Southwestern Journal of International Law

Volume XXXII 2026 Number 1



Articles

The Legal Roots of Corruption: How Public Law in Argentina Encouraged Corruption Instead of Fighting It
Héctor A. Mairal

Problems in the Institutional Design for the Defense of Competition: The Argentine Experience
Miguel Ángel De Dios

Prosecuting Crimes Against Humanity in Iran: Pathways for Justice and Legal Accountability
Pegah Banihashemi

Notes & Comments

Patently Unfair: Unlocking Access to Insulin Through Compulsory Licensing
Sioneh Azarian

Mind Over Matter: Contracting Away Cognitive Liberty
Julianna Montano

Seizing the Digital Future: Why the United States Must Join the Digital Economy Partnership Agreement
John Camara

Southwestern Law School

Published Two Times Annually by the Students of
Southwestern Law School
3050 Wilshire Boulevard
Los Angeles, CA 90010-1106
(213) 738-6857
lawjournal@swlaw.edu

Subscription Rates Commencing Volume Thirty

$34.00 per year (domestic)
$38.00 per year (foreign)
Single Copies: $17.00 (plus $5.00 for foreign mailing)

The Southwestern Journal of International Law publishes scholarly articles and notes contributed by members of the legal community and students that it deems worthy of publication. Views expressed in material appearing herein are those of the authors and do not necessarily reflect the policies or opinions of the Law Journal, its editors and staff, or Southwestern Law School.

Manuscripts should be sent to the Editor-in-Chief, Southwestern Journal of International Law, 3050 Wilshire Boulevard, Los Angeles, California 90010.

Address all correspondence regarding subscriptions to the Managing Editor, Southwestern Journal of International Law, 3050 Wilshire Boulevard, Los Angeles, California 90010.

Send changes of address to the Managing Editor, Southwestern Journal of International Law, 3050 Wilshire Boulevard, Los Angeles, California 90010, at least 45 days before the date of the issue for which the change is to take effect. If a notice of termination is not received by the Managing Editor before the expiration of a subscription, the subscription will be automatically renewed. Unless a claim is made for non-receipt of an issue within six months after the mailing date, that issue will not be supplied free of charge. The Post Office will not forward copies unless the subscriber has provided extra postage. Duplicate copies will not be sent.

Southwestern Law School has served the public since 1911 as a non-profit, nonsectarian educational institution. Southwestern Law School is approved by the American Bar Association and is a member of the Association of American Law Schools. Southwestern Law School does not discriminate on the basis of race, sex, age, religion, national or ethnic origin, sexual orientation, handicap, or disability in connection with admission to the school, or in the administration of any of its educational, employment, financial aid, scholarship, or student activity programs. Nondiscrimination has been the policy of Southwestern Law School since its founding and it is reaffirmed here in compliance with federal regulations.

© 2026 Southwestern Law School

Published Two Times Annually by the Students of
Southwestern Law School
3050 Wilshire Boulevard
Los Angeles, CA 90010-1106
(213) 738-6857
lawjournal@swlaw.edu

Subscription Rates Commencing Volume Thirty

$34.00 per year (domestic)
$38.00 per year (foreign)
Single Copies: $17.00 (plus $5.00 for foreign mailing)

The Southwestern Journal of International Law publishes scholarly articles and notes contributed by members of the legal community and students that it deems worthy of publication. Views expressed in material appearing herein are those of the authors and do not necessarily reflect the policies or opinions of the Law Journal, its editors and staff, or Southwestern Law School.

Manuscripts should be sent to the Editor-in-Chief, Southwestern Journal of International Law, 3050 Wilshire Boulevard, Los Angeles, California 90010.

Address all correspondence regarding subscriptions to the Managing Editor, Southwestern Journal of International Law, 3050 Wilshire Boulevard, Los Angeles, California 90010.

Send changes of address to the Managing Editor, Southwestern Journal of International Law, 3050 Wilshire Boulevard, Los Angeles, California 90010, at least 45 days before the date of the issue for which the change is to take effect. If a notice of termination is not received by the Managing Editor before the expiration of a subscription, the subscription will be automatically renewed. Unless a claim is made for non-receipt of an issue within six months after the mailing date, that issue will not be supplied free of charge. The Post Office will not forward copies unless the subscriber has provided extra postage. Duplicate copies will not be sent.

Southwestern Law School has served the public since 1911 as a non-profit, nonsectarian educational institution. Southwestern Law School is approved by the American Bar Association and is a member of the Association of American Law Schools. Southwestern Law School does not discriminate on the basis of race, sex, age, religion, national or ethnic origin, sexual orientation, handicap, or disability in connection with admission to the school, or in the administration of any of its educational, employment, financial aid, scholarship, or student activity programs. Nondiscrimination has been the policy of Southwestern Law School since its founding and it is reaffirmed here in compliance with federal regulations.

© 2026 Southwestern Law School

SOUTHWESTERN JOURNAL OF INTERNATIONAL LAW

VOLUME XXXII 2026 NUMBER 1

TABLE OF CONTENTS

ARTICLES

THE LEGAL ROOTS OF CORRUPTION: HOW PUBLIC LAW IN ARGENTINA ENCOURAGED CORRUPTION INSTEAD OF FIGHTING IT 1
Héctor Mairal

PROBLEMS IN THE INSTITUTIONAL DESIGN FOR THE DEFENSE OF COMPETITION: THE ARGENTINE EXPERIENCE 104
Miguel Ángel De Dios

PROSECUTING CRIMES AGAINST HUMANITY IN IRAN: PATHWAYS TO JUSTICE AND LEGAL ACCOUNTABILITY 209
Pegah Banihashemi

NOTES

MIND OVER MATTER: CONTRACTING AWAY COGNITIVE LIBERTY 246
Juliana Montano

PATENTLY UNFAIR: UNLOCKING ACCESS TO INSULIN THROUGH COMPULSORY LICENSING 274
Sioneh Azarian

SEIZING THE DIGITAL FUTURE: WHY THE UNITED STATES MUST JOIN THE DIGITAL ECONOMY PARTNERSHIP AGREEMENT 299
John Camara

SOUTHWESTERN JOURNAL OF INTERNATIONAL LAW

VOLUME XXXII 2026 NUMBER 1

Editor-in-Chief
OLIVIA DILAS

Managing Editor
EMIL ANDREASYAN

Special Projects Editor
GISELL DEL CARMEN

Senior Lead Article Editors
ESPERANZA ALONSO
JOEL VIDAL-CORTES

Lead Article Editors
SIONEH AZARIAN
GEORGE A. BANNA
KIERRA K. CAPURRO
MARY S. CHAMAS
ALYSSA V. STEVENSON

Staff Editors

MONET AGHAYANI
LINA G. ALEXANDER
NATALIE T. ALTOUNIAN
MAYA Z. ANGELO
KATHLEEN DEROSE
KARINA DJALILOVA
DIANA K. GAMA SALMERON
SPENSCER M. GREENBERG
MICHAELA GRETZINGER-CRADDOCK
CHRISTIAN G. HARO
BRENDA D. IBARRA LIMON
ALESSANDRA CAME Y. LIM
MARYKATHERINE Z. MARTIN
ANDRES E. MELEAN NAVA
ISABELLA MEZA
ANDRE NAZARIAN
SAVANNAH N. PANAH
INES RAMADANOVIC
RIO A. RIVERA
RODRIGO A. ROBLES TRISTAN
ERIC A. ROJAS
JACOB SIGLER
ALYSSA P. STEINFELD
JAIDYN A. YAMBAO
SAHAR H. YAZOURI
GABRIELLE G. ZETINO
KATHERYN WALK
MARIAM E. MIRZOYAN
ANGEL R. MORALES
RUBEN MURADYAN

Faculty Advisors
JONATHAN M. MILLER
FAISAL KUTTY

SOUTHWESTERN LAW SCHOOL
2025-2026

BOARD OF TRUSTEES

J. BERNARD ALEXANDER
HAROUT DIMIJIAN
CHRISTIAN DOWELL
THOMAS L. DRISCOLL
PETER DUCHESNEAU
ANDREW FIGUERAS
MATTHEW FRENCH
JOHN M. GERRO
ROBERT GLASSMAN
KEN GORVETZIAN
JAHMY S. GRAHAM
NYREE GRAY
HON. J. GARY HASTINGS
THOMAS H. HOBERMAN
DANA HOLLINGER
JINNA KANG
BETTY P. KELEPECZ
DANIEL KRAMMER
LAUREN B. LEICHTMAN
MARIA MEHRANIAN
SANFORD MICHELMAN
JOE NUÑEZ
STEPHANIE PEATMAN
DOUGLAS PRAW
CHERIE S. RAIDY
HARRIET ROLNICK
ANDREW ROSEN
MEE H. SEMCKEN
LYNDA SHERIDAN
HEIDY VAQUERANO
GEORGE WOOLVERTON
WALTER M. YOKA
DENNIS P.R. CODON, *Trustee Emeritus*
SHELDON A. GEBB, *Trustee Emeritus*
BRIAN A. SUN, *Trustee Emeritus*

ADMINISTRATION

DARBY DICKERSON, B.A., M.A., J.D., *President and Dean*
ANAHID GHARAKHANIAN, B.A., J.D., *Vice Dean*
JULIE K. WATERSTONE, B.A., J.D., *Vice Dean for Experiential Education and External Engagement*
LUKE BOSO, B.A., J.D., LL.M., *Co-Associate Dean for Research*
ZACHARY BRUNING, B.A., M.A., *Assistant Dean, Student Services*
MARCIE CANAL, B.A., *Chief Operating Officer*
MARISELA CERVANTES, B.A., MPA, Ed.D., *Chief of Staff and Assistant Corporate Secretary*
LISA M. GEAR, B.A., *Associate Dean for Admissions*
JORDAN HALL, *Associate Dean, Student Services*
MARGARET HALL, B.A., M.L.I.S., J.D., *Associate Dean and Law Library Director and Associate Professor of Law*
STEVEN LOPEZ, B.A., *Chief Communication and Marketing Officer*
NYDIA JOHNSON, B.A., J.D., *Associate Dean, Academic Success and DEI Initiatives*
CRISTINA C. KNOLTON, B.A., J.D., *Associate Dean for SCALE®*
DEBRA L. LEATHERS, B.A., *Associate Dean for Institutional Advancement*
AMY MCLELLAN, B.A., J.D., LL.M., *Associate Dean for Online Education*
ROBERT MENA, B.A., M.S., Ed.D, *Associate Dean for Student Affairs*
SEAN MURPHY, MCCES, *Chief Information Officer*
JEFFREY POLTORAK, *Vice President for Institutional Advancement*
LAURA PONDER, B.A., MBA., *Chief Financial Officer*
ORLY RAVID, B.A., J.D., *Associate Dean, Biederman Entertainment and Media Law Institute*
NATALIE RODRIGUEZ, B.A., J.D., *Associate Dean for Academic Innovation and Administration*
CHANTÉ SPANN, B.A., J.D., *Assistant Dean, Online Education*
BYRON G. STIER, B.A., J.D., LL.M., *Associate Dean for Strategic Initiatives*
OSCAR TERAN, B.A., J.D., *Associate Dean for Career Services*
TRACY L. TURNER, B.A., J.D., *Associate Dean for Learning Outcomes*
RACHEL E. VANLANDINGHAM, B.A., M.P.M., J.D., LL.M, *Co-Associate Dean for Research*
JULIE K. XANDERS, B.A., J.D., *General Counsel and Corporate Secretary*
EILEEN ZWIERS, *Registrar*

FULL-TIME FACULTY

RONALD G. ARONOVSKY, A.B., J.D., *Professor of Law*
ARMAN AVAGYAN, B.A., J.D., *Associate Professor of Law for Academic Success and Bar Preparation*
JESSICA BARCLAY-STROBEL, B.A., J.D., *Associate Professor of Law for Academic Success and Bar Preparation*
LUKE BOSO, B.A., J.D., LL.M., *Co-Associate Dean for Research and Professor of Law*
MELISSA BRANDMAN, B.A., J.D., *Associate Professor of Legal Analysis, Writing, and Skills*
BETH CALDWELL, B.A., M.S.W., J.D., *Professor of Law and Director of Criminal Law and Advocacy Concentration*
CHRISTOPHER DAVID RUIZ CAMERON, B.A., J.D., *Justice Marshall F. McComb Professor of Law and Director of Labor and Employment Law Concentration*
MARK CAMMACK, B.A., J.D., *Professor of Law*
PHILIP J. COSTA, B.A., J.D., *Associate Professor of Law for Academic Success and Bar Preparation*
JAMES CURTIS, B.A., J.D., *Visting Professor of Law*
ANDE DAVIS, B.A., M.F.A., Ph.D., J.D., *Associate Professor of Law*
BRIDGETTE M. DE GYARFAS, B.S., J.D., *Professor of Legal Analysis, Writing, and Skills, Director of the Legal Analysis, Writing, and Skills, and Director of Southwestern's Evening Hybrid Program*
ANGELA DEAN, B.A., J.D., *Associate Professor of Law*
MEERA E. DEO, B.A., J.D., Ph.D., *The Honorable Vaino Spencer Chair and Professor of Law*
DARBY DICKERSON, B.A., M.A., J.D., *President, Dean, and Professor of Law*
ALEXANDRA D'ITALIA, B.A., J.D., M.P.W., *Associate Professor of Law, Director of Writing Center, and Co-Director of the Moot Court Honors Program*
MICHAEL M. EPSTEIN, B.A., M.A., J.D., Ph.D., *Professor of Law, Director of Entertainment and Media Law Concentration, and Supervising Editor of the Journal of International Media and Entertainment Law*
JAMES M. FISCHER, J.D., *Professor of Law*
ANDREA FREEMAN, B.A., J.D., *Second Century Chair and Professor of Law*
REBECCA FRIEDMAN, B.A., J.D., *Associate Professor of Legal Analysis, Writing, and Skills*
SPENCER GALES, B.A., J.D., M.M., *Faculty Librarian and Reference Librarian*
ANAHID GHARAKHANIAN, B.A., J.D., *Vice Dean, Professor of Legal Analysis, Writing, and Skills, and Co-Director of the Externship Program*
ANDREW GILDEN, B.A., J.D., *Professor of Law*
KARIN GRAVER, B.A., J.D., *Professor of Legal Analysis, Writing, and Skills*
KEVIN J. GREENE, B.A., J.D., *John J. Schumacher Chair and Professor of Law*
WARREN S. GRIMES, B.A., J.D., *Irving D. and Florence Rosenberg Professor of Law*
ISABELLE R. GUNNING, B.A., J.D., *Mayor Tom Bradley Professor of Law and Director of Critical Race, Gender and Sexuality Studies Concentration*
JEFFREY HAAS, B.S., J.D., *Distinguished Visiting Professor of Law*
MARGARET HALL, B.A., M.L.I.S., J.D., *Associate Dean and Law Library Director and Associate Professor of Law*
DANIELLE KIE HART, B.A., J.D., LL.M., *The Honorable Arleigh M. Woods, and William T. Woods Chair and Professor of Law*
JOHN HEILMAN, B.S., J.D., M.P.A., M.R.E.D., *Professor of Law and Interim Director of Critical Race, Gender and Sexuality Studies Concentration*
ROMAN J. HOYOS, A.B., J.D., M.A., Ph.D., *Professor of Law*
COLLIN HU, B.A., J.D., *Associate Professor of Law for Academic Success and Bar Preparation and Associate Director of Dean's Fellow Program*
JODI JEWELL, B.A., J.D., *Professor of Legal Analysis, Writing, and Skills*
NYDIA L. JOHNSON, B.A., J.D., *Associate Dean for Academic Success and Bar Preparation and Associate Professor of Law*
RICHARD JOLLY, B.A., M.Sc., J.D., *Professor of Law*
HILA KEREN, LL.B., Ph.D., *Paul E. Treusch Professor of Law*
JOERG W. KNIPPRATH, B.A., J.D., *Professor of Law*

CRISTINA C. KNOLTON, B.A., J.D., *Associate Dean for SCALE® and Professor of Legal Analysis, Writing, and Skills,*
FAISAL KUTTY, J.D., LL.M., Ph.D., *Professor of Legal Analysis, Writing, and Skills*
CHRISTINE L. LOFGREN, B.A., J.D., *Professor of Legal Analysis, Writing, and Skills and Director of Technology Law & Entrepreneurship Concentration*
DAVID MCFADDEN, B.A., M.S.L.S., *Faculty Librarian and Senior Reference Librarian*
JONATHAN M. MILLER, B.A., J.D., *Professor of Law*
DINAH MINKOFF, B.A., M.S.L.S., J.D., *Faculty Librarian and Head of Collection Services Librarian*
JANET NALBANDYAN, B.A., J.D., *Associate Professor of Law and Co-Director of the Externship Program*
JYOTI NANDA, B.A., J.D., *Professor of Law*
JANET PHILIBOSIAN, B.A., M.A., J.D., *Associate Professor of Law for Academic Success and Bar Preparation*
ANDREA RAMOS, B.A., J.D., *Clinical Professor of Law, Director of Clinical Programs, and Director of the Immigration Law Clinic*
ORLY RAVID, B.A., J.D, *Associate Dean, Biederman Entertainment, Media, and Sports Law Institute, and Associate Professor of Law*
CHRISTOPHER J. ROBINETTE, B.A., J.D., LL.M., *Professor of Law and Co-Director, Panish Civil Justice Program*
NATALIE RODRIGUEZ, B.A., J.D., *Vice Dean for Academics and Associate Professor of Law*
JENNY RODRIGUEZ- FEE, B.A., J.D., *Clinical Professor of Law and Director of the Children's Rights Clinic*
LOUIS ROSEN, B.A., M.A., J.D., *Faculty Librarian and Remote Reference Librarian*
SARAH SCHIMMEL, B.A., J.D., *Associate Professor of Law for Academic Success and Bar Preparation, Co-Director of the Negotiation Honors Program, and Associate Director of Bison Bar Pass Program*
IRA L. SHAFIROFF, B.A., J.D., *Professor of Law*
JUDY BECKNER SLOAN, B.A., J.D., *Professor of Law*
BYRON G. STIER, B.A., J.D., LL.M., *Associate Dean for Strategic Initiative, Professor of Law, Co-Director, Panish Civil Justice Program, and Director of Civil Litigation and Advocacy Concentration*
PHILLIP A. TALBERT, B.A., M.Ec., J.D., *Associate Professor of Legal Analysis, Writing, and Skills*
JOHN TEHRANIAN, A.B., J.D., *Paul W. Wildman Chair and Professor of Law*
DELLA THOMPSON-BELL, B.A., J.D., *Professor of Legal Analysis, Writing, and Skills*
TRACY L. TURNER, B.A., J.D., *Associate Dean for Learning Outcomes and Professor of Legal Analysis, Writing, and Skills*
RACHEL E. VANLANDINGHAM, B.A., M.P.M., J.D., LL.M, *Co-Associate Dean for Research and Irwin R. Buchalter Professor of Law*
JULIA VAZQUEZ, B.A., M.A., J.D., *Clinical Professor of Law, Director of Community Lawyering Clinic, and Director of Public Interest Law Concentration*
DOV A. WAISMAN, A.B., M.S., J.D., *Professor of Law*
TARA WALTERS HIROMURA, B.A., J.D., *Visiting Professor of Legal Analysis, Writing & Skills*
JULIE K. WATERSTONE, B.A., J.D., *Vice Dean for Experiential Education and External Engagement and Clinical Professor of Law*
WILLIAM WOOD, B.A., M.A., M.S.E.L., M.P.P., J.D., *Professor of Law*
BRYCE WOOLLEY, B.A., J.D., *Associate Professor of Law for Academic Success and Bar Preparation*
PANTEA YASHAR, B.A., J.D., *Associate Professor of Legal Analysis, Writing, and Skills*
DENNIS T. YOKOYAMA, B.A., M.S., J.D., *Professor of Law*

