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In-House Counsel CLE Webinar Series: End of Summer Session

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Supply Chain Strategies for Success: Navigating and Addressing Human Rights

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In-house Counsel CLE webinar series • September 2022

Course Overview

- Brief Overview of the Current Landscape for Supply Chain and Due Diligence Laws
- German Supply Chain Act
- Draft EU Corporate Sustainability Due Diligence Directive
- Supply Chain Management Through Trade Laws
- Supply Chain Management Through Contracts and Codes of Conduct / Indirect Application of German Supply Chain Act
- Enforcement (Audits, Certifications, Training, Corrective Action Plans, Ultima Ratio: Termination)
- Q&A

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Introductions

John Cotton Richmond

Prof. Dr. Birgit Spiesshoffer, M.C.J.

Raj Bhala

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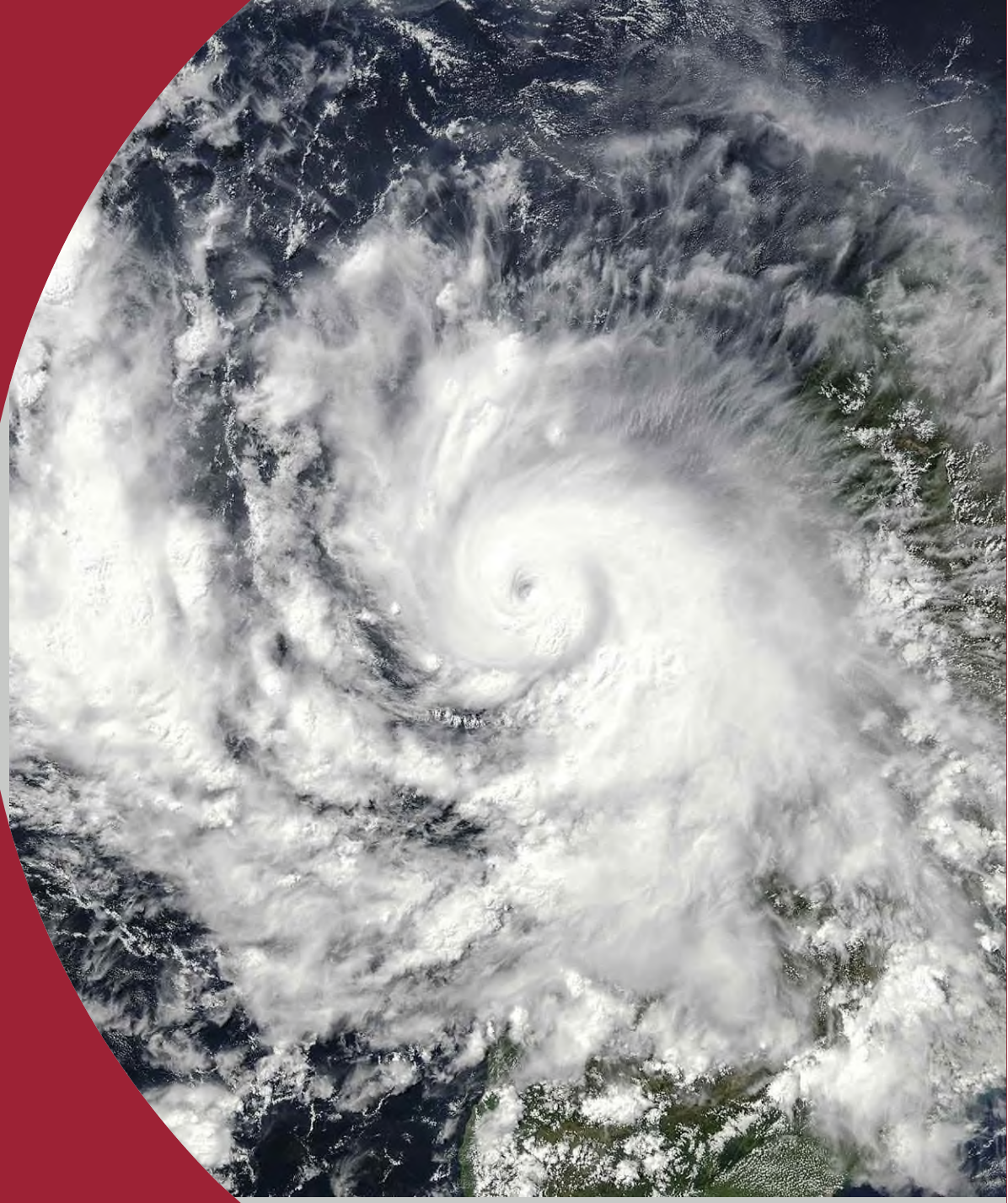
Brief Overview of the Current Landscape for Supply Chain and Due Diligence Laws



ESG

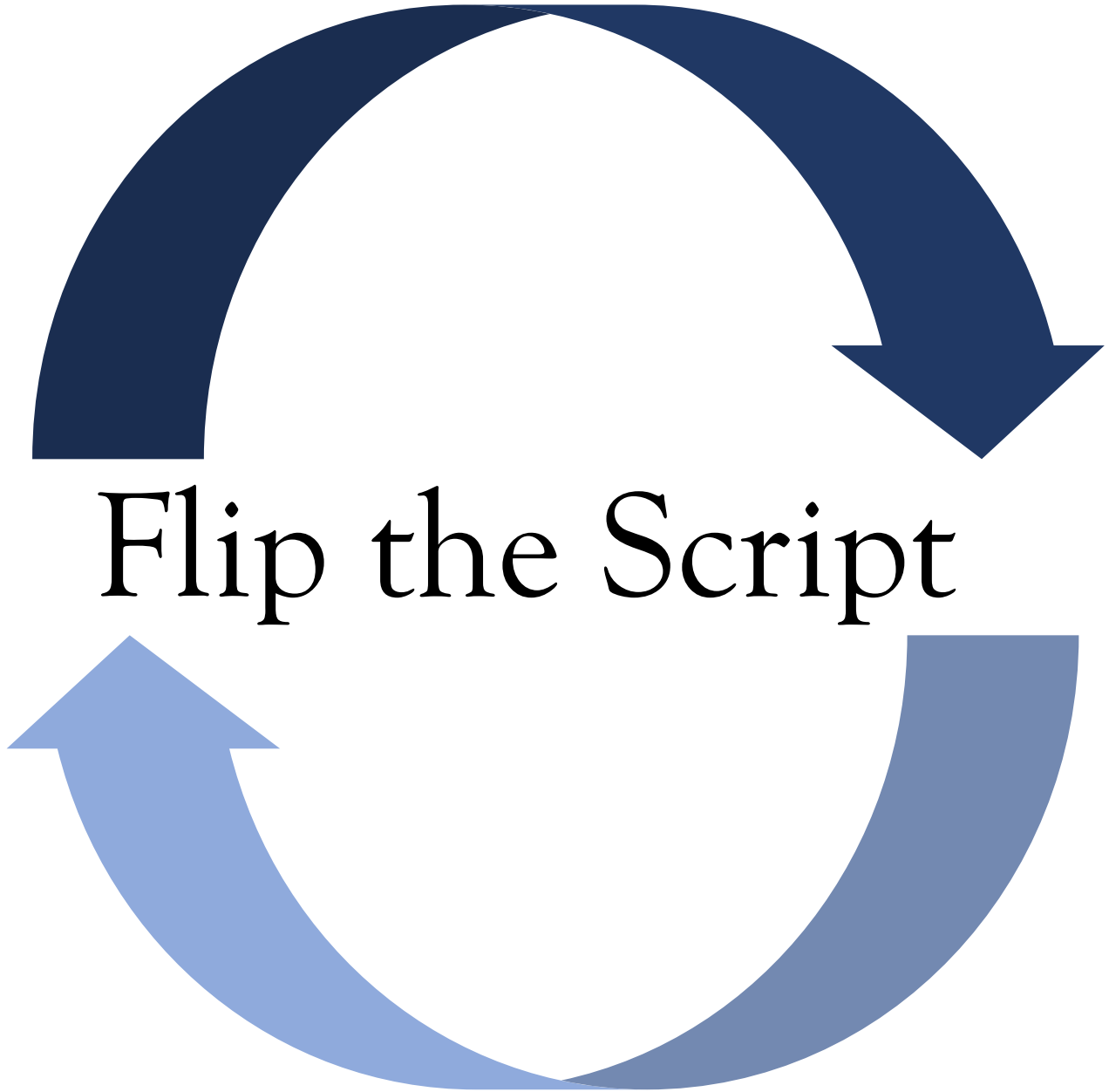
Disclose what, if anything . . . .

2010

2015

2018


Disclosure
Diligence


Flip the Script

Germany Supply Chain Law

Thesis

International trade (exportation and importation of goods, services, and intellectual property), foreign direct investment (FDI), and foreign portfolio investment are *inextricably linked* with national security and human rights.

The linkages become obvious in supply chain management.

To manage a supply chain is to do so in compliance with the national security and/or human rights laws and policies of an importing country.

To implement the national security and/or human rights laws and policies, and importing country imposes supply chain management requirements.

In essence, International Trade Lawyers are also National Security Lawyers and Human Rights Lawyers, too.

What Are “Human Rights”?

For sure:

United Nations (U.N.) “International Bill of Rights”

But also?:

International Labor Organization (ILO) “internationally recognized worker rights”?

Free Trade Agreement (FTA) provisions concerning rights of women and LGBTQ+ persons?

