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SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE

SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE

Letter from the Editor-in-Chief

Dear Valued Readers,

It is with great pleasure and a profound sense of accomplishment that I write to you, as we celebrate the remarkable milestone of 50 years since the inception of the Syracuse University Journal of International Law and Commerce. This half-century journey has been nothing short of extraordinary, marked by scholarly excellence, intellectual vigor, and a steadfast commitment to advancing the discourse in the fields of international law and commerce.

As we reflect on this momentous occasion, it is impossible not to be filled with gratitude for the countless individuals who have contributed to the success and legacy of our journal. From the founding members whose vision laid the groundwork for our publication, to the dedicated editors, authors, and reviewers who have tirelessly worked to uphold the highest standards of academic rigor, each one has played a pivotal role in shaping the journal into what it is today.

As we mark this special anniversary, we also look to the future with optimism and enthusiasm. The world is changing rapidly, presenting us with new challenges and opportunities in the realms of international law and commerce. Yet, we remain steadfast in our commitment to excellence, innovation, and the pursuit of truth. We will continue to push the boundaries of knowledge, to engage with pressing issues facing our global community, and to uphold the highest standards of scholarship and integrity.

On behalf of the entire editorial team, I extend my heartfelt gratitude to all our readers, contributors, supporters, and partners who have been part of this incredible journey. Your unwavering commitment and support have been instrumental in our success, and we are deeply grateful for your continued involvement and engagement. Thank you for being part of our story.

Here's to the next 50 years of the Syracuse Journal of International Law and Commerce!

With warmest regards,

Jennifer Arinze

Editor-in-Chief, Volume 51
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DATA PRIVACY REGULATION'S IMPACT ON THE GLOBAL DIGITAL INNOVATION ECONOMY: AN ANALYSIS OF INTERNATIONAL REGULATORY EFFECTS ON THE TECHNOLOGY INDUSTRY

Lucas V. Di Lena[†]

ABSTRACT

This work aims to discuss the genesis of data privacy regulation and how it has impacted the overall international digital economy. Namely, how the regulatory framework present in today's society has developed, sparking action by nations including the European Union, United States, and the United Kingdom to police the use of their citizens' data. As each individual country developed their own national laws regarding data privacy, various impacts were felt by companies operating internationally, as well as domestically in their efforts to grow.

A discussion on the disparate impacts across the technology sector as a whole will review how both large and small technology companies have been and continue to be subject to regulation which brings positive and negative results. Particularly, the regulatory framework has grown increasingly complex with each individual nation proffering its own regulations which depart at various junctures. Small and midsized enterprises have experienced harmful impacts from these regulatory frameworks, with larger enterprises notably better equipped to handle these changes.

As the landscape for data privacy protections and the protection of an individual's right to privacy has become a key point at the core of these regulations, an important balancing test must be struck between liberty and the stifling of innovation. Overly complex regulation has impacted the mergers and acquisition space, a strong tool utilized in the technology sector to foster innovation and the further development of novel technology. With an ever-growing market in the technology sector based on artificial intelligence, some countries stand at a disadvantage from an investment and innovation perspective given their approach to regulation.

[†]*J.D. Candidate, Syracuse University College of Law, Class of 2024.* *A special thank you to the professors who contributed their time in helping to develop this note, namely, Professor Emily Brown and Professor Shuba Ghosh. An additional thank you to my Syracuse University colleagues and the members of the Syracuse University Journal of International Law and Commerce for their tireless efforts, insight, and encouragement.*

INTRODUCTION

How data privacy is regulated and what laws will govern how individuals' personal data is used, processed, and ultimately monetized is one of the most hotly debated topics this century across the globe.[1] Companies face heightened levels of scrutiny and corporate challenges specific to their profitability and ability to provide services to their customers, including Citymapper.[2] Citymapper, a UK startup with a goal of providing users with a new means to city navigation, amassed close to fifty million users before facing revenue generation issues and a clear route to profitability.[3] The route usually taken, that of amassing millions of data points on customers and ultimately selling or monetizing that data, is one that the startup could not achieve in light of the infamously wide-reaching European Union ("EU") data privacy regulation, the General Data

1. Astrid Gobardhan, *Data Privacy Trends to Follow for 2023*, INFORMATIONWEEK (Jan. 26, 2023), *available at* https://www.informationweek.com/big-data/data-privacy-trends-to-follow-for-2023 (last visited Mar. 18, 2024).

2. Margaret Taylor, *How to Save Citymapper*, WIRED (May 26, 2021), *available at* https://www.wired.co.uk/article/how-save-citymapper (last visited Mar. 18, 2024).

3. *Id.*

Privacy Regulation ("GDPR").[4] Facing issues to monetize, Citymapper eventually failed, accumulating millions in losses and frustrating investors keen on pulling back their investments after seeing poor routes to profitability.[5] Here lies a large problem when approaching wide-reaching legislative movements toward regulating large industries–disparate impacts. The highly complex global regulatory framework on data privacy and artificial intelligence ("AI") has stifled innovation by adding ineffective, burdensome complexities to the mergers and acquisitions process, most of which disproportionately impact smaller and midsize organizations.

I. THE GENESIS OF DATA PRIVACY REGULATION

Privacy, a concept once defined as the "right to be left alone" by two American lawyers at the turn of the century, has now come to permeate all facets of everyday life in the modern age.[6] In 1948, the Universal Declaration of Human Rights was adopted, which formalized a framework of universal human rights that the global community believed were fundamental to human life, including the right to privacy.

Over the last 100 years, this fundamental right began to shift and take a more modern shape as technology and innovation infused the lives of citizens across the world.[7] Governments and companies amassed information and data on individual citizens, all of which could be considered intrusive as private citizens lacked control of and visibility into this information. Granted, in the mid-20th century, technology was far from the level of sophistication it has achieved today, and the stakes were lower, with respect to the value of transmission and control of personal information. However, in 1967, the United States ("U.S.") led the charge on access to and protection of information by passing the Freedom of Information Act ("FOIA").[8]

FOIA provided everyone the right to request access to documents from state and federal agencies that were related to, concerning, or

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4. *Id.*

5. *Id.*

6. International Network of Privacy Law Professionals, *A Brief History of Data Protection: How Did It All Start?*, INPLP (July 10, 2020), *available at* https://inplp.com/latest-news/article/a-brief-history-of-data-protection-how-did-it-all-start/ (last visited Mar. 18, 2024).

7. The Economist, *The Roaring 20s?: Why a Dawn of Technological Optimism Is Breaking*, THE ECONOMIST (Jan. 16, 2021), *available at* https://www.economist.com/leaders/2021/01/16/why-a-dawn-of-technological-optimism-is-breaking (last visited Mar. 18, 2024).

8. International Network of Privacy Law Professionals, *supra* note 6.

encompassing their own personal information.[9] Following FOIA's adoption, other countries began to follow suit by providing similar frameworks to allow citizens to access data as the flow of data between various entities; both public and private, became more common across society.[10]

During the 1980s, the Organization for Economic Cooperation and Development ("OECD"), an intergovernmental organization with thirty-eight member countries, focused on stimulating economic progress and world trade, issuing guidelines on data protection as a reaction to the increasing use of computers to process business transactions.[11] The OECD set forth guidelines on the Protection of Privacy and Transborder Flows of Personal Data, acknowledging the importance of transborder data flows.[12] With the rise of computer-reliant banking and insurance industries, it became necessary to ensure the free flow of data across international borders but presented the challenge of balancing privacy interests with economic influences.[13]

The EU realized that despite the guidelines issued under OECD, they were merely guidelines and therefore inherently non-binding.[14] As technology continued to advance, becoming more entrenched in everyday life, the first major European privacy and human rights directive, European Data Protection Directive ("DPD"), took effect on December 13, 1995.[15] As a policy directive, the DPD was aimed at protecting individuals concerning the processing of personal data and the free movement of such data. As a directive, and not a regulation, EU member states were encouraged to follow this directive and implement the corresponding provisions outlined therein as national laws by October 24, 1998.[16]

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9. *Id.*

10. *Id.*

11. *Ratification of the OECD Convention, Organisation for Economic Co-operation and Development*, OECD, *available at* https://www.oecd.org/about/document/ratification-oecd-convention.htm (last visited Mar. 18, 2024).

12. *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, Organisation for Economic Co-operation and Development* ORG. FOR ECON. COOP. AND DEV., *available at* https://www.oecd.org/sti/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm#memorandum (last visited Mar. 18, 2024).

13. *Id.*

14. Nate Lord, *What Was the Data Protection Directive? The Predecessor to the GDPR*, DIGIT. GUARDIAN (July 12, 2018), *available at* https://digitalguardian.com/blog/what-data-protection-directive-predecessor-gdpr (last visited Feb. 19, 2024).

15. Ernst-Oliver Wilhelm, *A Brief History of the General Data Protection Regulation,* INT'L ASSOC. OF PRIV. PRO. (Feb. 2016), *available at* https://iapp.org/resources/article/a-brief-history-of-the-general-data-protection-regulation/ (last visited Mar. 18, 2024).

16. Directive 94/46/EC, 1995 O.J. (L 281) 31.

Following the DPD, EU member states began to define what personal data encompassed and enacted regulatory structures within each member state to create a compliance framework to protect all EU citizens and their data.[17] Under Article 2(a) of the Data Protection Directive, EU member states were to define personal data as "any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified directly, or indirectly, in particular by reference to an identification number or to one or more factors special to his physical, mental, economic, cultural or social identity."[18] Put simply, the DPD established protections for data where if any information, taken in the aggregate, could be linked back to any particular person.

Some of these changes directly affected categories of data, including names, government-issued identification numbers, credit card numbers, bank statements, and addresses traceable to any private citizen.[19] The DPD defined personal data and established a requirement for companies and actors who leverage personal data to have "data controllers." These data controllers are responsible for notifying governing bodies of the purpose of their data processing, providing contact information, listing categories of data subjects, identifying types of data collected, specifying who can view the data, indicating whether or not the data will be transferred to other countries, and outlining what protective measures have been put in place to ensure the security of the processed data.[20]

Despite the implementation of the DPD across EU member states, international considerations necessitated other protections in moving toward a framework that balanced protection of EU citizen data with the need to ensuring free flows of data from the EU to other countries.[21] On July 26, 2000, the United States and the EU achieved this goal and agreed upon a mechanism that would provide for "adequate level[s] of protection" required by the DPD.[22] This agreement was codified by the United States Department of Commerce and arrived on the heels of the DPD.

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17. Lord, *supra* note 14.

18. *Id.*

19. *Id.*

20. *Id.*

21. Joshua P. Meltzer, *The Importance of the Internet and Transatlantic Data Flows for U.S. and EU Trade and Investment*, BROOKINGS (October 1, 2015) *available at* https://www.brookings.edu/wp-content/uploads/2016/06/internet-transatlantic-data-flows-version-2.pdf *(*last visited Mar. 18, 2024).

22. Martin A. Weiss & Kristin Archick, CONG. RSCH SERV., R44257, U.S. EU DATA PRIV.: FROM SAFE HARBOR TO PRIV. SHIELD, (2018), *available at* https://sgp.fas.org/crs/misc/R44257.pdf (last visited Mar. 18, 2024).

Named the "Safe Harbor Privacy Principles Agreement" ("Safe Harbor Agreement"), it was implemented and subsequently recognized by the European Commission.[23]

The Safe Harbor Agreement established the mechanism that balanced the privacy of EU citizens with the need to ensure free flows of data across transatlantic borders. To achieve this, the Safe Harbor Agreement provided a method for companies based in the United States to self-certify annually to the Department of Commerce that the seven principles (required by the DPD) and other related requirements conformed with the data privacy adequacy standards.[24] These seven principles of the DPD included notice, onward transfer, security, data integrity, access, enforcement, choice (opt-out or opt-in for sensitive information.)[25] The Safe Harbor Agreement protected United States companies and the growth of the digital economy for roughly two decades as the cornerstone of companies' compliance with international data privacy regulations.[26]

However, this cornerstone may not have been as strong a foundation as envisioned. The Safe Harbor Agreement faced harsh criticism from European privacy advocates who believed it facilitated significant data protection loopholes, poor implementation, and a lack of oversight.[27] These complaints were paired with issues of false compliance claims by U.S. corporations and non-mandatory annual compliance checks.[28] These claims evidenced hundreds of companies that fraudulently claimed they had properly registered and adhered to the Safe Harbor Agreement framework.[29] In addition to issues with compliance, oversight was also thought to be inadequate. The Federal Trade Commission ("FTC") only brought enforcement actions against thirty-nine companies over the course of the first thirteen years of the Safe Harbor Agreement.[30] This paradigm of prioritizing the flows of data at the cost of potential inadequacies in the protection of personal data laid the foundation for a shift

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Weiss & Archick, *supra* note 22.

28. *Id.*

29. Nikolaj Nielsen, *Hundreds of U.S. Companies Make False Data Protection Claims*, EUOBSERVER (Oct. 8, 2013) *available at* https://euobserver.com/rule-of-law/121695 (last visited Mar. 18, 2024).

30. *FTC Privacy and Security Report*, FED. TRADE COMM'N (2020), *available at* https://www.ftc.gov/system/files/documents/reports/reports-response-senate-appropriations-committee-report-116-111-ftcs-use-its-authorities-resources/p065404reportprivacydatasecurity.pdf (last visited Mar. 18, 2024).

in the European Union's approach to data privacy. As a result, the General Data Protection Regulation brought sweeping changes to global data flows and privacy regulation across global markets.[31]

Following years of debate, on April 27, 2016, the European Commission adopted the GDPR, with enforcement beginning on May 25, 2018.[32] The DPD was implemented at a time where the internet was in its infancy and OECD member states agreed to prioritize functional data flows and prioritize economic growth and development. Therefore, regulatory changes would likely be inevitable. With the adoption of GDPR came the most expansive changes to any privacy policy to date, and with it, a threat to innovation in the technology sector. [33]

Primarily, the GDPR changed the definition of personal data, expanding the DPD definition to include: any information that could be used, on its own, or in conjunction with other data, to identify any individual.[34] This new definition reflected the changes in more modern technology such as IP addresses, mobile device identifiers, geolocation, and biometric data, as well as any data related to an individual's physical psychological, genetic, mental, economic, cultural, or social identity.[35] As technology matured and allowed for companies based in countries outside of the EU to harness and capitalize on user data across international borders, it became imperative to establish more stringent data controller or processor requirements. These requirements were enforced regardless of the company's location.[36] Further, with the bark of the GDPR came the bite of the EU, which created high financial penalties for failure to comply with the GDPR. In the event a company was found to be in breach of the GDPR, that fine could reach up to €20 million, or four percent of the total global annual turnover a company earned in the preceding fiscal year.[37]

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31. Samantha Beaumont, *The Data Protection Directive versus the GDPR: Understanding key changes,* SYNOPSYS (Jan. 18, 2018), available at https://www.synopsys.com/blogs/software-security/dpd-vs-gdpr-key-changes/ (last visited Mar. 18, 2024).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. He Li et al., *The Impact of GDPR on Global Technology Development*, J. OF GLOB. INFO. TECH. MGMT. (2019), *available at* https://www.tandfonline.com/doi/pdf/10.1080/1097198X.2019.1569186?cookieSet=1 (last visited Mar. 18, 2024).

37. *Id.*; Ben Wolford, *What are the GDPR Fines?*, PROTON AG, *available at* https://gdpr.eu/fines/ (last visited Mar. 18, 2024).

Outside of the direct financial penalties for noncompliance, it also established new mechanisms to empower EU citizens. Under the GDPR, companies were required to offer EU citizens robust privacy rights such as, the right to be forgotten, the right to access data, the right to data portability, and the right to explanation of automated decision-making.[38]

II. DATA PRIVACY REGULATION CROSSES INTERNATIONAL BORDERS BRINGING ADDITIONAL COMPLEXITY

Following the implementation of the GDPR, countries outside of the EU began to model data privacy regulations on the GDPR and make strides towards protecting citizens digital privacy rights.[39] Shortly after the GDPR was passed and implemented, other countries followed suit in implementing data privacy regulation; namely, individual states in the United States.[40] In the U.S., California pioneered the effort to create state-level legislation to provide residents of California rights similar to those created for EU citizens under the GDPR.[41] Both regulations take similar steps to ensure companies take appropriate measures to safeguard data they collect and use, however, they differ slightly in their approaches.[42] The GDPR takes a much more detailed approach on implementation of data protection standards, as well as the efforts companies must take to achieve compliance with the GDPR.[43] Where the GDPR, as its namesake, acted as the pioneer in the global data privacy regulation forum, other regions followed suit.[44] California went a step further in passing the California Privacy Rights Act ("CPRA") which transferred rulemaking authority from the California Attorney General to the

38. Li, *supra* note 36.

39. *California Consumer Privacy Act (CCPA)- an overview* USERCENTRICS (Aug. 5, 2021), *available at* https://usercentrics.com/knowledge-hub/california-consumer-privacy-act/#:~:text=The%20California%20Consumer%20Privacy%20Act%20(CCPA)%20was%20the%20first%20data,effect%20from%20January%201st%2C%202023 (last visited Mar. 18, 2024).

40. *Id.*

41. *Id.*

42. *Id.*

43. Danielle Kucera, *CCPA vs. GDPR: Similarities and Differences Explained*, OKTA (Apr. 13, 2021), *available at* https://www.okta.com/blog/2021/04/ccpa-vs-gdpr/ (last visited Feb. 15, 2024).

44. *How GDPR Changed the World, and Privacy Regulation's Future*, KASPERSKY (Dec. 15, 2021), *available at* https://kfp.kaspersky.com/news/how-gdpr-changed-the-world-and-privacy-regulations-future/ (last visited Mar. 18, 2024).

California Privacy Protection Agency.[45] Acting in effect as the United States' first formally codified expansive data privacy protection law, other states began to follow in California's footsteps, including Virginia, Connecticut, and Colorado which presently are in effect.[46] However, in addition to those four states, an additional nine states have also passed data privacy laws which will take effect during the second half of 2024, and some in early 2025.[47] As thirteen states have passed comprehensive privacy legislation, as of February 9, 2024, an additional seventeen states have active bills of varying scope regarding privacy and data protection presently working their way through respective state legislatures.[48]

It is important to note the differences in how each of these governmental bodies have approached data privacy regulation in their own respects. Despite taking cues from the EU and their passage of the GDPR, California defined the scope of its privacy laws in a slightly different manner, protecting "consumers," i.e., natural persons who are California residents, rather than "data subjects" or any identifiable person who resides in the EU.[49] Taking this a step further, the CCPA was drafted to direct the regulation of businesses, specifically, any for-profit organization in California, processing the personal information of California-based consumers.[50]

With a seemingly larger scope targeting businesses directly, and not that of data controllers and data processors, like the GDPR, the CCPA

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45. *CCPA vs. CPRA: What's the Difference?*, BL (Jan. 23, 2023), *available at* https://pro.bloomberglaw.com/brief/the-far-reaching-implications-of-the-california-consumer-privacy-act-ccpa/ (last visited Mar. 25, 2024).

46. Mark Smith, *Analysis: Five Subtle Ambiguities in Virginia's New Privacy Law*, BL (June 9, 2021), *available at* https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-five-subtle-ambiguities-in-virginias-new-privacy-law (last visited Mar. 25, 2024); *What is the Virginia Consumer Data Protection Act (VCDPA)?*, BL (Dec. 28, 2022), *available at* https://pro.bloomberglaw.com/brief/what-is-the-vcdpa/ (last visited Mar. 25, 2024); *See* F. Paul Pittman, *US Datq Privacy Guide*, WHITE & CASE (March 22, 2024), *available at* https://www.whitecase.com/insight-our-thinking/us-data-privacy-guide#:~:text=Currently%2C%20a%20total%20of%20thirteen,Montana%2C%20Oregon%2C%20and%20Delaware (last visited Mar. 25, 2024).

47. States such as Utah, Iowa, Indiana, Tennessee, Texas, Florida, Montana, Oregon, and Delaware have also passed laws but will not take effect until mid-2024 and early 2025. *See* F. Paul Pittman, *US Data Privacy Guide*, WHITE & CASE (March 22, 2024), *available at* https://www.whitecase.com/insight-our-thinking/us-data-privacy-guide#:~:text=Currently%2C%20a%20total%20of%20thirteen,Montana%2C%20Oregon%2C%20and%20Delaware (last visited March 25, 2024).

48. *See* Andrew Folks, *US State Privacy Legislation Tracker*, IAPP (March 22, 2024), *available at* https://iapp.org/resources/article/us-state-privacy-legislation-tracker/ (last visited March 25, 2024).

49. Kucera, *supra* note 43.

50. *Id.*

established three thresholds where one of which must apply to be subject to the CCPA.[51] These thresholds include: $25 million dollars or more in gross annual revenues; the purchase, sale, sharing or receipt of personal information of 50,000 or more consumers, households or devices; or the company derives at least 50% of gross revenue from the sale of consumers' personal information.[52] The ability for a business to use and process personal data is automatic under the CCPA, as long as there is a clear option provided for consumers to opt out of the sharing of their personal information.[53] In contrast, under the GDPR, to process personal data, an organization must meet at least one of the six legal principles of consent, contract, legal obligation, vital interests, public task, or the more flexible lawful basis, a legitimate interest.[54]

When discussing these two wide-reaching data privacy regulations, enforcement is governed by various bodies and varies country by country. In California, the CCPA was recently bolstered by the passage and enactment of a subsequent data privacy regulation, the California Privacy Rights Act, which provides Californians with a formalized separate state regulatory body with data privacy enforcement powers that may pursue enforcement.[55] The CPRA became operative on January 1, 2023, at which point it vested and transferred power in the California Privacy Protection Agency granting "full administrative power, authority, and jurisdiction to implement and enforce" the CCPA.[56]

The state-level privacy regulations enacted across the U.S. have sparked a movement at the federal level prompting members of Congress to begin the arduous process of crafting federal regulation on data privacy.[57] Enter the American Data Privacy and Protection Act ("ADPPA"), an omnibus federal privacy bill that garnered significant bipartisan support, but faced objection from state level actors who believed it may not

51. *Id.*

52. *Comparing privacy laws: GDPR v. CCPA,* DATA GUIDANCE & FUTURE PRIV. F. (2018), *available at* https://fpf.org/wp-content/uploads/2018/11/GDPR_CCPA_Comparison-Guide.pdf (last visited Mar. 25, 2024).

53. *Id.*

54. Kucera, *supra* note 43.

55. Bloomberg Law, *supra* note 45.

56. *Id.*

57. Niketa K. Patel et al., *The American Data Privacy and Protection Act: Is Federal Regulation of AI finally on the Horizon?*, MAYER BROWN (Oct. 21, 2022), *available at* https://www.mayerbrown.com/en/perspectives-events/publications/2022/10/the-american-data-privacy-and-protection-act-is-federal-regulation-of-ai-finally-on-the-horizon (last visited Mar. 25, 2024).

go far enough as a federal regulation.[58] This backlash comes primarily from California advocates, lobbyists, and government officials who believe that the ADPPA does not go far enough to protect Californians.[59] A federal law will usually govern a conflict involving state and federal disputes.[60] Preemption is at the core of this data privacy regulation dispute in the U.S. today, as the members of Congress seek to enact sweeping legislation at the federal level which would drive the U.S. closer to a level playing field across the global data privacy regulatory framework.[61] The ADPPA would act as a much larger scale piece of legislation that goes much further than the CCPA by shifting the burden of information protection to those who process data, rather than who generates it.[62] Further, the ADPPA also extends a much broader individual right to sue under the ADPPA whereas the CCPA currently provides this right to only Californians.[63]

Notably, the CCPA in its current form "only requires that businesses notify individuals of the information they collect and the purposes for which they use it, and to use it in ways 'reasonably necessary and proportionate to achieve the operational purpose for which it was collected or processed.'"[64] On the other hand, the ADPPA goes further to limit data collection to only what is "reasonably necessary and proportionate." This may impose limits on the information that companies can collect from individuals, bolstering the inherent right to privacy these regulations seek to protect in the first instance.[65] With a battle set to begin among lobbyists, non-profit organizations rooted in the data privacy space, and Congress as a whole, there is a long road ahead before the U.S. is able to firmly add a layer of complexity to the global data privacy regulatory framework. This ultimately will lead corporations to make some assumptions regarding their data privacy practices when navigating their path to profitability.

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58. Cameron F. Kerry, *Will California be the Death of National Privacy Legislation?*, BROOKINGS (Nov. 18, 2022), *available at* https://www.brookings.edu/blog/techtank/2022/11/18/will-california-be-the-death-of-national-privacy-legislation/ (last visited Mar. 25, 2024).

59. *Id.*

60. *Preemption*, CORNELL LAW SCH. LEGAL INFO. INST., *available at* https://www.law.cornell.edu/wex/preemption (last visited Mar. 25, 2024).

61. Kerry, *supra* note 58.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

Global data privacy regulation still saw further degrees of complication where large geopolitical changes like the United Kingdom's ("UK") exit from the EU resulted in a need for the UK to bring their own regulatory shade to international data transfers.[66] Following the complex geopolitical move of the UK leaving the EU, or "Brexit," this necessitated a large scale shift in many regulations and laws governing the UK, and for the purposes of this endeavor, the UK's adopted their own General Data Privacy Regulation..[67] Initially taking a similar approach to that of the EU GDPR, the UK modeled much of their version upon the pioneering nations of the EU.[68] After the UK widely adopted the EU's GDPR, the UK went further to pass the Data Protection Act of 2018 ("DPA") which bolstered the UK GDPR to ensure that all rules under the original EU GDPR would be followed in other sectors where it did not originally apply.[69] For example, the UK DPA established requirements for data protection officers, as well as an Information Commissioner who enforces, supervises, and regulates the UK GDPR.[70]

With all these privacy acts in force today, there is a complex regulatory system that companies must be aware of, and in compliance with, to avoid harsh penalties.[71] Companies interested in operating within the United States or globally have been forced to comply with all these privacy acts across international borders, which creates a complicated web of data privacy regulations and potential penalties. Though these privacy acts differ in their breadth and scope, a trend has emerged across the global stage that has thrust policing and safeguarding of customer and user data to the forefront of the technology sector.[72]

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66. Itgovernance, *Data Protection and Brexit: How the UK's Withdrawal from the EU Affects Data Protection in the UK: the EU GDPR, UK DPA 2018, and UK GDPR*, ITGOVERNANCE (2023), *available at* https://www.itgovernance.co.uk/eu-gdpr-uk-dpa-2018-uk-gdpr (last visited Mar. 25, 2024).

67. *See The Data Protection Act*, GOV. UK, *available at* https://www.gov.uk/data-protection (last visited Mar. 25, 2024).

68. Itgovernance, *supra* note 66.

69. GDPR EU, *How Do the UK's GDPR and EU's GDPR Regulation Compare?*, GDPR EU, *available at* https://www.gdpreu.org/differences-between-the-uk-and-eu-gdpr-regulations/ (last visited Mar. 25, 2024).

70. *Id.*

71. Laura Jehl & Alan Friel, *Comparison Chart: GDPR, CCPA, and Other State Privacy Laws*, BAKER & HOSTETLER LLP, (July 2019), *available at* https://perma.cc/7LZW-FR6J, (last visited Mar. 25, 2024).

72. Kaspersky, *supra* note 44.

III. MERGERS AND ACQUISITIONS IN THE TECHNOLOGY SECTOR UNDER GDPR

The array of international data privacy regulations present and applicable to the technology industry subjects both large and small organizations, operating globally, to varying regulatory schemes from many different countries. What originated under the EU's approach with the GDPR, eventually blossomed into a bouquet of data privacy regulations from EU member states, the UK, and individual states in the U.S. including California, Virginia, and Colorado, to what may ultimately be a formalized federal law in the coming years.[73]

As companies need to comply with these varying data privacy regulations to remain competitive in the marketplace, ensuring compliance and creating stringent internal policies across an organization is of paramount importance in light of the regulatory frameworks. The failure to do so could result in a large financial penalty that may be catastrophic to a smaller organization or result in an unexpected, high-priced expenditure for a larger organization.[74]

The overlapping international regulations have created potentially burdensome issues for the technology industry and impacted how technology companies approach the mergers and acquisitions space.[75] Particularly, when smaller companies bring new innovative products or services to the international market, be it through an acquisition by a larger entity or simply by natural growth of their product offering, cumbersome regulations can be an impediment to these efforts.[76]

Considering the web of regulation woven over the years since the EU enacted the GDPR, it is important to note the impacts that the technology sector as a whole has experienced and understand if this approach may be misguided.[77] Regulation of any industry can lead to issues with

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73. Anne Godlasky, *Data Privacy Act Has Bipartisan Support. But…,* NAT'L PRESS FOUND. (Dec. 28, 2022), *available at* https://nationalpress.org/topic/data-privacy-act-adppa-us-lacks-law-eu-standard
(last visited Mar. 25, 2024).

74. Jennifer Huddleston, *The Price of Privacy: The Impact of Strict Data Regulations on Innovation and More*, AM. ACTION F. (June 3, 2021), *available at* https://www.americanactionforum.org/insight/the-price-of-privacy-the-impact-of-strict-data-regulations-on-innovation-and-more (last visited Mar. 25, 2024).

75. Laurent Belsie, *Impacts of the European Union's Data Protection Regulations*, NAT'L BUREAU ECON. RSCH. (July 2022), *available at* https://www.nber.org/digest/202207/impacts-european-unions-data-protection-regulations (last visited Mar. 25, 2024).

76. *Id.*

77. Garrett A. Johnson et al., *Privacy & Market Concentration: Intended & Unintended Consequences of the GDPR*, FED. TRADE COMM'N 1, 2 (Mar. 20, 2020), *available at*

development and innovation, and overregulation may have harmful effects on global economies and important technological advancements. Namely, areas like AI, which rely heavily on the free flow of data to develop these novel inventions, can be hindered where technology companies face overly complex regulatory mechanisms.[78]

Companies can take multiple approaches to growth, one of which can be inorganic growth, a term used in the corporate sector to define the process where a company grows in size by a merger, an acquisition, or the takeover of another company.[79] When companies merge, this process typically involves one company acquiring or purchasing another company[80] Traditionally, the acquirer will purchase all of the stock or assets of another company, thus adding them to their existing organization.[81] Organic growth, on the other hand, refers to the natural growth a company experiences through their own internal primary product strings or services, for example, growth over time from the merits of a successful business.[82]

Both of these processes have their respective benefits and drawbacks, some of which include concepts like economies of scope and scale, competitive market edge, talent and resource access, access to new markets, and risk diversification through portfolio expansion.[83] In the technology sector, inorganic growth is often seen where a large technology company is seeking to corner the market in a particular product or service area or expand into a new market.[84] This trend of inorganic growth by merger or acquisition continues to foster digital innovation where

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https://www.ftc.gov/system/files/documents/public_events/1548288/privacycon-2020-garrett_johnson.pdf (last visited Mar. 25, 2024).

78. Ryan Ayers, *Big data and Artificial Intelligence: How They Work Together*, INDATA LABS (Mar. 29, 2022), *available at* https://indatalabs.com/blog/big-data-tech-and-ai (last visited Mar. 25, 2024).

79. Saikiran Chandha, *Understanding the Crux of Organic and Inorganic Growth,* FORBES (Apr. 1, 2022, 7:45 AM), *available at* https://www.forbes.com/sites/forbesbusinesscouncil/2022/04/01/understanding-the-crux-of-organic-and-inorganic-growth (last visited Mar. 25, 2024).

80. Tom Addleston-Towney, *The Basics of an M&A Deal*, FLEXIMIZE, *available at* https://fleximize.com/articles/001039/the-basics-of-an-m-a-deal (last visited Mar. 25, 2024).

81. Chandha, *supra* note 79.

82. *Id.*

83. *The Top Mergers and Acquisitions Benefits You Should Know*, WINDES (Apr. 28, 2021), *available at* https://windes.com/the-top-mergers-and-acquisitions-benefits-you-should-know (last visited Mar. 25, 2024).

84. *See generally, Id.*

companies seek to acquire market competitors to drive disruptive growth opportunities.[85]

Companies across various sectors, including consumer businesses, telecommunications, and financial services, have pushed boundaries of how technology companies have been defined.[86] In doing so, they are targeting disruptive technologies including financial technology, AI, and robotics as they become active deal-makers.[87] These trends have permitted companies to bridge gaps between product and market offerings across many sectors, thus leveraging inorganic growth to innovate, attract talent, and increase customer loyalty through private capital infusions in new ventures.[88] Ultimately, strategic acquisitions in the digital space have allowed companies to converge across market sectors and pursue long-term strategic goals that can allow large companies to collaborate and co-invest in emerging technologies aimed at pushing digital innovation further.[89]

For example, Oracle Corporation, one of the largest technology companies by market cap, has long operated across the technology sector.[90] In July of 2016, Oracle acquired the very first cloud company, NetSuite, in a transaction valued at approximately $9.3 billion.[91] During this acquisition process, companies like Oracle and NetSuite engage in due diligence processes to understand the value and potential costs of the acquisition target. [92] Often, the company seeking to acquire another will consider various benefits of purchasing technology through an acquisition, rather than developing similar technology in-house by an investment in the research and development of that technology.[93] Regardless of the decision to build or buy, ultimately the end result drives benefits for the

85. Iain Macmillan & Sriram Prakash, *Fueling Growth Through Innovation*, DELOITTE 1, 1, 4 (2017), *available at* https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/corporate-finance/deloitte-uk-ma-innovation.pdf (last visited Mar. 25, 2024).

86. *Id.*

87. *Id.*

88. *Id.* at 1.

89. *See id.*

90. *See Market Capitalization of Oracle*, COMPANIESMARKETCAP , *available at* https://companiesmarketcap.com/oracle/marketcap (last visited Mar. 25, 2024).

91. *See Oracle Buys NetSuite*, ORACLE (July 28, 2016), *available at* https://www.oracle.com/corporate/pressrelease/oracle-buys-netsuite-072816.html (last visited Mar. 25, 2024).

92. *See generally id.*

93. Saikat Chaudhuri & Behnam Tabrizi, *Capturing the Real Value in High-Tech Acquisitions*, HARV. BUS. REV. (Sept. 1, 1999), *available at* https://hbr.org/1999/09/capturing-the-real-value-in-high-tech-acquisitions (last visited Mar. 25, 2024).

average consumer who could see new products entering the marketplace or higher quality product and service offerings to corporate customers.[94]

All these considerations are facets of the mergers and acquisition space within the technology sector, and the GDPR complicates them significantly. This added layer of complication comes directly from the new data processing requirements following the adoption and enforcement of the GDPR.[95] Now, not only do companies need to go through traditional due-diligence procedures, which may entail costs like hiring outside advisory firms, accounting firms, or lawyers to advise on a transaction, but in the GDPR era, data security has now become a top priority.[96] With extremely high penalties in place for failure to comply with the GDPR, a company seeking to acquire a smaller organization must consider whether the acquisition target is compliant with the GDPR. Smaller organizations may believe they are in compliance, but this may not always be the case and the potential acquirer will likely need to review various areas like supplier contracts, customers, and employees of the acquisition target. [97]

Occasionally, where an acquisition target is too small to be subject to GDPR regulation, this could necessitate a costly investment on the acquiring party to ensure that all the assets and underlying third-party contracts present are in compliance with the GDPR.[98] Under these circumstances, it may be necessary to invest significant sums of money to bring the target company into compliance, which may result in a scenario where the cost becomes too high to acquire the targeted company despite it potentially owning valuable technology necessary to the acquirer's business model.[99]

Existing agreements or contracts that a target company may have in place may also require certain amendments where there are third parties processing data on its behalf, which adds further complexities to a

94. *See id.*

95. *GDPR and the Effects on the M&A Process*, M&A WORLDWIDE (2022), *available at* https://m-a-worldwide.com/gdpr-and-the-effects-on-the-ma-process (last visited Mar. 25, 2024).

96. *See id.*

97. *See generally* Kevin Stout, *GDPR Becomes Major Factor in M&A Transactions,* LOCKTON, (Jan. 23, 2020), *available at* https://global.lockton.com/gb/en/news-insights/gdpr-becomes-major-factor-in-m-and-a-transactions (last visited Mar. 25, 2024).

98. *Id.*

99. *See generally id.*

successful acquisition.[100] Not only does data privacy regulation pose potential hurdles in the acquisition process, but it can also present companies with issues that may arise after a transaction has closed.

When an acquisition closes, some of the assets that may accompany this transaction often include the data held by the acquired company, which may bring with it unforeseen issues.[101] For example, consider the large hotel group Marriott, which faced a fine of roughly £18.4 million from the UK's Information Commissioner's Office because one of Marriott's customer databases was compromised in 2014.[102] That customer database came under Marriott's ownership following the completion of the Starwood acquisition, another major hotel company, in 2016, evidencing the incredible importance of conducting thorough due diligence of GDPR compliance factors when evaluating an acquisition.[103] Despite the fact that these systems came under Marriott's ownership following the 2016 acquisition, whose breach of those databases occurred in 2014, Marriott was ultimately held liable for the breaches of their customer's personal data.[104] Marriott was forced to pay the financial penalty due to insufficient technical and organizational measures to ensure information security for systems they came to own by an acquisition.[105] This directly evidences the important implications that data privacy regulation has placed on corporations not only in their everyday operations but also in their business-to-business transactions as corporate entities.

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100. Mikaela Dealissia et al., *Private M&A: Data Privacy and Cyber Security in Global Dealmaking*, LEXOLOGY, (Oct. 3, 2022), *available at* https://www.lexology.com/library/detail.aspx?g=0e3896f6-55f8-40b5-a8e0-0682266a0ce9 (last visited Mar. 25, 2024).

101. Suzy Bibko, *Data with Destiny: How GDPR is Changing M&A*, DATASITE, (July 2, 2021), *available at*
https://www.datasite.com/us/en/resources/insights/blog/how-gdpr-is-changing-m-and-a.html (last visited Mar. 12, 2023).

102. *Id.*

103. Jena Tesse Fox, *Marriott Completes Starwood Merger*, HOTEL MGMT., (Sept. 23, 2016), *available at*
https://www.hotelmanagement.net/transactions/marriott-completes-starwood-merger#:~:text=Long%20live%20the%20new%20Marriott,hotel%20brands%20to%20its%20portfolio (last visited Mar. 25, 2024).

104. *Marriott International Inc, Penalty Notice*, INFO. COMM'R OFF. (Oct. 30, 2020), *available at*
https://ico.org.uk/media/action-weve-taken/mpns/2618524/marriott-international-inc-mpn-20201030.pdf (last visited Mar. 25, 2024).

105. *Id.*

IV. DATA BREACHES BRING NEW COMPLEXITIES UNDER THE GDPR

Society has continued to trend more toward an ever-increasing dependence on technology and connected systems, and this movement has brought with it many benefits but also some varying degrees of risk. As technology becomes more and more complex, there are now more risks and threats of cybercrime, particularly over the past decade, for businesses operating across the internet.[106] With so many companies reliant upon their systems and connectivity, it is of the utmost importance to secure these systems and the data contained within them. Over the past three decades, cybercrime has permeated nearly all industries across the globe, targeting financial institutions, healthcare centers as well as municipal and state governments.[107] Most cybercrimes involve some form of data theft or breach of personally identifiable information ("PII") often achieved by deploying ransomware or other more sophisticated malware.[108]

Throughout the 1990s, society as a whole achieved some of the greatest communication technologies of the last 100 years which connected the globe across networks that lacked the levels of security present today.[109] Given these technological advancements were novel at the time, trust and safety controls did not develop until the rates of cybercrime began to increase. For example, in 1994, one of the first known hackings of a financial institution occurred.[110] This involved the compromise of Citibank's network where a hacker received more than $10 million in fraudulent transactions.[111] As these cyber-attacks continued to increase into the 2010s and to the present day, nations saw more sophisticated approaches to cybercrime, including targeted attacks by nation-states and criminal groups.[112] Widespread breaches of large companies housing the personal data of their users, employees, and customers have become more common. This data, referred to as PII became a large focus of the modern GDPR.

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106. *A Brief History of Cybercrime*, ARCTIC WOLF (Nov. 16, 2022), *available at* https://arcticwolf.com/resources/blog/decade-of-cybercrime/ (last visited Mar. 25, 2024).

107. *Id.*

108. *Id.*

109. *Id.*

110. Amy Harmon, *Hacking Theft of $10 Million from Citibank Revealed*, L.A. TIMES (Aug. 19, 1995), *available at* https://www.latimes.com/archives/la-xpm-1995-08-19-fi-36656-story.html (last visited Mar. 25, 2024).

111. *Id.*

112. Arctic Wolf, *supra* note 106.

After a security breach, or more specifically, a breach which implicates PII, the GDPR requires that companies notify all appropriate supervisory authorities within seventy-two hours upon discovery of a breach.[113] In the event of a breach that triggers the notice requirement, data controllers of the company must report to their supervisory authority the nature of the personal data compromised, approximations of the number of data subjects, number of records impacted, describe the likely consequences of the breach, and outline any measures taken or proposed to be taken to mitigate any possible adverse effects.[114] Following this reporting requirement is essential under the GDPR.[115] For example, any shortcomings can leave a company already suffering from the results of a breach subject to administrative fines such as €20,000,000 or 4% of total worldwide annual turnover under article 83(4)(a) of the GDPR.[116]

GDPR fines imposed for mishandling EU-citizen data can also be imposed upon any company that operates outside of the EU, as evidenced by the varying degree of financial penalties levied against companies like the hotel group Marriott in 2020.[117] These companies operate on a global scale, progressively amassing large amounts of PII of EU citizens and other nations.[118] There is a high level of scrutiny on large financial institutions, technology companies, and governmental organizations alike to secure their internal data not only from the likes of cybercriminals, but also to prevent any reprimand or financial penalty levied against them.[119]

Companies had to adopt structured internal cybersecurity policies, often making large investments to bolster their protection from cybercriminals and to avoid internal data leaks or the misuse of PII.[120] Data privacy protective measures have also seen rapid growth over the past two decades in the cybersecurity industry as a whole, where companies

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113. *Guidelines 01/2022 on Personal Data Breach Notification*, EUR. DATA PROT. BD. (Oct. 2022), *available at* https://edpb.europa.eu/system/files/2022-10/edpb_guidelines_202209_personal_data_breach_notification_targetedupdate_en.pdf (last visited Mar. 25, 2024).

114. *Id.*

115. *Id.*

116. *Art. 83 GDPR – General conditions for imposing administrative fines*, GDPR INFO. (May 27, 2018), *available at* https://gdpr-info.eu/art-83-gdpr/ (last visited Mar. 25, 2024).

117. Information Commissioner's Office, *supra* note 104.

118. *Id.*

119. *See* Max Freedman, *How Businesses Are Collecting Data (And What They're Doing With It)*, BUS. NEWS DAILY, (Feb. 21, 2023), *available at* https://www.businessnewsdaily.com/10625-businesses-collecting-data.html (last visited Mar. 25, 2024).

120. *See A Privacy Reset from Compliance to Trust-Building*, PWC *available at* https://www.pwc.com/us/en/services/consulting/cybersecurity-risk-regulatory/library/privacy-reset.html (last visited Mar. 25, 2024).

have begun to offer entire suites of software with a main goal of protecting a company's internal data.[121] As GDPR penalties and industries have grown and we as a society move toward the modern age of data privacy regulations, it is important that a balance is struck between privacy protection controls and penalties in order to avoid stifling any form of innovation. In the world of technology startups, the levels of sophistication often required by the GDPR in terms of data privacy protections, data control officers, internal cybersecurity software services, can impose large financial costs for smaller organizations.[122] This can quickly pose problems to smaller companies that do not have adequate safety measures in place.[123] One of the more common issues that comes up in modern merger and acquisition discussions within the technology sector in particular is whether a target company has adequate information security measures and protocols in place at the time of the due-diligence process.[124] The GDPR and other international privacy regulations are trending toward more stringent measures and continue to change year after year, but these trends may inadvertently stifle innovation in the technology sector.

V. GLOBAL DATA PRIVACY REGULATION AND THE IMPACT ON DIGITAL INNOVATION

Since the GDPR's inception, it and global regulatory enforcement mechanisms similar to it have changed the manner in which new technology companies and long-standing companies approach and interact with global markets.[125] A key factor at play in the relationship between companies, global markets, and governmental bodies is that of regulation. An important balance must be struck as to not over-regulate. Overregulation often presents where a high bar for compliance costs ultimately slow innovation by disincentivizing new investments.[126]

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121. *Id.*

122. *Id.*

123. *Id.*

124. Huddleston, *supra* note 74.

125. Benjamin Mueller, *A New Study Lays Bare the Cost of the GDPR to Europe's Economy: Will the AI Act Repeat History?*, CTR. FOR DATA INNOVATION (Apr. 9, 2022), *available at* https://datainnovation.org/2022/04/a-new-study-lays-bare-the-cost-of-the-gdpr-to-europes-economy-will-the-ai-act-repeat-history/ (last visited Mar. 25, 2024).

126. Michael Pisa et al., *Why Data Protection Matters for Development: The Case for Strengthening Inclusion and Regulatory Capacity*, CTR. FOR GLOB. DEV. (Dec. 2021), *available at* https://www.cgdev.org/sites/default/files/why-data-protection-matters-for-development.pdf (last visited Mar. 25, 2024).

The EU in particular has seen negative impacts to their digital economy and the rates of new application development since the enforcement of the GDPR.[127] In a recent study reporting on the GDPR's impact on mobile app development, at the start of GDPR enforcement the EU saw the exit of a third of all mobile apps available in the marketplace.[128] In addition, there was a drop of roughly 47.2 percent in new entry of mobile applications in the EU market and the same study shows there is likely a 30.6 percent reduction in aggregate usage and revenue for EU based mobile apps.[129] Further, the GDPR has also negatively impacted companies that target European consumers where firms who were subject to regulation saw an eight percent decline in profits and a two percent reduction in overall sales.[130]

Not only has the EU's economy overall seen harmful impacts, but these harmful impacts have been laid disproportionately across small and midsize enterprises ("SME") in the EU.[131] Large tech giants are notoriously better equipped to handle the impact of GDPR regulation than that of their small and midsized counterparts simply from a resource standpoint.[132] Following the adoption and later enforcement of the GDPR, tech giants like Facebook, Google, and Apple were able to rapidly adapt to GDPR enforcement by employing means such as increased investment in lobbying, and hiring new engineers, lawyers, and managers to ensure compliance and offset costs.[133] In leveraging their stature as tech giants, those same companies increased their lobbying efforts, ranking among

127. Benjamin Mueller, *More Evidence Emerges That the GDPR Has Inflicted Lasting Damage to the EU's Digital Economy*, CTR. FOR DATA INNOVATION (May 11, 2022), *available at* https://datainnovation.org/2022/05/more-evidence-emerges-that-the-gdpr-has-inflicted-lasting-damage-to-the-eus-digital-economy/ (last visited Mar. 25, 2024).

128. Rebecca Janßen et al., *GDPR and The Lost Generation of Innovative Apps,* NAT'L BUREAU OF ECON. RSCH. (May 2022), *available at* https://www.nber.org/system/files/working_papers/w30028/w30028.pdf?utm_campaign=PANTHEON_STRIPPED&amp%3Butm_medium=PANTHEON_STRIPPED&amp%3Butm_source=PANTHEON_STRIPPED (last visited Mar. 25, 2024).

129. *Id.*

130. Chinchih Chen et al., *Privacy Regulation and Firm Performance: Estimating the GDPR Effect Globally*, UNIV. OF OXFORD, OXFORD MARTIN SCHOOL (Jan. 6, 2022), *available at* https://www.oxfordmartin.ox.ac.uk/downloads/Privacy-Regulation-and-Firm-Performance-Giorgio-WP-Upload-2022-1.pdf (last visited Mar. 25, 2024).

131. Giorgio Presidente & Carl Benedikt Frey, *The GDPR effect: How Data Privacy Regulation Shaped firm Performance Globally*, VOXEU (Mar. 10, 2022), *available at* https://cepr.org/voxeu/columns/gdpr-effect-how-data-privacy-regulation-shaped-firm-performance-globally (last visited Mar. 25, 2024).

132. *Id.*

133. *Id.*

the top five corporate spenders for lobbying the EU with annual budgets that exceed €3.5 million.[134]

Whereas in the SME space, SMEs have seen a decrease in their market share, as a result of their inability to adjust as quickly and effectively to the GDPR as the large technology enterprises were able to.[135] A key consideration in the studies that show disproportionate impacts on SMEs involves the consent to share data requirement of the GDPR.[136] Given that under the GDPR companies must maintain affirmative consent to share customer data, larger information technology companies can more easily allocate resources to structured data consent management divisions than their SME counterparts.[137]

The disadvantage that SMEs face is evidenced plainly by Citymapper, a city navigation mobile application launched in the UK that despite securing £6.7m of new cash in just 24 hours, suffered GDPR specific growing pains.[138] Similar to many SMEs operating in the technology sector, most SMEs approach early-stage revenue generation by selling data.[139] Citymapper amassed large amounts of user and public data, developed a strong model to provide it's users with a useful service for travel, yet failed to turn a profit and ultimately burned capital.[140] Typically the datasets on nearly 50 million users would be packaged and sold to interested parties seeking to harness the underlying data on those 50 million users, but this is an expensive undertaking to seek the affirmative consent from those same users to comply with GDPR requirements.[141] As a result, Citymapper found itself in an exceedingly difficult position like other similar SMEs to turn a profit and continue to provide a service to its users.[142]

Turning to more novel forms of technology and innovation, the GDPR has broadly hurt the EU's position as a haven for private-sector investment in technologies like AI.[143] The EU failed to secure a foothold

134. *Id.*

135. Muller, *supra* note 125.

136. Chen, *supra* note 130.

137. *Id.*

138. Taylor, *supra* note 2.

139. *Id.*

140. *Id.*

141. *Id.*

142. Janßen, *supra* note 128.

143. Benjamin Mueller, *Is the EU Doing Enough to Address Europe's Digital Investment Shortfall?*, CTR. FOR DATA INNOVATION (Apr. 20, 2021), *available at* https://datainnovation.org/2021/04/is-the-eu-doing-enough-to-address-europes-digital-investment-shortfall/ (last visited Mar. 25, 2024).

as the home to large technology firms, holding only two of the thirty largest technology firms by market cap.[144] As the EU has adopted the first binding regulation to regulate AI, this could potentially impose even more of a burden on the EU's position as a center for novel technology development harnessing AI.[145]

In 2020, private-sector AI funding for startups in Europe sat at roughly around $4B, far from the levels of the United States and China, at $36B and $25B respectively.[146] Further, beyond AI alone, Europe's entire digital economy has seen a decline in private investment following the GDPR's enforcement.[147] Global markets have seen stark differences in venture capital investment with the EU securing only $40B in venture capital investment, a "small" amount when compared to the $150B of private investment in the United States.[148] Despite the EU's laggard position in the race to develop AI technology from a private investment standpoint, it has solidified itself as the first major body to propose and pass a legal regulatory framework for AI.[149]

However, the European Commission's goals to "facilitate the development of a single market for lawful, safe and trustworthy AI applications and prevent market fragmentation," will require companies in the EU to collect large amounts of data.[150] AI development generally requires large amounts of data, typically data on individual persons, in order to process,

144. CompaniesMarketCap, *supra* note 90.

145. Shiona McCallum, et al., *MEPs Approve World's First Comprehensive AI Law*, BBC (Mar. 12, 2024), *available at https://www.bbc.com/news/technology-68546450* (last visited Apr. 12, 2024).