EMERITI FACULTY

DEBRA LYN BASSETT, B.A., M.S., J.D, *John J. Schumacher Chair Emerita*
PAUL A. BATEMAN, B.A., M.A., Ph.D., *Professor of Legal Analysis, Writing, and Skills Emeritus*
MICHAEL J. BERGER, B.A., M.A., J.D., *Associate Professor of Law Emeritus*
KATHRYN CAMPBELL, B.A., J.D., *Professor of Legal Analysis, Writing, and Skills Emerita*
CATHERINE L. CARPENTER, B.A., J.D., *The Honorable Arleigh M. Woods, and William T. Woods Chair, Emerita and Professor of Law*

CRAIG CHRISTENSEN, B.S., J.D., *Professor of Law Emeritus*
MICHAEL B. DORFF, A.B., J.D., *Professor of Law Emeritus*
MICHAEL H. FROST, B.A., M.A., Ph.D., *Professor of Legal Analysis, Writing, and Skills Emeritus*
NORMAN M. GARLAND, B.S., B.A., J.D., LL.M., *Second Century Chair in Law and Professor of Law Emeritus*
BRYANT G. GARTH, B.A., J.D., Ph.D., *Dean Emeritus*
JAY W. GENDRON, B.A., J.D., *Associate Professor of Law Emeritus*
HERBERT T. KRIMMEL, B.S., M.Acc., J.D., *Professor of Law Emeritus*
JAMES A. KUSHNER, *B.B.A., J.D., Professor of Law Emeritus*
ROBERT C. LIND, B.E.S., J.D., LL.M., *Paul E. Treusch Professor of Law Emeritus*
CHRISTINE METTEER LORILLARD, B.A., M.A., Ph.D., *Professor of Legal Analysis, Writing, and Skills Emerita*
ROBERT E. LUTZ, B.A., J.D., *Paul E. Treusch Professor of Law Emeritus*
SUSAN J. MARTIN, B.A., J.D., *Professor of Law Emerita*
ROBERT POPOVICH, B.S., MBT, J.D., *Professor of Law Emeritus*
SUSAN WESTERBERG PRAGER, A.B., M.A., J.D., *Dean Emerita and Professor of Law Emerita*
ROBERT A. PUGSLEY, B.A., J.D., LL.M., *Professor of Law Emeritus*
HARRIET M. ROLNICK, B.A., J.D., *Associate Dean for SCALE® Emerita*
KATHERINE C. SHEEHAN, B.A., M.A., J.D., *Professor of Law Emerita*
J. KELLY STRADER, B.A., M.I.A., J.D., *Irwin R. Buchalter Professor of Law Emeritus*
LEIGH H. TAYLOR, B.A., J.D., LL.M., *Dean Emeritus and Professor of Law Emeritus*
N. KEMBA TAYLOR, B.A., J.D., *Professor of Legal Analysis, Writing, and Skills Emeritus*
LINDA A. WHISMAN, B.A., M.L.S., J.D., *Associate Dean for Library Services and Professor of Law Emerita*

ADJUNCT FACULTY

RYAN ABELMAN
MICHELE ANDERSON
MICHAEL ASHJIAN
VANESSA BARNETT
ISELA BARRIOS
JOHN BEGAKIS
DAVID BELL
NICHOLAS BOND
MICHAEL BORENSTEIN
SAMANTHA BORGHI
HON. KELLY BOYER
ABRAHAM BRAN
MACKENZIE BROWN
VICTORIA BURKE
LORENZON CALLENDER
ROBYN LEE CHEW
SUSAN CLEARY
CAROL CONTES
HON. ANNABELLE CORTEZ
LINDA DAKIN-GRIMM
HON. ANGELA DAVIS
SAMANTHA DENNIS
HAROUT DIMIJIAN
ADAM DOMBCHIK
JOEY ESPOSITO
JONATHAN EVANS
MITCHELL FEDERER
TESS FELDMAN
GARY P. FINE
KELSEY FINN
REBECCA FISCHER
SHAUGHNESSY FLINT
RICARDO GARCIA
SIMON GARDINER
ALICE J. GARFIELD
CRAIG GELFOUND
CHRISTOPHER GHAZARIAN
ROBERT GLASSMAN
KARINA GODOY
ADAM GRANT
MEHRNAZ HADIAN
NAZGOLE HASHEMI
RHONDA HAYMON
DAVID HELFANT
MICHELLE HERNANDEZ
HOWARD JACOBS
VERONICA JEFFERS
ALLAN JOHNSON
DOUGLAS JOHNSON
NEVILLE JOHNSON
JULI JORDAN
ROBERT KAYNE
NARIS KHALATIAN
ANDREW KNAPP
DANIEL KRAMER
DANIEL LIFSCHITZ
KATHY M. LOMBARD
HENRY LYDIATE
APRIL MACARAEG
KYLE MARKS
HON. DARRELL S. MAVIS
TIMOTHY B. MCCAFFREY, JR.
LORI MEYERS
JAMES MIXON
HON. KARINE MKRTCHYANN
MICHAEL MORSE
NEGIN MOSTADIM
ANASHEH NALBANDIAN
MATTHEW NUSSBAUM
TIGRAN PALYAN
KATHRYN PODSIADLO
ROMY RAHMANIAN
JUAN A. RAMOS
EMILY REHM
NICOLE ROSSI-STANDLEY
GEORGE RUIZ
ANASTASIA SAGORSKY
CHRISTINE SAHAKIAN
MARINA SAMSON
CARLY SANCHEZ
BILL SEKI
MATTHEW SEROR
JEFFREY SHANE
JAY J. SHIN
ALYSSA SKOLNICK
JENNA SLEEFE
ALEXANDRA SMYSER

EDWARD STARK
JULIA SYLVA
MARK TALISE
JOSEPH TRIGILIO
ETHAN TYER
DANIELLE VAN LIER
EMMANUEL VERGARA
ANNA WASSENBERG
BRYAN WEISER
ALLYSON WELDEN
KAIMIPONO WENGER
LAURA WESLEY
CHRISTOPHER WHITE
SANAM YASSERI
IRYNA ZAVERUKHA

THE LEGAL ROOTS OF CORRUPTION: HOW PUBLIC LAW IN ARGENTINA ENCOURAGED CORRUPTION INSTEAD OF FIGHTING IT

Héctor A. Mairal*

Abstract

This article seeks to identify the features of a legal system that, intentionally or not, favor corruption. Rules that are unobtainable, obscure, ambiguous, of doubtful validity or that change continuously; legal requirements that are unrealistic, very costly to comply with, and that are unevenly enforced; unnecessary excessive discretion granted to public officials; regulations that require multiple government authorizations to carry out private activities; and inefficient legal remedies, especially in the face of administrative delays. All these are factors that put private businesses at the mercy of public officials and thus create an incentive for corruption. Apart from reversing these flaws, citizen participation in the drafting of regulations and strengthened judicial control are some of the remedies proposed to rectify this situation. A separate section examines the defects in public procurement and government contracting practices, such as the systematic delay in payments to contractors, that promote corruption. Examples of improper practices drawn from court decisions, other commentators, or

* Abogado, University of Buenos Aires (1961); M.C.L., Southern Methodist University (1963); Doctorate, University of Buenos Aires (1973); Visiting Scholar, Harvard University School of Law (1983), Cambridge University (1986); Professor of Law, University of Buenos Aires (1978-2008); partner emeritus Marval O'Farrell Mairal, Buenos Aires. In addition, Professor Mairal has received a Lifetime Achievement Award from Chambers and Partners (2005), a Platinum Konex award for his contribution to the Social Sciences in Argentina in Administrative Law (2006) and is an elected member of Argentina's National Academy of Moral and Political Sciences since 2011. This article translates and expands on his book LAS RAÍCES LEGALES DE LA CORRUPCIÓN: O DE CÓMO EL DERECHO PÚBLICO FOMENTA LA CORRUPCIÓN EN LUGAR DE COMBATIRLA [The Legal Roots of Corruptions: Or How Public Law Encourages Corruption Instead of Combatting It] (Editorial Astrea 2007).

from the author's own experience are provided throughout the article. While this work focuses on Argentina, its citations to other Latin American sources, and the author's exposure to similar problems across the region, demonstrate that the issues discussed are of a more general nature.

FOREWORD

The first edition of this work was published in Spanish in 2007. It had a silent impact on the Argentine government practices, particularly during the administration of President Mauricio Macri. Thus, some comments and notes providing examples of the then-current incorrect practices are now drafted in the past tense. During the present administration of President Javier Milei, Minister Federico Sturzenegger heads an ongoing effort to deregulate and cut down bureaucratic obstacles that, intentionally or not, favor corruption. Also, recent laws amending the Administrative Procedure Law and the penal tax regime have mitigated some of their more oppressive features.[1] However, the examples that this article offers of how features of Argentina's administrative law and practice both foster and fostered corruption remain relevant not just to understanding Argentina and its history, but to understand issues faced by many developing countries.

I. INTRODUCTION 4
A. When Law Nurtures Corruption 4
B. The Different Types of Corruption 6
C. The Various Causes of Corruption 8
D. The Legal Causes of Corruption 12
E. Anomie as a Backdrop to Corruption 14
F. Law, an Ally of Corruption 15
II. LEGAL UNCERTAINTY AS A BREEDING GROUND FOR CORRUPTION 16
A. Excessive Number of Rules 17
B. Ignorance of the Standard 18
C. The Obscurity or Ambiguity of the Rules 22
D. Rules of Dubious Validity 28

1. *Ley de Bases y Puntos de Partida para la Libertad de los Argentinos* [Law of Bases and Starting Points for the Freedom of Argentines], Law No. 27742, July 8, 2024, B.O. (Arg.); *Régimen Penal Tributario* [Tax Criminal Regime], Law No. 27799, Jan. 2, 2026, B.O. (Arg.).

E. Individual Decisions of Dubious Validity 31
F. Restrictions on the Access of Justice 32
G. State Violence Against Citizens 34
H. The Contempt for the Law by the State Itself 38
I. The Consequences of Legal Uncertainty 40
1. The Defenselessness of the Citizen 41
2. The Defenselessness of the Civil Servant 43
J. Utopia or Reality? 48
III. FACTORS THAT HAVE A DIRECT IMPACT ON CORRUPTION 49
A. Unfair, Unrealistic, or Overly Ambitious Rules 50
B. Excessive Granting of Discretionary Powers 57
1. Discretion in the Selection of Controlled Parties 58
2. The Multiplicity of Special Authorizations 61
3. Delay in Resolving Approval Requests 64
4. The Unnecessary Precariousness of Concessions and Permits for the Use of the Public Domain 69
5. The Instability of Utility Concessions 71
6. The Instability of Any Right Arising from an Administrative Decision 73
C. Legal Obstacles to the Abusive Exercise of Discretionary Powers 74
1. Prior Controls 74
2. Citizen Participation 75
3. Transparency of Public Decisions 76
4. Deepening Judicial Control 77
IV. SHORTCOMINGS IN PUBLIC PROCUREMENT 78
A. Who Decides and Who Should Decide 79
B. The Stage of Contracting 82
1. Public Bidding 82
2. Performance of the Contract 87
3. Payment 91
4. Dispute Resolution 95
V. CONCLUSION 96

I. INTRODUCTION

A. When Law Nurtures Corruption

In almost all countries, there are people who, from the public or private sector, try to obtain illegitimate advantages from the actions of the State. More precisely, illegal exchanges take place in almost all countries, where public officials obtain money (or other material benefits that can be monetized) from private citizens or groups in return for preferential treatment in governmental decision-making.[2] This has been the case throughout history.[3]

Studies on corruption have gained significant importance in recent decades. Its causes, its institutional and economic consequences, its regional impact, its development in certain countries, and the methods to combat and reduce it have all received significant attention.[4]

While the phenomenon of corruption is observed on a global scale, its degree of pervasiveness differs significantly between countries. In some, the phenomenon is sporadic; in others, corruption has become a necessary way to operate normally in certain sectors of society and of

---

2. *See* Luigi Manzetti, *Market Reforms Without Transparency, in* COMBATTING CORRUPTION IN LATIN AMERICA 130, 143 (Joseph S. Tulchin & Ralph H. Espoch eds., 2000) (defining corruption in terms of exchanges of material benefits for preferential governmental treatment).

3. *See generally* CARLO ALBERTO BRIOSCHI, CORRUPTION: A SHORT HISTORY (Antony Shugaar trans., Brookings Inst. Press 2017), http://www.jstor.org/stable/10.7864/j.ctt1hfr1sk (last visited Sept. 26, 2025) (examples of bribery throughout history); JOHN T. NOONAN, JR., BRIBES (1984); Felipe Fucito, *Algunas Consideraciones Sobre La Corrupción Desde La Sociología Jurídica y La Historia Nacional [Some Considerations on Corruption from Legal Sociology and National History], in* ADMINISTRACION PUBLICA Y CORRUPCION [PUBLIC ADMINISTRATION AND CORRUPTION] 157 (Buenos Aires: Scotti, 2017) (corruption throughout history); Carlos Botassi, *Ética, Administración Pública, y Corrupción* [*Ethics, Public Administration and Corruption*], *in* ADMINISTRACION PUBLICA Y CORRUPCION [PUBLIC ADMINISTRATION AND CORRUPTION] 61 (Buenos Aires: Scotti, 2017) (recent corruption in Argentina).

4. *See* SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM (1999); ECONOMICS OF CORRUPTION (Arvind K. Jain ed., 1998); CORRUPTION: ANTHROPOLOGICAL PERSPECTIVES (Dieter Haller & Cris Shore eds., 2005); COLIN NICHOLLS QC ET AL., CORRUPTION AND MISUSE OF PUBLIC OFFICE (Oxford Univ. Press 2006); MICHAEL JOHNSTON, SYNDROMES OF CORRUPTION (Cambridge Univ. Press 2005); FRANK VOGL, WAGING WAR ON CORRUPTION (Rowman & Littlefield Publishers 2012); COMBATING CORRUPTION IN LATIN AMERICA (Joseph S. Tulchin & Ralph H. Espach eds., Woodrow Wilson Center Press 2000); REBECCA WEITZ-SHAPIRO, CURBING CLIENTELISM IN ARGENTINA POLITICS, POVERTY, AND SOCIAL POLICY (Cambridge Univ. Press 2014); ALEJANDRO NIETO, CORRUPCIÓN EN LA ESPAÑA DEMOCRÁTICA (Ariel, 1997); JESÚS GONZÁLEZ PÉREZ, CORRUPCIÓN ÉTICA Y MORAL EN LAS ADMINSTRACIONES PÚBLICAS (Thomson Reuters, Civitas 2006); VICIOS PUBLICOS: PODER Y CORRUPCION (Óscar Ugarteche ed., 2005).

the economy.[5] To put it in the words of Mariano Grondona, in the former, there are *acts of corruption,* while in the latter, we can speak of a *state of corruption*.[6]

In Argentina, there is a perception, supported by real data and confirmed by national and international surveys, that the spread of corruption has been very high, even compared to neighboring countries with similar social, economic and cultural characteristics. In 1992 Carlos Nino stated that "the phenomenon of corruption is massively widespread in Argentine society,"[7] and Luis Moreno Ocampo has described the Argentine situation as *hyper-corruption*.[8] According to a 1996 Gallup poll, 97% of the public in Greater Buenos Aires considered the level of corruption in Argentina to be high or very high. *Transparency International* ranked Argentina 35th out of 54 countries ranked from lowest to highest level of corruption, significantly behind Chile (No. 21).[9] This result was repeated in an index prepared by the same organization and in which, with an index of 3 for 1998 (out of a maximum of 10 for countries like New Zealand, where corrupt practices were not observed at all), Argentina was behind Chile (6.8), Uruguay (4.3) and even Brazil (4).[10] This perception had not improved by the early 2020's.[11]

However, what commentators in Argentina fail to recognize are the degrees to which law and the legal system can encourage

---

5. Maria-Eleni Syrmali, George Sfakianakis & George Agiomirgianakis, *The Complex Phenomenon of Corruption: An Empirical Analysis*, 13 THEORETICAL ECON. LETTERS 1698, 1708 (2023).

6. Mariano Grondona, *El tercer desafio (The third challenge), in* LA CORRUPCIÓN [THE CORRUPTION] 2, 4 (Mariano Grondona ed., Editorial Planeta Argentina, 1993).