From the perspective of managing supply chains:

Suggest treating all such rights as human rights, even if certain of the rights are not (yet) technically universally agreed to be part of International Human Rights Law.

U.N. Bill of Rights

Four U.N. Instruments make up the “International Bill of Rights.”

1. United Nations Universal Declaration of Human Rights (UDHR), drafted (beginning in 1946) by a U.N. Committee chaired by First Lady Eleanor Roosevelt, accepted by the General Assembly on 10 December 1948 (U.N. Resolution 217), by a vote among the then-58 U.N. Members of 48 in favor, 0 against, 8 abstentions, and 2 non-voting. (The Soviet Union and 5 other Communist countries, plus Saudi Arabia and South Africa, abstained. Saudi Arabia abstained because it disagreed with the UDHR affirmation of the right to change religion.)
2. United Nations International Covenant on Civil and Political Rights (ICCPR), which the General Assembly adopted on 16 December 1966, and which entered into force on 3 January 1976.
3. United Nations International Covenant on Economic Social and Cultural Rights (ICESCR), which the General Assembly also adopted on 16 December 1966, and which also entered into force on 3 January 1976.
4. Two optional Protocols to the ICCPR, make up the so-called “International Bill of Human Rights.”

U.N. Bill of Rights, continued

Key (foundational) document is United Nations Universal Declaration of Human Rights (UDHR):

- Drafted by a U.N. Committee chaired by First Lady Eleanor Roosevelt.
- Accepted by the General Assembly on 10 December 1948 (U.N. Resolution 217), by a vote among the then-58 U.N. Members of 48 in favor, 0 against, 8 abstentions, and 2 non-voting.
- Contains 30 Articles that lay out the “basic rights and fundamental freedoms” and states they are universal, inherent, and inalienable for all human beings.

U.N. Bill of Rights, continued

UDHR:

Articles 1-2:

Basic concepts of human dignity, liberty, and equality. Persons are “born free and equal in dignity and rights,” regardless of their “nationality, place of residence, gender, national or ethic origin, color, religion, language, or any other status.”

Articles 3-5:

Individual rights, especially right to life, prohibition of slavery, and prohibition of torture.

Articles 6-11:

Fundamental legality of human rights, to be enforced with specific remedies for their defense if violated.

U.N. Bill of Rights, continued

UDHR:

Articles 12-17:

Rights of individual toward the community (distributive justice – what community owes to individual), such as right to nationality, residence, property, and freedom of movement.

Articles 18-21

Constitutional liberties, such as spiritual, public, and political freedoms, including freedom of thought, opinion, expression, religion, conscience, peaceful association, and communication through media

Articles 22-27:

Economic, social, and cultural rights, such as healthcare, adequate standard of living.

Articles 28-30:

Means for exercising the aforementioned rights, areas where rights cannot be applied, and duty of individual to community (legal justice).

U.N. Bill of Rights, continued

- But UDHR is not legally binding as an international agreement (it did not proclaim itself to be legally binding), nor as customary international law.
- General consensus of the international community is that several Articles are customary international law (evidenced, for example, by its translation into 530 languages – more than any other international legal document).
- General consensus also is that UDHR is an interpretation and elaboration of the human rights provisions contained in the United Nations Charter.
- Today, all 193 U.N. Member States have agreed to UDHR, and many have input its provisions into their national Constitutions (especially if those Constitutions were drafted after the 1948 UDHR).

U.N. Bill of Rights, continued

ICCPR and ICESR elaborate further on UDHR:

ICCPR commits States Parties to respect the civil and political rights of individual persons, such as rights to life, due process and a fair trial, freedoms of assembly, religion, and speech, and election freedoms.

173 of the 193 U.N. Members are States Parties; 6 (including China and Cuba) have signed ICCPR but not ratifying it. (North Korea has sought to withdraw.)

The United Nations Human Rights Committee (as distinct from the Human Rights Council) monitors compliance with ICCPR.

U.N. Bill of Rights, continued

ICESR commits States Parties to work toward economic, social, and cultural rights, including labor rights, and the rights to education, health, and an adequate standard of living.

171 of the 193 U.N. Members are States Parties; 4 (including the U.S.) have signed but not ratified ICESR.

The United Nations Committee on Economic, Cultural, and Social Rights (CESCR) monitors compliance with ICESR.

Top 5 International Labor Organization (ILO) "Worker Rights"

1. The freedom of association;
2. The right to organize and bargain collectively;
3. The freedom from forced or compulsory labor;
4. A minimum age for the employment of children; and
5. Measures that set forth minimum standards for work conditions.

Top 5 ILO “Worker Rights,” continued

Founded in October 1919 pursuant to the Treaty of Versailles under the League of Nations, there are now 187 Member States of the ILO (including 186 of the 193 U.N. Members).

ILO is the first, and oldest, specialized agency of the U.N.

These ILO labor rights / standards, as well as others, are internationally recognized by the ILO of the United Nations in its Conventions and endorsed by a number of countries.

The United States incorporates these five standards as conditions for affording trade preferences to developing countries under such programs as the Generalized System of Preferences (GSP).

Top 5 ILO “Worker Rights,” continued

There are over 180 ILO Conventions, but the 4 most significant ones are:

(1) Number 87, on Freedom of Association and Protection of the Right to Organize;

(2) Number 98, on the Right to Organize and Collectively Bargain;

(3) Number 105, on Abolition of Forced Labor; and

(4) Number 138, on Minimum Age.

Not all ILO members (including the U.S.) have ratified all the Conventions.

Top 5 ILO “Worker Rights,” continued

The ILO Governing Body identifies its 8 “fundamental” Conventions as:

(1) 1948 Freedom of Association and Protection of the Right to Organize Convention (Number 87)

(2) 1949 Right to Organize and Collective Bargaining Convention (Number 98)

(3) 1930 Forced Labor Convention (Number 29)

(4) 1957 Abolition of Forced Labor Convention (Number 105)

(5) 1973 Minimum Age Convention (Number 138)

(6) 1999 Worst Forms of Child Labor Convention (Number 182)

(7) 1951 Equal Remuneration Convention, 1951 (Number 100)

(8) 1958 Discrimination (Employment and Occupation) Convention (Number 111).

Top 5 ILO “Worker Rights,” continued

On 17 June 1999, the ILO unanimously adopted Convention 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor.

Convention 182 defines “child” as anyone less than 18 years old, and identifies the “worst forms” as slavery, debt bondage, forced or compulsory labor (including the use of children in armed conflict), prostitution, pornography, the use of children for illicit activities (*e.g.*, narcotics production and trafficking), and work that is likely to harm the health, safety, or morals of children.

In effect, the ILO definition does not ban all “child” labor, but rather only work that is forced upon a child by a person who is not a member of that child’s family. Thus, work by a child on the farm or enterprise owned or operated by that child’s family, *i.e.*, the family farm or family business, is not forbidden.

Of course, there is the ambiguity of defining “family” – nuclear or extended?

Top 5 ILO “Worker Rights,” continued

ILO Members are obligated to take immediate and effective measures to eliminate these “worst forms of child labor” practices.

The Convention took effect on 19 November 2000. In August 1999, President Bill Clinton (1946-, President, 1992-2001) sought the advice and consent of the Senate for ratification, and the Senate acted favorably on 2 December 1999.

Note, however, the Convention can be viewed as a pragmatic, if not depressing, compromise. Rather than trying to outlaw all forms of child labor, a possibly hopeless effort, it seeks only to rid the globe of the worst forms.

U.N. and ILO References in EU and German Supply Chain Laws

European Union (EU) and German supply chain laws (discussed below) refer to the United Nations Guiding Principles on Business and Human Rights (UNGP), as well as to the (aforementioned) ILO Conventions.

Indeed, European and German legislation is implementing the UNGP, and to a degree going beyond it insofar as this legislation (1) expressly includes both human rights and the environment, and (20 treats the UNGP as a blueprint for similar legislation worldwide.

The German Act refers to specific U.N. documents and ILO Conventions in an Annex that defines the legal positions which shall be protected.

(For detailed explanations, the UNGP Interpretative Guide is useful.)

Free Trade Agreements and Rights of Women and LGBTQ+ Persons

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Chapter 23, Article 23:4, “Women and Economic Growth:”

1. The Parties *recognize* that *enhancing opportunities* in their territories *for women*, including workers and business owners, to participate in the domestic and global economy contributes to economic development. The Parties further recognize the benefit of sharing their diverse experiences in designing, implementing and strengthening programs to encourage this participation.

Free Trade Agreements and Rights of Women and LGBTQ+ Persons, continued

2. Accordingly, the Parties *shall consider undertaking cooperative activities aimed at enhancing the ability of women, including workers and business owners, to fully access and benefit from the opportunities* created by this Agreement. These activities *may include providing advice or training, such as through the exchange of officials, and exchanging information and experience on*:

(a) programs aimed at *helping women build their skills and capacity*, and *enhance their access to markets, technology and financing*;

(b) *developing women's leadership networks*; and

(c) identifying *best practices related to workplace flexibility*.

[Emphasis added.]

Soft Law!