146. Kevin Körner, *How will the EU become an AI Superstar?,* DEUTSCHE BANK (Mar. 18, 2020), *available at* https://www.dbresearch.com/PROD/RPS_EN-PROD/PROD0000000000505746/%28How%29_will_the_EU_become_an_AI_superstar%3F.pdf?undefined&realload=njg/hwUiq~NzVtY1gqBJw-TeZefzEboXVM3~bNnAogi0htyygawyhQr13CTgAcC/l (last visited Mar. 25, 2024).

147. *Id.*

148. Gené Teare, *European VC Report 2020: Strong Fourth Quarter Closes Out 2020*, CRUNCHBASE, (Jan. 21, 2021) *available at* https://news.crunchbase.com/startups/european-vc-report-2020-strong-fourth-quarter-closes-out-2020/ (last visited Jan. 8, 2024); Pitchbook et al., *Venture Monitor Q4 2020*, PITCHBOOK (2020), available *at* https://files.pitchbook.com/website/files/pdf/Q4_2020_PitchBook_NVCA_Venture_Monitor.pdf (last visited Mar. 25, 2024).

149. Future of Life Institute, *The Artificial Intelligence Act*, FUTURE OF LIFE INS. (Feb. 27, 2024), *available at* https://artificialintelligenceact.eu/ (last visited Mar. 25, 2024); McCallum, *supra* note 145.

150. *Laying Down Harmonised Rules On Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, EUR. COMM'N (Jan. 4, 2021), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0206 (last visited Mar. 25, 2024).

train, and develop their algorithms.[151] This data is already increasingly held by many companies based in the United States or China which have already amassed large data profiles on their users, with adequate GDPR compliance measures readily in place.[152] Herein lies the dilemma that the EU faces, balancing the interests in protecting the rights of EU citizens and their privacy, with that of preventing the creation of barriers to digital innovation.[153]

VI. REGULATORY FRAMEWORK IS CUMBERSOME IN ITS CURRENT FORM

The GDPR itself offers guidance to those who fall under its jurisdiction, ideally providing that any enforcement actions or investigations will be decided "without delay" under article 60(3) of the GDPR.[154] This may be the goal across the vast-reaching privacy regulation, however, in practice, it does not always occur without delay.[155] The current regulatory framework allows for a per-member state approach, in practice, a "one-stop shop" system which allows corporations to subject themselves to enforcement on cross-border data processing issues in the state where their European headquarters is located.[156] This framework has been met with much pushback as some nations have been slow to pursue enforcement, and others have been slow to provide decisions "without delay."[157] Ireland's Data Protection Commission, in particular, has struggled to issue fines and provide draft decisions regarding enforcement on questionable data processing practices by certain big tech players.[158]

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151. James E. Bessen, et al., *GDPR and the Importance of Data to AI Startups*, N.Y.U. STERN SCH. OF BUS. (Sept. 10, 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3576714 (last visited Mar. 25, 2024).

152. Körner, *supra* note 146.

153. Axel Voss, *How to Bring GDPR into the Digital Age*, POLITICO (Mar. 25, 2021), *available at* https://www.politico.eu/article/gdpr-reform-digital-innovation/ (last visited Jan. 8, 2024).

154. *Irish DPC Burns Taxpayer Money over Delay Cases*, NONE OF YOUR BUS.–EUR. CTR. FOR DIGIT. RIGHTS, (Apr. 28, 2022), *available at* https://noyb.eu/en/irish-dpc-burns-taxpayer-money-over-delay-cases (last visited Mar. 25, 2024).

155. *Id.*

156. Data Protection Commission, *One-Stop Shop (OSS) Cross-Border Processing and the One Stop Shop*, DATA PROTECTION COMM'N, *available at* https://www.dataprotection.ie/en/organisations/international-transfers/one-stop-shop-oss#:~:text=The%20GDPR%20provides%20a%20new,it%20applies%20to%20your%20organisation (last visited Mar. 25, 2024).

157. Ilse Heine, *3 Years Later: An Analysis of GDPR Enforcement*, CTR. FOR STRATEGIC & INT'L STUDIES (Sept. 13, 2021), *available at* https://www.csis.org/blogs/strategic-technologies-blog/3-years-later-analysis-gdpr-enforcement (last visited Mar. 25, 2024).

158. None of Your Business–European Center for Digital Rights, *supra* note 154.

These problems have brought up more significant questions for the Irish Data Protection Commission, which has taken the lead on enforcement for some larger technology companies under the "one-stop shop" framework and may be suffering from understaffing and resource issues.[159] Ireland holds the responsibility for overseeing the regulation of roughly half a billion EU citizen's data.[160] Ireland's High Court has struggled in its enforcement of larger technology companies, notably only releasing a draft decision of its enforcement action against WhatsApp and Instagram on April 1, 2022—a striking forty-six months after complaints were initially filed.[161] This led activist groups to petition for answers and further information as to the status of enforcement actions like those against WhatsApp and Instagram.[162] Underfunded GDPR enforcement vehicles will continue to complicate not only the process by which companies are able to process data in pursuit of their corporate missions, but also hinder EU citizens ability to understand if their regulators are in fact adequately policing big tech.

VII. AS TECHNOLOGY CONTINUES TO INNOVATE, NEW REGULATORY CONCERNS ARISE

As the Commission moves forward in its effort to supplement the GDPR with a new regulatory mechanism explicitly catered to the use of AI, the European Commission should carefully consider the importance of developing these technologies.[163] AI has the potential to serve as a "key element" in areas such as addressing climate change, track the spread of diseases, and even aid in developing vaccines and medical therapies.[164] Though a highly speculative assessment, with so many potential uses, AI has the potential to impact the world economy "at a staggering $13-16 trillion by 2030."[165] The EU has served as the pioneer for data privacy regulation frameworks since its first effort with the enforcement

159. Marie O'Halloran, *"Serious Shortage" of Data Protection Staff a Huge Risk to Ireland's Reputation*, IRISH TIMES (Sept. 23, 2020), *available at* https://www.irishtimes.com/news/politics/serious-shortage-of-data-protection-staff-a-huge-risk-to-ireland-s-reputation-ff-senator-1.4362865 (last visited Mar. 25, 2024).

160. *Id.*

161. None of Your Business–European Center for Digital Rights, *supra* note 153.

162. *Id.*

163. Mueller, *supra* note 143.

164. Körner, *supra* note 146.

165. *Id.*

of the GDPR.[166] Now, it has the opportunity to take another market-making step in the AI space. Considering the issues that are currently present across global markets, where nations have begun to adopt their own data privacy standards, a complex web of regulations has formed.[167] This web of regulation has resulted in disparate effects on SMEs, large tech giants, and companies across all industries that leverage any form of personal data.[168]

As the EU attempts to step forward yet again in setting the tone for regulating AI, it is imperative that a common approach to the implementation and enforcement of data protection rules occurs on a global scale.[169] With the U.S. keen on adding to the global regulatory framework that is currently in place across the EU and the UK, albeit an effort that will likely take years to formalize, collective action is imperative to reduce complexity.[170] The EU has long provided for each of its twenty-seven member states, the authority to leverage their own data protection authorities and enforcement arms, but this may have fallen short of its goal. With AI regulation rapidly approaching as the next frontier ripe for regulatory intervention, the global community of nations must come together to strike a balance. This balance must focus on balancing the protection of individuals' fundamental right to privacy while not creating oppressive barriers to the development of digital innovations, including AI.[171]

The UK has already taken steps toward untangling some of the more cumbersome regulations currently in force under the EU GDPR, potentially driving more complexity.[172] The UK has published a revision to the existing UK GDPR which is designed with feedback from various businesses and data experts to create less stringent requirements on record

166. European Comm'n, *A European Approach to Artificial Intelligence*, EUR. COMM'N (2022), *available at* https://digital-strategy.ec.europa.eu/en/policies/european-approach-artificial-intelligence (last visited Mar. 25, 2024).

167. Körner, *supra* note 146.

168. *See* Prof. Thomas B. . .ck, et. al., *Digital SME Position Paper on the EU AI Act*, EUR. DIGIT. SME ALL. (Sept. 2021), *available at* https://www.digitalsme.eu/digital/uploads/DIGITAL-SME-Position-Paper-AI-Act-FINAL-DRAFT-1.pdf (last visited Mar. 25, 2024).

169. Voss*, supra* note 153.

170. Godlasky, *supra* note 73.

171. *See* Vincent Manancourt, *Top EU Official Warns Privacy Rules May Need to Change*, POLITICO (Dec. 2, 2021), *available at* https://www.politico.eu/article/eu-privacy-regulators-clash-gdpr-enforcement/ (last visited Mar. 25, 2024).

172. John Georgievski & Gregory Szewczyk, *The UK Publishes Bill to Update UK GDPR,* BALLARD SPAHR LLP (Mar. 9, 2023), *available at* https://www.jdsupra.com/legalnews/the-uk-publishes-bill-to-update-uk-gdpr-4040942/ (last visited Mar. 25, 2024).

keeping and cookies consent, among other specific changes under the revised UK GDPR standards.[173] This step is presumably an effort toward reducing the degree of complexity and ensuing costs that UK businesses face, with estimates projected at a reduction of four billion pounds to the UK economy over the next ten years.[174]

As the lighthouse of data privacy regulation, the EU comes again with the opportunity to fall back on its original aspirations to create a unified data privacy regulation that may serve as a beacon to other nations.[175] Rather than the U.S. approaching the ADPPA in a vacuum, a referendum, among all major nations, to create a unified approach to data privacy and AI regulation could provide for much clearer guidelines as companies do business in the digital age.[176] As opposed to siloed regulation coming from various nation-states including, among others, the UK, EU, and the U.S., an international data privacy regulatory body could be formed akin to the International Court of Justice which could handle the regulation of international corporations.

Should a company primarily do business within one nation's borders, regulation could continue to be centralized within that nation but with an overarching international regulatory body to provide oversight and collaboration on enforcement. Today, where large corporations ultimately face the prospect of being subject to financial penalties from more than one regulatory body, this can pose an overarching threat to the technology sector's ability to operate and develop groundbreaking technological advancements freely.

CONCLUSION

Recalling the same sentiment that led to the cornerstone principle of all individuals' right to privacy that the Universal Declaration of Human Rights codified, a modern, common approach to regulation may help to untangle the web that companies face today.[177] The GDPR in its current form, has negatively impacted digital economies, small and midsize enterprises alike, and shown slow judicial progress on adequately delivering

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173. *Id.*

174. Natasha Lomas, *UK Takes Another Bite at post-Brexit Data Protection Reform–with 'New GDPR,'* TECHCRUNCH (Mar. 8, 2023), *available at* https://techcrunch.com/2023/03/08/uk-data-reform-bill-no-2/ (last visited Mar. 25, 2024).

175. *See* Manancourt, *supra* note 171.

176. *See* Mark MacCarthy, *What U.S. Policymakers Can Learn from the European Decision on Personalized Ads,* BROOKINGS (Mar. 1, 2023), *available at* https://www.brookings.edu/blog/techtank/2023/03/01/what-u-s-policymakers-can-learn-from-the-european-decision-on-personalized-ads/ (last visited Mar. 25, 2024).

177. *See id.;* Heine, *supra* note 157.

enforcement decisions. This process will only become increasingly complex as more regulatory frameworks emerge. Without a global concerted effort to create new fundamental guidelines regarding AI and data privacy laws generally, the progressive privacy rights that the EU pioneered under the GDPR may continue to create inequitable and disjointed global regulatory frameworks in the decades to come.

INTERNATIONAL LL.M. STUDENTS AND THEIR EXPERIENCES: A CASE STUDY OF SYRACUSE UNIVERSITY COLLEGE OF LAW'S LL.M. PROGRAM

Arlene S. Kanter[†]
Andrew Horsfall[†]
Zhijuan Niu[†]
Qi Wu[†]
Dr. Moon-Heum Cho[†]

[†]*Professor of Law, Laura J. and L. Douglas Meredith Professor of Teaching Excellence; Faculty Director, International Programs; Founding Director, Disability Law and Policy Program, Syracuse University. All correspondence regarding this article may be sent to Professor Kanter at kantera@syr.edu.* *We wish to thank the students in Professor Cho's Spring 2020 Techniques in Educational Evaluation course; Visiting Scholar, Hojin Choi, Esq. (SU LAW '16); and my research assistants, Jessica Senzer (SU LAW '23 and M. S. Ed. '23) and Marie LeRoy (SU Law '24 and M. S.Ed. '24) for assistance on earlier drafts.*

[†]*Assistant Dean of International Programs.*

[†]*Ph.D. student, Department of Instructional Design, Development & Evaluation, School of Education, Syracuse University.*

[†]*Ph.D. student, Department of Instructional Design, Development & Evaluation, School of Education, Syracuse University.*

[†]*Associate Professor, Program Director, Department of Instructional Design, Development & Evaluation, School of Education, Syracuse University.*

INTRODUCTION

Universities and colleges have opened their doors to international students for decades.[1] More recently, U.S. law schools have developed and expanded programs for international students by creating specialized graduate LL.M. programs. These LL.M. Programs offer graduates from law schools in other countries the opportunity to continue their legal education in the United States. Although the number of such programs have proliferated in many years, little research has been conducted about these programs. This Article seeks to fill this gap. This Article reports on the first empirical evaluative study about the experiences of LL.M. students and alumni, their professors, and their peer mentors at Syracuse Law's LL.M. Program.

The Article begins in Part I with a brief discussion of the background of LL.M. programs in the United States, followed in Part II by a discussion of the benefits of international legal education to law schools and their international and U.S.-born students. Part III discusses the findings of a recent collaborative research project conducted between the Office of International Programs of the Syracuse University

College of Law ("Syracuse Law") and a team of Program Evaluation experts of the Syracuse University School of Education. This study aimed to assess the efficacy and outcome of the Syracuse LL.M. Program, through surveys and interviews of Syracuse Law LL.M. students, alumni, faculty, and peer student mentors. The findings of this study may inform other law schools about factors that contribute to the success of an LL.M. Program as well as serve as a model for the evaluation of other programs. Based on the study's findings of the overall success of the LL.M. Program at Syracuse Law, this Article may also provide an impetus for the development of future LL.M. programs and initiatives.

I. AN OVERVIEW OF LL.M. PROGRAMS IN THE UNITED STATES

In recent years, the number of LL.M. programs at U.S. law schools has increased dramatically.[2] In 2012, 55 of the 201 ABA-approved law schools offered

1. *See* Carole Silver, *Globalization and the Legal Profession: States Side Story: Career Paths of International LL.M. Students, or "I Like to be in America,"* 80 FORDHAM L. REV. 2383, 2413 (2012) (explaining that law schools enroll international students in LL.M. and J.D. programs).

2. Kathleen Darvil & Carrie W. Teitcher, *Resetting the Clock for International Students: A Call for the ABA to Establish Standards for LL.M. Students and for Law Schools to Rethink Their LL.M. Curricula*, 4 INT'L J. BUS. & APPLIED SCI. 10, 11 (2018).

LL.M. programs.[3] By 2022, that number had increased nearly threefold, to 153 programs.[4] As the number of LL.M. programs has increased, so too has the number of international students enrolled in J.D. degree programs.[5] In 2009, fewer than two percent of J.D. students were international students.[6] As of 2019, this percentage increased to more than three percent, representing an eighty-one percent increase in ten years, in the number of international students enrolled in J.D. programs in the United States.[7] Despite the increase in the number of international students who are

3. *Id*. at 10, n. 11 (noting that, in 2012, "At least 114 law schools offer LL.M. or similar one-year programs. . .' fifty-five of which offer U.S. Legal Studies Programs for Foreign Lawyers or International Students"); *see also* Jennifer Smith, *Crop of New Law Schools Opens Amid a Lawyer Glut*, WALL ST. J., Jan. 31, 2013 (stating that there were 201 ABA-approved law schools in 2012); *see also* ABA, *Legal Education*, AM. BAR ASS'N, *available at* https://www.abalegalprofile.com/legal-education.php (last visited Apr. 25, 2024).

4. *See ABA List of Approved Law Schools*, AM. BAR ASS'N, *available at* https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/ (last visited Apr. 25, 2024) (As of January 2023, the American Bar Association has accredited and approved 199 law schools conferring a J.D. degree); *see also Office Guide to LL.M, Master's, and Certificate Programs,* LAW SCH. ADMISSIONS COUNCIL, *available at* https://www.lsac.org/llm/choosing-a-law-school/alpha-llm-program-guide (last visited Apr. 25, 2024) (153 law schools offer LL.M. International Law Programs or Certificate Programs out of the 199 ABA accredited law schools); *see also Post J.D./Non J.D. Programs by School*, AM. BAR ASS'N, *available at* https://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/programs_by_school.html (last visited Apr. 25, 2024) (Over 150 law schools presently offer post-J.D. graduate programs).

5. *Section of Legal Education and Admission to the Bar – ABA Required Disclosures*, AM. BAR ASS'N, *available at* http://www.abarequireddisclosures.org/Disclosure509.aspx (last visited Apr. 25, 2024); *Statistics Archives*, AM' BAR ASS'N, *available at* https://www.americanbar.org/groups/legal_education/resources/statistics/statistics-archives/ (last visited Apr. 25, 2024).

6. The term "International students" here refers to students holding a F1, M1, or J1 Visa. *See Student Visas*, INT'L STUDENT, https://www.internationalstudent.com/study_usa/preparation/student-visa/ (last visited Apr. 25, 2024); 8 U.S.C. §1101(F)(i); 8 U.S.C. §1101(J); 8 U.S.C. §1101(M)(i); *Section of Legal Education and Admission to the Bar Enrollment Date 2020-2022*, AM. BAR ASS'N, *available at* https://www.americanbar.org/groups/legal_education/resources/statistics/ (last visited Apr. 25, 2024); As of 2022, 2.1 percent of the total 116,723 J.D students are international students. *See Statistics*, AM. BAR ASS'N, (Feb. 10, 2023), *available at* https://www.americanbar.org/groups/legal_education/resources/statistics/ (last visited Apr. 25, 2024) (providing data as to 1L enrollment by gender and race/ethnicity and indicating that in 2022, 3,507 J.D. students were nonresident aliens).

7. *See infra* Table 1 (illustrating that in 2009, there were 2595 total foreign national students, while in 2016, that number rose to 3,530, and highlighting an increase in the number of J.D. students that are international students); *2022 Standard 509 Information Report Data Overview*, AM. BAR. ASS'N (Dec. 19, 2022), *available at* https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/Questionnaires/2022/2022-aba-standard-509-data-overview-final.pdf (last visited Apr. 25, 2024) (indicating that in 2022, 24,134 students enrolled in other than J.D. programs, including LL.M. programs, which is an increase of 3270 students enrolled in other than J.D. programs since 2021, highlighting an increase in the number of international students enrolling in law

enrolling in U.S. law schools, little is known about them or the programs in which they enroll.[8]

One reason for the lack of information about LL.M. programs and their students is that LL.M. programs, unlike J.D. programs, are not subject to any external approval, accreditation, or reporting requirements.[9] Neither the ABA nor any other

schools). Some states define "foreign law graduate" for the purpose of bar admission, such as New York State. *See Foreign Law Graduate Eligibility - New York Bar Exam*, N.Y. BAR EXAMINERS, *available at* https://www.newyorkbarexam.com/foreign-law-graduate-eligibility/ (last visited Apr. 25, 2024). *Table 1* below shows the gradual increase in the number of international J.D. students over nine years, together with the steady decrease in the total number of J.D. students. (Note: Three decimal places were rounded off in the total percentages shown).

Table 1: The Number of Non-Resident International JD Students by Years

Year	Non-resident international JD Students	Total JD Students	Percentage
2009	2,595	144,645	1.79 percent
2010	2,500	148,596	1.68 percent
2011	2,609	146,930	1.78 percent
2012	2,748	139,504	1.96 percent
2013	2,972	128,799	2.31 percent
2014	3,232	119,845	2.70 percent
2015	3,641	113,876	3.20 percent
2016	3,530	111,095	3.18 percent
2017	3,656	110,176	3.32 percent
2018	3,703	111,581	3.32 percent
2019	3,653	112,879	3.24 percent

8. *See* Frank Sullivan, Jr., *International LL.M. Students: A Great Resource for U.S. Law Schools,* 22 IND. INT'L & COMP. L. REV. 219, 224 (2012) (reviewing George E. Edwards, *LL.M. Roadmap: An International Student's Guide to U.S. Law School Programs* (2011)).

9. *Chapter 5, ABA Standards and Rules of Procedure for Approval of Law Schools 2019-2020,* AM. BAR ASS'N (2019), *available at* https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-and-rules-of-procedure.pdf (last visited Apr. 25, 2024); *see Council Statements 2013-2014*, AM. BAR ASS'N (2013), *available at* https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_council_statements.authcheckdam.pdf (last visited Apr. 25, 2024) (Council Statement 1 indicates that the American Bar Association's approval of a law school extends only to the first professional degree in law, thereby excluding LL.M. degrees from eligibility for ABA approval); s*ee also* Helmut Kohl, *LEGAL CULTURE: LL.M. Programs: The Frosting on the Cake of Legal Education?,* 4 GERMAN L. J. 735, 737 (2003) (finding that while the ABA closely monitors primary law degree programs, it does not accredit or supervise LL.M programs).

entity collects or maintains any centrally collected data about LL.M. programs, their outcomes, or their students.[10]

Despite this lack of data, some scholars have begun to collect information about LL.M. Programs, anecdotally. The next section of this Article will discuss the scholarship that has been conducted to date about LL.M. programs and their students.[11] None of these articles, however, involve the type of empirical research conducted about Syracuse Law's LL.M. Program, as discussed in Part III. Following Part II's discussion of what we currently know about the advantages of LL.M. Programs, the existing literature, Part III discusses the first-of-its-kind mixed method (qualitative and quantitative) study of Syracuse Law's LL.M. Program.

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10. Law schools are required to provide data to the ABA on their compliance with the ABA Standards. *See Chapter 5, ABA Standards and Rules of Procedure for Approval of Law Schools 2019-2020*, AM. BAR ASS'N, *available at* https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-and-rules-of-procedure.pdf (last visited Apr. 25, 2024). Standard 509, for example, requires law schools to submit an Annual Questionnaire that includes information and data on a range of issues, including the number and ethnicity of J.D. students. *See Guide to Compilation – All Schools' Data, ABA Standard 509 Information Report Spreadsheets*, AM. BAR ASS'N, *available at* http://www.abarequireddisclosures.org/Disclosure509.aspx (last visited Apr. 25, 2024). However, Standard 509 does not apply to LL.M. programs. Instead, the only requirement the ABA imposes on law schools relevant to LL.M. programs is included in Standard 313. Standard 313 prohibits all "degree program(s) other than [the] J.D. degree program" unless the following situations apply: (a) the law school is fully approved; (b) the ABA Council has granted acquiescence in the program; and (c) the degree program will not interfere with the ability of the law school to operate in compliance with the Standards and to carry out its program of legal education. *Id.*; *see also Chapter 3, ABA Standards and Rules of Procedure for Approval of Law Schools 2019-2020,* AM. BAR ASS'N, *available at* https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-and-rules-of-procedure.pdf (last visited Apr. 25, 2024). According to this Standard, all law schools seeking to start a new LL.M. program, or any other new degree-granting program must seek and obtain ABA Acquiescence. One of the grounds for acquiescence is that the new program will "not interfere with the ability of the law school to operate in compliance with the Standards and to carry out its program of legal education." Law schools typically interpret Standard 313 to mean that LL.M. programs (and other law school programs such as S.J.D. programs) may not interfere with or dilute the school's J.D. program, but no ongoing supervision or acquiescence by the ABA is required.

11. *See e.g.*, Carole Silver, *States Side Story: Career Paths of International LL.M. Students, or I Like to Be in America*, 80 FORDHAM L. REV. 2383, 2394 (2012); Carole Silver, *Perspectives on International Students' Interest in U.S. Legal Education: Shifting Incentives and Influence,* 49 NEW ENG. L. REV. 463, 465 (2015); Carole Silver & Swethaa S. Ballakrishnen, *Sticky Floors, Springboards, Stairways & Slow Escalators: Mobility Pathways and Preferences of International Students in U. S. Law Schools*, 3 UC IRVINE J. INTER. TRANSACTIONAL AND COMP. L. 39, 60 (2018).

II. ADVANTAGES OF LL.M. PROGRAMS

In order to practice law in the United States, any student – U.S. or foreign born – must complete certain requirements. These requirements typically include graduating from an ABA-accredited law school with a J.D. degree, passing a state bar exam, and gaining admission to a state bar, in compliance with the state bar association's rules for admission.[12] No LL.M. degree is required to practice law in any state or federal jurisdiction in the U.S. Even for those law graduates who wish to enter the legal academy, an LL.M. is not required. In fact, due to the increasing interdisciplinary nature of legal education, many law schools now favor faculty candidates with advanced degrees in fields other than law.[13] As a result, LL.M. programs in the U.S. are not designed to attract students from the United States.[14] Instead, most LL.M. programs are aimed at international lawyers and law graduates who received their first degree in law in another country, and who seek to continue their legal studies in the U.S. for professional or personal reasons.[15]

A. The Benefits of LL.M. Programs to International Students

For international lawyers, an LL.M. degree from an ABA-accredited law school is a highly coveted credential that will hopefully increase their job prospects as well as their professional standing in their home countries.[16] For some, it is the "obvious next step" in their careers.[17] For others, it may open up opportunities for

12. Sullivan, Jr., *supra* note 8 at 227-28.

13. *See generally* Heather A. Haveman & Ogi Radic, *Educational Background and Stratification in the Legal Academy: Invasion of the Body Snatchers … or More of the Same?*, 21 J. GENDER RACE & JUST. 91 (2017).

14. *See International Lawyers Getting an LLM in the USA*, INT'L STUDENT, *available at* https://www.internationalstudent.com/study-law/international-llm/ (last visited Apr. 25, 2024) (stating that an LL.M. degree is most often requested by applicants to the bar who were educated in or practiced outside the U.S.). On exception is the Master of Laws Programs in Tax, which are popular with U.S. students, as well as international students. *See e.g.*, *Program Overview: Master of Studies in Law in Taxation*, NYU LAW, *available at* https://www.law.nyu.edu/llmjsd/taxation (last visited Apr. 25, 2024).

15. Online Master of Legal Studies Programs, *Guide to Master of Laws (LL.M.) Programs*, 2U INC., *available at* https://onlinemasteroflegalstudies.com/law-degrees/llm/ (last visited Apr. 25, 2024) (stating that there are LL.M. programs offering concentrations, including but not limited to, concentrations in Global Food Law (Michigan State University), American Legal Studies (Regent University), Health Law (Seton Hall University), and Advocacy (Stetson University)).

16. Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers*, 14 CARDOZO J. INT'L & COMP. L. 143, 156 (2006).

17. Swethaa Ballakrishnen, *Homeward Bound: What Does a Global Legal Education Offer the Indian Returnees?*, 80 *FORDHAM L. REV.* 2441, 2463 (2012) (finding that for many students, a global legal education is valuable and that an LL.M. is an "obvious" next step after obtaining an LL.B. or bachelor's degree in law).

legal employment and residency in the United States.[18] Although an LL.M. degree is not a necessary prerequisite for law jobs in either the U.S., the LL.M. degree has been shown to be a prestigious, and even necessary, credential for certain jobs in some countries.[19] In fact, many international law students who enroll in LL.M. Programs report the value of the degree when seeking employment in their home countries.[20] Foreign law graduates have described the "halo advantages" that comes with simply being associated with a law school in a "high status country," such as the United States.[21] Other LL.M. graduates report that their LL.M. degrees are valuable for making contacts "within a global legal community."[22]

For students who may wish to relocate permanently in the U.S., LL.M. programs also offer the opportunity to take state bar exams and become admitted to practice law in the U.S. This option is especially appealing to those students from countries undergoing political and/or economic hardships.[23]

Attending a law school in the U.S. also allows an international student the opportunity to improve their English proficiency.[24] Because English proficiency is such an important skill for legal practitioners in today's world, developing one's English fluency is one of the most commonly cited reasons students in the past have sought to enroll in LL.M. programs in the U.S.[25]

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18. Sullivan Jr., *supra* note 8, at 220-21, 227.

19. Matthew S. Parker, *The Origin of LL.M Programs: A Case Study of the University of Pennsylvania Law School*, 39 U. PA. J. INT'L L. 825, 887, n. 309 (2018) (citing John Treu, *Should You Go for an LLM Degree After Law School? It Depends*, JD ADVISING (Jan. 16, 2014), *available at* https://jdadvising.com/is-getting-an-llm-worth-it-after-law-school/ (last visited Apr. 25, 2024) (stating that obtaining a license in a new jurisdiction is invaluable in LL.M. students' respective home countries).

20. Sullivan Jr., *supra* note 8, at 221; Ballakrishnen, *supra* note 17, at 2446 (finding that the LL.M. credential is often used as capital and can offer vast advantages in some countries).

21. Ballakrishnen, *supra* note 17, at 2445.

22. *Id.* at 2446.

23. Silver, *supra* note 16, at 158. However, according to BARBRI, citing the National Board of Law Examiners' Bar Admission Guide, only a handful of states allow students with LL.M. degrees from ABA-approved law schools to qualify for their bar exams. *U.S. Bar Exam Foreign Eligibility*, BARBRI, *available at* https://www.barbri.com/usbar/bar-exam-foreign-eligibility/ (last visited Apr. 25, 2024); *citing* the National Council of Bar Examiners, *Comprehensive Guide to Bar Admissions Requirements* (2023), *available at* https://www.ncbex.org/publications/bar-admissions-guide/ (last visited Apr. 25, 2024) (explaining those states are Texas, District of Columbia, Illinois, Maryland, Massachusetts, North Carolina, Ohio, Pennsylvania, Tennessee, and Washington).

24. Silver, *supra* note 16, at 156-57.

25. Carole Silver & Mayer Freed, *Translating the U.S. LLM Experience: The Need for a Comprehensive Examination,* 101 NW. U. L. REV. COLLOQUY 23, 25 (2007), *available at* https://www.academia.edu/5854151/Translating_the_U.S._LLM_Experience_The_Need_for_a_Comprehensive_Examination (last visited Apr. 25, 2024) (stating that, for some, specifically international students from countries with

In addition, an LL.M. degree from a U.S. law school may help international students who are unable to become admitted to practice law in their home countries, especially in those countries with low bar passage rates.[26] In such cases, graduates of LL.M. programs who take and pass a state bar in the U.S., may be eligible to waive into admission to the bar in their home countries, without taking their countries' bar exams.[27]

Some lawyers from other countries may simply prefer to continue their legal studies in the U.S. due to the unique aspects of an American legal education. U.S. law school classes typically incorporate the Socratic method, consideration of precedent and policy, and teaching students to "think like lawyers."[28] These practical aspects of an American legal education, may be considered beneficial in preparing students for the increasing globalization of law practice.[29] Moreover, the curricula of most U.S. law schools also provide opportunities for smaller, elective, and experiential classes, as well as clinics and externships. These opportunities encourage the development of practical lawyering skills as well as closer relationships between

low bar passage rates like Korea and Taiwan, the prospect of earning a license to practice law in the US is important).

26. Silver, *supra* note 16, at 158 (stating that, notably, in Japan and Korea, there is a low bar passage rate and many law graduates do not pass the bar exam, but if they pass the bar exam in a U.S. jurisdiction, they can return home and be recognized as a foreign lawyer, so many students will utilize the LL.M. as a "process to get a license"); Silver & Freed, *supra* note 25, at 25 (stating that, for some, specifically international students from countries with low bar passage rates like Korea and Taiwan, the prospect of earning a license to practice law in the U.S. is important).

27. Silver, *supra* note 16, at 158.

28. Justin W. Evans & Anthony L. Gabel, *Preparing Legal Entrepreneurs as Global Strategists: The Case for Entrepreneurial Legal Education*, 32 ARIZ. J. INT'L & COMP. LAW 728, 732 (2015).

29. *Id.* at 778 (explaining that with an increase in globalization, it is important that lawyers acquire "the skills needed for these new practice settings," and therefore that law schools need to offer progressive clinical experiences and experiential opportunities); *see* Randall Robbins & Thomas Matthews, *Cultural Diversity: Is It Present In American Law Schools and the Legal Profession?*, 9 J. DIVERSITY MGMT. 75, 75 (2014) (discussing the critical role of law schools for making balanced cultural diversity in an attempt to shape young lawyers into future leaders); David R. Barnhizer, *The Purposes and Methods of American Legal Education*, 36 J. LEGAL PROF. 1, 42 (2011) (introducing the concept of "thinking like a lawyer"); Donald G. Marshall, *Socratic Method and the Irreducible Core of Legal Education*, 90 MINN. L. REV. 1, 3-5 (2005) (arguing that the Socratic method can support dynamic group involvement and interaction in relation to the legal profession, which is intellectually based and humanistically motivated); *see generally* Charles Szypszak, *Socratic Method for the Right Reasons and in the Right Way: Lessons from Teaching Legal Analysis Beyond the American Law School*, 11 J. POL. SCI. EDUC., 358 (2015) (introducing advantages and disadvantages of Socratic method and ways to improve it).

faculty and students, which may be less common in the law schools in other countries.[30]

Finally, the overall U.S. law school experience may support the development of students' intellectual potential, especially among those students whose legal education in their home countries is in a "state of crisis."[31]

In sum, from the international students' point of view, earning an LL.M. degree from a U.S. law school may offer them opportunities for professional advancement, networking, and to gain knowledge about the American legal system, as well as to improve their English proficiency and other lawyering skills relevant to the increasingly globalized practice of law.[32] Moreover, the unique pedagogical methods and curriculum in many U.S. law schools provide an additional appeal to those international students who seek new academic challenges, as well as practical lawyering experiences not available in their own countries' law schools.

B. The Benefits of LL.M. Programs to U.S. Law Schools and Their U.S. Students

For law schools, LL.M. programs have been promoted as a way to increase law school revenues. The promise of new tuition dollars is desirable, especially now. In the past decade, the overall J.D. enrollment has dropped by 20.9 percent.[33]

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30. *See generally* Allison Korn & Laila L. Hlass, *Assessing the Experiential (R)Evolution*, 65 VILL. L. REV. 713, 758 (2020) (explaining the results of Korn and Hlass' 2018 study titled "Emerging Models of Experiential Courses," in which they learned that schools have undertaken major changes to experiential learning curriculum, including by, among other things, guaranteeing placement or requiring enrollment in law clinic and externship courses and adding more experiential learning courses); *see also* Deborah Burand, *Crossing Borders to Create Value: Integrating International LL.M.'s Into a Transactional Clinic,* 19 LEWIS & CLARK L. REV. 441, 457 (2015) (stating that classroom conventions, like clinics and experiential learning experiences, are unusual to foreign-educated law students).

31. Jayanth K. Krishnan & Vitor M. Dias, *The Aspiring and Globalizing Graduate Law Student: A Comment on a Lazarus-Black and Globokar LL.M. Study*, 22 IND. J. GLOBAL LEGAL STUD. 81, 87 (2015) (noting that in some LL.M. students' home countries, the system of legal education is in crisis, teachers teach in outdated methods, and research and writing are left unsupported, among other concerns, so students look abroad to "obtain self- actualization and maximize their intellectual potential," and that India and Brazil are examples of two countries in which legal education is in crisis, the state of legal education is weak and basic necessities are lacking, and these weaknesses are adversely affecting law students domestically).

32. Dorra-Maria Sonderhoff, *The Costs and Benefits of Pursuing an LL.M. Degree in the United States*, 20 ILSA QUART. 36, 37 (2012).

33. Data compiled by the ABA Section on Legal Education and the Bar, reported at *Law School Enrollment*, LAW SCHOOL TRANSPARENCY, *available at* https://www.lawschooltransparency.com/trends/enrollment (last visited Apr. 25, 2024); *see also* Silver & Ballakrishnen, *supra* note 11, at 42-43 (noting a decline in J.D. enrollment for ABA-approved law schools in all degree programs from 140,000 in the 2013-2014 academic year to below 125,000 by the fall of 2016).

Moreover, since LL.M. programs are not subject to ABA reporting and monitoring requirements, as discussed above,[34] law schools are free to use their LL.M. tuition dollars as part of their general budget, without running afoul of ABA Standards, and without any adverse impact on the standing of their J.D. programs within the ABA.[35]

In addition to adding revenue to law school budgets, the increasing popularity of LL.M. programs can be understood as part of the larger trend towards internationalization and globalization within legal education,[36] as well as the legal profession.[37] As one commentator has observed, "…from the perspective of the incoming students, changes in the world market for legal services have created a new environment in which an international legal education has practical value and demand."[38]

Other studies have found that the interaction between U.S. and international students enhanced the overall climate of law schools, as well as the outlook, open mindedness, support for differing viewpoints, understanding of international matters, cross cultural understanding, and intercultural sensitivity and awareness among the students.[39] For example, the presence of international students may enhance the

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34. *See* Silver, *supra* note 16.

35. *Id.* at 147 (stating that graduate programs are not subject to the same ABA oversight as J.D. programs, so law schools are able to focus more on cost efficiencies with LL.M. and graduate programs than they can with J.D. programs); *see* AM. BAR ASS'N, *supra* text accompanying note 6.

36. *See* UNESCO 2009 World Conference on Higher Education, July 5-8, *Trends in Global Higher Education: Tracking an Academic Revolution*, 27, Ed.2009/Conf.402/inf.5. (explaining that internationalization was apparent at all levels of the higher education enterprise around the world over the last decade, and its pervasiveness was amongst the most critically important characteristic of internationalization); Bohm et al., *Global Student Mobility 2025: Forecasts of the Global Demand for International Higher Education*, IDP EDUC. AUSTRALIA, 3 (2002) (forecasting the number of international students in the world would increase from 1.8 million in 2000 to 7.2 million in 2025); *see also* Krishana and Dias, *supra* note 31 at 82-83 (noting that law schools view accepting and educating LL.M. students as a way to add international diversity and expand their networks abroad); *see* Swethaa Ballakrishnen, *Homeward Bound: What Does a Global Legal Education Offer the Indian Returnees?,* 80 FORDHAM L. REV. 2441, 2444 & 2471 (2012) (finding that an LL.M. degree is one of great value because of the international experiences associated therewith and that there are increasingly globalized demands of the legal services market, warranting a need for lawyers with international experience).

37. *See e.g.,* Theresa Kaiser-Jarvis, *Preparing Students for Global Practice: Developing Competencies and Providing Guidance*, 67 J. LEGAL EDUC. 949, 950 (2018) (finding that all lawyers of the 21st century, not just U.S. lawyers, should be prepared to address international, trans-national or cross-border legal issues, and how all law schools and programs should prepare their students for this reality).

38. Carole Silver & Swethaa S. Ballakrishnen, *Sticky Floors, Springboards, Stairways & Slow Escalators: Mobility Pathways and Preferences of International Students in U.S. Law Schools*, 3 UC IRVINE J. INTER. TRANSACTIONAL AND COMP. L, 39, 42-3 (2018).

39. *See* Alvija Sumskaite & Inga Juknyte-Petreikiene, *Parameters for the Assessment of the Impact of Internationalisation Policy on Quality in Higher Education and its Influence on the Development of Society: the Lithuanian Case*, 10 CENT. EUR. J. PUB. POL'Y, 1, 4-5 (2016)

U.S. law students' understanding of their own culture, increase their support for internationalism, generally, and their interest in international career options, in particular.[40] Similarly, U.S. students who attend classes with international students have been found to have higher levels of intellectual engagement and self-assessed academic skills.[41]

In order to attract international students, some law schools have developed new or expanded their existing international and comparative law courses and programs. For example, a 2009 longitudinal study of U.S. J.D. graduates found that 44 percent of the respondents engaged in work involving non-U.S. clients or cross-border matters within their first seven years of practice.[42] In the same study, more than 60 percent of attorneys working in various law office settings, including large private firms, in-house corporate counsel, legal services, and public defender offices, reported that their work involved cross border legal matters.[43] Another 2009 study of members of the Philadelphia Bar Association found that 67.5 percent of 1,050

(presenting an extensive literature review regarding positive effects of internationalization of higher education); Richard C. Sutton & Donald L. Rubin, *The GLOSSARI Project: Initial Findings from a System-Wide Research Initiative on Study Abroad Learning Outcomes*, 10 FRONTIERS: THE INTERDISC. J. OF STUDY ABROAD, 65, 73 (2004) (finding that the students who studied abroad showed greater levels of functional knowledge, knowledge of world geography, knowledge of cultural relativism, and knowledge of global interdependence compared to the other students); *see generally* Madhav P. Sharma & Loren B. Jung, *How Cross-Cultural Social Participation Affects the International Attitudes of U.S. Students,* 9 INT'L J. INTERCULTURAL REL. 377 (1985) (explaining the results of a study on the interactions between U.S. and international students that showed that U.S. students who interacted with international students developed a greater cosmopolitan world outlook, cultural pluralism, world-mindedness, understanding of their own culture, more support for internationalism, international career aspirations, and political liberalism).

40. *See* Sharma & Jung, *supra* note 39, at 381; *see also* Carole Silver, *Getting Real About Globalization and Legal Education: Potential and Perspectives for the U.S.*, 24 STAN. L. & POL'Y REV. 457, 472 (2013) (citing to Rebecca Lindsey Parsons, *The Effects of the Internationalisation of Universities on Domestic Students,* 41 (June 2007) (unpublished Ph. D. dissertation, Griffith University) (on file with author)), *available at* https://research-repository.griffith.edu.au/handle/10072/365867?show=full (last visited Apr. 25, 2024); *see generally* Sullivan Jr., *supra* note 8; *see* Sharma & Jung, *supra* note 39, at 381.

41. Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 351 (2002) (indicating that academic skills include self-rated academic ability, writing ability, listening ability, self-reported change in general knowledge, analytic and problem-solving skills, ability to think critically, writing skills, and foreign language skills).

42. *See generally* Ronit Dinovitzer et al., *After the JD II: Second Results From a National Study of Legal Careers*, THE AM. BAR FOUND. & THE NALP FOUND. FOR L. CAREER RESEARCH AND EDUC., 18, 35 (2009), *available at* https://www.americanbarfoundation.org/resources/after-the-jd-ii-second-results-from-a-national-study-of-legal-careers/ (last visited Apr. 25, 2024). The research was conducted with a sample of J.D. graduates with approximately seven years of work experiences; *id*. at 12-14.

43. *Id*.

responding active members reported handling matters that required knowledge of foreign and/or international law.[44]

Former Supreme Court Justices Ginsburg, O'Connor, and Breyer have all acknowledged the value of understanding international and comparative law in applying U.S. law.[45] In fact, Justice Breyer has observed that because 15 to 20 percent of cases require judges to consult facts, laws, and decisions from other countries, judges should have an understanding of foreign law as well as international law and practice.[46]

Moreover, international students add to the diversity of law schools.[47] Although it has been assumed that most international students who come to the U. S. to attend law school are English speaking[48] and wealthy, given the high cost of tuition

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44. Susan L. DeJarnatt & Mark C. Rahdert, *Preparing for Globalized Law Practice: The Need to Include International and Comparative Law in the Legal Writing Curriculum*, 17 LEGAL WRITING: J. LEGAL WRITING INST. 3, 20 (2011) (showing the support for the thesis that international and comparative legal issues are now a part of the general practice of law).

45. Assoc. Just. Stephen Breyer, *Speech at the American Society of International Law 97th Annual Meeting*, U.S. SUPREME COURT (Apr. 4, 2003), *available at* https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_04-04-03) (last visited Apr. 25, 2024). During this speech, Justice Breyer explained that, among other things, the Supreme Court has seen an increasing number of domestic legal questions that directly implicate foreign or international law which increasingly require the Supreme Court to rely on decisions of foreign courts for comparison. As a result, he noted the importance of understanding international law and practice for today's American lawyers; *Id.;* Theresa Kaiser-Jarvis, *Preparing Students for Global Practice: Developing Competencies and Providing Guidance*, 67 J. LEGAL EDUC. 949, 954 (2018) (citing Robert Barnes, *Breyer Says Understanding Foreign Law is Critical to Supreme Court's Work*, WASH. POST, (Sept. 12, 2015, 9:24 PM), *available at* https://www.washingtonpost.com/politics/courts_law/breyer-says-understanding-foreign-law-is-critical-to-supreme-courts-work/2015/09/12/36a38212-57e9-11e5-8bb1-b488d231bba2_story.html) (last visited Apr. 25, 2024) (stating that Justice Breyer estimated that fifteen to twenty percent of cases require judges to consult facts, laws, or decisions from abroad). Although the law and the legal profession are becoming more "internationalized," the U.S. has a long history of opposition to the ratification of international treaties, as well as citing international law in U.S. decisions. Former Justices Ruth Bader Ginsburg and Sandra Day O'Connor even reported receiving anonymous death threats for citing international law in their opinions, and, as recently as 2006, Senate Republicans introduced bills to "prohibit federal courts from referring to foreign laws or rulings in interpreting the U.S. Constitution." Tony Mauro, *Justice Ginsburg Says Death Threat Fueled by Dispute Over International Law*, CAL. SUP. CT. MONITOR (ONLINE) (Mar. 16, 2006), *available at* https://www.law.com/almID/900005548196/ (last visited Apr. 25, 2024).

46. Breyer, *supra* note 45.

47. *See* Christine Gregory, *Building Social Justice Leaders: The University of Michigan Law School's Diversity Program*, 63 J. LEGAL EDUC. 302, 302 (2013) (describing efforts of the law school adopting admission policies to enhance diversity of student body).

48. English as the most popular language in the world for both native and non-native speaker, representing about 1.132 billion people who speak English. *Cochrane Evidence in Different Languages*, COCHRANE (Feb. 12, 2024), *available at* https://www.cochrane.org/news/cochrane-evidence-different-languages (last visited

of U.S. law schools, many LL.M. students are from diverse backgrounds, based on nationality, ethnicity, gender as well as their economic background.[49] Given their diversity, they often contribute to the overall racial, ethnic, and economic diversity of law school student bodies.[50]

III. THE CASE STUDY: AN EVALUATION OF THE SYRACUSE UNIVERSITY COLLEGE OF LAW'S LL.M. PROGRAM

A. An Overview of Syracuse Law's LL.M. Program

Syracuse Law is one of many law schools that recently expanded their international LL.M. programs.[51] Although Syracuse Law has had an international law program for decades, including the first summer externship program in London, it was not until 2012 when Syracuse Law inaugurated its LL.M. Program for international students, followed by an international S.J.D. Program in 2021.[52]

Apr. 25, 2024); *The Most Spoken Languages in the World*, BERLITZ (Feb. 8, 2024), *available at* https://www.berlitz.com/blog/most-spoken-languages-world (last visited Apr. 25, 2024).

49. Bryant G. Garth, *Notes Toward an Understanding of the U.S. Market in Foreign LLM Programs: From the British Empire and the Inns of Court to U.S. LLM Programs,* 22 IND. J. OF GLOB. LEGAL STUD. 67, 76-77 (2015) (explaining that LL.M. students who attend elite U.S. law schools likely come from elite backgrounds, and that LL.M. students attending non-elite law schools also likely come from some type of privileged background, making LL.M. students a nondiverse group).

50. *See* Jan Hoffman French, *At Play in the Field of Law: Symbolic Capital and Foreign Attorneys in LL.M. Programs,* 22 IND. J. GLOBAL OF LEG. STUD. 95, 101 (2015) (debunking the stereotype that all foreign law students come from the highest economic echelons of their countries of origin by pointing to an LL.M. student body that is diverse in nationality, ethnicity, gender, and economic background).

51. James R. Maxeiner*, Learning from Others: Sustaining the Internationalization and Globalization of U.S. Law School Curriculums*, 32 FORDHAM INT'L L.J. 32, 37 (2008) (explaining additive, integrative, and immersive approaches of internationalization at law schools); Julie M. Spanbauer, *Lost in Translation in the Law School Classroom: Assessing Required Coursework in LL.M. Programs for International Students*, 35 INT'L J. LEGAL INFO. 396, 397 (2007) (indicating that law schools invite international students to participate in LL.M., J.D., S.J.D., and J.S.D. programs that are exclusively or primarily for international students or to which international students are admitted); Rosa Kim, *Globalizing the Law Curriculum for Twenty-First-Century Lawyering*, 67 J. LEGAL EDUC. 905, 921 (2018) (discussing approaches of globalization of law schools and efficiency of strategies of providing globalized curriculums); John Edward Sexton, *The Global Law School Program at New York University*, 46 J. LEGAL EDUC. 329, 330 (1996) (providing information regarding the program at NYU's backgrounds and strategies).

52. Syracuse Law has long been committed to an international approach to legal education. For more than forty years, Syracuse Law has offered the nation's first summer study abroad externship program in London, as well as additional short-term study abroad programs. In 1969, Syracuse Law inaugurated the internationally known Center for Global Law

As of 2023, the Syracuse Law LL.M. Program has enrolled 261 LL.M. students from fifty-seven different countries.[53] The Syracuse Law LL.M. program has grown each year, although it is designed to remain small in order to allow for individualized student support, and the development of meaningful relationships between faculty and students, a hallmark of the Syracuse Law legal education. The Syracuse LL.M. program also offers opportunities for the development of academic and professional skills through various extracurricular, externship, volunteer and study abroad programs, and other opportunities.[54]

In 2020 the Office of International Programs proposed a research project to evaluate the LL.M. Program. A team of experts in evaluation at the Syracuse University School of Education agreed to conduct a mixed method evaluative study of the LL.M. Program. During the first phase of the research, graduate students, under the supervision of Professor Moon-Heum Cho, developed survey instruments for

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and Practice, directed by the late Peter Herzog. This Center later housed the Lockerbie Trial Families Project, under the direction of the late Donna Arzt, which documented, in real time, the developments in the criminal trial following the bombing of Pan Am Flight 103 over Lockerbie, Scotland. *See* Andrew I. Killgore, *Prosecution Stumbles in "Lockerbie Trial" of Pan Am Flight 103,* WA. REPORT ON MIDDLE EAST AFFAIRS, 24, 78 (December 2000), *available at* https://www.wrmea.org/000-december/prosecution-stumbles-in-lockerbie-trial-of-pan-am-flight-103.html (last visited Apr. 25, 2023). The Center also housed the Sierra Leone Project, directed by David M. Crane, former Chief Prosecutor of the Special Court of Sierra Leone. Today, Syracuse Law continues its commitment to international programming with the Syrian and Ukrainian Accountability Projects, the Institute for Security Policy and Law, directed by the Hon. James Baker, former Judge of the U.S. Court of Appeals for the Armed Forces and the Global Law Program, its Journal, the Journal of Global Rights and Organizations, and Impunity Watch News, directed by Professor Cora True Frost. The College of Law's Disability Law and Policy Program, founded and directed by Professor Arlene Kanter, works with governments and disability organizations around the globe to advance disability rights and justice. In addition, all of these opportunities are available to and attract the interests of LL.M. students.