7. CARLOS S. NINO, UN PAÍS AL MARGEN DE LA LEY [A COUNTRY ON THE MARGINS OF THE LAW] 110 (1992).

8. Luis Moreno Ocampo, *Una propuesta de acción (A proposal for action), in* LA CORRUPCIÓN [THE CORRUPTION] 38-48 (Mariano Grondona ed., Editorial Planeta Argentina, 1993); Grondona *supra* note 6, at 42, 46.

9. Transparency Int'l & Johann Graf Lambsdorff, TI Corruption Perceptions Index 1996, (Transparency Int'l & Univ. Of Göttingen 1996), https://files.transparencycdn.org/images/1996_CPI_EN.pdf.

10. Lawrence Whitehead, *High-Level Corruption in Latin America: A "Transitional" Phenomenon?*, *in* COMBATING CORRUPTION IN LATIN AMERICA 114 (Joseph S. Tulchin & Ralph H. Espach eds., 2000).

11. *See Los Políticos Argentinos, Segundos en Corrupción*, LA NACIÓN (Dec. 10, 2004), https://www.lanacion.com.ar/politica/los-politicos-argentinos-segundos-en-corrupcion-nid661851/; VOGL, *supra* note 4, at 271; Transparency Int'l, *Corruption Perceptions Index 2022* (Jan. 31, 2023), https://www.transparency.org/en/cpi/2022.

corruption through their design. When there are excessive or confusing regulations, rules that are impossible to comply with, inconsistent enforcement, and inconsistent or delayed judicial protection, among other aspects of Argentine law, corruption is inevitable. Many of these designs can be found in other countries, and this article aims to serve as a broader guide on how a legal system's design will often foment corruption. Reforming these features can enable a country's regulatory and judicial systems to become important tools for combating corruption rather than indirectly encouraging it.

B. The Different Types of Corruption

When studying countries where corruption is prevalent, analysts distinguish between different systems. The first, termed "kleptocracy," exists wherever corruption is organized in the upper echelons of government. The other system is based on multiple recipients of bribes at the middle and lower levels of the administration.[12] Both can (and usually do) occur together.[13]

The first type can be called "grand corruption" because it involves large bribes and generally occurs in public procurement and natural resource concessions.[14] The second, which involves small bribes (comparatively speaking), is called "*petty corruption*."[15]

Despite what one might believe, the impact of "petty" corruption is very significant. While the number of participants in major corruption is necessarily limited, the tentacles of petty corruption reach much of the public administration. A 2002 survey estimated that the average number of corrupt officials in Latin America was as high as 71%.[16]

---

12. *Compare* ROSE-ACKERMAN, *supra* note 4 (describing bribery of high-level officials in connection with major government contracts and concessions), *with* KAREN DAWISHA, PUTIN'S KLEPTOCRACY: WHO OWNS RUSSIA? 1-12, 313-50 (2014) (describing bribes at the middle and lower levels of administration).

13. *See generally* Daron Acemoglu, James A. Robinson & Thierry Verdier, *Kleptocracy and Divide-and-Rule: A Model of Personal Rule*, 2 J. EUR. ECON. ASS'N 162, 167–70 (2004).

14. Jorum Duri, *Definitions of Grand Corruption*, U4 HELPDESK ANSWER 2020:25, (Oct. 2, 2020) https://www.u4.no/publications/definitions-of-grand-corruption.

15. *See generally* Marie Chêne, *Successful Approaches to Tackle Petty Corruption,* (Transparency Int'l 2019), https://knowledgehub.transparency.org/assets/uploads/kproducts/Fighting-petty-corruption-2019.pdf.

16. GONZÁLEZ PÉREZ, *supra* note 4, at 29 (quoting Marta Lagos reporting that a survey placed Argentina at the top of the list with 89% of corrupt officials, a figure that seems to us to be exaggerated even under the worst governments).

There is also a much broader range of companies and individuals who, spontaneously or compulsively, resort to petty corruption. Often, to obtain what they are legally entitled to without exaggerated delays or arbitrary refusals.[17]

Petty corruption is the main compliance problem faced by reputable companies, whose headquarters are located in a country where criminal legislation penalizes bribes paid to foreign officials.[18] Many executives of these companies from the United States and the United Kingdom have lost their careers for agreeing to pay bribes to foreign officials just so they could continue to operate normally. It is very difficult to compare the total amount of bribes paid in each type of corruption, but the sum of small and medium-sized bribes paid on countless occasions surely reaches considerable figures.[19]

Certainly, the harmful effects of petty corruption are very widespread. On the one hand, it destroys respect and trust in the State among the population.[20] On the other hand, it fosters an atmosphere of irregularity in the public administration, thus creating a kind of solidarity among corrupt officials, an *esprit de corps* that makes it difficult to investigate crimes.[21] "Live and let live" is the motto that prevails in this environment and conspires against the detection and punishment of both small and large corruption.[22]

Hence, combating petty corruption will increase the number of people willing to inform and collaborate in the fight against grand corruption and make it easier to eradicate. Where corruption prevails, the reality is the opposite of what it should be: the honest are persecuted, while the accomplices of corruption are tolerated and even rewarded. A medium-sized Argentine company that, faced with unfair

17. Carlo Angelucci & Matteo Bobba, *Petty Corruption and Citizen Reports*, 63 INT'L ECON. REV. 829, 832 (2022).

18. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1–78dd-3 (1977); Bribery Act 2010, c. 23 (U.K.).

19. Marie Chêne, *Evidence of the Impact of Facilitation Payments*, (Transparency Int'l 2013), https://knowledgehub.transparency.org/helpdesk/evidence-of-the-impact-of-facilitation-payments.

20. James Lewis, *Social Impacts of Corruption Upon Community Resilience and Poverty*, 9(1) JÀMBÁ: J. DISASTER RISK STUD. 7 (2017) (S.Afr.).

21. Mariusz Wojtalewicz, *Public Administration as a Structure Vulnerable to Corruption*, Internal Security (2022).

22. *See* Akhil Gupta, *Narrating the State of Corruption, in* CORRUPTION: ANTHROPOLOGICAL PERSPECTIVES 173 (Dieter Haller & Cris Shore eds., 2005) (describing similar patterns of corruption in rural India).

competition, denounced its competitors for tax evasion, ended up being the only one in the entire sector investigated by the authorities.[23]

C. The Various Causes of Corruption

Many factors affect the degree of corruption in a given country: cultural, social, economic, and political. For example, one might ask whether the cult of friendship observed in Latin countries fosters corruption by creating interpersonal ties much stronger than those that bind the citizen to the State.[24] An official who rigorously applies administrative law (customs, tax, etc.) to a relative, a friend, or a colleague will likely be the object of social criticism rather than praise.

With regard to economic factors, it is widely believed that an interventionist economic system, characterized by exchange and price controls and an economy separated from the outside world by high customs taxes, fosters corruption by creating opportunities for significant profits for those who, *de facto* or *de jure*, can be exempted from complying with the restrictive rules. Ludwig von Mises stated it categorically: "Interventionism always breeds corruption."[25] It has even been argued that opportunities for corruption are the real reason that motivates the implementation of interventionist and statist policies. It is not malevolent to think, says Professor Alejandro Nieto concerning the Spanish reality, "that the prodigious increase in administrative intervention in all fields of economic and social life is often inspired by the desire to simultaneously extend the possibilities of corruption."[26]

---

23. This case is based on the personal experience of the author. The name of the private party involved is withheld for confidentiality reasons.

24. *See* NINO, *supra* note 7, at 199–201 (describing how Argentines favor intimates and mistreat outsiders, undermining civic duty and fostering corruption); Edward C. Banfield, *The Moral Basis of a Backward Society* 92 (Free Press 1958) (introducing the concept of "amoral familism," in which loyalty to family and friends outweighs civic obligation, thereby weakening state institutions and encouraging corruption).

25. LUDWIG VON MISES, HUMAN ACTION 867 (10th ed., 2011).

26. Joaquín Morales Solá, *Una Corrupción peor que la de la AFA,* LA NACIÓN (Jan. 4, 2026), https://www.lanacion.com.ar/opinion/una-corrupcion-peor-que-la-de-la-afa-nid04012026/ (investigations currently underway in Argentina suggest that profits exceeding one billion dollars were generated during the previous administration through the circumvention of strict exchange-control regulations. Certain individuals, unlawfully authorized by the Central Bank to purchase dollars at the official exchange rate, resold those dollars on the black market at a higher rate).

High levels of inflation is another factor that favors corruption, and it does so in two ways.[27] First, inflation increases the frequency of State interventions in the economy, given the repeated need to arbitrate private interests affected by the continuous change in the value of the local currency and, with it, of relative prices.[28] This leads to a corresponding increase in the opportunities for undue sectorial and individual favors.[29] Secondly, the mere passage of time makes historical amounts expressed in national currency derisory.[30] Public officials are thus able to disclose their declarations of assets based on purchase prices, which, released years later, do not give rise to scandal.[31]

In his classic work *The Other Path*, the Peruvian economist Hernando de Soto is eloquent in his critique of what he calls *redistributive law*, which arises when law is conceived "as an instrument to redistribute wealth and not to facilitate its creation."[32] It should come as no surprise, says this author, "that bribery and corruption are features of a system of law in which competition for rent has become the predominant way of producing the law."[33] These words seem to be written for Argentina, which during the year 2002 experienced an avalanche of regulations that, like the Babylon lottery imagined by Borges, impoverished certain sectors of the population and enriched others.[34]

---

27. Miguel Braun & Rafael Di Tella, *Inflation, Inflation Variability and Corruption*, 16 ECON. & POL. 77, 95 (2004).

28. *See* Jon Frye & Robert J. Gordon, *Government Intervention in the Inflation Process: The Econometrics of "Self-Inflicted Wounds,"* 71 AM. ECON. REV. 288 (1981).

29. Braun & Di Tella, *supra* note 27, at 79.

30. *See generally* Matthias Doepke & Martin Schneider, *Inflation and the Redistribution of Nominal Wealth,* 114 J. POL. ECON. 1069, 1070 (2006).

31. *See generally* LAURA POP, DMYTRO KOTLYAR & IVANA ROSSI, ASSET AND INTEREST DISCLOSURE 28 (1st ed., 2023).

32. HERNANDO DE SOTO, ENRIQUE GHERSI & MARIO GHIBELLINI, EL OTRO SENDERO 239 (1st ed., 1987).

33. *See id.* at 241.

34. *See* Hector A. Mairal, *El Derecho en Tiempos de Colera* [*The Law in Times of Anger*], ACTUALIDAD JURÍDICA URÍA MENÉNDEZ [LEGAL NEWS URÍA MENÉNDEZ] 9 (2002) (describing the 2002 Argentine crisis and the mandatory conversion of dollar-denominated debts and deposits into pesos at below-market rates). *See* STAFF OF H. JOINT ECON. COMM., U.S.108TH CONG., ARGENTINA'S ECONOMIC CRISIS: CAUSES AND CURES (June 2003) (noting the causes of the crisis).

Public officials often act with a sense of entitlement.[35] This is not a recent phenomenon, although it has spread in recent decades.[36] Anyone who denounces the practice faces visceral criticism from the entire civil service, especially if the critic is of high economic status. "We all have the right to a system for making money," seems to be the argument implicit in this censorship.[37] "You have yours, and we don't question it. Why do you question this officer's system?"[38]

Moreover, a large part of Argentina's national business community has entered into a Faustian pact with the Government by exchanging their economic freedom for customs protection, which leads many high-level officials to feel that they deserve some recognition for such protection.[39]

Both phenomena result, then, in a sense of entitlement that many public officials have concerning private wealth, which leads them to self-justify their illicit claims.

From another ideological perspective, that of a critical viewpoint of certain aspects of the privatization process in Latin America, it has been observed that corruption can also find opportunities to develop both during the privatization stage itself and in the subsequent regulatory stage.[40] From this viewpoint, therefore, critics take for granted that corruption increases in right-wing governments.[41]

However, when a political system is infected by corruption, it will find opportunities to obtain bribes under any economic regime. Therefore, given the difficulty of establishing precise mechanisms for measuring a largely clandestine phenomenon such as corruption, the comparison between the greater or lesser impact that different economic regimes have on corruption will always be a matter of opinion. An

35. *See* Gonzalo Garcés, *La Vida Bajo el Capitalismo de Amigos* [*Life Under Crony Capitalism*], LA NACIÓN (Arg.), August 26, 2024 https://www.lanacion.com.ar/opinion/la-vida-bajo-el-capitalismo-de-amigos-nid26082024/.

36. *See* Silvana Ferreyra, Romina Garcilazo & Sebastián Pereyra, *Escándalos y Usos Políticos de la Acusación de Corrupción en la Historia Argentina, in* NUEVOS ENFOQUES SOBRE LA CORRUPCIÓN: PERSPECTIVA HISTÓRICA, FEDERAL Y MULTIDIMENSIONAL 71, 71-102 (María Luján Blanco ed., 2023).

37. *See* Inter-Am. Comm'n H.R., *Corruption and Human Rights,* at 154-157, OEA/Ser.L/V/II. Doc. 236 (December 6, 2019) (explaining the risks faced by those who report acts of corruption in the Americas).

38. *Id.*

39. *See* Garcés, *supra* note 35.

40. Manzetti, *supra* note 2, at 130-31, 141.

41. ERNESTO TENEMBAUM, ENEMIGOS 73 (1st ed., 2004).

opinion that is also greatly influenced by the ideological preferences of the interpreter. "Corruption is quantifiable only from a strictly subjective perspective."[42]

Something similar happens with the political causes of corruption. A political system in which an attack on one's adversary replaces the rational discussion of problems, favors corruption, since the civic value of discovering and punishing corrupt officials will normally be sacrificed to party solidarity. The use of partisan attacks in the political struggle, with more rhetorical than substantive effects, is an attitude that has long roots. "A moral weapon was wielded by petty politicians at that time, and it was to accuse each other of embezzling public funds, a rustic resource that had very good effects on the people," said Benito Pérez Galdós, describing Spanish politics at the time of the Junta of Cadiz at the beginning of the XIX Century.[43] On the contrary, other analysts will argue that the alternation in power of bitter political adversaries is what makes it possible to shed light periodically on the phenomenon, while the succession of mutually condescending regimes favors pacts of silence that protect all its members.[44] Again, the position of the interpreter will inevitably color its vision.

For all these reasons, it may be useful to look at the legal causes of corruption, which are more neutral from the point of view of ideological preferences. Although they are not totally neutral, it is possible that the degree of coincidence among political parties, and with it the possibility of generating a political agreement that overcomes partisan discrepancies, is greater when trying to correct legal structures that facilitate corruption. In other words, while combating the economic or political causes of corruption can lead to an intractable discussion, people of different schools of thought, but equally motivated to combat the scourge, can more easily agree on correcting the legal causes of corruption.

---

42. ALFONSO SABÁN GODOY, EL MARCO JURÍDICO DE LA CORRUPCIÓN 14 (1st ed., 1991). *See* also Jesús González Amuchástegui, *Corrupción, Democracia y Responsabilidad Política, in* PODER, DERECHO Y CORRUPCIÓN 63, 72-73 (Miguel Carbonell & Rodolfo Vázquez eds., 2003) (discussing the difficulty of comparing levels of corruption in different political regimes).

43. BENITO PÉREZ GALDÓS, EPISODIOS NACIONALES 4 (2nd ed. 1976).

44. INDRO MONTANELLI & MARIO CERVI, L' ITALIA DEGLI ANNI DI FANGO (2013) (ebook); Alberto Vanucci, *La corrupción en los sistemas políticos democráticos. Algunas notas para un análisis comparado, in* PODER, DERECHO Y CORRUPCIÓN 81, 103 (Miguel Carbonell & Rodolfo Vázquez eds., 2003).

D. The Legal Causes of Corruption

We talk about the legal causes of corruption because the law, in addition to serving as an instrument for an economic system that fosters corruption, can also act independently as a factor of corruption. This is paradoxical since its mission should be to help in the fight against the phenomenon. However, in Argentina, in many cases it acts as its ally.

This paper is, therefore, an attempt to describe some of the legal factors that operate as a breeding ground or even as a direct cause of corruption, regardless of the prevailing economic or political system, and to point out preliminarily some possible remedies. The problem goes beyond a particular regime or party. Situations such as those described here have been taking place in Argentina for decades.

The chosen approach is also neutral from a second point of view: the analysis of certain legal regimes that would allow corruption to flourish does not necessarily imply that all the administrative agencies that currently apply those regimes are affected by the vice. Instead of a detective analysis more typical of criminal law, which often falls into unproven accusations and which, in any case, already has rigorous regulations and abundant literature, what we propose is a conceptual analysis that is not aimed at specific agencies or officers. Hence, the examples of inconvenient rules or practices presented in this work do not pass judgment on the conduct of the officers who apply them. Examples will often involve the main organs of the national administration, whose actions are subject to various controls and are carried out under permanent public scrutiny, so it would be unfair to accuse them of being systematically involved in criminal conduct. But such examples are necessary because they demonstrate how, at the highest levels of public administration, rules are used that leave the field open to corruption.

