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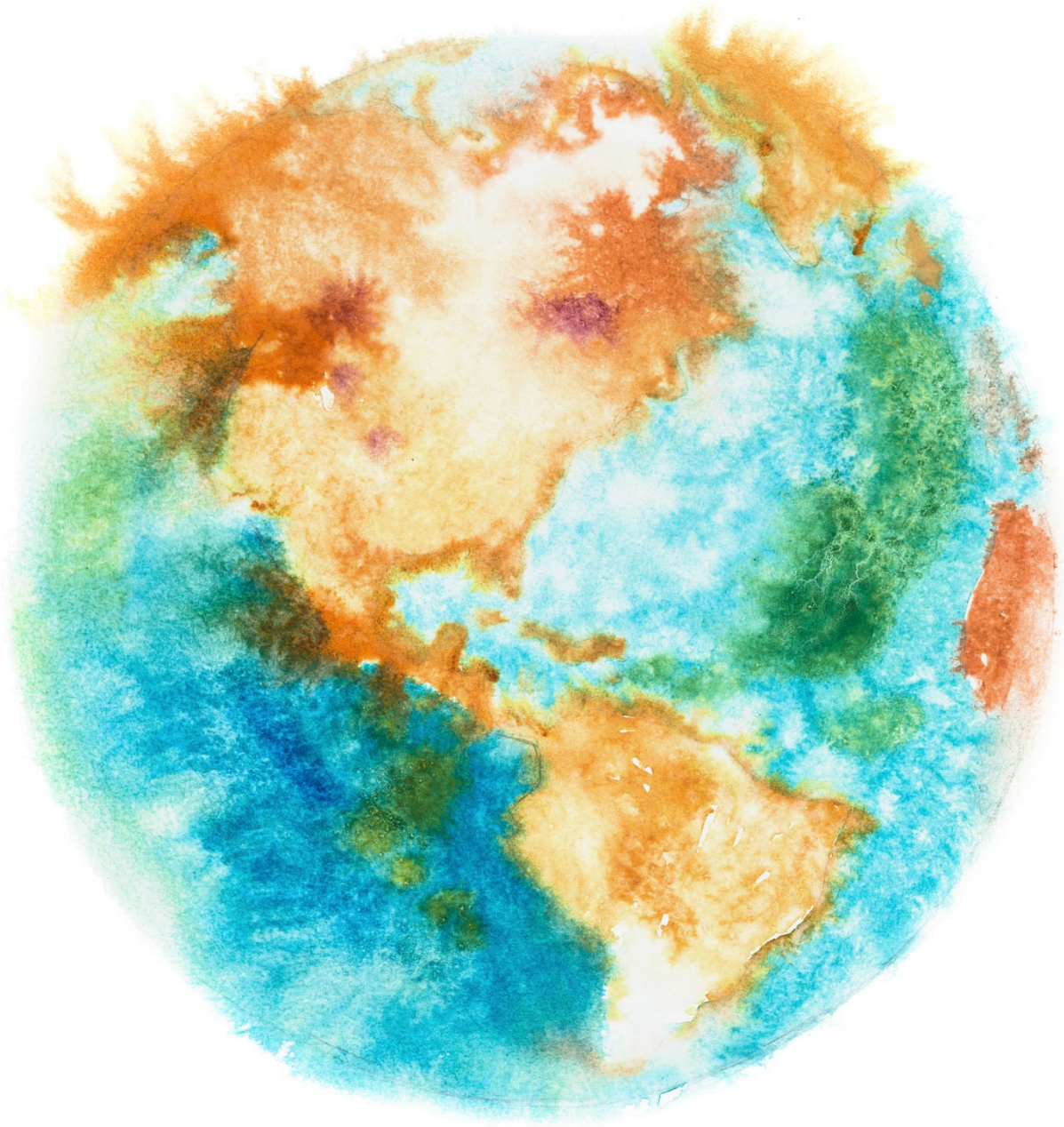

INTERNATIONAL LAW NEWS

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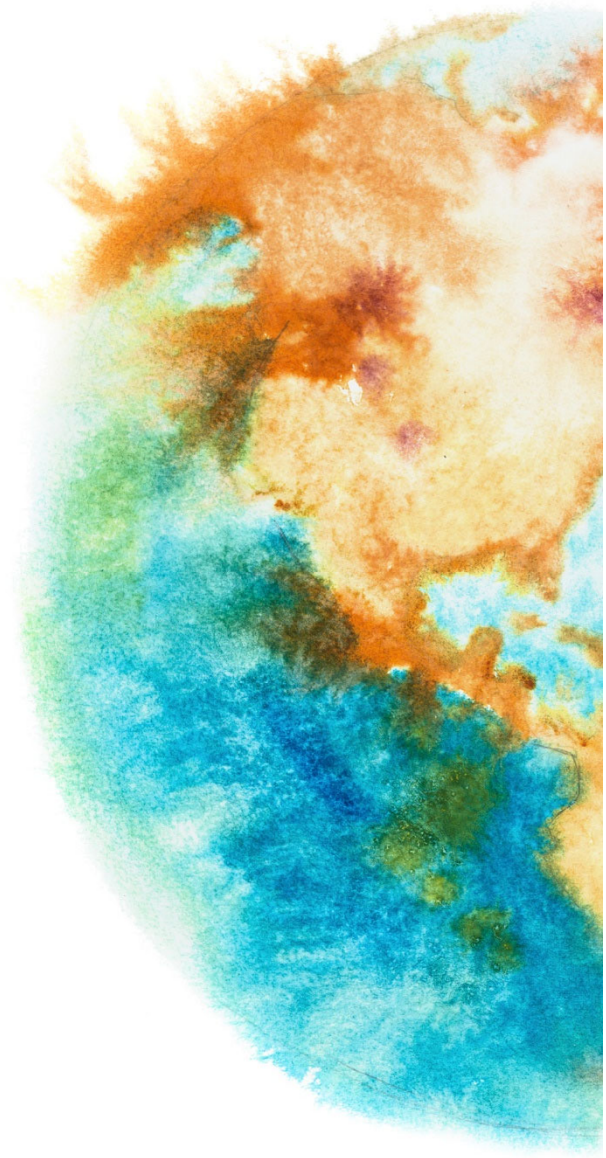

Features

Post ABA Resolution 102A:
Swimming with the Sharks

Regina M. Paulose

In August 2020, the ABA House of Delegates adopted Resolution 102A which urges governments to "enact and enforce legislation that prohibits and penalizes the possession, sale, and trade of shark fins."[1] This article briefly looks at the state of affairs around the world since the Resolution passed and reflects on where the ABA, particularly the International Law Section, can continue to protect sharks and other aquatic life from extinction through legal avenues.

Sharks are a key ocean predator. Despite the negative publicity that the movies and the coastline of Australia has given sharks, they are a necessary element in the marine eco-system. They are natural "lawn mowers" for the oceans. This means that sharks, much like wolves, are the central figures that keep the ecosystem in balance - cleaning out individual species that are weak and keeping the food chain in check. Therefore, the more sharks we lose, the worse off our oceans are. External factors like pollution and climate change are already forcing sharks to migrate to unchartered waters. In July 2021, it was reported that hundreds of sharks "hid out" in Florida canals to escape the toxic algae blooms which come from flooding, soil erosion, fertilizer, and animal excrement.[2] Due to climate change, sharks are also migrating. Ocearch reported that there is a growing population of white sharks in the Northwest Atlantic along Canada and United States.[3]

Although this appears to be a positive trend in one part of the world, slaughter of sharks for their fins continues. On September 24, 2021, news outlets reported that a ship bound to Hong Kong had been stopped by authorities in Colombia where over 3,000 shark fins were confiscated. Sadly, it was estimated "between 900 and 1,000 sharks of different species …were killed, 'causing irreparable environmental damage to aquatic ecosystems of Colombia.'"[4] It is illegal to sell or process shark fins in Colombia and in Hong Kong. However, Hong Kong remains a key transit area for illegal wildlife trafficking, where most wildlife parts are shipped from Hong Kong into places like mainland China. Authorities in Hong Kong have reported that in the first nine months of 2021, they have seized HK 730 million in wildlife, luxury items, and other contraband.[5] In October, an international team of inspectors from the United States, South Korea, and Canada uncovered during a joint operation 450 shark fins illegally on-board vessels operating in the waters of the Pacific Rim.[6]

Within the legal and policy realm, positive trends continue. In January 2021, Mozambique passed legislation prohibiting commercial fishing of whales, sharks, and manta rays, including the establishment of "no take zones" and encouraging fishing communities to re-examine the instruments in which fish are caught. Included in the national legislation are prohibitions on shark finning. Several months later, in August 2021, the United Kingdom stepped up into the waters with a "world-leading" ban on the shark fin trade, which includes import and export bans on fins and shark fin soup products. This is a significant step as the United Kingdom was one of the greatest hubs for the shark fin trade, where most of the fins travel onwards to Spain.[7]

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[1] *ABA Resolution 102A, Adopted by the House of Delegates* (August 3-4 2020), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/102a-annual-2020.pdf.

[2] HARRY BAKER, "Sharks hide in Florida canal to escape toxic red tide sweeping the coast" *LiveScience* (August 4, 2021), https://www.livescience.com/sharks-hide-in-florida-canals-red-tide.html.

[3] MRINALI ANCHAN, "Something in the water: Shark population on the risk in Atlantic Canada, researcher says" (October 14, 2021), https://www.cbc.ca/news/canada/new-brunswick/more-shark-sightings-nb-1.6210615.

[4] *La Prensa Latina Media*, "Nearly, 3,500 China-bound shark fins seized at Bogota airport" (September 24, 2021), https://www.laprensalatina.com/nearly-3500-china-bound-shark-fins-seized-at-bogota-airport/.