53. Master of Laws (LL.M.), SYRACUSE UNIV. COLL. OF LAW, *available at* https://law.syr.edu/academics/master-of-laws-ll-m-in-american-law/ (last visited Apr. 25, 2024). To earn the LL.M. degree, students must take two required courses in their first semester (Introduction to the American Legal System and Legal Writing for International Students) and successfully complete a total of twenty-four additional credits. LL.M. students are also permitted to take two graduate-level elective courses in other colleges and departments of Syracuse University. Prior to enrolling, international students are provided an opportunity to enroll in an "English for Lawyers" summer program, supported by the English Language Institute of Syracuse University. This program is designed to provide a foundation in legal terminology and language usage in listening, speaking, reading, writing, and research for the law students who are not English native-speakers, and is open to students admitted to Syracuse Law's LL.M. Program, as well as any other law school program in the United States.

54. The International Scholar Lecture Series, at which international LL.M. and S.J.D. students are invited to present their research to the greater Syracuse University community; and the opportunity to become involved in one or more of thirty student-led law school organizations and affinity groups.

current LL.M. students, alumni, and their J.D. student mentors.[55] The surveys covered a range of topics, including the motivations for international students enrolling in the Syracuse Law's LL.M. Program, their pre-arrival expectations, and an assessment of their overall experience. Later, the team sent surveys and conducted interviews of law faculty who taught LL.M. students.

The response rate of current students was quite good, and their experiences, favorable. As a result of the pandemic, the alumni response to the initial survey was very low, however. But the survey and interview questions were refined and administered again to all alumni, with an impressive response rate of 40 percent. Of those, an overwhelming ninety percent reported that the Syracuse Law LL.M. program exceeded their expectations. In addition to the alumni, the researchers surveyed peer mentors, J.D. students who were selected by a competitive process, and law faculty who were involved in the LL.M. Program, several of whom several agreed to be interviewed. All research was conducted with the approval of the University's Institutional Review Board (IRB).

1. Surveys and Interviews of Current LL.M. Students

In March 2020, a survey was sent to all students enrolled in the LL.M. Program during the 2019-20 academic year. Of the thirty-two LL.M. students surveyed, twenty-one responded, resulting in a sixty-five percent response rate. Of the twenty-one respondents, ten were female and eleven were male; six were twenty-five to twenty-nine years of age, with nine respondents thirty to thirty-four years of age, and six respondents over the age of thirty-five. These respondents represented thirteen different countries from East Asia, Southeast Asia, the Middle East, Europe, South America, and the African region. About half of the respondents indicated they planned to return to their home countries after graduation, while the other half indicated they would seek to remain in the United States, including those with plans to take the NYS Bar Exam. Most of the respondents reported high satisfaction with the program. When asked whether respondents felt the LL.M. Program met their expectations and whether they would enroll in the program, if they had the option to go back in time, most responded affirmatively. On a five-point scale with a five being "Very Satisfied" and a one being "Very Dissatisfied," the average score for satisfaction with the program was a 4.25 and 4.5, respectively. However, female respondents gave a lower rating to their overall experience (3.79/5) than male students, (4.01/5).

A total of 38 percent of the respondents reported that their main reason for enrolling in Syracuse Law's LL.M. program was the opportunity to take the NYS

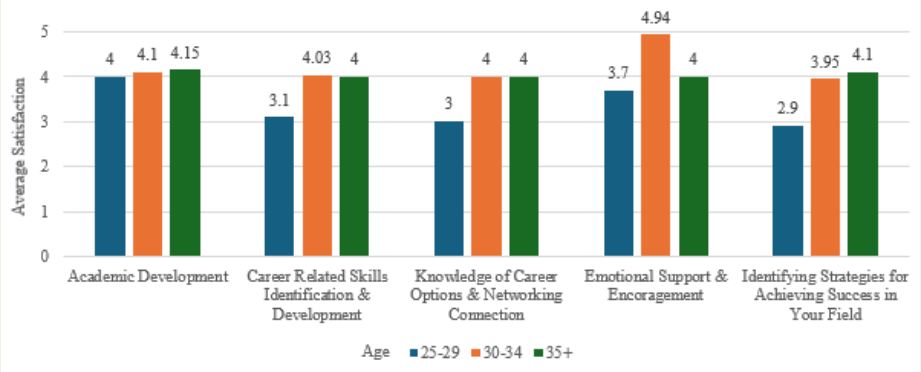
55. Two of the groups also arranged for interviews of some of the current students but were not able to complete the interviews due to the closing of school when COVID-19 arrived in Syracuse in March 2020. Upon completion of their analysis, the students prepared and sent their findings to the staff of the Office of International Programs in May 2020.

bar exam, regardless of whether their ultimate desire was to stay in the U.S., return home, or to use their knowledge to advance their career outside the US. While some students planned to become eligible to sit for the NYS bar in order to increase their employment opportunities at home, others hoped to remain in the U. S. to practice law. Some students chose to enroll in order to gain exposure to the American legal system. In addition, 19 percent of respondents noted that the primary reason they chose Syracuse Law was because of its Disability Law and Policy Program.

The respondents were highly satisfied with their legal education. Respondents reported a 73 percent improvement in their understanding of the American law system, a 12 percent improvement in their understanding of the legal system utilized in their workplace, and a 20 percent improvement in their understanding of the general international legal system and other legal topics. The LL.M. students' responses also revealed high satisfaction with their professors and faculty advisors. At the time of the data collection, each LL.M. student was assigned a faculty advisor to discuss and plan their academic program. To promote greater integration between J.D. and LL.M. students, LL.M. students are now included within the law school-wide faculty mentorship program.

In terms of their overall satisfaction with the faculty, every student (100 percent) responded that their professors helped them to achieve academic success. Ninety-five percent of the respondents favored their professors' teaching styles. For example, one student commented that the professors "respected" them, and that they were "kind and supportive." However, when the students were asked about specific areas of support offered by the faculty, the satisfaction levels varied depending on the age of the student. As Figure 1 shows, students aged twenty-five to twenty-nine years reported lower satisfaction levels, compared to the satisfaction levels of students aged thirty or older.

Figure 1 Satisfaction with Professors by Age Group



The respondents also indicated satisfaction with the extracurricular activities offered at the law school, with an average satisfaction rating of 3.8 on a scale from one (poor) to five (excellent). The overall satisfaction level with extracurricular activities was higher among female respondents (average score 4.11) than for male respondents (average score 3.90). Younger students, between the ages of twenty-five to twenty-nine, rated the importance of extracurricular activities to their success at 3.66, relatively lower than students aged thirty to thirty-four years (3.88) or students over thirty-five years (3.8). Approximately 49 percent of respondents suggested more job-related extracurricular activities, including internships, law-clinic experiences, and networking with local attorneys. Further, of the twenty-one respondents, 76 percent felt "confident" or "highly confident" that they developed the job-related skills they would need to successfully pursue employment following their LL.M. program.

Several students reported relatively less satisfaction with career development opportunities and the support they received from the Office of Career Services. When asked about what offices the students use, one student reported, "We have a career office in [the] law school, but they only take care of JD students. They don't know how to support us." Some students reported being "ignored" by certain law school offices and having the impression that these offices worked only for their J.D. peers.[56] Since the study, the law school hired a new director and new staff in the Office of Career Services.

The current LL.M. students also commented on their interaction with their J.D. student peers. Fifty percent of the respondents said they enjoyed attending off-campus events with other Syracuse Law students. Seventy one percent of the respondents reported favorably about one event in particular, the university-wide Martin Luther King Dinner, that the Office of International Programs had arranged for them to attend. Some current LL.M. students also expressed a desire for more interaction with U.S. students, both academically and socially, including more opportunities to participate in cultural and local events and activities with their J.D. peers.

2. Surveys and Interviews of LL.M. Alumni

In February 2021, a survey was sent to all alumni of Syracuse Law's LL.M. Program.[57] Of the more than 200 LL.M. alumni who received the surveys, eighty responded, resulting in a forty percent response rate. In addition to the eighty respondents, four were

56. School administrators have addressed the relationship between the Office of Career Service and LL.M. students. In 2021, a new director of Career Service was hired who has identified as a priority additional programs and support for all international students, including LL.M. and S.J.D. students.

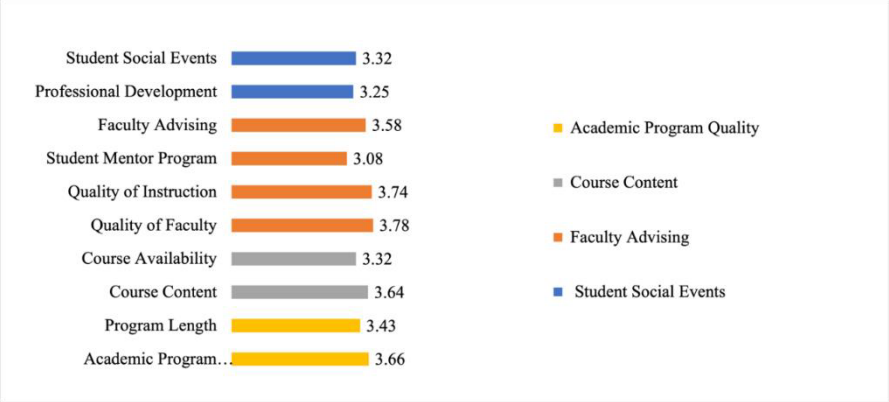
57. Syracuse Law's LL.M. Program celebrated its 10th anniversary in 2021, and at that time, which is also when the survey was sent out, the program had about 200 alumni.

interviewed.[58] Three of the alumni who agreed to be interviewed graduated in 2019 and one graduated in 2017. Of the eighty respondents, half were male (50 percent) and nearly half were female (46 percent). The alumni ranged in ages from eighteen to forty-four years old.

The alumni respondents represented diverse ethnic groups. Of the respondents, 38 percent were Caucasian, 24 percent were Hispanic/Latino, 14 percent were Asian, and 10 percent were African or African American. Prior to enrolling in the Program, almost half of the respondents had two to five years of full-time work experience (41 percent), followed by participants who had five or more years of experience (33 percent), and those who had no legal experience or one year of experience (25 percent). Prior to enrolling in the LL.M. program, half (50 percent) of the participants were practicing lawyers, 15 percent were students, 8 percent were consultants, 5 percent were judges, and 4 percent were academics.

To evaluate the alumni respondents' satisfaction with the LL.M program, the survey reported descriptive statistics, or means and standard deviations, in four categories: Academic Program Quality, Course Content, Faculty Advising, and Student Social Events. Figure 2 shows the level of alumni respondents' satisfaction with the LL.M. Program.

Figure 2 Levels of Alumni Satisfaction with the LL.M. Program[59]



Note: Four point-Likert scale was used in which 1 denotes "not satisfied at all" and 4 denotes "very satisfied."

58. While alumni were surveyed and interviewed, another study was conducted with current LL.M. students. In March 2020, the survey of current students was sent to all thirty-two students enrolled in the LL.M. Program. The current students' responses to their respective survey were similar to those of the eighty-one alumni surveyed, and the current students made similar suggestions to the alumni suggestions on how to improve the program.

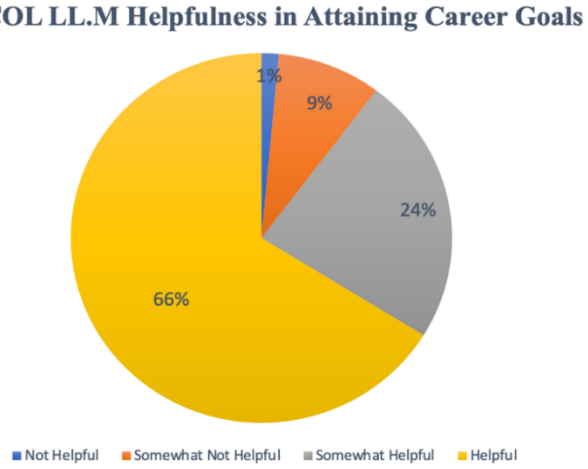
59. The numbers reflected in Figure 2 illustrate the means as the dimension of evaluation.

The students' motivation for enrolling in Syracuse Law's LL.M. Program varied. The primary motivation was the LL.M. Program's overall reputation, based on the positive recommendations by Syracuse Law alumni, followed by the schools' general reputation regarding the quality of its courses, faculty, and curriculum.

Other reasons cited by alumni for enrolling in the LL.M. Program included the availability of financial support, the diversity of the student population, the low cost of housing in Syracuse, the availability of tutors, the proximity to NYC, and other personal reasons. Some alumni reported that they chose Syracuse Law because it offered the opportunity for successful graduates to sit for the NYS Bar Exam. As one student observed, "our law system in Brazil … is a completely different from American legal system.… So, my main goal was to take the bar exam … in the United States such as New York and Washington DC." Some alumni reported that the law school's specialized programs, such as the Disability Law and Policy Program, was the primary reason they chose to attend Syracuse Law.

Overall, the alumni respondents reported high satisfaction with their Syracuse Law education. More than half of the respondents reported that they gained and learned more than they had expected. Additionally, 38 percent of the respondents reported favorably on the practical skills they learned, and 44 percent reported favorably regarding the professional networking events offered to them as LL.M students. The alumni responses also showed high satisfaction with their employment opportunities after graduation. Of the eighty-one alumni who responded, 66 percent reported that they were employed full time after graduation, while only 3 percent of respondents reported being unemployed. Further, within one year after graduation, 84 percent of the alumni were employed, and of the remaining 16 percent, the majority were not seeking employment. An overwhelming 99 percent of alumni reported that attending the Syracuse Law LL.M. Program was "helpful" to them in attaining their career goals.

Figure 3 Helpfulness of LL.M. Program in Attaining Career Goals



Inevitably, not all alumni will be able to secure jobs especially in the U.S., even if that is their preference. Factors such as their professional and linguistic backgrounds as well as their lack of legal experience in the U.S. may hinder their ability to secure legal jobs in the U.S. after graduation. As a result, some alumni reported a preference for additional career training and networking opportunities relevant to their fields of interest. Other alumni would have liked greater support in their search for employment after graduation.

The issue of career counseling for LL.M. students is challenging. Most LL.M. students attend law school in the U.S. on an F-1 student visa, which prohibits them from working off campus, including in law offices, during the academic year and summers. By contrast, U.S. law students typically work in law offices during their first and second summers of law school, and many also work during the year as employees or externs. As a result, LL.M. students have less experience working in U.S. law offices, and are therefore disadvantaged in competing for law jobs in the U.S. One way international law students may gain legal experience is through the Optional Practice Training (OPT) Program.[60] This Program permits international students to receive temporary authorization to work for up to 12 months, following graduation. However, additional research is needed to identify the specific barriers LL.M. students face in securing employment after graduation, as well as the strategies that have helped those who have succeeded in finding jobs in their chosen fields.

60. The Optional Practical Training Program, administered by the Office of U.S. Citizenship and Immigration Services, allows students on F-1 visas to receive temporary employment authorization for up to 12 months before and/or after completing their academic studies. *Optional Practical Training (OPT) for F-1 Students*, U.S. CITIZENSHIP AND IMMIGR. SERVICES (Mar. 27, 2024), *available at* https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/optional-practical-training-opt-for-f-1-students (last visited April 25, 2024).

3. Surveys and Interviews of J.D. Peer Mentors

Syracuse Law's LL.M. peer mentorship program is unique. No other law school, as far as we are aware, has developed a peer mentorship program specifically for LL.M. students. For this reason, it was especially important to collect data about and from the mentors to guide the development of future programs.

All Syracuse Law LL.M. students are assigned a student mentor, typically a second-year or third-year J.D. student. During the 2019-20 academic year, the five mentors were asked to complete a survey, with a request for follow-up in-person interviews. Four of the five student mentors agreed to be interviewed. The survey questions and interviews focused on the performance of the mentors, their perception of their accomplishments and challenges as mentors, as well as their impact, if any, on the academic progress and successful integration of LL.M. students.

The findings of the mentor surveys revealed that most J.D. students chose to become mentors not because of the monetary compensation, but because of their "intrinsic motivation,"[61] such as their desire to help others and learn about the legal systems of other countries. As one of the mentors explained: "I think that's my biggest incentive [is] getting them to reach their goals [and that] is something that's really huge for me. We do get paid. … I probably would do this even if it wasn't paid …" Some mentors reported feelings of empathy towards the LL.M. students, based on their own personal struggles in law school. As one mentor explained, "I struggled in my first year trying to adjust to the high demands, the reading or writing in law school. Since I had gone through a year already … I can work with the students that were struggling in that area in the same way that I have struggled…" The mentors also suggested that their success as mentors may be related to their prior experience and skills in such areas as tutoring, writing, knowledge of American law, as well as their personal social skills. Another mentor explained, "I help them out . . . It's fun . . . I'm developing my personal network at the same time. I'm helping students with stuff that might seem easy to me, but for them it's a little difficult…."

Other mentors shared their personal experiences of studying abroad or their relationships with family members who came from other countries as motivating factors in their decision to serve as mentors. One mentor, for example, stated, "I had gone abroad when I was an undergrad and I knew how many questions and fears that I had during that experience, so I thought I could relate in that kind of way." Some mentors also reported having an interest in different cultures and a desire to learn about foreign legal systems. As one mentor explained, "some of [the LL.M. students] were judges in their home countries. And we would talk about. . . the law system is their country. It was just so different.… So, I really enjoyed that."

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61. *See e.g.*, Richard M. Ryan & Edward L. Deci, *Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions*, 25 CONTEMP. EDUC. PSYCHOL. 54, 56 (2000) (defining intrinsic motivations as doing an activity for its inherent satisfactions, such as fun or challenge, rather than for some separable consequence like external prods, pressures, or rewards).

To assist them in their role, all mentors received training and a copy of the LL.M. Handbook, prepared by the Office of International Programs. The mentors reported that the training they received during the mentor orientation session as well as the information provided in the LL.M. Handbook played an important role in helping them to understand their job responsibilities. One mentor noted: "I like to have something to be able to refer to, so a lot of the information contained in the handbook is similar to the information from our training. But I like to have it as a reference point in case there's a particular issue that I have a question on…."

The findings also indicated that different mentors played different roles for their mentees. Some mentors provided primarily academic support by helping their mentees overcome language barriers or deal with the stress brought on by the high amount of coursework. As one mentor responded, the mentor's role was to "look at the students' needs, tutoring in small group sessions, study groups. . .one-hour tutoring, subject matter that is extremely difficult for students, provide English paper editing, and explain some legal concepts for the students…" Other mentors saw their role more as tutors for specific classes, or as advisors about social and professional opportunities in Syracuse. One mentor observed that "…there are a lot of things that they need to do in a very short period of time, and so getting them ready if they want to take the bar, helping them with job searches, helping them with pro bono …"

The mentors worked approximately ten hours per week, which they found sufficient to perform their duties. However, the mentors indicated that their availability was not limited to formal appointments. As one student mentioned, "I do not start and stop on a clock." In other words, the duration of each session between the student and the mentor varied, depending on the issues, academic schedules, coursework, or social events.

The mentors reported that they communicated most often with their mentees online rather than in person, even before the pandemic. However, some mentors commented that email was not always the most effective way of communicating with LL.M. students since they did not always respond. Two mentors reported that they struggled to maintain contact with their LL.M. mentees. As one explained, "emailing does not seem to entice them to respond or participate;" while another reported, "I reach out to them via email a lot and I just don't hear back." All the mentors surveyed agreed that in-person communication or communication via social media and WhatsApp was the most effective and easiest way to build a relationship with their mentees.

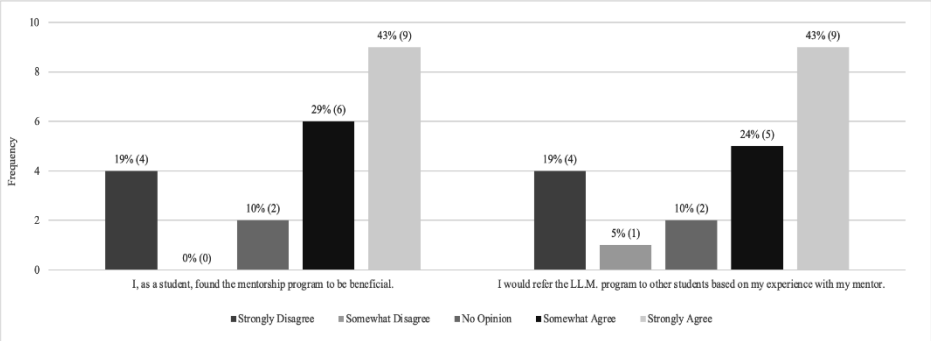
Overall, the mentorship program is highly valued as beneficial, and personally and professionally valuable to mentors and mentees, alike. As one mentor noted, "… I want to someday teach law and so this is like a really good opportunity for me to do that … getting to know people from different cultures, getting to see different perspectives both on the law and on the world in general …"

The LL.M. student-mentor relationship was not without challenges, however. In addition to the communication challenges mentioned above, some mentors noted that because their group of mentees were from different countries and with different cultural backgrounds, there were challenges with communication, as well as challenges meeting the mentees' varied needs. As one mentor reported, "… it is a very diverse group of people; they have different kinds of needs and interests…"

However, from the LL.M. students' point of view, they were highly satisfied with their mentors. Seventy one percent of the LL.M. students agreed or strongly agreed that the mentorship program was beneficial to them. Sixty seven percent responded that they would refer the Syracuse Law LL.M. Program to other students based on their experiences with the mentorship program.

The surveys also revealed that not all LL.M. students met regularly with their mentors. One LL.M. student noted that since the mentor had less legal experience than the student, themselves, they had "no need" to meet with the mentor. But the majority of LL.M. students (76 percent) met with their mentors, and of those, 66 percent met regularly, while others (4.8 percent) met with their mentors only when they had specific issues to discuss. The most common topic LL.M. students discussed with their mentors related to their "academic development." Over half (62 percent) chose to discuss only academic issues with their mentors. As one LL.M. student explained: "The mentors are a great source. They are U.S. law students, and they try to help us, not only to study but also to adapt to the new environment. Every week, they have sessions for international students. Some mentors are in the same class, and they help explain the legal terms." Figure 4 illustrates the evaluation of the Mentorship Program by LL.M. students. As reported here, the mentorship program has had a mutually beneficial impact on LL.M. student mentees and student mentors, alike.

Figure 4 Evaluation of the Mentorship Program by LL.M. Students



4. Faculty Surveys and Interviews

The other unique aspect of this research is the collection of data from law faculty who teach LL.M. students. Little research, if any, has been conducted on the role of law faculty in LL.M. Programs. Yet faculty can play an important role for LL.M. students as teachers, advisors, mentors, as well as references for future job opportunities for LL.M. students. Accordingly, including faculty in this research was essential. The purpose of the faculty portion of this study was to collect information from the law faculty about their attitudes and experiences with the LL.M. program, generally, and the LL.M. students in particular. The faculty survey also sought to elicit faculty suggestions about areas, if any, in which the program could be improved.

Most faculty at Syracuse Law encounter LL.M. students in their classes since LL.M. students are required to enroll in only two courses offered only for them. All the other courses LL.M. students take are part of the general J.D. curriculum. The research team sent surveys to 52 members of the Syracuse Law faculty. A total of 27 valid responses to the survey were collected, and four volunteers were also interviewed. Over half of the survey participants were male (52 percent), with less than half who were female (37 percent). Among the participants, 30 percent have taught in the law school for 1-10 years, followed by 11-20 years (19 percent), 21-30 years (26 percent) and 31-40 years (7 percent). In terms of faculty responses to their ranks, not all faculty responded, but of those who did 38 percent of the participants were teaching professors, (non-tenure track), followed by full (with tenure) professors (26 percent), adjunct professors (11 percent), and associate (with tenure) professors (7 percent). Individual in-depth interviews were conducted of four volunteer participants (one male and three females).

The faculty spoke highly of the LL.M. program in terms of the overall program, and their experiences with the students. The faculty respondents highlighted the beneficial impact of the diversity LL.M. students bring to the law school, including differences of perspectives, experiences, and thought. Faculty also emphasized the potential impact of the LL.M. Program beyond the law school, and in other countries throughout the world. Faculty viewed the LL.M. students as professionals and saw them as "great role models" for less experienced U.S. J.D. students. Faculty also expressed their gratitude and appreciation to the LL.M. Program administrators for their dedication to the Program and its students. Finally, faculty thought that the services provided to the LL.M. students, such as the mentorship program, were meaningful and helped to facilitate student success.

Faculty also commented about the extent to which LL.M. students participated in class. Figures 5-7 below show how often LL.M. students participated in class and how faculty viewed their participation. According to Figure 5, about 40 percent of the faculty respondents reported that LL.M. students sometimes participated in their classes, followed by most of the time (37 percent) and always (22 percent). To the

extent that some faculty believed that LL.M. students added value to their courses, over half the faculty respondents (63 percent) reported they are very valuable, followed by somewhat valuable (26 percent), and not very valuable (11 percent), as shown in Figure 7. In response to questions about participation by LL.M. students in class, 70.37 percent of the faculty respondents reported that LL.M. students always contributed in class, while 14.81 percent of faculty described their contribution as fair, 11.11 percent responded they had little contribution, and 3.7 percent of faculty found that the LL.M students had no contribution to class, as shown in Figure 6.

Figure 5 LL.M. Students' Participation Rate in Classes

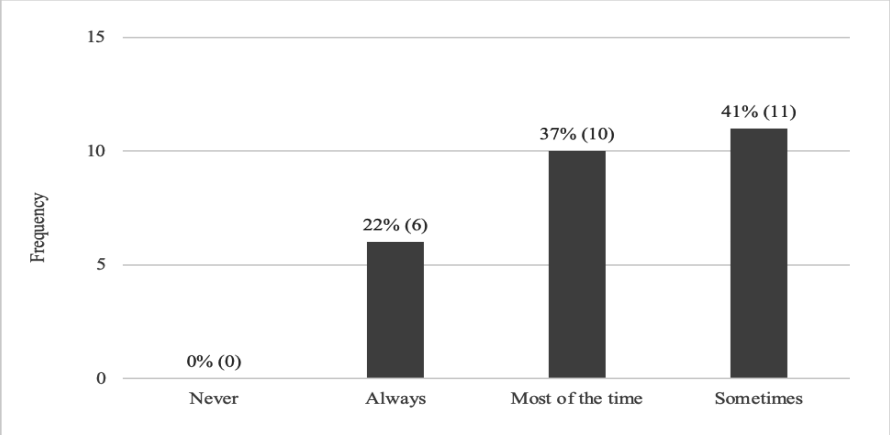


Figure 6 Faculty Perspectives on LL.M. Students' Participation in Classes

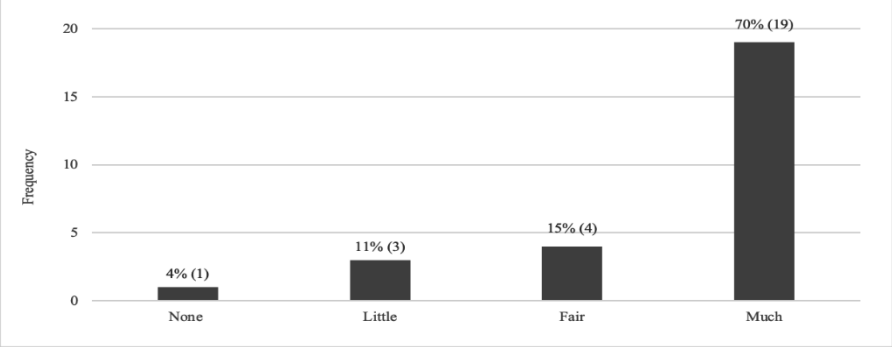
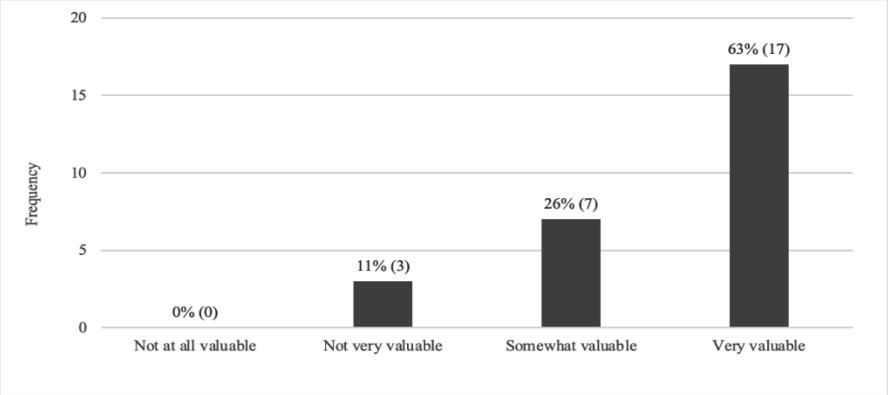


Figure 7 Faculty Perspectives on LL.M Students' Value in Classes



When faculty were asked about whether LL.M. students bring value to their classes, the four faculty who were interviewed answered affirmatively. For example, one faculty interviewee observed: "I think our LL.M. students bring to the law school, diverse experiences, information about other countries that we would never hear about or read about but for their presence in the class." A different faculty member explained: "I believe LL.M. students do bring value to my class, and actually to the College of Law…[including] many different types of experiences that are very different from our J.D. students. [The LL.M. Program] adds a type of diversity to the college, which I think is fantastic." A third faculty member said: "They bring value to classes because they bring their perspectives. In my view, it's very different having students with their personal direct experiences discuss the laws of their countries."

In terms of the faculty members' teaching experiences, 89 percent of the faculty respondents reported that there was no difference teaching LL.M. students and J.D. students. However, 11 percent of the faculty respondents disagreed, noting that it was it more challenging to teach LL.M. students than J.D. students, but they did not say why. In addition, most faculty (52 percent) believed that LL.M. students "sometimes" participate in law school-sponsored, non-academic social events outside of class, followed by 22 percent who believed they participate "most of the time," and 11 percent who believed they never participate.

In terms of the faculty members' observations of the interactions between J.D. and LL.M. students, 70 percent of the faculty reported that they saw LL.M. students communicating with J.D. students, including collaborating on school projects. As one faculty member observed, "It's one of my course goals when I have LL.M. students in the class, [to] pair them up with J.D. students, so they get to meet and work together." Only 4 percent of the faculty reported that they never saw LL.M. students communicate with J.D. students. As for faculty expectations, 48 percent of the

faculty reported that the current communication frequency between J.D. and LL.M. students met their expectations. Thirty-three percent of the faculty respondents expected higher communication frequency between the LL.M. and J.D. students. Only 7 percent of the faculty respondents reported that the current communication frequency between the two groups of students was beyond their expectations.

Most faculty (71 percent) also reported that they heard positive comments from LL.M. students about their experiences at the law school, followed by 19 percent who reported that they never heard any comments from LL.M. students, and 7 percent who reported that they heard both positive and negative comments from LL.M. students. As one faculty member noted during an interview, "Well, they certainly seem happy when they come to class, and they have their own group of friends… so it's just my observations of LL.M. students, but I believe that they are happy with the program because they look happy." Another faculty member noted: "There seems to be some positive feelings towards the school from some of those students. I assume they're not excluded, and they have enough of a community here."

In terms of their own interaction with LL.M. students, most faculty reported that they discussed the academic program and requirements with LL.M. students (23 percent), with 17 percent recommending specific courses. At least 19 percent of the faculty also reported discussing professional career planning with the students and agreed to write letters of recommendation for them. Fourteen percent of the faculty respondents reported providing non-academic advice to LL.M. students.

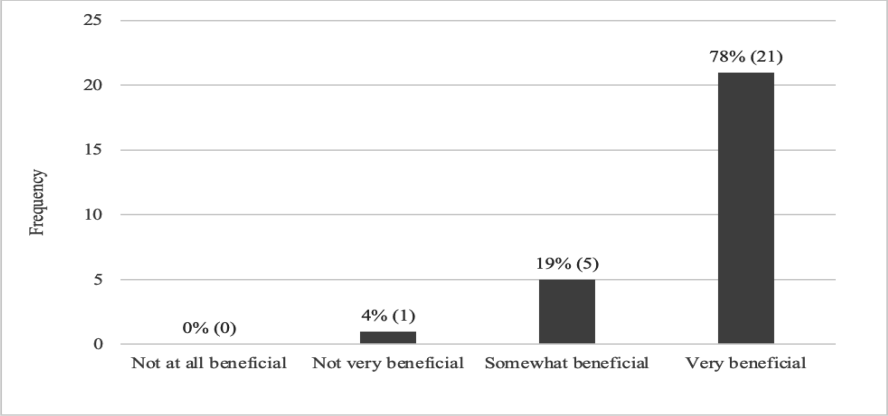
In terms of the law school faculty's attitude toward the LL.M. Program, generally, 70 percent "strongly like" the Program, with 11 percent who neither like nor dislike the program, and 7 percent, who dislike the Program. Of the faculty interviewees, they all "strongly liked" the Program because of the "richer experience and perspectives" that LL.M. students brought to the program, and the "internationalization" of the program.

Faculty respondents also reported on challenges they observed relating to language differences, academic background gaps, and the failure of some LL.M. students to seek academic help. Faculty respondents recommended additional support for LL.M. students. For example, some faculty suggested the availability of translation services, advanced English training, and adding closed captioning for videos and presentations for those students who lacked a high level of English proficiency.

The faculty expressed pride in the success of the LL.M. program, overall. Figure 8 illustrates the view of faculty regarding the benefits of the LL.M. program to the law school, with 77.8 percent of the participants reporting that they thought the program was very beneficial, and an additional 18.52 percent reporting it was somewhat beneficial. When asked during the interviews how they think the Program contributed to Syracuse Law overall, all of the faculty mentioned its "global perspectives," as well as the influence of the LL.M. program throughout the world because of the contributions of LL.M. alumni. As one interviewee said explicitly, "…

the reputation of the College of Law is now established in many different countries around the world as a result of the L.LM. program…"

Figure 8 Faculty Perspectives on the LL.M. Program



The faculty respondents indicated their appreciation for the support provided by the Office of International Programs, and that no additional support from that Office was needed. However, when asked if and how the LL.M. program could be improved, faculty offered several suggestions such as offering additional English training, higher admission standards, admitting students from additional countries, additional funding for scholarships, and additional activities designed to increase contact between LL.M. and J.D. students. Nonetheless, most faculty responded that the LL.M. program was excellent and stated that no improvements were necessary.

IV. LIMITATIONS OF THE STUDY

Although this study has broad application beyond Syracuse Law, as a model for the evaluation of other law school programs, and with findings that may provide a blueprint for other successful programs, this particular study has several limitations. First, the surveys and interviews were distributed and conducted in the spring of 2020 and 2021, the height of the Coronavirus pandemic. Although the response rate was relatively high for students, alumni, peer mentors, and faculty, it is likely lower than it could have been, had the study had not been conducted not at the height of the pandemic. Second, although this study is the first to utilize mixed methods to assess an LL.M. program from the perspectives of current LL.M. students, alumni, peer mentors, and faculty, future research is needed to assess the views of other stakeholders, including law school administrators, budget personnel, as well as the general J.D. student body. Finally, although data for this study was collected from diverse perspectives, all the data is from only one LL.M program at one law school.

CONCLUSION

This article reports on the first mixed method—qualitative and quantitative—research study of an LL.M. program. As such, the findings, as well as the methodology, should be useful for further research involving LL.M. programs and their students. Conducted by an expert team of researchers in 2019-21, this study of Syracuse Law's LL.M. Program revealed high overall satisfaction among current and former LL.M. students, their J.D. student peer mentors, as well as the law faculty. The data collected revealed the many reasons students have for enrolling in LL.M. programs, the high confidence in English proficiency among LL.M. students, and their success in securing employment upon graduation.[62] The findings also confirmed the Syracuse Law alumni's high satisfaction with the LL.M. Program, as well as the "helpfulness" of attending the LL.M. Program to attain their future career goals. The findings of this study also highlighted the value of Syracuse Law's unique peer mentorship program. Both the peer mentors and the LL.M. students valued their relationship. The LL.M. students also valued the different types of assistance and support their peer mentors provided, as well as the support of their professors. To the extent there were differences in satisfaction among the students, the reasons focused on specific issues, such as the need for additional career counseling, and greater interaction between J.D. and LL.M. students. Younger female LL.M. students also reported slightly lower satisfaction in certain categories than did the older male students. However, the findings also revealed overwhelmingly positive experiences by the LL.M. students, with 90 percent of alumni reporting that the program exceeded their expectations, as well as positive reactions by faculty about their LL.M. students. The authors hope that these findings as well as the methodology used in this first-of-its-kind study, will be instructive for other law schools as they consider the development and expansion of their own LL.M. programs.

62. *See* Spanbauer, *supra* note 51 at 410-11 (stating that language barriers of international students have been a concern of the U.S. law schools for a long time). Their confidence in their English skills may be attributed to a variety of factors, including the fact that some come from English-speaking countries and for those that do not, they may have studied English in the past or attended academic programs in English prior to joining the Syracuse Law LL.M. Program. In addition, some LL.M. students attend the Syracuse University English Language Institute during the summer prior to the beginning of their LL.M. Studies. This program also offers continuing support with English speaking and writing throughout the academic year. *See English for Lawyers,* SYRACUSE UNIV., *available at* https://eli.syr.edu/programs/english-for-lawyers/ (last visited Apr. 25, 2024).

APOLOGY AS AN INTELLECTUAL PROPERTY REMEDY IN CHINA: A PRELIMINARY EXAMINATION OF AMERICAN LITIGATION EXPERIENCES

Robert H. Hu[†]

ABSTRACT

Seeking and receiving an apology from the wrongdoer is a ubiquitous social phenomenon in Chinese culture and society. In recent years, litigation and apologies appear to be natural elements of contemporary life in China. Apologies as a legal remedy in Chinese laws and regulations have become prevalent for nearly four decades. In particular, in intellectual property law, the last thirty years have witnessed an explosion of apology cases. In such litigation, plaintiffs seek (and sometimes obtain) apologies from the defendants as a statutory remedy besides injunction and damages. American businesses operating in China increasingly take to the Chinese courts to protect their intellectual property, and seeking apologies during litigation is deployed as a useful strategy to curb intellectual property thefts.

This article explains the legal remedy of apologies popular in China but not commonly understood outside of the country. The essay discusses the evolution of Chinese apology laws and examines in depth apologies as a legal remedy in intellectual property laws and litigation. Based on more than a dozen judicial opinions, this essay considers the experiences of American corporations seeking apologies in Chinese courts and analyzes the facts and issues of such litigation. Some preliminary assessments and recommendations are made following this examination with the hope of providing useful guidance.

[†]*Professor of Law and Director of the Institute on Chinese Law and Business, St. Mary's University School of Law, Texas.* *I acknowledge and express my sincere gratitude to my colleagues and friends for their assistance and support during the research, drafting, and editing of this article: Dr. He Yudong (和于东), Professor of Law at Beijing University of Chemical Technology, China; Ms. Guo Ye (郭叶), Vice President of Chinalawinfo, Beijing; Craig Joyce, Professor of Law at University of Houston (retired); Librarian Stacy Fowler and St. Mary's University Law Library; Chenglin Liu, Professor of Law at St. Mary's University; and Mikaela Mandola, Law Student and Research Assistant. All mistakes and omissions are mine, and I apologize for them.*

INTRODUCTION: "AN APOLOGY PHENOMENON IN CHINA"

These days civil disputes and apology lawsuits are a constant occurrence in China.[1] The explosion of apology litigation, the so-called "apology phenomenon," is deeply rooted in the Chinese tradition of self-pride and dignity but is largely driven by the legislation of "personality rights."[2] Recent statistics indicate that as many as 192,675 "personality rights" cases were filed with the Chinese courts in 2021, representing a sharp 19.2% increase over the previous year.[3] People from all walks of life—authors, entertainers, athletes, academics, scientists, businessmen, and government officials—are involved in "personality rights" lawsuits that seek and may result in an apology judgment. Examples of these lawsuits are numerous. An author whose novel was plagiarized by another well-known writer, sued the plagiarizer, demanded, and obtained

[1] China, as used in this article, refers to the People's Republic of China (PRC), which was founded in 1949 by the Chinese Communist Party. At present, the PRC government controls and governs the country's territory comprising of the mainland, plus Hong Kong, and the Macau Special Administrative Regions. For purposes of this article, China refers to the mainland only, excluding Hong Kong, Macau, and Taiwan. Historically, the Republic of China (ROC), founded in 1911 by the Kuomintang-led Chinese Nationalists, ruled China until 1949. They retreated to Taiwan after losing the Chinese civil war to the Communists. The ROC still exists and governs Taiwan today. Although the PRC has never exercised political or legal controls over Taiwan, it considers Taiwan part of China's territory that must be reunited with the mainland, by force if necessary. *See* Central Intel. Agency World Factbook, *China* Central Intel. Agency (Mar. 22, 2024) *available at* https://www.cia.gov/the-world-factbook/countries/china/#military-and-security (last visited Apr. 1, 2024).

[2] *See generally* "Personality rights" 【人格权】 stand for the right(s) enjoyed by a natural or legal person regarding his (or its) life, body, health, name, image, honor, reputation, and privacy. Personality Rights (【人格权】) Civ. Code of the People's Republic of China (2020) § Art. 991, 178.

[3] *See* Shi Zhipeng, *Using Judicial Power to Protect Personality Rights*, PEOPLE'S DAILY (Jun. 6, 2023), (on file with author).

damages along with a public apology.[4] A young woman was turned down twice as a candidate for a job and was told that her failures were due to her origins from a province of poor reputation. Outraged and humiliated, she filed a lawsuit against her would-be employer and demanded a public apology plus payment for her humiliation. And she prevailed in court.[5] Moreover, a prestigious university filed a defamation lawsuit against a former employee who falsely accused the school of having widespread sexual abuses and harassments on female employees by male administrators. The university won a judgment of an injunction and a public apology against the false accuser.[6]

In many civil disputes of the type involving "personality rights," plaintiffs will demand that the defendants offer an apology, a statutory remedy provided.[7] If they prevail, the courts will order that the defendants apologize, in addition to the ordinary measures, such as an injunction or monetary compensation. A large and rising number of apology judgments ironically opened up opportunities for business. For instance, a company has created a national apology inquiry website where people can conveniently post legally required apologies, and the platform charges $500 per announcement.[8] There were nearly two dozen apology letters displayed on the website as of early July 2023. However, in most cases, a formal apology typically will be published in a newspaper for public viewing. The following example is the true copy of an apology printed in the *Legal Daily* years ago.

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[4] *See Duan Ping v. Ye Xin, et.al.,* Kun Min Liu Chu Zi No. 13 (2005) 【段平诉叶辛等著作权纠纷案, (2005) 昆民六初字第13号】*available at* Chinalawinfo.com (ID: CLI.C.76833). *See also* Wang Wengyang Dai Yan, *Ye Xin, Vice Chairman of the Chinese Writers Association, Paid 90,000 Yuan for Infringement*, LEGAL INFO. NETWORK (Dec. 24, 2005), *available at* https://rb.gy/u2i95 (last visited Apr. 16, 2024).

[5] *See* China Daily, *The Court Spoke - Girl Job Candidate Was Twice Turned Down Just Because She Was from Henan Province,* CHINA DAILY (Nov. 27, 2019), *available at* https://rb.gy/6tnv4 (last visited Apr. 1, 2024).

[6] *See* Legal Network, *The Court Publishes Judgment to Enforce Apology on Zhou Hengpu*, LEGAL NETWORK (Mar. 2, 2016), *available at* https://rb.gy/xgpvv (last visited Apr. 16, 2024).

[7] Article 179 enumerates "apologies" among eleven forms of remedy for civil liability, including cessation of injury, restoration, restitution, compensation, elimination of adverse effects, reparation of reputation, and so forth. Civ. Code of the People's Republic of China, (2020) § Art. 179, 33.

[8] *See* National Apology Inquiry Forum, *available at* https://shuzigonggao.com (last visited Apr. 16, 2024).

Figure 1. A Letter of Apology[9]

Statement of Apology

The book ***Liang Qichao and His Famous Family*** (edited by Ding Yu and Liu Jingyun) and published by our agency copied about 22,000 words from the book ***Liang Qichao and His Sons and Daughters*** (written by Wu Liming). Because our agency failed to uncover the plagiarized text during the review, we violated the copyright of Ms. Wu Liming. For this reason, our agency apologizes to Ms. Wu Liming!

China Industry and Commerce United Publishing House
July 26, 2003

Source: LEGAL DAILY, July 26, 2003

Many American companies, for example, Apple, Budweiser, Microsoft, Nike, and Walt Disney, operate in China, and are not immune from this cultural shift in society. These entities play an important role in the Chinese "apology phenomenon." Collectively, American businesses in China make plenty of apologizing as things go awry. For instance, Apple apologized to Chinese consumers for its arrogance in disregarding Chinese consumers' opinions and feedback;[10] Budweiser offered apologies to the Chinese government and the public for running a TV commercial containing bloody and violent scenes;[11] and Coach apologized for offending China and hurting Chinese people's feelings because some Coach t-shirts mistakenly displayed Taiwan and Hong Kong

[9] The apology letter here is a translation from the original document in Chinese (on file with author).

[10] Apple's apology states in part: "We realize that insufficient communications with the public led to the impression that Apple is arrogant and does not care about, or pay attention to, the consumers' feedback. We sincerely apologize to consumers for any of their concerns or misunderstandings so caused." *See Apple Issues Apology Letter to Chinese Consumers on Official Website*, CONSULATE GEN. OF THE PEOPLE'S REPUBLIC OF CHINA IN N.Y. (April 1, 2013), *available at* https://rb.gy/sdypb, (last visited April 16, 2024).

[11] Budweiser's apology reads in part: "On October 21, 2020, the company posted a Halloween promotional announcement on our official Weibo account, and a video clip of 2 minutes plus 5 seconds long embedded in the promotion showed bloody, horrific, violent scenes. . . . We apologize for having caused unhealthy emotions and impact." *See Right Now, Budweiser Apologizes*, DAILY ECON. NEWS (May 17, 2021), *available at* https://rb.gy/wzsfu, (last visited April 16, 2024).

as independent sovereignties outside China.[12] On the other hand, American companies (or at least some of them) seem knowledgeable of Chinese apology customs and practices, who often resort to and demand apologies as part of the remedy package against defendants in civil and intellectual property litigation (see Table 5 for examples).

This article will investigate and analyze apologies as a legal remedy and how it plays out in intellectual property litigation in China. This paper will focus on American experiences as seen from over a dozen Chinese court decisions. Part I is an introduction to Chinese apology culture to show its popularity and prevalence. Part II briefly discusses apologies as an intellectual property remedy under Chinese law and explains key terms and phrases used in this article. Part III offers an overview of Chinese apology law in general, explaining the relevant historical context, recent developments in judicial practice, and theoretical discourse. Chinese apology law scholarship will be compared with the American counterpart as well. Part IV deals with American IP apology litigation in China and examines a collection of selected decisions rendered by Chinese courts. A careful analysis of those American apology cases will end up with some personal insights and observations. The last section of the article, Part V, will draw conclusions and offer some suggestions for American businesspeople and intellectual property lawyers on how to take advantage of apology laws in China.

I. INTELLECTUAL PROPERTY LAW AND APOLOGIES

A. Dominant Economic Force and the Implications for American Businesses

China's superpower and dominance in the world economy is undisputed—its GDP is approximately 18% of the global GDP, and its economy contributes 30% of the world's economic growth.[13] Undoubtedly, what happens in China profoundly impacts the U.S. and the world. However, the growing impact of China goes beyond economics, technology, and diplomacy. Increasingly, Chinese culture, customs, and law affect and shape business behaviors, policies, and strategies of American firms operating in China. Chinese people take great pride in their tradition,

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[12] Coach's apology reads in part: "In May 2018, Coach discovered a grave mistake in the designs of several T-shirt styles. Coach deeply realizes the seriousness of this matter. Coach expresses its very profound apology to the consumers for hurting their feelings." *See Coach Publicly Apologizes and Vows to Respect and Preserve Chinese Sovereignty and Territorial Integrity*, SOHU.COM (Aug. 12, 2019), *available at* https://rb.gy/nibkq, (last visited April 16, 2024).

[13] *See* Li Qiang, *Opening Remarks at the 14th Annual Summer Davos Forum*, PEOPLE'S DAILY (Overseas Ed.), June 28, 2023 (on file with author).

culture, and personal dignity (often referred to as the "Face"), and people are very much accustomed to demanding apologies when they suffer a loss of the Face or humiliation in interpersonal relations and business dealings. In recent decades, society and daily life have endured seemingly endless apology episodes playing out in public view and on social media. As a result, civil and intellectual property disputes seeking an apology remedy have seen a steady upward trend in China, resulting in a huge amount of apology litigation and judgments. From 1990 to July 2023, Chinese courts decided 62,677 civil apology cases, 27,093 IP and unfair competition apology cases, 6,142 administrative apology cases, 3,353 criminal apology cases, and 1,261 state compensation apology cases, according to a leading Chinese law database.[14] Among the 27,093 apology cases in the IP and unfair competition category, 1,160 cases involved foreign litigants.[15] Given this cultural landscape, American businesses operating in China must pay greater attention to Chinese ways of doing things in order to be effective and successful.

B. "An Intellectual Property Powerhouse," and the Chinese IP System

China's economic dominance in the world is fueled by its technology superpower rooted in the global innovation hub. In 2021, China ranked first in the world for the most patents in force (3.59 million) and the most patent applications filed globally (1.58 million), according to the United Nations' World Intellectual Property Organization (WIPO).[16] The Global Innovation Index 2022 published by the WIPO ranks China 11th among 132 countries, moving up three years in row since 2020.[17] Without a doubt, "China is an intellectual property powerhouse," as characterized by Dr. Francis Gurry, Director General of the WIPO.[18]

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[14] These statistics, for instance, 27,093 IP and unfair competition apology cases decided, are the result of an investigation conducted in Chinalawinfo.com on and about July 30, 2023. The subfile selected was Judicial Cases (司法案例), the specific field chosen to search was Remedies Sought (诉讼请求), and the term Apology (赔礼道歉) was the query used in the field.

[15] *Id.* Note: Foreign cases don't account for cases in which litigants from Hong Kong, Macau, and Taiwan participate.

