railway workers employed by the state-owned South African Railways, which by 1920 had already

³⁹⁹ The Union of South Africa, Housing Act No. 35 1920, Government Gazette Extraordinary, Vol 41 No. 1087 (Aug. 19, 1920), art. xxii-xxxvii, <https://archive.gazettes.africa/archive/za/1920/za-government-gazette-dated-1920-08-19-no-1087.pdf>.

⁴⁰⁰ *Id.*

⁴⁰¹ Alan Mabin, *A Century of South African Housing Act 1920-2020*, Urban Forum (2020), <https://doi.org/10.1007/s12132-020-09411-7>.

⁴⁰² The Native (Urban Areas) Act of 1923 segregated urban residential space and created "influx controls" to reduce access to cities by Blacks, *See Segregation of South Africa*, <https://www.britannica.com/place/South-Africa/Segregation#ref480696>.

⁴⁰³ *See supra* note 400.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

provided almost 10,000 houses.⁴¹¹ In January 1919, the government introduced the Unhealthy Areas Improvement Schemes Bill.⁴¹² Sections 14 and 15 required “accommodation in suitable dwellings ... provided by the local authority or otherwise for people displaced by improvement schemes.”⁴¹³ The idea was to empower municipalities to intervene where crowded housing appeared to create health risks.⁴¹⁴ The bill was introduced as a “Housing Bill” in some areas of the country. However, the government withdrew the Unhealthy Areas Bill and initiated a government investigation into housing questions. A Housing Committee was appointed by the Minister of Public Works to consider and report whether it is advisable for the Government to give financial or other assistance to local authorities and others in providing housing accommodation in urban areas for persons of limited means.⁴¹⁵

The Committee’s Report showed that its members thought of the population as divided into three parts—native, colored, and European, though at times all were included as members of the community.⁴¹⁶ The Committee expressed concern at the risk that municipalities would continue to neglect decent housing for black people:

We earnestly hope that interest in the housing problem which has been awakened in South Africa may not exhaust itself in efforts for the housing of the white people only ... The interest in the problem must be extended to its existence amongst and its effect upon the [colored], native, and Asiatic people who form so large a proportion of the population of our towns, and if the white section of the public is indifferent to the needs of the other section, the authorities have a greater responsibility in the matter.⁴¹⁷

The Committee argued for the necessity of a public role in addressing the housing question:

As regards houses for the poorer classes of white people, colored, native and Asiatic, there can be no doubt that, as private enterprise has not in the past met the need, it would be futile to rely on its doing so in the future ... means must be devised for making good the shortage of houses within a reasonably short space of time, and it is only the authorities, local or central, which can be expected to take action.⁴¹⁸

⁴¹¹ Heribert Adam, *Modernizing Racial domination: The Dynamics of South African Politics*, Berkeley: Univ. of Cal. Press (1971).

⁴¹²Susan Purnell, *Creating Racial Privilege: The Origins of South African Public Health and Town Planning*, J. of S. Afr. Stud. (1993), <https://www.jstor.org/stable/2636912>.

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

The Committee's recommendations focused on creating a system in which municipalities would be key actors in building houses:

We consider that the local authorities have failed, through lack of adequate powers or from other reasons, to deal with the housing question in the towns, and the conditions ... are ... such as to justify and demand intervention and action on the part of the Central Government ... the Committee considers that the local authorities should be empowered to act within defined limits in the matter of housing and that the Government should take power to compel action on the part of local authorities in certain eventualities to provide or secure proper housing for the people.⁴¹⁹

To equip government, the Committee recommended establishing a housing commission.⁴²⁰ It also called for town planning principles and practice, meaning a good layout and urban design.⁴²¹

The 1920 Housing Act raised many points of debate and contest: public intervention, subsidy, and roles of different spheres of government.⁴²² Some issues were left unresolved including where to build subsidized housing—rural or urban, peripheral, or central, and thus the unresolved issue linking housing provision to spatial planning.⁴²³ Most obviously, the Act did not resolve the major question of racial segregation. What it did accomplish was to initiate a century of housing subsidy. The Act compelled municipalities to address housing matters at least to some extent for their African populations.⁴²⁴ Approval of schemes became a matter of mutual arrangement between the Native Affairs Department, provincial administrations, and the Board.⁴²⁵ Some municipalities prioritized projects intended for disenfranchised people.⁴²⁶ Over the decades that followed, municipalities supplied thousands of houses based on the system created by the 1920 Act.⁴²⁷

a. EFFECTS OF COLONIALISM

South Africa is known for its way of life, separateness, or apartheid.⁴²⁸ Apartheid was the official policy under South African law from 1948 to 1994.⁴²⁹ Two years after apartheid became law, the Population Registration Act was passed, requiring the entire South African population to

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ *The History of Separate Development in South Africa*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/article/history-separate-development-south-africa>; see also Oliver Wainwright, *Apartheid Ended 20 Years Ago, So Why is Cape Town Still 'a Paradise for the Few'?* THE GUARDIAN, Apr. 30, 2014.