The proposed approach differs from, but is complementary to, the approach generally followed when attempting to combat corruption by legal methods. These methods usually seek to punish those guilty of corruption by establishing disclosure of obligations of various kinds for public officials, typifying crimes, establishing penalties, imposing incompatibilities, prohibitions and controls, permitting presumptions that shift the burden of proof, and adopting other measures of deterrence and prosecution. This is the case with the laws that have been passed in our country in recent years, with the treaties that Congress has approved during those same years, and with the myriad of

administrative regulations that have been issued during that period.[45] There is no shortage of rules.[46]

However, little attention has been paid to the legal framework that fosters corruption and to the possible remedies to avoid such a consequence and, where possible, prevent corruption. As noted by Luis Moreno Ocampo, "To avoid corruption it is more important to detect guilty systems than guilty people."[47]

45. First, *see* CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 256-268 (punishing various offences against the public administration that consist in acts of corruption). In this regard, *see* JORGE LUIS RIMONDI, CALIFICACIÓN LEGAL DE LOS ACTOS DE CORRUPCIÓN EN LA ADMINISTRACIÓN PÚBLICA (1st ed. 2005). In addition, our country has ratified three international conventions to combat corruption: *see Ley de Convención Interamericana contra la Corrupción* [Inter-American Convention Against Corruption Approval Law], Law No. 24759, Jan. 13, 1997, B.O. (Arg.) (approving the Inter-American Convention against Corruption), *Convención sobre la Lucha contra el Cohecho de Funcionarios Públicos Extranjeros en las Transacciones Comerciales Internacionales* [Convention on Combating Bribery of Foreign Public Officials in International Business Transactions] Law No. 25319, Oct. 6, 2000 (approving the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions), and *Convención de las Naciones Unidas contra la Corrupción* [United Nations Convention Against Corruption], Law No. 26097, Jun. 6, 2006 (approving the United Nations Convention against Corruption). Argentina has also enacted *Ley de Ética en al Ejercicio de la Función Pública* [Ethics in Public Office Law], Law No. 25188, Oct. 26, 1999, *regulated by* Decree No. 164/99, Dec. 28, 1999 (repealed in large part by Decree No. 808/00, Sep. 20, 2000), and issued Decree No. 41/99, Jan. 27, 1999 (enacting a Code of Ethics for the Civil Service), Decrees No. 201/17, Mar. 21, 2017; and No. 202/17, Mar. 22, 2017 (establishing rules on conflicts of interest), and various resolutions approving special codes of ethics for different departments (*see* Resolution No. 393/2021, Dec. 10, 2021 (Ministry of Public Works) and Order No. 86/18, Mar. 26, 2018 (AFIP, the Argentine IRS)). In this regard, *see* MIRIAM MABEL IVANEGA, MECANISMOS DE CONTROL PÚBLICO Y ARGUMENTACIONES DE RESPONSABILIDAD 234-43 (1st ed., 2003); Agustín Gordillo, *Un Corte Transversal al Derecho Administrativo: la Convención Interamericana contra la Corrupción*, 1997-E L.L. 1091 (1997); Julio Rodolfo Comadira, *Función Pública y Corrupción*, 1 Revista Jurídica de Buenos Aires 463, 463 (2004); María Jeanneret de Pérez Cortés, *Ética y Función Pública*, 2005-D L.L. 1097 (2005); Federico Nielsen & Juan Pablo Comadira, *Apuntes sobre los Principios de la Ética Pública en el Derecho Argentino,* 267-268 Documentación Administrativa, 135 (2004). Finally, *Ley de Responsabilidad Penal Empresaria* [Corporate Criminal Liability Law], Law No. 27401, Dec. 1, 2017, was enacted in 2017 and establishes the criminal liability of private companies for participating in acts of corruption sanctioned by the Penal Code.

46. That is why it is criticizable that, in the face of a criminal event that moves public opinion, voices are raised calling for changes in the legislation because this, many times, is not necessary to punish the conduct and, in addition, it can imply that such conduct is not provided for by the law then in force and, therefore, cannot be retroactively punished.

47. Moreno Ocampo, *supra* note 8, at 125.

E. Anomie as a Backdrop to Corruption

Based on the classic work of Carlos Nino, it is a commonplace to affirm that Argentina is "a country outside the law."[48] But the causes of this anomie, that is, the reasons why Argentines do not comply with the law, are not always sufficiently emphasized. Although the question is beyond the scope of this article, it is useful to identify these causes because some, if not all, influence the expansion of corruption.

The reasons why people obey laws have been classified as instrumental and normative.[49] The former includes the severity of penalties for violating the law and the effectiveness of their enforcement. The latter, on the other hand, points to the reasons for voluntarily obeying the law. They are: the intrinsic justice of the rule, the legitimacy of the regime that has established it, and the reasonableness and justice of the procedures with which the law is applied, and its violations are judged.

As will be seen throughout this article, several of these reasons have often been absent in Argentina. While penalties are generally severe, enforcement is far from effective and is often arbitrary. With regard to the legitimacy of the rule-making regime, it should be recalled that a large part of our population comes from countries that for centuries, if not millennia, have been subject to foreign domination (southern Italy is an example). Therefore, they maintain a tradition that the violation of the law is an expression of their human dignity. An autochthonous circumstance can be added which is the succession of *de facto* governments that ruled in Argentina during the twentieth century. However, these last forty years of democracy have not made us more compliant.

But the factor of the intrinsic injustice of many Argentine norms is the one that, in our opinion, most favors the culture of non-compliance: a State that (due to high inflation rates throughout the years) deprives its people of a real currency and makes it a crime to try to deal in a real one, cannot demand respect for its legislation. We will discuss this point at length in section III.

48. NINO, *supra* note 7.

49. TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1st ed. 2006); *see also* NINO, *supra* note 7, at 110-18, 129-35.

F. Law, an Ally of Corruption

To understand how the law operates in favor of corruption, we start from the premise that a normal person, faced with a clear and reasonable requirement of a norm, the violation of which is controlled and severely sanctioned, will prefer to comply with it rather than risk the sanction. Argentines are no exception. For example, there is no evidence that the many Argentines living abroad engage in frequent acts of corruption when they live in countries with properly designed legal systems.

Certain characteristics of a legal system, however, may change this preference in a certain percentage of cases. Alternatively, even without changing this preference, it may place people in a situation of punishable non-compliance despite trying to comply with the rule or believing that they are doing so. As explained in the next section, this is the case with Argentine law due to certain characteristics that Argentina often presents, namely:

- There are an excessive number of rules.
- The very existence of the applicable rule is often unknown to most of the people who should comply with it.
- Due to the continuous regulatory changes, it is difficult to know for sure what the current text of the applicable regulation is.
- Standards are often obscure and open to a variety of interpretations, some of which raise, and others significantly reduce, the cost of enforcement.
- The rules are often of dubious validity and unreasonable.
- The rules often impose excessive formal requirements.
- In law or fact, the rules usually enable the official to determine the degree of compliance that can be required of each individual or category of individuals.
- Many times, it is difficult or impossible to comply fully with the rule, or its cost of compliance is very high, so it puts at risk the continuity of private conduct or, plain and simple, prevents it.
- Control is usually lax, so the probability of detecting non-compliance is very low.
- Even if the control is not lax, the authority usually allows the operation of a sector of society in violation of the norm and sanctions a small percentage of non-compliant individuals, whom it selects not always with transparent and politically neutral criteria.

 In some cases (as in environmental matters), it is cheaper to face fines than to carry out the tasks, or accept the limitations, imposed by law.

 Even if the punishment envisaged is very severe, the benefits of non-compliance with the rule are generally so high as to justify running the risk of detection.

At the same time, the discretion of the Argentine public official responsible for controlling and sanctioning non-compliance is very great due to the presence of the following additional factors:

 It is not always possible for individuals to obtain appropriate judicial intervention to confirm the meaning or validity of the rule without running the risk of being sanctioned for non-compliance.

 The penalty may be so severe that it can lead to imprisonment or bankruptcy for the defaulter.

 There is little administrative control over the sanctioning officer. Moreover, the sanction of the private individual may be well regarded, even if it is unjust, since it exempts the official from suspicion of favoritism.

 Judicial review of the official's decision is ineffective because it is slow or costly, or because of the existence of legal doctrines that make it possible to predict a decision contrary to the private challenger of the decision.

All these circumstances, on the one hand, encourage non-compliance with the rule and, on the other, create or increase the legal defenselessness of individuals. Corruption is present where the individual is legally defenseless vis-à-vis the public officer. This is because any person placed in a situation of legal non-compliance is subject to corruption, either at the initiative of the person himself when he is discovered, or at the initiative of the public officer. Thus, legal uncertainty, unreasonable regulations, and excessive discretionary power of the administration give rise to a breeding ground for corruption. We will consider these factors in that order.

II. LEGAL UNCERTAINTY AS A BREEDING GROUND FOR CORRUPTION

The lack of legal certainty is frequently mentioned in Argentina as a brake or deterrent to the flow of private investment, national and

foreign, that the country needs.[50] Here, we will consider it as a factor that affects the spread of corruption.

The fact that legal uncertainty acts as an ally of corruption is certainly not a new phenomenon. An author who studied corruption as the cause of the decline of the Roman Empire enumerates certain factors that in that distant era favored corruption by facilitating the extortion of private individuals by public officials. Namely, the increasing degree of violence employed by the Government against private individuals, the ambiguity of the laws, an increase in the number of laws, and the intrusive nature of the rules and officials.[51] These same factors, all of which cause legal uncertainty and oppression of individuals, and indirectly corruption, are present in our country today.

A. Excessive Number of Rules

The lives of private individuals have been hyper-regulated by the Argentine Government. Just as it is impossible to build a dam stopping only part of a river, and as individuals react to new regulations by changing their conduct to circumvent them, new regulations are continuously needed to expand the restrictions and reach new conduct. In 2002, the Central Bank of Argentina issued 1,015 (one thousand and fifteen) regulations,[52] i.e., at a rate of four for each working day. The parallel with ancient history repeats itself: "Innumerable are the decrees that are issued and published every day," said a complaint that has been preserved since the time of the decline of Rome.[53] Also, it is estimated that during our colonial era, the three centuries that it lasted, the Spanish crown, turning a deaf ear to Don Quixote's warning about the excessive number of "pragmatics", issued almost a million laws and regulations.[54] An IMF officer recently called the interference of the Argentine Government with the private economy "brutal".[55] The

50. *See La Seguridad Jurídica y la Credibilidad de Nuestra Palabra,* LA NACION, (June 2, 2024), https://www.lanacion.com.ar/editoriales/la-seguridad-juridica-y-la-credibilidad-de-nuestra-palabra-nid02062024/.

51. RAMSAY MACMULLEN, CORRUPTION AND THE DECLINE OF ROME 137 (Yale University Press, 1988).

52. *See* Banco Central de la República Argentina [Central Bank of Argentina], Indice de Comunicaciones [Index of Regulations] (Comunicaciones"A"–"C"), https://www.bcra.gob.ar/Pdfs/SistemasFinancierosYdePagos/Comunicaciones/indhasta1207.pdf.

53. MACMULLEN, *supra* note 51, at 137.

54. *See* VARGAS LLOSA, ÁLVARO, RUMBO A LA LIBERTAD 51 (Planeta, 2004).

55. This is based on the author's own experience.

simplest transaction, such as the closing of the sale of a house, requires a logistical operation worthy of military maneuvers.[56]

B. Ignorance of the Standard

Panama Refining Co. v. Ryan[57] is famous in U.S. constitutional history because it is one of the few cases in which the U.S. Supreme Court declared a delegation of legislative powers made by Congress in favor of the Executive Branch unconstitutional. One of the factors that influenced the Court to disqualify the regulations approved by the President in exercise of that delegation was the ignorance of the administration itself about the correct text of the regulations in force. This ignorance had been caused by the farrago of regulations that it had issued in recent years, implementing the power that it had been delegated by Congress.[58]

The same phenomenon occurs, to an even greater degree, today in Argentina. There are cases in which the administration invoked repealed rules and the judge issued his ruling applying them. The fact that one of the cases of arbitrary judgment occurs when the judgment is based on a law that is not in force indicates that the phenomenon recurs with some frequency.[59]

Although most national rules are published in the Official Gazette, and electronic data systems are in place,[60] none of these means ensure

---

56. *See* Noelle Harff & Eliana Raszewski, *With buyers wary, Argentina's zombie mortgage market has a long road to revival,* REUTERS (July 16, 2024), https://www.reuters.com/world/americas/with-buyers-wary-argentinas-zombie-mortgage-market-has-long-road-revival-2024-07-16/ (describing how inflation exceeding 200% has led major transactions in Argentina to be conducted in U.S. dollars in cash because of widespread distrust of banks and past government "pesification" of dollar deposits and obligations).

57. *See* Panama Refining Co. v. Ryan*,* 293 U.S. 388 (1935) (holding that a delegation of legislative authority to the Executive branch was unconstitutional).

58. *See id*.; *see also* LOUIS L. JAFFE & NATHANIEL L. NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS 52-53 (Little, Brown & Co., 4th ed. 1976).

59. *See* NÉSTOR P. SAGÜÉS, DERECHO PROCESAL CONSTITUCIONAL: RECURSO EXTRAORDINARIO, VOL. 2, at 252-55 (4th. ed. 2016) (explaining that judgments applying a rule not in force may be reversed as arbitrary).

60. The Legislative and Documentary Information Area of the Documentation and Information Centre of the Ministry of Economy administers a free and publicly accessible database called *Infoleg*. According to the provisions of Decree 67/2003, this area must coordinate the compilation and updating of national legislation on economic matters, its interpretative rules and background, so there is no obligation to compile all national legislation. We would also like to highlight the work carried out by the Congressional Parliamentary Information Office. There is also the Argentine Legal Informatics System (SAIJ), a service under the Ministry of Justice and Human Rights. *See*

complete coverage. In addition, there is no edition of all laws classified by topic and updated periodically. This makes the determination of which of the existing laws and regulations remain effectively in force a cumbersome matter. The phenomenon is even more serious at the provincial and municipal levels. To this day, there are municipalities in Greater Buenos Aires that do not publish their ordinances.[61]

Often, one cannot tell the law in force. New rules usually end with an indiscriminate derogation ("any norm that conflicts with the present one is hereby repealed"), and there is often no express derogation of norms of sublegal hierarchy when the law they regulated is repealed. The same applies to laws that are repealed without amending other laws that refer to them.[62] It has been said that 85% of the laws currently in force in the country are not applicable.[63] The ambitious project of enacting an "Argentine Legal Digest" including only the laws currently in force has not been completed successfully, thus adding more confusion as to which laws should be considered in force.[64] Alberto Vannucci speaks of the *inertial* force of laws that, when they remain

INFOLEG, Ministerio de Justicia, https://www.infoleg.gob.ar/ (last visited Sept. 13, 2025); Sistema Argentino de Información Jurídica (SAIJ), https://www.saij.gob.ar/ (last visited Sept. 13, 2025); Dirección de Información Parlamentaria, Honorable Cámara de Diputados de la Nación, https://www.hcdn.gob.ar/secparl/dgral_info_parlamentaria/ (last visited Sept. 13, 2025).

61. A State company once called a competitive tender to be run under the rules of the company's contracting regulation. When a copy of this regulation was requested by an interested party, the company's officers refused to produce it. The company's in-house counsel, a well-known administrative law author, verbally interceded to no avail. "It's very similar to the national contracting regulation" was the best help that such counsel was able to provide. This is based on the personal experience of the author. The name of the private party involved is withheld for confidentiality reasons.

62. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "Visa Argentina S.A.," Fallos (327-2703) (Arg.) (holding that later legislation may implicitly modify earlier laws).

63. Laura Serra, *No sirve el 85 por ciento de las leyes que hoy rigen en el país,* LA NACION (Arg.), June 12, 2005, https://www.lanacion.com.ar/politica/no-sirve-el-85-por-ciento-de-las-leyes-que-hoy-rigen-en-el-pais-nid712271/.

64. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "Expreso Tigre Iguazú SRL c. Estado Nacional," Fallos (2024-347-2015) (Arg.) (where the Supreme Court decided a case on the basis of a report that indicated that more than ten years after it had been prepared, the Legal Digest was not yet "operative," so a law described therein as "repealed" was still in effect). *See also* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "Empresa San José S.A. c. Estado Nacional," Fallos (2023-346-1070) (Arg.).

in force indefinitely, "increases with inflationary rhythms the number of binding provisions to which individuals are subject."[65]

Hence, over time, the law acquires a sedimentary character caused by the continuous superimposition of norms whose validity, increasingly difficult to analyze, is shrouded in a *cloud of indeterminacy* according to Vannucci.[66] Thus, Argentine exchange controls were reinstated in December 2001 through the repeal of a 1991 decree, which in turn had repealed the decree that had established an exchange regime in 1964.[67] The effect was to revive the 1964 regime and consequent doubt about whether the regulatory rules of the reinstated regime were also reinstated.[68]

Added to the lack of knowledge of the existence of the norms is the confusion created by their repeated modifications, as in the 2002 Central Bank example of 1,015 regulations in one year.[69]

Even discounting the cases in which the main parties affected by the legislation are sophisticated corporations, like in the Central Bank example cited above, (financial entities that receive continuous legal advice and are therefore well prepared to analyze the new rules),[70] the position of the private citizen in the face of such an avalanche of regulations is often one of total uncertainty. The phenomenon is widespread in public administration. As Mario Vargas Llosa warns, "A logical consequence of such abundance is that each legal provision has another rule that amends, attenuates, or rejects it." Which, in other words, means that those who are immersed in such a pile of legal contradictions live transgressing the law, or perhaps more demoralizing

65. Alberto Vannucci, *La Corrupción en Los Sistemas Políticos Democráticos. Algunas Notas para un Análisis Comparado*, *in* PODER, DERECHO Y CORRUPCIÓN 81, 95 (Miguel Carbonell & Rodolfo Vázquez eds., 2023).

66. *Id.*

67. Decreto 1606/2001, *Boletín Oficial* [B.O.] December 6, 2001 (Arg.) (repealing its predecessor Decreto 530/91, (B.O March 28, 1991 (Arg.)), and therefore reinstating Decreto 2581/64, (B.O April 13, 1964 (Arg.)).

68. The Office of the Attorney General of the Treasury has had to rule on the non-tacit reinstatement of rules. See Procuración del Tesoro de la Nación [Attorney General of the Treasury of Argentina], *Dictámenes* 235:*156 bis,* 156 *quinque vta*. (Arg.).