Free Trade Agreements and Rights of Women and LGBTQ+ Persons, continued

United States Mexico Canada Agreement (USMCA, *i.e.*, NAFTA 2.0) Chapter 23, Article 23:9, “Sex-Based Discrimination in the Workplace””

The Parties *recognize the goal of eliminating [sex-based] discrimination in employment and occupation*, and *support the goal of promoting equality of women in the workplace*. Accordingly, each Party *shall implement policies that . . . protect workers against employment discrimination on the basis of sex (including with regard to) sexual harassment, pregnancy, sexual orientation, gender identity, and caregiving responsibilities*; provide *job-protected leave for birth or adoption of a child and care of family members*, and *protect against wage discrimination*.

[Emphasis added.]

Free Trade Agreements and Rights of Women and LGBTQ+ Persons, continued

The shocking (?) footnote 13:

The United States' existing federal agency policies regarding the hiring of federal workers *are sufficient to fulfill the obligations set forth in this Article*. The Article thus requires *no additional action on the part of the United States*, including any amendments to Title VII of the Civil Rights Act of 1964, in order for the United States to be in compliance, with the obligations set forth in this Article.

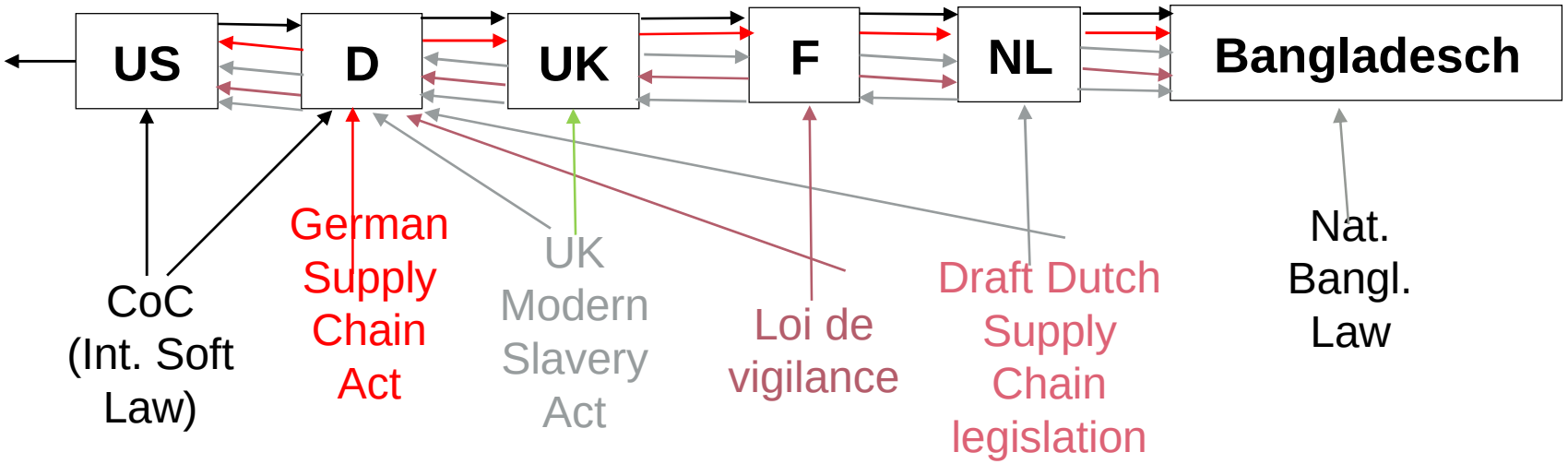
Again, Soft Law!

German Supply Chain Act of 16 July 2021

German SCA - Basics

- UN Guiding Principles on Business and Human Rights > blueprint for all Supply Chain legislation in EU
- French Loi de Vigilance is predecessor to German SCA (covering also negative impacts on the environment)
- Increasingly national legislation (e.g. NL Child Labor Due Diligence Act, Draft Act on Responsible and Sustainable International Business Conduct)
- European Commission: need for harmonisation > Draft EU Corporate Sustainability Due Diligence Directive (CSDD)

German SCA - Transnational Supply Chain Regulation



German SCA - Challenges

- Extraterritorial reach and effect
  - „rule jungling“ for the supply chain enterprises
  - National sovereignty / Counter-regulation (e.g. China MOFCOM Order No. 1 of 2021 on Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures)
  - Push-back, negotiation, enforcement, compliance cost
  - Lack of legal security
  - Questionable fit for other cultures and jurisdictions > dilemma situations

German SCA – Scope of Application

- GSCA **directly** covers companies, *irrespective of their legal form*, which have their head office, principal place of business, administrative headquarters or registered office in Germany or a branch office in Germany, provided they have at least 3,000 employees (January 1, 2023), or 1,000 employees as of January 1, 2024, in Germany.
  - Attributions: Temporary workers (if employed > 6 months).
  - *Affiliated companies*: the employees of all affiliated companies employed in Germany must be taken into account when calculating the number of employees of the parent company, as well as employees posted abroad.
- The GSCA **indirectly** covers *all* companies in the supply and service chains of directly obligated companies

German SCA – Supply Chain

Definition (Sec. 2 (5) GSCA):

"all products and services of a company"; all steps in Germany and abroad required to manufacture the products and provide the service, from the extraction of raw materials to delivery to end customers.

German SCA – Supply Chain

Supply chain covers:

- Acting of the company in its ***own business area***; in affiliated companies, the parent company's own business area includes a company belonging to the group if the parent company exercises a determining influence on it > Similar to the conception of the company as an economic unit in European antitrust law, a ***group responsibility*** *of the parent company* is established (Sec. 2 (6))
- ***Direct suppliers*** are contractual partners according to Sec. 2 (7).
- An ***indirect supplier*** is any company which is not a contractual partner and whose supplies are necessary for the manufacture of the product or the provision of the service (Sec. 2 (8)).

German SCA

Features

- (Protected) **Legal Position**, **Risk**, **Violation** > Sec. 2 GSCA "defines" three terms: legal position (para. 1), human rights and environmental risk (para. 2 and 3) and violation (para. 4)
  - Protected *legal positions* shall be those resulting from the human rights and environmental conventions listed in the Annex
  - Human rights or environmental *risk* is a condition in which due to actual circumstances with sufficient probability a violation of one of the defined prohibitions is imminent
  - *Violation* is a "breach" of any of the human rights or environmental prohibitions

German SCA

Due Diligence

According to Sec. 3 GSCA, companies are obligated to observe **human rights and environmental due diligence** obligations in their supply chains with the aim of preventing or minimizing risks in this regard or ending the violation of human rights or environmental obligations. The due diligence obligation includes:

1. the establishment of a risk management system (Sec. 4 (1)),
2. the appointment of a representative (Sec. 4 (3)),
3. regular risk analyses (Sec. 5),
4. the issuance of a policy statement (Sec. 6 (2)),
5. the establishment of preventive measures in the company's own business area (Sec. 6 (1), (3)) and vis-à-vis direct suppliers (Sec. 6 (4)),
6. the taking of corrective action (Sec. 7 (1 - 3)),
7. the establishment of a complaints procedure (Sec. 8),
8. the implementation of due diligence with regard to risks at indirect suppliers (Sec. 9), and
9. documentation (Sec. 10 (1)) and reporting (Sec. 10 (2)).

German SCA

Due Diligence

- ***Compliance management systems*** must be amended accordingly
- ***Appropriateness of due diligence measures*** depends on the type and scope of business *activity*, the company's ability to *influence* the perpetrator of a risk or breach, the typically expected *severity* of the breach, its *reversibility* and the likelihood of a *breach* of a human rights and environment-related duty, as well as the nature of the *contribution* to the risk or breach of duty (Sec. 3 (2)).
- Violation of duties under this Act shall ***not*** give rise to ***civil liability***, but civil liability established independently thereof shall remain unaffected (Sec. 3 (3)).

German SCA

Enforcement & Sanctions

- **Legal representation** (Sec. 11): a person who claims that his or her rights have been infringed may entrust a domestic trade union or NGO with the legal assertion of his or her rights.
- GSCA relies on a **combination** of administrative control and enforcement (Sec. 12 - 21) on the part of the Federal Office of Economics and Export Control (BAFA), coercive fines (Sec. 23), criminal monetary sanctions (Sec. 24) and exclusion from public procurement procedures (Sec. 22).

German SCA

What‘s next?

- Will enter into force on January 1, 2023
- BAFA has already issued and will issue more *guidances* to specify certain provisions of the GSCA
- Ministries can issue additional *regulations* specifying certain requirements, in particular, regarding indirect suppliers
- GSCA will need to be revised when *EU CSDD-Directive* will be enacted

European Union

Draft Directive on Corporate Sustainability Due Diligence (Draft CSDD) of 23 February 2022

Draft CSDD

- Political process still at an early stage
- Unlikely that CSDD will be enacted any time soon
- Likely that there will be modifications after the last consultation
- Present draft is in a number of respects wider and tighter than GSCA

Draft CSDD

Scope of Application

- „Company“ > only specific company forms
- Certain types of regulated financial enterprises regardless of their legal form (e.g. insurance, pension funds, investment)
  - Min. 500 employees
  - More than 150 Mio EUR turnover worldwide p.a.
- Enterprises active in certain high-risk sectors (textile, food, mining, oil and gas industry)
  - Min. 250 employees
  - Annual worldwide turnover min. 40 Mio EUR

Draft CSDD

Value Chain

- Whole value chain upstream and downstream
- „established business relationships“
- Encompasses direct and indirect suppliers > no direct contractual relationship required
- Including customers
- (Controlled) subsidiaries not part of the „own business area“ of parent company

Draft CSDD

Features

- Protected legal positions derived from a larger number of human rights and environmental conventions (22) than GSCA
  - ➢ Same problem: programmatic character of conventions primarily addressed to states
- Due Diligence > duty of care, but different specification than GSCA
  - Due Diligence Policy
  - Code of Conduct
  - Description of implementation, supervision and application to supply chain
  - Risk analysis

Draft CSDD

Measures

- Prevention and remediation measures required > similar to GSCA but differences in detail
- Obligation to invest in management and infrastructure
- Cooperation between companies to increase leverage
- Avoidance or termination of business relationships if negative impacts cannot be mitigated or avoided otherwise
- Contractual assurances to comply with CoC and prevention plan from direct suppliers, contractual cascade > EU Commission will draft model clauses
  - Less stringent requirements for SMEs
  - Compliance to be checked (e.g. certifications, industry standards)

Draft CSDD

Remedial Measures

- Bring negative impacts to an end, if not possible > mitigation
- Compensate negative impacts (relationship to liability?)

Draft CSDD

Measures

- Complaints mechanism + whistleblowing system
- No explicit duty to document and report
- Civil liability if
  - Company did not fulfil its duties to prevent or remediate and
  - this violation caused a damage

Draft CSDD

Sanctions

Combination of

- administrative enforcement and control,
- criminal monetary sanctions,
- exclusion from public procurement procedures,
- exclusion from public subsidies,
- naming and shaming through publication of sanctions > negative consequences for scores (e.g. Ecovadis)

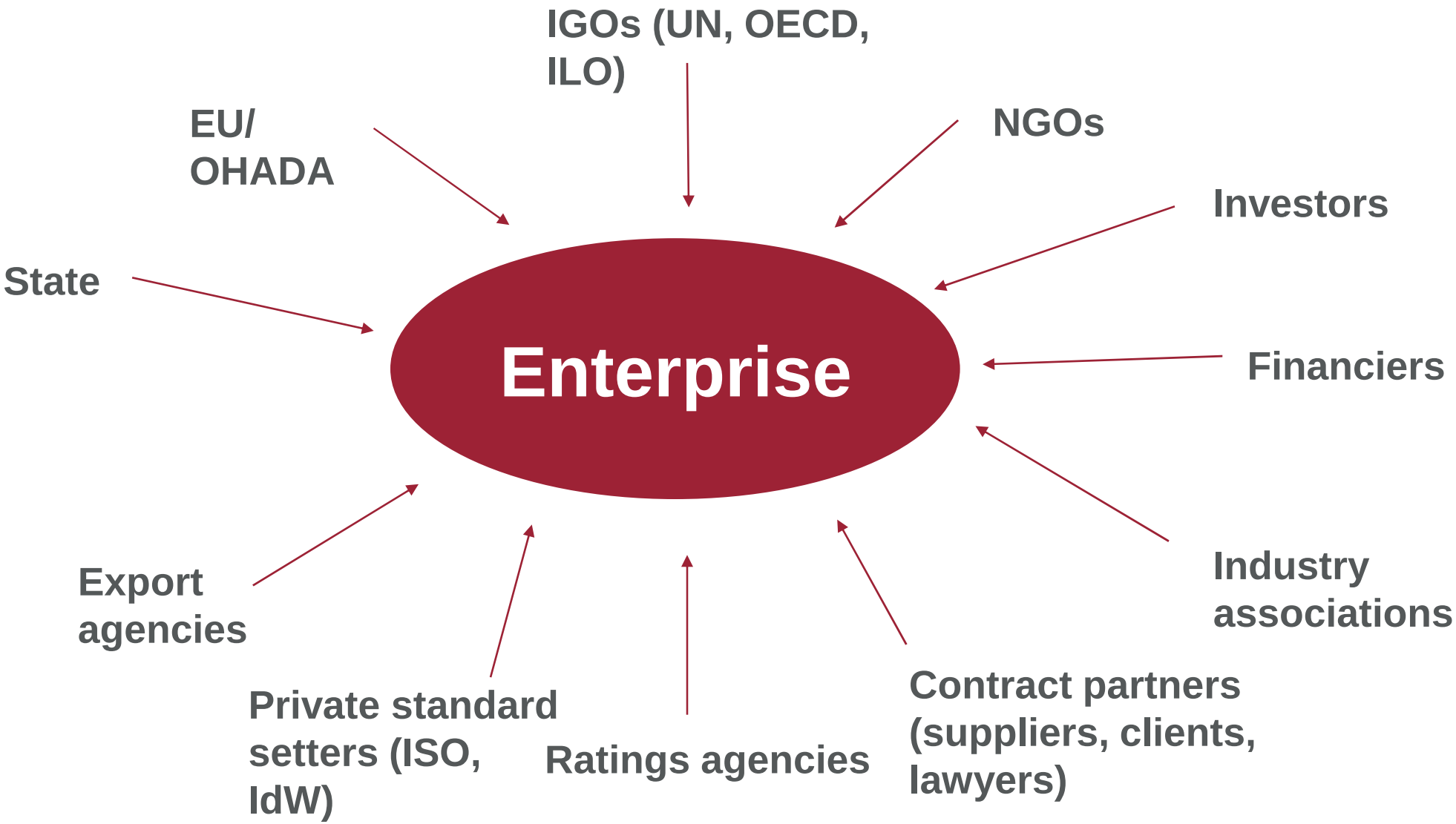
Draft CSDD

Sustainable Corporate Governance

New: Sustainable Corporate Governance provisions

- Plan how to achieve Paris Agreement goals > double materiality (to be examined to what extent the company is affected by climate risks or causes climate risks itself)
- Emission reduction plans in case needed
- Fulfilment of these duties shall be reflected in variable compensation of top management
- Top management shall act in the best interest of the company > this shall include to take into consideration the impact of their decisions on sustainability aspects (human rights and the environment)

Indirect application of German SCA


IGOs (UN, OECD, ILO)
EU/ OHADA
NGOs
Investors
State
Enterprise
Financiers
Export agencies
Industry associations
Private standard setters (ISO, IdW)
Ratings agencies
Contract partners (suppliers, clients, lawyers)

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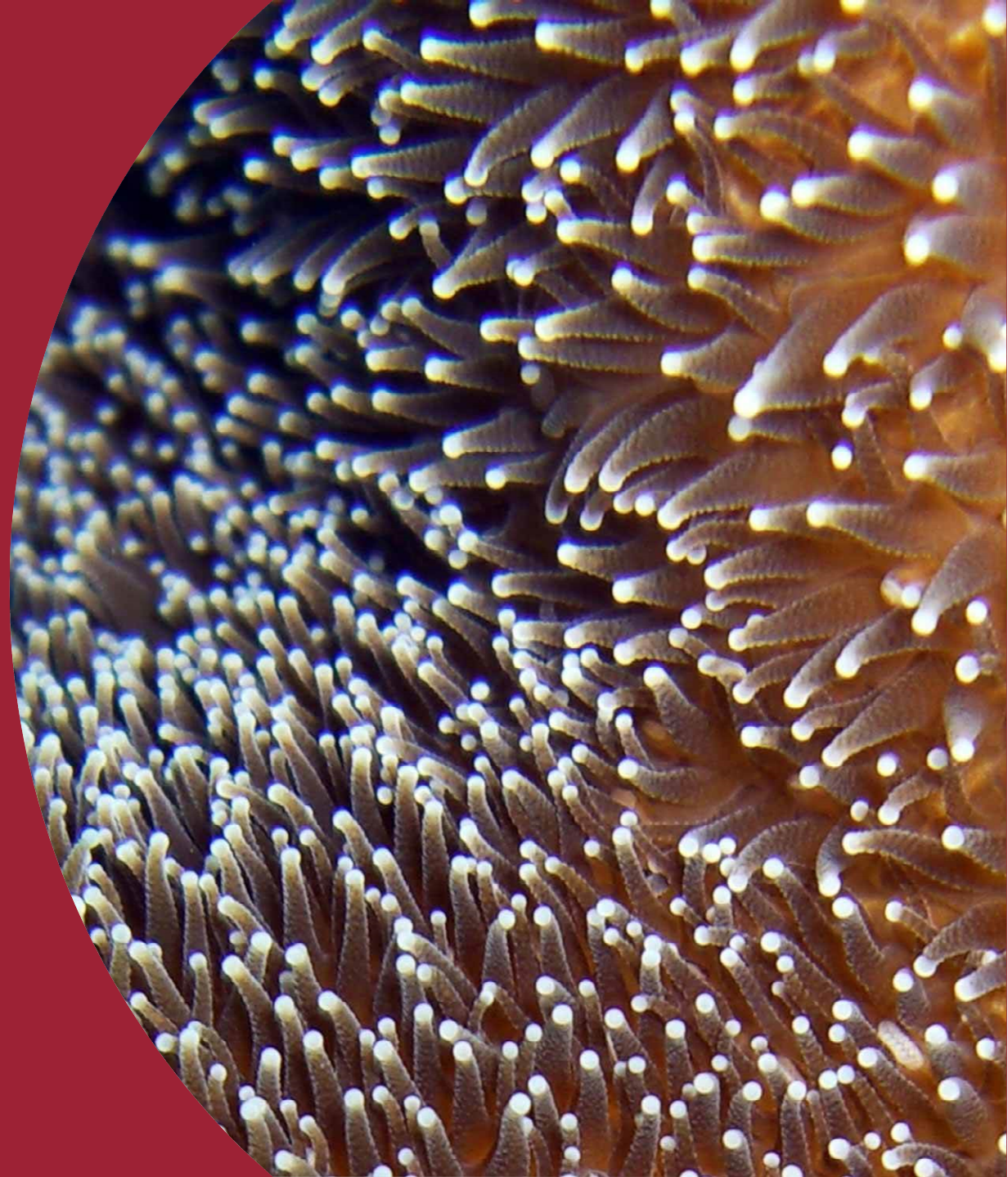
Indirect application of GSCA

- Regulatory competition and anarchy
- Supply Chain management through
  - Contracts and codes of conduct
  - Questionnaires
  - Audits
  - Certifications
  - Trainings
  - Corrective action plans
  - Ultima ratio: termination of relationship
    - ➢ Challenges for enterprises in the supply chain

Supply Chain Management Through Trade Laws



How Does the United States Link Supply Chain Management to Human Rights, Worker Rights, and Rights of Women and LGBTQ+ Persons?

Through Four Vehicles:

Trade Preferences:

GSP (discussed above)

FTAs:

USMCA – Chapter 23 Soft Law (discussed above)

USMCA – Hard Law (discussed below)

Statutes:

Uyghur Forced Labor Prevention Act (UFLPA) (discussed below)

CHIPS Act (discussed below)

Sanctions:

Russia (discussed below)

Trade Agreement Linkages

USMCA Hard Law Obligations:

Labor Rules of Origin (ROOs) –

At least 40% of the value of a car, and 45% of the value of a truck, must be manufactured by high-wage labor, specifically, by workers paid at least U.S. $16 per hour.

Mexico agreed to enforce ILO labor rights rules, and to eliminate labor contracts signed by employers and union leaders without the consent of workers.

Labor Rapid Response Mechanism (RRM) –

To deal with certain labor disputes expeditiously; already used.

Indo-Pacific Economic Framework (IPEF)? (Not an FTA) –

Let's see what happens.

Trade Agreement Linkages

Indo-Pacific Economic Framework (IPEF)? (Not an FTA):

On the one hand, IPEF is not a formal trade agreement but a trade partnership, with no discussion of tariff eliminations or market access. Thus, IPEF is a major departure from CPTPP and USMCA. (The President does not have trade negotiating authority for an FTA.)

So, for example, America's proposals at the first-round of negotiations in September 2022 seem little else than to create a roster of contact points in each of the IPEF countries to deal with emergency semiconductor chip shortages. A shared telephone roster of who to call was not even close to constituting a trade agreement.

On the other hand, America is touting a digital skills training initiative aimed at women and girls in emerging Indo-Pacific markets, called "IPEF Upskilling Initiative," and has obtained commitments from 14 American companies (including Amazon, Apple, Google, and Microsoft) to provide about 7 million training and education opportunities to women and girls across 10 years.

Let's see what happens!

Statutory Linkages: UFLPA and CHIPS Act

Statutes:

Uyghur Forced Labor Prevention Act (UFLPA)

CHIPS Act

Key Uyghur Forced Labor Prevention Act: Key Provisions

The final, enacted version of the *Act*, formally called the *Uyghur Forced Labor Prevention Act* (UFLPA), which amends the *Tariff Act of 1930*, retains in Section 3(a) the **rebuttable presumption** that all articles, goods, merchandise, and wares from Xinjiang **are** made with forced labor – unless an importer proves otherwise and CBP grants an "Exception" – and thus are barred from entry into the U.S.

Under Section 3(b), an importer must adduce **"clear and convincing evidence"** that goods are not made with forced labor to overcome this presumption and obtain the "Exception."

Key UFLPA Provisions, continued

Under UFLPA, CBP must apply the rebuttable presumption that any article, good, merchandise, or ware manufactured, mined, or produced wholly or in part in XUAR, or by a listed entity (discussed below), is forbidden from entry into the U.S. by the forced labor statute, Section 307 of the Tariff Act of 1930, 19 U.S.C. Section 1307, unless the importer of record has (within 30 days of the detention by CBP of the item in question):

(1) "fully complied" with CBP guidance and regulations, including proper due diligence, effective supply chain tracing, and supply chain management to ensure no imports were made with forced labor in the PRC;

(2) "completely and substantively responded to all inquiries" from CBP; **and**

(3) demonstrated by "clear and convincing evidence" that the import was not made in whole or part by forced labor.

So, as CBP officials warned …

- “the bar for clearing imports will be ‘very high.’
- ‘If there’s a part or a piece of an input that is coming from the Xinjiang region, then that shipment will be considering containing forced labor and it will not be allowed into the country,’ said Elva Muneton, Acting Executive Director of the Task Force implementing the new law.
- Under the *Act*, the U.S. assume[d] that anything made even partially in the western region of Xinjiang is produced with forced labor and can’t be imported unless companies can provide ‘clear and compelling evidence’ otherwise.”

Quoted in *China Warns U.S. Ban on Xinjiang Goods to “Severely Disrupt” Ties*, BLOOMBERG, 2 June 2022.

Key UFLPA Provisions, continued

Also, the Act obliges DHS "to create a **list of entities** that collaborate with the Chinese government in the repression of the Uyghurs." Merchandise from such entities, even if not made in XUAR, is subject to the Section 3 rebuttable presumption.

That is, Section 3(a) mandates CBP apply a rebuttable presumption that the import prohibition applies not only to goods mined, produced, or manufactured in the XUAR, **but also by certain entities regardless of origin.** (To be sure, the UFLPA does not spell this point out explicitly, but it seems to allow for such exclusions by implication from Sections 2 and 3, based on any linkage to XUAR.)

The theory is to disincentivize listed entities from continuing their collaboration by denying their merchandise entry to the U.S. So, the scope of Section 3(a) covers any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in the XUAR, **or** by any listed entity.

Key UFLPA Provisions, continued

Hence, there are four categories of such entities (which Section 2(d)(2)(B)(i), (ii), (iv), and (v) sets out):

(1) Entities in the XUAR that use forced labor.

(2) Entities working with the government of the XUAR to relocate Uyghurs, Kazakhs, Kyrgyz, and other persecuted groups in China out of the XUAR.

(3) Entities that export products that used forced labor from China to America.

(4) Entities that source from the XUAR or from the Xinjiang Production and Construction Corps (XPCC), or from persons working with the government of the XUAR, for the purposes of (a) "poverty alleviation," (2) "pairing-assistance" programs, or (3) similar government labor schemes that use forced labor.

Key UFLPA Provisions, continued

- "Genocide" – U.S. (January 2021), U.K. (House of Commons, April 2021), Canada (Parliament, February 2021), France Parliament, January 2022), Netherlands (1st EU Parliament, after Canada), Belgium (mid-June 2021), Czech Republic (Parliament, June 2021), Lithuania (May 2021)
- "Crimes against humanity" (may have been committed) – August 2022 Report of the United Nations Office of the High Commissioner for Human Rights (UNOHCR).
- So, importers into the U.S. (regardless of where they are located) must practice due diligence and supply chain tracing, and (if they sought an "Exception," discussed below) be prepared to adduce evidence to prove goods were not produced with forced labor.

UFLPA Practical Operation

- Two challenges are available under the Act to importers the goods of which were detained, seized or excluded by CBP from the U.S. market alleging a violation of the Act:
  1. an **"Outside the Scope"** challenge, *i.e.*, the Act is inapplicable; or
  2. an **"Exception,"** *i.e.*, a rebuttal of the presumption of forced labor usage; or
  3. Other Options will vary depending upon CBP procedural stage: export goods, abandon goods

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UFLPA Practical Operation, continued

- What is the evidentiary standard in an **"Outside the Scope"** challenge?
  - CBP's *Operational Guidance for Importers* (13 June 2022) says that standard is not "clear and convincing," *i.e.*, it is not the standard CBP applies to the rebuttable presumption that forced labor is involved in any items from Xinjiang. (That is the standard for an "Exception.")
  - For an **"Outside the Scope"** challenge: documentation that "demonstrates" and "substantiate" that its import has no connection to Xinjiang or to an entity on the UFLPA Entity List.

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Industrial Policy and U.S. CHIPS Act

- What is “industrial policy”?

There is no standard meaning of “industrial policy.”

The economic purpose of industrial policy is reliable (steady) supply chain management.

“Reliable,” which refers to ensuring sources of vital merchandise and its inputs, has two dimensions. Sources should be (1) robust (consistent and sustained), and (2) resilient (capable of absorbing exogenous shocks without severe or prolonged disruption).

The CHIPS Act is newfound American-style Asian “industrial policy.”

The *Act* establishes a multi-billion-dollar subsidy scheme in the form of a tax credit for friendly enterprises to incentivize semiconductor investment in the homeland and thereby substitute for imported chips.

The *Act* is buttressed by an array of export controls.

But the *Act* also is about human rights.

Industrial Policy and U.S. CHIPS Act, continued

- What is the *CHIPS Act* in relation to "industrial policy" specifically, and more generally, human rights?

The key provision of the *Act* is the "Advanced Manufacturing Investment Credit."

American companies can obtain a 25% tax credit for investments in new or expanded domestic manufacturing of semiconductors, including the cost of making specialized tooling equipment.

The *Act* also establishes a voluntary "National Supply Chain Database" to help the government and industry minimize supply chain disruptions by assessing production capabilities in the U.S., and tightens research security (*e.g.*, by mandating university foreign funding reporting over $50,000).

Industrial Policy and U.S. CHIPS Act, continued

- What is the *CHIPS Act* in relation to "industrial policy" specifically, and more generally, human rights?

This AMI Credit could be worth $20 billion to the chip industry.

Any U.S. taxpayer that is not a "foreign entity of concern" is eligible for this Credit.

Other than Foreign Terrorist Organizations, persons listed by the Office of Foreign Assets Control as Specially Designated Nationals, and convicted spies, guess who are "foreign entities of concern"?

Any entity owned or controlled by, or *subject to the jurisdiction of, China, Iran, North Korea, or Russia*, or which the Department of Commerce determines is engaged in unauthorized conduct *detrimental to America's national security*.

Sanctions Linkages

Against Russia:

- Most comprehensive set of sanctions against any country in history (in terms of sanctions measures, more so than even Iran)
- Allegations of “war crimes”
- Near total import, export, and foreign direct investment (FDI) ban
- Listing of Specially Designated Nationals (SDNs)

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Q&A

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Maintaining the Integrity of the Profession:

ABA Model Rule 8.4(g)

Efforts Toward Improved Diversity and Inclusion

Course Overview

- Introduction to ABA Model Rule 8.4
- ABA Intent and Goals
- Analysis of Rule 8.4(g)
- Controversy
- Adoption Status
- Application
- Forward Look
- Q&A

Introductions

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Model Rule 8.4(g)

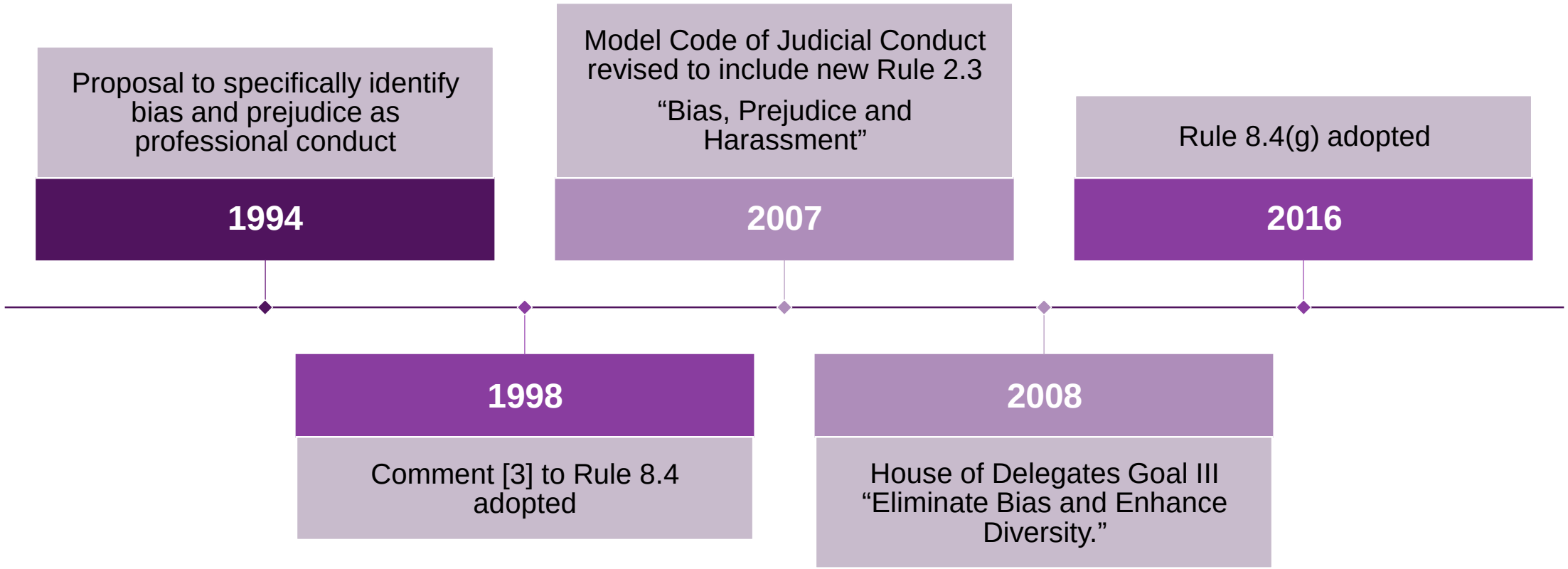
It is professional misconduct for a lawyer to:…

engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

Conduct related to the practice of law includes:

- representing clients;
- interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law;
- operating or managing a law firm or law practice; and
- participating in bar association, business or social activities in connection with the practice of law.

Prior Efforts



Prior Comment [3]

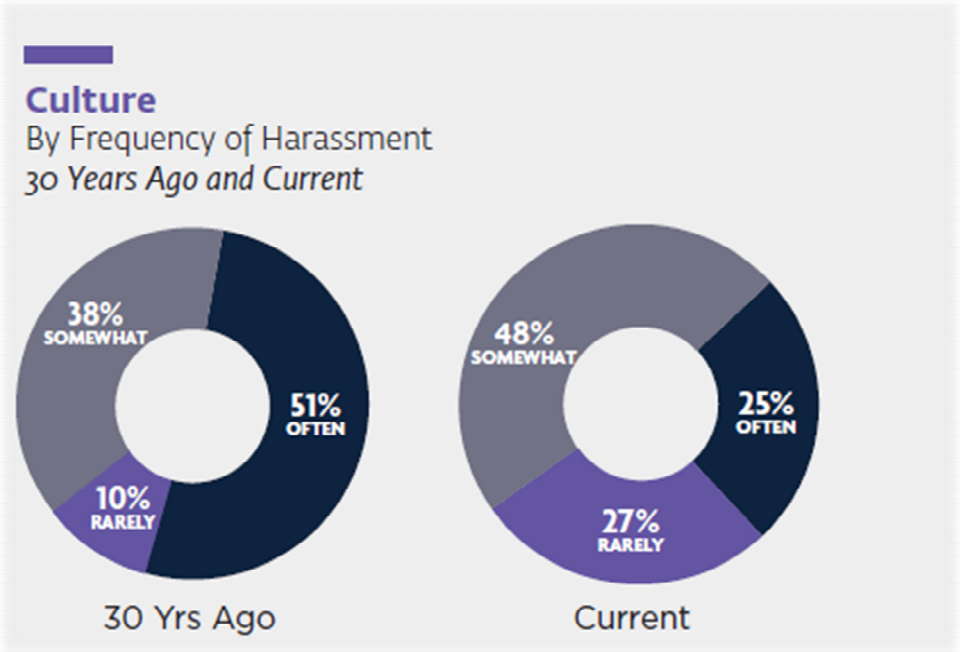
A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice.

Reasoning

- Comments are not Rules
- Scope is limited
- ABA had already brought antidiscrimination and anti-harassment provisions into the black letter of other conduct codes
- 25 jurisdictions has already adopted antidiscrimination and/or anti-harassment provisions into the black letter of their rules of professional conduct
- Florida Bar survey - 43% of respondents reported experienced gender bias

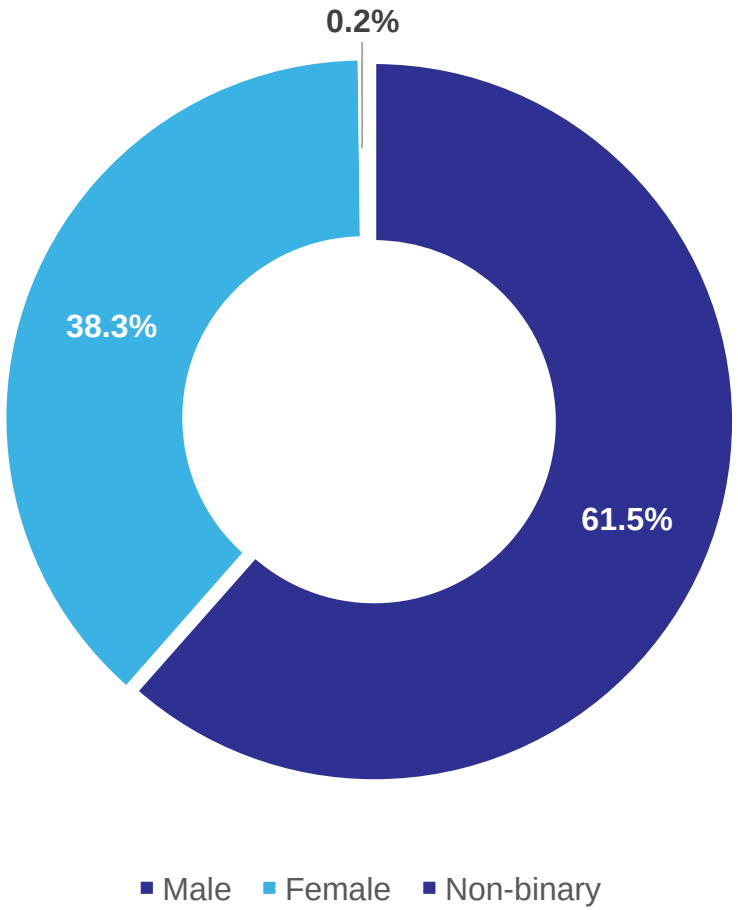
Source: Final Revised Resolution and Report

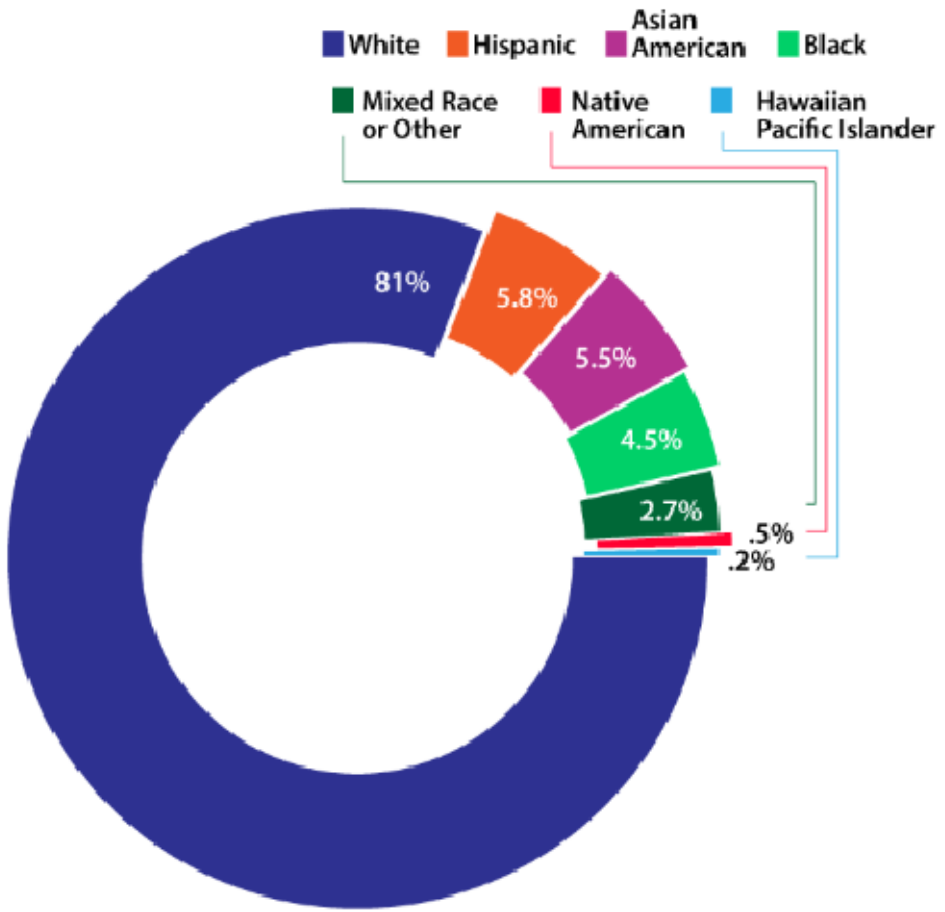
Survey says…



"Changing the culture is very slow and very difficult . . . The same issues I experienced 30 years ago occur today on a regular basis."

Demographics





Analysis of Rule 8.4(g)

- Rule 8.4(g) provides:

It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Analysis (cont.)

- Comment [3] to Rule 8.4(g) addresses meaning of “discrimination” and “harassment”
- Emphasizes that such conduct “undermine[s] confidence in the legal profession and the legal system.”
- Discrimination includes “harmful verbal or physical conduct that manifests bias or prejudice towards others.”
- Harassment includes “derogatory or demeaning verbal or physical conduct.”
  - “Sexual harassment” is more specifically described as “unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.”

Analysis (cont.)

- Existence of the requisite harm assessed using standard of objective reasonableness.
  - A lawyer need only know or reasonably should know that the conduct in question constitutes discrimination or harassment.
  - Most common violations likely involve conduct that is intentionally discriminatory or harassing.

- Comment [4] identifies scope of "conduct related to the practice of law," listing such activities as:

- Finally, Rule 8.4(g) specifically excludes from its scope "[l]egitimate advice or advocacy consistent with these Rules."

CONTROVERSY

Big Feelings

"Arguments against the Rule fall upon scrutiny as products of underlying agendas or fantasies of creative commentators."

The new Rule constitutes "a clear and extraordinary threat to free speech and religious liberty" and "an unprecedented violation of the First Amendment."

"This is America, where you're not supposed to lose your professional license because you dare to express certain views at a Continuing Legal Education debate, or a bar association dinner."

"The preposterous claim that the First Amendment entitles lawyers to make racist, sexist, and homophobic statements in connection with law practice is an embarrassment"

Constitutional Concerns

- Overbroad
- Vague
- Constitutes an unconstitutional content-based speech restriction
- Violates attorneys' free exercise of religion and free association rights

Overbreadth

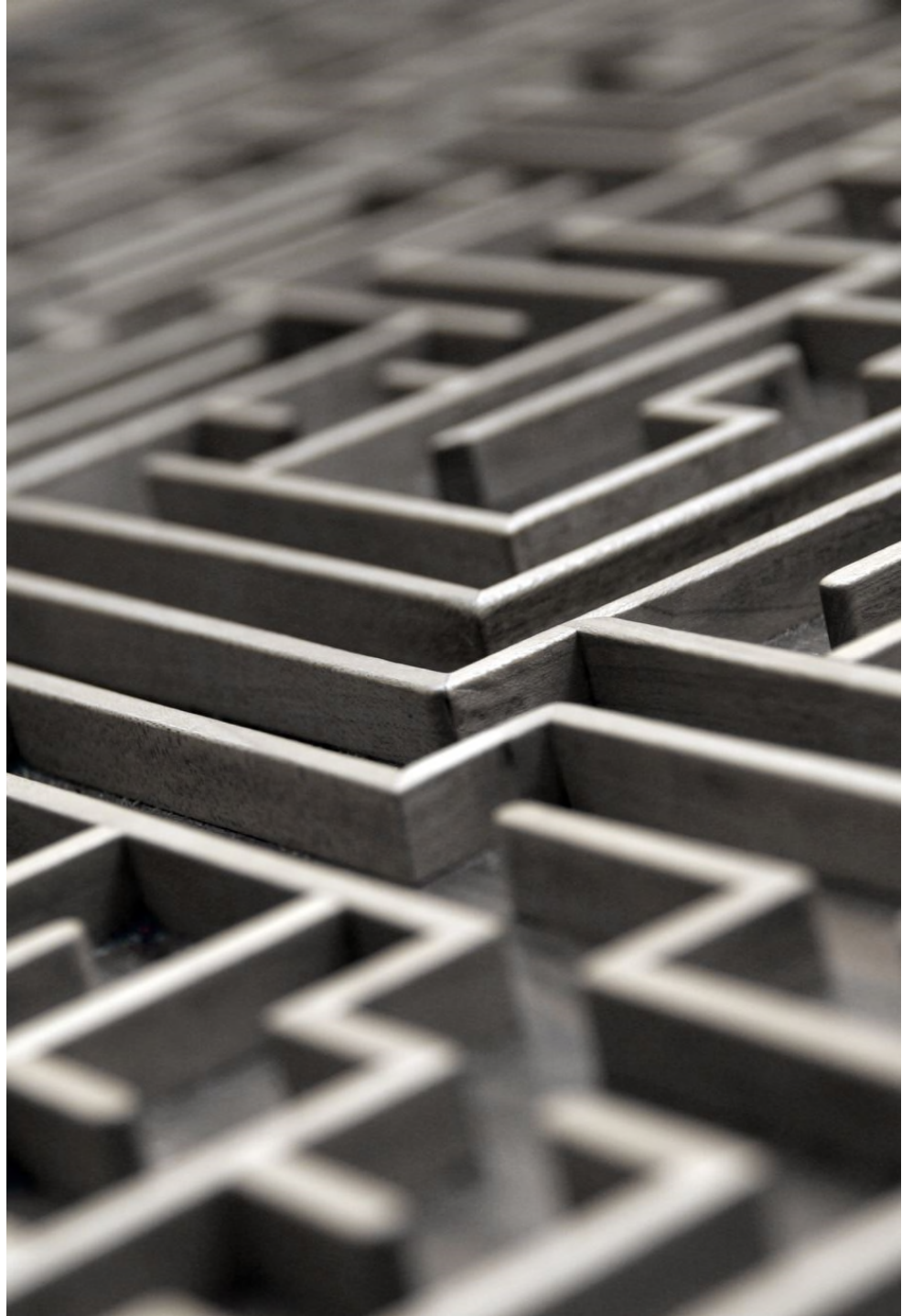
- Rule’s open-ended provisions could result in regulation far beyond the traditional “bounds” of the legal practice.
- The clause “conduct related to the practice of law” does not identify how and when an attorney would or could violate the rule.
- The rule’s potential to chill a lawyer’s protected speech and association, particularly related to teaching or legal social events based on the fear of a bar complaint for statements made during the event

Vagueness

- **Test**: Whether the restriction “is set out in terms that the ordinary person exercising ordinary commonsense can sufficiently understand and comply with, without sacrifice to the public interest.”

- The Model Rules do not define “related to the practice of law.”

- Further, language has been criticized forgiving too much discretion, and too little interpretive support, to bar regulators
  - Leaves attorneys and the public to simply “trust” that regulators will properly enforce the rule in the absence of narrowly tailored language



Rule 8.4(g) and the First Amendment

- Two important constitutional principles guide and constrain its application.

    1. An ethical duty that can result in discipline must be sufficiently clear to give notice of the conduct that is required or forbidden.
    2. Rule must not be overbroad such that it sweeps within its prohibition conduct that the law protects.

- Identifying the proper balance between freedom of speech or religion and laws against discrimination or harassment is not a new problem, however.

- The scope of Rule 8.4(g) is no more or less reducible to a precise verbal formula than any number of regulations of lawyer speech or workplace speech that have been upheld and applied by courts

Other Arguments

- In employment context attorneys should be regulated as any other employer

- Assurances that the proposed rule will not be applied in an unconstitutional manner does not cure the rule's constitutional infirmities

Counterarguments

- Attorney speech is already more regulated than those of general populace.
  - *See* Model Rules 7.1, 7.2, and 7.3, which regulate attorney advertisements and solicitation, restrict the First Amendment commercial speech of lawyers in ways that non-lawyers are not limited.

- Similarly, by regulating fee sharing and legal entities operations, Model Rule 5.4(b) limits a lawyer's right of association.

- Plain text of the rule and comments limits the scope moreso than remaining rules

- Reasonable reading of the rule would prevent the parade of horribles opponents claim will occur

Constitutionality

- Four State Attorney Generals concluded Model Rule 8.4(g) was unconstitutional: Texas, South Carolina, Louisiana, and Tennessee
- Pennsylvania district court found Pennsylvania's ethical rule incorporating Model Rule 8.4(g) was unconstitutional
  - Fatal language: "by words … manifest bias or prejudice".
- In addressing these issues, in July 2021, the Pennsylvania Supreme Court approved revisions to the rule, which prohibited knowingly engaging in "conduct constituting harassment or discrimination."

Constitutionality: Take Two

- District court determined revised language still unconstitutional because infringed on first amendment
- The court held that the changes “regulate speech, not merely conduct,” making the burden placed on freedom of expression “not incidental” to enforcement of the rule.
- Also found that Rule 8.4(g) is unconstitutionally vague under the Fourteenth Amendment in violation of due process
  - There is “insufficient guidance to implement” the rule “in a precise, consistent manner,” the court said

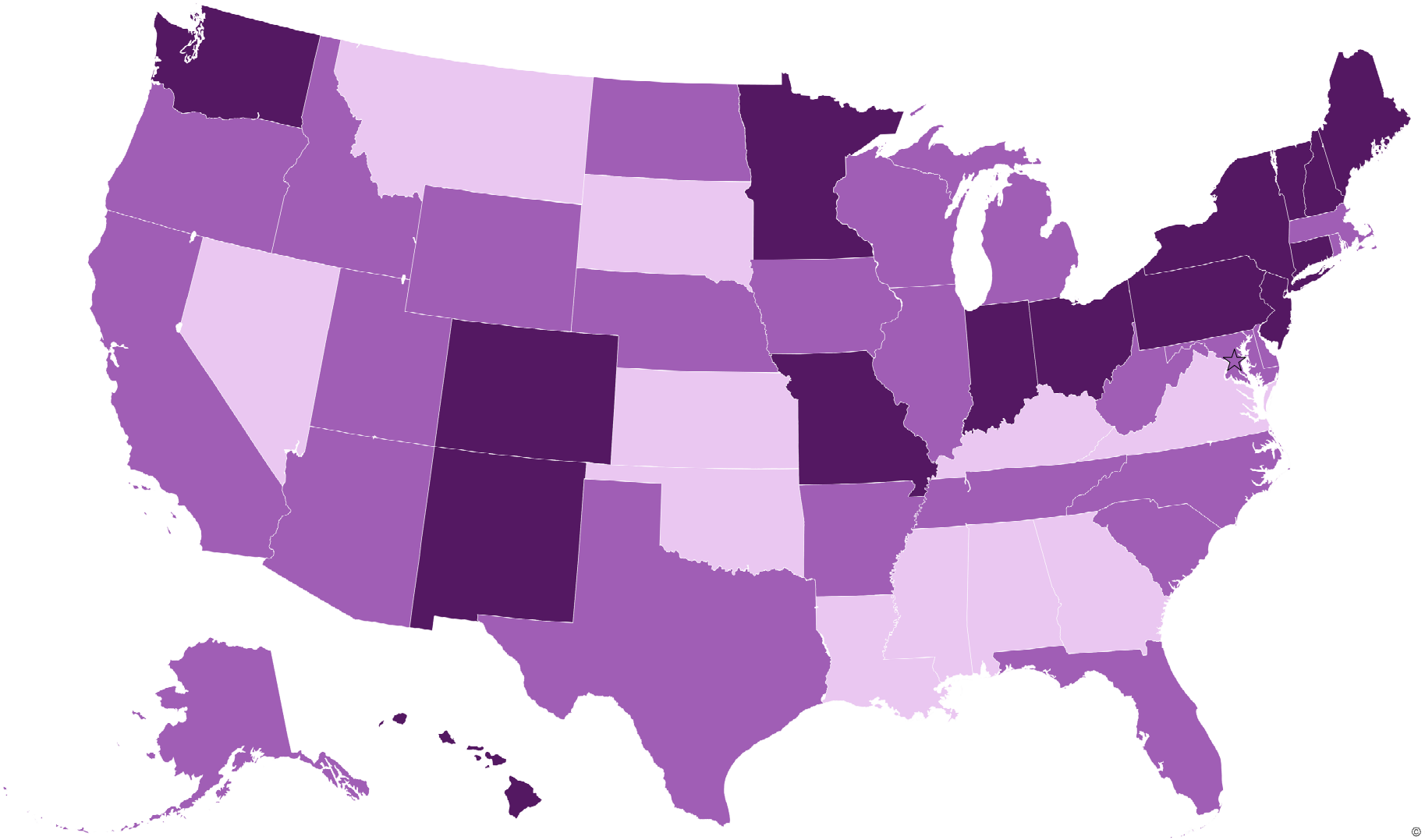
Source: *Greenberg v. Goodrich*, No. 20-03822, (E.D. Pa. March 24, 2022)

Constitutional Carve Out

- Connecticut District Court found that challengers of the rule had no standing, dismissed the lawsuit
- Plaintiffs failed to show rule created real and imminent fear rights would be chilled
- The use of harsh language to help clients understand racial bias, forceful advocacy, and criticizing religious practices one views as harmful to society do not fall within the explanation of what constitutes discrimination for purposes of Rule 8.4
- Plaintiffs' argument that they have real and imminent fear also weakened by the language in the Commentary specifically providing that conduct protected under the First Amendment does not violate Rule 8.4(7)

Source: *Cerama v. Michael P. Bowler in his official capacity as Connecticut Statewide Bar Counsel*, 3:21-cv-01502 (D. Conn. Aug. 29, 2022)

Adoption Status of MR 8.4(g) by State



Adoption by State

Adopted in full or with revision

Not adopted; addresses bias, discrimination, harassment in Comments or state Rules

Not adopted; no Comment/Rule

★ District of Columbia: has not adopted MR(g) but addresses discrimination/harassment in Comment and Rule 9.1.

APPLICATION

Hypo

Attorney represents ex-wife in divorce proceedings and files a motion noting that children were put in harms way by ex-husband's association with Arabic woman.

In re Thomsen, 837 N.E.2d 1011 (Ind. 2005)

Hypo

Attorney called female opposing counsel “babe” repeatedly during a deposition.

Mullaney v. Aude, 730 A.2d 759, 767 (Md. Ct. Spec. App. 1999); *In the Matter of Discipline of Jason R. Craddock, Sr.*, No. 17 MC 27 (N.D. Ill. 2017)

[The lawyer's] behavior . . . was a crass attempt to gain an unfair advantage through the use of demeaning language, a blatant example of "sexual [deposition] tactics." . . . These actions . . . have no place in our system of justice and when attorneys engage in such actions they do not merely reflect on their own lack of professionalism, but they disgrace the entire legal profession and the system of justice that provides a stage for such oppressive actors.

Hypo

A lawyer serving as an adjunct professor supervising a law student in a law school clinic made repeated comments about the student's appearance and also made unwelcome, nonconsensual physical contact of a sexual nature with the student.

In re Griffith, 838 N.W.2d 792 (Minn. 2013)

Hypo

Judge determines an attorney has utilized peremptory challenges in a discriminatory manner

ABA Formal Opinion 493; Model Rule 8.4 Cmt 5

Hypo

Judge’s chamber rules require a singular pronoun [he or she] be used for a singular person to “keep order in the courtroom, and to have a clear record”

Opinion 21-09: Opinion by NY Advisory Committee on Judicial Ethics

Hypo

Attorney represents conservative religious couple in lawsuit where they refused to provide services to a same-sex couple on First Amendment grounds

ABA Formal Opinion 493; Model Rule 8.4 Cmt 5

Hypo

Attorney from previous slide is discussing the case at a firm dinner and states support for client's actions because plaintiff's lifestyle is immoral

Hypo

A lawyer participating as a speaker at a CLE program on affirmative action in higher education expresses the view that rather than using a race-conscious process in admitting Latino students to highly-ranked colleges and universities, those students would be better off attending lower-ranked schools where they would be more likely to excel.

ABA Formal Opinion 493

Hypo

A lawyer is a member of a religious legal organization, which advocates, on religious grounds, for the ability of private employers to terminate or refuse to employ individuals based on their gender identity.

ABA Formal Opinion 493

Final Thoughts

- Legal system would benefit from increased diversity, equity, and inclusion
- Need to tailor the Rule and provide more guidance for more widespread adoption
- This is an evolving area of ethics
- Difficult to determine where trajectory will go

Questions?

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