⁴²⁹ Pdraig O'Malley, *The National Party, Apartheid, and the Anatomy of Repression in South Africa, 1948-1994*, NELSON MANDELA CTR. OF MEMORY, <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02167/04lv02264/05lv02303/06lv02304/07lv02305/08lv02310.html>.

be classified into three groups—black, white, and colored.⁴³⁰ Thus, racial discrimination was institutionalized in South Africa, stripping nonwhites of many fundamental rights. Under apartheid, nonwhites were removed from their homes and communities, especially in Cape Town.⁴³¹ Under the Group Areas Act of 1950, blacks, Asians, Indians, and mixed-race persons were forced to live in segregated communities.⁴³² Cape Town was made up of a white-only center surrounded by contained settlements for the black and colored labor forces to the east, each edged in by highways, rail lines, rivers, and valleys and separated from the affluent white suburbs by protective buffer zones of scrubland.⁴³³

Evidence of past discrimination is still present in South Africa today. Although South Africa no longer has an official policy, spatial segregation in housing remains obvious. Nonwhites continue to live outside of cities in segregated communities—shantytowns—which are called townships or informal housing.⁴³⁴ Millions of South Africans still live in townships, in shanties, which lack electricity, running water, toilets, and safe walkways.⁴³⁵ About fourteen percent of the population of South Africa live in informal housing.⁴³⁶ Under apartheid, these townships were intentionally located far from city centers.⁴³⁷ Residents had to commute to the city center for jobs and work as live-in domestic servants for white families.⁴³⁸

In the past decade, there has been a significant increase in first-generation black entry into South Africa's middle class.⁴³⁹ However, many of the poor South Africans still live in the old black and colored townships because they cannot afford to move to formerly all-white communities.⁴⁴⁰ South Africa did improve and build housing units under South Africa's post-apartheid Reconstruction and Development Program (1994); however, these housing units were built in or near old townships, perpetuating spatial separation of races and keeping the poorest residents on the edges of cities.⁴⁴¹

⁴³⁰ See *id.* (explaining that blacks were referred to as “African” or “native.” and “colored persons” were defined as mixed race, Indian or Asian, which was often further subdivided.)

⁴³¹ Kevin Mwanza, *South Africa's 'Dispossessed' Urban Poor Call for Land Reform*, Thomson Reuters Foundation, <https://www.reuters.com/article/us-safrica-land-cities-analysis/south-africas-dispossessed-urban-poor-call-for-land-reform-idUSKBN1JU03D> (July 3, 2018) (discussing how Cape Town had the largest displacement, which caused 60,000 forced moves to slums outside the city and approximately 150 families moved back to area following passage of the Land Restitution Act in 1995.)

⁴³² Michael Pearson & Tom Cohen, *Life under Apartheid: Demeaning, Often Brutal*, CNN (Dec. 6, 2013), <http://www.cnn.com/2013/12/06/world/africa/mandela-life-under-apartheid/>.

⁴³³ See Wainwright, *supra* note 430.

⁴³⁴ Lisa Findley & Liz Ogbu, *South Africa: From Township to Town*, PLACES J. (Nov. 2011), <https://placesjournal.org/article/south-africa-from-township-to-town/>.

⁴³⁵ *Id.*

⁴³⁶ *Understanding Living Conditions*, STAT. S. AFR., http://www.statssa.gov/za/?page_id=595.

⁴³⁷ *Id.*

⁴³⁸ See *supra* note 323.

⁴³⁹ Omari Jackson, *A Generation Out of Apartheid: Intergenerational Educational Experiences among the South African Black Middle Class*, <https://ucinnatipress.manifoldapp.org/read/issues-in-race-and-society-an-interdisciplinary-global-journal-spring-2020-edition/section/20698fdf-a0f6-4e81-bc34-ba930019d823>.

⁴⁴⁰ See Wainwright, *supra* note 430.

⁴⁴¹ *Id.*

a. HOUSING DEFICIT

In 1997C, the post-apartheid Constitution of the Republic of South Africa came into effect during Nelson Mandela's presidency.⁴⁴² The document represents the first time in global history that socioeconomic rights were incorporated into a national constitution.⁴⁴³ Other countries were amazed and astonished at the model. Even U.S. Supreme Court Justice Ruth Bader Ginsburg praised the South African constitution and stated that it "was a deliberate attempt to have a fundamental instrument of government that embraced basic human rights, had an independent judiciary. . . ."⁴⁴⁴ However, the U.S. did not provide this constitutional right to its citizens. South Africa's Bill of Rights also provides the right to freedom and security of the person.⁴⁴⁵ South African children are guaranteed additional rights to "basic nutrition, shelter, . . . and social services."⁴⁴⁶ In addition, it provides that "[e]veryone has the right to have access to affordable housing."⁴⁴⁷ The South African constitution also provides that "[t]he state *must* take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right [to have access to affordable housing]."⁴⁴⁸

3. ASSESSMENT OF HOUSING INITIATIVES AND PROGRAMS

In South Africa, there are various housing subsidy programs available for medium- to low-income earners. The government typically has two types of housing subsidies: the financed subsidy, which allows people to be fully financed for the subsidy; and the non-financed subsidy, where the person will pay a contribution set according to their income.⁴⁴⁹ The requirements differ according to the housing agency offering the subsidy. South Africa has many subsidy programs such as the Government Subsidy Housing, Community Residential Units, Upgrading of Informal Settlements Programme, Emergency Housing Programme, Finance Linked to Individual Subsidy Programme, and Social Housing.⁴⁵⁰

SOCIAL HOUSING

Social rental housing programs began as early as 1995.⁴⁵¹ The government made subsidies available to third-sector organizations to build and manage affordable rental accommodation.⁴⁵² The same time, private property developers recovered abandoned, sometimes squatted, buildings, especially in Johannesburg, and converted them into inexpensive rental apartments. From these early initiatives emerged a new social housing policy in 2006, which tied subsidies to

⁴⁴²Mandela Signs SA Constitution into Law, S. AFR. HIST. ONLINE (Dec. 10, 1996), <https://www.sahistory.org.za/dated-event/mandela-signs-sa-constitution-law>.

⁴⁴³ Clariss A. Wertman, *There's No Place Like Home: Access to Housing for All South Africans*, 40 BROOK. J. INT'L L. 719, 719 (2014).

⁴⁴⁴ David Weigel, *Ruth Bader Ginsburg Makes Banal Point, Destroys the Republic*, SLATE (Feb. 3, 2012), <https://slate.com/news-and-politics/2012/02/ruth-bader-ginsburg-makes-banal-point-destroys-the-republic.html>.

⁴⁴⁵ THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA Dec. 4, 1996, ch. 2, § 29.

⁴⁴⁶ *Id.* at § 28.

⁴⁴⁷ *Id.* at § 26(1).

⁴⁴⁸ *Id.* at § 26(1) (emphasis added).

⁴⁴⁹ Andreas Scheba & Ivan Turok, *The Role of Institutions in Social Housing Provision: Salutory Lessons from the South*, HOUSING STUDIES (Jun. 21, 2021), <https://www.tandfonline.com/doi/full/10.1080/02673037.2021.1935765>.

⁴⁵⁰ *Id.*

⁴⁵¹ Org. for Econ. Coop. and Dev. [OECD], *Social Housing: A Key Part of Past and Future*, Employment, Labour and Social Affairs Policy Briefs (2020), <https://www.oecd.org/social/social-housing-policy-brief-2020.pdf>.

⁴⁵² *Id.*

the delivery of medium-density rental units in restructuring zones like “urban free zones” in France. The goal was to bring working-class black citizens closer to areas with access to economic and social opportunities.⁴⁵³

III. COMPARATIVE ANALYSIS OF HOUSING IN THE U.S. AND OTHER FOREIGN COUNTRIES

FOREIGN SOCIAL HOUSING

In OECD and non-OECD EU countries, social-rental housing represents more than 28 million dwellings and on average, around 6% of the total housing stock.⁴⁵⁴ Yet there are significant differences across countries in the definition, size, scope, target population, and type of provider of social housing.⁴⁵⁵ “[S]ocial housing is defined as residential rental accommodation provided at sub-market prices that is targeted and allocated according to specific rules, such as identified need or waiting lists. . . .”⁴⁵⁶ It may be referred to as social or subsidized housing (Australia, Canada, Germany, and the United Kingdom), public housing (Australia and the U.S.), council housing (United Kingdom), or general housing (Denmark), among others.⁴⁵⁷

In some countries, social housing comes in multiple forms: in Austria, Latvia and Lithuania, social housing is provided alongside municipal housing (additionally, in Lithuania, municipalities are encouraged to rent housing in the private market and sublease it to households on the waiting list for social housing); across the United Kingdom, council housing coexists with social housing; in the U.S., public housing is provided by local housing authorities alongside specific programs targeting the elderly (Section 202) and disabled people (Section 811), as well as rental housing made available at sub-market rates by private-and non-profit developers through the Low-income Housing Tax Credit program (LIHTC).⁴⁵⁸ In many countries, the definition of social housing has evolved over time, alongside changing policy approaches to shifting market conditions.

Social housing can be distinguished from the more encompassing term, *affordable housing*, which refers to rental and owner-occupied dwellings that are made more affordable to households through a broad range of supply- and demand-side supports (including housing allowances or vouchers, subsidies, or tax relief to first-time homeowners).⁴⁵⁹ The range of measures at governments’ disposal to make housing more affordable will be profiled in a forthcoming OECD policy brief on affordable housing.⁴⁶⁰

Nevertheless, in some countries, it can be difficult to distinguish social housing from other housing tenures. In Ireland, for instance, traditional social housing is supplemented by dwellings that are publicly leased from private owners and allocated to recipients of housing allowances.⁴⁶¹

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

Colombia and Norway offer both social rental and owner-occupied dwellings; in Colombia, the new social rental housing programme, *semillero de propietarios*, complements the older *vivienda de interés social* housing programme, which continues to provide both rental and ownership units.⁴⁶² In Sweden, where no official social housing sector exists, municipal housing associations provide dwellings and estates that have become increasingly inhabited by low-income households, even though rents are not set below market level.⁴⁶³ In Germany, social housing obligations concerning eligibility and rent levels only exist during the term of the subsidized financing period at which point the dwellings are transferred to the private stock.⁴⁶⁴ Such variation in systems and definitions render cross-national comparison of social housing a challenge.

Part III of this paper discusses recommendations and calls to action based on the global effects of affordable housing around the world. The goal of this section is to demonstrate how each housing perspective can be utilized to create a viable solution. This section also addresses the need for the U.S. to use international precedent to establish the legal right of humans in the U.S.

IV. CONCLUSION AND RECOMMENDATIONS

The U.S., Jamaica, and South Africa have taken different approaches in the attempts to legislate and supply affordable housing to those in need. The U.S. does not have any justiciable rights, while Jamaica and South Africa have the right set in their national constitutions. Based on my research, the countries that do better with eliminating homelessness and poverty are those countries that have the right set in its national law. Citizens and residents in need of adequate housing must wait for years or risk becoming homeless. Although the international countries in this paper have constitutions which provide housing rights, there are issues with enforcement and support for those living in affordable housing units. Countries with national laws provide a right to housing and a statutory scheme to provide an enforcement mechanism. This means that those in need of housing have a way of seeking aid from the state. Most of these countries are in the European region like France, Netherlands, New Zealand, and Denmark.⁴⁶⁵

Examining the frameworks and the efforts of these three countries, it is imperative to note that it is not enough to merely create a legal right to housing. There must also be concrete provisions and mechanisms for enforcement. Countries should also be advocates for people and make sure their citizens know their rights and options for adequate, affordable housing. Based on the research, each country needs to pass legislation federally, nationally, and locally for a better chance of success. The main goal for each country should be to adopt measures to prevent homelessness, improve poverty, improve social services, and embrace new techniques to produce affordable housing units. Below are other recommendations to improve upward mobility and decrease racial discrimination.

⁴⁶² *Id.*

⁴⁶³ *Id.*

⁴⁶⁴ *Id.*

⁴⁶⁵ Social housing is the key part of past and future housing policy. Social housing is an important dimension of social welfare policy and affordable housing provisions.

RECOMMENDATIONS FOR THE U.S.

The main recommendation for the U.S. is creating social housing and changing legislative policies to make housing a human right. Fixing the chronic shortage of affordable and available housing for low-income individuals requires long-term commitments. The optimal option is mandatory inclusionary zoning because it allows individuals and families to live in more socioeconomically integrated settings and gives a chance at upward mobility which is usually denied to misrepresented communities. Developers, planners, city officials, and other stakeholders should consider the primary goal of assessing the location, density level, income mix, quality of construction, access to transportation networks, availability of high-performing schools, and prospects for maintenance. These factors will provide sustainable long-term projects—Smart Growth.

Governmental officials, federal and state, should make sure property right protections are in place to rein in local land use regimes that unjustifiably restrict the supply and location of affordable housing and otherwise constrain market efficiencies, impose economic harms, and effectively create patterns of residential segregation. Governmental officials should also guarantee legal protections for tenants individually and low-income households as a group.

To combat discrimination and segregation, Congress should expand the Fair Housing Act to include source-of-income discrimination and enforce compliance, which means greater accountability in the use of HUD funds to further Fair Housing purposes. Congress should also expand supply-producing initiatives, such as the LIHTC program, to address affordable supply deficits and the expiring affordability periods of existing low-income housing. This means Congress should propose that each state mandate sufficient funding to cover the affordability gap, at least with respect to all very low-income families.