[16] *See Intellectual Property Statistical Country Profile 2021 – China*, WIPO (2022) *available at* https://rb.gy/lf0xk, (last visited April 16, 2024).

[17] According to the WIPO, "The Global Innovation Index (GII) ranks world economies according to their innovation capabilities. Consisting of roughly 80 indicators, grouped into innovation inputs and outputs, the GII aims to capture the multi-dimensional facets of innovation." *See The Global Innovation Index 2022*, WIPO (2022) *available at* https://rb.gy/stq8z (last visited April 16, 2024).

[18] *See WIPO Collection of Leading Judgments on Intellectual Property Rights: People's Republic of China (2011-2018)*, Foreword at 7, WIPO (2019*), available at* https://tind.wipo.int/record/40570 (last visited April 16, 2024).

The explosive economic growth and broad technology revolution have rapidly transformed China's legal system. Comprehensive laws and regulations have been enacted to encourage innovation and protect intellectual property in the form of patents, copyrights, trademarks, and trade secrets. Numerous international treaties and agreements have been negotiated and executed to safeguard foreign patents, copyrights and trademarks in China. Also, the courts and legal institutions have been set up to handle and adjudicate intellectual property disputes. After more than four decades of innovation and endurance, a modern system of intellectual property rights (IPR) has been established in China as the country becomes a global leader of manufacturing and innovation.[19] Nowadays Chinese citizens and foreign businesses readily apply, acquire, and own an enormous amount of intellectual property in China, which is protected by the courts and administrative agencies.[20] Hundreds of thousands of IPR cases are filed with and adjudicated by Chinese courts every year, making China the busiest place in the world for IPR litigation and protection.[21] Despite much progress, the Chinese system of IP protection remains a source of dissatisfaction with the U.S. government.[22] The Sino-U.S. tensions on intellectual property rights are ongoing and can flare up periodically.[23] Some U.S. politicians are proposing more severe steps to sanction China on IP violations.[24]

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[19] For an overview and assessment of the Chinese IP system, *see* Peter Yu, *When the Chinese Intellectual Property System Hits,* 35 QUEEN MARY J. OF INTEL. PROP. 3, 3-14 (2018).

[20] Chinese administrative agencies, such as the National Copyright Administration, and the State Administration for Market Regulation, are responsible for implementing respective IP laws and rules. These bodies are authorized to take administrative actions, e.g., raids, seizure of counterfeits, and imposition of fines, against law breakers.

[21] In year 2022 alone, Chinese courts adjudicated 543,379 IP cases. *See* Table 2, Adjudication of Intellectual Property Cases by Chinese Courts in 2022.

[22] *See, e.g.*, Peter Yu, *Still Dissatisfied after All These Years: Intellectual Property, Post-WTO China, and the Avoidable Cycle of Futility*, 34 GA. J. OF INT'L & COMP. L. 143-58 (2005).

[23] For example, in 2018, President Trump imposed tariffs and trade sanctions against China partly due to theft of American intellectual property by Chinese actors and China's forced technology transfers by U.S. companies. The negotiations led to the conclusion of the U.S.-China Economic and Trade Agreement in January 2020, which has an entire chapter to address IP protection processes and measures.

[24] *See* Alex Leary, *DeSantis Says He Will Weigh U.S. Ban of TikTok if Elected President*, WALL ST. J. (July 31, 2023), *available at* https://rb.gy/f3ie9 (last visited Apr. 1, 2024). For example, Ron DeSantis, a Republican presidential candidate for the 2024 election, is calling for extreme measures to punish China, which include "revoking China's permanent normal trade relations status and banning the import of Chinese goods made from stolen intellectual property."

C. Apologies as Intellectual Property Remedy

Apologies are a statutory remedy in Chinese intellectual property law and there is a prevalent legal apology culture in China today. In intellectual property infringement and other civil lawsuits, plaintiffs often seek a statement from the defendants expressing their "regret" or remorse about intentionally offending the plaintiffs or violating their rights. The requested apology, usually in writing and to be published in print and/or digital formats for a fixed period of time, is part of the remedies that courts will consider for approval along with other measures like damages and fines. Apologies are written into important Chinese legislation, for example the Civil Code,[25] the Copyright Law, and the Regulation for the Protection of Computer Software, which all specifically recognize and adopt apologies as a form of legal measures for civil liability. Consequently, plaintiffs in IP litigation frequently seek, in addition to an injunction and damages award, an apology from the defendants as a way of psychological reparation, perpetrator shaming, and repetition deterrence.[26] Chinese courts routinely grant plaintiffs' request for apologies. Without doubt, apologies as an intellectual property remedy are pervasive and impactful in the Chinese system and will continue to play an influential role in protecting IPRs in Chinese business and society.[27]

Interestingly China's apology law, especially in the intellectual property domain, is little known or understood in the United States even though China and the U.S. are big trade and investment partners and their

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[25] *See* Civil Code of the People's Republic of China, Third Session of the Thirteenth National People's Congress, art. 1000, May 18, 2020, *available at* https://regional.chinadaily.com.cn/pdf/CivilCodeofthePeople'sRepublicofChina.pdf (last visited Apr. 16, 2024) (stating "[a]n actor shall bear civil liability such as elimination of adverse effects, rehabilitation of reputation, or extension of apologies. …" The Civil Code, promulgated by the Thirteenth National People's Congress on May 28, 2020, is a comprehensive and systematic body of legislation. Within seven titles and 1,260 articles, the Code regulates and governs all civil legal matters and human relations in the society, such as legal capacity, agency, contracts, torts, property, marriage and divorce, inheritance, wills and estate, civil liability and remedies. The Civil Code was approved in May 2020, and became effective on January 1, 2021. The Code absorbs and replaces pre-existing laws including: the Marriage Law (2001), the Inheritance Law (1985), the General Principles of the Civil Law (1986), the Adoption Law (1998), the Guarantee Law (1995), the Contract Law (2012), the Property Law (2007), the Tort Law (2009), and the General Provisions of the Civil Law (2017). The Civil Code is a fundamental body of law in China. The drafting and enactment of the Civil Code, which took more than three decades to accomplish, is truly a milestone event in the progress of China's legal system.

[26] *See* Wu Xiaobin (吴小兵), *Peili Daoqian de Heli Xing Yanjiu* (赔礼道歉的合理性研究) [*Study on the Reasonableness of Apology*], Qinghua Faxue 《清华法学》 [Tsinghua L. J.], no. 4, 2010, at 144, 146.

[27] *See infra* Section D(1): Evolution of Chinese IP Law of Apologies.

economies are highly integrated with each other.[28] In 1986, apologies were first introduced into legislation as legal remedies. Since then, apologies have often been applied to civil and IP litigation in tens of thousands of cases. However, American legal commentators have written very little on this topic. A brief literature review identifies only a handful of articles, all written by one scholar.[29] A better knowledge, and appreciation, of this important legal measure by a wider community can help American IP owners and their lawyers deal with Chinese intellectual property challenges more effectively.

D. Key Terms and Phrases Explained Bilingually

It is critical to clarify some key terms and phrases and their translations used in this article at the outset. Chinese language is a character-based writing system, which is entirely different from the Romantic alphabet-based spelling system of English. To be authentic of and consistent with the Chinese concepts and their connotations in English translations, it is essential to see Chinese terms and phrases spelt out in vernacular form. For these purposes, the Chinese legal terms for *apology* and some relevant words are described and explained below:

1. Apology (赔礼道歉)

The Chinese term赔礼道歉 (pronounced pei li dao qian), a string of four characters, is translated into "apology," or "apologize" in English. The first two characters (赔礼) in the string literally suggest "to make amends," whereas the last two words (道歉) in the set mean "to apologize." Put together, the phrase stands for "make amends and apologize."

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[28] Based on U.S. government data, U.S. trade in goods with China in 2023 totaled $575 billion. *See Trade in Goods with China*, U.S. CENSUS BUREAU, *available at* https://www.census.gov/foreign-trade/balance/c5700.html (last visited Apr. 16, 2024); In addition, U.S. foreign direct investment (FDI) in China (stock) was $126.1 billion in 2022, whereas China's FDI in the United States (stock) was $28.7 billion in the same year. *See The People's Republic of China*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, *available at* https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china (last visited Apr. 16, 2024).

[29] *Xuan-Thao Nguyen*, UNIV. OF WA. SCHOOL OF LAW, *available at* https://www.law.uw.edu/directory/faculty/nguyen-xuan-thao (last visited Apr. 16, 2023). Between 2012-2014, Professor Xuan-Thao Nguyen published three pieces on Chinese apologies as remedies in intellectual property law, which introduced Chinese apology law to the U.S. These articles are: *Trademark Apologetic Justice: China's Trademark Jurisprudence on Reputational Harm*, 15 UNIV. OF PA. J. OF BUS. L. 131-68 (2012); *Apologies as Intellectual Property Remedies: Lessons from China*, 44 CONN. L. REV. 883-923 (Feb. 2012); and *China's Apologetic Justice: Lessons for the United States?*, 4 COLUMBIA J. OF RACE AND L. 97-128 (2014).

In Chinese usage, the same phrase 赔礼道歉 can represent either a noun (apology), or a verb (apologize), depending on the context.

As shown in the subsequent pages, "apology" frequently appears in Chinese laws, regulations, and court judgments.30

2. Statement (声明)

The Chinese term 声明 (pronounced sheng ming), a phrase of two characters, is the English equivalent of a statement, declaration, notice, or announcement. The same phrase 声明 can be used as a noun (statement or declaration) or a verb (declare or announce), depending on the situation. Under Chinese laws and regulations, a public statement is a form of civil remedy, which may be imposed on the wrongdoer to clarify certain facts and clean up adverse effects on the victim's honor and/or reputation caused by the wrongdoer's conduct.31 See the term Elimination of Adverse Effects (消除影响) for further explanation.

3. Apologetic Statement, or Apologetic Declaration (致歉声明-道歉声明)

The Chinese phrases 致歉声明 (pronounced zhi qian sheng ming) and 道歉声明 (pronounced dao qian sheng ming) are synonyms. With nearly identical spellings, both terms denote a formal, public apology made by the offender, which may be ordered by the court as a legal relief under the proper conditions (Figure 1 is an example of a court-ordered public apology.) This type of announcement is ordinarily in writing and published in a news outlet or social media platform appointed by the

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[30] For instance, *see* art. 45 of the Copyright Law of The People's Republic of China (1990) [hereinafter Copyright Law (1990)], which reads in part: "Anyone who commits any of the following acts of infringement shall bear civil liability for such remedies as ceasing the infringing act, eliminating the effects of the act, *making a public apology* or paying compensation for damages, depending on the circumstances, and may, in addition, be subjected by a copyright administration department to such administrative penalties as confiscation of unlawful income from the act or imposition of a fine:

(1) plagiarizing a work created by another;
(2) reproducing and distributing a work for commercial purposes without the consent of the copyright owner;
(3)–(7) (omitted)"

For examples of cases imposing an apology remedy, *see infra* part IV. Apologies in IP Litigation: American Experiences.

[31] For examples, Article 15 of the *Tort Law* (2009) states in part: "The methods of assuming tort liability shall include: 1. cessation of infringement; 2. removal of obstruction; 3. elimination of danger; 4. return of property; 5. restoration to the original status; 6. compensation for losses; 7. apology; and 8. *elimination of consequences and restoration of reputation* . The above methods of assuming the tort liability may be adopted individually or jointly." For cases imposing an elimination of adverse effects remedy, *see infra* part IV. Apologies in IP Litigation: American Experiences.

court. In Chinese judicial practice, the spelling of致歉声明 (zhi qian sheng ming) seems to be more common usage than the alternative spelling 道歉声明 (dao qian sheng ming). Although both phrases have the identical meaning and are used interchangeably by litigants and judges, their slight variations can make a difference in retrieving judgments and articles from online searching in Chinese, depending on which spelling is used. To ensure most complete search results, both spellings should be employed.

4. Elimination of Adverse Effects (消除影响)

The Chinese term 消除影响 (pronounced xiao chu ying xiang) stands for "elimination of adverse effects" (EAE), a phrase often seen in the context of bearing civil liability.[32] The same phrase may be deployed either as a noun (elimination of adverse effects), or a verb (to eliminate adverse effects) depending on the context. This remedy is usually granted by the courts in trademark infringement and unfair competition violations: the wrongdoer is mandated to publicly state or clarify certain facts in order to help restore the plaintiff's personal or commercial honor and/or reputation damaged by the wrongful act. An EAE measure is an independent legal remedy authorized by the law, which may be meted out in lieu of, or in combination with, an apology relief, as an individual case's circumstances warrant.[33]

II. LAW OF APOLOGIES: A CHINESE EXPERIMENT

A. 负荆请罪: "Proffer a birch and ask for punishment by flogging." [34] *Apologies Are a Way of Life and Culture*

Chinese society and culture are full of well-known apology stories. Chinese people are proud of their tradition of being a civilized nation that respects and affords dignity to all humans. Personal pride and dignity, the so called "the face," is highly prized and valued; it is very natural of ordinary people to ask for apology when they feel shamed or insulted by another (i.e., losing "the face"). The phrase, *负荆请罪*, comes from a legend of two thousand years ago, touting the virtue of sincerely apologizing for one's transgression in the hope of receiving forgiveness. Asking for an apology, and making one in response, permeates many aspects

[32] *Id.*
[33] *Id.*
[34] This Chinese idiom means to offer a humble and sincere apology.

of the social life in China.[35] In other words, apology is deeply rooted in Chinese culture but has only recently been codified.[36]

Paradoxically, refusal to apologize is also common in China and always co-exists with rendition of apology. *负荆请罪* [37] (pronounced *fu jing qing zui,*), that is, to offer a humble and sincere apology for one's guilt, represents behavior at one end of the spectrum; people who do so are considered noble and moral citizens. By contrast, *死不认错* (pronounced *si bu ren cuo*), which literally means "to refuse to admit one's mistake until his death," represents people who absolutely refuse to apologize for their wrongs under any circumstances.[38] Such behavior often invites negative publicity and even societal condemnation.

B. A Brief Survey of Chinese Law of Apologies

As a cultural phenomenon, apology, used in the ordinary sense of the term, belongs to the class of ethics and morality. By contrast, apology, used in the legal sense, such as in the Chinese Civil Code and other laws,[39] falls within a category of statutory remedies, which are to be meted out by the courts under certain conditions. In other words, apologies as an ordinary expression of some ethical behavior differs from apologies used as a form of legal measure for civil liability. The legal measure of this term is the primary focus (meaning) in this article.

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[35] *See* Fan Jiqiang, *Apologies as Civil Remedy: A Judicial Dilemma and Resolution*, 3 CHINESE APPLIED LEGAL SCI. 186-200 (2018), at 186. 【Chinese citation: 范纪强: "*赔礼道歉*"*民事责任的司法困境及其破解*,《中国应用法学》2018年第3期,186-200页, 第186页】

[36] Huang Zhong, *A Forgotten "Oriental Experience: Further Discussion on the Legalization of Apologies*, 33 TRIBUNE OF POLITICAL SCIENCE AND LAW 115-28 (2015), at 116. 【Chinese citation: 黄忠: *一个被遗忘的"东方经验" – 再论赔礼道歉的法律化*,《政法论坛》2015年第33卷第4期115-128页, 第116页】

[37] This Chinese phrase "*fu jing qing zui"* literally means to "proffer a birch and ask for punishment by flogging," as told by an ancient legend.

[38] *See* Ge Yunsong, *Apologies Application as Civil Remedy*, 5 JURISPRUDENCE 93-105 (2013), at 105. 【Chinese citation: 葛云松:

赔礼道歉民事责任的适用,《法学》2013年第5期93-105页。第105页】

[39] *See* Civil Code of the People's Republic of China [hereinafter Civil Code] (promulgated by the STANDING COMM. NAT'L PEOPLE'S CONG., May. 28, 2020) 20202 STANDING COMM. NAT'L PEOPLE'S CONG. (China); *see* Tort Law of the People's Republic of China (promulgated by the STANDING COMM. NAT'L PEOPLE'S CONG., Dec. 26, 2009) 2009 STANDING COMM. NAT'L PEOPLE'S CONG. (China); *see* Copyright Law of People's Republic of China (promulgated by the STANDING COMM. NAT'L PEOPLE'S CONG., Sept. 7, 1990) 1990 STANDING COMM. NAT'L PEOPLE'S CONG. (China).

1. Apology Legislation, and the Judicial Practices

Historically, apologies as a civil legal remedy can trace back as far as the common customs practiced during China's Qing Dynasty (1644-1911), as offered by some commentators.[40] Under the draft Great Qing Civil Code of 1911, the court could order a tortfeasor to publish an apology in the local newspaper to restore the damaged reputation of the plaintiff.[41] Before the founding of the People's Republic of China (PRC) in 1949, apologies were widely used in civil mediations in the Communist Party controlled territories. Such measures proved to be effective in solving civil disputes between individuals.[42]

In contemporary China,[43] scholars generally agree that apologies initially entered intellectual property law in 1990, the year when the Copyright Law [44] was passed in response to China's growing demands for economic modernization and opening up to the outside world. As ordinary legal remedies, however, apologies had been adopted much earlier. For instance, when the initial Criminal Law was enacted in 1979, apologies were made a penal measure.[45] Afterwards, apologies were placed in the Civil Code (draft version) in 1981, and such measures also showed up in the other drafts of the *Civil Code* under consideration.[46] Subsequently, in 1986, the General Principles of the Civil Law was passed, formally ushering in apologies as an independent form of civil remedy.[47] Thereafter, apologies were adopted in additional laws and regulations, such as the landmark legislation Tort Liability Law of 2009.[48] Finally, apologies

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[40] *See* Huang Zhong, *Take Apologies Seriously*, 5 LEGAL SCIENCE 73-80 (2008), at 73.
【Chinese citation: 黄忠：*认真对待'赔礼道歉'*,《法律科学》2008年第5期第73页】;
Civ. Code of the People's Republic of China, *supra*, note 3, (stating that apology is a customary practice in solving civil disputes in the Qing Dynasty of China).

[41] *See* Huang Zhong, *supra* note 37, at 116.

[42] *Id*.

[43] Contemporary China refers to the Chinese nation beginning in 1911, the year when the Republic of China was established following the overthrow of the Qing Dynasty (1644-1911), the last dynasty in China's long feudal history.

[44] *See* Copyright Law (1990), supra note 31, arts. 45-46.

[45] *See* Criminal Law of The People's Republic of China (1979), art. 32, which reads: "If the circumstances of a person's crime are minor and do not require punishment, he may be exempted from criminal sanctions; however, he may, according to the different circumstances of each case, be reprimanded or ordered to make a statement of repentance, *offer an apology* pay compensation for the losses or be subject to administrative sanctions by the competent department." *See also* Huang Zhong, *supra* note 37, at 116 (discussing the history of apology legalization in contemporary China.)

[46] *See* Huang Zhong, *supra* note 37, at 117.

[47] *See* General Principles of the Civil Law (1986), arts. 118, 120, 134.

[48] *See* Tort Liability Law of The People's Republic of China (2009), art. 15, which reads: "The methods of assuming tort liabilities shall include: 1. cessation of infringement; 2. removal of obstruction; 3. elimination of danger; 4. return of property; 5. restoration to the

were codified in the Civil Code promulgated in 2020.[49] For a comprehensive summary of the progress of apology laws in China, see Appendix A. Making of Apology Laws in China 1979-2020: A Chronology.

Today, apology remedies are ubiquitous in Chinese laws and regulations due to efforts of the previous decades. These measures are applied to a broad range of cases in civil disputes, torts, intellectual property, unfair competition, state compensation, criminal liability, consumer protection, and regulation of judges and prosecutors. In particular, tens of thousands of civil and intellectual property cases are litigated every year, where an apology remedy is sought after and decided.[50] Apology judgments and episodes of celebrities and ordinary people are shared, discussed, and argued over all the time among commentators, bloggers, and citizens on the internet and social media.[51] The far-reaching influence of Chinese apology law and jurisprudence cannot be underestimated. It is widely believed among Chinese jurists that legalizing apologies for civil liability is an unprecedented innovation of China, which contributes to progress of the world's legal systems.[52]

2. Legal Scholarship, and a Theoretical Framework

A meaningful discussion of Chinese apology laws should start with the 1986 passage of the *General Principles of Civil Law* (hereafter GPCL), a landmark event in China's legal history. That legislation was significant for several reasons. First, it was the first attempt in modern China to draft a systematic Code to regulate all civil matters - rights and obligations, which would take decades to make. Second, the GPCL was

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original status; 6. compensation for losses; 7. *apology* ; and 8. elimination of consequences and restoration of reputation. The above methods of assuming the tort liability may be adopted individually or jointly."

[49] *See* Civil Code, *supra* note 40, art. 1000 (promulgated by the Thirteenth Nat'l People's Cong., May 28, 2020), which states: "[a]n actor shall bear civil liability such as elimination of adverse effects, rehabilitation of reputation, or extension of apologies . . ."

[50] 62,677 civil apology cases and 27,093 IP apology cases were decided by Chinese courts from 1990 to July 2023. *See* Chinalawinfo.com, *supra* note 15.

[51] Well-known cases in recent years include famous author Zhen Kaige (陈凯歌), who fought a defamer and obtained an apology from him and former law dean of Shandong University, who successfully held a female lawyer accountable for falsely accusing him of sexual assaults on his female colleagues. Additionally, a well-known playwright, Yu Zheng (于正), was sued for plagiarizing famous author Quang Yao's fiction, while Guo Jingming (郭敬明) was brought to court for copying and altering author Zhuang Yu's work. Both Yu and Guo were ordered by the court to apologize to the original authors and copyright owners, but they refused. However, they eventually apologized after 5 or 6 years.

[52] *See* Duan Weili, *On Apologies as Legal Remedy in Civil Law*, 21 PRIV. L. STUDY 17, at 18 (2017) (stating that apology as an independent form of civil remedy is China's innovation in civil legislation, and that it is rare to see this remedy applied to civil infringement liability).

the first national legislation to introduce apologies into civil remedies, legalizing what is always deemed moral norms, with considerable controversy. Third, the inclusion of apologies in the GPCL laid the ground work for such remedy to be adopted into intellectual property laws and other rules.

For nearly thirty years following the GPCL's passage, scholars have undertaken a robust discourse on legalized apologies in China, producing a rich body of apology law literature. An inquiry of China-based legal periodicals conducted in the summer of 2022 retrieves over forty articles and writings, covering the earliest pieces published in 1994[53] and the latest in 2022.[54] These writings examine apology law's application and challenges in various disciplines: civil, criminal, intellectual property, unfair competition, environmental, consumer protection, and state compensation. Theoretical and practical approaches are taken in analyzing the law of apologies. From the theoretical angle, commentators look at the conceptual, ethical, and psychological and other dimensions of apologies. By contrast, empirical investigations[55] address particular issues and concerns in judicial practice, such as the legal standard for apology approvals, modes of performance, and enforcement measures. The works of two

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[53] *See* He Linglong &Yao Dexiang, Unsuitable to Order an Apology, 1 J. OF LEGALL JURIS. 42, (1994). 【Chinese citation: 何玲龙, 姚德祥, 不宜判决"赔礼道歉."《法学杂志》1994年第1期42 – 页。】

[54] Zhai Xiaobo*, The Concept of Apologies: Some Preliminary Thoughts*, 4 SJTU L. REV. 6, 6-16 (2023); Gan Lihao, *On Institutionalization of Apologies in the Modern Society Management*. 1 NEW MEDIA AND THE SOCIETY 303, 303-418 (2021); Zhang Yuan, *Comprehension and Application of Apologies as Civil Liability,* 1 GUANGHUA LEGAL JURIS. 144,144-57 (2021). 【Chinese citation: 翟小波：*道歉的概念：一些初步的思考*。《交大法学》2023年第4期第6-16页。】【Chinese citation: 甘莅豪：*论现代社会治理中的道歉制度化*。《新媒体与社会》2021年第1期303-318页】【Chinese citation: 张源, "*赔礼道歉"民事责任的理解与适用*。《光华法学》2021年第1期144-157页】

[55] *See*, Fan Jiqiang, *supra* note 36.

commentators—Huang Zhong[56] and Ge Yunsong,[57]—appear to command much attention overall. For apologies in intellectual property law, there are merely a handful of articles on point. Two pieces deal with apologies in copyright cases—the appropriateness of granting apologies in copyright infringement lawsuits,[58] and approving apologies in successive copyright infringement cases.[59] Two other writings discuss apologies in relation to a legal person's commercial reputation harm, whether and how apologies should be applied to a legal person's reputational harm,[60] and the differences between an apology remedy and an elimination of adverse effects (EAE) remedy in commercial defamation lawsuits.[61] Last, one comment attempts to distinguish and ascertain the apology remedy from the EAE measure in intellectual property infringement

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[56] Huang Zhong, *Take Apologies Seriously, 5* LEGAL SCI. 73, 73-80 (2008) 【Chinese citation: *认真对待'赔礼道歉,'*《法律科学》2008年第5期第73-80页】; Huang Zhong, *Legalization of Apologies: Why It Is Possible and How It Is to Be Implemented, 2* LEGAL SYSTEM AND SOCIAL DEV. 118, 118-128 (2009) 【Chinese citation: *赔礼道歉的法律化：何以可能及如何实践*。《法制与社会发展》2009年第2期118-128页】; Huang Zhong, *A Forgotten "Oriental Experience"*, 33 TRIBUNE OF POLITICAL SCIENCE AND LAW 115, 115-128 (2015). (Huang Zhong (黄忠) is a law professor at Southwest University of Political Science and Law, Chongqing, China).) 【Chinese citation: *一个被遗忘的"东方经验"* – *再论赔礼道歉的法律化*,《政法论坛》2015年第33卷第4期115-128页】

[57] Ge Yunsong, *Apologies as Civil Liability and Its Compulsory Enforcement*, LEGAL RESEARCH 2 (2011); Ge Yunsong, *Apologies and Its Application as Civil Liability*, JURISPRUDENCE 5 (2013) (Ge Yunsong (葛云松) is a law professor at Peking University, Beijing, China. Between 2011 and 2013, he published two essays on apology law, which were frequently cited by Chinese commentators.

[58] *See* Zheng Xiaohong, et al., *An Exploration of the Apology Liability and Its Application Issue*, CHINA COPYRIGHT 3. 【Chinese citation: 郑晓红, 韦之, 杨德嘉: "赔礼道歉"责任与适用问题探讨. 《中国版权》2019年第3期81-85 页】.

[59] *See* Xia Shuping, et al., *The Legal Application of Apologies in Infringement Cases of Copyright Inheritance,* INTEL. PROP. 1 (2004).

[60] *See* Cai Lidong & Yang Ye, *Apologies as Civil Liability and Relief for the Reputational Harm of Legal Persons*, 1 GUANGDONG SOCIAL LAW SCIENCE ,247-56 (2016). 【Chinese citation: 蔡立冬，杨晔：赔礼道歉责任与法人名誉权的救济。《广东社会法学》2016年第1期，247-256页】.

[61] *See* Li Guoqing, *On Apologies and Elimination of Adverse Effects Liability in Commercial Defamation Litigation,* INTELLECTUAL PROPERTY 6 (2014), *available at* <https://www.faxin.cn/lib/Flwx/FlqkContent.aspx?gid=F365620&libid=*040101*> (last visited Apr. 17, 2024). 【Chinese citation: 李国庆: *论商业诋毁诉讼的赔礼道歉和消除影响责任*。《知识产权》2014年第6期50-57页】.

cases.[62] The following paragraphs give a summary of the academic literature on apology law in China.

3. Question of Definition

Apology in the ordinary sense means to affirm one's fault and express his guilt for committing the wrongful act, according to the Chinese dictionary.[63] What is an apology in law? Chinese laws and regulations offer no definition, although this measure has been widely adopted by legislation and frequently enforced by the courts. Scholars hold different views of what apology means. Some believe that apology offers a civil remedy intended to protect a person's dignity, whereby an injured person has the wrongdoer admit a fault and show his remorse for damaging another's personality right.[64] Others think that apology is a form of civil remedy designed to make an infringer compensate for his victim's emotional harm by publicly admitting fault, showing regret, and begging for forgiveness.[65] Still, others consider apology a legal remedy that forces a wrongdoer to admit his responsibility to the injured, orally or in writing, in order to receive forgiveness, and as such is applied primarily to a minor violation of so-called "personality rights."[66] Despite the divergent definitions, commonalities lie in these elements: (1) apology is a type of civil remedy against the wrongdoer; (2) apology requires the wrongdoer to admit fault and express a sense of guilt to the injured; and (3) apology is granted by the court to resolve a dispute quickly and sometimes amicably.[67]

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[62] *See* Zhang Xiodu, *Between Apology and Elimination of Adverse Effects: Ascertaining Civil Liability Remedies in Intellectual Property Infringement*, CHINA PATENT AND TRADEMARK 4 (2004), *available at http://www.shangbiao-law.com/cn/rights/detail.asp?id=560#* (last visited Apr. 17, 2024). 【Chinese citation: 张晓都: *知识产权侵权民事责任中消除影响与赔礼道歉责任方式的确定*. 《中国专利与商标》2004年第4期21-25页】

[63] *See* Hu Yan, *Legalization of Apologies in Our Country's Civil Law Domain*, CHINA CIVIL AND COMMERCIAL LAW, *available at* <https://civillaw.com.cn/zt/t/?id=30108> (last visited Apr. 17, 2024).

[64] Xu Jing, et al., *Exploration of Apologies as Civil Liability Remedy*, 11 HUBEI POLICE U. J. 86, 86-89 (2014).

[65] *See* Huang Zhong, *supra* note 41, at 73.

[66] *See* Min Wan (闵婉), Lun Peili Daoqian Minshi Zeren (论赔礼道歉民事责任) [On Apology as a Remedy of Civil Liability], Hubei Jingguan Xueyuan Xuebao 《湖北警官学院学报》 [HUBEI POLICE U. J.], no. 2, Feb. 2014, at 119-21.

[67] *Id.*

4. Purposes and Function

Broadly speaking, a legal apology's purposes are to protect the legal rights of citizens, educate wrongdoers, relieve civil disputes, and promote social stability and harmony.[68] By contrast, when it comes to the function served by apologies, commentators hold divergent and sometimes conflicting views, including: releasing a victim's anger,[69] reparations for a victim's mental suffering,[70] punishing the offender,[71] smoothing the process of mediation and settlement,[72] offsetting the offender's psychological guilt, and restoring social morale.[73] Nevertheless, most commentators believe that a legal apology can calm down and comfort someone suffering mental distress caused by harm to his personality right(s), and that the positive effects of an apology cannot be replaced by any other remedy.[74] One scholar concludes that apology's benefits can be viewed in three points: for the injured, apology serves a need for emotional or psychological reparation; for the offender, apology acts as a self-redemption and moral restoration; and for society at large, apology works to rehabilitate the broken morale and reestablish the law's authority through punishment and education.[75]

5. Scope of Application

Given the omnipresence of legal apologies, the probability of abuse in practice is very real. What are the proper boundaries for this measure? Little guidance in the law exists. However, a general agreement among scholars is that apologies may (or should) be applied only in three types of violations: Personality Rights (人格权), Intellectual Property Rights, and Special Property Rights.[76] First, personality rights include a person's rights to life, health, and dignity.[77] An apology remedy should be granted

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[68] *See* Huang, *supra* note 41, at 73.
[69] *See* Xu Jing, *supra* note 65, at 87.
[70] *See* Ge Yunsong, *supra* note 39, at 93.
[71] Fu Cui-ying, et al., *On the Application of Apology in Civil Liabilities*, 26.4 HEBEI L. SCI. 133, 133-141 (2008).
[72] *See* Huang Zhong, *supra* note 37, at 121.
[73] *See* Xu Jing, *supra* note 65, at 87.
[74] *See* Wan Min, *On Apology as a Remedy of Civil Liability*, 2 J. HUBEI U. POLICE 119, 119-121 (2014).
[75] *See* Wu Xiaobin, *Study on the Reasonableness of Apology*, 4 TSINGHUA L. J. 144, 144, 146 (2010).,
[76] *See* Fan Jiqiang, *supra* note 36, at 196.
[77] "Personality rights are the rights of life, inviolability and integrity of person, health, name, likeness, reputation, honor, and privacy, among others, enjoyed by parties to civil legal relations. Besides the personality rights prescribed in the preceding paragraph, a natural person enjoys other personality rights based on personal freedom and personal dignity." Di Jiubai Jiushi Tiao (第九百九十条) [Art. 990 Civ. Code] (2020).

when an offense happens in that situation. Second, intellectual property rights cover copyright and related neighboring rights, like the dignity and integrity of the author and/or his works. An apology should be approved when an infringement of this kind occurs. However, since patent and trademark rights are purely property rights with no personality element, they are ineligible for an apology measure unless the right owner's name, reputation, or honor is collaterally damaged under special circumstances.[78] Third, an apology should be awarded to protect special properties. There may be a unique or sentimental value to the owner in special property. For example, a personal gift or object may embody emotional quality or characteristics special to the owner. When such an interest gets damaged permanently or perishes due to the wrongdoer's act, the owner should be entitled to an apology, in addition to monetary compensation.

6. Performance and Formality

How is an apology to be performed? Chinese laws remain silent on specific requirements. In trials, apologies ordinarily are to be delivered in one of two ways—orally or in writing. Several possible scenarios can play out depending on the case: (1) the defendant is ordered to make an oral apology to the plaintiff in court; (2) the defendant is ordered to orally apologize to the plaintiff in front of a named person and/or at a fixed venue; (3) the defendant is directed to hand-deliver a written apology to the plaintiff; and (4) the defendant is required to publish an apology letter in a designated newspaper, a trade journal, and/or a digital platform for a fixed period of time, and the letter's content must be approved by the court. In the last scenario, the court will publish key portions of the judgment at the defendant's expense should the defendant fail to comply with the apology order.[79] Although uncommon, in some regions, courts may allow a defendant to apologize to his victimized recipient by bowing, offering tea or cigarettes, or setting off firecrackers.[80]

7. Enforcement and Compulsion

How do courts enforce apologies if defendants refuse to carry out the measures? Should courts compel defendants to apologize against their will? These are some of the most difficult and controversial questions regarding legal apologies. On the theoretical level, opponents of

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[78] *See* Ge Yunsong, *Apologies as Civil Liability and Its Compulsory Enforcement*, 2 Legal Rsch. 113, 114 (2011) (stating that apologies are not applicable to patent and trademark rights since the courts consider such as property rights only).
[79] *Id.*
[80] *See* Ge Yunsong, *Apologies' Application as Civil Remedy*, 4 LEGAL SCI. 119, 119-21 (2015).

legalized apologies argue that this measure should not be written into law in the first place since apologies belong to the domain of ethics and morality, not law.[81] They believe that any benefits of an apology, if forced or compelled by courts, will diminish, or completely disappear as a forced apology goes against the essence and objectives of apologies. They strongly object to compulsive enforcement because a court-forced apology necessarily violates the defendant's freedom of conscience and constitutional right to free speech (or to remain silent).[82] Some commentators suggest abolishing legal apologies on these grounds.[83] On the practical level, opponents point to issues such as abuse of this measure in judicial proceedings and challenging aspects in enforcement.[84]

Regardless of philosophical objections and real obstacles, apologies as a civil remedy have taken root and thrived in China as a natural development of a traditionally effective legal remedy. The legislation and judicial practice over the last four decades have settled the academic debate in favor of apology legalization and court-compelled performance (usually in the form of publishing the judgment in a news outlet at the defendant's expenses). However, scholars undoubtedly will continue to discuss and argue over many of the same difficult questions.

8. Apology v. Elimination of Adverse Effects (EAE)

Confusions arise between an apology and the elimination of adverse effects (EAE) because both measures are often enforced by the nearly identical vehicle—the wrongdoer's publication of a written letter in a news outlet or digital media. However, these two statutory measures are distinct legal reliefs to serve related but different objectives. Apology affirms a sense of guilt and shows remorse to the victimized recipient for the harm caused by the wrongdoer. When properly delivered, an apology has the benefits of relieving the mental suffering and/or repairing the damage to the ego of the injured. By contrast, an EAE directs the wrongdoer to publicly affirm the truthful facts with the objective of restoring the name or reputation of the injured. Chinese laws provide for both apology and EAE as independent legal remedies of civil liability. For instance, the Civil Code lists "Apologies" and the "EAE" in the same

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[81] *See* Duan Weili, *supra* note 53, at 23-24.

[82] *See* Yao Hui & Duan Rui, *On the Apology: Its Alienation and Regress*, 2 J. RENMIN UNIV. OF CHINA 104, 104, 109, 111 (2012).

[83] *See* Sun Zun-hang, *On Theory of Abolishment of Coerced Apology*, J. OF SICHUAN POLICE COLL. 56, 56-60, 58-59 (Dec. 26, 2014). 【Chinese citation: 孙尊航：*"被迫的赔礼道歉"应当废除*。《四川警察学院学报》2014年第26卷第6期56-60.】

[84] *See* Fan Jiqiang, *supra* note 36.

sentence as parallel civil measures.[85] Other laws treat these two measures in a similar manner.[86] The statutes make clear that apologies and EAEs can be applied in the same litigation separately or jointly as conditions require. And the courts will mete out one or both measures in the same litigation depending on the plaintiff's petition and the circumstances.[87]

C. Comparison with American Law and Perspectives

America has a complicated reality when it comes to apologies. Apologies are almost as familiar to Americans as apple pie,"[88] and American culture values apologies.[89] Children are raised to say "sorry" when committing minor aggressions toward siblings and friends. Adults are accustomed to apologizing when offending another's feelings. Family members routinely apologize to each other to make things up and get along. In the public spheres, apology stories and episodes are spread through the newspapers, radios, TV, and the internet. Big stories grab national headlines. To illustrate, movie star Will Smith, who slapped Chris Rock at the 2022 Oscars for insulting his wife, apologized to Mr.

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[85] Art. 1000 reads: "An actor that assumes civil liabilities of *elimination of adverse effects*, rehabilitation of reputation, and *extending a formal apology* (emphasis added), among others, for infringing upon the personality rights shall assume liabilities equivalent to the specific manner of the acts and the scope of influence.

[86] There are several examples: art. 52 of the Copyright Law People's Republic of China (2020), which states in part: "He who commits any of the following acts of infringement shall bear the civil liability for such remedies as ceasing the infringing act, *eliminating the effects of the act, making a public apology* (emphasis added) or paying compensation for damages, depending on the circumstances … art. 23 of the Regulation on the Protection of Computer Software (2013 amendment), which reads in part: "Except where otherwise provided in the Copyright Law of the People's Republic of China or these Regulations, anyone who commits any of the following acts of infringement shall, in light of the circumstances, bear civil liability by means of ceasing infringements, *eliminating ill effects, making an apology* (emphasis added), or compensating for losses . . ." and art. 15 of the Tort Laws (2010) (now superseded by the Civil Code of 2020)) says in part: "The methods of assuming tort liabilities shall include: 1. cessation of infringement; 2. removal of obstruction; 3. elimination of danger; 4. return of property; 5. restoration to the original status; 6. compensation for losses; 7. *apology*; and 8. *elimination of consequences* (emphasis added) and restoration of reputation. The above methods of assuming the tort liability may be adopted individually or jointly.

[87] For example, the court in *GMAC v. New Oriental School* 【(2003)高民终字第1391号, Dec. 27, 2004】ordered both an apology and the elimination of adverse effects against the defendant (see Part III for details); by contrast, the court in *Real Networks, Inc. v. Beijing Baofeng Wangji Technology Co., Ltd*. 【(2009) 高民终字第1924号, decided Nov. 26, 2009] allowed an elimination of adverse effects relief in lieu of an apology.

[88] *See* Xuan-Thao Nguyen, *Apologies as Intellectual Property Remedies: Lessons from China*, 44 CONN. L. REV. 883, 885 (Feb. 2012).

[89] *Id.*

Rock in a YouTube video.[90] The Boeing Company issued a full-page apology in the *Wall Street Journal* for its 737 Max's mechanical failures, which killed hundreds of passengers plus crew members.[91] United Airlines ran a full-page advertisement in the *USA Today* to apologize for brutally dragging a passenger off the plane.[92] Fox News offered an apology (and $20 million) to the host Gretchen Carlson to settle a sexual harassment lawsuit against the company.[93]

Occasionally, politicians have to apologize for their behaviors. For instance, Ralph Northam, former Governor of Virginia, offered apologies to Virginians for dressing in racist blackface in a school yearbook photo.[94] Eliot Spitzer, former Governor of New York, held a press conference to apologize to his family and New York citizens for patronizing prostitution.[95] Even former President Donald Trump, who is known as a fighter and nearly never admits a fault, offered apologies for his lewd comments on women in the *Access Hollywood* tape scandal.[96] For government wrongful actions, the U.S. Congress apologized to Chinese-Americans for passing Chinese exclusion laws (e.g., Chinese Exclusion Act of 1882) that discriminated Chinese nationals and barred their immigration to the U.S. for over sixty years.[97] In foreign relations, President Bill Clinton offered "sincere" and repeated apologies to China for

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[90] *See* ABC7,*"My Behavior 200as Unacceptable." Will Smith Addresses Oscars Slap, Apologizes to Chris Rock*, YOUTUBE (July 29, 2022), *available at* https://rb.gy/78hsp (last visited Apr. 17, 2024).

[91] *See A progress report on the 737 MAX, on Boeing, on safety*, WALL ST. J., Oct. 25, 2019, at A7. The statement reads in part, "We are truly sorry."

[92] *See* Oscar Munoz, *Actions Speak Louder Than Words*, USA TODAY, Apr. 27, 2017, at 8A. The apology reads in part, "We can never say we are sorry enough for the shameful way one of our customers was treated aboard United flight 3411."

[93] *See* David Folenlink, *Former Fox Host Gretchen Carlson Gets Apology, $20M Settlement*, NPR (Sept. 6, 2016, 12:01 PM), *available at* https://rb.gy/k9rg5 (last visited Apr. 17, 2024).

[94] *See* Richard Gonzales, *Calls for Resignation As Va. Governor Apologizes for Racist Image In 1984 Yearbook*, NPR (Feb. 1, 2019), *available at* https://www.npr.org/2019/02/01/690862933/virginia-governor-displayed-racist-image-in-1984-medical-school-yearbook#:~:text=Virginia%20Gov.,a%20Ku%20Klux%20Klan%20robe. (last visited Apr. 17, 2024).

[95] *See Public Apology Central: Governor Eliot Spitzer*,PUB. APOLOGY CENT., *available at* https://publicapologycentral.com/apologia-archive/political-2/eliot-spitzer/ (last visited Apr. 17, 2024).

[96] *See* Robert Farley, *Trump's Rare Apology*, FACTCHECK.ORG (Dec. 12, 2017) *available at* https://www.factcheck.org/2017/12/trumps-rare-apology/(last visited Apr. 17, 2024).

[97] S. Res. 201-A, 112th Cong., (2012); *see also* H.R. Res. 683, 112th Cong. (2012).

erroneously bombing the Chinese embassy in Belgrade, Yugoslavia and killing diplomats there.[98]

Meanwhile, the U.S. legal culture discourages apologies,[99] and apologies are rare in civil litigation.[100] A number of reasons and factors can explain withholding one's apologies. The primary reason may be the concern to avoid potential liabilities against the apologizer.[101] No federal legislation recognizes or adopts apologies as a legal measure of civil liability. On the state level, there was a rash of legislation during the 1986-2009 period; 35 states passed statutes to encourage apologies in civil disputes by providing "safe harbors" to offenders in the hope of promoting reconciliation, mediation, and settlement.[102] Such state statutes are, by design, quite different from Chinese apology laws; the latter legalize and codify apologies into normal civil remedies to be enforced by the courts.

The lack of formal apology remedies in the U.S. may be due to several factors, such as the legal tradition and culture, constitutional constraints, and advocacy strategies. Besides legislation, American courts and judges have taken a wide range of approaches toward apologies through the common law regime; while some courts disfavor and reject apologies, others welcome such measures.[103] The rejection of apologies may be based on several grounds, such as an apology's inability to right moral wrongs; a lack of equitable powers in the courts to grant apologies; an apology's insufficiency to rectify the harm done; and First Amendment concerns regarding the defendant's freedom to stay silent.[104] By contrast, some courts embrace and affirm apologies in certain types of cases, including perjury, wrongful discharge of employment, First Amendment violations, and attorney disciplinary actions.[105]

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[98] Andrew Glass, *Bill Clinton Apologizes to Jiang Zemin for NATO Bombing,* POLITICO (May 14, 2013), *available at* https://www.politico.com/story/2013/05/this-day-in-politics-091279 (last visited Apr. 17, 2024).
[99] *See* Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 461 (2003).
[100] *See* John Council, *In Litigation, Sometimes All It Takes Is Saying 'Sorry'* Texas Lawyer, N.J.L.J. (Mar. 1, 2017), *available at* https://www.law.com/texaslawyer/almID/1202779050706/ (last visited Apr. 17, 2024).
[101] *Id.* ("Apologies are unusual in tort cases for a variety [of] reasons, chief among them that defendants are loath to offer anything more than broad condolences to a plaintiff that has sued them for fear of admitting liability").
[102] *See* Michael B. Runnels, *Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases*, 46 SAN DIEGO L. REV. 137, 151-57 (2009).
[103] *See* Xuan-Thao Nguyen, *Apologies as Intellectual Property Remedies: Lessons from China*, 44 CONN. L. REV. 883, 899 (Feb. 2012).
[104] *Id.* at 899-900.
[105] *Id.* at 901.

A long-running history of apology research in the U.S. has established a multi-disciplinary field that examines all imaginable subjects and dimensions, such as business, politics, family life, interpersonal relations, benefits and limitations, ethical, psychological, social-economic, and philosophical aspects. In the legal area, apology research is believed to have begun in and around the 1980s, when some scholars published essays in the *Law & Society Review* comparing Japan-U.S. apology laws and cultures.[106] Following those papers, many books and law reviews have been written in the ensuing decades, according to one apology scholar.[107] A leading investigator, Jennifer Robbennolt, a University of Illinois law professor, has undertaken much research in this field with a lasting impact.[108] For her, the primary benefits of apology lie in that apology can lead to reconciliation by "resolving conflicts, repairing relationships, and finding reconciliation in many different types of conflicts."[109] She says:

> When injury occurs, people often want to understand what has happened and why. They may seek accountability. And they often want to make sure that similar harm doesn't happen–to them or to others–ever again. At their best, apologies can speak to these needs. *Apologies can demonstrate respect for their recipients, affirm their dignity, and acknowledge their suffering*.[110]

Incidentally, Chinese apology law scholarship took off following the American research. The collective body of American literature of apologies has had some influence on Chinese scholars' thinking, and some commentators in China cite leading American (and other foreign) authors and works in their own research.[111] Despite the nearly four decades of

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[106] *See* Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & SOC'Y REV. 461, at 461 (1986); John O. Haley, *Comment: The Implications of Apology*, 20 L. & SOC'Y REV. 499, 504-05 (1986).

[107] *See* Xuan-Thao Nguyen, *supra* note 104, at 891-97.

[108] Robbennolt's publications are too many to be listed here. A few examples include: *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 460-516 (2003); *What We Know and Don't Know about the Role of Apologies in Resolving Health Care Disputes*, 21 GEO. ST. UNIV. L. REV. (2005): 1009-1028; *Bankrupt Apologies*, 10 J. EMPIRICAL LEG. STUDIES, 771, 771-96 (2013); *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 349-98 (Spring 2008); and *To Err Is Human, to Apologize Is Hard: The Role of Apologies in Lawyer Discipline*, 34 GEO. J. OF LEG. ETHICS 513-66 (2021).

[109] *See* Jennifer K. Robbennolt, *The Power of an Appropriate Apology*, ABA (Sep. 13, 2021), *available at* https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2021/dr-magazine-reconciliation-is-it-really-possible/the-power-of-an-appropriate-apology/ (last visited Apr. 17, 2024).

[110] *Id.*

[111] *See e.g.* Huang Zhong, *supra* note 37, at 120 (quoting Robbennolt's "Apologies and Legal Settlement: an Empirical Examination," in *Mich. Law Review* 102 (2003) 460-516); Ge

extensive apology litigation, very little has been written or understood of the Chinese experiment beyond China. To illustrate, a literature search on Westlaw conducted in Summer 2023 turned up only a handful of American law review articles, all of which were written by one commentator about fifteen years ago.[112] Given the critical importance of Chinese law to American businessmen and lawyers dealing with China, it is surprising to see this level of paucity in the scholarship of Chinese law and practice.

D. Apology as Intellectual Property Remedy in Chinese Law

1. Evolution of Chinese IP Law of Apologies

Despite ongoing criticism, periodically accompanied by U.S. sanctions, China remains a global superpower of innovation and intellectual property creation. Patent applications are filed and granted by the hundreds of thousands annually, millions of trademarks are approved for registration, and tens of thousands of literary and artistical works are given copyrights. For instance, in 2021, 1.5 million patent applications and 11 million trademark applications were filed in China, ranking first in the world in both categories.[113] In that same year, nearly 700,000 new patents were granted, bringing the total number of Chinese patents in effect to 3.5 million. That makes China the world leader in the number of patents in force.[114]

The General Principles of the Civil Law (hereafter GPCL), approved in 1986, is the predecessor to the Civil Code adopted in 2020. The GPCL formally introduced apologies as a form of civil remedies into a major piece of legislation to address infringement of personality rights.[115]

Yunsong, *supra* note 81, at 115 (quoting Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 *CORNELL L. REV.* (Sept. 2006): 1261-1311); and Duan Weili, *supra* note 53, at 19 (quoting Susan Daicoff's *Apology, Forgiveness, Reconciliation & Therapeutic Jurisprudence*, in 13 PEPP. DISP. RESOL. L. J. 131-180 (2013).

[112] Between 2012-2014, Professor Xuan-Thao Nguyen published three pieces on Chinese apologies as remedies in intellectual property law, which introduced Chinese apology law to the U.S. These articles are: *Trademark Apologetic Justice: China's Trademark Jurisprudence on Reputational Harm*, 15 UNIV. OF PA. J. BUS. L. 131-168 (2012); *Apologies as Intellectual Property Remedies: Lessons from China*, 44 CONN. L. REV. 883-923 (Feb. 2012); and *China's Apologetic Justice: Lessons for the United States*, 4 *COLUM. J. RACE L.* 97-128 (2014).

[113] *See Intellectual Property Statistical Country Profile 2022: China* WORLD INTELL. PROP. ORG., (Dec. 2023), *available at* https://rb.gy/df872 (last visited Apr. 17, 2024).

[114] *Id*.

[115] *See* General Principles of the Civil Law of the People's Republic of China (《中华人民共和国民法通则) (promulgated by Order No.37 of the President of the People's Republic of China, on Apr. 12 1986, effective Jan. 1 1986) art. 120 (: "If a citizen's

Additionally, the GPCL unambiguously enumerated apologies as normal civil remedies in the same class as restoration to the original conditions, compensation for loss, and payment of damages.[116] For intellectual property protection measures, the law listed "cessation of infringement, elimination of adverse effects, and compensation for losses," without a specific mention of apologies.[117] The GPCL's adoption, followed by passages of the *Copyright Law* (1990) and other statutes legalizing apologies, ushered in a new era of apology litigation in China.