69. Banco Central de la República Argentina, *supra* note 52.

70. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/05/2000, "Cadipsa S.A. v. Estado Nacional et al.," Fallos (2000-323-1146) (Arg.) (recognizing that specialized companies are presumed to have greater knowledge of applicable rules).

than that, in a structure of this nature, any abuse or transgression can find a legal twist and turn that redeems and justifies it."[71]

This normative anarchy is aggravated by the lack of unity in the behavior of the different organs of the administration. At the beginning of 2005, the Central Bank initiated proceedings against exporters who followed a course of conduct considered valid at the time by the Ministry of Economy, but never accepted by the Central Bank.[72] It reached the absurdity of the Central Bank initiating administrative proceedings against companies that had violated terms set by the enforcement authority of a rule deemed invalid by the Central Bank itself.[73] Gordillo's words are relevant: "Regulations are the source of most illegality and arbitrariness in administrative agencies. Nowhere else in administrative law is arbitrariness, caprice, self-contradiction, improvisation and permanent unpredictability, constant countermarches, and misuse of power so enshrined."[74] The result is that, except for large companies (and sometimes without that exception), private individuals carry out their activities in ignorance of many of the rules they must abide by. They learn of their existence when they are punished for their violation, at which point they evaluate whether it is in their interest to correct their behavior for the future, or whether such correction implies such a cost that it would prevent them from continuing their activities,

71. DE SOTO ET AL., *supra* note 32, at XXIV.

72. *See Fuero Penal Económico confirma libre disponibilidad del 70% de las divisas de exportaciones de petróleo y gas* [*The Economic Criminal Court Confirms the Free Availability of 70% of the Foreign Currency Generated from Oil and Gas Exports*], MARVAL (Dec. 13, 2007), https://www.marval.com/publicacion/fuero-penal-economico-confirma-libre-disponibilidad-del-70-de-las-divisas-de-exportaciones-de-petroleo-y-gas-5381?lang=es.

73. The deadlines for the sale to the Central Bank of the foreign currency proceeds of exports, the violation of which was investigated by the Central Bank, had been set by the enforcement authority designated by Decree 1638/01 for the purpose of implementing the same. (*See* S.C. Resolution 269/01). However, the Central Bank in repeated proceedings maintained, with the support of an opinion of the Attorney General of the Treasury, the nullity of Decree 1638/01 because it sought to modify a norm of higher hierarchy, namely: Decree 2581/64 reinstated by Decree of Necessity and Urgency 1606/01. *See* Cámara Nacional de Apelaciones en lo Penal Económico, (CNPenal Económico) [National Court of Economic Criminal Appeals], 12/21/2012, "BBVA Banco Francés S.A. y otros s./ infracción Ley 24.144," La Ley [L.L.] (AR/JUR/71765/2012) (Arg.) (Reversing fines imposed on a private bank and its officers for violations of the Exchange Control Law and its implementing regulations issued by the Central Bank itself, noting that the Central Bank's own officers issued contradictory opinions on the illegality of the Defendants' conduct).

74. AGUSTÍN GORDILLO, TRATADO DE DERECHO ADMINISTRATIVO, VOL. 1, PARTE GENERAL [TREATISE ON ADMINISTRATIVE LAW, VOL. 1, GENERAL PART] at VII-20 (8th ed. Buenos Aires, FDA 2003).

and therefore they persist in the violation, trying to curry favor with the official who controls them.

This situation of perpetual non-compliance, this feeling that the mere knowledge of the rules they must comply with — let alone compliance itself — is unattainable for the common man, makes a large part of the population accept *ab initio* that it will have no legal defenses against the authorities. That is why the solution to one's predicament when accused of violating a norm can only be irregular. Hernando de Soto calculated that the amount that Peruvian informal entrepreneurs had to pay illegally to avoid being sanctioned amounted in some cases to 15% of their gross income.[75]

A partial remedy to the situation is possible. Every department should keep an updated record, ordered by subject, of the rules it applies and that are in force, which must be available to individuals.[76] Electronic databases make this possible today at a very low cost. The rules should also be simplified, and the number of amendments should be reduced. Individuals should be aware of the regulations in force, however imperfect they may be, rather than to sacrifice that knowledge (and therefore the possibility of complying with them) for the sake of the continuous improvement of the regulations. It is also advisable to set a time limit between the publication of the regulation and its entry into force. Individuals should not be forced to suddenly change their conduct but should be granted, unless exceptional reasons of public interest prevent it, a reasonable transition period.

C. The Obscurity or Ambiguity of the Rules

Another important cause of legal uncertainty is the obscurity or ambiguity of the rules, or even the contradiction between them. These same factors of complexity and lack of clarity of the rules have even been accused of being a cause of corruption in the European Union itself.[77]

---

75. *See generally* DE SOTO ET AL., *supra* note 32.

76. From 2003 onwards, and for some time, the Central Bank published monthly summaries of the exchange regulations in force. Today it does so without equal regularity.

77. JAIME RODRÍGUEZ-ARANA MUÑOZ, ÉTICA, PODER Y ESTADO [ETHICS, POWER, AND STATE] 174 (2004).

The clarity of norms is one of the cardinal requirements of the "morality of the law" and thus of the existence of the rule of law.[78]

When a rule is obscure, an official may interpret it broadly or restrictively, so that the individual does not know for sure what conduct is expected. It usually happens that, when faced with two possible readings of the rule, individuals choose to follow the less restrictive one, so they are thereafter at the mercy of the implementing authority, which can declare the most restrictive interpretation correct.[79] Only at that point will the public know what to expect for sure. It is common for situations of this type to develop for years in full view and with tolerance of the authorities, but without such tolerance serving as a legal defense when the rule is interpreted in a sense contrary to that which until then was applied by individuals.

The obscurity or ambiguity of rules is a common phenomenon, especially at the regulatory level. Several causes contribute to this situation, and only some of them are unintentional. Carelessness in drafting is common, a defect that is usually due to the urgency of putting into force regulations in an economy that lives from emergency to emergency,[80] to the point that the emergency declared by a law at the beginning of 2002 was successively extended until it expired at the end

78. *See* LON L. FULLER, THE MORALITY OF LAW 35 (1969); Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1988–93, 2002 (2015); Juan Zocca, Opinion, *Un fallo que recuerda la importancia de la claridad, precisión y coherencia de la actuación administrativa* [*A Ruling that Underscores the Importance of Clarity, Precision, and Consistency in Administrative Action*] (Aug. 5, 2020), https://abogados.com.ar/un-fallo-que-recuerda-la-importancia-de-la-claridad-precision-y-coherencia-de-la-actuacion-administrativa/26466 (discussing the need for clarity and coherence in administrative action).

79. This is based on the author's own experience.

80. *See* JULIO C. CRIVELLI, LA EMERGENCIA ECONOMICA PERMANENTE [THE PERMANENT ECONOMIC EMERGENCY] (2001) (discussing the persistent nature of Argentina's economic crises).

of 2017,[81] only to be renewed in 2019 and 2024.[82] Only carelessness can explain cases not only of obscurity but of real contradiction between the rules of the same law; thus, the law that regulated Private Retirement and Pension Funds established in separate articles different courts to appeal the same measures.[83] Further, regulators often fail to write with precision, since if it is not easy to express legally what the author wishes, it is even more difficult to express *only* what is wished. The problem is compounded by the fact that the power to participate in the drafting of the law depends more on the political proximity of someone to the then-current authorities than on their knowledge of legislative drafting technique or of the subject matter itself. It is regrettable that our country's legislatures seem to lack offices responsible for assuring correct drafting or, where the offices exist, that so little attention is paid to them. The low quality of drafting norms has been pointed to as one of the causes of our national *anomie*.[84] The situation is compounded by the lack of discipline rampant in Argentine administrative law. On the one hand, legislators misuse concepts of univocal meaning.[85] On the other hand, it tolerates academic positions that ignore the mandates of the legislator when they contradict the preferences of the scholar. Thus, the Law on State Companies provided that these entities would be governed by the rules that apply to private

81. *See Emergencia Pública y Reforma del Régimen Cambiario* [Public Emergency and Exchange Rate Reform Law], *Law No.* 25820, Dec. 31, 2003, B.O. (Arg.); *Emergencia Pública* [Public Emergency Law], *Law No.* 25972, Dec. 22, 2004, B.O. (Arg.); *Emergencia Pública* [Public Emergency Law], *Law No.* 26077, Jan. 10, 2006, B.O. (Arg.); *Emergencia Pública* [Public Emergency Law], *Law No.* 26204, Dec. 20, 2006, B.O. (Arg.); *Emergencia Pública* [Public Emergency Law], *Law No.* 26339, Dec. 21, 2007, B.O. (Arg.); *Emergencia Pública* [Public Emergency Law], *Law No.* 26456, Dec. 22, 2008, B.O. (Arg.); *Emergencia Pública* [Public Emergency Law], *Law No.* 26729, Dec. 28, 2011, B.O. (Arg.); *Emergencia Pública* [Public Emergency Law], *Law No.* 26896, Dec. 27, 2013, B.O. (Arg.); *Emergencia Pública* [Public Emergency Law], *Law No.* 27200, Nov. 3, 2015, B.O. (Arg.).

82. *See Ley de Solidaridad Social y Reactivación Productiva en el Marco de la Emergencia Pública* [Social Solidarity and Productive Reactivation Law in the Framework of the Public Emergency], Law No. 27541, Dec. 23, 2019, B.O. (Arg.); *Ley de Bases y Puntos de Partida para la Libertad de los Argentinos* [Law of Bases and Starting Points for the Freedom of Argentines], *supra* note 1.

83. *See Sistema Integrado de Jubilaciones y Pensiones* [Integrated Retirement and Pension System Law], Law No. 24241, Oct. 13, 1993, B.O. arts. 118, 152 (Arg.).

84. NINO, *supra* note 7, at 231.

85. CARLOS GRECCO & GUILLERMO A. MUÑOZ, LA PRECARIEDAD EN LOS PERMISOS, AUTORIZACIONES, LICENCIAS Y CONCESIONES [THE PRECARIOUSNESS IN PERMITS, AUTHORIZATIONS, LICENSES, AND CONCESSIONS] 83 (Buenos Aires, Depalma, 1992) (commenting on the discrepancy between legal terminology and that used by doctrine).

corporations and that the laws on public accounting, public works, and administrative procedures would not apply to them.[86] Despite the clarity of these rules, one of their first interpreters, considering that these rules were legally flawed, argued that the excluded regimes should still be applied.[87]

Given that the rules are often drafted by politicians or public officials, it is not surprising that their texts are broad and generous in describing the powers of the State, but timid in defining the rights of individuals. Thus, the Public Works Law includes among the grounds for termination of a contract the non-compliance of the contractor, but not a delay in payment, which is the most common situation of non-compliance of the public administration.[88] At the same time, the Law on State Liability does not expressly provide for compensation for loss of profits in the event of an unlawful act of the administration. But when it regulates such liability for lawful acts, its Article 5 includes the following sentence, "in no case shall reparation be made for loss of profits." The question that arises is whether this exclusion is limited to liability for a lawful act, or does it apply in all cases of State liability? As can be seen, the solution in favor of the individual requires an elaborate construction of the norms, because the solution does not arise expressly from the text of the law itself.

Ambiguity is often deliberate for two reasons. First, it is often a result of political negotiation. "Ambiguity breeds consent," as it allows both sides of the discussion to conclude (or pretend) that they won the argument. Second, because allowing two readings of the rule increases the discretion of the official who applies it. In addition, the author of the rule is protected from criticism because they can always invoke the reading most favorable to the State, even if they have allowed individuals to apply the opposite reading for a long time. The political acceptance of the norm is easier when those subject to it think, *ab initio*, that it allows for a benign interpretation. It is only at a second stage, once the validity of the rule with little negative impact has been

86. *Sociedades del Estado* [State-Owned Companies Law], Law No. 20705, arts. 2, 6, June 6, 1974, [24738] A.D.L.A. 1974-III-2026 (Arg.).

87. Rodolfo C. Barra, *Acerca de la Naturaleza Jurídica de las Sociedades del Estado* [*Regarding the Legal Nature of State-Owned Corporations*], 67 E.D. 601 (Arg.).

88. *Compare Ley de Obras Públicas* [Public Works Law], Law No. 13064 [Public Works Law], arts. 50 & 53, Oct. 28, 1947, B.O. (Arg.) with Spain's Public Sector Contracts Law of 2017 art. 198 (allowing the contractor to terminate the contract when the administration's delay in paying the price exceeds six months).

established, that the restrictive reading is put into effect, and the restrictive reading can be given retroactive effect because it is the mere interpretation of a rule whose text has not changed.[89] Hence, the reluctance of the author of the rule to clarify it. If, in the face of a change in economic or political circumstances, the tolerated interpretation begins to be criticized, it may be ignored as valid without its author or official interpreter being held responsible. That is why requests for clarification submitted by individuals are often answered with the same degree of ambiguity ("petitioners must conform to the regulations in force") as that of the rule whose clarification is sought. At the same time, it is often the case that the first interpreter of the regulation and the judge of its violation is the same agency that issued it, so the regulation will be interpreted by a party with an incentive to interpret it to absolve it of the accusation of lack of foresight in the drafting.[90]

The first remedy for this situation is the application in public law of the principle *contra stipulatorem*, according to which, in case of doubt, writings are interpreted against their author, in this case, against the State, and in favor of the individual.[91] The reason behind this rule of interpretation is as valid in public law as it is in private law: the sanction should fall on the person responsible for the drafting. First of all, they must assume the risk of the obscurity that they themselves have created, and, more, because in this way they will take care to write clearly in the future. This solution is in line with the traditional rule that mandates the restrictive interpretation of norms that limit individual freedoms and rights: *In dubio pro libertate.*[92] In Argentina,

89. The retroactive effect of normative interpretations is uniformly accepted by case law. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 02/03/2011, "S.A. Compañía Argentina Agrícola e Industria Ingenio Río Grande c. Nación Argentina," Fallos (2011-285-447) (Arg.).

90. *See Ley de Procedimiento Fiscal* [Fiscal Procedure Law], Law No. 11683, art. 16 (Arg.); *Régimen Penal Cambiario* [Foreign Exchange Criminal Regime], Law No. 19359, t.o. by Decree 480/95, art. 5 (Arg.).

91. CÓDIGO CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. CIV. Y COM.] [CIVIL AND COMMERCIAL CODE] art. 987 (Arg.) (laying down the rule for contracts concluded by adhesion to predisposed general clauses, as are, in practice most State contracts); *but see Hotel Internacional Iguazú S.A. v. Nación Argentina*, 308 Fallos 618 (1986) (Arg.) (Argentine Supreme Court following the opposite rule, holding that a private contractor can only claim what is expressly and clearly stated in his favor).

92. AGUSTÍN GORDILLO, TRATADO DE DERECHO ADMINISTRATIVO, VOL. 3, EL ACTO ADMINISTRATIVO [TREATISE ON ADMINISTRATIVE LAW, VOL. 3, CH. V] at V-21 (4th ed. Buenos Aires, FDA 1999).

however, the consequences of the confusing wording used by public officers do not fall on them or the State, but on the private individuals.

The second remedy is to negate retroactive effects to the official interpretation of the norm when it contradicts the open and generally followed practice up to that time. If the Supreme Court has rejected the retroactive application of new jurisprudential criteria[93], the same rule should be applied in administrative proceedings, both in the case of express decisions[94] and of tacit decisions resulting from the tolerance of private conduct carried out in an open and ostensible manner. It should be possible to sustain the non-incrimination of private conduct carried out under an appearance of legitimacy created by the administration itself.[95]

These proposed solutions are fair because behaviors generally adopted by a regulated sector are rarely unknown to its regulatory authority.[96] This would put an end to a corruption that consists of severely punishing conduct that becomes illegitimate only when the interpretative criterion accepted by the State is announced or modified. This improper practice is sometimes combined with the offering of payment plans so that "offenders" prefer a lenient punishment to the risk of a lengthy trial that can lead to a fine that puts their survival as a corporate entity at risk. In this way, the State also avoids the risk that its interpretation will ultimately be rejected by the courts. Non-retroactive interpretation would encourage officials to focus on practices that are really infringing, thus maintaining uniform rules of the game for all those who participate in the activity. Often different operators in the market or industry interpret the same rule differently or are subject to different enforcement which increases the risk of arbitrary advantages.

---

93. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "María Esther Tellez v. Bagala S.A.," Fallos 1986-308-552 (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "Sacoar and C. v. Province of Buenos Aires," Fallos 1988-311-2082 (Arg.).

94. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "IBM Argentina S.A v. Administración Nacional de Aduanas," Fallos (1998-321-1248) (Arg.) (illustrating a customs fine based on a change of administrative criteria subsequently set aside by the courts).

95. HECTOR A. MAIRAL, LA DOCTRINA DE LOS PROPIOS ACTOS Y LA ADMINISTRACIÓN PÚBLICA [THE DOCTRINE OF ONE'S OWN ACTS AND THE PUBLIC ADMINISTRATION], (Depalma, 1994).

96. *The BCRA announced that it monitors the purchase and sale of bonds and shares,* LA NACIÓN, (March 23, 2006) (reporting that a bond transaction deemed illicit by the Central Bank represented approximately 25% of foreign exchange financial transactions).

By contrast, the practice of knowingly tolerating for a long-time behaviors that are arguably lawful, and then choosing whom to punish as a lesson (the case of the criminal *vedettes* mentioned below) so that only then will others correct their behavior in the future, is a source of corruption, as those subject to the interpretation seek to avoid punishment. And even if the sanction based on a mere change of criteria is general, the civic effect is still harmful; contrary to the very principles of a Republic, society becomes submissive and fearful of the authority on whose fickle criteria private patrimonies depend. We must be categorical on this point: it is incompatible with the rule of law to consider retroactively certain private conduct unlawful only when it reaches a volume that concerns the authorities.

D. Rules of Dubious Validity

A rule of doubtful validity creates legal uncertainty similar to that caused by an ambiguous rule. In both cases, there is uncertainty about whether certain private conduct is lawful, depending on whether the restricting rule is valid or not.

This phenomenon is as old as the law itself, but has expanded significantly in our country following the 1994 constitutional reform, which empowered the Executive to legislate almost on equal footing with Congress. As a result, the Executive now issues general norms whose validity is often highly contested and largely influenced by political perspectives.[97] This subject is more appropriate for an in-depth legal analysis and exceeds the scope of this work.[98] For this paper, it is enough to note that in *Verrocchi* (1999)[99], the Supreme Court

97. *See* Art. 4, Constitución Nacional [Const. Nac.] (Arg.); *Régimen Legal de los Decretos de Necesidad y Urgencia, de Delegación Legislativa y de Promulgación Parcial de Leyes* [Legal Regime of Necessity and Urgency Decrees, Legislative Delegation and Partial Promulgation of Laws], Law No. 26122, 2006 (requiring both Chambers of Congress reject a decree of necessity and urgency for it to be considered abrogated, and then only with future effect); *Compare* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 03/05/2003, "Provincia de San Luis c. Nación Argentina," J.A. (2003-I-188) (Arg.), *with* CSJN, 26/10/2004, "Alberto Roque Bustos v. Nación Argentina," Fallos (2004) (Arg.).