[5] CLIFFORD LO, "Hong Kong customs makes largest-ever smuggling bust, with HK$210 million haul of shark fins, luxury goods including Hermes, Gucci and Louis Vuitton handbags" *South China Morning Post* (October 7, 2021), https://www.scmp.com/news/hong-kong/law-and-crime/article/3151422/hong-kong-customs-makes-largest-ever-smuggling-bust.

[6] *Fisherman's News*, "450 Shark Fins Uncovered in International Fisheries Boarding in North Pacific" (October 2021), https://fishermensnews.com/450-shark-fins-uncovered-in-international-fisheries-boardings-in-north-pacific/.

[7] GREENPEACE, "REVEALED – Tonnes of shark fins exported from Britain every year" (July 29, 2019),

In 2016 that the World Ocean Assessment of the United Nations noted that "humankind was running out of time to start managing the oceans sustainably."[8] Building upon this and other external threats to the oceans, the UN announced 2021-2030 as the "Ocean Decade." The purpose of the Ocean Decade is to implement capacity building programs and increase international cooperation which protect life below water, a 2030 Sustainable Development Goal. In line with this Sustainable Development Goal many countries are examining their relationship to the oceans.

So, the real question is, what can the ABA continue to do? Resolution 102A is a great step in the right direction and shows the ABA's commitment, not only to marine species, like sharks, but to our oceans. The focus should broaden however to activities that impact sharks as well as other species. A large, sometimes controversial issue, is illegal, unregulated and unreported fishing (IUU) and destructive fishing.[9] As more conversations take place around IUU and destructive methods of fishing, the ABA International Law Section has an opportunity to also utilize and emphasize the UN Declaration on the Rights of Indigenous Peoples, which was adopted by the House of Delegates (HOD 107D) in 2021. Taken together both resolutions, 102A and 107D form ample opportunities for discussions and inroads on marine conversation and the importance of preserving all life underwater.

There are two more interesting aspects to the Shark Fin Resolution that should also be considered. First, given the prevalence of organized crime in the illegal shark fin and general illegal wildlife trade, the ABA International Law community should consider adopting the UN Transnational Organized Crime Convention (UNTOC) as a resolution. UNTOC, a suppression convention, encourages states to cooperate with one another and provide mutual legal assistance in order to combat transnational organized crime. It is one of the most widely accepted international instruments to date. In addition, the United Nations Human Rights Council adopted the "Right to a safe, clean, healthy and sustainable environment" in its 48th session. This right should be incorporated into our discussions about ocean protection and human rights, as the oceans cover 71% of the earth's surface, over 870 million people depend on the oceans for their livelihood, and approximately three billion people depend on the oceans for food security.[10]

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https://www.greenpeace.org.uk/news/revealed-tonnes-of-shark-fins-exported-from-britain-every-year/.

[8] SDG KNOWLEDGE HUB, "UN Ocean Decade: An Ocean Knowledge Revolution in Action" (July 28, 2021), https://sdg.iisd.org/commentary/guest-articles/un-ocean-decade-an-ocean-knowledge-revolution-in-action/.

[9] For all international treaty buffs out there, you can showcase your knowledge of UNCLOS with this issue!

[10] *Ibid.*

Addressing Corporate Activity That Negatively Impacts Natural Resources:

Community-Led Engagement as a Path to Rights Compatible Remedies

Katherine McDonnell, Morvarid Bagheri and Shauna Curphey

Companies engaged in agricultural, mining, and other extractive projects may explore and operate on or near land or water belonging to or used by local communities, often in communities that depend on those resources for their livelihoods. In other circumstances, corporate activity may lead directly to negative impacts on human rights. This will become more frequent as climate change, population growth and environmental degradation create more demand for shrinking natural resources.

At the same time, there is wide recognition that corporations have a responsibility to respect human rights. This responsibility is articulated in the UN Guiding Principles on Business and Human Rights (UNGPs), unanimously endorsed by the UN Human Rights Council in 2011,[1] and reflected in the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises,[2] as well as a growing list of national laws and international standards. The UNGPs recognize that while states are principal duty bearers in upholding human rights, corporations have a responsibility to: 1) conduct human rights due diligence (HRDD) to avoid causing harm and; 2) enable access to remedy to impacted people when harm does occur. Both HRDD and access to remedy require that companies communicate with impacted communities to understand and mitigate potential human rights risks, and receive and address complaints when operations lead to human rights abuses.[3]

In practice, these responsibilities are often ignored or approached as superficial, tick-the-box compliance exercises without adequate engagement with local communities, resulting in harms not being adequately identified, mitigated, or remedied. There is thus an urgent need to understand and promote processes for mitigating and remedying corporate human rights harms in ways that lead to rights-respecting outcomes for local communities.

This article explores how companies may use remedial mechanisms that appear adequate to fairly address negative impacts on local communities' enjoyment of natural resources but nonetheless fail to remedy those harms. It begins by outlining existing expectations and standards concerning the effective delivery of remedy through non-judicial mechanisms. It then interrogates whether procedural characteristics are sufficient to ensure that those mechanisms deliver effective remedy and highlights key obstacles to rights-compatible remedy outcomes. It concludes by positing examples of greater local community control as alternative procedural approaches that can help overcome those obstacles.

The UNGPs' Baseline Expectations for Rights-Respecting Non-Judicial Grievance Mechanisms

Efforts to obtain remedy outside of courts in this context often take place under the auspices of a non-judicial grievance mechanism (NJGM). As defined by the UNGPs, a NJGM is any routine process outside of a formal judicial system for raising complaints and seeking remedy for business-related human rights abuses. While some NJGMs engage in investigation and fact-finding, they often rely on dialogue and mediation, particularly in the context of corporate activity negatively impacting natural resource use.[4] These NJGMs may be created by governments, such as the National Contact Points for OECD member states, or as non-state-based mechanisms, including those created by development finance institutions like the World Bank, multi-stakeholder initiatives, and project-specific, operational level mechanisms.

[1] John Ruggie (Special Representative of the Secretary-Gen. on the Issue of Hum. Rts and Transnat'l Corp. and Other Bus. Enter.), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,* Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).
[2] ORG. ECON. COOP. DEV. [OECD], OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), http://dx.doi.org/10.1787/9789264115415-en.
[3] Shift, OXFAM, & GLOBAL COMPACT NETWORK NETHERLANDS, *Doing Business with Respect for Human Rights: A Guidance Tool for Companies* (2016), www.businessrespecthumanrights.org.
[4] Mariëtte van Huijstee & Joseph Wilde-Ramsing, *Remedy Is the Reason: Non-judicial Grievance Mechanisms and Access to Remedy*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS (Surya Deva & David Birchall eds., 2020).

Principle 29 of the UNGPs requires that businesses "establish or participate in effective operational level grievance mechanisms for individuals and communities who may be adversely impacted" by their activities.[5] The language "*or participate in*" acknowledges that people outside of the company may create the NJGM. Indeed, even before the endorsement of the UNGPs, a 2008 report by the UN Special Representative on Business and Human Rights stated that a NJGM "should be designed and overseen jointly with representatives of the groups who may need to access it."[6]

More recently, the UN Working Group on Business and Human Rights also emphasized that "rights holders should be central to the entire remedy process," and recommended that operational level mechanisms "should be at the service of rights holders, who should be consulted meaningfully in creating, designing, reforming and operating such mechanisms."[7] The International Commission of Jurists (ICJ) made similar observations in a 2019 report,[8] and industry guidance has also followed suit, encouraging a "co-design" process.[9]

Unfortunately, this guidance is rarely followed in practice. Instead, most NJGMs do not involve meaningful input from impacted people, and instead emphasize procedures that appear fair, but fail to deliver rights-respecting outcomes.

Do Procedural Elements Ensure Rights-Respecting Outcomes?

The right to an effective remedy under international law involves a procedural and substantive element.[10] Procedurally, there should be practical and meaningful access to a mechanism that is capable of ending and repairing the violations.[11] The substantive element involves guaranteeing non-repetition, providing compensation for the harm suffered, and restoring affected people to their material situations that existed before the harm.[12]

Although the UNGPs call for remedies that "counteract or make good any human rights harms that have occurred," and deliver rights-compatible outcomes,[13] they lack clear criteria for assessing the effectiveness of remedy outcomes.[14] Principle 31 sets forth eight minimum effectiveness criteria for NJGMs, including that they be accessible, equitable, legitimate, predictable, transparent, a source of continuous learning, rights-compatible, and, with regard to operational level mechanisms in particular, based on dialogue and engagement.[15] Rights compatibility is the only effectiveness criterion under Principle 31 that specifically references the "outcomes" of procedures, requiring that they "accord with internationally recognized human rights."[16] Thus, while Principle 31 provides a list of criteria for the design and practice of NJGMs, they primarily focus on process and not whether the outcome provides an effective remedy, despite that being the most important element for impacted communities.[17]

This is significant because, while process is important, research has shown that NJGMs that formally fulfill the UNGPs' effectiveness criteria still fall short of effectively remedying the harms suffered by impacted communities.[18] Many experts have observed this trend,[19] including the ICJ and UN Office of the High Commissioner for Human Rights, who note that the increase in the creation and use of operational level

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[5] *supra* note 1 at 31.
[6] John Ruggie (Special Representative of the Secretary-Gen. on the Issue of Hum. Rts and Transnat'l Corp. and Other Bus. Enter.), *Protect, Respect and Remedy: A Framework for Business and Human Rights, U.N. Doc. A/HRC/8/5* ¶ 95 (2008).
[7] UN GENERAL ASSEMBLY, *Rep. of the Working Group on the Issue of Hum. Rts. and Transn'l Corp. and Other Bus. Enter. ¶ 19, 21, UN Doc. A/72/162, July 18, 2017* ¶ 19, 21.
[8] INT'L COMM'N OF JURISTS, *Effective Operational-level Grievance Mechanisms* (2019), https://www.icj.org/wp-content/uploads/2019/11/Universal-Grievance-Mechanisms-Publications-Reports-Thematic-reports-2019-ENG.pdf.
[9] INT'L COUNCIL ON MINING AND METALS (ICMM), *Handling and Resolving Local-Level Concerns and Grievances* 16 (2019), https://www.icmm.com/grievance-mechanism.
[10] *supra* note 1 at 27.
[11] International Covenant on Civil and Political Rights, 999 UNTS 171 (23 March 1976) art 2(3); UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147 (21 March 2006) Principles 2(b), 3(c)–(d), 11(a)–(b), 12, 15–23; Committee on Economic, Social and Cultural Rights, General Comment 9: The Domestic Application of the Covenant, UN Doc E/C.12/1998/24 (3 December 1998) para 9.
[12] JOANNE BAUER ET AL., *What is Remedy for Corporate Human Rights Abuses? Listening to Community Voices, A Field Report* 47, 49 (2015), http://www.humanrightscolumbia.org/sites/default/files/SIPA%20Listening%20to%20community%20voices%20on%20effective%20remedy%20-%20final.pdf.
[13] *supra* note 1 at 27, 34.
[14] *supra* note 12 at 52; *supra* note 4 at 481.
[15] *supra* note 1 at 33–34.
[16] John Ruggie (Special Representative of the Secretary-Gen. on the Issue of Hum. Rts and Transnat'l Corp. and Other Bus. Enter.), *supra* note 6; BAUER ET AL., *supra* note 12 at 38.
[17] *supra* note 12 at 36.
[18] MAY MILLER-DAWKINS, KATE MACDONALD & SHELLEY MARSHALL, *Beyond Effectiveness Criteria: The Possibilities and Limits of Transnational Non-Judicial Redress Mechanisms* 6 (2016); *supra* note 12 at 36, 52.
[19] MILLER-DAWKINS, MACDONALD, AND MARSHALL, *supra* note 18 at 21; BAUER ET AL., *supra* note 12 at 36; van Huijstee and Wilde-Ramsing, *supra* note 4 at 485.

mechanisms has not correlated with evidence of their effectiveness.[20]

Obstacles to Rights-Compatible Remedy Outcomes

Through our own work as practitioners and informed by a large body of existing research,[21] several obstacles have been identified as potential reasons for the stalled progress on outcomes, many of which are particularly relevant to NJGMs used in the context of natural resource issues. Such negotiation based NJGMs by their very nature involve compromise, which raises concerns over their appropriateness for dealing with human rights harms. The power asymmetries that exist between companies and affected-communities manifest in various ways, and often force communities to accept outcomes that are not rights-compatible, if remedy is offered at all. The non-exhaustive list of obstacles discussed illustrates how power asymmetries limit NJGMs' effectiveness, and highlights their connection to the perspectives of impacted communities.

- *Inadequate involvement. of rights holders.* Despite the increasing calls for more rights holder involvement, company-level and multi-stakeholder NJGMs continue to primarily be created and operated by companies. Some have offered limited consultations or included token community representation, but they deny communities any meaningful decision-making power. Input on NJGMs established by states or financial institutions is generally limited to high-level policy advocacy efforts. As a result, communities are largely unaware of the existence of available mechanisms, how to use them, or their rights under them. They rarely have opportunities to provide feedback on the NJGM process or monitor the progress of complaints.

- *Imbalances in bargaining power.* While proponents of NJGMs argue that they are faster, cheaper, and more localized than judicial avenues, NJGMs still require significant time, resources, and trade-offs for communities choosing to participate. Companies have significantly more money, access to information and negotiation experience, while communities tend to have little leverage and much more to lose, as they may have few alternatives to accepting a company's offer. These challenges are compounded when the mediator or other party facilitating the dialogue interprets their impartiality as "outside of the conflict" rather than ensuring that one party does not have an unfair advantage. This can lend the process an appearance of legitimacy while undermining the rights of community members by failing to confront the imbalances in bargaining power and capacity.

- *Contested perceptions of value.* The effectiveness of a remedy should be judged by the perspective of the rights holder, but the failure, or refusal, of a company to understand that perspective undermines the possibility of reaching an agreement. This is particularly relevant in the context of land and natural resource-related harms, where calculations must include the social and cultural value attached to the area and the effects on livelihoods and generational losses. When a company fails to understand the rights holders' perception of the value of the potential loss, it may fail to provide a fair remedy, even where it may have a good faith belief it is doing so.

- *Limited scope and mandates of NJGMs.* There are limitations on what NJGMs can and will provide in terms of remedy[22] and not all NJGMs

[20] *supra* note 8 at 20, 23–25.

[21] Fiona Haines & Kate Macdonald, *Nonjudicial business regulation and community access to remedy*, 14 REGULATION & GOVERNANCE 840–860 (2020); van Huijstee and Wilde-Ramsing, *supra* note 4; SAMANTHA BALATON-CHRIMES & KATE MACDONALD, *Wilmar and Palm Oil Grievances: The Promise and Pitfalls of Problem Solving* (2016); Maximilian J. L. Schormair & Lara M. Gerlach, *Corporate Remediation of Human Rights Violations: A Restorative Justice Framework*, 167 J BUS ETHICS 475–493 (2020); Samantha Balaton-Chrimes & Fiona Haines, *Redress and Corporate Human Rights Harms: An Analysis of New Governance and the POSCO Odisha Project*, 14 GLOBALIZATIONS 596–610 (2017); MILLER-DAWKINS, MACDONALD, AND MARSHALL, *supra* note 18; Duygu Avcı, Fikret Adaman & Begüm Özkaynak, *Valuation languages in environmental conflicts: How stakeholders oppose or support gold mining at Mount Ida, Turkey*, 70 ECOLOGICAL ECONOMICS 228–238 (2010); COLUMBIA LAW SCHOOL HUMAN RIGHTS CLINIC & HARVARD LAW SCHOOL INTERNATIONAL HUMAN RIGHTS CLINIC, *Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned* (2015), https://hrp.law.harvard.edu/wp-content/uploads/2015/11/FINALBARRICK.pdf.

[22] REP. OF THE UN HIGH COMM'R HU. RTS., IMPROVING ACCOUNTABILITY AND ACCESS TO REMEDY FOR VICTIMS OF BUSINESS-RELATED HUMAN

perceive provision of remedy as their function or purpose. When a mechanism does not clarify its limitations, it can create false expectations among rights holders, and cause confusion, frustration and material loss for those who have engaged in it. Moreover, while judicial mechanisms are the core of the remedy system and should handle the most serious human rights issues,[23] communities have at times been required to waive their rights to future litigation. Other times, judicial avenues are not available, leaving NJGMs as the only option.

- *Lack of enforcement*. The non-binding, and often voluntary nature of NJGMs means that companies are not obliged to participate in good faith (or at all) and provides little incentive for providing rights-compatible remedies, or following through on remedies that companies may promise to provide.

Emerging Strategies for Overcoming Obstacles to Rights-Compatibility Through Rights-Holder Involvement and Leadership

We posit that addressing power asymmetries is central to overcoming obstacles to NJGMs' capacity to produce rights-compatible outcomes. This includes ensuring meaningful rights holder involvement in the design and implementation of the NJGM, including monitoring and enforcement processes.

Research has shown a correlation between the level of participation that rights holders have in a remedial process and their satisfaction and trust in it.[24] As the obstacles highlight, this cannot be improved by adding more consultations or simply having rights holders at the table, but rather it requires a shift in the entire approach to company-community engagement, and an explicit focus on rights-compatible remedy outcomes. These can be strengthened through two-way communication, authentic efforts to understand and incorporate the perceptions of the rights holders, adequate space for rights holder decision-making and oversight, and concrete actions to equalize power asymmetries in negotiations. We discuss below two emerging models that offer potential for facilitating that shift.

Impact and Benefit Agreements

Impact and Benefit Agreements (IBAs) offer an example of how to address power asymmetries by ensuring that local communities have more negotiating power.[25] An IBA is a contract in which Indigenous people trade their support for a project in exchange for company compensation or mitigation measures.[26] They are common in Canada as a result of a series of decisions by the Canadian Supreme Court, which establish that the government has an obligation to consult with and, if necessary, accommodate Indigenous people before making a decision that unduly affects their rights. The degree of accommodation depends both on the strength of the Indigenous community's claim and the severity of the impact. For example, consent--the highest level of consultation and accommodation--is required on land where Indigenous title is established unless the government can present a "compelling and substantial" public purpose that justifies infringement of that title.[27]

While Canadian law places the duty to consult on the government, in practice companies face a potential government refusal to issue permits if they cannot demonstrate that they have consulted with the impacted Indigenous community. In addition, failure to adequately consult can result in court sanctions. As a result, companies seek to reduce the risk of challenges by proactively engaging with Indigenous communities to obtain their support for development projects that could potentially impact their rights. Thus, IBAs address power imbalances because the local community's lack of support for a project may mean that the project will not proceed, or could be subject to a successful legal challenge.

Even with this added bargaining power, however, positive outcomes often turn on deliberation within a community to reach clarity regarding goals, to remain unified, and to plan collectively.[28] When there is

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RIGHTS ABUSE THROUGH NON-STATE-BASED GRIEVANCE MECHANISMS, ¶ 29, UN DOC. A/44/32, MAY 19, 2017.

[23] *supra* note 4 at 471.

[24] *supra* note 12; DISPUTE OR DIALOGUE? COMMUNITY PERSPECTIVES ON COMPANY-LED GRIEVANCE MECHANISMS, (Emma Wilson & Emma Blackmore eds., 2013), https://pubs.iied.org/sites/default/files/pdfs/migrate/16529IIED.pdf? *supra* note 21.

[25] GINGER GIBSON & CIARAN O'FAIRCHEALLAIGH, *IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements* (2015), www.ibacommunitytoolkit.ca.

[26] Martin Papillon & Thierry Rodon, *Proponent-Indigenous agreements and the implementation of the right to free, prior, and informed consent in Canada*, 62 ENVIRONMENTAL IMPACT ASSESSMENT REVIEW 216–224 (2017).

[27] *Id.* at 218.

[28] *supra* note 25 at 12.

disagreement within a community, companies can try to consult with those more favorable to the project, and isolate and ignore opponents. Without the opportunity to deliberate as a community, and support for doing so, the IBA may fail to address the full gamut of a community's actual concerns.[29] When communities have the resources to deliberate collectively, IBAs offer a promising strategy to address power asymmetries, including in the absence of incentivizing laws, to ensure more rights-compatible outcomes.

Community-Driven Operational Level Grievance Mechanisms

Another emerging strategy for effective NJGMs is the Community-Driven Operational Level Grievance Mechanism (CD-OGM), developed and piloted by EarthRights International in partnership with communities from six villages impacted by the Thilawa Special Economic Zone (TSEZ) in Myanmar. In a CD-OGM, impacted community members lead the decision-making on the design, and if they choose, participate in implementation of the mechanism.[30] The CD-OGM model is premised on the ideas that those impacted by a project: 1) have right to a say in the remedial process, and 2) are best placed to identify what processes and outcomes would be adequate and appropriate for their context.[31] This model was informed by the successful Fair Food Program, a worker-driven social responsibility program designed and implemented by the Coalition of Immokalee Workers in the U.S that, over its ten years in operation, eliminated the worst forms of human rights abuses at participating farms.[32]

In a "community-driven" OGM, the impacted rights holders play a decision-making role, rather than being passive receivers of company-initiated consultations. They propose the form they want remedial procedures to take, including the specific processes for filing complaints and appeals, conducting investigations, and monitoring. They also propose who would participate and in what capacity, as well as the scope of harms to address and remedies to be offered. The interactions between the community and the company in the design process could take many forms, from a collaborative effort between the company and community, to something designed entirely by the community then shared with the company. Of central importance is that the decisions about both its form and function are made by the rights holders.

In the CD-OGM envisioned for the TSEZ, community leaders designed a mechanism to meet the needs of the impacted communities.[33] It provided detailed procedures for intake, oversight, monitoring, and feedback from the users. The community envisioned the Thilawa CD-OGM as a multi-stakeholder effort, with both the project developer and the community playing roles in its implementation.

A major limitation of any company-level model, however, is that the company has to agree to participate. When companies are reticent, communities may have to campaign to exert external pressure, which can be very challenging. The draft Thilawa CD-OGM was shared with the project developer in late 2016 for feedback.[34] In late 2017, the project developer instead implemented a separate complaints process. However, the parties resumed discussions as the community leaders continued to advocate for the priorities identified in their CD-OGM design to be included in the new grievance mechanism. Given the current situation in Myanmar, that advocacy is on hold.

While the original CD-OGM as drafted has not been, and may not be, accepted in its entirety, it has led to indirect benefits. The advocacy around the CD-OGM convinced the project developer to acknowledge and act upon the need for a grievance mechanism and opened the door to direct company-community dialogue. While still in early development, the CD-OGM model offers another promising strategy for ensuring adequate rights holder participation that is more likely to lead to rights-compatible outcomes.

Conclusion

The overemphasis on the UNGPs' effectiveness criteria without equal attention to outcomes has resulted in NJGMs that may look good on paper but which fail to do what they were intended to do: provide remedy for corporate human rights harms. The two examples

[29] *supra* note 26 at 218.
[30] Community-Driven Operational Grievance Mechanisms, EARTHRIGHTS INTERNATIONAL, https://earthrights.org/what-we-do/corporate-accountability/cdogm/ (last visited Oct 7, 2021).
[31] Jonathan Kaufman & Katherine McDonnell, *Community-Driven Operational Grievance Mechanisms*, 1 BUS. AND HUM. RIGHTS J. 127–132 (2016).
[32] Greg Asbed & Steve Hitov, *Preventing Forced Labor in Corporate Supply Chains: The Fair Food Program and Worker-Driven Social Responsibility*, 52 WAKE FOREST L. REV. 497–531 (2017).
[33] *supra* note 31.
[34] Draft CD-OGM for Grievances Arising Out of the Thilawa SEZ, https://media.business-humanrights.org/media/documents/files/documents/Thilawa_CDOGM_proposal.pdf.

discussed above offer insights into how increased rights holder involvement in the remedy process can lead to more rights-compatible outcomes. While these examples offer great potential, they also highlight the obstacles that will remain as long as power asymmetries are unaddressed.

More work is needed to understand how to facilitate rights-compatible outcomes. Such work could include identifying ways to acknowledge rights-holder perceptions of value to understand the actual scope of the harm and to determine an adequate and appropriate remedy. It could include a reorientation of the role of mediators in these negotiations. It will require development and implementation of effective monitoring and enforcement measures as a necessary component of remedy, with consequences for noncompliance. Finally, NJGMs should serve as a corollary to, not a substitute for, access to justice through the courts.

A quote often attributed to Albert Einstein reminds us that "[w]e cannot solve our problems with the same thinking we used when we created them." While NGJMs have the potential to play a role in providing early warning of potential human rights abuses and allowing for efficient and culturally relevant remedies when such abuses occur, they have largely not lived up to this promise. Rights holder-centered approaches allow for new thinking and merit further exploration of their potential to ensure effective access to remedy for corporate human rights abuses.

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The Unauthorized Practice of Immigration Law

Sergio R. Karas and Ari Goodman

Those who require legal representation may be taken advantage of by fraudulent and dishonest actors. False advertising can deceive people into believing that they hired a licensed and capable representative. Foreign nationals who require assistance with immigration matters are part of a particularly vulnerable community; incompetent representation will jeopardize their immigration status. To remedy these concerns, legislation has been enacted to combat the scourge of unauthorized representatives.

Legislation

The *Immigration and Refugee Protection Act*[1] (*IRPA*) addresses representation for immigration matters in Section 91:

> Representation or advice for consideration
> **91 (1)** Subject to this section, no person shall knowingly, directly or indirectly, represent or advise a person for consideration — or offer to do so — in connection with the submission of an expression of interest under subsection 10.1(3) or a proceeding or application under this Act.
> Persons who may represent or advise
> **(2)** A person does not contravene subsection (1) if they are
> **(a)** a lawyer who is a member in good standing of a law society of a province or a notary who is a member in good standing of the Chambre des Notaires du Québec;
> **(b)** any other member in good standing of a law society of a province or the Chambre des notaires du Québec, including a paralegal; or
> **(c)** a member in good standing of a body designated under subsection (5).
> …
> Penalties
>
> **(9)** Every person who contravenes subsection (1) commits an offence and is liable
> **(a)** on conviction on indictment, to a fine of not more than $200,000 or to imprisonment for a term of not more than two years, or to both; or
> **(b)** on summary conviction, to a fine of not more than $40,000 or to imprisonment for a term of not more than six months, or to both.[2]

Authorized representatives under the *IRPA* include licensed lawyers, licensed paralegals, notaries regulated by Chambre des Notaires du Québec, and members of the Immigration Consultants of Canada Regulatory Council. An unauthorized representative is a person outside of these groups who charges a fee for their services. Anyone who breaches s.91(1) of the *IRPA* commits an offence.

Licensed lawyers and paralegals are regulated under strict guidelines to preserve public confidence in the legal profession. The *Law Society Act*[3] (*LSA*) is the governing statute for the Law Society of Ontario (LSO), the regulatory body formerly known as the Law Society of Upper Canada. That statute authorizes the LSO's regulatory powers over legal professionals in Ontario. Under the *LSA* s.26.1, only LSO licensees who are not under suspension can practice law or provide legal services in the province. According to s.26.2 of the Act, those who breach s.26.1 may be fined up to $25,000 for a first offence and up to $50,000 for each subsequent offence. Section 26.3 of the Act enables the LSO to apply for statutory injunctions in the Superior Court of Justice. This remedy bars unauthorized representatives from practicing law or providing legal services. If an injunction is breached, an application can be made to sanction the offender with fines or imprisonment.

Case Law

A representative's authorization to practice law can impact procedural fairness. In *Domantay v Canada*,[4] the applicant was a citizen of the Philippines and a former Catholic priest who had a daughter with one of his parishioners before he left the church and travelled to Canada. Domantay admitted that he had entered a fraudulent marriage with a Canadian citizen for immigration purposes. After that marriage ended in divorce, he remarried his parishioner in the Philippines

[1] Immigration and Refugee Protection Act, SC 2001, c 27 (IRPA).
[2] *Ibid* at s 91.
[3] Law Society Act, RSO 1990, c L8 (LSA).
[4] 2008 FC 755.

and tried to sponsor her and their daughter. He listed his daughter as an accompanying dependent, but not as his own child. This was considered a misrepresentation under the *IRPA* s.40(1)(a):

> Misrepresentation
> **40 (1)** A permanent resident or a foreign national is inadmissible for misrepresentation
>
> (a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act.[5]

Domantay was excluded from Canada and a removal order was issued. His former counsel accepted a fee for representation services and delegated the Immigration Appeal Division (IAD) hearing of the application for stay of removal to an unauthorized representative. The appeal was denied because the IAD found that his abuse of the immigration system had more weight than any humanitarian and compassionate considerations. The applicant alleged that a denial of procedural fairness had occurred because the IAD allowed an unauthorized person to represent him. He submitted that the IAD must ensure that representatives are either authorized or unpaid under the "Policy for Handling IRB Complaints Regarding Unauthorized, Paid Representatives." Because this policy post-dated the hearing, it was not considered. The court held that the information provided in Domantay's affidavit was insufficient to establish prejudice. His evidence did not state whether he was aware of his representative's qualifications, when he discovered that she was not authorized, if she had made any misrepresentation, or if he had paid for her services. It further held that the onus was on the applicant to choose his representative and that he had to establish that a duty owed to him was not met, which resulted in a breach of natural justice. The applicant appeared to have accepted the delegation to an unauthorized representative by his legal counsel. Therefore the court found no failure of the IAD verification obligations, and the appeal was dismissed.

Regulators are concerned with protecting the public from fraudsters who represent themselves as legal professionals. In *Law Society of Upper Canada v Augier*,[6] the respondent was a clergyman who operated a law corporation out of his church premises. Augier had never obtained a law license, but his company website suggested that it provided legal services. The respondent was found to have negotiated an estates matter and had acted in divorce and immigration proceedings. The Law Society sought a statutory injunction to stop the respondent from practicing law and from advertising himself as a lawyer. Goldstein J explained the necessity for statutory injunctions in relation to unauthorized representation:

> "The Law Society has an important role in protecting the public from the activities of unlicensed and unregulated persons holding themselves out to be lawyers and paralegals. The [unlicensed] respondent, for example, is not required to carry professional liability insurance, keep books and records for inspection by the Law Society, or maintain a trust account for client funds that can be audited by the Law Society. Indeed, the Law Society would have no right or ability to carry out a spot audit or any other kind of check in relation to the activities of the respondent, as it would for a licensed legal professional. That is why the Law Society has a duty to seek remedies against unauthorized persons practicing law or holding themselves out as legal professionals."[7]

This analysis provides the primary considerations for limiting paid representation to authorized representatives. The court held that the respondent practiced law and performed the work of a paralegal contrary to s.26.1 of the *LSA*. An injunction was granted and $15,000 in costs were awarded to the Law Society.

Disbarred lawyers are another source of unauthorized representatives. In *Law Society of Ontario v Leahy*,[8] the LSO sought a statutory injunction to stop a disbarred immigration lawyer from practicing law and providing legal services. The LSO tribunal revoked the respondent's law license, and he did not appeal the decision. He continued to advertise himself as a qualified solicitor, and provided advice, drafted documents, and assisted clients with Federal Court cases. Leahy argued that the practice of immigration law was governed by the *IRPA* and by the *Federal Courts Act*.[9] He asserted that the LSO had no authority over the provision of legal services or legal practice in immigration law. The court held this argument to be invalid because the LSO is authorized to regulate the practice of law in Ontario

[5] IRPA, *supra* note 1, at s 40(1)(a).
[6] 2013 OJ No 350.
[7] *Ibid* at para 9.
[8] 2018 OJ No 4113.
[9] Federal Courts Act, RSC 1985, c F-7.

under s.26.1 of the *LSA*. Federal paramountcy was not a relevant consideration because there are no legislative inconsistencies between the *LSA* and the *IRPA*. Further, there are no practice exemptions for immigration law because the *IRPA* does not provide authorization for unlicensed persons to provide legal services. After his license was revoked, Leahy was no longer an authorized representative under the *IRPA*.

Leahy argued alternatively that his provision of services fell within the exceptions for other regulated professions, and for acting through a corporate vehicle in s.1.1(8) of the *LSA*:

> Not practising law or providing legal services
>
> **(8)** For the purposes of this Act, the following persons shall be deemed not to be practising law or providing legal services:
>
> **1.** A person who is acting in the normal course of carrying on a profession or occupation governed by another Act of the Legislature, or an Act of Parliament, that regulates specifically the activities of persons engaged in that profession or occupation.
>
> **2.** An employee or officer of a corporation who selects, drafts, completes or revises a document for the use of the corporation or to which the corporation is a party.[10]

The court held that Leahy was not acting as a professional governed by other legislation nor were his activities incidental to corporate duties. Leahy's actions were not authorized under the *IRPA* or the *LSA*. The application was allowed, and a permanent injunction was granted.

In *Benito v. Immigration Consultants of Canada Regulatory Council*,[11] Benito and his two sons were immigration consultants who applied for the judicial review of a decision by the disciplinary committee of the *Immigration Consultants of Canada Regulatory Council* (*ICCRC*). The regulatory body had granted a motion to suspend Benito and his sons from the right to act as immigration consultants because of a pending investigation. Benito admitted that he continued to practice as an immigration consultant after he was suspended, and he never informed his clients that he had been suspended.[12]

There were allegations that the three Benito family members took part in an illegal immigration scheme. The alleged scheme involved transferring large sums of money to clients' bank accounts. Up to $20,000 would be deposited into a client's bank account to be used as evidence that the client had sufficient funds to live and study in Canada. The purpose of this alleged scheme was to circumvent section 220 of the *IRPA* which requires that:

> Financial resources
>
> **220** An officer shall not issue a study permit to a foreign national, other than one described in paragraph 215(1)(d) or (e), unless they have sufficient and available financial resources, without working in Canada, to
>
> **(a)** pay the tuition fees for the course or program of studies that they intend to pursue;
>
> **(b)** maintain themself and any family members who are accompanying them during their proposed period of study; and
>
> **(c)** pay the costs of transporting themself and the family members referred to in paragraph (b) to and from Canada.[13]

The court dismissed the application for judicial review because the *ICCRC* investigation was ongoing, and it determined that the body's motion was not premature. It concluded that there was no breach of procedural fairness or fundamental justice within the disciplinary process that led to the committee's decision.

In *R v Codina*[14] a disbarred immigration lawyer appealed her convictions for violating the *IRPA*. She owed $30,200 in restitution and was sentenced to seven years imprisonment after being found guilty of four counts of unauthorized representation contrary to the *IRPA* s.91(1), and one count of counselling someone to make a misrepresentation contrary to the *IRPA* s.126:

> Counselling misrepresentation
>
> **126** Every person who knowingly counsels, induces, aids or abets or attempts to counsel, induce, aid or abet any person to directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act is guilty of an offence. [15]

Codina provided immigration related services through a corporation called Codina International. In each of the five claims against her, payments were made to her

[10] LSA, *supra* note 3, at s 1.1(8)1, 1.1(8)2.
[11] 2019 FC 1628.
[12] *Ibid* at para 15.
[13] IRPA, *supra* note 1 at s 220.
[14] 2020 OJ No 5766.
[15] IRPA, *supra* note 1, at s 126.

corporation and none of the clients achieved their desired results. Codina challenged the validity of the charges. She argued that s.91(1) of the *IRPA* was *ultra vires* the federal government because the business of providing legal advice was regulated under the exclusive provincial jurisdiction of property and civil rights under s.92(13) of the *Constitution Act*.[16] The court held that s.91(1) of the *IRPA* was valid federal legislation. Its authority flows from the criminal law power under s.91(27) of the *Constitution Act.* Section 91(1) of the *IRPA* enhances its overall integrity and promotes its purpose. The provision was created as a response to the dishonest and fraudulent conduct of unregulated representatives who advised clients in immigration matters. That section is concerned with the competence and honesty of representatives, and provides supervision and control over authorized individuals.

Codina also argued that s.91(1) and s.126 of the *IRPA* were unconstitutional and contrary to s.7 of the *Canadian Charter of Rights and Freedoms*:

> "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."[17]

The court held that the language in these sections of the *IRPA* was justifiably broad to protect vulnerable clients seeking access to programs and proceedings under the Act. The court was not persuaded by further arguments of alleged errors that were made at Codina's trial, and the appeal was dismissed.

Codina tried to re-open her conviction and sentence appeals in 2021.[18] She alleged that a miscarriage of justice had occurred, and she restated arguments from her conviction appeal. Alternatively, she argued for reopening because a new regulatory body that governed immigration consultants had been created. The court held that it had provided a comprehensive explanation as to why it dismissed Codina's conviction appeal. The regulatory development on consultants was considered irrelevant to the charges because she was never an authorized immigration consultant. The application was dismissed.

In *Law Society of Ontario v Kopyto*,[19] the LSO sought a permanent injunction against the respondent for providing legal services after he was disbarred. Kopyto applied for a paralegal license after the *LSA* came into force. His application was rejected after a hearing determined that he failed to meet the good character requirement under the *LSA*:

> Good character requirement
> **(2)** It is a requirement for the issuance of every licence under this Act that the applicant be of good character.[20]

The Law Society considered Kopyto ungovernable because he refused to follow the rules of the legal profession. Evidence showed that Kopyto provided legal services in three matters after he was denied a paralegal license and that he represented himself as someone that could provide services as a "legal agent." He acknowledged that he would continue to provide services until prohibited by a court order. The court held that the respondent provided legal services and represented that he was capable of practicing law, and acted as an unauthorized representative and breached s.26.1 of the *LSA.* The court granted a permanent injunction against him.

Conclusion

Legislation that bars unauthorized representatives from practice has multiple purposes. When representation is restricted to a pool of regulated professionals, there are fewer opportunities for a miscarriage of justice. Unauthorized representatives' errors can put a strain on the court system due to excessive appeals by applicants whose cases are refused. Statutory injunctions can prevent fraudsters from enriching themselves at the expense of vulnerable individuals. Disbarred immigration lawyers that attempt to continue to practice law do a disservice to the public. While they may believe that they are unduly bound by restrictive legislation, s.9.1 of the *IRPA* and s.26.1 of the *LSA* aim to protect vulnerable people who require guidance and advocacy for sophisticated matters. Immigration law is best interpreted by regulated professionals who have the authorization and expertise to undertake immigration matters.

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[16] Constitution Act, 1867.
[17] Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 7.
[18] 2021 OJ No 932.
[19] 2020 OJ No 48.
[20] LSA, *supra* note 3, at s 27(2).

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Getting Evidence in the US Before Commencing Litigation in Other Countries: Flexible Use of 28 USC § 1782

Stuart M. Riback and Hermann Knott

It is no secret that the United States permits far broader pretrial discovery than most – probably ***all*** – other countries. True, other common law countries do provide some degree of pretrial discovery, usually by requiring production of documents and often providing for other methods as well. But discovery even in other common law countries tends to be less expansive (and less expensive) than in the US. Civil law countries are even more restrictive. Typically, there is no general pretrial discovery. Parties develop evidence on their own and usually have almost no pretrial access to the adversary's information.

In recent years, though, American discovery has been playing an increasing role in disputes in other countries. Under 28 USC § 1782, a person with an interest in a proceeding overseas can make its own request to an American district court for leave to obtain evidence in the United States. Section 1782 permits an applicant to request documents or testimony, or both.

One issue that has gained increasing focus is pre-litigation discovery. An applicant who meets the statutory thresholds for § 1782[1] may seek evidence in the US even if no actual proceeding abroad has been filed yet. This issue takes on special importance in civil law countries, where procedural rules often require that the document initiating a lawsuit must annex at least some of the evidence the plaintiff relies on. Sometimes a plaintiff may have a valid claim, but to support that claim, will need a document it does not have. So § 1782 may be an option in that situation – but the Supreme Court has cautioned that § 1782 is available only if the foreign lawsuit is within "reasonable contemplation."[2] What does that mean? How far down the road to an actual lawsuit does a dispute have to be before an American court will be satisfied that litigation is within reasonable contemplation?

A. What kind of contemplation is reasonable?

This issue has taken on extra significance as the volume of § 1782 applications has grown in recent years. And as the issue comes up more often, the case law is steadily developing guidelines to tell us what it means to have a lawsuit within reasonable contemplation.

It definitely ***does not*** mean a foreign would-be litigant can seek § 1782 evidence to help him decide whether he has a claim or not, or that he need only consider or discuss the possibility of commencing proceedings.[3] Americans cannot do that for domestic lawsuits and there is no reason to believe Congress wanted to allow foreigners to do it either.

On the other hand, the Supreme Court in *Intel* also made clear that the foreign case need not be imminent. The lower courts in the succeeding years have come up with a new test that is easy to articulate, but not so easy to define. Some patterns do emerge, though.

The Second and Eleventh Circuits both require the applicant to provide facts showing a lawsuit is in prospect. As the Eleventh Circuit put it, "a district court must insist on reliable indications of the likelihood that proceedings will be instituted within a reasonable time."[4] The Second Circuit's test, enunciated in the 2015 case *Certain Funds v. KPMG, LLC*[5] is substantively similar:

> [T]he applicant must have more than a subjective intent to undertake some legal action, and instead must provide some objective indicium that the action is being contemplated. . . .

[1] The statutory requirements are as follows: "(1) the person from whom discovery is sought reside[s] (or [is] found) in the district of the district court to which the application is made, (2) the discovery [is] for use in a proceeding before a foreign tribunal, and (3) the application [is] made by a foreign or international tribunal or 'any interested person.'" *In re Guo,* 965 F.3d 96, 102 (2d Cir. 2020). *See also In re Furstenberg Finance SAS*, 877 F.3d 1031, 1034 (11th Cir. 2017), *citing In re Clerici*, 481 F.3d 1324, 1331 (11th Cir. 2007).

[2] *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004).

[3] *Certain Funds v. KPMG, LLC*, 798 F.3d 113, 124-25 (2d Cir. 2015); *In re Sabag*, 2020 WL 4904811, case no. 19-mc-00084, slip op. at 4 (S.D. Ind. Aug. 18, 2020); *In re Wei*, 2018 WL 5268125, case no. 18-mc-117, slip op. at 2 (D.Del. Oct. 23, 2018); *In re Gulf Investment Corp.*, 2020 WL 7043502, case 19-mc-593 (VSB), slip op. at 4 (S.D.N.Y. Nov. 30, 2020). *See also Leutheusser-Schnarrenberger v. Kogan*, 2018 WL 5095133, case no. 18- mc-80171, slip op. at 3-4 (N.D.Cal. Oct. 17, 2018)

[4] *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1270 (11th Cir. 2014).

[5] 798 F.3d 113, 123-24 (2d Cir. 2015).

> [T]he Supreme Court's inclusion of the word "reasonable" in the "within reasonable contemplation" formulation indicates that the proceedings cannot be merely speculative. At a minimum, a § 1782 applicant must present to the district court some concrete basis from which it can determine that the contemplated proceeding is more than just a twinkle in counsel's eye. "Reliable indications," "objective indicium" and "concrete basis" all mean the applicant must show facts. The Second Circuit confirmed this in so many words in late 2020, by referring to "the fact-specific nature of the inquiry."[6]

But neither court specified which facts are necessary and sufficient to provide a "concrete basis" or "reliable indication." The Second Circuit explicitly declined to provide a formula in 2015 and again in 2020.[7] Because this is a factual issue, the court apparently believed that providing a checklist would make the analysis less flexible and less attuned to the nuances of a particular case. That leaves us to divine from the facts of individual cases what sorts of scenarios can suffice.

1. Don't apply too early

First we look at what does ***not*** suffice. *Certain Funds* denied an application that sought discovery for use in anticipated proceedings in Saudi Arabia and England. When the investors first applied for §1782 discovery, all they had done is retained counsel and "discuss[ed] the possibility of initiating litigation."[8] That was not enough even though, by the time the appeal was argued, they had actually commenced a proceeding in England. Whether a proceeding is within reasonable contemplation is measured as of the date of the §1782 application.[9] The lesson, of course, is not to jump the gun – be sure to have your facts in place ***before*** you make your application.

It should also come as no surprise that the Second Circuit held in November 2020, in *Mangouras v. Squire Patton Boggs*,[10] that a §1782 application should not have been granted where the allegations of wrongdoing abroad were conclusory and unelaborated. Vagueness is not a "reliable indication."

A subjective intention to launch a proceeding, coupled with little more than an explanation of how such proceedings work, is not a "concrete basis."[11] Listing possible venues and legal theories, without connecting them to facts or to the foreign country's law, likewise is not enough – especially if the applicant has not even engaged counsel in the foreign country.[12] If the applicant "d[oes] not provide any detail as to the potential form of litigation it intended to pursue, nor does it provide legal theories under which it intended to rely in such litigation," then it has failed to show that a lawsuit was reasonably contemplated.[13]

Especially fatal to an application is anything that suggests the applicant is using §1782 to help decide whether to sue. Use of "whether" or "possibly" is often a giveaway. It certainly was in *Mangouras*, in which the applicant was hoping to prove that certain persons had lied in earlier proceedings. In deciding that the application should not have been granted, the court italicized the key words when it quoted Mangouras's attorney: "discovery is going to help us determine *whether or not* these individuals knew what they were testifying to was false."[14]

The lower courts likewise have turned away applicants who appear to need the evidence to decide whether to sue and for what. That is a sure indicator that the future lawsuit is a matter of speculation and not within reasonable contemplation.[15] "Courts must guard against the specter that parties may use §1782 to investigate whether litigation is possible before launching it."[16]

2. Make a record: hire counsel and develop a case

The leading case on what suffices to show litigation

[6] *Mangouras v. Squire Patton Boggs,* 980 F.3d 88, 102 (2020)
[7] *Certain Funds*, 798 F.3d at 123-24; *Mangouras, supra,* 980 F.3d at 102.
[8] *Certain Funds* at 124.
[9] *Id.*
[10] 980 F.3d 88 (2d Cir. 2020).
[11] *In re Sabag*, 2020 WL 4904811, case no. 19-mc-00084, slip op. at 4 (S.D. Ind. Aug. 18, 2020).
[12] *In re Wei*, 2018 WL 5268125, case no. 18-mc-117, slip op. at 2 (D.Del. Oct. 23, 2018).
[13] *In re Gulf Investment Corp.*, 2020 WL 7043502, case 19-mc-593 (VSB), slip op. at 4 (S.D.N.Y. Nov. 30, 2020). *See also In re Pilatus Bank PLC*, 2021 WL 1890752, case no. 20-mc-94-JD, slip op. at 9 (D.N.H. May 11, 2021); *Leutheusser-Schnarrenberger v. Kogan*, 2018 WL 5095133, case no. 18- mc-80171, slip op. at 3-4 (N.D.Cal. Oct. 17, 2018).
[14] *Mangouras, supra,* 980 F.3d at 101. *Accord In re Pilatus Bank PLC*, 2021 WL 1890752, case no. 20-mc-94-JD, slip op. at 9 (D.N.H. May 11, 2021).
[15] *In re Sargeant*, 278 F. Supp.3d 814, 823 (S.D.N.Y. 2017). *See also In re Rendon*, 519 F. Supp.3d 1151 (S.D.Fla. 2021); *In re Newbrook Shipping Corp.*, 2020 WL 6451939, case no 20-misc-150, slip op. at 5 n.2 (D.Md. Nov. 3, 2020); *In re Asia Maritime Pacific Ltd.*, 253 F. Supp.3d 701, 707-08 (S.D.N.Y. 2015).
[16] *Sargeant, supra,* 278 F. Supp.3d at 823.

is "reasonably contemplated" is the same Eleventh Circuit decision that formulated the "reliable indications" test – *Consorcio Ecuatoriano*, decided in 2014.[17] In that case, the applicant CONECEL had conducted an internal investigation and audit that found certain former employees likely had engaged in fraud. CONECEL contemplated a civil, and later criminal, action in Ecuador. The reason CONECEL had not yet sued is that Ecuadorian law requires the plaintiff to annex its evidence to its pleading – evidence it did not have, but was seeking in the §1782 application. So the combination of an applicant's "facially legitimate and detailed explanation of its ongoing investigation, its intent to commence a civil action against its former employees, and the valid reasons for CONECEL to obtain the requested discovery under the instant section 1782 application before commencing suit" together sufficed to show "reasonable contemplation."

Note the importance that *Consorcio Ecuatoriano* placed on the factual investigation. The applicant had flushed out the key facts, explained the basis for liability and identified the court in which the action would be commenced.

The cases that grant pre-litigation §1782 applications tend to focus on the applicant having actually developed the basis for the foreign case. There is some case-to-case variation, but speaking generally, the court will consider persuasive a combination of most or all of these elements: the applicant has hired counsel, determined the facts, identified legal theories for the prospective lawsuit and represented its intention to litigate.

According to the Second Circuit, an application containing "well-documented assertions" of the basis for the claim, with sworn declarations of the applicant's intent to proceed, is enough to demonstrate that litigation was within reasonable contemplation.[18] District courts have come to similar conclusions.[19] Having previously commenced prior related litigation is an evidentiary point in favor of the applicant as well.[20]

The Fifth Circuit likewise relied on factual detail from the applicant. In *Bravo Express v. Total Petrochemicals & Refining U.S.*,[21] the Fifth Circuit stressed several factors: the applicant "la[id] out, in great detail, the facts that give rise to the prospective lawsuit;" its counsel "attested that Bravo had already prepared its 'claim of particulars' against [the prospective defendant] and was "intending of filing [*sic*] it in October of this year before the UK courts, the commercial division, the High Court of London" and "had requested and received extensions of time to file from the prospective defendant."[22]

Filing a provisional pleading abroad for purposes of interrupting the prescription period indicates that litigation is reasonably contemplated, at least where the applicant sets forth the factual basis for its claims.[23] A regulatory complaint, if still pending, also may be a reliable indicator that litigation is reasonably contemplated.[24]

The bottom line is that the closer the applicant is to having the case ready to file, the more likely it is that an American court will agree the case is within reasonable contemplation for purposes of §1782. Facts plus legal theories plus declarations of intention often equal "reasonable contemplation."

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[17] 747 F.3d 1262, 1270 (11th Cir. 2014).
[18] *In re Furstenberg Finance SAS*, 785 Fed. App'x 882, 885 (2d Cir. 2019. The Eleventh Circuit had earlier come to a similar conclusion in the same dispute. *Application of Furstenberg Finance SAS*, 877 F.3d 1031, 1035 (11th Cir. 2017) (statement of intention coupled with "specific evidence" is sufficient).
[19] *See, e.g.*, *In re Hansainvest Hanseatische Investment-GmbH*, 364 F. Supp.3d 243, 249 (S.D.N.Y. 2018) ("hiring German litigation counsel, retaining experts and sending a detailed demand letter," plus representing on the record intent to file by year-end suffice); *In re Top Matrix Holdings, Ltd.*, 2020 WL 248716, case no. 18-mc-465, slip op. at 4-5 (S.D.N.Y. Jan. 16, 2020) (sworn statement of intention plus description of legal theories).
[20] *In re Hornbeam*, 722 Fed. App'x 7, 9 (2d Cir. 2018).
[21] 613 Fed. App'x 319, 323 (5th Cir. 2015).
[22] *Id.*
[23] *California State Teachers Retirement Sys. v. Novo Nordisk, Inc.*, 2020 WL 6336199, case no. 19- 16458 (D.N.J. Oct. 29, 2020).
[24] *Sampedro v. Silver Point Capital, L.P.*, 818 Fed. App'x 14, 19-20 (2d Cir. June 5, 2020).

The Afghan Special Immigrant Visa Program:
A Promise to Keep

Harry William Baumgarten

On October 7, 2001 President George W. Bush launched Operation Enduring Freedom in Afghanistan as a response to the September 11 attacks.[1] In December, 2014 President Barack Obama ended Operation Enduring Freedom and replaced it with the somewhat more limited Operation Freedom's Sentinel.[2] President Donald J. Trump's administration subsequently signed agreements with both the Afghan government[3] and the Taliban[4] on February 29, 2020 assenting to a full withdrawal of U.S. troops within 14 months. President Joseph R. Biden oversaw the implementation of these agreements, withdrawing American forces from Afghanistan on August 30, 2021.[5] The War in Afghanistan ultimately proved America's longest war[6] and one of its most expensive.[7]

Creation of the Afghan Special Immigrant Visa (SIV) Program

To wage this war, the United States recruited Afghan interpreters, translators, and other on-the-ground allies through two major programs. The first program was created by Section 1059 of the Fiscal Year 2006 National Defense Authorization Act (NDAA).[8] This provision allowed for up to 50 Afghan nationals who had worked directly for U.S. Armed Forces for at least one year as translators, in addition to their spouses and children, to obtain lawful permanent resident (LPR) status per year. The provision was expanded in 2007 to allow for interpreters to qualify for the same program.

The second program targeted Afghan nationals employed by or on behalf of the U.S. government in Afghanistan. It was established by Title VI of the Omnibus Appropriations Act, 2009 with an initial cap of 1,500 principal aliens per year from FY'09 until FY'13.[9] Subsequent legislation added visas to this program, including the 2017 NDAA which provided an additional 8,500 visas. The FY'20 NDAA placed a numerical cap of 22,500 on the number of principal aliens who could receive special immigrant visas after December 18, 2014. However, the Emergency Security Supplemental Appropriations Act, 2021 expanded the cap to 34,500 since December 19, 2014.[10]

Afghan SIV Program Post-Withdrawal:

Prior to the Taliban takeover of Afghanistan, estimates ranged between approximately 50,000 to 100,000 individuals who would benefit from these immigration programs, including the family members of principal applicants.[11] In withdrawing from Afghanistan, the U.S. airlifted 65,000 Afghans to the United States, U.S. military bases abroad, and foreign countries, where

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[1] *Text: Bush Announces Strikes Against Taliban*, WASHINGTON POST (Oct. 7, 2001), https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_100801.htm.
[2] *Obama, Hagel Mark End of Operation Enduring Freedom*, U.S. DEPARTMENT OF DEFENSE (Dec. 28, 2014), defense.gov/News/News-Stories/Article/Article/603860/obama-hagel-mark-end-of-operation-enduring-freedom/
[3] *Joint Declaration between the Islamic Republic of Afghanistan and the United States of America for Bringing Peace to Afghanistan*, U.S. DEPARTMENT OF DEFENSE (Oct. 29, 2020), https://www.state.gov/wp-content/uploads/2020/02/02.29.20-US-Afghanistan-Joint-Declaration.pdf/.
[4] *Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban and the United States of America*, U.S. DEPARTMENT OF DEFENSE (Oct. 29, 2020), https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf.
[5] *Remarks by President Biden on the End of the War in Afghanistan*, THE WHITE HOUSE (Aug. 31, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/31/remarks-by-president-biden-on-the-end-of-the-war-in-afghanistan/.
[6] Idrees Ali and Jonathan Landay, Steve Holland, *America's longest war: 20 years of missteps in Afghanistan*, REUTERS (Aug. 16, 2021), https://www.reuters.com/world/asia-pacific/americas-longest-war-20-years-missteps-afghanistan-2021-08-16/.
[7] John Harrington and Grant Suneson, *What were the 13 most expensive wars in U.S. history?*, USA TODAY (June 13, 2019), https://www.usatoday.com/story/money/2019/06/13/cost-of-war-13-most-expensive-wars-in-us-history/39556983/.
[8] Andorra Bruno, *Iraqi and Afghan Special Immigrant Visa Programs*, CONGRESSIONAL RESEARCH SERVICE (June 21, 2021), https://crsreports.congress.gov/product/pdf/R/R43725.
[9] *Id.*
[10] *H.R.3237 - Emergency Security Supplemental Appropriations Act, 2021*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/3237/text.
[11] Michelle Hackman, *How Do the Highly Sought-After Special Immigrant Visas for Afghans Work?*, THE WALL STREET JOURNAL (Aug. 23, 2021), https://www.wsj.com/articles/how-does-the-14-step-visa-program-for-foreign-interpreters-work-11629414605.

many await SIV processing.[12] Yet, according to an unnamed senior State Department official, a majority of SIV-eligible individuals may have been left behind when the U.S. withdrew from Afghanistan.[13] If history is any guide, anyone who aided the U.S. that remains in Afghanistan is likely to be a top target for Taliban attacks.[14] In response to the chaotic American retreat, the State Department Inspector General announced that it will be investigating the agency's role in withdrawing from Afghanistan.[15] The result of this investigation remains to be seen.

Conclusion

With the U.S. having already withdrawn from Afghanistan, it is uncertain what more, if anything, can be done to fulfill the promise made to Afghans who aided the U.S. government during the war. At a minimum, it is essential that special immigrant visa applications be processed as expeditiously as possible. Civil society groups and Congress have a strong role to play in ensuring that the Administration processes them in a timely manner and that all approved applicants are effectively resettled in the United States. It is also worth considering whether military or clandestine activities may be justified to save at least some individuals who remain in Afghanistan. However, this is a risky endeavor that could lead to suboptimal results. Regardless, the United States has a responsibility to do everything in its power to ensure that SIV status is granted to the maximum number of qualifying applicants without delay. We owe our allies no less.

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[12] Elizabeth Ferris, *The evacuation of Afghan refugees is over. Now what?*, THE BROOKINGS INSTITUTION (Sept. 10, 2021), https://www.brookings.edu/blog/fixgov/2021/09/10/the-evacuation-of-afghan-refugees-is-over-now-what/.

[13] Jessica Donati, *Majority of Interpreters, Other U.S. Visa Applicants Were Left Behind in Afghanistan*, THE WALL STREET JOURNAL (Sept. 1, 2021), https://www.wsj.com/articles/majority-of-interpreters-other-u-s-visa-applicants-were-left-behind-in-afghanistan-official-says-11630513321.

[14] Nell Clark and James Doubek, *An Afghan Interpreter Who Helped The U.S. Military Is Now A Target For The Taliban*, NPR (Aug. 16, 2021), https://www.npr.org/2021/08/16/1028016074/an-afghan-interpreter-for-the-u-s-army-is-trying-to-get-out-of-afghanistan.

[15] Vivian Salama, *Afghanistan Withdrawal to Be Subject of State Department Investigation*, THE WALL STREET JOURNAL (Oct. 19, 2021), https://www.wsj.com/articles/afghanistan-withdrawal-to-be-subject-of-state-department-investigation-11634671379.

Bar Associations and Pandemic Response

ABA Rule of Law Initiative

On September 15, LawAsia and the American Bar Association (ABA) coordinated a dialogue on the challenges legal communities faced because of the pandemic and how bar associations responded. This was the first of a series of four virtual dialogues to analyze challenges to the rule of law during the pandemic. Experts will be drawn from across Asia and the United States to share experiences in their jurisdictions and work together to develop recommendations for bar associations within the Asia Pacific region.

The inaugural session opened with remarks from the Presidents of both the ABA and LawAsia who lauded this collaborative initiative as critically important during these challenging times. As Mr. Turner of the ABA noted, the pandemic has put into stark relief problems within our legal systems. He challenged attendees to focus not only on the challenges of the pandemic, but the ways it has forced us as lawyers to serve the public through alternative means and changing the way practice perhaps for the better.

The program featured four panelists from Singapore, Sri Lanka, Korea and the United States, who provided a brief analysis of the challenges and bar association responses. Among the topics analyzed were:

- The ability (or inability) to convert to virtual hearings and the impact on access to justice and lawyers' workloads.
- Negative effects of strict lockdowns from mental strain on lawyers due to isolation and diminished professional support (esp. for jr. lawyers) to human rights violations, for victims of domestic violence suffering from slower court proceedings and evictions.
- Legality of mask mandates and lockdowns and capacity of bar associations to coordinate policy advice to governments.

Panelists participated in a 30-minute question and answer dialogue facilitated by ABA's Associate Executive Director for Global Programs, during which panelists addressed further issues of concern raised by attendees most notably on the issue of vaccine distribution and inequality, vaccine mandates and court backlogs.

An Action Report, summarizing the challenges and recommendations developed during the session follows. The next dialogue, scheduled to take place in early December 2021 will focus on Laws to Address Misinformation and Fake News related to the Pandemic, followed by an exploration of Emergency Orders and Lockdowns (in January 2022) and a final session that will revisit some of the challenges explored in September to refine the recommendations.

The mission of the American Bar Rule of Law Initiative is to promote justice, economic opportunity and human dignity through the rule of law.

Action Report

Bar Associations and the Pandemic Response Webinar Series

On September 15, 2021, LawAsia and the American Bar Association (ABA) coordinated a dialogue on the challenges legal communities face because of the pandemic and how bar associations are responding. The discussion in this session, the first in a series of four dialogues, centered around challenges in three main topical areas: ***access to justice***, laws adopted via ***abbreviated legislative processes***, and challenges faced by ***individual bar members***.

Opening Remarks

- Mr. Chunghwan Choi, President of LawAsia
- Mr. Reginald Turner, President of the ABA

Rapporteurs

- Sara Sandford
- Annalee Patel

Presenters

- Ms. Lisa Sam, Vice President of the Law Society of Singapore
- Mr. Saliya Peiris, President of the Bar Association of Sri Lanka
- Ms. Eugene SOHN Member of International Committee, Korea Bar Association
- Prof. Juliet Suzanne Sorensen, ABA Task Force on Legal Needs Arising from the Coronavirus Pandemic

Facilitator

- Mr. Alberto Mora, Associate Executive Director, Global Programs for the ABA

Below is a summary of the actions analyzed during the session, followed by specific recommendations from each panelist.

Access to Justice

Delays in hearings due to court closures and postponements during lockdowns adversely impacted access to justice and timely consideration of cases. Prolonging pre-trial detentions and preventing people in urgent need of assistance from authorities – forced evictions or abusive relationships, for example – affected people's human rights and safety. Court re-openings were backlogged, stretching the bandwidth of judges and lawyers, leading to concerns about responding to the above needs while maintaining the quality of legal representation and decisions.

Recommendations

Hybrid virtual and in-person hearing structure was an effective way to improve the efficiency of courts and access to justice.

Successful strategies to capitalize on this innovation could include:

• Training court staff, judges, and lawyers on how to use the technology. Digital security and effective communication techniques are also recommended for improved digital advocacy.

• Tasking lawyers to help resolve commercial disputes timely through a non-mandatory adjudicative process and mediation that can be done virtually.

• Setting standards for when virtual hearings are permissible/required. For example, in ex parte and chambers hearings and mediation.

• Hybrid models must be sure to balance the need for improved efficacy with the right of defendants to challenge accusers in relation to virtual cross-examinations.

• Standardizing forms and filings required for virtual and asynchronous (email) hearings.

Bar Members

Across the region, lawyers reported feeling isolated and burdened by increased workloads— remaining abreast of changing laws and filing requirements, dealing with new technology, and addressing the backlog of cases after courts re-opened. Burn-out and financial uncertainty pose significant personal challenges to members of the legal community across Asia.

Recommendations

Establish support systems for lawyers including but not limited to:

• Financial supports: waiver or reduced fees for certain members and unemployment support.

• Mental support: virtual psychologists; virtual huddles to provide social interaction and venting.

• Offer mentorship programs to support newly admitted lawyers and developed expanded legal education offerings (conducted virtually).

• Capitalize on opportunities of the virtual era -- expanded legal education offerings; exchanges with legal communities in other countries; and virtual exhibitions to promote domestic lawyers abroad.

Legislative Process

Transparency and due process was undermined by a lack of involvement by constituencies typically afforded input on legislation. Lack of involvement by legal experts and bar associations resulted in a variety of issues – including ambiguities and inconsistencies in new regulations – making it difficult for the public to understand and comply with new laws. In some cases, concerns arose about the enforceability and constitutionality of legislation adopted quickly. In other cases, new legislation allowed for human rights abuses and safety risks, without concomitant benefit to society that was the original basis for adopting the law. For example, some governments have used lockdown laws to stifle dissent when similar activities of pro-government activists were not restricted.

Recommendations

Develop stronger institutional working relationships with government departments, in particular health departments, to develop laws to prevent and respond to future health crises. Particular attention should be paid to potential human rights and constitutional impacts of legislation such as:

• Health discrimination in treatment and vaccine distribution.

• Certain individuals/businesses taking significant losses for the benefit of all without compensation.

• Establish committees or working groups within bar associations to address specific challenges enables input from diverse sectors of the legal profession and can lead to more comprehensive solutions in a shorter timeframe.

Bar Associations and the Pandemic Response

Speakers' Action Tips

Offered by Vice President Lisa Sam of Singapore

To Help Members

• Consider relief for new lawyers – reduced bar dues, stipends, mentoring, free CLE/CPD.

• Help firms hire – advertising subsidies and other financial support.

• Seek government support for unemployed – including staff.

• Establish a compassion fund for emergency one-off needs of lawyers and law-related staff.

• Establish periodic "virtual huddles" – Zoom gatherings to share best practices, see one another, and avoid isolation.

• Acknowledge and address the technology gap – including equipment, infrastructure, and training – they could have done more for senior attorneys on this point, in retrospect.

• Offer confidential mental health counseling.

• Survey members to understand their needs.

• Establish methods to carry on existing benefits programs virtually, if needed.

• Establish methods to conduct associations business virtually.

• Liaise with the government to help address the needs of society members and the broader legal community.

To Help the Public

• Balance speed with the importance of access to justice. Virtual hearings are one answer, in some cases.

• Help with hearings and ADR virtually to help resolve disputes even if not, in person.

• Consider having experienced lawyers decide contract disputes in lieu of court proceedings, in certain instances.

Offered by President Saliya Peiris of Sri Lanka:

To Help Members

• Make sure the judiciary and bar are prepared for the possible need to operate via remote technology to avoid the stress on all participants from delay and compacted schedules resulting from backlogs.

• Consider tolling of time bars (statute of limitations) in connection with claims.

• Offer lawyers with less than five years' experience "kind hands" – financial support.

• Take advantage of the delays to offer more CLE online, including in multiple languages.

To Help the Public

• Balance interest in timely hearings with interest in fair hearings, especially in the criminal law context.

• Consider the bar association's obligation to challenge non-scientifically based decisions of the government that affect individual rights and freedoms, such as the mandated cremation that was in place in Sri Lanka for almost a year.

• Take the lead publicly to remind the authorities of their obligation to honor human rights even during a pandemic, including the right to protest.

• Work with authorities to establish protocols to better protect individuals from domestic violence and address acts of violence that do occur.

• Work with the government to make sure health laws are up to date and fairly address the needs of society in a present-day health crisis, including a system of administering required vaccines or healthcare fairly and efficiently.

Bar Associations and the Pandemic Response

Speakers' Action Tips

Offered by Ms. Eugene Sohn of South Korea:

To Help Members

• Develop a handbook (the KBA's was 400 pages) on advising clients on COVID-related disputes and issues.

• Consider member fee reductions but leave such decisions to regional leaders who can decide on a case-by-case basis.

To Help the Public

• Establish a process to learn from experience in the pandemic (like post-MERS in 2015). Assess whether human rights were adequately protected, for example in the how private information was used and disposed of in the government led tracing and tracking program.

• Support legislation for those businesses that disproportionately bear the brunt of the economic consequences, for the benefit of all.

• Prepare the court system to deal with the backlog that develops on cases affected by sick participants.

• Raise money to help those in need and distribute masks by increasing pro bono efforts to support the legal needs of those impacted by illness.

Offered by Professor Juliet Suzanne Sorensen for the United States:

To Help Members

• Address the digital divide of parties and lawyers with varied technological facilities through training, etc.

• Educate members about the impacts of the pandemic and the needs of the community that they can help serve.

To Help the Public

• Establish a process to learn from experience in the pandemic (like post-MERS in 2015). Assess whether human rights were adequately protected, for example in the how private information was used and disposed of in the government led tracing and tracking program.

• Support legislation for those businesses that disproportionately bear the brunt of the economic consequences, for the benefit of all.

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