Like the rest of the Chinese legal system, intellectual property law in China fully embraces apologies as a civil remedy, and such has been codified into some key IP and IP-related laws and regulations. For instance, apologies initially entered into the *Copyright Law* in 1990,[118] followed by inclusion in the Regulation on the Protection of Computer Software in 1991.[119] Apologies were also included in the Interpretation of the Supreme People's Court on Certain Issues Concerning Adjudication of Copyright Civil Disputes in 2002,[120] and a similar measure was made into the Regulation on the Protection of the Right to Publicly Communicate Works on Information Networks in 2013).[121] The apology provisions

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right of personal name, portrait, reputation or honor is infringed upon, he shall have the right to demand that the infringement be stopped, his reputation rehabilitated, the ill effects eliminated, and an *apology* (emphasis added) made; he may also demand compensation for losses. The above paragraph shall also apply to infringements upon a legal person's right of name, reputation or honor.")

[116] *See id.* art. 134 ("The methods of bearing civil liability shall be: (1) Cessation of infringement; (2) Removal of obstacles; (3) Elimination of dangers; (4) Return of property; (5) Restoration to original conditions; (6) Repair, reworking or replacement; (7) Compensation for losses; (8) Payment of damages for breach of contract;
(9) Elimination of adverse effects and rehabilitation of reputation; and (10) *issuance of apology* (emphasis added).")

[117] *See id.; see also id.* art. 118, ("When a citizen's or legal person's rights of authorship (copyrights), patent rights, rights to exclusive use of trademarks, rights of discovery, rights of invention or rights for scientific and technological research achievements are infringed upon by such means as plagiarism, alteration or imitation, they shall have the right to demand that the infringement be stopped, its adverse effects be eliminated and the damages be compensated for.")

[118] Copyright Law of the Peoples Republic of China (promulgated by Order No.31 of the President of the People's Republic of China, on Sep. 7, 1990, effective Sep. 7, 1990) art. 45-46.

[119] Regulations for the Protection of Computer Software (promulgated by Order No.31 of the President of the People's Republic of China, May 4, 1991, effective Oct. 1, 1991) art. 30.

[120] The Interpretation of the Supreme People's Court Concerning Several Issues on Application of Law in Hearing Correctly the Civil Copyright (promulgated by 1246th Meeting of the Adjudication Committee of the Supreme People's Court, (Oct. 12, 2002), effective Oct. 15, 2022) art. 17.

[121] *See* Regulation on the Protection of the Right of Communication to the Public on Information Networks (信息网络传播权保护条例 [已被修订]) (promulgated by Decree No.

contained in these laws and regulations remain effective today after these laws and rules have gone through several rounds of revisions in the last few decades.

2. Current Status of Apologies in Chinese IP Law

The current state of apologies as intellectual property remedies in China is described in Table 1 below. The inclusion of the Civil Code in the chart needs some explanation. Although the Civil Code is not an intellectual property statute *per se*, there are important reasons for treating it this way. First, the Civil Code is a fundamental law governing all matters civil. A whole title of the Civil Code is devoted to "personality rights," covering the rights to one's name, image or likeness, reputation, and honor.[122] Incidentally, these same rights are protected by the Copyright Law,[123] and Anti-Unfair Competition Law.[124] Second, the Civil Code clearly identifies and recognizes intellectual property rights as part

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634 of the State Council, Jan. 30, 2013, effective Mar. 1, 2013) Art. 18. (**"**Whoever commits any of the following infringements in violation of the provisions of this Regulation shall, depending on the circumstances, assume civil liability by ceasing infringement, eliminating effects, *making an apology* (emphasis added), or paying damages; in the case of any damage caused by the infringement to the public interest, the copyright administrative department may order cessation of infringement, confiscate any illegal proceeds, and impose a fine of not less than one nor more than five times the amount of illegal operation if the amount of illegal operation is 50,000 yuan or more or a fine of not more than 250,000 yuan according to the seriousness of the circumstances if there is no amount of illegal operation or the amount of illegal operation is less than 50,000 yuan; if the circumstances are serious, the copyright administrative department may confiscate computers and other equipment mainly used to provide network services; and if the infringement constitutes a crime, the offender shall be held criminally liable in accordance with the law:

(1) Providing the public with works, performances, or sound or audio-visual recordings of others on aninformation network without their consent.

(2) Intentionally circumventing or compromising technological measures.

(3)-(5) (omitted)")

[122] *See* Civil Code, *supra* note 40, (promulgated by the Thirteenth Nat'l People's Cong., May 28, 2020, effective Jan. 1, 2021), Book IV, (China).

[124] *See* Copyright Law of the People's Republic of China] (promulgated by the Seventh Nat'l People's Cong., Sept. 7, 1990, amend. By the 24th Meeting of the Committee of the Ninth Nat'l People's Cong., Oct. 27, 2001), art. 10, (China) which states: "Copyright" shall include the following personal rights and property rights: (1) the right of publication, that is, the right to decide whether to make a work available to the public; (2) the right of authorship, that is, the right to claim authorship in respect of, and to have the author's name mentioned in connection with, a work; (3) the right of revision, that is, the right to revise or authorize others to revise a work; (4) the right of integrity, that is, the right to protect a work against distortion and mutilation."

[125] DAWO LAW FIRM, *Another Tool in your IPR Toolbox: China's Anti-Unfair Competition Law*, DA WO LAW FIRM SHANGHAI (Apr. 22, 2019), *available at* <https://shorturl.at/ySUY3> (last visited Apr. 17, 2024); *see also* FANG CHEN, ESSENTIAL KNOWLEDGE AND LEGAL PRACTICES FOR ESTABLISHING AND OPERATING COMPANIES IN CHINA, 743 (Springer eds., 1st ed. 2022).

of civil rights.[125] Third, the Civil Code and its apology provisions therein are often cited together in Chinese civil litigation and intellectual property cases, so the Civil Code is well known among citizens and professionals interested in apologies and the law. Last, the Civil Code remains the primary legal foundation for academic discourse of Chinese apology law in general and intellectual property apologies in particular.[126]

Table 1. Apology Provisions in Current Chinese Intellectual Property Law

	Title	**Article No.**	**Amendment**
1	Copyright Law	52	11/11/2020
2	Regulation on the Protection of Computer Software	23 -24	1/30/2013
3	Regulation on the Protection of the Right to Publicly Communicate Works on Information Networks	18	1/30/2013
4	Interpretation of the Supreme People's Court on Issues Concerning Adjudication of Copyright Civil Disputes	17	12/29/2020
5	Civil Code	995, 1000	5/28/2020

3. Intellectual Property Apology Cases: The Good, the Bad, and the Ugly

The Chinese legal system keeps pace with technology innovations and intellectual property generation by active legislation and consistent enforcement. As Table 2 below illustrates, hundreds of thousands of IPR cases involving Chinese citizens and businesses are filed and adjudicated by the courts each year, making China the world's busiest destination of IPR litigation.

[126] Aaron R. Wininger, *China's National People's Congress Releases English Translation of Civil Code Including Intellectual Property Law Articles*, SCHWEGMAN LUNDBERG WOESSNER (May. 2, 2021), *available at* <https://shorturl.at/cdiko/> (last visited Apr. 17, 2024).

[126] Ge Yunsong, *supra* note 58.

Table 2. Adjudication of IP Cases by Chinese Courts in 2022

All New Cases Accepted	Cases That Were Concluded Adjudication	Foreign Cases That Were Concluded Adjudication at Trial Level
526,165	543,379[127]	9,000

Source: Intellectual Property Court of the Supreme People's Court—Intellectual Property Protection by Chinese Courts (2022), at 2 and 17.

Chinese courts handle a large number of IP disputes when an apology remedy is pursued. From January 1990 to July 2023, a volume of 27,093 IP apology disputes were decided.[128] Naturally, many of those decisions did not approve an apology relief sought by the plaintiffs,[129] and the successful cases granting apologies faced enforcement issues. Ideally, the defendant's apology should be timely, issued to admit the harm caused the plaintiff, express guilt or remorse, and promise not to commit the wrong again. Such an ideal apology can be found in Figure 2 below.

[127] This number includes newly accepted cases and old cases carried over from the preceding year of 2021.

[129] Chinalawinfo.com, *supra*, note 15.

[129] In a small sample of 115 apology cases examined, apology success rate is only 13%. *See* Table 6 for details.

Figure 2. A Public Apology Statement [130]

Public Apology Statement

Yangzhou Star Toothbrush Co., Ltd. (hereinafter referred to as "our company") hereby declares that it recognizes and respects Kline Beecham P.L.C. and its subsidiary, Smith Kline Beecham P.L.C. (hereafter the right-holders"), as respective owners of the exclusive rights in the trademarks and copyright of the S-curved design works (see above for the picture of the S-curved toothbrush products of the right-holders).

Without authorization, our company used the words "SB and pictures" on Star Toothpaste F901 and F262, used "FLEXOSAURUS" on Star Toothpaste F212, and used "FLEX DIRECT" on Star Toothpaste F918. Our company admits that the above acts have violated the exclusive right of the registered trademarks of the right-holders and caused certain economic losses to them.

At the same time, our company has used the S-curved designs on the above-mentioned products without authorization. Our company admits that the above behavior has violated the copyright of the right-holders' S-curved designs.

Our company apologizes for the adverse effects caused by the above-mentioned infringements upon the right-holders, and promises not to infringe on their trademark exclusive rights and S-bend design copyright in the future.

Yangzhou Star Toothbrush Co., Ltd.

Mar. 20, 2004

Source: PEOPLE'S DAILY (overseas edition), Mar. 20, 2004, at 3.

However, ideal apology outcomes are few and far between, while bad apology outcomes are quite common. For instance, well-known writer Ye Xing was ordered by the court to apologize to another author whose work Ye copied and plagiarized extensively. Mr. Ye had initially refused to apologize and fought the charges vehemently in court. After

[130] This is a translation of the original document in Chinese (on file with author).

the judgment was issued, Ye delivered a terse apology letter to the plaintiff in which he simply stated that he "unknowingly" infringed on the plaintiff's work due to his publisher's fault.[131] In another apology case, Chinese internet search engine giant Sohu was ordered to apologize to eLong Company for copyright infringement, with the apology to be posted at Sohu's website for twenty-four hours.[132] Since Sohu did not apologize within the allotted timeframe, eLong applied to the court to enforce the measure. However, eLong was outraged when it discovered that Sohu's apology was just a one-line tiny spot without admitting any guilt. eLong rejected the apology and threatened to sue Sohu again. Some apology outcomes are even worse. In the case of author Guo Jingming, Guo was found guilty of copyright infringement and ordered to pay the plaintiff RMB 200,000 yuan in damages and to publish a written apology in a national newspaper. Guo delivered the payment, but refused to apologize, so the court ended up publishing the judgment in the newspaper at a cost of RMB 14,000 yuan to be paid by Guo.[133] Guo eventually published an apology online six years after the judgment. Another extreme apology case involved the defamation by Zou Henpu, a prominent scholar at a top Chinese university. After Zou was found guilty of defaming Peking University by false accusations against senior administrators, he resolutely refused to apologize. Thus, the Court published the judgment in the newspaper *People's Courts Reporter*.[134]

III. APOLOGIES IN IP LITIGATION: AMERICAN EXPERIENCES

"In trademark and copyright infringement cases, Chinese law recognizes the universal norm of apology and incorporates it as a form of remedy—in addition to injunctive relief and damages."[135]

A. China's Intellectual Property Litigation Landscape

Protecting intellectual property through the courts has become more common in China as the country emerges as a global leader in IP litigation. A modern judicial system has been implemented to handle ever-growing volumes of intellectual property disputes. The regime consists

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[131] Duan Ping, *Ye Xing Apologized to Me*, BA NA 1, 43-45 (2006).
[133] Beijing Times, *eLong Company Might Sue Sohu Again, Found Apology Letter Unacceptable*, Sina (Mar. 17, 2002), *available at* https://tech.sina.com.cn/i/c/2002-03-17/107078.shtml (last visited Apr. 17, 2024).
[133] *See* Chase Shê, *Guo Jingming and Yu Zheng Apologize for Plagiarism Following Industry Boycott*, DRAMAPANDA (Jan. 2, 2021), *available at* <https://shorturl.at/rtxZ8> (last visited Apr. 24, 2024).
[134] *See* Legal Network, *supra* note 7.
[135] Xuan-Thao Nguyen, *supra* note 104, at 922.

of three layers of courts; the *Intellectual Property Court of the Supreme People's Court of China* (the Intellectual Property Court, or IPC) sits on the top,[136] four intellectual property courts located in Beijing, Shanghai, Guangzhou and Haikou are in the middle;[137] and at the bottom are twenty-seven (27) intellectual property tribunals at provincial levels, together with 558 basic courts having jurisdiction to hear IP cases.[138] A standing judicial body under the Supreme People's Court, the IPC primarily hears cases on appeal over patent and other IP rights involving professional technologies throughout China. The IPC aims to further unify the trial criteria of IP cases in the country.[139] Since its founding in 2019, the IPC has accepted 13,863 cases and concluded adjudication of 11,148 of the cases as of 2022.[140] The IPC continues to stay busy; in 2022 alone, the IPC accepted 6,183 IP cases, concluding adjudication in 3,468 of them.[141] Together, Chinese courts adjudicate hundreds of thousands of intellectual property cases annually. In all Chinese courts, 543,379 IP cases were adjudicated in 2022.[142] While the vast majority of the lawsuits are between Chinese individuals and businesses, a significant number of disputes are between foreign and Chinese litigants. For instance, Chinese courts heard 9,000 cases involving foreign right-holders in 2022,[143] and the IPC alone accepted 396 foreign cases (9% of the IPC's total caseload).[144] Additionally, the IPC accepted a total of 1,257 foreign cases from 2019 to 2022 (9.1% of the IPC's aggregate caseload).[145]

Among foreign IP owners, the United States, Japan, the Republic of Korea (ROK), Germany, France, and the United Kingdom are the leaders

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[136] The Intellectual Property Court of the Supreme People's Court of China, *available at* < https://enipc.court.gov.cn/en-us/index.html> (last visited Apr. 24, 2024).
[137] Beijing Intellectual Property Court, Guangzhou Intellectual Property Court, and Shanghai Intellectual Property Court were established in 2014, and Hainan Free Trade Port Intellectual Property Court was established in 2020.
[138] *See* Pan Xutao, *Protecting Intellectual Property, the World Trusts China*, PEOPLE'S DAILY (overseas edition), April 26, 2023, at 5.
[139] *Introduction to the Intellectual Property Court of the Supreme People's Court*, THE INTELLECTUAL PROPERTY COURT OF THE SUPREME PEOPLE'S COURT OF CHINA, *available at* https://enipc.court.gov.cn/en-us/news/view-136.html (last visited Apr. 17, 2024).
[140] *See* Annual Report of the Intellectual Property Court of the Supreme People's Court (2022), THE INTELLECTUAL PROPERTY COURT OF THE SUPREME PEOPLE'S COURT OF CHINA, *available at* https://ipc.court.gov.cn/zh-cn/news/view-2268.html (last visited Apr. 17, 2024).
[141] *Id.* at 4.
[142] *See* the Intellectual Property Court of the Supreme People's Court (editor), "Intellectual Property Protection by Chinese Courts (2022)," at 2 (on file with author).
[143] *Id.* at 17.
[144] *See* Annual Report of the Intellectual Property Court of the Supreme People's Court (2022), *available at* <https://ipc.court.gov.cn/zh-cn/news/view-2268.html> (last visited Apr. 24, 2024).
[145] *Id.*

as to the number of Chinese patents, trademarks, and industrial designs (see Table 4 below). It is most likely that these same countries have the most IP litigation lawsuits in China among all foreign right-holders. Because of the importance of Chinese IP law and litigation, the United States Patent and Trademark Office (USPTO) holds public, quarterly webinars on Chinese IP legislation and litigation updates, the University of California-Berkley holds an annual conference on Chinese IP litigation (now in its 5th year), and Stanford University ran an influential China Guiding Cases Project from 2011 to 2021.[146]

Table 3. Chinese Patent and Trademark Applications in 2021–Selected Foreign Countries

Country of Origin	Patent Applications		Trademark Applications	
	Quantity	Share of Foreign Filings	Quantity	Share of Foreign Filings
Japan	47,010	29.8%	30,194	11.8%
U.S.	42,266	26.8%	66,782	26.1%
ROK	17,691	11.2%	18,214	7.1%
Germany	16,481	10.4%	17,549	6.9%
France	4,962	3.1%	XXX	XXX
UK	XXX	XXX	24,964	9.8%

Source: WIPO: Intellectual Property Statistical Country Profile 2021 – China.

B. American IP Litigation and the Apology Remedy

American intellectual property owners regularly file and litigate disputes in Chinese courts. In fact, the United States holds the largest share of Chinese adjudications among all foreign IP owners because the U.S. is a top trading partner, investor, and technology supplier with China. Among all foreign states, the U.S. ranks first in the number of Chinese trademark applications in 2022 and ranks second in the volume of Chinese patent applications the same year (see Table 3). To identify and locate relevant American intellectual property cases decided by Chinese courts, a Beijing-based bilingual database–Chinalawinfo—was searched.[147] The investigation targeted those judgments in which an

[146] *See Stanford's China Guiding Cases Project*, STANFORD LAW SCHOOL, *available at* https://rb.gy/20qk4 (last visited Apr. 17, 2024).

[147] Chinalawinfo (known as北大法宝 in China) is a Chinese-English bilingual database of full-text Chinese laws, court cases, academic journals, and legal news. Developed and

American IP owner was present (as plaintiff or defendant) and where an apology remedy was considered by the court.[148] That search retrieved a total of 528 cases, including: 312 decisions of the first instance, 197 decisions of the second instance, two re-trial decisions, and 19 decisions of simple litigation procedures. After the use of filters, a majority of the retrieved cases were taken out of the search results due to their failure to meet one of the pre-determined criteria.[149] This yielded a net of 115 decisions for further examination and analysis (see Table 5 below.) It is worth noting that those 115 cases are only those containing an apology demanded by the plaintiffs, which may be requested along with other measures, like injunction and/or payment of damages. These 115 decisions represent a small fraction of all American litigation in Chinese courts. For example, Microsoft has filed numerous IP cases in China, but it has only eight apology cases listed under its name (see Table 4).

owned by Peking University, this company has operated continuously since 1985 and become a leading legal information provider in China. Its subscribers and customers include Chinese government agencies and courts, large law firms, and major universities in China, North America and around the world. Chinalawinfo is the equivalent of West Law or LexisNexis for Chinese legal information among Chinese lawyers, judges, scholars, government officials, and professionals.

[148] Specifically, Chinese language searching was performed in Chinalawinfo.com on and around June 24, 2022, using structured queries in fields *美利坚* ("United States" in full document), *美国* ("America" in party field), *赔礼道歉* ("apology" in cause of action), and *知识产权与竞争纠纷* ("intellectual property and competition" in classification).

[149] There are two criteria for inclusion: (1) one of the parties must be an American entity incorporated in the U.S., including an American subsidiary incorporated in China; (2) the decision must be final after the exhaustion of appeals allowed under Chinese law.

Table 4. American IP Apology Cases in China: 1995-2022[150]

	Name of American Entity	**Apology Granted**	**State-ment Granted**	**Apol-ogy De-nied**	**Total**
1	3M			2	2
2	20th Century Fox			1	1
3	Adobe Systems			2	2
4	AFC Enterprises	1			1
5	**Alt-N Technologies**			14	**14**
6	**American Petroleum Institute**			5	**5**
7	American Power Con-version			1	1
8	Anheuser-Busch [aka Budweiser (China)]	1	4		5
9	ARBO Industries			1	1
10	**Autodesk**	1		4	5
11	Bausch & Lomb		1		1
12	Bloomberg		1		1
13	Blizzard Entertainment	2		1	3
14	Charleston Interna-tional			1	1
15	Discovery		1		1
16	Educational Testing Service (ETS)	2			2
17	E. I. Du Pont			1	1
18	Eli Lilly			2	2
19	Getty Images			2	2
20	GMAC	1			1
21	Gold Eagle		1	1	2
22	Google			1	1
23	Live-Right		1		1
24	**Levi Strauss**		1	15	**16**

[150] This chart summarizes IP litigation in Chinese courts in which an American company is either the plaintiff or the defendant. The cases are alphabetically listed by company names. A normal company name spelling stands for the plaintiff, whereas an italicized name indicates the party may be the defendant or plaintiff or both. The bolded name indicates a company having litigated five or more IP cases in China. In all the cases the plaintiff demands that the court order a public *Apology* and/or a public *Declaration* from the defendant as a legal remedy.

25	Microchip Technologies			1	1
26	**Microsoft**			8	**8**
27	Nike			1	1
28	Nvidia			1	1
29	Paramount Pictures			1	1
30	Pfizer			3	3
31	Philip Morris	1			1
32	PNY Technologies	1			1
33	Real Networks		1		1
34	**Rhino Software**			12	**12**
35	Sesame Workshop			1	1
36	SI Group		1		1
37	Standard Performance Evaluation (SPEC)			2	2
38	Starbucks	1			1
39	Symantec			1	1
40	Universal City Studios			1	1
41	**Walt Disney**	3		2	**5**
42	WordPerfect Corp.	1			1
	Total	15	12	88	115

From the above chart, it seems clear that American entities won an apology remedy in only fifteen out of 115 IP cases, whereas they lost on this count in eight-eight IP decisions. The businesses with the most IP apology litigation in China are: Levi Strauss (16), Alt-N Technologies (14), Rhino Software (12), Microsoft (8), American Petroleum Institute (5), Autodesk (5), and Walt Disney (5). However, the leader in securing most apology awards in Chinese litigation is Walt Disney, which succeeded in winning three apology decisions. Disney is followed by Blizzard Entertainment and the Educational Testing Service (ETS), each of which won two apology judgments in IP litigation. Meanwhile, American companies secured twelve statement (remedy) judgements in lieu of an apology, even as they lost the quest for apology (see Table 5 for details.) Overall, the apology remedy is granted in only 13% of all American IP cases, whereas the rate of denial of apology by Chinese courts is much higher at 76%.

Table 5. Disposition of American IP Apology Cases in China: 1995-2022

Disposition by Court	Number of Cases	Percentage %
Apology denied	88	76.52
Apology granted	15	13.0
Statement granted	12	10.43
Total	115	100

What kind of IP cases are the favorite candidates for an apology remedy? Table 7 below gives a breakdown of the types of American cases decided. Among the 115 IP apology cases, 66 are copyright cases, 43 are disputes of trademark and unfair competition, and only six are patent decisions. Overall, the courts declined to order an apology measure in 88 cases, whereas they granted the same relief in only 15 judgments. It appears that an apology remedy was most frequently ordered in disputes concerning copyright (eight grants) and trademark & unfair competition (seven approvals), while an apology remedy was denied in all the patent cases. Additionally, the courts granted a statement remedy in one copyright case and 11 trademark and unfair competition disputes. However, a statement measure was never granted in any of the patent cases.

Table 6. Breakdown of American IP Apology Cases in China: 1995-2022

Disposition by Court	Total	Copyright	Trademark, Trade Secret & Unfair Competition	Patent
Apology Denied	88	57	25	6
Apology Granted	15	8	7	0
Statement Granted	12	1	11	0
Total	115	66	43	6

As shown above, Chinese courts can approve or support the plaintiff's application for an apology remedy in two types of intellectual property cases: copyright in one category, and trademark and unfair competition (TUC) in the other. Individual cases vary in their circumstances, but the apology laws are general and vague, which contributes to the courts'

considerable discretion on whether to support an apology. What follows is a brief summary of these American IP apology cases in China. The collection of these case summaries shines lights on the factors and reasoning that affect the determinations of Chinese courts.[151]

C. Affirming an Apology Remedy by Chinese Courts

1. Copyright Decisions

i. Autodesk, Inc. v. Beijing Longfa Construction & Decoration Engineering Co.[152]

Autodesk, Inc. is California-based multinational software corporation. According to the company's website, "Our technology spans architecture, engineering, construction, product design, manufacturing, media, and entertainment, empowering innovators everywhere to solve challenges big and small. From greener buildings to smarter products to mesmerizing blockbusters, Autodesk software empowers innovators to design and make a better world for all."[153] Beijing Longfa Construction & Decoration Engineering Co. (hereafter Longfa) is a Chinese firm engaged in the business of residential and office interior designs and construction. Autodesk held U.S. copyrights to a series of computer software packages. Longfa, without Autodesk's consent, appropriated and installed such software on Longfa's computers and networks. Autodesk filed a copyright infringement suit with Beijing Second Intermediate People's Court, seeking the following remedies: Longfa be barred from further infringement, Longfa pay a sum of RMB 1.73 million yuan for damages, and Longfa publish an apology simultaneously in *Beijing Evening News* and *Beijing Youth Daily*. The Court first found that Autodesk's software packages were protected by Chinese law due to the Berne Convention for the Protection of Literary and Artistic Works of 1886 (hereinafter Berne Convention), under which China is obliged to treat and protect U.S. copyrighted works as if they were China's own. Next, the Court decided that Longfa committed copyright infringement against Autodesk with a blatant malicious intent since it had previously been fined by the Beijing government for illegally appropriating the same software packages

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[151] For ease of tracking and comparison, the Chinese case name is included, along with its docket number, such as this: "(2003) 高民终字第1310号." Additionally, the ID number assigned by the database company is attached.

[152] *Autodesk, Inc. v. Beijing Longfa Construction & Decoration Engineering Co., Beijing High People's Court* (Dec. 29, 2003), *available at* Chinalawinfo.com (last visited Apr. 17, 2024).

[153] *See Corporate Info*, AUTODESK, *available at* https://www.autodesk.com/company/newsroom/corporate-info (Corporate Info (last visited Apr. 17, 2024).

owned by Autodesk. Therefore, reasoned the Court, it was proper to impose an apology relief on Longfa besides other measures because of Longfa's intentional infringing acts. Citing the Copyright Law, Articles 47-48, the Regulation on the Protection of Computer Software, Articles 5 and 24, and the Interpretation of the Supreme People's Court on Several Issues Concerning Adjudication of Copyright Disputes, Article 21, the Court mandated Longfa to apologize to Autodesk in *Beijing Evening News* within 30 days of the judgment, in addition to being enjoined from future infringement and paying damages in the amount of RMB 1.49 million yuan. Under the order, the content of Longfa's apology had to be pre-approved by the Court; after which the Court would go forward to publish the main portion of this judgment in the local paper at Longfa's expenses should Longfa fail to apologize within 30 days of the decree. Longfa appealed the decision to the Beijing High People's Court but withdrew the appeal after reaching a settlement with Autodesk. Consequently, the trial court's apology and other remedies were sustained.

ii. Blizzard Entertainment, Inc. v. Beijing Fenbo Times Network Technology Compan[154]

Blizzard Entertainment, Inc. (hereafter Blizzard) is an Irvine, California-based video game developer and publisher. Blizzard created popular video games such as the *Warcraft*, *Diablo*, *StarCraft*, and *Overwatch* series, in which it held U.S. copyrights. Beijing Fenbo Times Network Technology Company (hereafter Fenbo) is a Chinese video game developer and operator. In a lawsuit filed with the Guangzhou Intellectual Property Court, Blizzard accused Fenbo of copyright infringement by illegally copying, distributing and exploiting Blizzard's artistic works in the World of Warcraft games covering the characters, cosmetics, and designs. Blizzard requested the Court to hold Fenbo liable for copyright violations and grant several remedies which included: enjoining Fenbo from future copyright violations, recovering damages in the amount of RMB 5 million yuan, and ordering Fenbo to apologize to eliminate harmful effects on the plaintiff. Blizzard suggested that the apology be posted on the defendant's website and another popular video games website for the public's view.

The Guangzhou court agreed with Blizzard. Finding Fenbo liable for copyright infringement, the Court held that Fenbo violated the plaintiff's right of attribution in the concerned video games, and that the circumstances surrounding such violations were serious enough to warrant

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[154] *Blizzard Entertainment, Inc. v. Beijing Fenbo Times Network Technology Co.*, Beijing High People's Court (Dec. 17, 2017), CHINA LAW INFO (2016), *available at* http://chinalawinfo.com (last visited Apr. 17, 2024).

an apology relief under the law. Relying on the *Copyright Law* (Articles 48-49), the *Tort Law* (Articles 8, 9 and 15), and the *Interpretation of the Supreme People's Court on Several Issues Concerning Adjudication of Copyright Cases* (Articles 25-26), the court ordered that Fenbo cease infringing upon Blizzard's copyrighted video games, pay a sum of RMB 4 million yuan in damages, and post an apology with 30 days of the effect of the judgment on Fenbo's website and another popular video games website. The judgment noted that the apology's content must be pre-approved by the court.

On appeal, the High People's Court of Guangdong Province affirmed the apology and other measures in the trial court's decision.

iii. Educational Testing Service (ETS) v. New Oriental School (NOS)[155]

Educational Testing Service (ETS), a New Jersey-based company, develops and administers the widely used graduate school entrance exam known as the GRE.ETS registered and owns the U.S. copyright to the GRE tests. Additionally, the GRE was registered in China as a trademark to be used on all GRE test prep courses and study materials. The Beijing-based firm New Oriental School (NOS) provides Chinese citizens with foreign language training and study abroad preparation services. For many years, the NOS copied and sold GRE tests and prep materials to Chinese users without ETS's consent. In litigation filed with the Beijing First Intermediate People's Court, ETS accused NOS of copyright and trademark infringement. The Court agreed with both charges, citing Articles 2, 51-52, and 52 of the Copyright and Trademark Laws. Specifically, the Court rejected the NOS argument that tests were not covered by Chinese copyright law, reasoning that GRE tests were creative works eligible for protection under Chinese law. Consequently, the Court ordered the defendant to destroy infringing materials and prohibited future infringement. Additionally, the defendant was required to pay the ETS compensation in the amount of RMB 3.95 yuan million and make a public apology in the *Legal Daily* within 30 days of the judgment's effective date.

On appeal, the Beijing High People's Court affirmed the judgment of copyright infringement but reversed the trademark violation because the defendant's use of the GRE mark was for a descriptive purpose without a trademark meaning. The higher court upheld the damages award with a slight reduction from RMB 3.95 million yuan to RMB 3.90 million

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[155] *Educational Testing Service (ETS) v. New Oriental School.*, CLI.C.11792, (Guangzhou Intellectual Property Court, Dec. 27, 2004) (China).

yuan. Importantly, the apology remedy was sustained in part due to the defendant's intentional, continuing illegal copying after it had assured the Beijing authorities to the contrary. According to the Court, the content of the apology must be approved by the Court before publication, with the proviso the Court would go ahead and publish the main section of the judgment in the *Legal Daily* at the defendant's expense should the defendant fail to comply within 30 days.

iv. Educational Testing Service (ETS) v. New Oriental School[156]

Educational Testing Service (ETS), a New Jersey-based company, develops and administers college and graduate tests and prep materials. ETS registered and owns copyright to the Test of English as a Foreign Language (TOEFL). ETS registered the TOEFL in China as a trademark on TOEFL study and test prep courses and material. The New Oriental School (NOS), a Beijing-based Chinese firm, provides foreign languages training and study broad preparation services to Chinese citizens. The NOS and ETS signed a license agreement that allowed the NOS to distribute TOEFL tests cassettes and related study materials to its customers. However, the NOS distributed such items to the public at large beyond the allowable scope of the license, and the NOS continued copying and distributing such materials after the license expired. In litigation filed with the Beijing First Intermediate People's Court, ETS alleged both copyright and trademark infringement against the NOS. Relying on the Copyright Law (Articles 2 and 52), the Trademark Law (Articles 51 and 52), and the Berne Convention, the Court found both copyright and trademark violations committed by the NOS. Therefore, the NOS was ordered to follow these measures: discontinue infringement, turn over the infringing materials to the Court for destruction, pay compensation to ETS in the sum of RMB 5 million yuan, and apologize in the *Legal Daily* within 30 days of the judgment becoming effective.

On appeal, the Beijing High People's Court affirmed the copyright infringement claim but dismissed the trademark infringement. The Court reduced the damages award to RMB 3.74 million yuan. The apology remedy was sustained for copyright infringement because, in the High Court's opinion, the NOS knowingly committed such acts for years after it had assured the local authorities that it would not infringe further. In consequence, the NOS had to publish an apology in the *Legal Daily* within 30 days of the judgment becoming effective, and the apology's content required pre-approval by the Court. Additionally, if the NOS

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[156] *Id.*

does not comply with this order, the Court will publish the main section of the judgment in *Legal Daily*, with the defendant bearing the cost.

v. GMAC v. New Oriental School[157]

The Graduate Management Admission Council (GMAC), a Virginia-based global association of leading graduate and business schools, owns and administers the Graduate Management Admission Test (GMAT). The GMAT symbol is a registered trademark under U.S. copyright law, and it is also protected under Chinese law due to the 1886 Berne Convention between China and the United States. For many years, NOS copied, published, and sold GMATs and prep materials not only to its enrolled students, but also on the internet, without GMAC's consent. In a complaint lodged with the Beijing First Intermediate People's Court, GMAC accused NOS of copyright and trademark violations in connection with the illegal use of the GMAT tests and the GMAT trademark. The Court found that GMAC tests were creative works eligible for copyright protection under Chinese copyright law Citing Articles 2 and 47 of the Copyright Law and Articles 51 and 52 of the Trademark Law, the Court found that NOS violated GMAC's copyright and trademark rights related to the GMAT tests and the GMAT indicia. Consequently, NOS was required to discontinue further infringement, submit the infringing materials and production equipment to the Court for destruction, pay damages in the sum of RMB 410,000 yuan, and apologize in the *Legal Daily* within 30 days of the judgment.

On appeal to the Beijing High People's Court, the defendant's copyright violation was sustained, but the trademark infringement claim was dismissed because the NOS used the GMAT in a descriptive manner only without using it in the trademark sense. The damages award was lowered to RMB 298,538 yuan. Despite promising not to violate GMAC's intellectual property rights again, NOS continued its illegal acts, according to the High Court. Thus, NOS's violation was intentional and repetitive. NOS pointedly argued that the apology should not be made in a national newspaper like the *Legal Daily* because the tests and prep materials were sold only to a local market outside the classroom. The High Court rejected this argument and directed NOS to publish an apology in the *Legal Daily* within 30 days of the judgment, and the apology's content must be approved by the Court with the proviso that the Court would go forward to publish the main section of the judgment at NOS's expense should the defendant fail to do so.

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[157] *GMAC v. New Oriental School,* (Beijing High People's Court, Dec. 27, 2004) (China).

vi. PNY Technologies, Inc. v. Beijing Innovation and Beyond Technology Company[158]

PNY Technologies is a New Jersey based global technology manufacturer of consumer and commercial electronics. The company owns the PNY+ trademark registered in Taiwan and the US.. Due to many years of promotion and extensive marketing and sales in China, the company gained name recognition in the Chinese market, and its products were recognized as high-quality among Chinese customers and users. Beijing Innovative Technology Corporation (BITC) is a developer of computer graphic cards and equipment. BITC registered and owned the PNY as a word trademark in China. BITC, without permission of PNY Technologies, employed and prominently displayed on its official website both *PNY* word + graphic and PNY Technologies on computer graphic cards in the *PNY Quadro* series. The BITC website was deep linked to PNY Technologies' website, without authorization. By print and digital advertisement, BITC falsely held itself out as the authorized agent of PNC Technologies. In a lawsuit filed with the Beijing First Intermediate People's Court, PNY Technologies claimed that BITC infringed upon its copyright in the *PNY* + graphic trademark, and that BITC unfairly competed by misappropriating the company's tradename and related fame and intentionally misleading consumers. The Court agreed with the plaintiff. In the Court's opinion, the *PNY* + graphic mark was an artistic work created by the plaintiff and thus was protected by the copyright law; meanwhile, because PNY Technologies is the plaintiff's trade name entitled to the protection of Chinese trademark law, BITC's illegal use of such on its own website and through linking of both websites had created a false impression of affiliation between the two companies. Consequently, the Court held that BITC committed copyright infringement and unfairly competed against the plaintiff based on the Copyright Law (Articles 2,11, 47 and 48), Berne Convention for the Protection of Literature and Artistic Works (Article 3(1)(a)), and Anti-Unfair Competition Law (Articles 2, 5, 9 and 20), and the Interpretation of the Supreme People's Court on Several Issues Concerning Adjudication of Unfair Competition Civil Cases (Article 6). Thus, the Court ordered BITC to stop using the *PNY* + graphic insignia and required the defendant pay damages in the amount of RMB 50,000 yuan. To remove any harmful effect caused by BITC to the plaintiff's reputation, the Court directed BITC to post an apology on its own website for three consecutive days and to publish an

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[158] *PNY Technologies, Inc. v. Beijing Innovation and Beyond Technology Company,* CLI.C.158435, (Beijing High People's Court, Nov. 28, 2008) (China).

apology in the industry magazine *Computer Commerce Intelligence Report* within 30 days of the effect of the judgment.

On appeal to the Beijing High People's Court, the lower court's decision was affirmed entirely.

vii. Walt Disney Company v. Beijing Publishing Press[159]

This case is most likely the first Chinese intellectual property apology decision involving a foreign plaintiff. Walt Disney Company, a California-based corporation, filed a copyright infringement claim with the Beijing First Intermediate People's Court and succeeded in obtaining a court-ordered apology against a Chinese publisher. Disney owned U.S. copyrights in well-known cartoon characters, such as Mickey Mouse, Cinderella, and Snow White. Disney was also the copyright owner of a book series called the Classic Value Series, which consisted of Bambi, Peter Pan, and seven other books. Beijing Publishing Press, along with several Chinese publishers, distributors, and bookstores, illegally published, exploited, and distributed Disney's famous cartoon characters and the Classic Value Series. In litigation at the Beijing court, Disney claimed copyright infringement against the Chinese firms, seeking an injunction and damages. Disney additionally requested the defendants to issue a written promise not to infringe again and to publish an apology in a Chinese newspaper of nationwide circulation. The Court held that, under the 1992 Sino-U.S. agreement on the protection of intellectual property rights (the MOU), American copyrighted works are within the scope of protection of the Copyright Law (Article 46) and the General Principles of the Civil Law (Article 106). The defendants infringed upon Disney's copyrights, so found the Court. For relief, the Court prohibited any further publishing and sales of Disney's books by the defendants and ordered Beijing Publishing Press to pay RMB 227,094 yuan for Disney's lost revenue. Significantly, the Court required Beijing Publishing Press to apologize in a nationally circulated Chinese newspaper within 60 days of the judgment. However, the Court declined Disney's request for a written promise from the defendants not to infringe again, reasoning that such was not a remedy for civil liability.

On appeal, the Beijing High People's Court affirmed the apology remedy and most of the other measures mandated by the lower court.

viii. WordPerfect Corporation v. Beijing Giant Computer

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[159] *Walt Disney Company v. Beijing Publishing Press,* CLI.C.18366, (Beijing High People's Court, Dec. 19, 1995) (China).

Company[160]

This case is one of the earliest Chinese IP apology decisions in which an American company successfully secured an apology remedy for copyright infringement. WordPerfect Corporation (WordPerfect), a Utah-based software developer, was owner of WordPerfect software (Version 5.2) and held U.S. copyright to this registered software package. Beijing Giant Computer Company (Giant Computer), a Chinese company that developed and sold computer programs, installed WordPerfect software (V. 5.2) on the computer units it assembled and distributed, without WordPerfect's permission. Before the Beijing First Intermediate People's Court, WordPerfect alleged that Giant Computer infringed upon its copyright and damaged its reputation by illegally copying, displaying and installing such software for profit. WordPerfect asked the Court for an injunction against the defendant, a public apology, and payment of $20,000 in damages. The Court ruled in favor of WordPerfect, citing the *General Principles of Civil Law* (Article 118), the *Copyright Law* (Article 46), and *the Regulation on the Protection of Computer Software* (Article 30). In finding Giant Computer liable, the Court barred the defendant from further copyright violation and mandated the defendant to pay RMB 54,792 yuan to WordPerfect. Importantly, Giant Computer was directed to make a public apology to the plaintiff in two publications - the *Legal Daily* and *China Computer Reporter* within thirty days of the judgment becoming effective at the defendant's expense. The purpose of the apology was to eliminate negative effects on WordPerfect's reputation caused by the defendant, according to the Court.[161]

2. Trademark and Unfair Competition Decisions

i. Anheuser-Busch (China) v. Red Dimond Hotel Inc. in ZhangpuCity[162]

Anheuser-Busch, LLC, markets and distributes American brewed beers in China under the trade name Budweiser (China) Distribution. Both American trademark Budweiser and its Chinese trademark counterpart *百威*were registered in China. And the company's original trade name *ABInbev* (and its Chinese counterpart*百威英博*) was protected under Chinese law. Through years of promotions and marketing, both *百*

[160] *WordPerfect Corporation v. Beijing Giant Computer Company*, CLI.C.95639, (Beijing First Intermediate People's Court, April 16, 1996) (China).
[161] This decision became final and appears, based on the author's extensive search of public court decisions, never to have been appealed.
[162] *Anheuser-Busch (China) v. Red Diamond Hotel Inc. in Zhangpu City,* ChinaLawInfo, CLI.C.96532997, (Zhangzhou Intermediate People's Court, Nov. 30, 2018) (China).

威 and *百威英博* became distinctive marks associated with the Budweiser brand and enjoyed a high level of recognition in China. *百威* was officially recognized as a famous mark by China's trademark registration office. The Red Dimond Hotel Inc. in Zhangpu City (hereinafter Red Dimond Hotel) is a Chinese company selling Chinese beers and products. Lizhen Company, the co-defendant, is the supplier of beers and beverages to Red Dimond Hotel. Bringing a lawsuit with the Zhangzou Intermediate People's Court, Anheuser-Busch accused both Red Dimond Hotel and the Lizhen Company (co-defendants) of infringing upon its trademark rights in *百威* and *百威英博* marks by using them in their stores, displays, advertising materials and other ways. Plaintiff requested the Court to bar the defendants from further infringement, to award damages in the amount of RMB 1 million yuan, and to destroy all promotional materials bearing its Chinese mark(s). Importantly, the plaintiff sought for the defendants' apology to be published in three news outlets, for the purpose of restoring its damaged reputation. Relying on the Trademark Law (Articles 48 and 57), the Anti-Unfair Competition Law (Article 6), and the Interpretation of the Supreme People's Court on Several Issues Concerning Adjudication of Unfair Competition Civil Cases (Article 6), the Court found trademark infringement by the defendants and approved a reduced award for damages in the sum of RMB 120,000 yuan. On the apology request, the Court held that because the defendants infringed upon the plaintiff's personality right and caused negative effects to the plaintiff's reputation, the defendants should be responsible for eliminating ill effects of their actions. However, continued the Court, the request for publishing an apology in three newspapers was overly broad in scope and unnecessary; it was sufficient to publish the apology in *China Consumers News* only.

Thereafter, one of the defendants appealed the decision to the High People's Court of Fujian Province. However, the appellant entered into a settlement with the plaintiff and withdrew the appeal.

ii. Blizzard Entertainment, Inc. v. Beijing Fenbo Times Network Technology Company, Ltd.[163]

This is the sister case of the *Blizzard Entertainment Inc. v. Beijing Fenbo Times Network Technology Company*, discussed above. The parties and the facts are identical to those in the companion case. In the other lawsuit, Blizzard alleged copyright infringement, whereas here Blizzard's suit was on the grounds that *Fenbo Times* committed unfair competition and false advertising. In particular, Blizzard claimed that *Fenbo Times*, in connection with its own developed video games, illegally utilized Blizzard's trade name and trade dress associated with the World of Warcraft game; and that *Fenbo Times* was engaged in false advertisement on its website(s) and through other digital channels (i.e., WeChat and Weibo) by describing its own videogame in a way that was misleading with regard to its affiliation with Blizzard. Blizzard sought to enjoin *Fenbo Times* for future unfair competition and misrepresentation, and requested damages in the amount of RMB 5 million yuan. Significantly, Blizzard asked the Court to order *Fenbo Times* to publish, which should be posted on *Fenbo Times'* website and another popular videogame website, an apology to eliminate negative impact on Blizzard's reputation. The Court agreed with Blizzard in returning a judgment. Citing the Tort Law (Articles 8, 9 and 15), the Anti-Unfair Competition Law (Articles 5, 10, and 20), and the Interpretation of the Supreme People's Court on Several Issues Concerning Adjudication of Unfair Competition Cases (Article 17), the Court ordered that *Fenbo Times* must stop unfair competition in connection with all Blizzard's trade and trade dress associated with its videogames, pay RMB 2 million yuan in damages, and publish an apologetic statement[164] on *Fenbo Times'* website and another popular videogame site within thirty days of the judgment becoming effective, with the content of such statement having been pre-approved by the Court.

On appeal, the lower court's decision was affirmed by the High People's Court of Guangdong Province.

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[163] *Blizzard Entertainment, Inc. v. Beijing Fenbo Times Network Technology Company, Ltd.*, ChinaLawInfo.com, CLI.C.10666043, (High People's Court of Guangdong Province, Dec. 17, 2017) (China).

[164] Although the judgment misses the word "apology" without explanation, that meaning can be clearly inferred from reading the entire judgment and the plaintiff's initial request for an apology. Compare this with the explicit usage of "apology" in the sister judgment.【(2016) 粤民终1719号)】

iii. Philip Morris Company v. Shanghai General Lighters Co.[165]

In a very early Chinese trademark apology case involving a foreign party, Philip Morris Company was successful in extracting a court-mandated apology for trademark infringement against the Chinese firm Shanghai General Lighters Co. (General Lighters), the lead defendant, and with two other Chinese co-defendants. Philip Morris owned the *Marlboro* trademark in the U.S. in connection with the company's cigarettes, tabaco products and related packaging. Philip Morris registered in China a combined English-Chinese word mark, *Marlbor万宝路*, which was attached to its cigarettes, lighters, and tabaco appliances sold in China. General Lighters made and distributed lighters in and out of China, and it was supported by the co-defendants for production supplies and marketing. The firm, without Philip Morris' permission, engraved the *Marlboro万宝路* word and graphic to the metal shells and packaging of its lighters produced and sold, among other things. In a trademark infringement claim at a Shanghai court, Philip Morris sought to hold the Chinese entities liable. The Court ruled in favor of Philip Morris on the trademark infringement claim. The defendants were forbidden to further production, marketing, using or other actions in relation to the trademark *Marlboro万宝路*, and General Lighters was ordered to pay RMB 570, 464 yuan in damages. Importantly, the defendants were directed to publish an apology in the Shanghai newspaper *Xinmin Evening News,* with the requirement that the content of the apology must be approved by the Court in advance.

On appeal to the Shanghai Second Intermediate People's Court, the lower court's decision was affirmed. The appellate court relied on the *Trademark Law* (Articles 3 and 38) and the *General Principles of the Civil Law* (Article 63) for its decision.

iv. Shanghai Starbucks Coffee Co., Ltd. v. Shanghai Xingbake Coffee Co., Ltd.[166]

In a widely celebrated early trademark decision, Shanghai Starbucks Corp. (Chinese name: 上海统一星巴克咖啡有限公司), a subsidiary of the Seattle-based Starbucks Co., successfully held a Chinese coffee company–Shanghai Xingbake Coffee Co.—(Chinese name: 上海星巴克咖啡有限公司)—liable for trademark infringement and made the defendant change its trade name. In 1996, Shanghai Starbucks registered the

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[165] *Philip Morris Company v. Shanghai General Lighters Co.,* CLI.C.68704, (Shanghai Second Intermediate People's Court, April 15, 1997) (China).

[166] *Shanghai Starbucks Coffee Co., Ltd. V. Shanghai Xingbake Coffee Co., Ltd.*, CLI.C.77579, (Shanghai High People's Court, Dec. 20, 2006) (China).

English version of Starbucks trademark and the Starbucks graphic with the Chinese government. In 1999, the company registered a Chinese version of its trademark "*星巴克*" (pronounced "Xingbeke") in China. Shanghai Starbucks operated multiple coffee houses in Shanghai and other Chinese cities, and its trademarks acquired extensive fame and recognition among Chinese consumers. Shanghai Xingbake, a local coffee house started in 2000, sold coffee, beverages and Western-style food and wines. The Chinese firm adopted and displayed "Shanghai Xingbake Coffee Company, Ltd.," "Shanghai Xingbake Coffee Shop," "Xingbake Coffee Shop," and "Xingbake Brand Coffee Starbucks Coffee" on the windows, screens and receipts throughout its coffee shops. Additionally, a logo similar to that of Starbucks was displayed at coffee shops operated by the Chinese firm. Shanghai Starbucks sued the Chinese firm for trademark infringement and unfair competition, seeking reliefs including an injunction, damages, change of name, and an apology to be published in two newspapers.

The Court found the defendant liable for trademark infringement and unfair competition. Citing the Trademark Law (Articles 14, 52 and 56), the General Principles of the Civil Law (Articles 4, 118 and 134), and the Anti-Unfair Competition Law (Articles 2 and 20), the Court held that the defendant, by registering a trade name identical to the plaintiff's trademark(s), exhibited a malicious intent to ride on the plaintiff's fame and reputation and intentionally misled the public about its affiliation with the plaintiff. Therefore, the Court mandated an injunction, removal of "Xingbake" from the defendant's trade name, and a damages award in the sum of RMB 500,000 yuan ($62,500). Moreover, the defendant was required to publish an apology to the plaintiff in *Xinmin Evening News* within thirty days of the judgment becoming effective, with the content of such apology to be approved by the Court in advance.

v. Shandong Dezhou Chicken Company v. AFC Enterprises, Inc.[167]

Shandong Dezhou Chicken Company (Chinese name: 山东德州扒鸡总公司 -hereafter Shandong Dezhou), located in Shandong Province, China, brought a joint suit for trademark infringement against a Chinese

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[167] 【Chinse title: 山东德州扒鸡总公司等与美国AFC企业公司侵犯商标权上诉案, (2000) 沪高知终字第63号. Chinese text of the case is available in Chinalawinfo.com, citation no.: CLI.C.155493. 】
Shandong Dezhou Chicken Company v. AFC Enterprises, Inc. (山东德州扒鸡总公司等与美国AFC企业公司侵犯商标权上诉案), Chinalawinfo.com (Shanghai High People's Court 2001).

firm - Shanghai Deji Fast Food Company（Chinese name: 上海德积快餐有限公司, and the Atlanta-based AFC Enterprises, Inc. (AFC)- which licensed its "*Texas Chicken*" trademark for Shanghai Deji's use in China. Shandong Dezhou registered the Chinese word mark *德州*[168] (spelled *DeZhou* in Pinying) and used the mark on its cooked meats and foods. Shanghai Deji operated a fast-food franchise in China, and the company adopted and used three trademarks on its products and restaurants: one Chinese word mark "*德州炸鸡*" (translation: "DeZhou Fried Chicken"), another Chinese word mark "*美国小骑士（文字）德州炸鸡*" (translation: "*American Young Cowboy (word) - DeZhou Fried Chicken,"*), and the Chinese graphic and word mark "*美国小骑士（图形）德州炸鸡* " (translation: "*American Young Cowboy (graphic) – DeZhou Fried Chicken."*). The Atlanta-based AFC, owner of a U.S. fast-food restaurant chain, sold chicken dishes. AFC held a common law trademark in "*Texas Chicken*," which was licensed to Shanghai Deji to be used on the latter's foods and advertisement in China. At the Shanghai Second Intermediate People's Court, Shandong Dezhou alleged that the co-defendants infringed upon its registered word mark "*德州*" (i.e., DeZhou) by adopting a similar mark "*德州炸鸡"* (DeZhou Fried Chicken). The Court decided that the Chinese defendant committed a trademark violation. However, the Court ruled that AFC was not infringing because its "*Texas Chicken*" mark was, in spelling and shape, significantly different from the plaintiff's trademark; and AFC never expressly authorized the Chinese defendant to use the plaintiff's mark "*德州炸鸡.*" The Court thus ordered Shanghai Deji to stop further infringement, pay RMB 100,000 yuan in damages, and offer a written apology to the plaintiff to eliminate negative effects on the plaintiff's reputation.