98. *See* Hector A. Mairal, *La degradación del derecho público argentino* [*The degradation of Argentine public law*], *in* EL DERECHO ADMINISTRATIVO DE LA EMERGENCIA, IV [THE ADMINISTRATIVE LAW OF EMERGENCIES, IV] 17 (2005).

99. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 19/8/1999, "Verrocchi, Ezio Daniel c. Poder Ejecutivo Nacional – Administración Nacional de Aduanas s/ acción de amparo," Fallos (1999-322-1726) (Arg.); Mario A.R. Midon,

established severe restrictions on the power of the Executive Branch to issue decrees of necessity and urgency (i.e., with the force of law). If these guidelines were strictly enforced, a significant portion of the hundreds of such decrees issued in recent decades—particularly those not expressly ratified by laws—would likely be deemed unconstitutional.

Similar doubts are raised about the scope of the delegation of legislative powers that Article 76 of the new constitutional text begins by proscribing and then allows in matters of administration or public emergency.[100]

The 1994 constitutional reform introduced multiple levels of legal norms, such as treaties, laws, and decrees with differing hierarchies. This raises interpretive conflicts, such as whether a law passed by a simple majority can amend one that requires a qualified majority.

Doubts about the validity of government acts can have serious consequences for individuals. For example, taxpayers who relied on an executive decree exempting them from criminal penalties, despite having paid taxes only after an investigation had begun, were later prosecuted. Courts held the decree unconstitutional because it attempted to override an existing law that required payment before a tax investigation had been initiated in order to qualify for the exemption.[101]

Namely, the State encouraged taxpayers to put aside their defenses and pay the tax claimed, promising they would not be sanctioned. However, after accepting the Treasury's claim and paying the tax (with which they lost their legal defenses), those individuals were also criminally prosecuted because the State itself committed the legal error of issuing an invalid permissive rule. In another case, the tax authority applied, and the Tax Court validated a fine for non-payment of a tax that a ruling of the Attorney for the Treasury had considered repealed.[102]

Decretos de Necesidad y Urgencia en la Constitución Nacional y en los Ordenamientos Provinciales [Decrees of Necessity and Urgency in the National Constitution and in the Provincial Ordinances] (Buenos Aires, L.L., 2001).

100. Art. 76, CONSTITUCION NACIONAL [CONST. NAC.] (Arg.) (Author's translation).

101. Cámara Nacional de Apelaciones en lo Penal Económico, Sala A (CN Penal Económico) (National Court of Criminal Appeal for Economic Crimes, Division A), 30/11/2001, "Haygassar Gostanián," La Ley [L.L.] (2001) (Arg.).

102. *Compare Magariños*, Tribunal Fiscal de la Nación, Chamber B, (Dec. 20, 2004), *with* Dictamen No. 020/2005, Procurador del Tesoro de la Nación (Jan. 21, 2005).

There are two remedies that we propose to correct this situation, one rooted in existing domestic law and another inspired by U.S. law. The first is to apply the general principles of criminal law that protect the accused in economic legal matters. Specifically, courts should reject attempts to shift the burden of proof onto the defendant or to rely on presumptions in prosecuting tax offenses. Defendants should be broadly permitted to invoke the defense of error in non-criminal law,[103] especially when the State, which seeks to punish the conduct, was itself responsible for misleading the accused. If economic penal law wishes to achieve its objectives by resorting to sanctions of similar gravity to those of criminal law, it should accept the limits that civilized countries have developed for the latter over the past three centuries.

The second remedy, which will be discussed in more detail later[104], is to exempt from penalties those individuals who proactively challenge a legal rule with serious and well-reasoned arguments, until a court has passed a judgment on the rule's validity. While those who violate a rule and later contest its legitimacy must bear the risk of losing in court, those who transparently question a rule in advance perform a civic duty by promoting legal certainty. Unfortunately, administrative agencies often respond inappropriately: rather than welcoming legal challenges as a contribution to the rule of law, they punish challengers as threats to their authority. In contrast, those who quietly ignore the rule often go unpunished, as their silence is seen as deference to authority, which allows officials to save face.[105]

Together, these remedies would shift the consequences of vague legislation from individuals to the State. This change would not only promote fairness but also encourage Congress and administrative

103. *See* Enrique R. Aftalión*, El Derecho Penal Economico como capítulo del Derecho Penal Especial [Economic Criminal Law as a Chapter of Special Criminal Law], in* 1 TRATADO DE DERECHO PENAL ESPECIAL, 77, 141-144 (1969).

104. See section F (Restrictions on the Access to Justice) below.

105. A private school in Argentina was once asked by tax officials to disclose the names of the persons who paid for the tuition of its students. The school's lawyers challenged the request as a violation of the families' privacy. The reaction of the authorities was stark: "If you insist in the challenge we will prosecute and see that the name of the school reaches the papers. Comply and, if you are aware of a few sensitive cases, just fail to report them." (This comment is based on the personal experience of the author. The name of the private party involved is withheld for confidentiality reasons).

agencies to draft clear rules and avoid applying new interpretations retroactively.

E. Individual Decisions of Dubious Validity

Another major source of legal uncertainty is the dubious validity of many individual administrative decisions. This phenomenon, which is more widespread than commonly assumed, arises due to two main factors. First, the plethora of requirements required to validate the issuance of an individual administrative decision (e.g., respect of due process, legal opinions by government lawyers, proper explanation of motives). Second, the biased way in which those requirements are applied. While legal authors call for strict compliance with such requirements, many judges believe that if those requirements were rigorously applied, administrative work would be paralyzed. Therefore, to mitigate this risk, the theory of "remediation" allows procedural defects to be corrected after the act has been issued and during the administrative review stage.[106]

This proliferation of procedural requirements, coupled with bureaucratic delays, often leads to administrative paralysis. Government officials are reluctant to approve private requests for fear of being tainted by irregularities that they fail to detect, so they delay their decision or avoid deciding. Ironically, to combat this paralysis, administrations frequently bypass formal procedures altogether, producing decisions that are legally vulnerable. Political motivations then determine which flawed decisions are challenged, while others go unexamined. Often, it is the existence of political reasons that leads to the selection of some decisions that are thus flawed, to annul them and even prosecute their authors, ignoring the fact that countless other decisions are accepted daily despite being equally questionable from a formal point of view. The dilemma faced by a conscientious official is harsh. If they adhere strictly to all formal procedures, their actions may be delayed, and they risk being criticized for inefficiency. However, if they prioritize swift action over formalities, they risk prosecution for breaching their duties, regardless of their good faith, once they lose political protection. This creates another cause of legal uncertainty for

106. HÉCTOR A. MAIRAL, CONTROL JUDICIAL DE LA ADMINISTRACIÓN PÚBLICA, 732-34 (2nd ed., 2021).

individuals, who must base their rights on administrative acts that are often subject to legal challenge.

These procedural defects acquire greater legal significance when invoked by the administration itself to challenge its previous actions. In such instances, administrative and judicial rhetoric often invokes the principle of administrative legality and its foundational role in upholding the rule of law. Administrative decisions issued by the highest authorities of the State, after the intervention of their highest legal advisers and controlling agencies, have been declared null and void by the same agency (generally, but not always, under a different administration from that which issued the decision).

It would seem, then, that two different administrative laws coexist. One that is realistic and tolerant of the infractions and errors of the administration, when those defects are raised by private persons. The other, rigid and formalistic, occurs when the same flaws are cited by the state against its own prior conduct.

The result is an erosion of legal certainty. Individuals cannot rely on the stability of rights granted by the administration. Once again, this dynamic fosters a culture of submission in which citizens are encouraged to ingratiate themselves with public officials rather than trust that the law and the courts will protect their rights.

F. Restrictions on the Access to Justice

The possibility of obtaining judicial protection against the abuse of authority is one of the greatest obstacles to corruption. Where judicial remedies are expeditious, effective, and accessible, corruption declines. Conversely, when access to justice is hindered by excessive costs, procedural delays, obstacles, or other legal constraints, corruption thrives. A damaging restriction arises from rules that defer judicial review until after the sanction has already been enforced.[107] An

107. *Ley de Abastecimiento* [Supply Law], Law No. 20,680, art. 16 (Arg.) (thus providing that appeals from a sentence ordering closure of business premises would not suspend the execution of the closure). This aberration was eliminated by *Nueva Regulación de las Relaciones de Producción y Consumo* [New Regulation of Production and Consumption Relations], Law No. 26,991 (Arg.) (2014) (amending the Supply Law and eliminating the non-suspensive effects of appeals from closure orders). The *solve et repete* (pay and then appeal) requirement to be able to challenge fines was only eliminated very recently by *Ley de Bases y Puntos de Partida para la Libertad de los Argentinos* [Law of Bases and Starting Points for the Freedom of Argentines], *supra* note 1, amending *Ley de Procedimiento Administrativo* [Administrative Procedure Law], Law No. 19,549, Apr. 3, 1972, B.O. (Arg.); *see also id.* arts. 1 bis & 7(d).

arrangement appears that is reminiscent of the absurd regime that astonished the character in *Alice in Wonderland*. First comes the sanction, then the trial, and lastly the crime.

Another deterrent to justice is the imposition of serious penalties for non-compliance, which apply even to those who challenge the validity or interpretation of the rule in good faith and with reasonable arguments. When the cost of being wrong is prohibitively high, few will risk questioning the law. In some cases, even favorable rulings in lower courts will not shield an individual from penalties if the Supreme Court ultimately disagrees. However, due process should protect not only those who successfully challenge a rule, but also those whose legal arguments were reasonable, even if they do not succeed. In the United States, courts have recognized this principle. Litigants who present plausible arguments are protected from punitive consequences, even when the courts do not accept their claims. The U.S. Supreme Court has emphasized that the right to judicial review would be merely nominal and illusory if the affected party could only appeal to the courts at the risk of paying fines so high that it is better to yield to orders of uncertain legality than to ask for the protection of the law.[108] What matters is not the outcome of the case, but whether the individual had a legitimate basis to litigate.[109]

Argentina has moved in the opposite direction. At one time, the Tax Court had the authority to waive interest charges in tax matters, which was sometimes calculated at a punitive rate, for taxpayers who had reasonable grounds to litigate, even if their claims were ultimately rejected. However, even though this dispensation was in the hands of an agency of the same administration, such as the Tax Court (an administrative court), it was considered too generous and was repealed.[110]

Delay in the proceedings also weakens the effectiveness of judicial remedies, especially when individuals face sanctions during the lengthy course of litigation. To address this, the legal system should provide expeditious procedural mechanisms that allow individuals to obtain prompt judicial pronouncements on the interpretation and

108. Wadley S. Ry. Co. v. Georgia, 235 U.S. 651 (1915).

109. Oklahoma Operating Co. v. Love, 252 U.S. 331 (1920).

110. *See Ley de Procedimiento Fiscal* [Fiscal Procedure Law], *supra* note 90, art. 150 (Arg.) (repealed 1998); *Reforma Impositiva* [Tax Reform Law], Law No. 23549, Jan. 8, 1988, L.L., Jan. 26, 1988 (Arg.).

validity of disputed rules. Yet administrative agencies are often reluctant to formally clarify their own rules, and when they do, they tend to favor the interpretation that imposes the greatest restriction on the freedoms and rights of individuals. As a result, individuals hesitate to seek formal clarification, fearing adverse outcomes.

Moreover, administrative agencies frequently attempt to shield their interpretations from judicial scrutiny, as seen in early rules surrounding tax consultations submitted by individuals.[111] This is precisely the area where judicial intervention is most necessary. These disputes often center on legal interpretations, matters in which courts should have the final say, and the harm caused by an official measure should not be prolonged by procedural delays.

In practice, delays in court intervention enable constitutional and legal violations to persist, as only a small minority of individuals challenge such violations. Those who do risk sanctions during litigation or afterward if they lose. Meanwhile, any eventual ruling that invalidates the rule often arrives too late to benefit most affected individuals, who are barred from relief due to the statute of limitations.[112] It is difficult to imagine a policy that is more conducive to the propagation of unlawful State conduct than this temporary tolerance of invalid norms.

G. State Violence Against Citizens

State-imposed legal sanctions have increasingly become a vehicle for disproportionate punishment in Argentina, mirroring patterns of repression observed in other historical periods—just as state violence intensified in Late Imperial Rome, where half of the crimes punishable

111. Article 4 of General Resolution 858/00 of the Federal Administration of Public Revenue provided: "The option for this (consultation) regime implies the commitment to abide by the pronouncement of this Agency in those matters submitted to its interpretation and the waiver of any appeal against the answers that are consequently made." This rule has been amended. Today, the rule in force (Resol. General 4497/2019) requires strict compliance with the technical-legal criterion contained in the response to the consultation or the decision of the Ministry of Finance if the administrative appeal provided for in the same Resolution is filed, but does not establish the obligation to waive other remedies, so the decision should be reviewable by the courts and there are cases in which such review was procedurally admitted but rejected in on the merits (CNCAF, Chamber V, *Righetti v. EN*, 7/3/2017; *Cepas Argentinas S.A. v. EN*, February 2019).

112. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "Camaronera Patagónica," Fallos (2014-337-388) (Arg.) (striking down ministerially imposed export duties for want of congressional authorization, though the decision came too late for most taxpayers to recover).

by the death penalty under Constantine were administrative[113] in recent decades, Argentina has seen a significant increase in the harshness of legal sanctions against individuals.[114]

It is baffling to see how the Argentine legal system treats tax offenders in the same manner, or even worse, in procedural aspects, than the person accused of a crime such as homicide or embezzlement of public funds. When the penalties for each crime differ, the difference could be understood, but when the penalties are comparable (a tax evader can be sentenced to nine years in prison and a murderer can receive only eight years), the same due process guarantees should be applied.[115] The contrast becomes even starker when comparing the leniency given to the offenses perpetrated by public officers against the public administration. Offenses such as bribery, influence peddling, embezzlement of public funds, illegal exactions, negotiations incompatible with the exercise of public functions, and illicit enrichment of officials are all crimes that carry a minimum sentence of less than three years and a maximum of six years. Further, these offenses qualify for exemption from imprisonment during the trial and are subject to a suspended sentence.[116] On the other hand, tax evasion receives a maximum sentence of nine years and a minimum of three and a half years when the evaded amount exceeded 15 million pesos (an amount which, due to successive devaluations, had reached $ 10,000 in a given year). Thus, it disqualified the accused from release during trial,[117] which

113. MACMULLEN, *supra* note 51, at 140.

114. A multinational company, with a presence in several Latin American countries, recently estimated that Argentina accounted for 14% of its revenues in the region, but for more than 70% of its legal problems, largely arising from Government regulations and decisions. (This is based on the author's own experience).

115. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 79, *supra* note 45 (Arg.). Compare the penalties established by Article 79 of the Penal Code for intentional homicide with those established by Law 27430 for tax evasion.

116. This was the rule when the minimum sentence did not exceed three years, and the maximum eight. *See* CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 26, 256, 256 bis, 258, 258 bis, 259, 260, 261, 265, 266, and 268 (Arg.); CÓDIGO PROCESAL PENAL DE LA NACION [CÓD. PROC. PEN.] [CRIMINAL PROCEDURE CODE] arts. 316-317 (Arg.). Under the new Federal Code of Criminal Procedure, the possibility of avoiding imprisonment during the trial does not depend solely on the prison terms that may be imposed. CÓDIGO PROCESAL PENAL FEDERAL [FEDERAL CODE OF CRIMINAL PROCEDURE], art. 185 (Arg.).

117. *Reforma Tributaria* [Tax Reform Law], Law No. 27430, Dec. 29, 2017, B.O. (Arg.) (The amount had not been updated since 2017 and, due to successive devaluations, were equivalent to less than $1,000 by 2025). *See also Ley de Bases y Puntos de Partida para la Libertad de los Argentinos* [Law of Bases and Starting Points for the Freedom of Argentines], *supra* note 1; *Régimen*

meant that the defendant was detained until a decision was made as to whether the evasion existed. This is true even though resolving such cases required complicated and debatable legal and accounting analyses.

Moreover, the crime of negligent management of private pension funds (before they were nationalized) had a four-year minimum sentence. (In Argentina's volatile economy, what pension fund administrator could be sure that he would not be subject to such an accusation?) [118] This means that under Argentine law it is a lesser offense for a public official to pocket millions of dollars of state funds than for an individual to seek to avoid paying a much lower tax out of his pocket, or for another private individual to have been negligent in the management of the money of a private pension fund. These differences defy the constitutional guarantee of reasonableness and our historical commitment to legal equality. In 1810, Mariano Moreno drafted a decree on honors to magistrates, stating "the magistrate is not distinguished from others except because he sees that the laws are kept, in the other functions of society he is a citizen without other considerations than those he deserves for his virtues." The draft Constitution of 1813, went further, requiring that all laws, "whether [] prescriptive, penal or afflictive," be applied equally to all.

The threat of pre-trial incarceration based solely on the minimum penalties established for certain criminal-administrative offenses, has profound civic consequences. It empowers the State to threaten to imprison those who are deemed presumptively guilty until a court determines their innocence. Given the complexity of the issues that must be elucidated to reach such a conclusion, and the ambiguities of the legal system that we have just pointed out, it is not difficult to construct *prima facie* plausible accusations. This procedure echoes the very abuses the Magna Carta sought to prevent 800 years ago: No official

Penal Tributario [Tax Criminal Regime], *supra* note 1 (passed on the last days of 2025 it significantly increased significantly the thresholds mentioned in the text).

118. *See Sistema Integrado de Jubilaciones y Pensiones* [Integrated Retirement and Pension System Law], Law No. 24241, *supra* note 83; ELIZABETH A. MARUM, DELITOS RELACIONADOS CON EL SISTEMA INTEGRADO DE JUBILACIONES Y PENSIONES: INCORPORACIÓN Y TRASPASO INDEBIDO DE TRABAJADORES. INVERSIONES ILÍCITAS DE FONDOS. INCUMPLIMIENTO DE LAS PRESTACIONES PREVISIONALES. ANÁLISIS DE LA LEY 24.241 [CRIMES RELATED TO THE INTEGRATED RETIREMENT AND PENSION SYSTEM: IMPROPER INCORPORATION AND TRANSFER OF WORKERS ILLICIT INVESTMENTS OF FUNDS. FAILURE TO PROVIDE PENSION BENEFITS. ANALYSIS OF LAW 24.241] (2003).

shall put a person on trial, the document proclaimed, solely on the basis of the statements of the same official.[119] The chilling effect of such threats lies not in their execution, but in their potential; like the sword of Damocles, their deterrent power rests from the mere possibility of use.

Beyond incarceration, Argentine administrative penalties themselves are often excessive and unrelated to the actual harm caused. For instance, the Customs Code adopts a very broad definition of smuggling, which is punishable by a fine of up to *twenty times* the value of the goods involved, with imprisonment for up to ten years.[120] One foreign automotive company faced a fine that exceeded the company's net worth, which, if imposed, would have resulted in the total confiscation of the shareholders' investment. A similar disproportion occurs with exchange control fines, which can reach up to ten times the amount of the infringing transaction, amounts that obviously far exceed the exporter's profit or the Treasury's actual loss.[121] In fact, since an export of agricultural products usually yields a profit for the exporter of about 5% on the value of the export, it follows that the merely late sale of the foreign exchange proceeds of an exportation, even if it does not have measurable State damage, can result in penalties that dwarf the exporter's entire interest in the transaction.

Such draconian fines create economic distortions and discourage investment. Entrepreneurs may be reluctant to expose significant assets and capital in an environment where administrative sanctions can destroy entire enterprises overnight. This effect has already been studied in the United States as a consequence of another risk factor of similar magnitude: punitive damages.[122] For this paper, the phenomenon is of interest because it gradually discourages, impoverishes, or ultimately bankrupts honest businessmen. This phenomenon only allows those with political connections to shield themselves from such draconian sanctions and evade enforcement. Civil servants, bound to apply laws uniformly, often enforce rules rigidly on ordinary citizens, while

119. Magna Carta, 25 Edw. 1 (1297) (Eng.) (no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it).

120. CÓDIGO ADUANERO [CUSTOMS CODE], Law No. 22415, arts. 863, 864, 865 & 876 (Arg.).

121. *Ley de Procedimiento Fiscal* [Fiscal Procedure Law], *supra* note 90, art. 2. *Régimen Penal Cambiario* [Foreign Exchange Criminal Regime], *supra* note 90.

122. James Boyd & Daniel E. Ingberman, *Do Punitive Damages Promote Deterrence?*, 19 INT'L REV. L. & ECON. 47 (1999).

political allies benefit from leniency or exemptions. In extreme cases, the draconian nature of penalties increases the value of bribes, feeding corruption rather than curbing it.

In a country where it is estimated that more than half of the employees work in flagrant violation of labor and social security rules, the impartial and widespread application of the law would overwhelm the courts with criminal cases against employers. The fact that it does not occur suggests selective enforcement shaped by political priorities. Regulatory definitions are often tailored to minimize electoral repercussions, narrowing the scope of liability by focusing on the monetary amount of the infraction rather than the degree of deviation from the law, as evidenced by the taxpayer's conduct.[123] As a result of this policy, businessmen prefer to set up several micro-enterprises rather than growing a single business. The loss of efficiency is more than compensated by the tax savings made possible by the lesser control of small enterprises (i.e., flying under the radar).

Finally, inflation further undermines fairness by eroding the monetary thresholds that determine penalty severity. The threshold for imposing prison terms of up to nine years for aggravated tax fraud was the equivalent of 800,000 dollars when the amount was last updated in December 2017. At current exchange rates, that dollar amount has been reduced to approximately 10,000 USD. Despite the rampant inflation that has afflicted Argentina during the last two decades, the lack of adjustment of these figures shows the little importance that the rules on which the liberty of individuals depend has had for successive Argentine administrations. [124]

H. The Contempt for the Law by the State Itself

The Argentine Government presents a paradoxical landscape: the government routinely violates its laws. We are not referring to the violation of the law by unscrupulous officials for spurious purposes. While this phenomenon exists, it is of little importance in the face of a far more troubling pattern of overt and systemic legal violations by the State itself, often carried out under the sincere belief that these actions are to serve the public good. For example, while the national State

123. *See Ley de Obras Públicas* [Public Works Law], *supra*, note 88. However, rampant inflation repeatedly makes the threshold amounts ridiculously low.

124. *See Reforma Tributaria* [Tax Reform Law], *supra* note 117.

persecutes private companies that disguise the labor relationship of their employees under the guise of a service contract, it simultaneously engages in the same practice. The State employs its own workers under the guise of temporary or "hired" contracts, excluding them from essential welfare and retirement benefits.[125] Similarly, the Province of Buenos Aires issued decrees by the Governors acknowledging that the provincial authorities did not respect the rules on Government employment, in view of which it set a transition period for the rules to begin to be enforced.[126]

When the State constantly resorts to practices such as "junk contracts" (i.e. contracts that disguise an employment relationship) or payments to public employees that are not "remunerative" (i.e., are not computed for tax or welfare contributions), it is acknowledging the impossibility of assuming the cost of properly complying with the laws it enacts, yet it rigorously applies those laws to individuals. This double standard is so pervasive that it warrants a special study of the subject.

In a lecture, Mariano Grondona explained the phenomenon of the law-violating State by resorting to Rawls's distinction between the legal and the good.[127] When the law opposes what the Argentine State considers morally or politically "good," it tends to violate the law. In its defense of what it understands to be the public interest, the Argentine State sacrifices the rule of law again and again. Legality yields to the immediate conveniences of the public treasury (if not politics). The long-term institutional advantages that derive from respect for the law are dismissed as luxuries Argentina cannot afford amid its perpetual state of economic and political emergency.

The judicial courts often face a difficult choice. Either they demand immediate respect for the law by the State, at the cost of curbing important public policies, or they initially tolerate the violation and thus end up holding the treasury responsible for large sums, hoping

125. Dec. 1184/2001, Sept. 20, 2001, ERREPAR DIGITAL, https://documento.errepar.com/legislacion/empleo-publico-contratacion-de-servicios-profesionales-regimen-20100922075123604 (Arg.); Dec. 682/2004, May 30, 2004, ERREPAR DIGITAL, https://documento.errepar.com/legislacion/funcionarios-publicos-locadores-de-servicios-asignacion-no-remunerativa-vigencia-20100922075037276 (Arg.).

126. Agustín García Sanz, *Licitación Pública v. Contratación Directa: ¿La Batalla Perdida?, RAP NO. 2006-3*, at 456 (2006) (Spain) (English translation available at https://jccrivelliabogados.com/2021/03/public-tender-v-direct-contracting-the-lost-battle/).

127. JOHN RAWLS, A THEORY OF JUSTICE 392–96 (Harv. Univ. Press rev. ed., 1999).

that inflation, until effective payment, will erode them. It is not surprising, then, that the formal defenses of the State are exaggerated (the well-known problem of complying with all formal requirements to allow the court to hear the case, limitation periods, waivers of rights induced by the State itself) to avoid judgments against the State, or at least delaying such judgments, which in the long run may have the same effect. The Argentinian magistrate who contemplates the legal misconduct of the State evokes Judge Bridoye, Rabelais's fictional magistrate who delayed sentences in the belief that time alone solves all controversies.

Although understandable, judicial tolerance of non-compliance with the rules by the State itself is still subject to criticism. In some cases, jurisprudence ignores the rules themselves. One striking example is the aforementioned doctrine of remediation, which validates the violation of an individual's due process rights in administrative proceedings before the issuance of a decision (although such rights are expressly recognized by the Law on Administrative Procedures[128]). This rationale rests on the possibility that a defense in subsequent administrative proceedings challenging the decision will satisfy that requirement.[129]

When the very author of the law and guarantor of its application ignores it, the problem goes beyond mere legal uncertainty; it implies the absence of law. If the State does not recognize the force of its laws, the message to the population is clear and dramatic: "legal remedies are worthless, so pursue alternative means." Of those alternative means, the main one is corruption.

I. The Consequences of Legal Uncertainty

The pervasive legal uncertainty in Argentina has the consequence of placing citizens and public officials in a climate of defenselessness. In both cases, this legal uncertainty facilitates corruption and has serious consequences for the civic life of the country. As widely recognized in legal theory, the existence of a true rule of law requires that

128. *Ley de Procedimiento Administrativo* [Administrative Procedure Law], *supra* note 107, arts. 1 bis & 7(d); *see* MAIRAL, *supra* note 106, at 560–62.

129. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "S.A. Duperial I.C. v. Nación," Fallos (1979-301-953) (Arg.).

norms be stable, public, and clearly defined.[130] By this measure, Argentina continues to fall short of having a true rule of law.

1. The Defenselessness of the Citizen

One of the most immediate and damaging effects of legal uncertainty in Argentina is the sense of defenselessness it creates for ordinary citizens facing the State and the officers who represent it. As philosopher Carlos Nino once observed, "we Argentines all have the feeling of being outside the law."[131] Statistically, few are willing to confront the State in these circumstances;[132] most submit to authority without protest, and a significant number resort to corruption as a means of self-protection.

This defenselessness harms civic freedoms. As Nino noted, "there is no better breeding ground for authoritarianism than when all citizens are at fault and therefore at the mercy of power."[133] He further states, "the fact that all Argentines are outside the law weakens us as citizens in the face of public power and makes us susceptible to authoritarian or arbitrary attitudes from the authorities. We all have a guilty conscience and that's why we try not to raise our heads or our voices too much."[134]

The helplessness of private individuals has an additional, albeit indirect, effect on corruption. Citizens are discouraged from criticizing public officials when they are at the height of their power for fear of reprisals. This defenselessness creates fear, and that fear becomes an impunity of the powerful. As a result, public criticism of corruption—an unavoidable subject in social and political discourse today—is sporadic and timid in the face of those in power. On the other hand, it is constant, ruthless, and not always fair towards those who no longer possess it. Many of those who criticize corruption are less concerned with getting to the truth about the real cases of corruption, but, under

130. NINO, *supra* note 7, at 117; Santiago R. Carrillo, *Los Procesos Colectivos* [Collective Proceedings], 45 REVISTA DE DERECHO ADMINISTRATIVO [RAP] (2017) (Arg.).

131. *Id.* at 113-14.

132. Freddy Zárate, *Reflexiones de Carlos Nino sobre un país al margen de la ley* [*Carlos Nino's reflections on a country outside the law*], EL DEBER (BOL.) (Apr. 7, 2023), https://eldeber.com.bo/edicion-impresa/reflexiones-de-carlos-nino-sobre-un-pais-al-margen-de-la-ley_331061.

133. NINO, *supra* note 7, at 114.

134. *Id.* at 129.

the cover of the natural delay of judicial proceedings, actually seek to destroy their adversaries politically. The political class has concluded that sin lies in the loss of power and not in the practice of corruption. Consequently, both the national and provincial governments have increasingly pursued constitutional amendments permitting re-election.[135] Cincinnatus is not a model for Argentine politicians.

Importantly, the problems created by legal uncertainty are not solely borne by large companies; they also affect all entrepreneurs and individuals in general. However, legal uncertainty becomes more evident in the case of large companies, as they are often the only ones that take legal action.[136] Moreover, large companies are the most vulnerable to patrimonial forms of political reprisals.[137] However, this phenomenon also affects small and medium-sized enterprises, which often do not have the resources to litigate.[138] These businesses also lack the legal protection to challenge the arbitrariness of the officials. This same vulnerability affects individuals, who also face the legal uncertainty discussed herein.[139]

The widespread non-compliance among small businesses, a situation observed in many countries, deserves a separate paragraph. An English journalist who used to spend the summer in Italy observed how, in the year when the *mani pulite* (clean hands) policy began to be generally applied, none of the small businesses that used to liven up the stay on the beach (boat rentals, street vendors, cafes, etc.) were operating. All of the operations functioned outside the law, so the strict enforcement of the rule by now non-corruptible officials rendered

135. The national Constitution was amended in 1994 for this purpose. *See* MAIRAL, *supra* note 106, at 598-99 (describing the problem of the indefinite re-election of provincial governors). The Argentine Supreme Court has recently declared such indefinite re-election contrary to the republican form of government and thus unconstitutional. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 19/12/2024, "Confederacion Frente Amplio Formoseño v. Prov. de Formosa," Fallos (2024-347-2071) (Arg.).

136. *See* Laura Barbuto, *Legal Uncertainty, a Worrying Factor*, LA NACIÓN (Dec. 8, 1997), https://www.lanacion.com.ar/economia/la-inseguridad-juridica-un-factor-preocupante-nid82584.

137. A company once had to abandon, with prejudice, an *amparo* (summary action) in which it had obtained a favorable court decision because the defendant agency verbally threatened "we won't let you work anymore." (This is based on the author's experience).

138. *Siete de cada diez empresas advierten que los juicios laborales desalientan las inversiones y la creación de Empleo* [*Seven Out of Ten Companies Warn That Labor Lawsuits Discourage Investment and Job Creation],* INFOBAE, Dec. 2, 2024, https://www.infobae.com/economia/2024/12/02/siete-de-cada-diez-empresas-advierten-que-los-juicios-laborales-desalientan-las-inversiones-y-la-creacion-de-empleo/.

139. *See id*.

them inoperable. A similar pattern happens in Argentina. When tax inspectors arrive in a small town, all the businesses usually close. Can the State ignore this social reality and continue to legislate as if its orders were carried out by the majority of the citizens? If it does, the State should know that the only two attitudes of its officials in the face of massive disobedience to the law are passivity (except for sporadic attempts at control) when they are honest, or corruption when they are not. For this reason, any measure that simplifies and lowers the taxation of small businesses should be welcomed.[140]

This category of corruption is the easiest to reform. While there will always be a minority of persons who try to profit from the mismanagement of public affairs, many citizens prefer to work honestly. For them, corruption is not a choice but a last resort in the face of unreasonable rules and the lack of effective legal remedies.

2. The Defenselessness of the Civil Servant

At first glance, it may seem contradictory to suggest that Government officers are also defenseless against the State. But such a lack of defense exists. There are many directors of the Central Bank that have been, and continue to be, prosecuted for decisions made in the course of their functions. Criminal courts also investigate these officials to determine whether they caused undue damage to the State (for example, by granting loans to a bank that subsequently, and before repayment, went into liquidation). This reveals a stark reality; the State holds overwhelming power, not the individual public official. When acting on behalf of the State to confront the private individual, public officials exercise this supremacy. But when the official confronts the State, he stands defenseless in the face of suspicion and the reversal of the burden of proof that governs the first stage of criminal proceedings in Argentina. Here, the legal uncertainty previously discussed as a burden on private individuals now works against the very officials meant to enforce the laws. Their conduct is analyzed in the light of obscure, ambiguous, contradictory, or doubtful rules. The same uncertainty that

140. *Régimen Simplificado para Pequeños Contribuyentes* [Simplified Regime for Small Taxpayers], Law No. 25865, Jan. 19, 2004, B.O. (Arg.). In the sense proposed, it should be noted that the tax regime for unipersonal businesses in Argentina constitutes an important advance to solve these problems for those who are in the lowest income bracket of the business and professional sector, but this is provided that the ceiling does not leave a large percentage of small entrepreneurs outside the regime.

individuals must deal with operates to the detriment of the public official.

This practice of suspicion has far-reaching consequences. Officials who recognize or grant any legal rights to individuals are often accused of corruption. This paradoxically discourages honest officials from making decisions favorable to the individual. Only through corruption can an individual finally obtain what a corrupt official grants him, something that, by law or reason, should already be rightfully his. Public officials have said countless times that the individual is right, but he cannot recognize it because he would run the risk of being incriminated. As has been rightly said, "in our country, whenever a right is denied, it is possible to act summarily and without further grounds, or even without any grounds, without any fear of corrective intervention by the control agencies. This erroneous and authoritarian practice is one of the greatest sources of corruption in our administrative system. For since the official has the absolute and unchecked power to grant or to refuse, he is in fact empowered to corrupt himself."[141] Only when the unfounded refusal to recognize the individual's legal rights carries the possibility of being punished will this attitude begin to change.

The penal system we have thus constructed is deeply flawed. It fails to curb abuses while simultaneously punishing the innocent with cruelty and the guilty with leniency. While both are equally harassed by the system, usually neither is ultimately punished. Being subjected to a criminal process that can last over a decade—during which, for instance, the accused cannot travel abroad without judicial approval—is an unjust punishment for the innocent and an inadequate one for the guilty.

A pressing question emerges: is it appropriate to establish stricter guidelines to enable the criminal prosecution of public officials? The mere existence of a loss for the State's patrimony should not, in itself, justify criminal charges, and even more so when no damage arose at the date on which the act was issued, but was due to a subsequent

141. Julio C. Crivelli & Susana Vega, *Un nuevo sistema de Redeterminacion de Precios para la Obra Publica: El DNU 1295/02 y sus normas complementarias*, 290 RÉGIMEN DE LA ADMINISTRACIÓN PUBLICA [RAP] 35–45 (2002), https://jccrivelliabogados.com/publicaciones/un-nuevo-sistema-de-redeterminacion-de-precios-para-la-obra-publica-el-dnu-1295-02-y-sus-normas-complementarias/.

change in circumstances.[142] Nor should prosecution for the crime of violation of public duties occur when the invalidity of the official's conduct is doubtful and there is no clear evidence of malice or improper benefits for the officer or related parties. Strikingly, the presumption of legitimacy that ordinarily shields administrative acts does not seem to apply in criminal proceedings. In fact, it seems easier to prosecute an official in the criminal courts for issuing an invalid act (Penal Code, art. 248) than to have that same act annulled by a federal administrative court. Given the principle that criminal law must be interpreted narrowly, the standard should in fact be the reverse. The problem is not unique to Argentina. In Spain, there has been criticism of the practice of annulling, in criminal proceedings, administrative acts whose beneficiaries have not been summoned to trial, and this by decision of magistrates who are not specialized in the matter and who have no experience in resolving complex questions of administrative law.[143]

Under the current system, criminal cases with a purely political content proliferate, which is one of the reasons why justice cannot move more quickly in those cases where there is evidence of bribery. Time and resources are diverted to investigating honest officials, leaving less capacity to pursue the genuinely corrupt.[144] In this way, the persecution of the innocent ends up being the other side of the coin of impunity for criminals.

Given the cross-accusations interchanged by members of opposing political parties about the innocence or guilt of their respective party members accused of crimes against the public administration, and the public skepticism about the real independence of the judges that try them, consideration could be given to establishing a panel of foreign experts who have been members of national or international tribunals to seek their opinion. Although these opinions would not bind our Courts, it can help bolster public trust and offer a neutral, informed perspective.

---

142. MIRIAM M. IVANEGA, *De nuevo sobre la responsabilidad patrimonial de los funcionarios públicos [Again on the Patrimonial Responsibility of Public Officials]*, 381 REVISTA DE ADMINISTRAÇÃO PÚBLICA [R.A.P.] 113 (2005).

143. EDUARDO GARCÍA DE ENTERRÍA & TOMÁS RAMÓN FERNÁNDEZ, CURSO DE DERECHO ADMINISTRATIVO [COURSE ON ADMINISTRATIVE LAW], Vol. I (Civitas, 17th ed., 2015).

144. *See* Héctor A. Mairal, Opinion, *El Control de los Honestos* [*The Control of the Honest*], LA NACION (Feb. 27, 2003, updated July 23, 2020), https://www.lanacion.com.ar/opinion/el-control-de-los-honestos-nid476755.

Certain rules of criminal law that were originally justifiable have been distorted by overly broad legislative amendments. This is the case with the crime of negotiations incompatible with public office, which is punishable under Article 265 of the Penal Code. When, at the end of the nineteenth century, the concept was introduced in our law, it punished the official who became monetarily "interested" in a private business subject to his control or jurisdiction. Such was the case of the mayor who invested his own money in a company that operated a casino that he had authorized or should have controlled, so that the punishment was the loss of up to half of his investment.[145] As can be seen, if there has been no favoritism in the price paid by the public officer, there is no bribery here — since no bribe is paid to the official, but rather it is he who pays — but the ethical transgression is unquestionable.

The scope of this rule was expanded in two ways. First, by expanding the concept of "interest" to include any expression regardless of whether the official actually participates in the business, and second, by extending the prohibition to include benefits not only to the official but also to third parties.[146] The vagueness of the term "interest" creates considerable uncertainty. Any advice one official gives another concerning a decision that affects individuals can fall within the purview of the rule, since every decision may benefit some third party directly or indirectly. The breadth of the figure lends itself easily to political persecution.

Supporters of this expanded interpretation argue that the rule serves not only to protect reality but also the image of honesty in the exercise of public functions.[147] However, it is difficult to justify imposing the same maximum penalty for violating this abstract image of honesty, as opposed to causing actual harm to the public treasury, as that applied to officials who commit outright fraud against the public administration.[148] This disparity reflects a troubling lack of proportionality.

---

145. SEBASTIÁN SOLER, DERECHO PENAL ARGENTINO [ARGENTINE CRIMINAL LAW], Vol. V, at 211–13 (Tipográfica Editora Argentina 1951).

146. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 260-265, *supra* note 45.

147. República Argentina, RESPUESTA AL CUESTIONARIO MESICIC/OEA – 2DA RONDA [Response to the MESICIC/OAS Questionnaire – 2nd Round] (July 2006), SG/MESICIC/doc.172/06 rev. 2, available at https://www.oas.org/juridico/spanish/mec_rep_arg2.htm.

148. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 174, 265, *supra* note 45.

This rule is most frequently used against those who gain access to public office after working in private practice. Their past professional lives are intensely scrutinized, and any connection, no matter how outdated or tenuous, is considered demonstrative of willful connivance. In effect, the ideal public servant is portrayed as someone who assumes a leadership role in a state-owned company or enterprise without having participated in any business activity in the private sector, a lack of experience that is presented not as a demonstration of inexperience, but as a credential for trustworthiness.

Adopting more precise criteria would prevent the legal scandal of individuals with impeccable reputations[149] being dragged through years of litigation over decisions that, at most, involved debatable questions of policy or discretion. These prosecutions are often prompted by private interests adversely affected by the official's decisions or by political opponents seeking revenge. Reform would not only shield the judiciary from becoming an unwitting accomplice in partisan struggles, but it would also remove the main disincentive that prevents highly qualified people from serving in public office.

By way of comparison, the United States has developed the doctrine of immunity for public officials, which serves to shield public officials from civil liability for decisions taken in the exercise of their official duties. This doctrine, established by the federal courts, aims to preserve the effectiveness and decisiveness of public service by sparing civil servants from the burden of defending their official decisions in court. The rationale is clear: if they were not granted such immunity, officials might hesitate to act in the State's interests. Officials should not be forced to weigh every decision against the costs and risks of legal proceedings. Of course, this immunity does not apply in cases involving well-founded allegations of corruption. This immunity is absolute for high-ranking officials such as the President, Ministers, Judges, and certain other officials, such as Prosecutors. In these cases, any civil action challenging a decision made in an official capacity is dismissed up front (*in limine*) at the request of the defendant, without even reaching the production of evidence. For lower-ranking officials, immunity is qualified rather than absolute. This means that these officials are similarly protected unless the challenged decision violates

149. SECRETARÍA DE DERECHOS HUMANOS, LAWFARE: DEMOCRACIA EN PELIGRO [LAWFARE: DEMOCRACY IN DANGER] (Ministerio de Justicia y Derechos Humanos de la Nación 2023) (Arg.).

clearly established rules that any reasonable person should know exist.[150]

J. Utopia or Reality?

Some readers may agree with the observations made thus far, but may also fear that the systems we criticize cannot be reformed. They might believe that the deficiencies we have identified, particularly the tension between legal uncertainty and institutional integrity, are inherent in any legal system and therefore inevitable. Under this view, changes to the present legal system would be utopian.

This skepticism is understandable, but we argue, ultimately unpersuasive. We can reply to this reasonable reaction with the same argument we made at the beginning. While normative ambiguity exists in every legal system, the degree of uncertainty present in Argentina is exceptional and incompatible with the population's cultural and institutional development. Comparing statistics that purport to measure legal uncertainty in different countries, Argentina places among the countries with the highest level of legal uncertainty, often alongside countries whose cultural development is much lower than ours.[151]

To prove that a more coherent and rights-respecting approach is attainable, one need only consider the jurisprudence of the European Union. In contrast with the Argentine rules that we have just described, the European courts have articulated and enforced legal principles that provide greater predictability, transparency, and protection for individual rights as demonstrated by the following principles:

With respect to the principle of legal certainty: This principle requires that the effect of a legal provision be clear and predictable for the persons subject to it, especially when it imposes economic consequences.[152]

With regard to penalties: Penalties must not go beyond what is necessary to achieve the objective pursued in imposing them, they

150. *See* KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., 3 ADMINISTRATIVE LAW TREATISE 208 (3d ed., 1994); BERNARD SCHWARTZ, ADMINISTRATIVE LAW 559-60 (2d ed., 1984).

151. *See* WORLD BANK GRP., ARGENTINA: ESCAPING CRISES, SUSTAINING GROWTH, SHARING PROSPERITY 67 fig. 2.28 (2018) (showing that Argentina ranks near the bottom among countries on the Regulatory Enforcement Index, reflecting weak enforcement of laws and regulations).

152. *See What Is the Rule of Law?*, EUR. COMM'N, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/what-rule-law_en (last visited Sep. 18, 2025).

must be as little onerous as possible and they must not be so disproportionate to the seriousness of the offence as to limit the freedoms granted by the founding documents of the Community.[153] No penalty, even if not of a criminal nature, may be applied unless it is based on a clear and unambiguous text.

With regard to changes in legislation: In general, a Community institution cannot provide for a regulation to enter into force on the day of its publication, unless the risk of harm to the Community justifies otherwise. Where a transition period to allow companies to adjust to the new legislation cannot be granted, the new rules should be interpreted liberally.

With regard to legitimate expectations: When a Community institution adopts a practice which tolerates the conduct of a person, it violates that person's legitimate expectations to change that practice with retroactive effect: the change of practice requires an express legal provision or an individual notice given to the person concerned sufficiently in advance. The same principle prohibits, in principle, Community institutions from amending their rules without providing for a transitional period, unless this would be contrary to an overriding public interest.[154]

We Argentines boast of being like Europeans; what are we waiting for to imitate them in this aspect as well?

III. FACTORS THAT HAVE A DIRECT IMPACT ON CORRUPTION

While legal uncertainty creates a breeding ground for corruption, other factors exert a more direct and immediate impact on its expansion. Leading among them, unfair or unrealistic rules and excessive discretionary powers.

153. *See* DANIEL E. MALJAR, EL DERECHO ADMINISTRATIVO SANCIONADOR [ADMINISTRATIVE SANCTIONING LAW] 373-76 (2004).

154. *See* K. P. E. LASOK & TIMOTHY MILLETT, JUDICIAL CONTROL IN THE EU: PROCEDURES AND PRINCIPLES 341-64 (1st ed., 2004); PEDRO JOSÉ JORGE COVIELLO, LA PROTECCIÓN DE LA CONFIANZA DEL ADMINISTRADO: DERECHO ARGENTINO Y DERECHO COMPARADO [THE PROTECTION OF THE ADMINISTRATOR'S TRUST: ARGENTINE LAW AND COMPARATIVE LAW] 86-144 (2004) (analyzing the subject, citing mostly European Union precedents).

A. Unfair, Unrealistic, or Overly Ambitious Rules

Corruption often flourishes in environments where individuals face sanctions for violating laws that are costly or practically impossible to comply with.[155] We are not referring to the norm whose fulfillment is physically impossible, for in that case, that norm would not be valid under the basic principles of legal reasonableness. Rather, we are referring to economic impossibility derived from the high cost involved in compliance.

The Argentine legal scholar Juan Agustín García, in *La Ciudad Indiana*, observed that *contempt for the law* has deep historical roots in Argentine society, dating back to colonial times.[156] This cultural pattern continues to this day, as highlighted in the book of Carlos Nino and confirmed through more recent statistical studies.[157]

However, it is often overlooked that this contempt is motivated, at least partially, by the unreality or injustice of the norms that the State dictates and intends to apply. A modern illustration of this problem can be found in Argentina's monetary history. Since the mid-20th century, successive currency reforms have eliminated thirteen zeros from the peso. If those reforms had not taken place, the price of a cup of coffee would be measured in trillions of pesos. But that same State that failed to maintain a stable currency for its citizens has, as a general rule, forbidden and continues to forbid, adjustment of debts to account for inflation, and then pretends to punish severely those who wish to take refuge in a real currency, i.e., U.S. Dollars.[158] Hence, an important step in reversing this national trend requires a fundamental reassessment of the fairness and feasibility of the rules imposed by the State.

---

155. Alfonso Buteler, *Corrupción y Derecho Administrativo* [*Corruption and Administrative Law*], 48 A&C REVISTA DE DIREITO ADMINISTRATIVO & CONSTITUCIONAL 97, 109 (noting that when laws or regulations are costly or practically impossible to comply with, corruption tends to flourish since people are pressured toward noncompliance and bribery).

156. ANTONIO MARÍA HERNÁNDEZ, DANIEL ZOVATTO & MANUEL MORA Y ARAUJO, ENCUESTA DE CULTURA CONSTITUCIONAL: ARGENTINA, UNA SOCIEDAD ANÓMICA [SURVEY OF CONSTITUTIONAL CULTURE: ARGENTINA, AN ANOMIC SOCIETY] 13-16 (2005) (citing JUAN AGUSTIN GARCIA, LA CIUDAD INDIANA [THE INDIAN CITY] 6-7 (Angel Estrada y cia, eds., 1909)).

157. *Id.* (citing NINO, *supra* note 7).

158. Cámara Nacional de Apelaciones en lo Penal Económico, [CNPE] [National Court of Economic Criminal Appeals of the Federal Capital], 15/12/2004, "Hortensia Elena Murillo y otro s/inf. Ley 19.359," Jurisprudencia Argentina [J.A.] (2005-II-50) (Arg.) (illustrating the lengths Argentina enforces its exchange-rate policies, highlighting a case where an elderly retiree was prosecuted for privately exchanging $200 to avoid waiting in line at a bank; the appellate court reduced a 600-peso fine — effectively forfeiture of the amount exchanged — to a "symbolic" 10 pesos).

Another example of an arbitrary rule is the prohibition on merchants repricing their merchandise.[159] You don't need to be a graduate in business administration to know that, in an inflationary context, if there is no price adjustment, the seller will not be able to replenish their merchandise from sales revenue. As a result, they gradually run out of merchandise.

These types of rules, where compliance is either practically impossible, very difficult, impractical, or very costly, have been identified as a major cause of corruption. Economist Hernando de Soto has identified such rules as a central factor behind the proliferation of informal economies. In these contexts, bribery becomes the cost paid by the informal entrepreneur to avoid sanctions and continue operating.[160] This phenomenon has also been studied in Brazil.[161] In Argentina, when analyzing the causes of corruption, Carlos Nino observed that, "There are rules that require obligations that are almost impossible or absurd to fulfill," and gave as an example the rules for the opening of a business that impose exaggerated requirements.[162] Vanossi has called regulatory excesses *hotbeds of corruption*.[163]

The same applies to overly ambitious legal norms that shift the cost of legislative goals for social improvement onto individual actors, often with good intentions but without sufficient regard for practical consequences. Such is the case with urban planning regulations, which Nieto considers to be a frequent source of corruption.[164] Since the value of a piece of land varies dramatically according to the discretionary decision of the official or agency that applies zoning regulations, it is disingenuous to expect that corruption will not influence the adoption of that decision. Environmental standards, when enforced within already corrupt bureaucracies, follow a similar pattern. In practice, as

159. *Ley de Abastecimiento* [Supply Law], *supra* note 107, art. 4(b) (Arg.); *see also* Decree No. 70/2023, art. 9, Dec. 21, 2023, B.O. (Arg.) (showing that the law was repealed, 50 years after it was enacted).

160. *See* DE SOTO ET AL., *supra* note 32, at 196-99.

161. *See* Keith S. Rosenn, *The Jeito: Brazil's Institutional Bypass of the Formal Legal System and its Developmental Implications*, 19 AM. J. COMPAR. L. 514, 515 (Summer 1971).

162. NINO, *supra* note 7, at 117.

163. *See* Jorge R. A. Vanossi, *Primera aproximación al enfoque jurídico de la corrupción* [*First Approximation to the Legal Approach to Corruption*], 149 EL DERECHO [E.D.] 749 (1992) (Arg.).

164. NIETO, *supra* note 4, at 191.

many studies have shown, "it is usually cheaper to bribe the official than to make the required improvements."[165]

We do not argue against laws that pursue socially beneficial goals. But let us be critical that, unless general and efficient control can be ensured, the more ambitious a rule is, the more it increases the opportunities for corruption. As one writer noted, "Stricter regulation does not guarantee higher quality products (. . .) Rather, it stimulates the rise of corruption."[166] When regulations proliferate without clear prioritization, essential requirements become indistinguishable from minor ones. If compliance with even secondary provisions becomes burdensome, and corruption is used to circumvent them, bribery may ultimately erode respect for both categories of rules.

A country like Argentina, where corruption is embedded in society and there is a strong resistance to legal compliance, should have modest ambitions in setting the objectives of its rules when the values at stake are not people's lives or health. Enacting ambitious regulations without considering the required increase in public spending for enforcement can promote corruption. Therefore, when ambitious targets are set, efficient and permanent control systems should be established with their corresponding budgetary allocation. Otherwise, law-abiding citizens will face burdensome obligations, while those who disregard the law may continue to benefit from non-compliance.

The coexistence of demanding and detailed regulations with a practice that ignores them and behaves carelessly has been a recurring theme in our municipal life. The truth is that a large part of the services and activities provided to the public are carried out in precarious, irregular, unsafe, or unhealthy conditions. Yet, for many civil servants, their duties appear complete once idealized regulations are issued, regardless of whether they are followed. The lack of enforcement in response to widespread non-compliance can be attributed, at lower levels of administration, to factors such as corruption and limited effectiveness of disciplinary measures. At higher levels, authorities may choose not to implement sanctions for minor infractions in order to avoid political repercussions and potential increases in service costs for low-income individuals. When accidents occur, the legal responsibility

165. Susan Rose-Ackerman, *Is Leaner Government Necessarily Cleaner Government?*, *in* COMBATING CORRUPTION IN LATIN AMERICA 89 (Joseph S. Tulchin & Ralph H. Espach eds., Woodrow Wilson Ctr. Press 2000) (quoting *Passage to Cleaner Air*, FIN. TIMES, Apr. 10, 1996).

166. LLOSA, *supra* note 54, at 291.

falls on the businessman responsible for the accident. However, over time, the issue of widespread non-compliance remains unresolved, suggesting that officials may prioritize addressing personal liability over implementing broader corrective measures. A tragedy occurred in the last days of 2004, when a nightclub fire in Buenos Aires, that caused more than 100 deaths,[167] provoked the same official reaction that has been observed in Spain: "[The] authorities who, after an accident or supposed unforeseen event, carry out all the inspections that until then were conspicuous by their absence, are and have always been common currency in our public activity."[168]

In short, the combination of a political class eager to "improve" society by continually imposing new obligations and prohibitions on it (but curiously indifferent to the effective compliance of the rules), with a poorly paid, poorly controlled, and overburdened civil service, is an ideal recipe for corruption. More so when public officials are engaged in the widespread culture of "taking advantage" of public office to obtain irregular benefits. This contradiction generally goes unnoticed. Ironically, those who say they are most interested in fighting corruption are also the ones most in favor of promoting social development through new regulations.

Regulatory overshoot in Argentina derives from a conception of law as a vehicle for social improvement, rather than as a set of minimally enforceable standards. As one scholar noted, "the conception underlying this attitude is that of the law as a pure, marvelous, but ultimately a remote and inapplicable collective ideal."[169] