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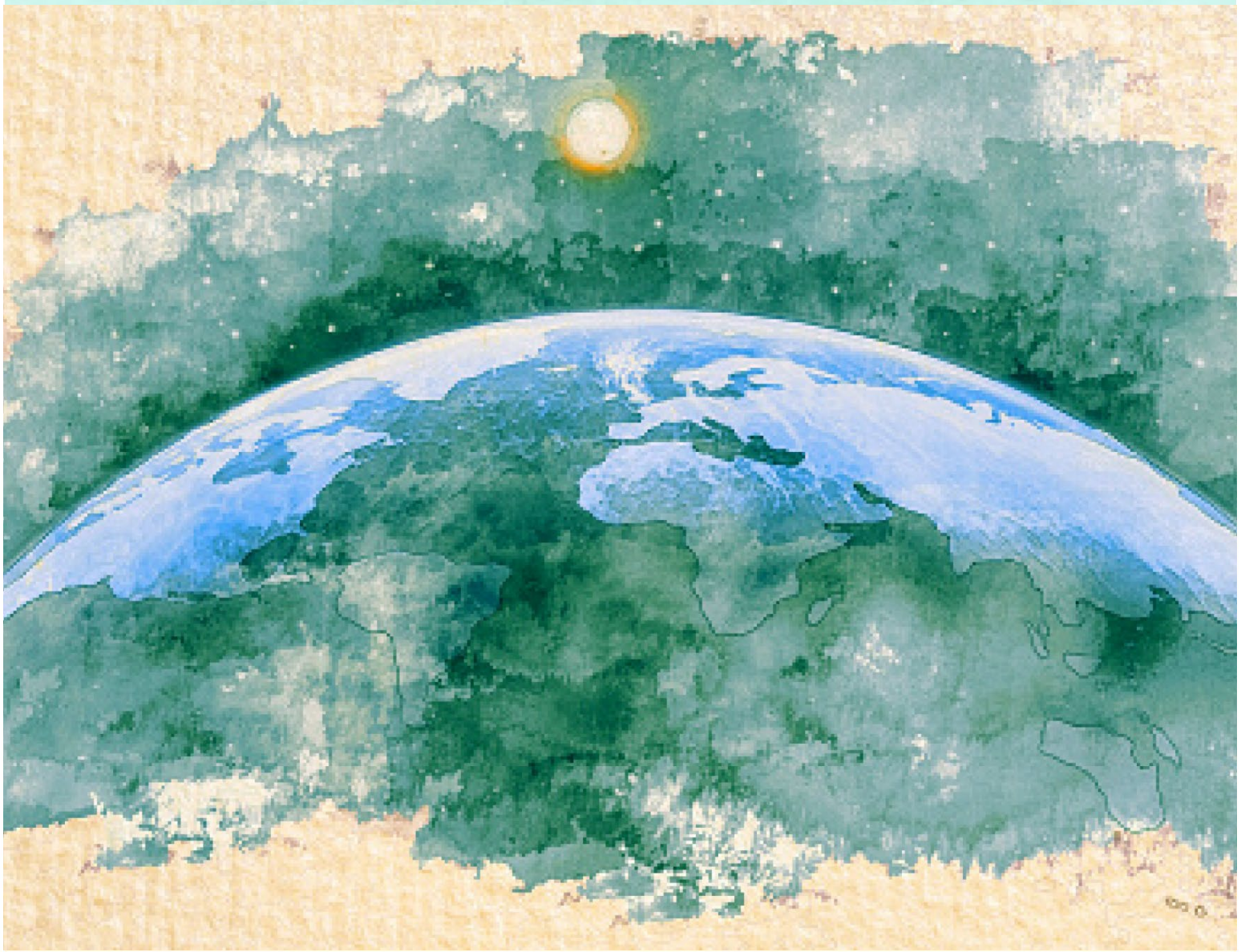

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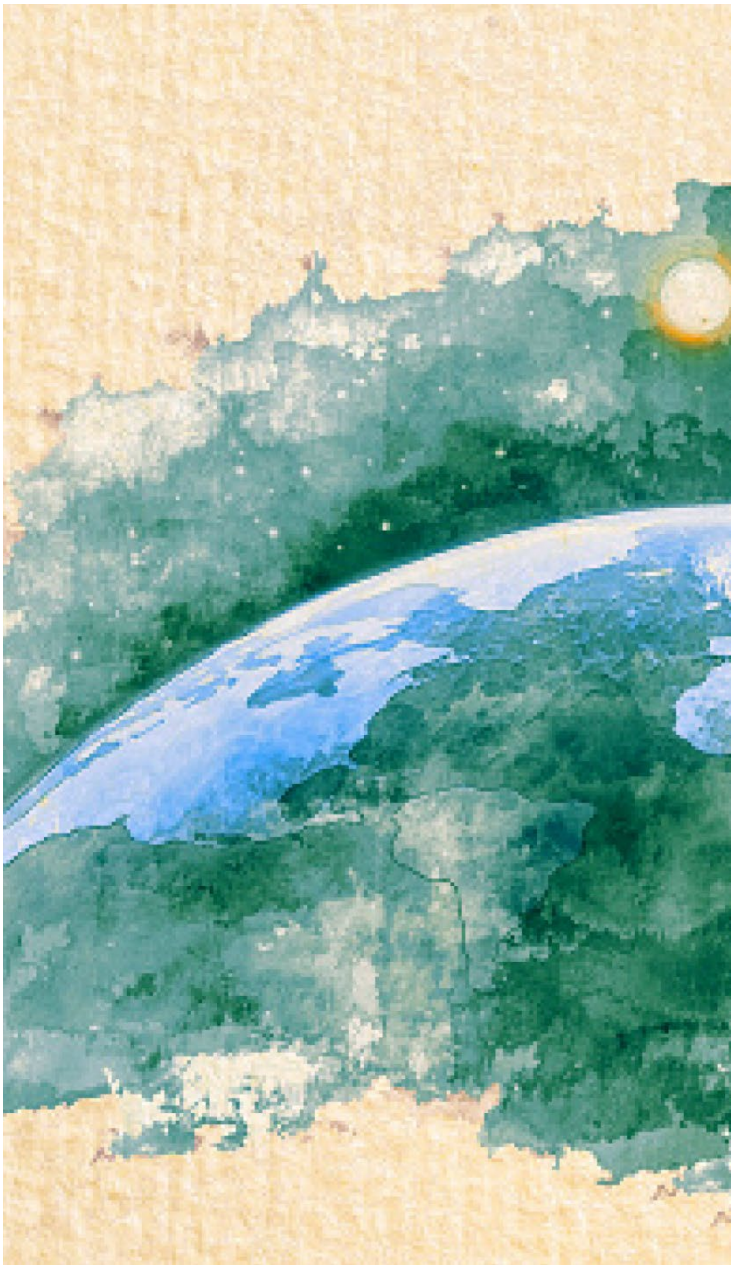

Jai Lee, Editor-in-Chief and Kelly Blount, Managing Editor

Addendum to Brief Reflections on International Protection in Europe – Part Two

Salvatore Filippini La Rosa

Referring to the article "Brief Reflections on International Protection in Europe – Part Two," published in the spring edition of the International Law News, this addendum addresses that Decreto Legge 20/2023, converted into Legge 50/2023, which has established more restrictive rules on irregular immigration.

The same law seems to have expanded the flows of regular entry for work reasons for the period 2023-2025 in favor of citizens of countries that organize job training courses on site. It has also set entry quotas reserved for citizens of countries that, also in collaboration with Italy, will have promoted media campaigns about the risks to personal safety deriving from irregular migration practices.

As for humanitarian protection, to be defined more correctly as "special protection," it has been partially modified. In particular, the special protection must be granted with an “ad hoc” two-year residence permit and the prohibition on expulsion, refoulement, and extradition for special protection are established only in the following cases:

a. risk of persecution on grounds of race, sex, language, citizenship, religion, political opinion, personal or social conditions, sexual orientation and gender identity;

b. risk of torture or inhuman or degrading treatment;

c. constitutional or international obligations, including those referred to in Art. 8 of the European Convention on Human Rights, which establishes the right to respect for private and family life. This right includes the right of the individual to forge and maintain links with the outside world, including social relationships established in the workplace. Great importance must therefore continue to be given to the social links of the foreigners in Italy, also on the basis, for example, of their knowledge of the Italian language, their educational improvements and their family relationships.

Salvatore Filippini La Rosa is a lawyer and international observer.

Smarter Tools Inc. ("STI") v. Chongqing Senci Import & Exp. Trade Co. ("SENCI"), 57 F. 4th 372 (2d Cir. 2023): U.S. Court of Appeals for the Second Circuit Decides that Remand to an Arbitrator for an Amended Reasoned Award was Appropriate

Eoin Ó Muimhneacháin and Kareem Sule Fuseini

The case, decided before the United States Court of Appeals for the Second Circuit ("the court") involves an international arbitration award in favor of SENCI against STI for failure to pay for the purchase of thousands of gas-powered generators. There was a disagreement as to whether the generators ordered by STI were to be California Air Resources Board ("CARB") compliant. STI ceased to trade in SENCI generators in California because they were not CARB-compliant and refused to pay SENCI the $2,402,680.43 purchase price for the generators ordered and received. An arbitration clause in their contract provided that any dispute arising from the contracts would be resolved by arbitration, to be conducted in New York City under the International Commercial Dispute Resolution Procedure of the American Arbitration Association ("AAA-ICDR Rules").

SENCI commenced arbitration and STI counterclaimed on the grounds that many of the generators were defective and did not comply with state and federal regulations. They agreed that a reasoned award should be provided by the arbitrator and an award was made in favor of SENCI.

STI, seeking a vacatur of the award, argued that the arbitrator failed to give an initial reasoned award. The district court agreed but rather than vacating the award, remanded it to the arbitrator with instructions to write a reasoned award. The arbitrator then issued a final amended reasoned award which provided the same relief as the original award. STI argued that the district court was wrong to have remanded the unreasoned award to the same arbitrator for an amended award and further, that the arbitrator acted in manifest disregard for the law.

The district court again found in favor of SENCI and stated that it was appropriate under the exceptions to the *functus officio* doctrine and the Circuit`s exceptions to remand to the arbitrator for an amended reasoned award. It also found that the arbitrator did not act in manifest disregard of the law.

Indeed, this was to be expected. It is well-settled under the Circuit's exceptions to the *functus officio* doctrine that an ambiguous award should be remanded to the arbitrator for clarification. Here, the original award was not a reasoned one as intended by the parties. The amended award provided that clarification to the initial award by detailing the rationale for rejecting the counterclaim. Such clarification was in line with the parties' intention to receive a reasoned award.

The third Circuit also recognizes certain exceptions under which an award may be remanded to an arbitrator: (1) an arbitrator can correct a mistake that is apparent on the face of his award, (2) where the award does not adjudicate an issue which has been submitted, then as to such issue the arbitrator has not exhausted his function, It remains open to him for subsequent determination, and (d) where the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify.

The case is significant in confirming that the doctrine of *functus officio*, widely recognized in international arbitration, is not absolute but subject to exceptions. It reinforces arbitrators' capacity or authority to correct and clarify their decisions in initial awards if the need arises.

In the end, this decision highlights that reconsideration of arbitral awards may be warranted in certain situations to ensure fairness to the parties and the effective enforcement of their agreement to arbitrate. The doctrine of *functus officio* must be approached with some degree of flexibility to achieve the necessary balance of finality and fairness and it should not be applied at all costs if it would result in manifest injustice.

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Impartiality, Ethics and Due Process in Corruption Investigations

João Lopes de Farias Da Matta

The recent events related to Supreme Court of the United States Justices brought back modern *Ágora* (public forum, in Greek) notions of impartiality and ethics in the Judiciary.[1] [2] [3] The principle of impartiality in lawsuits is a long tradition in Civil and Common Law systems; it is directly related to the concepts of justice and fairness. Judicial authorities must be equidistant to conflicts and interests that are brought before them to resolve. Impartiality can be affected in different ways; by lobbying, through gifts or friendship, or any other proactive involvement due to interest in the outcome of a lawsuit other than serving proper justice.

Recently, the Brazilian Justice System was also under scrutiny due to allegations of partiality in one of the most widely known anti-corruption criminal investigations in recent decades, with far-reaching repercussions, nationally and internationally. The Car Wash Operation (*Operação Lava Jato*, in Portuguese), which started in 2014 and ended in 2021, focused initially on money laundering, and it widened its scope to corruption (including bribes, kickbacks, and embezzlement of funds) between politicians and some of the largest construction companies in Brazil. *Lava Jato* was quite successful, with almost 280 convictions, and implications for other Latin American countries.[4] Despite the success of the cases in exposing corruption schemes, there were also negative results affecting the principle of impartiality.

Former Federal Judge Sergio Moro, the leading judge for the most important cases of *Lava Jato*, was publicly viewed in Brazil as a 'paladin of justice' with sky-rocketing popularity, media appearances, and public statements. His behavior stood out in a country where judicial authorities have traditionally been secluded from taking public interviews and or appearing in the media.

With Federal Prosecutor Deltan Dallagnol, one of the main prosecutors and the 'public face' of the Federal Prosecution, Moro accomplished what seemed almost impossible until then: the use of leniency agreements and plea bargain agreements (*coloboração premiada* in Portuguese) to arrest and imprison important political[5] and entrepreneurs figures in Brazil.[6] *Lava Jato* was practically undefeated in Federal Courts and reached peak popularity – a legal *Olympus* of sort - when former President Luís Inácio Lula da Silva was sentenced and arrested for corruption practices while he was running for office during the presidential elections of 2018.[7]

Right after the election, Moro accepted the invitation of then President-elect Jair Messias Bolsonaro to become Secretary of Justice, resigning from his position as Federal Judge, which he had held for 22 years. Moro stated that this change would "consolidate fighting crime and corruption to avoid setbacks." [8] However, many legal scholars were perplexed by the timing of his shift to a political office and perceived it as a further indication of partisanship in the justice branch. By then, there was growing criticism of *Lava Jato* for focusing mainly on Lula's Labor Party (*Partido dos Trabalhadores*, in Portuguese), in lieu of broadening the scope to include members of other political parties.

The disapproval of *Lava Jato* was limited and did not affect its popularity nor success until June 2019, when a

[1] Khaleda Rahman, *John Roberts' Wife Allegations Spark Call for Supreme Court Scrutiny*, Newsweek (Jul. 10, 2023), https://www.newsweek.com/john-roberts-wife-allegations-call-supreme-court-scrutiny-1778411.

[2] Heidi Przybla, *Law Firm head bought Gorsuch-owned property*, Politico (Jul. 14, 2023), https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579.

[3] Alison Durkee, *Clarence Thomas: Here are all the ethics scandals involving the Supreme Court Justice amid Horatio Alger Revelations,* Forbes (Jul. 11, 2023), https://www.forbes.com/sites/alisondurkee/2023/05/05/clarence-thomas-here-are-all-the-ethics-scandals-involving-the-supreme-court-justice-amid-new-revelations/?sh=3cb952e0ab84.

[4] Naiara Galarraga Gortázar, *Enterrada no Brasil, Lava Jato continua viva em outros países da América Latina.* (Jul. 25, 2023), https://brasil.elpais.com/brasil/2021-02-08/enterrada-no-brasil-lava-jato-continua-viva-em-outros-paises-da-america-latina.html.

[5] Jornal O Globo, *Políticos presos na Lava-Jato*. (Jul. 25, 2023) https://oglobo.globo.com/politica/politicos-presos-na-lava-jato-23540433#.

[6] Jornal Nacional, *Empresário Eike Batista volta a ser preso pela Lava Jato no Rio*. Portal g1 (Jul. 25, 2023), https://g1.globo.com/jornal-nacional/noticia/2019/08/08/empresario-eike-batista-volta-a-ser-preso-pela-lava-jato-no-rio.ghtml.

[7] Ian Bremmer, *Brazil's Democracy can survive the rise of a diehard demagogue*. Time (Jul. 25, 2023), https://time.com/5415039/jair-bolsonaro-brazil/.

[8] Portal g1. *Moro aceita convite de Bolsonaro para comandar o Ministério da Justiça*. (Jun. 10, 2023), https://g1.globo.com/politica/noticia/2018/11/01/moro-aceita-convite-de-bolsonaro-para-comandar-o-ministerio-da-justica.ghtml.

media outlet published a series of articles named "Car-Wash Leaks" (*Vaza-Jato*, in Portuguese).[9] It included leaked private conversations of the public officials leading *Lava Jato* that shocked the legal community in Brazil: the Federal Prosecutors and Moro shared strategic advice, informal clues, and engaged in political discussion while carrying out the investigation. Moro was also found to have offered suggestions and guidance to the Federal Prosecutors.[10]

Although Dallagnol and Moro denied (and still deny) the authenticity of such conversations, the Brazilian Supreme Court ruled in 2021 that Moro was biased and lacked jurisdiction to rule the cases against the former President. Thus, using some of the *Lava Jato* Leaks as examples in the ruling, the Brazilian Supreme Court annulled and voided all decisions against the former President. All suits against former President Lula were sent back to square one in different Federal Courts. Many of the accusations were subsequently dropped due to the statute of limitations.[11]

More recently, the National Council of Justice (*Conselho Nacional de Justiça* in Portuguese, a public institution auxiliary to the Judicial System) took disciplinary action against Marcelo Bretas, a Federal Judge responsible for *Lava Jato* cases in Rio de Janeiro.[12] He was known as "[*Juiz*] *Moro do Rio* [*de Janeiro*]" (Rio de Janeiro's Judge Moro) due to some similarities in public appearances, media comments, and the excess use of plea bargain and leniency agreements to ensure incarceration of political figures and entrepreneurs. The Council suspended Marcelo Bretas from office to investigate three complaints against him related to *Lava Jato* for possible violation of impartiality and judicial ethics.

There have been rumors that individuals and companies that accepted plea bargains and leniency agreements in the wake of *Lava Jato* seek to rescind these agreements due to the developments of Moro's seemingly biased case in the Supreme Court.[13] If Bretas' removal is confirmed, it may encourage more rescindments of leniency agreements. This could lead to potential liability for the Federal Government not only for the payments made under leniency agreements and plea bargains but also for potential indemnifications. These developments and allegations were largely unexpected from the authorities that were publicly fighting corruption. What could be seen as a new era of efforts to strengthen the fight against corruption, is now viewed with suspicion by legal and political science scholars and has damaged the public reputation of the judicial system and people's trust of it.[14]

These circumstances in Brazil show us that there is room for improvement in the rules regarding public appearances of judicial authorities and the quarantine period when they leave to run for legislative or executive offices. It also highlights that the principles of impartiality, ethics, and due process, by which all justice professionals are sworn to abide, are even more crucial when investigating and ruling corruption cases with broad media appeal. Violations of these principles in sensitive cases can destroy confidence in the justice system and faith in democracy. In summation, the government cannot fight corruption while simultaneously infringing its own laws, particularly the ethical duty of impartiality.

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[9] Terrence McCoy, *He's the 'hero' judge who oversaw Brazil's vast Car Wash corruption probe. Now he's facing his own scandal.* The Washington Post (June 20, 2023), https://www.washingtonpost.com/world/the_americas/alleged-leaks-threaten-legacy-of-brazils-hero-judge-who-oversaw-vast-corruption-probe/2019/06/17/9a8d7346-8eae-11e9-b08e-cfd89bd36d4e_story.html.

[10] Ernesto Londoño & Letícia Casado, *Leaked messages raise fairness questions in Brazil Corruption inquiry.* The New York Times (Jun. 2, 2023), https://www.nytimes.com/2019/06/10/world/americas/brazil-car-wash-lava-jato.html.

[11] Mônica Bergamo, *Supreme Court Justice Gilmar Mendes throws out all of Moro's Judgements against Lula.* Folha de São Paulo (Jun. 23, 2023), https://www1.folha.uol.com.br/internacional/en/brazil/2021/06/supreme-court-justice-gilmar-mendes-throws-out-all-of-moros-judgements-against-lula.shtml.

[12] Adriana Cruz, et al, *Quem é Marcelo Breats o 'Moro carioca' que mandou prender Temer e Cabral, agora afastado por desvio de donduta.* Portal g1 (Jun. 4, 2023), https://g1.globo.com/rj/rio-de-janeiro/noticia/2023/02/28/quem-e-marcelo-bretas-o-moro-carioca-que-mandou-prender-temer-e-cabral-agora-afastado-por-desvio-de-conduta.ghtml.

[13] Luiz Vassalo, *Delatores da Lava Jato querem anular acordos e receber dinheiro de volta.* O Estado de São Paulo (Jun. 5, 2023), https://www.estadao.com.br/politica/delatores-da-lava-jato-querem-anular-acordos-e-receber-dinheiro-de-volta/.

[14] Natália Portinari, *Moro no governo compromente imagem do Judiciário, diz Ayres Britto.* Jornal O Globo (Jun. 1, 2023), https://oglobo.globo.com/politica/moro-no-governo-compromete-imagem-do-judiciario-diz-ayres-britto-23204870.

A Global Finance Proposal from the World's Smallest Countries to Enhance Climate Change Resiliency and Adaptation

Thomas Andrew O'Keefe

At the center of the agenda for the June 22-23, 2023 Summit for a New Global Financing Pact in Paris hosted by French President Emmanuel Macron was a set of important changes to the current multilateral lending infrastructure. Spearheaded by little Barbados, these proposals merit the support and endorsement of the ABA.

In the lead up to the November 2021 United Nations Framework Convention on Climate Change Conference of the Parties in Glasgow, Scotland (COP 26), Barbadian Prime Minister Mia Mottley called for the suspension of debt and interest payments owed to multilateral financial institutions by Small Island Developing States (SIDS) while they respond to climate change exacerbated natural disasters.[1] Already among the world's most indebted countries *per capita* because of tiny domestic capital markets, low tax bases, and exorbitantly high interest rates[2] these payments become untenable when SIDS must also devote scarce resources for reconstructing critical infrastructure as well as building up resilience to future disasters. The injustice is compounded by the fact these nations have least contributed to the climate crisis but are most impacted through more frequent and ferocious hurricanes and typhoons, rising sea levels, unpredictable rainfall, and increasingly acidic oceans that wipe out critical food resources. In the Caribbean, the vital tourism industry is also suffering as beaches are inundated with piles of rotting sargassum seaweed.

One implicit objective in getting multilateral and regional institutions like the World Bank and the Asian Development Bank to accept natural disaster debt suspension clauses is to encourage commercial investors, including hedge funds, to do the same. Interestingly, the Inter-American Development Bank has already announced plans to include a "hurricane clause" in its loan agreements with Central American and Caribbean member states which would defer principal payments for up to two years.

In preparation for November 2022 COP 27 in Sharm El-Sheikh, Egypt, the Barbadian government upped the ante by also proposing important changes to the multilateral lending framework. Labeled the Bridgetown Initiative, these reforms include redirecting up to US$ 100 billion in unused International Monetary Fund (IMF) Special Drawing Rights (SDRs) for SIDS and operationalizing a US$ 45 billion IMF administered Resilience and Sustainability Trust.[3] SDRs are international reserve assets allocated to IMF member countries based on their economic size. It allows member governments to exchange their SDRs to borrow from one another's central bank reserves at very low interest rates in response to an economic crisis. While the IMF does have a Poverty Reduction and Growth Trust that, in part, utilizes unused SDRs to provide lending to low-income economies at zero percent interest rates, most SIDS are ineligible. That is because, but for eight countries, the remaining 31 SIDS are classified as middle or even high-Income economies.[4]

The Bridgetown Initiative also calls for US$ 1 trillion in multilateral loans at concessional rates to fund climate change adaptation and resiliency in the developing world. It further proposes leveraging an additional US$ 650 billion held by the IMF to set up a Climate Mitigation Trust that, through loan guarantees, would attract much larger private sector capital to directly invest in carbon-

[1] Small Island Developing States (SIDS) are a distinct group of 39 sovereign nations that are located in the **Atlantic:** [1] Cabo Verde, [2] Guinea-Bissau, and [3] São Tomé and Príncipe; the **Caribbean**: [1] Antigua and Barbuda, [2] The Bahamas, [3] Barbados, [4] Belize, [5] Cuba, [6] Dominica, [7] Dominican Republic, [8] Grenada, [9] Guyana, [10] Haiti, [11] Jamaica, [12] Saint Kitts and Nevis, [13] Saint Lucia, [14] Saint Vincent and the Grenadines, [15] Suriname, and [16] Trinidad and Tobago); the **Indian Ocean** ([1] the Comoros, [2] Maldives, [3] Mauritius, [4] Seychelles; the **Pacific**:[1] Cook Islands, [2] Fiji, [3] Kiribati, [4] Marshall Islands, [5] Federated States of Micronesia, [6] Nauru, [7] Niue, [8] Palau, [9] Papua New Guinea, [10] Samoa, [11] Solomon Islands, [12] Timor-Leste, [13] Tonga, [14] Tuvalu, and [15] Vanuatu); and Singapore in the **South China Sea.** The SIDS also include 18 associate members that are territories of other countries such as the British Virgin Islands and Puerto Rico.

[2] On average, interest rates for loans are often two to three times more if the borrower is a developing country as opposed to a wealthier developed nation. Justin Rowlatt, *Barbados PM Fights for Shakeup of Global Climate Finance*, BBC NEWS (June 22, 2023), https://www.bbc.com/news/science-environment-65962997.

[3] *The 2022 Bridgetown Initiative*, MINISTRY OF FOREIGN AFFAIRS AND FOREGN TRADE (September 23, 2022), https://www.foreign.gov.bb/the-2022-barbados-agenda/.

[4] The eight SIDS deemed to be low-income economies include the Comoros, Guinea-Bissau, Haiti, Kiribati, São Tomé and Príncipe, Solomon Islands, Timor-Leste, and Tuvalu.

free energy projects, for example, and avoid governments incurring even more unsustainable debt.

The Barbadian-led effort has been well received by the U.S. Special Presidential Envoy for Climate Change John Kerry as well as IMF Managing Director Kristalina Georgieva. In response, the World Bank Group launched an Evolution Roadmap in January 2023 to better address challenges including those of a cross-border nature such as climate change, that affect its ability to achieve its mission of economic growth, poverty reduction, and human development.[5] An internal committee completed an initial report on proposed reforms in time for the World Bank Group's Spring meeting in Washington, DC in mid-April 2023. Furthermore, following the Paris Summit this past June, the World Bank announced that it would suspend loan repayments to the most vulnerable countries hit by catastrophic events as an initial trial that might eventually expand to include all borrowers.

One reason the Barbadian proposals for overhauling the global financial architecture are likely to be adopted is that they are not pleas for no-strings attached compensation or reparations. Instead, they are focused on making the existing multilateral lending system more flexible to better meet the needs of governments to respond to the climate crisis and create incentives for more private sector investment. By contrast, an additional recommendation put forward by Barbados and other developing countries at COP 27 to tax the windfall profits of fossil fuel companies based on their carbon emissions, levy a small fee on airline tickets, and/or impose an international carbon border tax to fund so-called "loss and damage" grants for climate vulnerable developing nations has yet to gain traction.[6]

The proposed resolution that the International Law Section's drafting group representing various committees is developing not only calls on the ABA to support the suspension of loan payments by low and middle-income SIDS for up to two-years in response to a climate-exacerbated natural catastrophe, but also endorses the Bridgetown Initiative reforms to the multilateral lending system.

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[5] *World Bank Group Statement on Evolution Roadmap*, THE WORLD BANK (January 13, 2023), https://www.worldbank.org/en/news/statement/2023/01/13/world-bank-group-statement-on-evolution-roadmap.

[6] *Explainer: Will COP 28 Deliver a New Fund for Climate Loss and Damage?,* VOICE OF AMERICA (June 7, 2023), https://www.voanews.com/a/explainer-will-cop28-deliver-a-new-fund-for-climate-loss-and-damage-/7127095.html.

California Wins Proposition 12 Case Before the U.S. Supreme Court

David Favre

On May 11, 2023, the U.S. Supreme Court released their opinion in the case of the *National Pork Producers Council et al. v. Ross* (No. 21-468). This case involves a challenge to a California law known as Proposition 12, a ballot initiative adopted in 2018, by 63 percent of California voters. While Proposition 12 dealt with a number of animal welfare issues, the relevant one here forbids the in-state sale of pork meat that comes from breeding pigs that are "confined in a cruel manner."[1] Confinement is "cruel" if it prevents a pig from "lying down, standing up, fully extending [its] limbs, or turning around freely."[2] For the pigs this has been specifically defined as requiring access to at least 24 square ft of space per pig. Industrial standards previously accepted 12 square feet per pig. By the language of the law the requirement was imposed upon producers within the state, and more importantly producers outside the state who wished to sell pork within California.

Producers outside the state raised serious objections. They argued first that California had no right to impose welfare rules on operations outside the state, and second that the financial burden to comply with the standards was a substantial interference with interstate commerce. Shortly after Proposition 12's adoption, two organizations, the National Pork Producers Council and the American Farm Bureau Federation brought a lawsuit on behalf of their members who raise and process pigs alleging that Proposition 12 violates the U. S. Constitution by impermissibly burdening interstate commerce. The District Court and Ninth Circuit Court of Appeals dismissed the suit stating that the plaintiffs had not shown a sufficiently high burden upon interstate commerce. In a split opinion the Supreme Court upheld the 9th Circuit dismissal of the case, thus allowing California to proceed with enforcement of the law against out of state pork producers. This opinion will have far reaching consequences within industrial farm animal welfare.

First a reminder that there is no real law at the national level in the United States that sets animal welfare standards for farm animals. The federal Animal Welfare Act does cover animals in research, testing and exhibitions, but farm animals are specifically excluded from the definition of animal

With no national law on the topic, each state has the inherent power to provide for the welfare of animals. Fifty different legislatures have a voice in the animal conditions for their state. There is no debate about the ability of a state to establish the living conditions for any farm animal within its boundaries. For example, recently a number of states have declared that egg laying chickens should be cage free after a phase in period, thus eliminating the battery cage system which was dominate for decades within the industry.[3] Most states have not yet adopted such a rule. So, the quality of life for egg laying chickens depends on the state in which they reside.

The political power of the meat producer lobby at the state legislative level was strong enough to manage and defect any attempts toward welfare improvement by new laws and regulations. That was true for decades but beginning twenty years ago animal welfare organizations sought new laws by going directly to the citizens by the ballot initiative path, thus bypassing the legislative branch.

Initially the ballet initiative approach resulted in better living conditions for animals within a number of states. But California Proposition 12 in 2018 took an additional step that impacted animals outside of California. The focus of that law was on meat and egg products sold within California whether the animals were raised in the state or out of state. The same welfare standards were required for anyone selling a meat product in California. As most meat consumed in California is raised out of state, in Iowa for instance, the financial impact of upgrading facilities for the animals falls upon out of state producers and Iowa's legislature has no way to block

[1] Cal. Health & Safety Code Ann. §25990(b)(2).
[2] Id. §25991(e)(1).
[3] *See*, *e.g.*, Colo. Rev. Stat. § 35-21-203 (2020) (Colorado statute forbidding use of battery cages by 2025 and banning in-state sale of products from battery cage systems by 2025); Or. Rev. Stat. § 632.835–850 (2019) (Oregon statute banning use of battery cages in-state and banning in-state sale of products from battery cage systems by 2024.

California's law. There is no denial of the fact that compliance will require substantial changes with unknown financial impact on existing producers. Maine and other states have also started to use the focus of "meat sold" for imposing animal welfare requirements.[4]

Legal Context

The Constitution, in Art. I, § 8, cl. 3, delegated to the federal government the authority to regulate interstate commerce. In the absence of national rules states may adopt their own laws and regulations. The Supreme Court has decided in a series of cases over the past 50 years that the Court will strike down any state law which seeks to control commerce in another state or give preference to domestic commerce. However, California Proposition 12 does not mandate any welfare condition on out of state producers, it is voluntary. Additionally, the same rules apply to instate and out of state producers. All parties agreed that the Commerce Clause is not directly violated. However, there is still the concept of the "dormant commerce clause."

If a state law imposes a burden on interstate commerce, then the question is does the regulation meet the *Pike* test? A state statute that "regulates even-handedly" must be upheld by the Supreme Court "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[5]. In a prior case the Supreme Court did acknowledge that a state does have the right to protect against cruelty to animals.[6]. The present case should require a balancing test between the ethical position of the citizens of California and the economic losses of those the plaintiffs represent. This is representative of so many animal issues, how to weigh an ethical position versus an economic consequence in a political context.

The Opinion

By a 5-4 opinion the lower court dismissal of the case was upheld. There was a splintering of opinions on both the majority and dissent sides of the case. Part of the majority said that the petitioners were trying to extend the Pike case into areas that were not within the jurisdiction of the Court. Others agreed with the lower court that there was no substantial burden on interstate commerce and therefore the Pike test was not triggered. Some on the dissent side thought that there might be a substantial burden and wanted to refer the case back to the lower court for a factual determination of the burden and how the balancing test would come out. One justice held that there was a burden on interstate commerce and that the burden was not justified by the benefit of better welfare for the animals, and therefore that the law should be struck down. After reading this opinion it is difficult to find a new rule or test that might be used to judge other state laws.

A prime difficulty, or disappointment of the case is that the Court did not have anything to say about how strong was a state's interest in protecting animal welfare. Much of the discussion was around the issue of the "burden" imposed on the pork producers, but no test was suggested to clarify the definition of burden. It seemed more like the personal opinions of the Justices. Therefore, more cases will most likely be filed in the future to deal with this important topic.

The Future

National considerations. This author is predicting that a number of coastal states will extend this court win by adopting new laws impacting the producing states. It is not likely that these state laws will be identical. Therefore in a few years there may be as many as a dozen different standards that meat producers will have to meet in order to sell their products in these various states. This will in turn become an incentive for the creation of national standards. However, predicting the outcome of such national legislation is not possible, so it is unclear if the national legislation will actually improve the welfare of farm animals. Once adopted at the national level it will preempt state laws (unless the federal law specifically allows more protective measures at the state level).

Beyond animal welfare, there exists the possibility that this approach by one state could be used to impose environmental or labor standards on out of state producers. For example, will California require the producers of any product sold in the state to conform to their labor laws? Or perhaps require out of state producers possess a sustainability certificate issued by their agency? It seems that this case has opened a door to a large number of possibilities.

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[4] Id. Mass. Gen. Laws ch. 129 App., §§ 1-2–1-3 (2016) (Massachusetts statute prohibiting in-state use of gestation crates, battery cages, and veal crates, and instate sale of products from such systems, by 2022); Ariz. Admin. Code R3-2-907 (2022) (Arizona regulations forbidding use of battery cages and banning in-state sale of products from battery cage systems by 2025).

[5] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

[6] *United States v. Stevens*, 559 U.S. 460, 469 (2010).

International consideration. The California requirement will apply to meat produced outside the United States. This could raise an issue under the World Trade Organization provision which suggests that a country cannot restrict trade based on methods of production. However, the European Union case on seal skins also suggests that when an importing state restriction is based upon a strong ethical position within the restricting country then restrictions on production methods might be allowed.[7] There is no animal welfare treaty directly on the topic, but a treaty has been proposed which would touch upon the topic of industrial farm animal welfare.[8]

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[7] *See,* European Communities, *Measures Prohibiting the Importation and Marketing of Seal Products - Status report by the European Union*, (Jun. 18, 2014), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds401_e.htm.

[8] *See,* International Coalition for Animal Protection, *A new international treaty for animal welfare and pandemic prevention*, (Nov. 16, 2022), https://www.conventiononanimalprotection.org/the-cap-treaty.

U.S. Strategy to Prevent Conflict and Promote Stability Under the 2019 Global Fragility Act

Steven E. Hendrix

On March 24, 2023, President Biden transmitted to Congress ten-year plans to implement the U.S. Strategy to Prevent Conflict and Promote Stability (SPCPS) in and with priority partner countries and region: Haiti, Libya, Mozambique, Papua New Guinea, and the Coastal West Africa countries of Benin, Côte d'Ivoire, Ghana, Guinea, and Togo.[1] These plans integrate the U.S. government's diplomatic efforts, development programs, and security assistance initiatives. They reflect local conditions in our priority partner countries and will be adapted as conditions on the ground evolve over the course of implementation and as our ongoing and in-depth partner consultations yield new insights and solutions.

The plans fall under the landmark, bipartisan Global Fragility Act of 2019.[2] That legislation set forth an innovative long-term approach to addressing conflict, violence, and instability globally. It recognized that America's prosperity and national security depend on peaceful, self-reliant, and stable economic and security partners. The Act mandated cooperation with five priority countries or regions for implementation. In conjunction with the U.S. Strategy to Prevent Conflict and Promote Stability, the Administration is now moving forward with partnership-based implementation plans for the coming 10 years.

The October 2022 U.S. National Security Strategy[3] highlights the Administration's commitment to this effort. It states that we are addressing the root causes of fragility, conflict, and crisis, including through the Global Fragility Act. This includes using our humanitarian, development, and peacebuilding tools more cohesively. It also calls for investment in women and girls; responsiveness to local voices and focus on the needs of the most marginalized, including the LGBTQI+ community; and steps toward broader inclusive development.

The ten-year plans are cross-cutting and connect Administration priorities to promoting stability in our partner countries.[4] They represent a significant U.S. investment and serve as an important milestone to support our partners' progress toward resilience and a more peaceful future. The plans will guide increased U.S. assistance to these countries and region, including through the Prevention and Stabilization Fund. They further reflect extensive discussions with stakeholders and partners, including the U.S. Congress, experts from across the U.S. government, civil society organizations, multilateral and regional organizations, the private sector, and leaders and institutions in partner countries.

These ten-year plans are designed to guide efforts across U.S. administrations to deepen partnerships around the world to prevent conflict and promote stability. Going forward, the plans will provide a framework and opportunities for the United States to engage with – and within – countries striving to escape or entirely avoid costly and dangerous cycles of conflict and instability. Each plan tailors a shared approach to the unique challenges and opportunities of the local and regional context, including specific resiliencies for peace. Through ongoing consultative processes, the U.S. will seek to elevate local voices and solutions to prevent conflict and promote stability. The State Department and USAID will regularly review the plans as they learn from their implementation and as on-the-ground circumstances evolve. This will allow the plans to adapt over time.[5]

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[1] White House, *Fact Sheet: President Biden Submits to Congress 10-Year Plans to Implement the U.S. Strategy to Prevent Conflict and Promote Stability*, (Mar. 24, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/24/fact-sheet-president-biden-submits-to-congress-10-year-plans-to-implement-the-u-s-strategy-to-prevent-conflict-and-promote-stability/).

[2] 22 USC Ch. 105: *GLOBAL FRAGILITY*.

[3] White House, *National Security Strategy*, (Oct. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf.

[4] Center for Strategic and International Studies (CSIS), *The Global Fragility Strategy Gets a Refresh*, (Apr. 4, 2022), https://www.csis.org/analysis/global-fragility-strategy-gets-refresh.

[5] U.S. Agency for International Development (USAID), *The U.S. Strategy to Prevent Conflict and Promote Stability: Priority Countries and Region*, (Apr. 1, 2022), https://www.usaid.gov/news-information/press-releases/apr-01-2022-us-strategy-prevent-conflict-and-promote-stability-priority-countries-and-region.

Beyond this, these plans represent a commitment to enhance how the U.S. government works to address conflict-related challenges overseas. It is a reform of how U.S. government departments and agencies work abroad through a whole-of-government approach that integrates U.S. diplomatic, development, and security sector engagement. The Department of State, USAID, and the Department of Defense are united in this purpose, with support from the Department of the Treasury and other agencies for a whole-of-government approach.

These institutions can build upon previous U.S. experiences to identify lessons learned and apply resources intentionally, innovatively, and strategically. The plans will be further shaped and implemented in coordination with the many other actors who can help achieve the common objectives of more peaceful, prosperous, and stable communities and nations.

Besides a new standard for bilateral engagement, the U.S. also commits to multilateralism that addresses instability and enhances global peace. The strength and impact of initiatives are multiplied when partners and allies coordinate and combine efforts. A core component of implementing these plans will be working with partners on the ground, to include the United Nations and local civil society organizations. As such, this represents the Administration's commitment to work together as an international community.

The U.S. is taking seriously the need to integrate civil society organizations into shared efforts moving forward. The continuing support of our civil society partners – and the bipartisan backing received to date – are pivotal to success in both the short and the long run.[6]

In this way, the goal is to elevate whole-of-government efforts in pursuit of a broader whole-of-society approach. Besides partners in the U.S. Congress and civil society, the SPCPS affords means and scope to engage broadly with the private sector, academia, the faith community, foundations, multilateral and regional organizations, governments, and diaspora communities, among other key stakeholders in each of the partner countries.[7]

The plans are innovative in several ways. First, specific areas of innovation vary across the plans, yet several themes are consistent. The plans prioritize opportunities to increase U.S. engagement with local communities, especially in marginalized areas, to elevate the participation of those often living on the precarious front lines of fragility. Their lived experiences are central not only to understanding the impact of conflict and instability, but also to identifying ways that U.S. assistance can effectively mitigate the challenges they face.

The plans align U.S. support to the national-level plans of our partner countries, incentivizing the leadership and commitment of national government actors to tackle these challenges. The plans promote greater cooperation among international donors and partners to better align our cumulative support and resources toward shared objectives and metrics.

The SPCPS identifies the Department of State as leading strategy execution; USAID as leading implementation of non-security assistance; the Department of Defense supporting security-related efforts; and the Department of the Treasury and other agencies as providing support. The result will be a whole-of-government approach over a 10-year time horizon for our priority countries and region. The plans integrate learning and planning, strive for greater flexibility and adaptability based on local context, and improve joint coordination to multiply each other's efforts.

So how do the plans entail the U.S. government doing business differently? The plans institutionalize the application of U.S. government research, analysis, planning, messaging, prioritization of funding, and execution of activities toward prevention and stabilization. While interagency coordination and collaboration are not new, the scope and scale of this effort are unprecedented. For example, we have teams spanning Washington and our posts overseas, a high-level Prevention and Stabilization Steering Committee, and a new working-level Secretariat. All these new structures are composed of representatives from across the interagency.[8]

[6] U.S. Institute of Peace (USIP), *Implementing the Global Fragility Act: What Comes Next?*, (Apr. 7, 2002), https://www.usip.org/publications/2022/04/implementing-global-fragility-act-what-comes-next.

[7] U.S. Department of State, *U.S. Strategy to Prevent Conflict and Promote Stability*, (Apr. 1, 2022), https://www.state.gov/2022-prologue-to-the-united-states-strategy-to-prevent-conflict-and-promote-stability/.

[8] Teresa Welsh, Development Exchange (Devex), *US releases Global Fragility Act country plans*, (Mar. 27, 2023), https://www.devex.com/news/us-releases-global-fragility-act-country-plans-105226.

The interagency is also placing new emphasis on elevating the voices of local partners in the development of their communities and countries. Hundreds of consultative meetings and diverse perspectives have informed the plans' development and will continue to inform their implementation. This represents a huge step forward for fostering local ownership from the start.

The plans also emphasize particularly rigorous monitoring, evaluation, and learning that will help ensure their implementation is informed by data and adapts to evolving conditions.

The four countries and one region were selected based on the legislation. In line with the Act, the U.S. government engaged in a rigorous process to identify priority partners. It utilized quantitative comparisons, qualitative assessments, and prioritization criteria based on U.S. national security interests and feasible opportunities for partner country engagement. This process also included consultations with partner country governments. Local civil society, as well as the GFA Coalition- a body of over 100 civil society organizations who pushed for this legislation- were also consulted.

The resulting partner countries and region illustrate our commitment to partnering in a variety of geographic locations to respond to a wide range of emerging and persistent challenges that can weaken state capacity and legitimacy. The plans will aim to foster locally driven solutions grounded in mutual trust and long-term accountability.[9]

To develop the plans, U.S. embassy-based colleagues in each country collaborated with counterparts across the Coastal West Africa region. This reflects the vision for a field-led approach. They conducted broad-ranging consultations with partner countries' national and local leaders, academia, civil society, media, bilateral partners, the private sector, and representatives of multilateral and regional organizations. The Administration also leveraged the support of U.S. diplomatic, development, and defense personnel in Washington.

Congress was consulted during the development of these plans. At multiple stages in the process, there were briefings for key Congressional stakeholders. Briefings included participants from the relevant Congressional committees named in the legislation (House Foreign Affairs Committee - HFAC, United States Senate Committee on Foreign Relations - SFRC, House Committee on Appropriations for Foreign Affairs - HACFO, and Senate Appropriations Committee for Foreign Affairs - SACFO), as well as other member offices with a policy interest in the SPCPS. Congressional and staff delegations also visited several partner countries during the consultation phase.

Funding for implementation of the SPCPS will be aligned with each country or region's 10-year plan to best reflect on-the-ground needs. Congress made available $100 million in foreign assistance in Fiscal Year 2021, $125 million in Fiscal Year 2022, and $135 million in Fiscal Year 2023 for the Prevention and Stabilization Fund. The fund supplements existing bilateral and other centrally managed U.S. assistance benefiting these partner countries, which will be further aligned with these plans as appropriate.

Additional foreign assistance resources beyond the Prevention and Stabilization Fund may also be committed to these plans. Additional foreign assistance resources may include other bilateral funding managed by USAID and the Department of State for the priority countries and region, as well as Department of Defense resources and those resources and tools available through the U.S. International Development Finance Corporation and the Millennium Challenge Corporation. With these plans, the Administration is also committed to engaging more closely with other international donors and partners to identify opportunities for complementary programming.

Since the April 2022 announcement of the priority countries/region, there has been and continues to be a considerable amount of work to advance the SPCPS's implementation. Within the priority countries and region, our diplomats conducted hundreds of consultations at the regional, national, and local levels with partner governments, as well as with civil society and private sector representatives. These conversations informed the planning process and established an ongoing dialogue to meet the GFA's "locally led" vision.[10] The Administration engaged in high-level diplomacy with partner nations. Diplomacy has reinforced the focus on peace and stability in high-level dialogues with partner

[9] Joseph R. Biden, *Letter from the President on the Implementation of the Global Fragility Act*, (Apr. 1, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/01/letter-from-the-president-on-the-implementation-of-the-global-fragility-act/.

[10] Patrick W. Quirk and Richmond Blake, Brookings, *How the Biden administration can get the Global Fragility Strategy right*, (Jan. 5, 2021), https://www.brookings.edu/articles/how-the-biden-administration-can-get-the-global-fragility-strategy-right/.

countries, including at the recent U.S.-Africa Leaders Summit.[11]

The initiative is at the formative phase of a decade-long effort to reform how the United States engages abroad through a whole-of-government approach to promote peace and prevent conflict. Ultimately, these plans will integrate all relevant diplomatic, development, and security assistance activities in partner countries over the course of the ten-year timeframe. The Administration has moved forward with programming $100 million in Fiscal Year (FY) 2021 Prevention and Stabilization Fund (PSF) resources to carry out activities supporting the SPCPS and are planning activities for $125 million in FY 2022 PSF, which will be aligned with the ten-year plans. Examples of PSF-funded activities underway include grants in the Coastal West Africa region to build community-level resilience to violent extremism and support the role of youth in countering extremism. In Mozambique, grants for sports and arts diplomacy activities engage youth in Cabo Delgado and, with the Islamic Council and Christian Council of Mozambique, establish peace clubs to sustain community-level harmony as the demobilization, disarmament, and reintegration of former Renamo combatants concludes.

The Women, Peace, and Security (WPS) strategy is integrated into these plans.[12] WPS tenets are central to the SPCPS and integrated into the country and region plans, as seen through our efforts to align the SPCPS with the U.S. Strategy on Women, Peace, and Security. The initiative acknowledges that security cannot be achieved without the full, equal, and meaningful participation of women. In Papua New Guinea, for example, the ten-year plan focuses on addressing gender-based violence, promoting gender equity and equality, and supporting women peacebuilders. In Mozambique, the plan similarly aims to integrate gender equity and equality and empowerment as key components of recovery, reconciliation, and resilience by recognizing the potential for women and girls to serve as agents of peacebuilding.

The climate crisis is also integrated in the plans as a core feature of the SPCPS, in recognition of the fact that the climate crisis is both a stressor and a risk multiplier.[13] The plans are iterative and incremental and include consideration of direct and indirect climate hazards and key vulnerabilities – and how these drivers may be linked to fragility and conflict. The plans also consider the benefits of addressing climate impacts and taking adaptation actions in efforts to build long-term peace and security.

The plans further align with the U.S. Strategy on Countering Corruption, which identifies the deep linkages that exist between corruption and fragility, conflict, and instability. Depending on the precise context, the overseas teams engaged relevant interagency experts, including USAID's Anti-Corruption Task Force and the Department of State's Coordinator on Global Anti-Corruption, to understand, address, and wherever feasible account for the implications of corruption.

Similarly, violent extremism is interwoven with conflict dynamics and drivers in several of the priority countries and region. Overall, the analysis found that dangerous ideologies predicated on violence can take root and fester in communities that have been under- or ill-served by their governance and security institutions. Porous borders can also serve as conduits for the proliferation of illicit groups and activity. The plans reflect the belief that effective prevention requires investments in the economic, social, and political health of historically marginalized communities. The plans also leverage U.S. security assistance to support partner countries as they build and enhance the capabilities of their institutions and security forces to enable sustainable solutions to countering terrorism and other violent extremist activities.

U.S. Combatant Commands also play an important role.[14] In line with the Global Fragility Act and the

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[11] White House, *U.S.-Africa Leaders Summit: Strengthening Partnerships to Meet Shared Priorities*, (Dec. 15, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/12/15/u-s-africa-leaders-summit-strengthening-partnerships-to-meet-shared-priorities/.

[12] The WPS Agenda evolved from the U.N. Security Council Resolution (UNSCR) 1325, which was unanimously adopted on Oct. 31, 2000. U.S. Institute of Peace (USIP), *Advancing Women, Peace and Security U.S. Civil Society Working Group on Women, Peace & Security (U.S. CSWG),* (Sept. 2022), https://www.usip.org/programs/advancing-women-peace-and-security#:~:text=Women%2C%20Peace%20and%20Security%20(WPS,peace%20processes%2C%20peacebuilding%20and%20security.

[13] U.S. Agency for International Development (USAID), *The U.S. Strategy to Prevent Conflict and Promote Stability*, (May 9, 2023), https://www.usaid.gov/conflict-prevention-and-stability/fact-sheets/us-strategy-prevent-conflict-and-promote-stability.

[14] U.S. Department of Defense, *Deputy Assistant Secretary of Defense for Counternarcotics and Stabilization Policy, James Saenz, Travels to West Africa With Interagency Delegation*, (Nov. 1, 2022), https://www.defense.gov/News/Releases/Release/Article/3207443/deputy-assistant-secretary-of-defense-for-counternarcotics-and-stabilization-po/.

SPCPS, the Department of Defense is supporting the ten-year plans including by fostering civil-military engagement, building defense institutional capacity, and professionalizing security forces. Combatant Command-based personnel have been directly involved in the drafting of each plan and are incorporating the ten-year plans into theater campaign plans and additional regional strategies. The Department of Defense is reviewing planning and programming processes to incorporate SPCPS objectives and align initiatives supporting the security and military needs in our priority countries.

To measure results toward SPCPS goals, the State Department and USAID will work closely with stakeholders to monitor progress, identify best practices for implementation, and share lessons learned.[15] Each country and region is developing a monitoring, evaluation, and learning system informed by consultations with stakeholders. This system will be designed to capture changes in the local and external context and monitor progress on the plans, which will inform real-time decision-making and course corrections.

U.S. embassies overseas are scaling up to support this work. The Department of State, in coordination with interagency partners, continues to provide significant staffing support to our embassies as we move from the plan formulation phase to the implementation phase. For instance, it has positioned a new senior regional coordinator in Ghana to cover the Coastal West Africa region, and USAID is positioning a deputy regional coordinator and five country coordinators in the region. The State Department is similarly advancing planning and consultations in Haiti, Mozambique, and Papua New Guinea through deployed officers. The ten-year approach includes opportunities to identify and mitigate personnel and resource gaps.

The Take-Away

Deep partnerships are integral to the SPCPS. The U.S. government has consulted broadly in the development of these plans. As expressed in the plans themselves, the U.S. remains committed to partnering with others who bring knowledge, expertise, and their own resources to bear. These steps are part of a transformative U.S. government effort to prevent conflict, stabilize conflict-affected areas, and advance global peace in line with the Global Fragility Act.

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[15] Center for Strategic and International and Studies (CSIS), *The Global Fragility Act: Unlocking the Full Potential of Interagency Cooperation*, (May 16, 2023), https://www.csis.org/analysis/global-fragility-act-unlocking-full-potential-interagency-cooperation.

Canada's Supreme Court Rules on the Canada-U.S. Safe Third Country Agreement

Jacqueline Bart and Genevieve Giesbrecht

After 20 years in force, the Supreme Court of Canada ("SCC") has ruled on the *Agreement between the Government of Canada and the Government of the United States of America: For cooperation in the examination of refugee status claims from nationals of third countries*, known as the Safe Third Country Agreement ("STCA").

This bi-lateral treaty prevents most asylum seekers from lodging a claim for refugee status at a land border crossing between Canada and the United States. This "protection elsewhere" policy presupposes that the individual will be able to lodge a claim, and seek refuge, in the other country.

Protection elsewhere policies exist as a tool for states to control who is allowed within their geographical confines, without breaching their international responsibilities to asylum seekers by *refouling* them directly to their countries of origin. Protection elsewhere policies are useful in the face of an increasing complex refugee crisis, serve to prevent forum shopping, and can facilitate international cooperation, a principle recognized in the preamble of the *Refugee Convention*.[1] A risk exists, however, in that the sending country cannot control the receiving country's compliance with their international law commitments.

The Canada-USA STCA has been the subject of considerable debate and media attention in Canada, due in part to the changes to U.S. immigration policies over the past years. As such, a number of impacted refugee claimants and public interest litigants brought forth a challenge to this legislation in Canada, claiming it violates Canadian constitutional rights.

The decision turned on three main issues: Whether the designation of the United States as a safe country was *ultra vires;* and whether the return of asylum seekers from the Canadian border to the USA violated section 7 or section 15 of the *Canadian Charter of Rights and Freedoms*. The SCC found the STCA to be constitutional, although the section 15 challenge has been remitted to the Federal Court.

Importantly, at the time that the challenge to the STCA was launched, the STCA only applied to claimants at land borders. Asylum seekers crossing irregularly between the U.S. and Canada were not subject to the STCA. This implication of the STCA garnered significant media attention, especially after a number of serious injuries and deaths were reported of migrants crossing on foot.[2] On March 24, 2023, however, the countries expanded the STCA to apply to those who have crossed irregularly within the preceding two weeks. The new expansion and concern around irregular border crossings were not addressed in the present case.

Procedural History

Prior to introduction of the STCA, Canada instituted the framework that allowed the Governor in Council to designate a country as safe. This, along with other changes to domestic immigration legislation, was challenged and brought to the SCC in 1992. The case failed on procedural grounds.

In 2007, the enacted STCA was challenged at the Federal Court and Federal Court of Appeal (leave to SCC dismissed) on what amounted to administrative considerations regarding what the Courts could consider.

Present Case

The present case was then brought forward in 2017 and heard at the Federal Court in 2019. The applicants argued that Canada violated the constitutional rights of the claimants by returning refugee claimants to the USA. The applicants put forward evidence that certain policies in the U.S., including immigration detention and detention conditions, limitations to asylum law and protection, as well as potential *refoulement* were in

[1] *Convention Relating to the Status of Refugees*, 189 UNTS 137 (Jul. 28 1951, entered into force 22 April 1954) [*Refugee Convention*].

[2] See, for example: Austin Grabish, *Frostbitten refugee will lose fingers, toe after 7-hour trek to cross U.S.-Canada border*, CBC News (Jan. 11, 2017) https://www.cbc.ca/news/canada/manitoba/refugees-frostbite-manitoba-1.3930146; AlJazeera, *Two families found dead trying to enter US from Canada: Police*, (Mar. 31 2023), https://www.aljazeera.com/news/2023/3/31/canadian-police-say-six-bodies-found-near-quebec-border-with-us.

violation of Canadian constitutional principles and thus the STCA should be struck down.

At the Federal Court level, the legislation was found to be unconstitutional. This decision was overturned on appeal, where the Federal Court of Appeal also found that the proper challenge should have been to the administrative context, not to the legislation itself. The claimants and public interest parties then appealed to the SCC and were supported by the submissions of sixteen intervenor parties.

The SCC decided the case based on three primary arguments: The *vires* of the legislation, section 7 of the *Charter*, and section 15 of the *Charter.*

Of note, the SCC was not considering whether the laws and actions of the United States government complied with the Canadian *Charter.* Rather, the challenge was whether the impact of the Canadian legislature, which turned claimants away at the border, could in turn lead to a deprivation of the claimants' *Charter* rights on their return to the U.S.

Ultra Vires

First, the Court held that legislation designating the United States as a safe country is not *ultra vires*. The appellants argued that the Governor in Council did not have the statutory authority to maintain the designation of the United States as a safe country, as changes to the United States refugee policies rendered it no longer in compliance with the *Refugee Convention.* The Court found that it was only proper to look at whether the designation of the United States was within the statutory authority of the Governor in Council at the time of the designation. Moreover, the Government in Council has obligations to continue to review the designation. It is these reviews that could be challenged at a future date based on new changes in U.S. law and policy.

Section 7

Section 7 of the Canadian *Charter* reads:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The SCC found that claimants' section 7 rights to liberty and security of the person were engaged, but in a way that complied with the principles of fundamental justice.

First, the risk of claimants being placed in detention upon return to the U.S. engaged liberty and security of the person, especially when considering evidence of the detention conditions. For example, the use of solitary confinement or medical isolation, inadequate medical care, lack of religious dietary accommodation and abnormally cold conditions all triggered the application of section 7. In addition, the risk of returning claimants to their countries of origin without due consideration of international obligations was also relevant.

The SCC also found Canada was properly responsible for the engagement of these rights. Canada's action of turning claimants away at the border was a necessary pre-condition. Canada could also reasonably foresee, through actual and imputed knowledge, the engagement of some of the rights.

The Court then determined the legislation, although depriving claimants of their right to liberty and security of the person, did so in accordance with the principles of fundamental justice. The Court found that the Canadian legislation was neither overly broad nor grossly disproportionate, against the framework of international comity and foreign sovereignty.

Finally, the Court found that there were sufficient "safety valves" in the Canadian legislation to guard against potential *refoulement*. These safety valves include the exceptions to the STCA for certain family members, unaccompanied minors, and persons subject to the death penalty in the USA. They also include discretionary remedies from Canadian officials, such as the ability to issue temporary resident permits or delay removal of the claimants from Canada. As such, any breach in the legislation was cured, as the limited exemptions to the STCA and the discretionary remedies available at the border provided claimants with sufficient protections to avoid being *refouled.*

Section 15

Section 15 of the Canadian *Charter* reads:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, mental or physical disability.

At the first instance, the applicants argued that the STCA leads to gender-based discrimination, on the basis that asylum claims in the U.S. based on gender-

based violence are impacted by the U.S. interpretation of "particular social group".

The Federal Court, however, opted not to address this argument, and it was dismissed at the Federal Court of Appeal level. The SCC thus determined that they were not the appropriate body to decide whether section 15 was engaged, as this decision required a more in-depth analysis of the facts and the witness statements pertaining to this issue. The SCC did not want to undertake the fact-finding role regarding the gender-based implications of the STCA. The decision on section 15 was therefore remitted to the Federal Court.

Conclusion

At present, the STCA remains in force, and with greater strength, than it existed prior to the commencement of this litigation in 2017. But additional challenges are on the horizon, both in terms of remitting the argument on gender-based discrimination, and for future challenges to the March 2023 agreement expansion.

This case remains an important study of how "protection elsewhere" policies operate, and how states can share the responsibility of international legal commitments. States must be wary, however, that they cannot defer their international or domestic obligations to other states through these treaties.

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