On appeal to Shanghai High People's Court, both Shandong Dezhou and Shanghai Deji argued that AFC should be held liable for playing a

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[168] 德州 is a Chinese city in Shandong Province. The locale is well known partly due to its reputation for making flavorful chicken. A two-character combination, *德州* is romanized as ***DeZhou*** in Pinyin (a phonetic and spelling system of the Chinese language.) The English "Texas" is translated into Chinese "*德州"* (pronounced ***DeZhou***), meaning the State of Texas. Likewise, "Texas Chicken" is normally transliterated into "*德州炸鸡"*(***DeZhou Fried Chicken***).Chinese characters –"*德州*" and the Chinese translation of "Texas" – "*德州,"* are identical words, but they refer to drastically different places - one Chinese city and one American state. When "*德州*" is combined with the word c*hicken*, the resulting phrases can cause much confusion among Chinese speakers about the source of the product. Some unscrupulous businesses may intentionally exploit this type of confusion to their commercial advantage.

role in causing the infringement and for financially benefiting from the underlying transaction. The Appellate Court rejected the appeal and affirmed the lower court's judgment.

Walt Disney Company v. Jinjiang Kunxing Shoes Company[169]

Walt Disney Company, owner of the cartoon character Mickey Mouse, registered that graphic image as a trademark in China in 1987 and attached the mark to any children's shoes and hats distributed in China. Disney brought a trademark infringement claim against Jinjiang Kunxing Shoes Company (hereinafter Kunxing), a Chinese producer of shoes and apparel, and two co-defendants: a Kunxing majority shareholder Lin Kunmin and an unrelated vendor Zhang Ansheng. A Mouse graphic mark that resembled Disney's Mickey Mouse graphic mark was attached to children's shoes made by Kunxing. At the Guangzhou Intermediate People's Court, Disney alleged that the defendants violated its trademark rights in the Mickey Mouse mark, seeking an injunction, RMB 1.92 million yuan in damages, and a public apology to be published in *Guangzhou Daily* for three consecutive days. The Court agreed that Disney's trademark right was violated because there was substantial similarity between Kunxing's trademark and Disney's registered Mickey Mouse image. The Court determined that the defendants profited from sales of their merchandise by intentionally passing off their lower-priced products as Disney's, which damaged Disney's reputation. In reliance on the General Principles of Civil Law (Articles 118 and 234,), Trademark Law (Articles 52 and 56), and the Interpretation by the Supreme People's Court on Several Issues Concerning the Application of Law in Adjudication of Trademark Disputes (Articles 13 and 16), the Court barred the defendants from further infringement and ordered them to pay damages and Disney's legal fees in the aggregate of RMB 480,000 yuan. Additionally, the Court held that Kunxing and Lin must publish a court-approved apology to Disney in the *Guangzhou Daily* within ten days of the judgment becoming effective.

On appeal, the High People's Court of Guangdong Province affirmed the lower court's judgment. As to the apology remedy ordered, the High Court explained that Disney's Mickey Mouse was a registered trademark enjoying a high degree of recognition among Chinese consumers, and that Kunxing, by producing and selling a huge volume of Mickey

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[169] 【Chinese title:
晋江昆兴鞋业有限公司等与迪士尼企业公司(美国)侵犯注册商标专用权上诉案, (2010)粤高法民三终字第274号, citation no.: CLI.C.346702. 】. *Walt Disney Company v. Jinjiang Kunxing Shoes* Company
(晋江昆兴鞋业有限公司等与迪士尼企业公司(美国)侵犯注册商标专用权上诉案), Chinalawinfo.com (High People's Court of Guangdong Province 2021).

Mouse counterfeits, damaged Disney's commercial reputation and disrupted the normal market order. Thus, reasoned the High Court, the apology remedy ordered by the lower Court was legal and proper and must be sustained.

vi. Walt Disney Company v. Jinjiang Kunxing Shoes Company[170]

In a sister case based on nearly identical facts decided just a few days apart,[171] Walt Disney succeeded in holding Jinjiang Kunxing Shoes Company and its two co-defendants liable for infringing on the *Mickey Mouse* graphic trademark. Unlike in the companion case, however, here Kunxing adopted and employed word marks, such as "*米奇宝贝 "MICKEY BABY*," "*MICKEY BABY*" and "*MICKEY BAOBEI*" in connection with children's shoes produced by the company, and those indicia substantially resembled the *Mickey Mouse* trademark. In the litigation, Disney sought an injunction against the defendants, RMB 1.92 million yuan in damages, and a public apology to be published in *Guangzhou Daily* for three consecutive days. The Court agreed with Disney in finding trademark infringement. Furthermore, the judgment barred defendants from further violation and required payment for damages and Disney's reasonable litigation costs in the aggregate of RMB 480,000 yuan. Moreover, the defendants were ordered to publish a court-approved apology to Disney in the *Guangzhou Daily* within ten days of the judgment becoming effective.

On appeal, the High People's Court of Guangdong Province affirmed the injunction and the apology based on the same laws and reasoning stated in the companion case. However, the High Court dismissed the damages payment to avoid duplicative awards because the same remedy had been granted in the sister case (which had substantially similar facts).

D. Patent Litigation and Apologies

Under current laws and practice, apologies are not applicable in patent infringement cases because patent infringement usually violates the owner's property rights without damaging his or its "personality rights" as defined by the Civil Code of 2020 (e.g., personal honor, dignity, or

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[170] 【Chinese title:
晋江昆兴鞋业有限公司等与迪士尼企业公司(美国)侵犯注册商标专用权上诉案, (2010)粤高法民三终字第276号, citation no.: CLI.C.346313. 】

[171] *See* Walt Disney Company v. Jinjiang Kunxing Shoes Company (Decided by the High People's Court of Guangdong Province, 10/25/2010).

reputation) or causing emotional pain. The current Patent Law (2020 amendment), and the law's previous versions, contain no apology provisions, which is clearly different from other IP laws (e.g., Copyright Law) covering apology measures. Before 2003, however, some Chinese courts had periodically exercised free discretion to approve apology remedies in patent infringement decisions.[172] After 2003, the judicial practice of granting apologies in patent infringement litigation was largely discontinued, as the Supreme People's Court of China issued clear instructions to the effect that apologies should not be approved in patent infringement disputes.[173]

E. Apology-Affiliated Cases in Intellectual Property Litigation

In some Chinese IP litigation, plaintiffs seek an apology, among other remedies, but the courts order the defendants to publish an announcement instead (aka a declaration or notice) for to "eliminate adverse effects" (EAE) caused to the plaintiff's honor or reputation by the defendant's illegal action. This is true of the American IP litigation in China, and there are at least twelve such EAE decisions identified in this study (see Table 7 for details).

For a Court to issue an EAE remedy, it must rely on one or more of the following statutes and rules as the legal basis: the Civil Code,[174] the *Copyright Law*,[175] the Regulation on the Protection of Computer Software,[176] and the Anti-Unfair Competition Law.[177] These are the same

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[172] *See* Ge Yunsong, *supra* note 39, at 94-95 (giving examples of the courts ordering apologies in patent infringement decisions).

[173] *Id.*

[174] Art. 995 describes liability for intellectual property infringement and remedies, art. 1000 describes civil liability and remedy of apology; *see* Republic of China, *art. 995, 1000,* CIVIL CODE OF THE REPUBLIC OF CHINA (2020), *available at* https://shorturl.at/krY19 (last visited Apr. 17, 2024).

[175] Art. 52 describes what constitutes infringing conduct. *See, art. 52,* COPYRIGHT LAW OF THE PEOPLE'S REPUBLIC OF CHINA (2020), *available at* https://wilmap.stanford.edu/node/31101 (last visited Apr. 17, 2024).

[176] Art. 23 describes the liability imposed on those who committed infringement. Art. 24 describes the apology and other civil liability actions the court can take. *See*, *art. 23-24*, PEOPLE'S REPUBLIC OF CHINA REGULATION ON COMPUTER SOFTWARE PROTECTION (2013), *available at* https://www.wipo.int/wipolex/ar/text/455377 (last visited Apr. 17, 2024).

[177] Art. 23 describes when a business causes damage to the goodwill or product reputation of a competitor in violation of art. 11 of this Law, the supervisory inspection department shall order it to cease the illegal act and eliminate adverse effects, and impose a fine of not less than 100,000 yuan nor exceeding 500,000 yuan or if the circumstances are serious, a fine of not less than 500,000 yuan nor more than three million yuan. *See art. 23*, PEOPLE'S REPUBLIC OF CHINA ANTI-UNFAIR COMPETITION LAW (2019), *available at* http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383803.htm (last visited Apr. 17, 2024).

laws (sometimes even mentioned in the same articles) that are relied on by the Courts to order apologies. Because both measures are executed similarly through some kind of writing, this situation may cause confusion between them. For example, a court may require a defendant to issue an "announcement" to "apologize"; and a Court may order a defendant to "apologize" to "eliminate adverse effects." Because court decisions do not always explain or elaborate on why they choose an EAE measure in lieu of an apology sought by the plaintiff, it is reasonable to suspect that some courts do not truly distinguish an EAE from an apology and rather use these two measures interchangeably.

F. Some Observations: Key Elements for Success in Seeking Apologies

An analysis of the American cases reveals some commonalities and offers a few clues for a successful litigation strategy. Plaintiffs will invariably assert an infringement claim and, if proven, demand injunctive relief with damages. An apology is often a supplemental remedy to an injunction and monetary compensation, which work together to shame the wrongdoer and deter future violations. To secure an apology, the plaintiff must ensure the existence of the following conditions. First, the case is supported by a relevant statute (e.g., the Copyright Law, and the Civil Code) that spells out apologies as a measure of civil liability. In this regard, copyright infringement claims, which may involve illegal copying, publishing, disseminating, and/or distributing of writings, images, music, movies, video games, and computer software, are the strongest candidates for an apology measure. Second, because there are no apology measures spelled out in the Trademark Law or the Anti-Unfair Competition Law, an apology request in trademark infringement and unfair competition cases should be based on the Civil Code's "personality rights," under which the reputational harm suffered must be established to make an apology relief approvable. Third, for the plaintiff to persuade the court to issue apology relief, sometimes it may be necessary to prove the wrongdoer's knowledge and intention (or malice), which is especially true in trademark and unfair competition cases. Finally, the geographical scope of a violation may be relevant to the kind of media used to deliver an apology. For instance, if an infringement's effect is limited to a particular city, a local newspaper may be the suitable venue for publishing an apology; however, if a wrongful act's impact is widespread, the apology should be announced in a national newspaper to reach every targeted audience. Likewise, for online infringement acts, a digital platform, like the defendant's official website, may be an appropriate place for delivering the measure. However, the courts are very reluctant to order a

defendant to apologize in multiple outlets due to considerations of proportionality, fairness, and expenses to be incurred by the defendant.

CONCLUSION

What happens in China has critical implications for the U.S. and the world. The apology laws and litigation profoundly affect businesses, personal interactions, and other aspects of life in China. This raises imminent and continuous challenges to American businessmen and right-holders doing business in China. The examination of American IP cases in China demonstrates that American right-holders are adapting to Chinese laws and customs, using apologies as a supplemental measure to protect IPRs in the country. There are at least two lessons that can be learned from past experiences. First, apologies offer an additional tool against intellectual property rights violators in China, and this remedy may be useful due to its effects in shaming and possible deterrence. Right-holders should work with their local counsel to evaluate the strengths of their case carefully before initiating litigation and should request apologies only when there is a reasonable likelihood of the Court's approval. The Chinese law of apologies is broad and sketchy, leaving the courts with much discretion. Chinese courts seem more willing to approve apologies in certain copyright, trademark, and unfair competition disputes than in other types of litigation, for example, patent cases. The key to securing a successful apology determination depends on proof of reputational harm to the right-holder; the defendant's intent is also relevant. Second, making apologies properly and timely, especially when ordered to do so by the court, can repair or improve a business' image and public relations in society. China is an immensely competitive market, and businesses and consumers highly value personal dignity and pride. It is very common for Chinese to go to court and seek apologies against wrongdoers, domestic and foreign alike, when people believe that their dignity or pride is injured. Increasingly, Chinese citizens file litigation and seek apologies from American and other foreign businesses for intellectual property infringement. When the courts approve an apology measure against a foreign party, such a party should comply with the apology order in a timely and proper manner; otherwise, it will risk further reputational damage and public embarrassment.

Appendix A. Making of Apology Laws in China 1979-2020: A Chronology

	Title: In English and Chinese	**Article No.**	**Enactment**
1	Criminal Law【刑法】	32	7/6/1979
2	Answer of the Supreme People's Court to Certain Issues Concerning the Adjudication of Cases Involving the Right of Reputation【最高人民法院关于审理名誉权案件若干问题的解答】	10	8/7/1983
3	General Principles of the Civil Law【民法通则】	118, 120, 134	4/12/1986
4	Copyright Law 【著作权法】	45-46	9/7/1990
5	Regulation on the Protection of Computer Software【计算机软件保护条例】	30	6/4/1991
6	Consumer Rights Protection Law【消费者权益保护法】	43	10/31/1993
7	State Compensation Law 【国家赔偿法】	30	5/12/1994
8	Law Governing Judges 【法官法】	45	2/28/1995
9	Law Governing Public Procurators【检察官法】	48	2/28/1995
10	Interpretation of the Supreme People's Court on Certain Issues Concerning Judicial Compensation in Civil and Administrative Litigation【最高人民法院关于民事、行政诉讼中司法赔偿若干问题的解释】	13	9/16/2000
11	Regulation on Telecommunications【电信条例】	74-75	9/25/2000
12	Interpretation of the Supreme People's Court on Certain Issues Concerning the Ascertainment of	1, 8	2/26/2001

	Compensation Liability for Emotional Harm in Civil Torts 【最高人民法院关于确定民事侵权精神损害赔偿责任若干问题的解释】		
13	Interpretation of the Supreme People's Court on Certain Issues Concerning Adjudication of Copyright Civil Disputes 【最高人民法院关于审理著作权民事纠纷案件适用法律若干问题的解释】	17	10/12/2002
14	Public Security Administration and Punishment Law 【治安管理处罚法】	117	8/28/2005
15	Civil Servants Law 【公务员法】	103	4/27/2005
16	Regulation on the Protection of the Right to Publicly Communicate Works on Information Networks 【信息网络传播权保护条例】	18	5/10/2006
17	Tort Liability Law 【侵权责任法】	15	12/26/2009
18	Criminal Procedure Law 【刑事诉讼法】	277	3/14/2012
19	General Provisions of the Civil Law 【民法总则】	179	3/15/2017
20	Anti-Unfair Competition Law 【反不正当竞争法】	17, 23	11/4/2017
21	Civil Code 【民法典】	995, 1000	5/28/2020

STATE-SPONSORED DOPING AND INTERNATIONAL STATE RESPONSIBILITY: CAVEATS OF THE INTERNATIONAL ANTI-DOPING SYSTEM

Faraz Shahlaei[†]

ABSTRACT

This article provides an in-depth examination of the international legal implications and consequences of State-sponsored doping programs. It will investigate the process of identifying a case of state-sponsored doping within the framework of international State responsibility and discuss its consequences and importance in the fight against doping. It will conduct a comprehensive analysis of the foundational documents of both public and private anti-doping systems to evaluate their legal weight from the standpoint of public international law. The article emphasizes the shortcomings of existing legal mechanisms in effectively combating State-sponsored doping, such as the absence of robust sanctions and dispute-resolution mechanisms that can provide remedies for victims. It also proposes potential areas for improvement in anti-doping legal regimes, including the potential role of the Court of Arbitration for Sport (CAS) as a dispute resolution body for anti-doping violations of States.

[†]*JSD, LLM, LLB.* *Article submitted in partial fulfillment of the requirements for the degree of Doctor of Juridical Science (JSD) at Loyola Law School, Los Angeles. September 2023. Prof. Dr. Cesare P.R. Romano (Chair); Dr. Antoine Duval and Prof. Matthew J. Mitten (Committee members).*

"*The sad thing about doping is how much it obscures our appreciation of greatness*".[1]

INTRODUCTION

In 2015, an independent commission set up by the World Anti-Doping Agency (WADA) uncovered evidence of systematic and State-sponsored doping within the operations of the All-Russia Athletics Federation (ARAF).[2] The commission's report detailed a "deeply rooted

1. Malcolm Gladwell and Nicholas Thompson, *Usain Bolt, a Collapse, and an Epic Beer Mile*, NEW YORKER (Aug. 27, 2015), *available at* https://www.newyorker.com/sports/sporting-scene/usain-bolt-a-collapse-and-an-epic-beer-mile (last visited Apr. 8, 2024).

2. *Independent Commission Report on All Russian Athletics Federation*, WORLD ANTI-DOPING AGENCY (Nov. 9, 2015), *available at* https://www.wada

culture of doping," exploitation of athletes, corruption, bribery, and evidence of criminal conduct.[3]

In July 2016, WADA released its first report on the systematic doping of Russian athletes during the 2014 Winter Olympics in Sochi, Russia.[4] It confirmed that Russian sport authorities, in cooperation with State officials at all levels of government, had conducted a wide-scale doping operation involving dozens of athletes, altering the outcome of several competitions in some of the most important international sporting events.[5]

After broadening the scope of its investigations, in a second report in December 2016, WADA declared that Russia has hijacked international sports for years.[6] Investigations revealed the use of different methods, including the so-called "Disappearing Positive Methodology"[7] between 2012 and 2015, under the orders of Russia's Deputy Minister of Sport.[8]

Further investigation commissioned by the Disciplinary Committee of the International Olympic Committee (IOC), known as the Schmid Commission, confirmed the findings of previous WADA reports and reaffirmed the systematic and institutionalized nature of the Russian doping program.[9]

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ama.org/sites/default/files/resources/files/wada_independent_commission_report_1_en.pdf (last visited Apr. 8, 2024) [hereinafter ARAF Report].

3. *Id.* at 9-12.

4. *McLaren Independent Investigation Report – Part I*, WORLD ANTI-DOPING AGENCY (Jul. 18, 2016), *available at* https://www.wada-ama.org/en/resources/mclaren-independent-investigation-report-part-i (last visited Apr. 8, 2024) [hereinafter First Report].

5. As the result of investigations, Russia lost a few medals from the 2014 Sochi Games. Later, as the scandal prompted a re-analysis of doping samples from the London 2012 and Beijing 2008 Summer Olympics, more podiums were toppled, hitting some big names in the history of the Games. *IOC Strips Three More Medals from 2008, 2012 Games Re-Tests*, REUTERS (Apr. 5, 2017), *available at* https://www.reuters.com/article/us-doping-olympics-idUSKBN17726B (last visited Apr. 8, 2024); *see also* Carlos Grohmann, *Bolt Loses Relay Gold after Jamaica's Carter Tests Positive*, REUTERS (Jan. 26, 2017), *available at* https://www.reuters.com/article/idUSKBN15A0ZQ/ (last visited Apr. 8, 2024).

6. *McLaren Independent Investigation Report – Part II*, WORLD ANTI-DOPING AGENCY (Dec. 9, 2016), *available at* https://www.wada-ama.org/en/resources/mclaren-independent-investigation-report-part-ii (last visited Apr. 8, 2024) [hereinafter Second Report].

7. This methodology essentially worked based on reporting positive findings of samples as negative analytical results. First Report, *supra* note 4, at 10, 27.

8. *Id.* at 39, 41.

9. *IOC's Disciplinary Commission's Report to the IOC's Executive Board*, INT'L OLYMPICS COMM. [IOC] (Dec. 2, 2017), *available at* https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/Who-We-Are/Commissions/Disciplinary-Commission/IOC-DC-Schmid/IOC-Disciplinary-

While the use of doping by States to manipulate international sports competitions is not new,[10] the extent of Russia's doping program, considering the advancement of anti-doping frameworks, shocked even the most jaded observers. Additionally, this might not be the last case of State-sponsored doping. The possibility of States manipulating international sport competitions through doping, without facing effective sanctions, could result in a never-ending escalation of doping by other States and athletes. This could potentially damage the credibility of sports and pose threats to the health of athletes.[11] As the Independent Investigator of WADA that conducted two of the above investigations remarked, the Russian doping program was an "attack [on] the principle of clean sport and clean athletes which are at the very heart of WADA's raison d'être."[12]

The Russian State-sponsored doping case became a true test of the functionality of the global anti-doping system. Russia violated two anti-doping legal regimes: the "private" one, internal to international sports governance, involving sport governing bodies (SGBs) such as the International Olympic Committee (IOC) and WADA, aiming to ensure respect of the WADA Code; and the "public" one, under public international law, comprising two treaties of international law whose goal is combating doping. These include the United Nations Economic, Scientific, and Cultural Organization's (UNESCO) Convention against Doping in Sport (UNESCO Convention),[13] and the Council of Europe's Eu-

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Commission-Schmid-Report.pdf#_ga=2.104879233.385687857.1513014269-1584169185.1502791100 (last visited Apr. 8, 2024) [hereinafter Schmid Report].

10. *See generally* STEVEN UNGERLEIDER, FAUST'S GOLD: INSIDE THE EAST GERMAN DOPING MACHINE (2001).

11. "[A]thletes now think that you are better off cheating or getting your nation to establish a doping system because even if it is discovered, the consequences are minimal," … "[O]r, if you don't want to cheat, avoid elite sport like the plague." *See* Sean Ingle, *Russia's Backdoor Olympics*, The Guardian (Feb. 2, 2018), *available at* https://www.theguardian.com/sport/2018/feb/02/winter-olympics-russian-doping-ban-pyeongchang#img-1 (last visited Apr. 8, 2024). Before Russia, during 1980s and 1990s there were allegations of State-sponsored doping against China by a whistleblower. WADA has come under critique for not investigating the allegations. *See* Sean Ingle, *WADA Is Accused of Sitting on Mass China Doping Claims for Five Years*, THE GUARDIAN (Oct. 23, 2017), *available at* https://www.theguardian.com/sport/2017/oct/23/wada-china-doping-allegations-xue-yinxian#:~:text=Wada%20is%20accused%20of%20sitting%20on%20mass%20China%20doping%20claims%20for%20five%20years,-This%20article%20is&text=The%20World%20Anti%2DDoping%20Agency,by%20a%20whistleblower%20in%202012 (last visited Apr. 8, 2024).

12. First Report, *supra* note 4, at 22.

13. International Convention against Doping in Sport, Nov. 19, 2005, 201 U.N.T.S. 2419 [hereinafter UNESCO Convention].

ropean Anti-Doping Convention (European Convention).[14] These two private and public anti-doping legal regimes are deeply interwoven and there is a considerable effort to achieve synchronization between them.[15]

Despite the Russian doping program being the most brazen assault to date on the public and private anti-doping legal regimes, the reaction of the stakeholders (including States and SGBs) lacked consistency, arguably failed to detect the full extent of violations, and failed to provide remedies for the victims.[16] The sanctions imposed were primarily focused on suspending Russian SGBs, while still allowing Russian athletes to compete as neutrals under some conditions, without holding accountable the State apparatus that orchestrated and supported the doping program.

This article aims to address a gap in the existing scholarly literature on State-sponsored doping by examining the question from a public international law standpoint. However, one crucial aspect that is often overlooked is the fact that State-sponsored doping, or even doping in general, can also be a violation of international human rights law (IHRL). It violates both the rights of the athletes who were subjected to the State-sponsored doping program and the rights of those who competed against the doped athletes on the field of play. This aspect of the plague of doping has unfortunately received inadequate attention. There is a glaring lack of awareness of the intersection between doping practices and IHRL, especially in cases where doping has been orchestrated by States. Moreover, this should be considered in light of the 2020 report of the United Nations Office of the High Commissioner for Human Rights (OHCHR), which recognized that "consideration of human rights norms and standards in the resolution of sport disputes is

14. Council of Europe [CoE] Anti-Doping Convention, 1989, 135 ETS [hereinafter European Convention].

15. *See infra* Finally, the article discusses the Court of Arbitration for Sport (CAS) as the potential proper forum to adjudicate cases of State-sponsored doping. However, to enable it to do so, it would necessitate granting CAS jurisdiction over States. This can be done either in the form of an arbitration clause or by designating CAS as the dispute resolution forum for similar disputes through the adoption of an additional protocol supplementing the public international anti-doping legal regime.

16. *See infra* However, an essential question that requires attention is how effective the existing international mechanisms have been in remedying the consequences of a State's violation of international anti-doping obligations. The following section aims to address this significant question.

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limited,"[17] and that "[t]here is currently no global consensus on a consistent and comprehensive approach to the remediation of human rights abuses in sport."[18] A detailed analysis of this issue is beyond the scope of this research and warrants a separate investigation. However, this article will also examine the related issue of whether there are available avenues to provide remedies to the victims of a State-sponsored doping program, striving to identify the shortcomings of the current anti-doping system in this regard.

By applying the law of international State responsibility, this article will investigate first what international obligations States have in the fight against doping and how State-sponsored doping violates States' international obligations, is attributable to the State, and constitutes an international wrongful act (IWA). Once an IWA is established, then the State is internationally legally responsible. As a result, the State in question must cease the IWA, comply with its international obligations, and finally provide full reparations to all the affected parties. This article will specifically explore and evaluate the effectiveness of global anti-doping mechanisms to achieve these objectives, including ensuring future compliance and facilitating the provision of reparations in cases of wrongdoing.

Finally, the article discusses the Court of Arbitration for Sport (CAS) as the potential proper forum to adjudicate cases of State-sponsored doping. However, to enable it to do so, it would necessitate granting CAS jurisdiction over States. This can be done either in the form of an arbitration clause or by designating CAS as the dispute resolution forum for similar disputes through the adoption of an additional protocol supplementing the public international anti-doping legal regime.

I. STATE INTERNATIONAL OBLIGATIONS AND DOPING

In 2001, the United Nations International Law Commission (ILC) adopted the "Draft Articles on Responsibility of States for Internationally Wrongful Acts."[19] It took five Special Rapporteurs most of the sec-

17. U.N. Office of the High Commissioner for Human Rights, *Intersection of Race and Gender Discrimination in Sport*, U.N. DOC. A/HRC/44/26 (Jun. 15, 2020), *available at* https://undocs.org/en/A/HRC/44/26 (last visited Apr. 8, 2024).

18. *Id.* ¶ 39.

19. U.N. Int'l L. Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N Doc. A/56/10 (Nov. 2001), *available at* https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited Apr. 8, 2024) [hereinafter ILC Articles].

ond half of the twentieth century, producing almost thirty reports, along with countless drafts and government comments,[20] to codify international custom in this sensitive and complex field.[21]

The ILC Articles define the rules of customary international law regarding the attribution of responsibility to States for IWAs,[22] and clarify the content of responsibility and its consequences.[23] Together, Articles 1 and 2 lay down the key constitutive elements of international responsibility: (i) a conduct (action or omission) that breaches an international obligation of a State; and (ii) the conduct is attributable to the State under the rules of international law.[24] The ILC Articles also codify the consequences of international legal responsibility in terms of providing full reparations to the victims.

According to the ILC Articles, an international obligation emanates from a binding primary rule of international law, whether contained in a bilateral treaty, multilateral treaty or "any other source of legal commitments under international law,"[25] such as customary international law.[26] The obligation must be binding and enforceable at the time of the wrongful act.[27]

Arguably, Russia violated multiple international obligations deriving from both the "private" and "public" anti-doping regimes. The "private regime," the one internal to international sports governance, comprises at a minimum (i) the World Anti-Doping Agency (WADA) Code,[28] and (ii) in the case of Russia, the bilateral agreement between Russia and the IOC regarding the hosting of the 2014 Sochi Games.

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20. James Crawford, *Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. AUDIOVISUAL LIBR. OF INT'L L. (2012), *available at* https://legal.un.org/avl/pdf/ha/rsiwa/rsiwa_e.pdf (last visited Apr. 8, 2024).

21. *See e.g.*, ROBERT KOLB, THE INTERNATIONAL LAW OF STATE RESPONSIBILITY: AN INTRODUCTION, 8–12, 27–30 (2017).

22. Pellet has called State responsibility "the heart of international law" and the ILC Articles as "the constitution of the international community." ALAIN PELLET, THE LAW OF INTERNATIONAL RESPONSIBILITY 3, 5–6 (James Crawford et. al. eds., 2010).

23. U.N. Int'l L. Comm'n, Rep. of the International Law Commission on the Work of Its Fifty-Third Session, U.N. Doc. A/56/ 10 Supp. 10 (2001), General Commentary ¶ 3(f) [hereinafter Commentary].

24. ILC Articles, *supra* note 19, art. 2.

25. Commentary, *supra* note 23, art. 12, ¶ 3.

26. *Id.* art. 2, ¶ 7.

27. *Id.* at General Commentary ¶ 5.

28. *World Anti-Doping Code*, WADA (2021), *available at* https://www.wada-ama.org/sites/default/files/resources/files/wada_2021_code_november_2019_v._wada_2021_code_june_2020_final_-_english.pdf [hereinafter WADA Code], (last visited Apr. 8, 2024).

The second regime comprises two international anti-doping treaties, one global and one regional: (iii) The International Convention against Doping in Sport,[29] adopted by UNESCO in 2005 and entered into force on February 1, 2007;[30] and (iv) the Anti-Doping Convention,[31] adopted by the Council of Europe (CoE) in 1989, and entered into force on 1 March 1990.[32] The European Convention was strengthened and expanded in 2002, by the adoption of a Protocol that entered into force in 2004.[33] At the time of the events (at least from the 2012 London Games to the 2014 Sochi Games), Russia was party to both conventions but not to the Protocol to the European Convention. It ratified the UNESCO Convention on 29 December 2006[34] and acceded to the CoE's Convention on 12 February 1991.[35]

A. The Public Anti-Doping Regime

The term "public" anti-doping regime describes the system States created under public international law to supplement the private efforts of SGBs and others in fighting doping. The parties to the treaties com-

29. UNESCO Convention, *supra* note 13.

30. *Id.*

31. European Convention, *supra* note 14.

32. Having two international instruments on one issue with different scopes can create challenges. However, recognizing these challenges, the parties to these two treaties devised mechanisms to harmonize them, facilitating the monitoring process and creating a more effective infrastructure. *Evaluation of UNESCO's International Convention against Doping in Sport*, UNESCO's Internal Oversight Services Evaluation Office, IOS/EVS/PI/161 REV.2, ¶ 29 (Aug. 2017), *available at* https://unesdoc.unesco.org/ark:/48223/pf0000258739.locale=en (last visited Apr. 8, 2024). [hereinafter Evaluation of UNESCO Convention]). In 2017, the sixth session of the Conference of Parties considered the possibility of stronger inter-agency collaboration between the UNESCO Convention and the Council of Europe's Monitoring Group of the Anti-Doping Convention. *See Monitoring of the International Convention Against Doping In Sport: Harmonization between UESCO, WADA and the Council of Europe*, Conference of Parties to the International Convention against Doping in Sport, ICDS/6CP/INF.1 (Sep. 1, 2017), *available at* https://unesdoc.unesco.org/ark:/48223/pf0000258873_eng (last visited Apr. 8, 2024). Also, Conference of the Parties of the UNESCO Convention invited WADA and the CoE to attend its meetings going forward, to improve harmonization between the relevant international frameworks. *See* Evaluation of UNESCO Convention, ¶ 59.

33. *Chart of Signatures and Ratifications of Treaty 188*, COE, *available at* https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=188, (last visited Apr. 8 2024).

34. UNESCO Convention, *supra* note 13.

35. *Chart of Signatures and Ratifications of Treaty 135*, COE, *available at* https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/135/signatures?p_auth=sbWj3zSf, (last visited Apr. 8, 2024).

prising this regime are States. These treaties create obligations primarily (but not exclusively) for States.

1. The International Convention against Doping in Sport

In 2005, UNESCO adopted the International Convention against Doping in Sport (UNESCO Convention). The UNESCO Convention is probably the most important anti-doping treaty because of its global reach and being a treaty of the United Nations system. Its aim is to ensure and protect public health, integrity of sport, and other values related to sport.[36] It is the only universal legally binding instrument against doping in sport, having been ratified to date by 191 States, including Russia.

Under the UNESCO Convention, States that are a party have a general obligation to boost international cooperation between them and the WADA, in conformity with the WADA Code, to protect the athletes and the spirit of sport.[37] More specifically, the UNESCO Convention designs a system requiring public sector authorities (i.e. in areas such as public health, education, and justice) to cooperate with the private sector (e.g. sport federations, health operators, and pharmaceutical producers) to keep sports clean.[38] It requires States to take all necessary legislative and administrative measures[39] to achieve the purpose of the UNESCO Convention;[40] to cooperate in this regard;[41] to comply with internationally recognized ethical practices in conducting doping research;[42] to take measures against athlete support personnel who violate doping rules or who committed other offenses connected to doping in sports;[43] to assist sport and anti-doping organizations to implement doping control in their jurisdiction consistent with the WADA code;[44] and to facilitate doping control.[45] State parties shall ensure compliance with WADA regulations within their respective geographical borders.[46] The UNESCO Convention does not define doping or what doping substances are. It leaves it to the WADA Code—an appendix to the UNESCO

36. Evaluation of UNESCO Convention, *supra* note 32, ¶ 19.
37. *Id.* ¶ 4.
38. *Id.* ¶ 34.
39. UNESCO Convention, *supra* note 13, art. 5.
40. *Id.* art. 3.
41. *Id.* art. 5, 13, 16.
42. *Id.* art. 25(a).
43. *Id.* art. 9
44. UNESCO Convention, *supra* note 13, art. 12(a).
45. *Id.* art. 12.
46. *Id*. art. 3(a).

Convention[47]—to provide a harmonized set of rules, principles, and guidelines that govern the prevention, detection, and sanctioning of doping violations. The connection between the UNESCO Convention and the WADA Code is important for promoting uniformity and efficiency in the battle against doping, especially through the establishment of a comprehensive list of banned substances.

The body in charge of supervising the implementation of the UNESCO Convention is the Conference of the Parties (CoP), composed of the 191 States that ratified it.[48] A representative of WADA sits as an advisory member, with no vote, and representatives of other organizations (e.g. the IOC, the International Paralympic Committee, the CoE, and the Intergovernmental Committee for Physical Education and Sport (CIGEPS)) sit as observers.[49] State parties submit reports to the CoP biannually, through an online self-assessment questionnaire called the "Anti-Doping Logic System" (ADLogic questionnaire) developed in 2009.[50] It is the principal monitoring and evaluation tool of the UNESCO Convention and helps monitor "actions and measures taken by public authorities at the national level".[51] The ADLogic questionnaire asks States to answer 21 principal questions, covering the four thematic areas of the Convention: national activities to strengthen anti-doping (Articles 7-12); international cooperation (Articles 13-14 and 16); education and training (Articles 19-23); and research (Articles 24-27).[52] The report is generated automatically by the ADLogic system on the basis of responses provided by the State Party. In 2017, based on the results of the submitted reports, the CoP concluded that one of the challenges for the application of the Convention is incorporating its provisions into national frameworks, causing a lack of progress for a remarkably high number of States.[53]

Despite the above efforts, there is room for improvement for this public regime. The UNESCO Convention is the "most successful convention in the history of UNESCO in terms of rhythm of ratification after adoption" and the second most ratified UNESCO treaty.[54] However,

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47. *Id*. art. 2.

48. *Id*. art. 28.

49. UNESCO Convention, *supra* note 13, art. 29.

50. *Id.* art. 31.

51. Evaluation of UNESCO Convention, *supra* note 32, ¶ 77.

52. *Monitoring the Anti-Doping Convention*, UNESCO, *available at* https://webarchive.unesco.org/20240306173444/https://en.unesco.org/themes/sport-and-anti- doping/convention/monitoring (last visited Apr. 10, 2024).

53. *Id.* at 5-8.

54. Evaluation of UNESCO Convention, *supra* note 32, ¶ 1.

the pace and the number of ratifications of a treaty cannot be seen as indicators of success, and the effectiveness of a treaty should not be solely evaluated based on those factors.[55] For example, although the Convention is equipped with a reporting mechanism, it lacks a dispute resolution clause. We will delve into the challenges related to the implementation and enforcement of the UNESCO Convention further below.[56]

2. The Council of Europe's Anti-Doping Convention

In 1989, the CoE, a regional organization bringing together all States of the European continent, including Turkey and, at the time, Russia,[57] adopted the Anti-Doping Convention (European Convention).[58] This was the first international legal standard the CoE adopted on the subject of sports,[59] after nearly two decades of trying to address the problem.[60] The European Convention entered into force in 1990, and to date, it has been ratified by 52 States, including Russia.[61] Russia left the CoE in March 2022.[62] However, this does not automatically terminate the binding effect of the CoE treaties Russia previously ratified. The Committee of Ministers of the CoE passed a resolution in this regard, clarifying that:

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55. Barrie Houlihan, *Achieving Compliance in International Anti-Doping Policy: An Analysis of the 2009 World Anti-Doping Code*, 17 SPORT MMT. REV. 265, 275 (2014); Cedric Jenart, *The Binding Nature and Enforceability of Hybrid Global Administrative Bodies' Norms within the National Legal Order: The Case Study of WADA*, 24 EUR. PUB. L. 411, 419 (2018).

56. *See infra* However, an essential question that requires attention is how effective the existing international mechanisms have been in remedying the consequences of a State's violation of international anti-doping obligations. The following section aims to address this significant question.

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57. In March 2022, Russia announced its withdrawal from the CoE. *See Resolution CM/Res(2022) on the Cessation of the Membership of the Russian Federation to the Council of Europe*, THE COMM. OF MINISTERS OF THE COE (Mar. 16, 2022), *available at* https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5ee2f (last visited Apr. 10, 2024).

58. European Convention*, supra* note 14.

59. *Explanatory Report to the Anti-Doping Convention*, COE, ¶ 7 (Sep. 16, 1989) *available at* https://rm.coe.int/16800cb349 (last visited Apr. 10, 2024).

60. *For a Clean and Healthy Sport, The Anti-Doping Convention*, COE, *available at* https://rm.coe.int/for-a-clean-and-healthy-sport-the-anti-doping-convention/16807314b5 (last visited Apr. 10, 2024).

61. *Details of Treaty No. 135*, COE, *available at* https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/135 (last visited Apr. 10, 2024).

62. *See* The Committee of Ministers of the CoE, *supra* note 57.

> [T]he Russian Federation ceased on 16 March 2022, to be a Contracting Party to those conventions and protocols concluded in the framework of the Council of Europe that are only open to member States of the Organisation. The Russian Federation will, however, continue to be a Contracting Party to those conventions and protocols concluded in the framework of the Council of Europe, to which it has expressed its consent to be bound, and which are open to accession by non-member States. The modalities of the Russian Federation's participation in these instruments will be determined separately for each of them by the Committee of Ministers or, when appropriate, by the State Parties.[63]

The European Convention is open to non-member States of the CoE, and therefore, as per the aforementioned resolution, it continues to be legally binding on Russia unless it explicitly follows the procedures to terminate the legal effect of the Convention. Article 18 of the European Convention provides that "Any Party may, at any time, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe. … Such denunciation shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notification by the Secretary General."[64] As of now, there is no publicly available indication that Russia has taken such steps.

The European Convention, aiming to prevent and eliminate doping in sports,[65] was developed in response to concerns about the negative health effects of using performance-enhancing drugs (PEDs) and its damaging impact on fundamental values of sport, especially the principle of fair play.[66] It calls for more and better coordination and cooperation by each national government,[67] and between national and international sport organizations on aspects like research, education, and adopting a harmonized strategy on the list of banned substances.[68] It obliges governments to take steps to restrict access to prohibited substances and methods,[69] and encourages public funding for non-

63. *Id.*
64. European Convention*, supra* note 14, art. 18.
65. *Id.* art. 1.
66. *Id.* pmbl.
67. *Id.* art. 3.
68. *Id.* art. 7(1)(2), 8.
69. European Convention*, supra* note 14, art. 4(1)(2).

governmental organizations (NGOs) related to anti-doping efforts.[70] The European Convention also establishes a Monitoring Group to supervise its application, in which any Party can be represented with one vote.[71]

In 2002, the CoE adopted an Additional Protocol,[72] which entered into force in 2004, and to date, has been ratified by 29 States, but not by Russia.[73] The Additional Protocol added an enforcement mechanism to the European Convention.[74] An evaluation team, whose members are appointed by the Monitoring Group based on their competence in the anti-doping field,[75] studies the reports submitted by party States, conducts visits whenever necessary, and provides the Group with evaluation reports.[76] States complete and submit a detailed questionnaire annually, and the Monitoring Group conducts advisory visits as well. The questionnaire asks about anti-doping testing, monitoring, prevention, and education processes, including funding, anti-doping laws and disciplinary measures, educational programs, protection of whistleblowers, and the like.[77] A working group is in charge of revising the annual questionnaire.

At the outset, the European Convention failed to establish a clear and unified set of principles to fight doping, a problem that was addressed within the UNESCO Convention through the creation of links with the WADA Code and regulations. The European Convention initially left many key decisions to the initiative of the governments. That can potentially result in disharmony and inconsistency.[78] Nonetheless, this gap was to some extent remedied through the Additional Protocol that mandates the Parties to recognize WADA and other anti-doping organizations the power to conduct out-of-competition controls.[79] How-

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70. *Id.* art. 4, ¶ 3.

71. *Id.* art. 10-11.

72. *Details of Treaty No.188*, COUNCIL OF EUR. (2002), *available at* https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=188 (last visited Apr. 10, 2024).

73. *Chart of Signatures and Ratifications of Treaty 188*, COUNCIL OF EUR. (2002), *available at* https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=188 (last visited Apr. 10, 2024).

74. European Convention*, supra* note 14, art. 10.

75. Details of Treaty No. 188, *supra* note 72, art. 2 ¶ 1.

76. *Id.* art. 2, ¶ 2.

77. *Anti-Doping Questionnaire: Annual Reports*, COUNCIL OF EUR., *available at* https://www.coe.int/en/web/sport/adq-reports#%7B%22101769298%22:%5B0%5D%7D (last visited Apr. 1, 2024).

78. European Convention, *supra* note 14, art. 1, 4 ¶ 4.

79. Details of Treaty No. 188, *supra* note 72, art. 2 ¶ 1.

ever, because the Additional Protocol binds only those States that have ratified it (29) and not every party to the European Convention has (52), its efficacy is still limited.

B. The Private Anti-Doping Regime

The private anti-doping regime comprises the International Olympic Committee (IOC), International Federations, national anti-doping organizations, and testing laboratories.[80] The main legal instrument of this regime is the WADA Code. Additionally, in certain circumstances, other specific agreements, such as the Host City Contract (HCC) commit certain stakeholders to uphold anti-doping obligations. We call it "private" because these obligations bind mainly private actors rather than governments, and private entities and individuals (i.e., sport federations and athletes) are the only ones who might end up being sanctioned for non-compliance. We say "mainly" because, although private in nature, this legal regime also imposes some obligations on States that will be further discussed below.

1. The World Anti-Doping Agency Code (WADA Code)

WADA is a not-for-profit foundation, registered under Swiss law,[81] which was created in 1999, at the IOC initiative, to bring together private and public (i.e. state) forces fighting against doping.[82] The overall purpose of WADA is to ensure the moral and political commitment of all public and private stakeholders in the fight against doping.[83]

WADA is a *sui generis* organization of a hybrid nature[84] combining both public and private stakeholders, making it a quasi-public or

80. In certain countries, such as France (*see French Anti-Doping Agency*, AFLD, *available at* https://en.afld.fr/afld-in-short/ (last visited Apr. 10, 2024), and Italy (*see Implementation of Anti-Doping Policies in 2018- Italy, Anti—Doping Questionnaire*, COE at 3 (2018), *available at* https://rm.coe.int/t-do-en-adq-2018-report-italy/16809e2f93 (last visited Apr. 10, 2024)). The national anti-doping organizations and laboratories operate as public entities rather than private ones. This distinction contributes to the complex interplay between private and public anti-doping systems.

81. Constitutive Instrument of Foundation of The Agence Mondiale Antidopage World Anti-Doping Agency, art. 1.

82. *Id.* art. 1.

83. *Id.* art 4 ¶ 1.

84. Lorenzo Casini, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA) Symposium on Global Administrative Law in the Operations of International Organizations: I. Public/Private Partnerships Involving IOs*, 6 INT'L ORG. L. REV. 421, 423 (2009); Kathryn Henne, *WADA, the Promises of Law and the Landscapes of Anti-doping Regulation Research Note*, 33 POL. & LEGAL ANTHROPOLOGY R. 306, 320 (2010);

quasi-international organization.[85] Furthermore, WADA is an agency whose functions include issues of public interest.[86] The main governing bodies of WADA are the Foundation Board and the Executive Committee.[87]

The Foundation Board is composed of forty-two members, half of which are appointed by the Olympic Movement. The other half are representatives of governments, nominated by States and appointed by the WADA President, taking into account the need to ensure equitable geographic distribution,[88] and subject to certain eligibility criteria set out in the WADA Code.[89] The Foundation Board elects the President and the Vice President as well.[90] To ensure the balance of power between the two groups, the positions of the WADA President and Vice President rotate, so that neither representatives of the private and public stakeholders can occupy both positions at the same time.[91] The Executive Committee is composed of sixteen members appointed by the Foundation Board and is tasked with the actual management and running of the agency.[92]

The Executive Committee can also appoint a Director General tasked with partial or complete management of the organization.[93] Most members of the Committee are selected from the Foundation Board consisting of three independent members, one athlete council chair, five members from the Olympic movement, and five from public authorities plus the President and Vice-President. At the time of writing, seven out

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Maarten van Bottenburg, Arnout Geeraert & Olivier de Hon, *The World Anti-Doping Agency: Guardian of Elite Sport's Credibility*, 191-94, (A. Boin et al. (eds.), 2021).

85. *See* Casini, *supra* note 84, at 430-33, 39. The International Labor Organization, on the other hand, is a good example of an Inter-Governmental Organization that in its decision-making structures, also includes entities that are not subject of international law, like national trade unions.

86. Casini, *supra* note 84, at 432-33.

87. In addition to these two main organs, WADA also has five Standing Committees including an Athlete Council, ten Expert Advisory Groups, eleven working Groups, a Nomination Committee, and an Independent Ethics Board. *See Governance*, WADA, *available at* https://www.wada-ama.org/en/who-we-are/governance (last visited Apr. 10, 2024).

88. There are five regions: Africa, the Americas, Asia, Europe, and Oceania, and each region has equal representation on the Foundation Board. Each government within a region is invited to nominate a representative for the Board.

89. Constitutive Instrument of Foundation of The Agence Mondiale Antidopage World Anti-Doping Agency *supra* note 81, at art. 6 ¶ 1(2).

90. *Id.* art. 7.

91. *Id.*

92. *Id.* art. 11.

93. *Id.*

of the sixteen members were current or former international-level athletes.[94]

WADA is funded by allocations, donations, legacies, and other forms of allowance, subsidy, or other contributions from all public and private stakeholders. Governments' annual contributions are determined based on a regional allocation, and the Olympic Movement also provides matching funds that cover up to 50% percent of WADA's annual budget.[95] From a governmental perspective, contributions to WADA's funding are regionally allocated, with Africa, the Americas, Asia, Europe, and Oceania providing 0.5%, 29%, 20.46%, 47.5%, and 2.54% respectively. The specific amounts paid by each government within these regions are agreed upon internally.[96] In 2022, the Olympic Movement paid $21,412,007 and the public authorities paid $21,637,128 for their contributions to the WADA budget.[97]

WADA's functioning requires close collaboration between public and private sectors, the representatives of national and international sport organizations, and States. Thus, according to its statute, international SGBs (i.e., IOC, International Paralympic Committee, and international federations) are responsible for anti-doping testing and sanctioning violations in international competitions. National SGBs (i.e., National Olympic and Paralympic Committees and National Federations) are responsible for the same in national competitions. National anti-doping organizations (NADOs) do the testing procedures within their national borders and provide information to athletes and personnel for compliance with the WADA Code. Governments work to facilitate doping control through national policymaking. Finally, national laboratories analyze the samples in compliance with international standards.[98]

The core legal instruments of WADA are its statute and code. The statute is the constitutive instrument of the Agency. WADA statute is not a treaty. Instead, it is a legal act creating a foundation under the

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94. *See Executive Committee*, WORLD ANTI-DOPING AGENCY, *available at* https://www.wada-ama.org/en/who-we-are/governance/executive-committee (last visited Apr. 10, 2024).

95. *Funding*, WORLD ANTI-DOPING AGENCY, *available at* https://www.wada-ama.org/en/who-we-are/funding (last visited Apr. 10, 2024).

96. *Id.*

97. *Contributions to WADA's Budget 2022*, WORLD ANTI-DOPING AGENCY (Jan. 3, 2023), *available at* https://www.wada-ama.org/sites/default/files/2023-01/wada_contributions_2022_update_en.pdf (last visited Apr. 10, 2024).

98. *See Global Anti-Doping Organization Chart*, WORLD ANTI-DOPING AGENCY (Jan. 2009), *available at* https://www.wada-ama.org/sites/default/files/resources/files/WADA_PK_Global_ADO_Chart_200901_EN.pdf (last visited Apr. 10, 2024).

provisions of the Swiss Civil Code.[99] WADA's principal and official seat is in Lausanne, Switzerland, but it is also headquartered in Montreal, Canada.[100] That means that WADA operations are not regulated by international law but instead by Swiss law, and possibly also by Canadian law.

The WADA code sets out the anti-doping rules that apply to all athletes, team managers, NADOs, and International Federations that are signatories to the WADA code, and laboratories.[101] The code is a framework that harmonizes anti-doping policies, rules, and regulations across all sports and all countries, and it provides a consistent and standardized approach to anti-doping efforts worldwide. It is adopted and periodically amended by the WADA's Foundation Board.

The linkage between the WADA code and the public anti-doping framework is established through the UNESCO Convention. Whether the code is binding on States, in what ways, and to what extent, will be further discussed below. However, the unique character of this organization and the public-private partnership that it has formed turns WADA into a potential subject of public international law.[102]

2. Specific Bilateral Agreements

SGBs are private actors. They do not have the international legal personality necessary to be parties to treaties, however, during the past decades, all sorts of non-governmental entities have gradually been recognized as falling within the scope of the rules of public international law.[103] Agreements between State and non-State actors are becoming

99. WADA Statute, *supra* note 81, at art. 1 (2021).

100. *Id.* art. 2; *See also Governance*, WORLD ANTI-DOPING AGENCY, *available at* https://www.wada-ama.org/en/governance (last visited Apr. 10, 2024).

101. Jenart, *supra* note 55, at 422.

102. WADA Code, *supra* note 28, art. 4; "The Agency will be entitled to prepare plans and proposals in light of its conversion, if necessary, into a different structure, possibly based on international public law."

103. As the International Court of Justice recognized already in 1949, in the advisory opinion in *Reparation for Injures in the Service of the United Nations*; "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law … has already given rise to instances of action upon the international plane by certain entities which are not States." *See* 1949 I.C.J. 174,178; *See also* OLIVER DORR & KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, 74 (Oliver Dorr & Kirsten Schmalenbach, eds., 2d ed., 2012).

more common.[104] SGBs are one category of private actors that enter into such agreements with States.

Anti-doping is one area of cooperation between SGBs and States. The obligation to respect anti-doping regulations is incorporated also in specific bilateral agreements. The scope of these agreements is limited to a single State, which is typically the State hosting an international sporting event. Such agreements are relevant to the Russian doping case, and therefore, it is worth discussing their legal nature and value from the perspective of international law. Indeed, international legal responsibility arises from "the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole."[105]

The first situation is when there is a bilateral agreement to enforce anti-doping obligations between an SGB and the State. For example, in 2006, Russia (i.e., a State) entered into a bilateral agreement with the IOC (i.e., an SGB) as part of the agreement to host the 2014 Sochi Games.[106] The Russian Sport Ministry, acting on behalf of the Russian Federation, directly accepted the obligation to ensure the application of the WADA code and anti-doping rules adopted by the IOC.[107] As one study on the selection of Olympic Games hosts from 2012 to 2020 revealed, the IOC, concerned with the cooperation of local and State authorities, "requires bidders to sign onto and implement the relevant provisions of the key international anti-doping instruments" and needs guarantees from the "State" in this regard.[108] These guarantees are usually specified in a separate document.[109] Since 2014, ratification of the

104. Instances include: peace agreements between State and non-State actors (e.g. armed groups, insurgents, and the like), dispute settlement agreements between States and IGOs, or NGOs, or corporations, or agreements entered into by IGOs with private entities for the provision of services. *See* OLIVIER CORTEN & PIERRE KLEIN, THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION, 3, 18-20 (Enzo Cannizzaro ed., online ed., 2011).

105. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, UNITED NATIONS, 31, 32 (2001), *available at* https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited Apr. 10, 2024).

106. Schmid Report, *supra* note 9, at 6.

107. *Id.*; *See also The International Olympic Committee Anti-Doping Rules applicable to the XXII Olympic Winter Games in Sochi, in 2014*, INT'L OLYMPIC COMM., 1, 5 (July 29, 2013), *available at* https://library.olympics.com/Default/digital-viewer/c-177013 (last visited Apr. 10, 2024).

108. Ryan Gauthier, *Olympic Game Host Selection and the Law: A Qualitative Analysis*, 23 JEFFREY S. MOORAD SPORT L. J. 1, 35 (2016).

109. *Id.* at 36.

UNESCO Convention has been a required part of the bidding process, indicating the influence the IOC has on State affairs.[110]

The second situation involves the agreement to host international sporting competitions. The organization of major international sporting events requires the involvement of multiple private and public actors[111] and ultimately, the acceptance by the host in its various articulations of different obligations.[112] This multilayered relationship is governed by mutual agreements,[113] with different names. For instance, in the case of the Olympic Games, the agreement, known as the Host City Contract (HCC), entered into by SGBs on the one hand and the Organizing Committee of the Olympic Games (OCOG) for the host country on the other.[114] For brevity's sake, our focus will be solely on HCCs.[115]

The legal nature of HCCs is *sui generis*. They are not treaties of public international law concluded between States or IGOs.[116] They look like a contract between an SGB and a State, but even their true

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110. *Id.* at 37-38.

111. According to research, since 1996 the Games reached a size that their organization became heavily dependent on government involvement and support in many aspects. JEAN-LOUP CHAPPELET & BRENDA KÜBLER-MABBOTT, THE INTERNATIONAL OLYMPIC COMMITTEE AND THE OLYMPIC SYSTEM: THE GOVERNANCE OF WORLD SPORT, 80 (Thomas G. Weiss, ed., 1st ed. 2008).

112. *Id.* at 52; John G. Ruggie, *For the Game. For the World; FIFA and Human Rights*, HARV. UNIV. 1, 36 (Apr. 2016), *available at* https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/Ruggie_humanrightsFIFA_reportApril2016.pdf (last visited Apr. 10, 2024).

113. Chappelet & Kübler-Mabbott, *supra* note 111, at 94.

114. In the case of the International Volleyball Federation (FIVB), this document is called the "Organiser Agreement", concluded between the FIVB and the National Federation, or the Organising Committee of volleyball competitions. *FIVB Event Regulations 2020*, FIVB art. 43.1 (Nov. 3, 2020) *available at* https://www.fivb.com/-/media/2020/fivb%20corporate/fivb/legal/event%20regulation/updated/fivb%20event%20regulations%20202020201113clean.pdf?la=en&hash=6406948D18B0915DA35E8DC9725D47AD (last visited Apr. 10, 2024).

115. *See* Arnout Geeraert & Ryan Gauthier, *Out-of-control Olympics: Why the IOC Is Unable to Ensure an Environmentally Sustainable Olympic Games*, 20 J. ENV'T POL'Y & PLAN. 16, 21 (2018). The IOC started publishing the HCCs in 2018. Additionally, earlier HCCs have been made available through a court proceeding (2010), through a watchdog group (2012), and through the Rio OCOG (2016). Therefore, it is relatively easier to make meaningful observations with respect to HCCs compared to other hosting contracts, which are often confidential and not published. It is also notable that most other hosting agreements follow the same structure and are similar to HCCs.

116. Vienna Convention on the Law of Treaties art. 1, 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, U.N. Doc. A/CONF.129/15 (Mar. 21, 1986) (Not yet in force).

contractual nature remains questionable. As Geeraert and Gauthier highlighted, "the HCC is not a contract that is negotiated at arms length and is mutually agreed upon by the parties. Instead, the IOC requires the [Host City] to sign the HCC immediately after the host is selected".[117] HCCs have been considered a forceful infringement of State sovereignty,[118] and pressure tools on host States,[119] because they are unilaterally imposed on the host State and are equipped with enforcement mechanisms such as terminating the HCC and taking away the event from the host in case of non-compliance with HCC obligations.[120]

The obligations enshrined in HCCs can be connected to States in various ways. Sometimes States are direct signatories to HCCs. In the case of the 2000 Sydney Games, the HCC was signed by the government of New South Wales.[121] Sometimes governments are required to submit a "covenant" that commits the State to support the Host City and ensure the commitment of the Host National Olympic Committee (NOC) to respect the Olympic Charter and the HCC,[122] delegating, therefore, those entities some elements of public authority.

Because of the complexity of the provisions of HCCs, or perhaps because of the requirements of national legal frameworks, sometimes HCC "provisions have to be translated in a legal language familiar to the context of the specific edition of the Games."[123] For example, in order to "comply with the HCC, the UK [Parliament] adopted the London Olympic Games and Paralympic Games Act (LOGPA) in 2006."[124] In the case of the Rio Olympics, the HCC was incorporated into Brazil's domestic law through national legislation guaranteeing that "[e]ach of the three levels of Government is fully committed to upholding the pro-

117. Geeraert & Gauthier, *supra* note 115, at 24.

118. *See* Robert Sroka, *International sporting mega-events and conditionality*, 13 INT'L J. SPORT POL'Y & POL'S. 461, 473 (2021); *see also* Antoine Duval, *From Global City to Olympic City: The Transnational Legal Journey of London 2012*, *in* RSCH. HANDBOOK ON INT'L LAW AND CITIES 293, at 299 (Helmut Philipp Aust & Janne E. Nijman eds., 2021).

119. Walker J. Ross et al., *Governance of Olympic Environmental Stakeholders*, 4 J. GLOB. SPORT MGMT. 331, 343 (2019).

120. *Id.*

121. Stephen Frawley, *Organising Sport at the Olympic Games: The Case of Sydney 2000*, 30 INT'L . J. HIS. SPORT 527, 528 (2013).

122. London 2012 HCC, Preamble(G); Tokyo 2020 HCC, Preamble(G); Paris 2024 HCC, Preamble€.

123. Duval, *supra* note 118, at 300.

124. *Id*. at 299.

visions of the Olympic Charter and the [HCC], and all the necessary guarantees, declarations and covenants."[125]

HCCs' obligations can also be attributed to States because of the structure of OCOGs. Like the HCC, the OCOG is also an unusual legal entity created ad-hoc, under the national laws of the State hosting the games, for the purpose of organizing the games and entering into an agreement with the IOC.[126] The host city and the OCOG have joint financial responsibility for the planning, organization, and staging of the Games.[127] OCOGs can take different forms depending on the legal system of the host State.[128] In most cases, public entities are represented in the OCOGs.[129] As Chappelet and Kübler-Mabbott pointed out, the OCOGs have turned into "para-public entities within which the State–in the largest sense–plays a major role."[130]

> [T]he legal form of an OCOG is increasingly becoming that of a government agency (such as for Sydney 2000), a company whose executives are appointed by a prime minister (Athens 2004), an association dominated by public authorities (Albertville 1992) or a quasi-public foundation (Turin 2006). Purely private OCOGs (such as Atlanta 1996 or Los Angeles 1984) are progressively disappearing.[131]

In the case of the Tokyo Olympic Games, the OCOG had members from both the Tokyo metropolitan government and the Japanese government.[132]

Once created, the OCOG becomes the heart of the Games' organization and the main communication channel with the IOC.[133] Given its structure, and especially considering its functions, the OCOG is a "parastatal entity". In the law of international State responsibility, "parastatal entities" are "bodies which are not State organs in the sense of Article 4 [of ILC Articles], but which are nonetheless authorized to exercise gov-

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125. David McGillivray et al., *Mega Sport Events and Spatial Management: Zoning Space Across Rio's 2016 Olympic City*, 23 ANNALS LEISURE RSCH. 280, 288-89 (2020); *see also* Sroka, *supra* note 8, at 466.

126. *Id.*

127. London HCC, Basic Principles, 4; For government responsibilities, *see* basic principle 5.

128. Duval, *supra* note 118, at 299.

129. *Organising Committees for the Olympic Games*, IOC, *available at* https://olympics.com/ioc/olympic-games-organising-committees (last visited Apr. 10, 2024).

130. Chappelet & Kübler-Mabbott, *supra* note 111, at 11.

131. *Id.* at 91.

132. *Id.*

133. Chappelet & Kübler-Mabbott, *supra* note 111, at 90-91.

ernmental authority".[134] As the commentary to the ILC Articles noted, for classification of an entity as either public or private "the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, [and] the fact that it is not subject to executive control" are not decisive criteria for the purpose of attribution of the entity's conduct to the State.[135] Instead, what matters is that these entities be empowered, if only to a limited extent or in a certain context, to exercise specified elements of governmental authority.[136] "The justification for attributing to the State under international law the conduct of "parastatal" entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority."[137] OCOGs are one form of "the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs",[138] and therefore their conduct must be considered an act of the State under international law.

Organizing major international competitions, like the Olympic Games, without a certain degree of public power for the OCOG to fulfill the HCC obligations would be impossible.[139] As mentioned earlier, OCOGs are at the heart of many State obligations included in the HCCs.[140] Enforcing doping standards is one of the obligations included

134. Corten & Klein, *supra* note 104, at 4; *see also* Markos Karavias, *Treaty Law and Multinational Enterprises: More than Internationalized Contracts?*, RESEARCH HANDBOOK ON THE LAW OF TREATIES 597, at 613 (Christian J. Tams et. al. eds., 2014).

135. ILC Articles, *supra* note 19, cmt. to art. 5, ¶ 3.

136. *Id.*

137. *Id.*

138. *Id.* cmt. to art. 5, ¶ 1.

139. FIVB regulations also state that FIVB competitions are not possible "without the collaboration, efficient support and direct effort of the Government" of the hosting country (art. 82). It requires the host National Federation to provide some guarantees before being granted the hosting of the tournament. These guarantees include: economic guarantees with the backing of sponsors or a governmental agreement (art. 82.1) the application should be presented by the National Federation and the official authority of the host city/cities (art. 82.2) a document in which the government agrees to "grant its efficient support to the realization of the competition" and "[g]rant the necessary facilities for visas, customs, security, bank transactions and exchange, communication, transport and telecommunication and, in general, make a direct effort towards an excellent running of the competition" (art. 82.3).

140. Examples include obligations regarding ensuring the security of the event. *See* London 2012 HCC, art. 23; *See also* Paris 2024 HCC, art. 17.1,17.2; Certain measures, such as applying tax exemptions and enforcing specific visa and work permit regulations. Chappelet & Kübler-Mabbott, *supra* note 111, at 91; *see also* London 2012 HCC, art. 12, 13; Ruggie, *supra* note **Error! Bookmark not defined.** at. 18; Gauthier, *supra* note **Error! Bo okmark not defined.**, at 30-4; Ross, Leopkey & Mercado, *supra* note 119, at 339-340, 344; Intellectual property rights and prevention of ambush marketing. *See also* Mark James &

in the HCCs.[141] The 2024 Paris HCC contains anti-doping obligations.[142] It also refers to operational requirements of the HCCs, which entail strict doping compliance provisions as well.[143] The Tokyo HCC provided that the OCOG would be responsible for doping control,[144] and that the City, the NOC, and the OCOG are tasked with ensuring governmental support and cooperation for enforcement of anti-doping rules.[145] For Rio 2016, "HCC requirements for doping controls led to legislative creation of the Brazilian Authority for Doping Control. . . . Through delegation of administrative powers, the Authority was responsible for implementing the WADA Code. Additionally, a Sports Anti-Doping Tribunal was created to prosecute doping violations and implement penalties".[146] The HCC for the 2012 London Games[147] and 2000 Sydney Games[148] contained the same obligations regarding doping.

Lastly, although HCCs are not strictly speaking treaties, arguably they do not fall outside the scope of public international law rules in-

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Guy Osborn, *The Olympics, Transnational Law and Legal Transplants: The International Olympic Committee, Ambush Marketing and Ticket Touting*, 36 LEGAL STUD. 93 (2016); Gauthier, *supra* note **Error! Bookmark not defined.**, at 25-30.

141. FIVB, *supra* note 114 (also mentioning that "Organisers of FIVB or World Competitions are obliged to prepare and bear expenses for doping control").

142. Paris 2024 HCC, *supra* note 122, pmbl., art. 33(r).

143. *See, e.g.*, Medical services: "protect the health and safety of all Games participants, . . . The Medical Services area has two extremely important roles: providing medical care and health services … and managing the doping control programme. For this area, key success factors include an effective doping control programme" *Host City Contract - Operational Requirements*, IOC, at 104 (June 2018), *available at* https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Games/Host-City-Contract/HCC-Operational-Requirements.pdf (last visited Apr. 10, 2024); MED 15: "Ensure that relevant Host Country Authorities … guarantee the application of, and their compliance with, the World Anti-Doping Code and the IOC Anti-Doping Rules during the Olympic Games in particular with regards to investigations and intelligence gathering activities… [e]nsure that these Host Country Authorities provide their full cooperation and support for the implementation of the IOC and IPC Anti-Doping Rules.; *Id.* at 108-09; Med 16: "Implement and deliver a doping control programme, under the authority of the IOC/IPC, in accordance with … the provisions of the World Anti-Doping Code, its international standards and the IOC Anti-Doping Rules/IPC Anti-Doping Code that will be applied at Games time … develop and provide sample collection procedures in strict accordance with the World Anti-Doping Code, the IOC Anti-Doping Rules, the IPC Anti-Doping Code and, in particular, the international standards for testing and investigations. …" *Id.* at 109.

144. Tokyo 2020 HCC, *supra* note 122, at art. 24(b).

145. *Id.* at art. 24(c).

146. *See* Sroka*, supra* note 118, at 465-66, 469.

147. London 2012 HCC, supra note 122, at art. 24(b).

148. *See* Frawley, *supra* note 121, at 529.

cluding customary international law and the general principles of law.[149] Indeed, general principles of law,[150] and core rules of customary international law, such as *pacta sunt servanda* and the principle of good faith, apply to these agreements, *mutatis mutandis*.[151] They are still valid and applicable "under international law independently of the [Vienna Conventions]".[152] "Good faith", a general principle of international law, is paramount in the case of agreements underpinning the organization of international sport events.[153] Good faith not only imposes a general duty of cooperation but also requires the parties to act in compliance with the object and purpose of their agreements.[154] It protects "the legitimate expectations of another subject generated through a deliberate conduct, whatever the true intentions or will of the acting subject" is.[155] Although the wording of the agreements might not include all the purposes related to the obligations, the duty of not defeating the overall purpose, the spirit, of these types of agreements "must and [does] remain presupposed."[156]

Therefore, bilateral agreements between a State and an SGB as a private party can be a source of international obligations for States. When these agreements pertain to anti-doping obligations, the violation of their provisions can establish the basis for holding States internationally accountable.

II. STATE RESPONSIBILITY FOR STATE-SPONSORED DOPING

The aforementioned obligations can serve as the foundation for international responsibility of a State in doping violations. Drawing on the example of the Russian case, this section will argue that State-sponsored doping entails international legal responsibility of the State and will examine how a doping program involving State agents can

149. Mark E. Villiger, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 104 (2009).

150. Statute of the International Court of Justice, United Nations, June 26, 1945, 33 U.N.T.S. 993 at art. 38.1(c).

151. VCLT, *supra* note 116, pmbl., art. 26.

152. Villiger, *supra* note 149, at 104; *see also* VCLT, *supra* note 116, art. 3(b).

153. Some scholars go as far as holding that the whole philosophy of legal order, including the law of international responsibility, ultimately boils down to the principle of good faith. ROBERT KOLB, GOOD FAITH IN INTERNATIONAL LAW, 183 (2017).

154. *Id.* at 67-72.

155. *Id.* at 23.

156. *Id.* at 68-69.

constitute a breach of international obligations and be attributable to States.[157]

Under international law, the conduct of State organs, meaning "all the individual or collective entities which make up the organization of the State and act on its behalf"[158], is always attributable to the State. Three key principles are relevant here. First, international law does not allow States to hide behind internal divisions, and the principle of the "unity of the State" holds that the State is a single entity, regardless of its internal structures and functions.[159] Second, even if State authorities act beyond the scope of their official powers, the State can still be held responsible for its wrongful acts.[160] Third, intention is not a condition for international responsibility.[161] Investigations into Russian doping confirmed the pivotal role played by State agents.[162] According to investigations, between 2011 and 2015, there had been:

> An institutional conspiracy. . .across summer and winter sports [involving] athletes who participated with Russian officials within the Ministry of Sport and its infrastructure, . . .[to manipulate] doping controls. The . . . athletes were not acting individually but within an organized infrastructure. . . . This systematic and centralized cover up and manipulation of the doping control process evolved and was refined over the course of its use.[163]

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157. For an in-depth discussion of questions related to breach and attribution, see *Communication on behalf of Yuliya Stepanova and Vitaly Stepanov v. Russian Federation* submitted to the UN Human Rights committee, International Human Rights Center of Loyola Law School (Feb. 24, 2021), 67-73, *available at*: https://www.lls.edu/media/loyolalawschool/academics/clinicsexperientiallearning/ihrc/Stepanovs%20v%20Russia%20(3-1-2021)%20for%20distribution.pdf (last visited Apr. 10, 2024).

158. ILC Articles, *supra* note 19, cmt. to art. 4, ¶ 1.

159. *Id.* cmt. 7 to ch. II; *id.* cmt. to art. 2, ¶ 6; *id.* art. 4; *id.* cmt. to art. 4, ¶ 6, 7; *id.* cmt. to art. 7, ¶ 2.

160. *Id.* art. 7; *id.* cmt. to ch. 2, ¶ 6.

161. *Id.* cmt. to art. 2, ¶ 3, 9, 10; Pellet, *supra* note 22, at 5–6.

162. Schmid Report, *supra* note 9, at 13; First Report, *supra* note 4, at 25; the Schmid report uses a softer tone and language in comparison to the of independent commission from the first report to the second one, towards mitigating the involvement of high-ranking officials in the doping program; s*ee e.g.*, Schmid Report, *supra* note 9, at 13-14; there are also allegations that even the Russian President was aware of the program and that he confirmed it, *Putin 'Must Have Known' Of State-Sponsored Doping, Whistle-Blower Says*, RADIO FREE EUROPE RADIO LIBERTY (Jan. 29, 2018), *available at* https://www.rferl.org/a/russia-putin-knew-olympics-state-doping-rodchenkov-whistle-blower/29005175.html (last visited Apr. 10, 2024).

163. Second Report, *supra* note 6, at 1.

The investigations revealed that the Russian doping machine was "an intertwined network of State involvement through the Ministry of Sport and the [Russian Security Service (FSB), which are both Russian government organs,] in the operations of both the Moscow and Sochi Laboratories."[164] The Ministry of Sport was identified as the top of the command structure of the doping program, coordinating the work of a number of other organs.[165] The findings showed that the Minister of Sport, Mr. Vitaly Leontiyevich Mutko, was involved in reviewing reports from all those involved in the doping program, agreeing to bribery acts,[166] and deciding which football player should be saved from a positive doping test.[167] The Deputy Minister, Mr. Yuri Nagornykh, appointed directly by the Russian Prime Minister,[168] was the heart of the Sochi doping scheme,[169] supervising the first stage of the sample swapping process[170] and deciding what results should be covered up or reported.[171] Other State organs such as the Russian Security Service,[172] Center of Sports Preparation of National Teams of Russia (CSP), and the Russian Federal Research Center of Physical Culture and Sports (VNIIFK)[173] were involved in running the doping program.[174]

Furthermore, the actions of private entities, including the laboratories responsible for detecting doping, may also be imputed to the State, considering the level of State control over them.[175] For example, the investigations found that the Moscow Laboratory, a private organization, was acting under the orders of the Deputy Minister of Sport.[176] In the case of the Sochi Games, investigators were aghast by the "extent of

164. First Report, *supra* note 4, at 60.

165. Second Report, *supra* note 6, at 95; First Report, *supra* note 4, at 52–60.

166. First Report, *supra* note 4, at 55-56.

167. *Id.* at 38. Rodchenkov says that after the ARD channel documentary, everything was decided by Mutko, the minister of sports. GRIGORY RODCHENKOV, THE RODCHENKOV AFFAIR: HOW I BROUGHT DOWN PUTIN'S SECRET DOPING EMPIRE 63 (2020).

168. First Report, *supra* note 4, at 10.

169. *Id.* at 63.

170. Second Report, *supra* note 6, at 82.

171. First Report, *supra* note 4, at 9–11.

172. *Id.* at 12, 13, 43, 57, 58, 63; ARAF Report, *supra* note 2, at 196-97.

173. Schmid Report, *supra* note 9, at 7.

174. *Id*. at 13.

175. ILC Articles, *supra* note 19, art. 8; First Report, *supra* note 4, at 56.

176. First Report, *supra* note 4, at 35. Laboratory personnel, when inquired about who orders the manipulation of some samples stated: "there is no need [to know the names] because the instructions are directly from the Ministry of Sport. …" ARAF Report, *supra* note 2, at 195-96.

State oversight and directed control of the Moscow Laboratory in processing and covering up urine samples",[177] concluding that the "Laboratory was merely a cog in a State run machine, and not the rogue body of individuals".[178] Gregory Rodchenkov, a key figure in the scandal and the head of the Moscow laboratory, was appointed by the Minister of Sport and was under contract by the Ministry of Sport.[179]

The investigations revealed multiple breaches of anti-doping regulations, such as formulating and distributing a mouthwash doping cocktail among athletes;[180] corrupting Doping Control Officers;[181] the collusion of medical personnel with coaches to make them aware of washing periods (i.e. the period until one can have a clean test after taking a substance);[182] advance testing notice;[183] the failure to comply with WADA rules regarding the rapid enforcement of athletes biological passport;[184] intimidation of both Doping Control Officers and their families;[185] obstruction of anti-doping processes by various means;[186] surveillance of WADA accredited laboratories to cover up the doping cases;[187] finding male DNA in the urine samples of female athletes[188] indicating sample swapping;[189] bottle cap removing;[190] reporting the positive findings as negative in Anti-Doping Administration and Management System;[191] and, when all other efforts failed, disappearing positive results.[192]

These were not isolated incidents, but rather a pattern of conduct indicative of a prevailing, coordinated, and deliberate culture of doping in Russian sports. The scale of the Russian doping program required a high level of coordination and premeditated engineering with the in-

177. First Report, *supra* note 4, at 6.
178. *Id.* at 35.
179. *See* Rodchenkov, *supra* note **Error! Bookmark not defined.**, at 126.
180. First Report, *supra* note 4, at 49–51.
181. *Id.* at 8.
182. *Id.*
183. ARAF Report, *supra* note 2, at 183-84.
184. First Report, *supra* note 4, at 9.
185. ARAF Report, *supra* note 2, at 103-04.
186. *Id.* at 106-15.
187. First Report, *supra* note 4, at 8.
188. Second Report, *supra* note 6, at 19.
189. First Report, *supra* note 4, at 67-72.
190. *Id.* at 15, 47, 58.
191. *Id.* at 15, 34.
192. *Id.* at 35-42.

volvement of individuals from several governmental entities.[193] The continuing change of cover-up methods used in different tournaments, depending on the level of presence of international observers, demonstrated systematic thinking.[194] Adaptability and flexibility in such a high-profile operation[195] suggested strong governmental control and direction.[196]

WADA and IOC investigations suggest breaches of the obligations outlined in the previous section. With respect to the WADA Code, some articles were violated more conspicuously than others, as enumerated in the second report.[197] The doping program involved tampering[198] on behalf of both the officials and athletes, which is a violation of Art. 2.5 of the Code.[199] Conspiracy in the cover-up efforts, which is a violation of Art. 2.8 and 2.9 of the Code.[200] A case of reporting an adverse analytical finding as a negative test was also identified in the report as a potential violation of Art. 2.1 of the Code.[201] Furthermore, reporting the positive samples along with the identity of the athletes to Russian Deputy Ministry of Sport is a breach of the WADA International Standard for

193. *See* First Report, *supra* note 4, at 62-63. The First Report declares that the planning of Sochi scheme started in 2010 after a poor performance by Russian athletes in Vancouver Games.

194. *See id.* at 9-17, 61, 76 for a description of changing methods from Disappearing Positive Methodology at IAAF World Championships to sample swapping during 2014 Sochi Games.

195. Rebecca R. Ruiz & Michael Schwirtz, *Russian Insider Says State-Run Doping Fueled Olympic Gold*, NEW YORK TIMES (May 12, 2016), *available at* https://www.nytimes.com/2016/05/13/sports/russia-doping-sochi-olympics-2014.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer (last visited Apr. 10, 2024). ("We were fully equipped, knowledgeable, experienced and perfectly prepared for Sochi like never before," he said. "It was working like a Swiss watch.").

196. ILC Articles, *supra* note 19, cmt. to art. 7, ¶ 8.

197. Second Report, *supra* note 6, at 46-48.

198. WADA Code, *supra* note 28, app. I, definitions; The Code defines tampering as: "Intentional conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, offering or accepting a bribe to perform or fail to perform an act, preventing the collection of a Sample, affecting or making impossible the analysis of a Sample, falsifying documents submitted to an Anti-Doping Organization or TUE committee or hearing panel, procuring false testimony from witnesses, committing any other fraudulent act upon the Anti-Doping Organization or hearing body to affect Results Management or the imposition of Consequences, and any other similar intentional interference or Attempted interference with any aspect of Doping Control."

199. Second Report, *supra* note 6, at 46.

200. *Id.* at 46-47.

201. *Id.* at 47-48. The article concerns "presence of a prohibited substance or its metabolites or markers in an athlete's sample."

Laboratories,[202] and Articles 14.1.1 and 14.1.2 of the Code, which provide that adverse analytical findings should be reported to athletes, the NADO, the international federation, and WADA.[203] Other provisions of the WADA Code that have been violated include effective collection of intelligence for targeted testing, proper investigation of passport findings and any information regarding a doping violation (Art. 5.8),[204] following procedures after an adverse analytical finding including proper notices to the athlete (Art. 7.3),[205] education and doping prevention programs (Art. 18),[206] anti-doping research (Art. 19),[207] independence of anti-doping organizations (Art. 20.5),[208] and governmental efforts in implementation of the UNESCO Convention (Art. 22).[209] Given that the HCC and the "guarantee of observance" signed by the Russian Ministry of Sport[210] included obligations to adhere to the WADA Code and IOC Anti-doping regulations, the factual circumstances of the case also constitute violations of those documents.

Arguably, multiple articles of the UNESCO Convention were also violated including: the obligation to promote the prevention of and the fight against doping (Art. 1);[211] the duty to cooperate internationally by other States and leading anti-doping organizations (Art. 3(b)(c));[212] the duty to adopt proper legislation and create adequate administrative practices to fight doping (Art. 5);[213] the requirement of domestic coordination for the application of the Convention (Art. 7).;[214] and the duty to restrict the availability of prohibited substances (Art. 8).[215] In addition, one can also discuss the violation of the duty to facilitate doping control measures by domestic anti-doping organizations and testing by foreign doping control teams (Art. 12(a)(b));[216] the duty to encourage coopera-

202. *Id.* at 11; *see WADA International Standards of Laboratories*, WORLD ANTI-DOPING AGENCY 6.4.3, Version 9.0 2016, *available at* https://www.wada-ama.org/sites/default/files/resources/files/isl_june_2016.pdf (last visited Apr. 10, 2024).

203. WADA Code, *supra* note 28, art. 14.1.1, 14.1.2.

204. *Id.* art. 5.8.

205. *Id.* art. 7.3.

206. WADA Code, *supra* note 28, art. 18.

207. *Id.* art. 19.

208. *Id.* art. 20.5.

209. *Id.* art. 22.

210. Schmid Report, *supra* note 9, at 6.

211. UNESCO Convention, *supra* note 13, art. 1.

212. *Id.* art. 3(b)(c).

213. *Id.* art. 5.

214. *Id.* art. 7.

215. *Id.* art. 8.

216. UNESCO Convention, *supra* note 13, art. 12(a)(b).

tion between public authorities and sport and anti-doping organizations (Art. 13);[217] the duty to support WADA's mission in the international fight against doping (Art. 14);[218] and last but not least, multiple Convention obligations regarding testing with no advance notice, out of competition doping controls, timely handling of doping samples and their shipping (Art. 16).[219]

With respect to the European Convention, the violations include: the requirement to coordinate public entities for the practical application of the Convention (Art. 3),[220] adopting legislation, regulations and administrative measures to restrict availability of prohibited substances and effective application of anti-doping rules and cooperation with sport organizations (Art. 4);[221] adopting measures for establishing doping control laboratories with qualified staff (Art. 5);[222] harmonizing doping control rules and procedures and random testing without advance notice (Art. 7);[223] and promoting international cooperation both on the State level and on interorganizational level (Art. 8).[224]

On top of all these, one must also add Russia's failure to adopt proper legislative measures to comply with the WADA Code. The Conference of the Parties of the UNESCO Convention, in its 2017 compliance report, flagged the problem of integrating the WADA Code in internal laws of some countries[225] including Russia.[226]

Last but not the least, the facts suggest a violation of some fundamental principles of international law, including the *pacta sunt servan-*

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217. *Id.* art. 13

218. *Id.* art. 14.

219. *Id.* art. 16.

220. European Convention*, supra* note 14, art. 3.

221. *Id.* art. 4.

222. *Id.* art. 5.

223. *Id.* art. 7. This Article reads: "1. The Parties undertake to encourage their sports organizations and through them the international sports organizations to formulate and apply all appropriate measures, falling within their competence, against doping in sport. 2. To this end, they shall encourage their sports organizations … by harmonizing there: a) anti-doping regulations on the basis of the regulations agreed by the relevant international sports organizations; b) lists of banned pharmacological classes …; c) doping control procedures; … e) procedures for the imposition of effective penalties for [those] … associated with infringements of the anti-doping regulations by sportsmen and sportswomen."

224. *Id.* art. 8.

225. Conference of Parties to the International Convention against Doping in Sport, Sep. 19, 2017, ICDS/6CP/Doc.8, ¶¶ 43-46, 50, 52 [hereinafter UNESCO Convention's CoP].

226. *Id.* ¶¶ 7, 50, 52.

da and good faith.[227] *Pacta sunt servanda*, which is a logical foundation for obligations,[228] requires that agreements are honestly and loyally fulfilled by the parties based on their real intentions.[229] "Good faith requires conduct which is objectively compatible with meaning, object and purpose,"[230] and also that the parties comply with their obligations in a way that does not defeat the aim of the agreement.[231] Russia not only ignored the plain commitments of the conventions and the WADA Code, but also their spirit.[232]

III. CONSEQUENCES OF INTERNATIONAL STATE RESPONSIBILITY

Once an IWA is established pursuant to the rules of international State responsibility, there are consequences for it. States have the obligation to: (a) cease the wrongful conduct, if it is continuing, and to offer appropriate assurances and guarantees of non-repetition, if necessary;[233] and (b) make full reparation for the injury. "Injury" includes any damage, whether material or moral, caused by the IWA.[234] The State also has a continued duty to perform the affirmative obligation breached.[235] The scope of the obligations of cessation and reparation depends on the gravity of the breach.[236] More importantly, three forms of reparations, either on their own or in combination, can remedy a breach of international obligations: restitution, compensation, and satisfaction.[237] Hence, in this section, we will discuss the potential victims of a State-sponsored doping program. Subsequently, we will explore the extent to which the existing mechanisms have been effective in holding violating States accountable for breaching their international obligations and ensuring compliance with international law, and whether there is a realistic prospect of providing effective remedies for the victims.

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227. Vienna Convention, art. 26.

228. Robert Kolb, THEORY OF INTERNATIONAL LAW, 136 (2016).

229. Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, 114-5 (2006).

230. Guy S Goodwin-Gill, *State Responsibility and the Good Faith Obligation in International Law*, in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 76 at 92 (Malgosia Fitzmaurice et. al. eds 2004).

231. Dorr & Schmalenbach, *supra* note 3, at 446.

232. *Id.* at 89–92.

233. ILC Articles, *supra* note 19, art. 30.

234. *Id.* art. 31(2).

235. *Id*. art. 29.

236. *Id.* cmt. to art. 4, ¶ 1.

237. *Id.* art. 34-38.

Identifying whose rights have been violated is central to any discussion of attribution of State responsibility.[238] Obligations and rights are two sides of the same coin. Every obligation is owed to someone,[239] whether a State, several States, or the international community as a whole.[240] It might also be owed to individuals or "entities other than States", when, for instance, the wrongful acts constitute a breach of international human rights.[241] Once the violation is established, it does not matter if the obligation was owed to a single State, or multiple States, or the international community as a whole.[242]

Three distinct categories of victims can be identified in connection with a State-sponsored doping program: States, SGBs, and individuals, including athletes.

A. States

Under Article 42 of the ILC Articles, "A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached, is owed to: (a) That State individually; or (b) A group of States including that State, or (c) the international community as a whole, and the breach of the obligation: (i) specifically affects that State; or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation."

In this case, the obligations Russia has under the UNESCO and European conventions are not owed to any particular or specifically defined State. These Conventions are multilateral treaties, and their obligations are that of a multilateral nature[243] owed to any and all States that have ratified them.

The UNESCO Convention along with the WADA Code impose an obligation of international cooperation[244] among Member States and with sport NGOs, especially WADA,[245] to realize the aims of the Convention.[246] Fighting doping to protect public health and foster "interna-

238. ILC Articles, *supra* note 19, cmt. to pt. III, ch. 1, ¶ 2; *id.* art. 42.

239. *Id.* cmt. to art. 2, ¶ 8.

240. *Id.* art. 33(1).

241. *Id.* art. 33(2).

242. *Id.* cmt. to art. 1, ¶ 5.

243. ILC Articles, *supra* note 19, cmt. to art. 42, ¶ 10.

244. European Convention, *supra* note 14, art. 8(1); UNESCO Convention, *supra* note 13, art. 3(b).

245. UNESCO Convention, *supra* note 13, art. 3(c).

246. *Id.* art. 13.

tional understanding and peace"[247] is clearly something more than a bilateral obligation; rather, it is a common goal of all the parties.[248] If the obligations are supposed to serve the common interest of the parties, even the States who are not directly affected by the breach may invoke responsibility.[249] To the extent that the fight against doping is understood as a global obligation to protect the health of all, arguably, even States not party to the UNESCO Convention could invoke the responsibility of Russia.[250]

Moreover, the wrongful act may be a violation of a collective obligation and still have injurious effects on one or several States.[251] In the case of Russian doping, it can be argued that all States whose athletes participated in Olympic, Paralympic, and other international sports competitions where doped Russian athletes competed were specifically affected and may invoke responsibility.[252] Under the principles of international law, when conduct violates the rights of multiple States, each State can separately invoke responsibility.[253]

B. SGBs

The IOC, WADA, NOCs, and other international federations have also suffered harm as a result of the Russian doping scandal. Both the UNESCO and European Convention include a duty for State Party to cooperate with those organizations.[254] Any SGB that has entered into a hosting agreement containing doping obligations with the hosting State must also be considered an entity injured by a violation of doping standards.

However, the system for NGOs and non-State entities to invoke a State's responsibility is different from the procedures followed by injured States. According to the commentary of the ILC Draft Articles, "[i]n cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State".[255] In sports, CAS is the forum where responsibility can be

247. *Id.* pmbl.

248. ILC Articles, *supra* note 19, cmt. to art. 48, ¶ 7.

249. *Id.* art. 48(1)(a); s*ee also id.* cmt. to art. 48, ¶ 2.

250. *Id.* cmt. to art. 48, ¶ 2.

251. *Id.* cmt. to art. 42, ¶ 12.

252. *Id.* cmt. to art. 42, ¶ 5.

253. ILC Articles, *supra* note 19, art. 46.

254. UNESCO Convention, *supra* note 13, art. 3(c), 14; European Convention, *supra* note 14, art. 7.

255. ILC Articles, *supra* note 19, cmt. to art. 33, ¶ 4.

invoked, contingent upon the presence of an arbitration clause. However, the notion of States relinquishing their sovereignty by including an arbitration clause in favor of CAS to handle cases of doping violations and award damages to victims against the State presents a challenging and difficult prospect.

C. Individuals

Individuals have been increasingly recognized as the primary beneficiaries of reparations in international law.[256] In the words of Antonio Cançado Trindade, former judge of the International Court of Justice (ICJ), "the subject of the corresponding right to reparation is a human being".[257] It is in fact an individual who copes with the consequences of the violation[258] and should be regarded as the ultimate beneficiary of reparation.[259] While IHRL is a dominant form of State obligations versus individuals, individual rights can also be considered under international law outside the framework of IHRL.[260] It is now a well-established principle that individuals as human beings can be subject to reparations not only in cases of international human rights or humanitarian law violations but also in other forms of violations of international law.[261]

The centrality of athletes as the primary beneficiaries of the protections provided by the UNESCO Convention, the European Convention, and the WADA Code is evident.[262] Similar to human rights treaties, the UNESCO Convention and the European Convention "confer rights up-

256. CHRISTINE EVANS, THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT, 28-31 (2012).

257. *Ahmadou Sadio Diallo (Guinea v. Congo)*, Compensation, Judgment, I.C.J. Reports, Separate Opinion of Judge Cançado Trindade, at 349, ¶ 4 (2012).

258. *Id.* at 377, ¶ 77.

259. ILC Articles, *supra* note 19, cmt. to art. 33, ¶ 3; Separate Opinion of Judge Cançado Trindade, *supra* note 257, at 350; *See also* Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, n. 217 at 151 ("The emergence of human rights under international law has altered the traditional State responsibility concept, which focused on the State as the medium of compensation. The integration of human rights into State responsibility has removed the procedural limitation that victims of war could seek compensation only through their own Governments and has extended the right to compensation to both nationals and aliens. There is a strong tendency towards providing compensation not only to States but also to individuals based on State responsibility".)

260. *Id.*

261. *See* ILC Articles, *supra* note 19, cmt. to art. 33, ¶ 3.

262. *Ahmadou Sadio Diallo (Guinea v. Congo)*, Compensation, Judgment, I.C.J. Reports, Separate Opinion of Judge Cançado Trindade, at 363, ¶ 24 (2012).

on individuals, [and] impose obligations upon States."[263] Provisions of the UNESCO and European conventions are inherently positive obligations or obligations of prevention,[264] which brings them closer to the structure of human rights treaties. The UNESCO Convention, particularly in its preamble, refers to "existing international instruments relating to human rights."[265] This victim-oriented perspective entails recognizing individuals as victims of international obligations in the fight against doping and, therefore, qualified for reparations.

In State-sponsored doping, athletes are the most directly adversely affected parties by unfair competition and thus the primary victims.[266] Two groups of athletes can be distinguished in this context. Russian athletes who participated in the doping program either unknowingly or knowingly, but under coercion, and clean athletes from other countries competing on the same stage against them.

By creating unequal and unfair competition, States that sponsor doping deny clean athletes the opportunity to gain their living through a work they freely choose.[267] The unjust advantage denies equality of sports participation opportunities and benefits (both tangible and intangible).[268] According to the WADA investigator's report, the Russian doping program "undoubtedly denied other competitors a level playing field which would generate an equal opportunity for a fair chance to win medals at Sochi."[269] In cases of doping, clean athletes were unjustly subjected to harm, including emotional suffering and economic loss; therefore, they are also victims of the breach of international law that Russia committed.

However, an essential question that requires attention is how effective the existing international mechanisms have been in remedying the consequences of a State's violation of international anti-doping obligations. The following section aims to address this significant question.

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263. James Crawford, *The System of International Responsibility*, THE LAW OF INT'L RESPONSIBILITY 17, 17 (2010).

264. Benedetto Conforti, *Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations*, *in* ISSUES OF STATE RESPONSIBILITY BEFORE INT'L JUD. INS. 129, 129 (Malgosia Fitzmaurice et. al. eds 2004).

265. UNESCO Convention, *supra* note 13, pmbl.

266. Kolb, *supra* note 21, at 210.

267. *International Covenant on Economic, Social and Cultural Rights*, U.N. HUMAN RIGHTS OFF. OF THE HIGH COMM'R (Dec. 16, 1996) at art. 6(1), *available at* https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights (last visited Apr. 10, 2024).

268. Daniel Moeckli, *Equality and Non-Discrimination*, INT'L HUMAN RIGHTS LAW, 157, 159 (2014).

269. Second Report, *supra* note 6, at 95.

IV. DEFICIENCIES OF LEGAL MECHANISMS AND CHALLENGES TO THEIR ENFORCEMENT

Despite the presence of international legal frameworks for anti-doping, established through treaties and agreements involving States, certain design flaws undermine their effectiveness. These flaws limit the mechanisms' ability to ensure compliance, create challenges in implementing and enforcing obligations, and hinder the prospect of effective remedies for individuals affected by State-sponsored doping. There are also challenges in terms of implementation, with inconsistencies and overlaps causing confusion and tension between the public and private anti-doping systems. While the conventions focus on public authorities and grassroots development, the Code predominantly addresses the elite sports movement. As a panel of UNESCO-appointed experts concluded, "[t]he doping crisis in Russia has revealed a lack of surveillance and monitoring policies and an absence of coordination between the major international sport organizations."[270]

In the case of the Russian doping scandal specifically, there has been a lack of effective response by the above legal frameworks, with no adequate measures taken to counter the public dimension of the doping program, which involves State organs or acts attributable to States.

A. Lack of Clear Coordination between the Private and Public Anti-Doping Systems

The global anti-doping structure is multilayered but constantly evolving to address the existing gaps. Generally speaking, the legal frameworks established by the European and the UNESCO conventions are continuously evolving and being carefully synchronized with the WADA Code and its other regulations, in an effort to ensure that they all work together seamlessly towards the common goal of eradicating doping. However, the connection between the WADA Code and the UNESCO Convention raises questions regarding the true nature of this link and the binding effect of the WADA Code on the States.

The WADA Code *per se*, is not a treaty. States are not parties to it and thus not directly bound by it. It is instead a set of internal rules of WADA, regulated under Swiss law.[271] However, States are parties to

270. UNESCO Conference of Parties to the International Convention against Doping in Sport, art. 4.1 (Sep. 26, 2017).

271. WADA Code, *supra* note 28, art. 23.1.1 1, 144 (2021) ("The following entities shall be Signatories accepting the Code: WADA, the International Olympic Committee, International Federations, the International Paralympic Committee, National Olympic Committees, National Paralympic Committees, Major Event Organizations, and National Anti-

the UNESCO Convention, and the Convention establishes several links to the WADA Code. Namely, the UNESCO Convention relies on the WADA Code, as an appendix to the Convention, "to coordinate the implementation, at the national and international levels, of the fight against doping in sport" with a commitment that States make to the principles of the WADA Code.[272] While the appendices to the convention, including the WADA Code are not binding, the annexes to the Convention—the prohibited list and standards for therapeutic use exemption)—that are documents similarly adopted by WADA are binding on the States parties to the Convention.[273] Yet, Article 4(2) of the UNESCO Convention clearly states that the Code is not an integral part of the Convention and hence does not create direct obligations for the parties under international law,[274] a point that the ECtHR has also considered in one of its judgments. In *FNASS and Others v. France* the Court says: "the WADC is not binding on States because the instruments adopted by WADA are governed by private law, it was decided to draw up an international Convention in order to provide an internationally recognized legal framework allowing States to incorporate the Code into their domestic legislation. … Article 4 stipulates that the provisions of the WADC are not an integral part of the Convention and do not have direct effect in national law."[275]

These ambiguities over the true nature of the legal relationship between the WADA Code and the UNESCO Convention cause uncertainty and confusion regarding the enforceability of the Code and its binding nature on States. In particular, Houlihan has highlighted that the ambiguous wording of the Convention obscures the precise nature of obligations imposed on States.[276] Similarly, after discussing three approaches that make hybrid global norms such as the WADA Code binding on States,[277] Jenart raises doubts about the binding nature of the WADA Code due to the wording of the UNESCO Convention and sup-

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Doping Organizations. These entities shall accept the Code by signing a declaration of acceptance upon approval by each of their respective governing bodies.").

272. UNESCO Convention, *supra* note 13, art. 4(1).

273. *Id.* art. 4(3), (implying that States are obligated to align their domestic regulations with the WADA list of banned substances and adopt the same procedures for granting therapeutic exemptions.)

274. *Id.* art. 4(2).

275. N*ational Federation of Sportspersons' Associations and Unions (fnass) and Others v. France*, ECtHR, 48151/11, 77769/13, ¶ 54 (2018).

276. Houlihan, *supra* note 55, at 267.

277. Jenart, *supra* note 55, (being direct signatories of the document, ratification of treaties, and domestic legislation. He concludes that the only way that can make the WADA Code legally binding is the latter).

ports this claim by referring to the position of the French Council of State, the highest administrative body in France.[278] At the same time, others have, for example, recognized the UNESCO Convention as conferring a "mandate based in international law" to the WADA-led regime and bestowing upon it a "moral force".[279]

The UNESCO Oversight Division acknowledged such challenges drawing attention to the problem of understanding the interaction between the WADA Code and the UNESCO Convention and the confusion about the stakeholders in the fight against doping.[280] It admits that more work is needed "for clarifying and enhancing synergy between various legal instruments in the field of anti-doping."[281]

While acknowledging the validity of this criticism, and the need for more clarity in this regard, it would be still erroneous to dismiss the WADA Code as a strictly private legal instrument. The WADA Code in relation to the UNESCO Convention can be better construed as a document of hybrid nature[282] and a set of institutional obligations whose "legal force derives from a treaty [i.e. the UNESCO Convention], [yet] remain legally independent from the treaty."[283] As Casini noted, "[t]he Code offers, in fact, a prime instance of a source of formally private source of norms that show a high degree of 'publicness'."[284] Part of its authority originates in the representation of public authorities in the WADA Foundation Board,[285] and therefore a role in the decision-making process of the organization and drafting the Code,[286] and part of it is because of the reference to the Code in the Convention.[287] The UNESCO Oversight Division also considers that the "Code does not

278. *Id.* at 417-18.

279. Eric L. Windholz, *Sports' Global Anti-Doping Regulatory Regime: The Challenges and Tensions of Polycentricity and Hybridity*, 34 BOND L. REV. 93,116 (2022).

280. Evaluation of UNESCO Convention*, supra* note 32, at ¶¶ 25, 30-35.

281. *Id.* at 6.

282. Casini, *supra* note 84, at 14.

283. CONSTANTIN P ECONOMIDES, THE LAW OF INT'L RESP., 371-72 (James Crawford ET. AL. eds., 2010). In characterizing the sources of international obligations of States the author distinguishes between five categories: peremptory obligations, conventional obligations, customary obligations, institutional obligations, and unilateral obligations. It is the institutional obligations that can be supplemented by a treaty but remain legally independent from it. The WADA Code can be considered in this context. Any obligation also can belong to one or more of these categories at the same time.

284. Casini, *supra* note 84, at 18; *see also* R. C. R. SIEKMANN, INTRODUCTION TO INT'L AND EUROPEAN SPORTS LAW, 319 (R. C. R. Siekmann ET. AL. eds. 2012).

285. Siekmann, *supra* note 284.

286. *Id.*

287. *Id.*

have much weight in itself without the leverage that the Convention provides."[288] The Convention reinforces the WADA Code[289] by requiring States to develop harmonious mechanisms based on the Code. Another factor contributing to this public character is WADA's function in advancing public goals in the fight against doping and its role as a global standard setter in this regard.[290] The WADA Code provides the Convention with a reference document to introduce some clarity and a higher degree of certainty in the fight against doping.[291]

Apparently, the system itself is conscious of this deficiency in its functions. For example, the CoP has considered providing the State parties with "model legislation and policies" that can facilitate cooperation between public and private anti-doping agencies.[292]

Lastly, the criticisms regarding the interaction between the WADA Code and the Convention should not extend to the clarity of obligations imposed on States under the Convention. The Convention outlines specific obligations of a broader nature for States, which can be interpreted to encompass numerous detailed obligations that may not be explicitly mentioned in the Convention but exist within the global anti-doping framework. As we discussed earlier, many of the facts of the Russian doping case can constitute violations of multiple articles of the Convention.

Therefore, in order to enhance the effectiveness of anti-doping efforts, there is a need to clarify and strengthen the interaction between the WADA Code and the UNESCO Convention, to ensuring greater precision in what States need to do meet their obligations. This would contribute to a more efficient and harmonized approach in the fight against doping.

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288. Evaluation of UNESCO Convention, *supra* note 32*,* ¶ 34.

289. Houlihan, *supra* note 55, at 271.

290. Siekmann, *supra* note 284, at 318.

291. *See, e.g.*, UNESCO, *International Convention against Doping in Sport*, art. 2 (the definitions); art. 3(1) (complying with the principles of the Code); art. 11(c) (complying with financial principles of the code); art.12(a); art. 16(a)(f)(g); art. 20; art. 27(a)(b); Casini, *supra* note 84, at 14.

292. *See* UNESCO Conference of Parties to the International Convention against Doping in Sport, Consideration for the Elaboration of the Model Legislative Framework, ICDS/7CP/Doc.6 (Jul. 31, 2019).

B. Lack of Effective Enforcement Measures

1. The Private System

SGBs, and particularly WADA, are the first group of stakeholders who have the duty to fight doping. Although they reacted to the unprecedented situation of State-sponsored doping by imposing a range of sanctions on Russian athletes and sport entities, they did not address the public structure behind the doping program due to a lack of necessary authority to do so.

In 2015, following the ARAF report, the former IAAF suspended ARAF for violating anti-doping rules.[293] ARAF remained suspended until March 2023, when the World Athletics Council reinstated the organization, which, in the meantime, had renamed itself to RusAF.[294] During this period, Russian athletes could still compete as "Authorized Neutral Athlete", subject to the approval of the World Athletics Doping Review Board.[295] The World Athletics also fined RusAF $10 million for breaching the anti-doping rules, but there is no sign that any portion of that money was used by World Athletics to compensate the victims.[296] Instead, some of that money was allocated to record-breakers of future games.

In the aftermath of the Schmid report, in December 2017, just before the 2018 Pyeongchang Winter Games, the IOC suspended the Russian Olympic Committee.[297] The decision left open the possibility for certain Russian athletes to participate in the games if they could "be considered clean."[298] Surprisingly, less than three months later, in Feb-

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293. IAAF, *IAAF Provisionally Suspends Russian Member Federation ARAF*, WORLD ATHLETICS (Nov. 13, 2015), *available at* https://worldathletics.org/news/press-release/iaaf-araf-suspended (last visited Apr. 10, 2024).

294. *World Athletics Council Decides on Russia, Belarus and Female Eligibility*, WORLD ATHLETICS (Mar. 23, 2023), *available at* https://worldathletics.org/news/press-releases/council-meeting-march-2023-russia-belarus-female-eligibility (last visited Apr. 10, 2024).

295. *World Athletics Council Issues Package of Sanctions in Relation to RusAF's Breach of Anti-Doping Rules*, WORLD ATHLETICS (Mar. 12, 2020), *available at* https://worldathletics.org/news/press-releases/world-athletics-sanctions-rusaf-breach-anti-d (last visited Apr. 10, 2024).

296. *Id.*

297. *IOC Suspends Russian NOC and Creates a Path for Clean Individual Athletes to Compete in PyeongChang 2018 Under the Olympic Flag*, IOC (Dec. 5, 2017), *available at* https://olympics.com/ioc/news/ioc-suspends-russian-noc-and-creates-a-path-for-clean-individual-athletes-to-compete-in-pyeongchang-2018-under-the-olympic-flag (last visited Apr. 10, 2024).

298. *Decision of the IOC Executive Board*, INT'L OLYMPIC COMM. (Dec. 5, 2017), *available at*

ruary 2018, the suspension was lifted and Russia was reinstated, allowing Russian athletes to compete under the Russian flag and wear a national team uniform.[299] Additionally, while, initially, Russia lost thirteen medals won at the 2014 Sochi Games,[300] CAS reinstated seven of the thirteen medals before the 2018 Pyeongchang Olympic Games and lifted the ban on some Russian athletes.[301]

Moreover, the IOC Executive Board sanctioned Mr. Mutko, the Russian Minister of Sport, and Mr. Nagornykh, the Deputy Minister, with a lifetime ban from participation in all future Olympic Games.[302] However, Mr. Mutko appealed the decision to CAS. A CAS panel unequivocally sided with the Russian minister, ruling in favor of Mr. Mutko and against the IOC. The CAS panel cited the IOC's "lack of authority to issue any form of disciplinary sanction against the Appellant as an individual not subject to the IOC's jurisdiction and regulations."[303] The panel upheld the appeal of Mr. Mutko and completely set aside the ban for lack of a legal basis.[304] Ironically, in October 2016, after WADA reports were released, the Russian Government promoted Mr. Mutko to Deputy Prime Minister of Russia "overseeing sports, tourism, and youth

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https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/Who-We-Are/Commissions/Disciplinary-Commission/IOC-DC-Schmid/Decision-of-the-IOC-Executive-Board-05-12-2017.pdf#_ga=2.229015772.134844882.1546924793-900081857.1545022043 (last visited Apr. 10, 2024).

299. Maria Tsvetkova & Brian Homewood, *Russian Olympic Committee Reinstated by IOC*, REUTERS (Feb. 28, 2018), *available at* https://uk.sports.yahoo.com/news/russia-says-international-olympic-committee-reinstates-membership-133141941—oly.html?guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAL4WiFDZDecouFo85LuBhiLAb-zFoDc5VUV8jgRJt___2JHrD_yWNi-yeM860Jz7M0PFuk2p75HWipf8u9AvsiYEi5OtY7Ncf-bZVEuB5_174LXsxOftJOkUMDWyuwz79Qe_x-4jPD1RsIDd-7llcxmyR3rc5veLsyVAlbddAx1Y (last visited Apr. 10, 2024).

300. Nick Zaccardi, *List of Russia Olympic Medals Stripped; new Sochi Medals Standing*, NBC SPORTS (Nov. 27, 2017, 10:09 AM), *available at* https://olympics.nbcsports.com/2017/11/27/sochi-olympic-medal-standings-russia-medals-stripped-doping/ (last visited Apr. 10, 2024).

301. *The Court of Arbitration for Sport Delivers its Decisions in the Matter of 39 Russian Athletes v. The IOC: 28 Appeals Upheld, 11 Partially Upheld*, CT. OF ARBITRATION FOR SPORT (Feb. 1, 2018), *available at* https://www.tas-cas.org/fileadmin/user_upload/Media_Release__decision_RUS_IOC_.pdf (last visited Apr. 10, 2024).

302. Int'l Olympic Comm., *supra* note 298.

303. *Vitaly Mutko v. IOC*, CAS 2017/A/5498, Arbitration Award, ¶¶ 68-69 (Ct. of Arb. for Sport, Jul. 3, 2019), *available at* https://www.tas-cas.org/fileadmin/user_upload/Award__5498__FINAL_signed_.pdf (last visited Apr. 10, 2024).

304. *Id.* ¶ 69.

affairs."[305] It seems that Mr. Nagornykh did not file an appeal. To date, these are the only Russian government officials involved in the doping program to have been sanctioned by SGBs.

WADA, which had declared RUSADA non-compliant since 2015, reinstated RUSADA in 2018, only to uncover a new set of conspiracies that led to another suspension in September 2019.[306] WADA then requested a four-year ban on Russian sport. In 2020, a CAS panel reduced the four-year ban requested by WADA to two years,[307] turning the sanction against Russian sports into a symbolic and disappointing one.[308] However, Russian athletes were still permitted to compete during this time under strict conditions. It is a major shortcoming of the system that SGBs' sanctions end up punishing the athletes more than those behind the doping scheme, letting the main players responsible go unpunished.[309]

None of those measures had a meaningful impact on the State apparatus responsible for the doping program. The IOC-appointed Schmid Commission recognized the limited capacity of SGBs to address misconduct by government officials. The commission suggested that any action against the State should be pursued by UNESCO and WADA.[310] WADA's legitimacy came under criticism following the exposure of the Russian doping program from two distinct groups of stakeholders: the intergovernmental community and the SGBs, with the

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305. Ivan Nechepurenko, *Russian Sports Official Suspended Over Doping Resigns*, N.Y. TIMES (Oct. 24, 2016), *available at* https://www.nytimes.com/2016/10/25/sports/russian-sports-official-suspended-over-doping-resigns.html (last visited Apr. 10, 2024).

306. *See WADA Compliance Review Committee Recommends Series of Strong Consequences for RUSADA Non-Compliance*, WADA (Nov. 25, 2019), *available at* https://www.wada-ama.org/en/news/wada-compliance-review-committee-recommends-series-strong-consequences-rusada-non-compliance (last visited Apr. 10, 2024).

307. *WADA v. RUSADA*, CAS, 2020/O/6689, ¶¶ 739-745 (Dec. 17, 2020).

308. *See* Tariq Panja, *Russia's Doping Ban Is Cut to a Largely Symbolic Two Years*, N.Y. TIMES (Dec. 17, 2020), *available at* https://www.nytimes.com/2020/12/17/sports/olympics/russia-doping-wada.html (last visited Apr. 10, 2024); Sean Ingle, *Decision to Halve Russia's WADA Doping Ban Met with Disbelief and Anger*, THE GUARDIAN (Dec. 17, 2020), *available at* https://www.theguardian.com/sport/2020/dec/17/russia-doping-ban-halved-but-name-and-flag-barred-from-next-two-olympics-court-of-arbitration-for-sport-world-anti-doping-agency (last visited Apr. 10, 2024).

309. Rebecca R. Ruiz et al., *Even with Confessions of Cheating, World's Doping Watchdog Did Nothing*, N.Y. TIMES (Jun. 15, 2016), *available at* https://www.nytimes.com/2016/06/16/sports/olympics/world-anti-doping-agency-russia-cheating.html?_r=0 (last visited Apr. 10, 2024).

310. IOC, IOC DISCIPLINARY COMM'N'S REP. TO THE IOC EXEC. BD. 4 (2017).

latter even calling for WADA's dissolution.[311] WADA was called a "paper tiger" and "a powerless rule maker."[312]

Although WADA is the prominent and visible face of the anti-doping system, it lacks the necessary leverage to hold States accountable. While there may be valid criticisms of WADA regarding aspects of its functioning, such as the framework for considering whistleblower reports and providing adequate protections, it would be unfair to solely place the blame on WADA for the failure to detect the State-sponsored doping program and take immediate action against it. In fact, one could observe that the measures implemented by WADA may sometimes have achieved greater success and made a more significant impact than the measures taken by the public anti-doping system. Be that as it may, as it was discussed above, even when WADA reacted, its actions were often softened by other SGBs and CAS.

In fact, WADA lacks the proper capacity to act against a State. While the WADA Code sets out some "expectations" from governments, it mentions that "[t]he Signatories are aware that any action taken by a government is a matter for that government and subject to the obligations under international law as well as to its own laws and regulations."[313] It continues that monitoring compliance with the UNESCO Convention is entrusted to the CoP of the Convention and not WADA.[314]

311. DANIEL READ, et. AL., THE RUSSIAN OLYMPIC DOPING SCANDAL 163-7 (6th ed. 2021).

312. Antoine Duval, *Tackling Doping Seriously - Reforming the World Anti-Doping System after the Russian Scandal*, ASSER INSTITUTE POLICY BRIEF NO. 2016-02, 3 (2016), *available at* https://deliverypdf.ssrn.com/delivery.php?ID=737027111000006076122064089098094064016020050037028066000080079074126014086092083026061120060015055036110007000117097064112081108059078076004064005078093112022122080089030047002027089114115085126094065006100100090065120074068123086065096097067021115089&EXT=pdf&INDEX=TRUE (last visited Apr. 10, 2024); Antoine Duval, *The Russian Doping Scandal at the Court of Arbitration for Sport: Lessons for the World Anti-Doping System*, 16 INT'L SPORTS L. J. 177, 196 (2017).

313. WADA Code, *supra* note 28, art. 22.

314. WADA Code, *supra* note 28, art. 24.2; The WADA Code also adds "Failure by a government to ratify, accept, approve or accede to the UNESCO Convention may result in ineligibility to bid for and/or host Events as provided in Articles 20.1.11, 20.3.14 and 20.6.9, and the failure by a government to comply with the UNESCO Convention thereafter, as determined by UNESCO, may result in meaningful consequences by UNESCO and WADA as determined by each organization." WADA Code, *supra* note 28, art. 22.10.

WADA openly admitted its limited authority over States in the aftermath of the Russian doping scandal.[315] It acknowledged that unclear regulations had:

> …led to confusion, different interpretations among stakeholders and disagreement on what needed to be done. The end result was a set of uncoordinated decisions and actions – for example, what sanctions needed to be applied by which organizations to ensure some uniformity – which created frustration for many…[316]

It further said:

> …the challenge of detecting cheating in an environment such as the one that was prevailing in Russia at the time had never been encountered before. For [(anti-doping organizations)] and WADA, to detect cheating, which involves parties of the State such as the secret services (FSB) [Russia's principal security agency], is and will always be a difficult, if not impossible, task…[317]

To address the fast-paced developments, WADA revised its rules and regulations. In 2019, it adopted a roadmap and created the Code Compliance Monitoring Program[318] to detect cases of violation of its standards, consisting of questionnaires, audits and investigations, a taskforce, and a review committee.[319] The last step of this lengthy process is the referral of non-compliance cases of the WADA Code to CAS, an arbitration tribunal with limited powers and no jurisdiction over State agents.[320] There are also claims suggesting that WADA has been effective in enforcing and ensuring compliance with anti-doping policies.[321] However, it is very likely that such conclusions can only be applied to the private entities involved in the doping structure and should not be

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315. Ruiz & Austen, *supra* note 310.

316. *See generally Progress of the Anti-Doping System in Light of the Russian Doping Crisis*, WADA, at 2 (Jul. 2, 2019), *available at* https://www.wada-ama.org/sites/default/files/20190122_progress_of_the_anti-doping_system.pdf (last visited Apr. 10, 2024).

317. Duval, *supra* note 313 at 3-4.

318. *Id.* at 11.

319. *Id.* at 3-5.

320. *See* WADA, *Code Compliance by Signatories*, art. 1, 7.1.1, 9.3.2, 9.4, 9.5, 9.6, 11.2.2 (2021).

321. Windholz, *supra* note 279, at 115-117; van Bottenburg, et. al., *supra* note 84, at 194-198; Houlihan, *supra* note 55, at 275-76.

extended to the public structure. Whether and to what extent WADA sanctions have been successful in changing State practice cannot be accurately evaluated at this time. It requires ongoing monitoring and investigation over a long-term period.

2. The Public System

Public international law is perhaps where there is a stronger potential for holding State agents responsible for violations of international obligations of States. As it has been said, "[o]nly public international law could bind States from above and change domestic practices."[322] However, the public regimes of the two international anti-doping conventions, despite being potentially designed to address situations of State-sponsored doping, did no better –even worse than the private system, considering that at least some sanctions were implemented by the private system.

The UNESCO Convention suffers from a lack of specific provisions outlining sanctions or consequences that States may face in the event of non-compliance,[323] and is more focused on encouragement rather than strict requirements.[324]

After the first WADA report on Russian doping, in August 2016, the CoP of the UNESCO Convention held an extraordinary meeting and recommended an assessment of the anti-doping policies in the Russian Federation.[325] During the ordinary meeting in September 2016, the CoP hired two international and three Russian independent consultants to conduct an assessment.[326] The report of the consultants contained recommendations that were subject to a follow-up review by the CoP based on a report submitted by Russian officials. In 2019, the CoP found "significant progress" in cooperation with the Russian Federation in implementing the recommendations.[327]

In 2017, the stakeholders of the UNESCO Convention expressed concerns over the low rate of compliance, citing the lack of sanctions as

322. Frédéric Mégret, *Nature of Obligations*, *in* INTERNATIONAL HUMAN RIGHTS LAW, 86, at 87 (Daniel Moeckli et. Al. eds.) (2018).

323. Jenart, *supra* note 55, at 417-19.

324. Houlihan, *supra* note 55, at 267, 274.

325. Conference of Parties to the International Convention Against Doping in Sport, *Review of the National Anti-doping Policy of the Russian Federation in the Context of the Policy Advice Project,* ¶¶ 1-6, ICDS/6CP/Doc.8 (2017).

326. *Id.*

327. Conference of Parties to the International Convention Against Doping in Sport, *Report of the COP6 Bureau on the Review of the National Anti-doping Policy of the Russian Federation in the Context of the Policy Advice Project*, ¶ 3, ICDS/7CP/Doc.17 (2019).

one of the reasons.[328] This concern was later emphasized by the President of WADA who drew attention to the absence of an effective system of consequences for States, highlighting the lack of "real penalt[ies] for Governments that choose not to play by the rules" as one of the challenges of anti-doping systems.[329]

In light of such concerns, the CoP started working on the adoption of the "Operational Guidelines" to better implement the UNESCO Convention.[330] The Guidelines were eventually approved in October 2021. They establish two categories of non-compliance. The first includes "non-compliant non-responsive States." These are States that have failed to submit their national reports within the required timeframes. The second includes non-compliant States "below the . . . threshold of 60%," which refers to States whose submitted national reports do not meet the threshold of 60% of the ADLogic self-assessment questionnaire.[331]

The consequences for non-compliance are very mild. According to the Guidelines, a case of non-compliance "means that the State Party's implementation of the Convention in terms of national policies, legislation or operational programs can be improved."[332] The follow-up process in a non-compliance case includes the implementation of a "Corrective Action Plan" by the State.[333] The background work on the Guidelines indicates that their purpose is more focused on assisting non-compliant States to achieve compliance, rather than imposing sanctions or other punitive measures.[334] A type of positive intervention in the

328. Evaluation of UNESCO Convention, *supra* note 32, at 22, 34.

329. *WADA President Calls on Governments to Implement Sanction Framework for UNESCO's International Convention Against Doping in Sport*, WADA (Oct. 26, 2021), *available at* https://www.wada-ama.org/en/news/wada-president-calls-governments-implement-sanction-framework-unescos-international-convention (last visited Apr. 10, 2024).

330. See *Operational Guidelines and A Framework for Strengthening the Implementation of the International Convention against Doping In Sport*, COP (Oct. 2021) *available at* https://unesdoc.unesco.org/ark:/48223/pf0000381120/PDF/381120eng.pdf.multi (last visited Apr. 10, 2024) [hereinafter Operational Guidelines].

331. *See Id.* at 5; States Parties' Non-Compliance 2020-2021, COP, ICDS/8CP/Inf.3, 2-3 (Jan. 7, 2023).

332. Operational Guidelines, *supra* note 330, at 5.

333. *Id.* ¶ 78-82.

334. *See Draft of Operational Guidelines*, COP ICDS/7CP/Doc.5, ¶ 5, 37, 38 (Aug. 2, 2019), *available at* https://unesdoc.unesco.org/ark:/48223/pf0000370457/PDF/370457eng.pdf.multi (last visited Apr. 10, 2024).

form of capacity building and persuasion that was recognized earlier by other commentators as a weakness of the anti-doping system.[335]

Despite the alarming revelations of the Russian doping program and the significant level of State involvement, generally speaking, the approach of the UNESCO Convention continues to focus on assisting States in overcoming their "difficulties" in complying with the Convention without adequately addressing cases of intentional violation. Seemingly, the same challenges that earlier observers highlighted—"the Convention creates weak obligations to deliver imprecise objectives through a vague implementation framework"[336]—persist about a decade later. This lack of "palpable ramifications from a public international law point of view" has been highlighted by another observer who, with respect to the UNESCO Convention, said that "[a] treaty obligation that is binding, but that has no effective enforcement mechanisms, remains weak."[337]

A few reasons may account for this deficiency. It appears that UNESCO and the Member States were under the impression "that anti-doping would not be a crucial political issue for member States and therefore the Convention needed to be 'designed in such a way as to not be a burden'".[338] This could help secure more ratifications for the Convention under the "impression that the rapidity of ratification is seen as the primary indicator of success."[339] Also, it seems that the system of questionnaires employed by the Convention is focused on getting a good response rate as an indicator of commitment by the UN, as one senior UNESCO official has confirmed.[340] This observation suggests that the survey system may not accurately measure the true rate of compliance with anti-doping obligations, as the survey is believed to be more effective in assessing "breadth of commitment rather than depth of commitment."[341] The UNESCO Oversight Division shares the same concern over the reliability of the self-assessment system in accurately assessing the effectiveness of anti-doping efforts.[342] In addition, the stakeholders have emphasized the necessity to ensure that the question-

335. Houlihan, *supra* note 55, at 272.

336. *Id.*

337. Jenart, *supra* note 55, at 418.

338. Houlihan, supra *note* 55, at 270.

339. *Id.* at 273-74.

340. *Id.*

341. *Id.* at 272-74.

342. Evaluation of UNESCO Convention, *supra* note 32, ¶ 84; Houlihan, *supra* note 55, at 272.

naire remains up-to-date and effective in identifying the areas that need attention based on the rapid evolution of anti-doping methods.[343]

The critique of the UNESCO Convention's approach can also be examined in light of the general mission and policies of UNESCO as an educational organization and a "disseminator of knowledge" that primarily "assumes responsibility for education, prevention, cooperation, and information relating to sport" rather than "prohibitionist policies" of WADA.[344] This approach is clear in the *travaux préparatoires* of the UNESCO Convention: "Since the urgent need to combat dope-taking is now abundantly clear and punitive measures have proved to be ineffective, UNESCO would seem to provide a suitable worldwide framework for cooperation between States on research, information exchange, education, and prevention."[345]

The European Convention exhibits similar deficiencies. Despite having monitoring mechanisms in place and the adoption of an additional Protocol in 2002, the European Convention is still impotent in implementing deterrent measures. According to the database of the Monitoring Group of the Convention, Russia underwent evaluation visits on three occasions in 2001, 2013, and 2021.[346] The 2013 visit took place two months before the Sochi Games, during a time when the doping program was evidently at its peak, and ironically, the visit was started at the Russian Ministry of Sports "with an introductory meeting with Deputy Minister Mr. Yuri Nagornyh."[347] The report made some recommendations and concluded that Russia had fulfilled its commitments under the European Convention "in a very good way."[348] The 2021 report, after making some recommendations, also confirmed Russia's fulfillment of all its commitments under the Convention.[349]

In 2021, the Monitoring Group of the Convention published a document outlining its mission, vision, and long-term strategy, which nota-

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343. Evaluation of UNESCO Convention, *supra* note 32, ¶¶ 77-79.

344. Scott R. Jedlicka & Thomas M. Hunt, *The International Anti-Doping Movement and UNESCO: A Historical Case Study*, 30 THE INT'L J. OF THE HIST. OF SPORT 1523, at 1524-27 (2013).

345. Records of the General Conference: Resolutions, UNESCO (27 C/Resolutions, Paris, October 25–November 16, 1993), 71.

346. *See Monitoring Reports*, COUNCIL OF EUR. PORTAL, *available at* https://www.coe.int/en/web/sport/monitoring-reports (last visited Apr. 10, 2024)

347. Report by the evaluation team of Anti-Doping Convention (T-Do), CoE, T-DO (2014) 05, at 18 (May 8, 2014).

348. *Id.* at 35.

349. Evaluation Report of the Monitoring Group (T-DO) Evaluation visit to the Russian Federation 21-23 September 2021, CoE, T-DO (2021) 43 Final, at 4-36 (Jan. 1, 2022).

bly lacks any indication of sanctioning capacities or legal consequences for potential violations.[350] The 2023 Rules of Procedure of the Monitoring Group have an article on non-compliance. In a case of non-compliance, notifications will be sent to the Head of the Delegation of the State in the Monitoring Group, asking for corrective action. If non-compliance persists, notifications will be sent to the Permanent Representation of the party to the CoE. At this point, "no representative of the [State] Party may be eligible for the position of Chair or Vice-Chair of the Monitoring Group, the Advisory Groups, ad-hoc groups, or the [The Ad Hoc European Committee for the World Anti-Doping Agency (CAHAMA)] or for the position of European Representative in the Foundation Board or Executive Committee of WADA." The party's non-compliance will then be reported to the Committee of Ministers of the CoE, which "may take additional actions in its discretion."[351] There are very mild consequences for actions that can undermine a whole legal regime. Notably, a committee's collection of documents on the topic of doping does not include any references to the Russian State-sponsored doping program.[352]

In conclusion, the international anti-doping structure still relies on "naming and shaming" as its main sanctioning tool.[353] Addressing the issue of inadequate consequences for intentional violations of anti-doping provisions remains a critical challenge for the international community.[354]

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350. *Strategy of the Monitoring Group of the Anti-Doping Convention (T-DO)*, CoE (Jun. 10, 2021).

351. *Rules of Procedure of the Monitoring Group of the Anti-Doping Convention*, art. 18 (Jan 31, 2023). In July 2022, after cessation of Russian Federation's membership in the CoE, the Council of Ministers of the CoE confirmed the loss of rights of participation of the Russian Federation and Belarus in the intergovernmental work of the Ad hoc European Committee for the World Anti-Doping Agency; *see* Ad hoc European Committee for the World Anti-Doping Agency (CAHAMA), Committee of Ministers of the Council of Europe, CM/Del/Dec(2022)1440/8.1 (Jul. 13, 2022).

352. *See Committee of Ministers*, COUNCIL OF EUR. PORTAL, *available at* https://search.coe.int/cm#title=Doping#k=*#f=%5B%7B%22p%22%3A%22CoECMTopics%22%2C%22i%22%3A1%2C%22o%22%3A1%2C%22ix%22%3A1%2C%22value%22%3A%22doping%22%7D%5D. (last visited Apr. 10, 2024).

353. Houlihan, *supra* note 55, at 272; *see also* HANDBOOK OF INT'L ADJUDICATION (Cesare PR Romano et. Al. eds. 2014); I.C.J. Statute, art. 36(2).

354. Yaël Ronen, FORUM PROROGATUM, Max Planck Encyclopedias of International Law (Jun. 2020).

C. Lack of a Dispute Resolution Mechanism to Provide Reparations

Another critical factor that exacerbates the dearth of effective measures in combating State-sponsored doping is the absence of a forum that can resolve disputes and provide remedies to victims. The choice of forum for resolving disputes in international law depends on various factors, including the nature of the dispute, the parties involved, and the availability of mechanisms for dispute resolution. Potential litigants must carefully consider their options and weigh the potential benefits and drawbacks of each forum before deciding on a course of action. In this case, the choice of the forum might be different based on the type of victim that raises a claim, be it a State, an SGB, or an individual.

1. State-Related Mechanisms

Neither the UNESCO Convention nor the European Convention has a dispute settlement clause. This, *per se,* can result in a lack of effective remedies in cases where non-compliance has resulted in damages to victims. The absence of a dispute settlement clause can lead to uncertainty, inconsistency, and limited enforcement of the Convention's provisions. It can also create a dead end for victims who have suffered material or moral damages due to breaches of anti-doping obligations.

Although the UNESCO Convention has not designated a forum to adjudicate claims of violation, certain international adjudicative fora may have jurisdiction, nonetheless. One of these is the ICJ, the principal judicial organ of the United Nations,[355] and the highest dispute resolution body between States in international law. However, the ICJ does not have compulsory jurisdiction. States must consent to jurisdiction. This can be done in four ways: by ad hoc agreement; by a com promissory clause in a treaty or convention previously ratified by the States in the dispute; by an optional declaration of acceptance of the jurisdiction of the ICJ, under Article 36 of its Statute;[356] or by *forum prorogatum,* which means if "a State that has not recognized the jurisdiction of the tribunal at the time when an application instituting proceedings against it is filed, may subsequently consent to such jurisdiction and enable the

355. I.C.J. Statute, art. 1.

356. Sean D Murphy, INT'L JUDICIAL BODIES FOR RESOLVING DISPUTES BETWEEN STATES, 181, at 187-8 in OXFORD HANDBOOK OF INT'L ADJ. (Cesare PR Romano et. Al. eds. 2014); I.C.J. Statute, art. 36(2).

tribunal to entertain the case."[357] The ICJ cannot hear a case of State-sponsored doping unless both the applicant and the respondent State have accepted its jurisdiction, in one of these four ways.[358] In the Russian case, none of these conditions seems to be present, and there is no information available to confirm any other State's actions based on potential mutual treaties with Russia.

States can also have recourse to arbitration. Arbitration has the advantage over recourse to the ICJ because it can be used by international organizations and individuals, not just States, to resolve disputes. Arbitration can be *ad hoc*, where the parties agree on the rules and procedures that will govern the arbitration, or it can be conducted under the auspices of an arbitral institution, such as the Permanent Court of Arbitration.[359] However, arbitration still requires consent by both parties, which might be nonexistent, and the powers of the tribunal will depend on the provisions of the arbitration clause.

The lack of any international court or arbitral tribunal with clear jurisdiction probably explains why, to date, no State has brought a case against Russia to recover for harm caused by its doping scandal in any international forum. In addition, the lack of awareness regarding how State-sponsored breaches of doping obligations can result in violations of human rights or cause damages may be another reason for the absence of litigation in this regard. Likely, States may not fully comprehend the legal implications and potential consequences of State-sponsored doping programs, which can extend beyond sporting issues and engage with human rights questions. Enhancing awareness and understanding of the legal framework surrounding anti-doping efforts, including the human rights dimension, could play a crucial role in promoting accountability and seeking appropriate remedies.

One potential solution to address this deficiency in the governance of the above conventions is the adoption of an additional protocol. This protocol could supplement the provisions of the conventions by establishing a dispute resolution mechanism and recognizing the jurisdiction of an international court, such as the ICJ, or an arbitral tribunal, such as

357. Yaël Ronen, *Forum Prorogatum*, Max Planck Encyclopedias of International Law (Jun. 2020).

358. *See* Christian Tomuschat, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, 613-616 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds., Christian J. Tams & Tobias Thienel Ass. Eds.) (2006).

359. Commentary to I.C.J. Statute, art. 33, ¶ 4.

CAS, to enable athletes and others to access effective remedies.[360] This would provide a more robust framework for addressing disputes and promoting compliance with the convention.

2. Mechanisms Related to the IOC

According to the commentary of the ILC Draft Articles "[i]n cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its account and without the intermediation of any State."[361] The mechanism for resolving disputes regarding the HCC is arbitration under Swiss law. In the HCC of the 2012 London Games, the IOC and CAS were chosen to settle disputes arising between the hosting entities on one side, and the Olympic family on the other.[362] The HCC, which is governed by Swiss law,[363] excludes the jurisdiction of the national courts of Switzerland and of the host country and gives CAS exclusive jurisdiction over any dispute.[364] The arbitration clause of the 2012 London HCC provides:

> This Contract is governed by Swiss law. Any dispute concerning its validity, interpretation or performance shall be determined conclusively by arbitration, to the exclusion of the ordinary courts of Switzerland or of the Host Country, and be decided by the [CAS]… in accordance with the Code of Sports-Related Arbitration of the said Court.

In addition, the clause includes an important provision removing immunity of the parties in case of a potential dispute:

> The City, the NOC and the OCOG hereby expressly waive the application of any legal provision under which they may claim immunity against any lawsuit, arbitration or other legal action (i) initiated by the IOC, (ii) initiated by a third party against the IOC, particularly as per Section 9 above, or (iii) initiated in relation to the commitments undertaken by the Government and its regional and local authorities as reflected in Section 5 above. Such waiver shall apply not only to the

360. *See* Pavel Šturma, Dispute Settlement Provisions in the International Law Commission's (ILC) Codification Projects, Max Planck Encyclopedias of International Law (Jul. 2020).

361. Commentary to I.C.J. Statute, art. 33, ¶ 4.

362. London 2012 HCC, *supra* note 122, art. 71.

363. *Id.* art. 72.

364. *Id.*; *see also* Tokyo 2020 HCC, *supra* note 122, art. 74, 87.

> jurisdiction but also to the recognition and enforcement of any judgment, decision or arbitral award.

Similarly, Section 51.3 of the 2024 Games' HCC says:

> The Host City, the Host NOC, and the OCOG hereby expressly waive the application of any legal provision under which they may claim immunity against any lawsuit, arbitration or other legal action … Such waiver shall apply not only to the jurisdiction but also to the recognition and enforcement of any judgment, decision or arbitral award.

Since States enjoy jurisdictional immunity,[365] this waiver of immunity is a crucial factor if the IOC decides to initiate legal action against Russian State entities.[366]

The Sochi HCC is not publicly available but considering that most HCCs are designed in the same format and contain the same provisions, the Sochi HCC can be the source of contractual liability of the Sochi OCOG. As a party to the Sochi HCC and representing other SGBs and athletes, the IOC can bring claims against the organizing authorities of the Sochi Games for violating contractual anti-doping obligations. CAS will then adjudicate the case under its rules of procedure. As athletes are not parties to the HCC and lack standing to bring a case to CAS on this basis, it falls upon the IOC to fulfill its responsibility by providing compensation to athletes who have suffered damages due to Russia's IWA.

However, the IOC has not initiated any claims against the OCOG before CAS seeking damages on behalf of itself, other SGBs, or athletes. They have not effectively defended the rights of athletes who competed in their tournaments. This could be attributed to perceiving doping as a mere administrative and disciplinary infraction rather than an offense with financial ramifications or a violation of the rights of other athletes.

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365. A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State.

366. *See United Nations Convention on Jurisdictional Immunities of States and Their Property (art. 5)*, GEN. ASSEMBLY OF THE U.N. (Dec. 2, 2004), *available at* https://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf (last visited Apr. 10, 2024).

3. Mechanisms Related to Athletes

Given that both States and SGBs have been ineffective in remedying violations of their rights (much less individual athletes), the next question is whether athletes currently have available a court that has jurisdiction and authority to provide them with effective relief for harm caused by State-sponsored doping.

Individuals may face unique obstacles when it comes to accessing justice under international law. One of the main challenges is the lack of standing before many international courts and tribunals. In the case of adjudicative bodies that can hear only disputes between States, such as the ICJ, the only way in which their claims can be litigated is by securing the diplomatic protection of their State.[367]

The possibility of allowing individuals to invoke the international legal responsibility of States directly, as opposed to through the medium of diplomatic protection, was considered by Garcia Amador, one of the ILC Special Rapporteurs who worked on the drafting of the ILC Articles, but it was not accepted by the ILC at the end.[368] However, subsequent developments in IHRL and the creation of multiple forums where individuals directly can allege a violation of their human rights have made it possible for individuals not to have to rely on diplomatic protection to vindicate their rights.

Nowadays, in cases involving violations of IHRL, individuals can bring claims before regional or global human rights bodies such as the Inter-American Commission on Human Rights or the UN Human Rights Committee (HRC). However, international human rights litigation is not without its challenges, and one of the most significant hurdles is often the question of admissibility. Some of the most important and common admissibility criteria include establishing jurisdiction, exhaustion of domestic remedies, standing, timeliness, and the plausibility of the claims. In the Russian case, there are at least two, if not three, forums where athletes might try (or, better to say, should have tried, since time limits might have expired) to bring their cases.[369]

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367. James R Crawford, *State Responsibility*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW (Sept. 2006), at ¶ 1, *available at* https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1093 (last visited Apr. 10, 2024) (whether diplomatic protection is the right of the State, or the right of the individual is still a source of controversy); Pellet, *supra* note 22, at 88–89.

368. Solomon T Ebobrah, INTERNATIONAL HUMAN RIGHTS COURTS, OXFORD HANDBOOK OF INT'L ADJ., 225, at 231 (Cesare PR Romano et. Al. eds. 2014).

369. Many international human rights mechanisms impose time limits for filing a claim, with some of them having limited windows. For instance, the ECtHR requires that a complaint be filed within four months of the final ruling at the national level. *See The Time-*

One is the ECtHR. The ECtHR occupies a distinguished position in international human rights architecture. In the most judicialized continent in the world, the ECtHR is one of the judicial pillars of the new construction of Europe after WWII, with a wider jurisdiction than the Court of Justice of the European Union.[370] Its jurisprudence is influential, shaping IHRL both globally and regionally. Moreover, its decisions are legally binding for the States that are parties to the disputes.[371] ECtHR's rulings are the lowest common denominator of European public policy and the constitutional order of CoE member States.[372] This encourages the potential disputants to seek remedies in front of the ECtHR rather than, say, UN treaty bodies, which do not issue binding decisions. The ECtHR can be an appropriate forum for lodging claims of human rights violations against States that are parties to the ECHR or its optional protocols.[373] However, the situation becomes more complicated in the case of Russia, as it has already ceased its membership in the CoE,[374] but, as it was already explained, that would be no bar.[375]

In 2021 alone, the Russian Federation paid nearly 12 million euros for damages under the judgments of the ECtHR, which by far stands as the highest amount of just satisfaction payments made by any State.[376] Also, in 2020 and 2021, Russia resolved 174 and 221 cases respectively

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Limit for Applying to the European Court of Human Rights Is Four Months From the Date of the Final Domestic Decision, ECTHR PRESS RELEASE (Feb. 1, 2022) *available at* https://www.coe.int/en/web/portal/-/time-limit-for-echr-applications-reduced-to-4-months (last visited Apr. 10, 2024).

370. Cesare PR Romano, *The Shadow Zones of International Judicialization*, OXFORD HANDBOOK OF INT'L ADJ., 90 at 96 (Cesare PR Romano et. al. eds.) (2014).

371. ECHR, art. 46 which reads: "Binding force and execution of judgments 1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution…"; As Tomuschat says: "Of all the specialized regional courts for the protection of human rights, the [ECtHR] is the most important institution not only because of its long existence … and its large membership … but also mainly because of its widely extended case law and the effectiveness of its implementation mechanism." *See* Christian Tomuschat, Human Rights: Between Idealism and Realism, 286 (2014).

372. Jernej Letnar Černič, *Emerging Fair Trial Guarantees Before the Court of Arbitration for Sport*, SSRN (Dec. 7, 2014), *available at* https://ssrn.com/abstract=2546183 (last visited Apr. 10, 2024).

373. Solomon T. Ebobrah, *International Human Rights Courts*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION, 225, at 231 (Cesare PR Romano et. Al. eds. 2014).

374. *See* The Comm. Ministers of the CoE, *supra* note 57.

375. *Id.*

376. This amount stands at 11.5 million euros in 2020. *See Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights*, COE COMMITTEE OF MINISTERS, 69 (2021) *available at* https://rm.coe.int/2021-annual-report/1680a9c848 (last visited Apr.10, 2024).

through friendly settlements with the applicants.[377] Furthermore, in 2021, the highest percentage of cases under enhanced supervision procedures for urgent implementation belonged to Russia, with 16 percent.[378] However, these numbers should be interpreted cautiously, as Russia currently has the second-highest number of pending cases in front of the ECtHR after Türkiye, with 16,742 cases by 2022.[379]

A second forum is the HRC, the monitoring body of the ICCPR.[380] While the decisions of the treaty bodies of the United Nations are not binding *per se*, their views carry significant authority in terms of setting standards and interpreting the rules of human rights treaties. Therefore, any actions taken here, especially against Russia, are unlikely to result in compensation but rather aim to contribute to the development and strengthening of the human rights aspects of the issues at hand. However, when the first individual communication of its kind was brought before the HRC by Yuliya and Vitaly Stepanov, a Russian athlete and her husband who were the first whistleblowers of the Russian doping program,[381] the difficulties of international human rights litigation for individuals became evident.

The complaint regarding Yuliya Stepanova, as an athlete affected by the Russian doping program, claimed that several articles of the ICCPR had been violated, including articles that prohibit cruel, inhuman, and degrading treatment, medical experimentation without free consent, forced labor, interference with privacy, freedom of expression, and family life.[382] Regarding Vitaly, allegations of infringements on the right to privacy, freedom of expression, and non-interference with family life were made.[383] The Committee denied the communication registration, stating that the claims were not sufficiently substantiated. While admis-

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377. *Id.* at 74.

378. *Id.* at 63.

379. *Annual Report 2022 of the European Court of Human Rights*, COUNCIL OF EUR. (2023), *available at* https://www.echr.coe.int/annual-reports (last visited Apr. 10, 2024).

380. *View the ratification status by country or by treaty*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R (2023), *available at* https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=144&Lang=en (last visited Feb. 15, 2023).

381. *Communication on behalf of Yuliya Stepanova and Vitaly Stepanov v. Russian Federation* submitted to the UN Human Rights committee, International Human Rights Center of Loyola Law School (Feb. 24, 2021), 67-73, *available at*: https://www.lls.edu/media/loyolalawschool/academics/clinicsexperientiallearning/ihrc/Stepanovs%20v%20Russia%20(3-1-2021)%20for%20distribution.pdf (last visited Apr. 10, 2024).

382. *Id.* at 74-125.

383. *Id.*

sibility criteria such as exhaustion of domestic remedies is always a hurdle in human rights litigation, it is not clear, in addition to challenges with the substance, to what extent the above factors have influenced the Committee's decision.

A third possible forum is the United Nations Human Rights Council. In 2007, the Council instituted a complaint procedure.[384] The purpose of the procedure is "to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances."[385] The admissibility criteria before the Council is akin to those of other human rights procedures, including requirements that cases not be purely political, be consistent with human rights instruments, and have exhausted domestic remedies.[386] There are two separate working groups. The Working Group on Communications and the Working Group on Situations are responsible for respectively examining written communications and bringing consistent patterns of gross violations of human rights to the attention of the Council.[387] Since the proceedings are confidential to enhance cooperation with the State concerned,[388] it is hard to speculate on whether the Russian doping scandal has already been brought before the Council.

Despite the existence of the above potential forums, several factors could explain the historical lack of effective relief provided by any of them. A major problem bringing action in front of all the above forums is the exhaustion of local remedies, stipulating that individuals or States must first pursue and exhaust all available legal avenues and remedies within their domestic legal system before seeking recourse at the international level.[389] This principle is founded on the idea of respecting the sovereignty of States and allowing them the opportunity to resolve disputes or violations of rights through their own legal systems before seeking external intervention.[390]

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384. U.N Human Rights Council: Institution-Building, U.N. HUMAN RIGHTS COUNCIL (June 18, 2007), *available at* https://ap.ohchr.org/documents/dpage_e.aspx?si=a/hrc/res/5/1 (last visited Apr. 10, 2024).

385. *Id.* ¶ 85.

386. *Id.* ¶ 87(a).

387. *Id.* ¶¶ 89-99.

388. *Id.* ¶ 86.

389. U.N. Human Rights Council, *supra* note 384, ¶ 87(g).

390. *See generally* Silvia D'Ascoli & Kathrin Maria Scherr, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection*, 2007/02 EUR. UNIV. INST. DEPT. OF LAW 1, 15 (Feb. 2007).

Notwithstanding the general rule, exceptions exist, as elucidated by established principles of international procedural law and the prevailing practice of international courts and tribunals. In situations where domestic legal proceedings are unduly prolonged, unlikely to provide effective relief, are not available, or are not accessible for the victims, the principle of exhaustion of domestic remedies may be subject to exceptions.[391] For instance, ILC Articles notes that "[o]nly those local remedies which are 'available and effective' have to be exhausted before invoking the responsibility of a State."[392] Moreover, the ILC Draft Articles on Diplomatic Protection add two additional exceptions to the rule: (i) in circumstances when there is no "relevant connection" between the injured person and the State alleged to be responsible,[393] and (ii) when the injured person is "manifestly precluded from pursuing local remedies."[394]

Another limitation of human rights litigation in international courts and tribunals is the lengthy and time-consuming nature of the legal processes if the case can successfully overcome the admissibility hurdles. For athletes, following a path to take their case to a human rights court means the premature termination of their professional careers, or at the very least, the loss of a significant portion of their livelihood as athletes.

The backlog of cases before human rights courts can also contribute to their reluctance to accept cases related to human rights violations resulting from sport as opposed to cases involving, for example, torture, deprivation of life, unlawful detention, and other similar violations.

Other contributing factors can be the limited human resources of human rights courts to process cases, potential financial restrictions, limited knowledge about the existence of such proceedings on behalf of the victims, or challenges in accessing victims by lawyers who can effectively engage with these mechanisms. Eventually, a common issue that might be evident here as well, is a lack of awareness about the nature of human rights violations related to doping.

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391. Donna J. Sullivan, *Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW*, 1 OP-CEDAW TECH. PAPERS 1 (2008).

392. *Draft Articles on Diplomatic Protection with commentaries*, YEARBOOK OF THE INT'L LAW COMM'N (2006), *available at* https://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf (last visited Apr. 10, 2024).

393. *Id.* at cmt. to art. 15(c).

394. *Id.* at cmt. to art. 15(d).

CONCLUSION

Russia may not be the only country with covert doping programs, and there may be other cases warranting similar scrutiny.[395] It is, therefore, essential for all stakeholders in the anti-doping field, including States and SGBs, not to overlook the chance to strengthen the frameworks that can help address potential future situations. This article highlighted that State-sponsored doping is a violation of the international obligations of States under the two private and public anti-doping frameworks, however, it identified caveats that undermine the effectiveness of anti-doping measures against States.

The existing legal regimes of the two public anti-doping conventions were caught off-guard by the Russian program. Not only did they fail to detect the State-sponsored program's existence, but they also lacked effective measures to remedy its harm and to impose meaningful sanctions on the involved Russian government organs and officials. These mechanisms still rely on assistive measures to help violating States improve their anti-doping structures without any substantial system of penalties. Even in the aftermath of the Russian case, progress in developing better structures for the enforcement of conventional provisions has been slow. The global anti-doping system still lacks sufficient power to address the issues effectively or impose effective consequences for non-compliance. The response by the SGBs has primarily focused on non-State entities and individual athletes due to their lack of capacity to take action against States but has left the State apparatus behind the doping program largely untouched.

Another significant challenge is the absence of a dispute settlement body with jurisdiction over States, either through public forums established by State agreements and treaties or through private arbitration mechanisms. The lack of effective dispute resolution mechanisms has hindered the ability to address breaches and provide effective remedies to potential victims. Access to all existing fora that could potentially have been used is limited. Considering the problems of litigating in front of international courts such as the ICJ and the ECtHR, the choice of arbitration might be more justifiable. However, the scope of arbitration is limited to the terms agreed upon by the parties. This means that there may be complications in utilizing arbitration to resolve certain types of disputes.

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395. *Independent Commission Investigation*, WADA (Nov. 9, 2015), *available at* https://www.wadaama.org/sites/default/files/resources/files/wada_independent_commission_report_1_en.pdf (last visited Apr. 10, 2024).

Modifying the jurisdiction of a specialized arbitral tribunal with relevant expertise, which might be CAS in this case, can help create a clear path for victims in their right to an effective remedy. CAS, which currently serves as an interpreter of the WADA Code[396] and holds a pivotal position in rule enforcement in the private anti-doping structure,[397] can be granted an additional responsibility to fulfill the same role within the public anti-doping domain. States could negotiate and adopt protocols to the two anti-doping conventions giving CAS compulsory jurisdiction at least over similar violations committed by States. This process may face challenges such as the need for States to agree and ratify such protocols. Given the diversity of perspectives and interests among member states and concerns about the potential overreach of an arbitral tribunal into areas that are traditionally within the purview of national sovereignty, the obstacle might be daunting. However, one should not underestimate the potential of SGBs to put pressure on States to join such instruments by imposing bans from hosting or participating in sporting events under their national flag or setting pre-conditions in this regard.

Another option would be the adoption of an international convention for the resolution of disputes between States, SGBs, and even athletes, whereby States voluntarily accept the jurisdiction of the CAS to resolve potential disputes like those discussed in this article. Given its history of collaborating with SGBs, UNESCO could be the framework under whose aegis such a convention could be negotiated. Yet, this approach faces the same challenges as the previous one.

Alternatively, the arbitration clause in HCCs could be modified to enhance the protection of athletes in the face of egregious violations of international law or IHRL by the host officials. The most propitious approach would probably be an ad hoc arbitration agreement, entered before any given dispute, in which the State explicitly consents, independently from the HCC, to resolve disputes before CAS and to waive its sovereign immunity from damages claims in foreign tribunals. The waiver of immunity is a significant move in such contracts and can be a huge step toward holding States responsible for reparations. One of the main advantages of this approach is its potential feasibility, as it only requires the consent of the single State involved and does not depend on a broader consensus among other States. However, there is no guarantee that the State will agree to such a provision, especially if it is unwilling to be held responsible for reparations. Again, a State may be willing

396. Houlihan, *supra* note 55, at 267.

397. Windholz, *supra* note 279, at 104-05.

to acquiesce if doing so is a condition of hosting Olympic and other international sporting events as well as entering a national team in these athletic competitions.[398]

If States are going to accept the jurisdiction of CAS, arguably they will want to have a say in who is going to be included in the list of potential arbitrators, and possibly in their selection. This could ensure a balanced and inclusive arbitration process that takes into consideration the interests of all parties involved. Such reforms could ensure the inclusion and use of arbitrators with relevant expertise in legal intricacies involved in such disputes including human rights complexities. This will guarantee that the arbitration process is conducted in a manner that is fair, efficient, and effective. Therefore, it will be necessary to revisit questions of CAS's institutional structure.[399]

Finally, this article discussed that whenever States dope, the international anti-doping structure falls significantly short in its ability to ensure compliance by providing adequate compensatory and punitive remedies. Despite the evolution of the anti-doping system in the past years, the current legal regimes in place to fight doping are still in need of a fundamental overhaul to equip them with effective sanctions and avenues to provide effective remedies for athletes and other potential victims.

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398. Be that as it may, there is one common issue underlying all these scenarios. They all depend on CAS being an impartial and independent forum. Should the tribunal be seen as favoring the interests of the international sports community, any effort to designate CAS to such a role is doomed to fail. *See e.g.*, Grit Hartmann, *Tipping the Scales of Justice: The Sport and Its "Supreme Court*,*"* PLAY THE GAME (Nov. 2021), *available at* https://www.playthegame.org/publications/tipping-the-scales-of-justice-the-sport-and-its-supreme-court/ (last visited Apr. 10, 2024).

399. Apart from the theme of this article, it is important to highlight another intriguing aspect that warrants separate consideration but a comprehensive analysis of it is beyond the scope of this article. The above ideas may involve the establishment of a system in which sporting sanctions play a more prominent role in enforcing rules and regulations of public international law by putting pressure on sovereign States to join the international law instruments on sporting issues. If this happens then SGBs will be another step closer towards full recognition as subjects of international law.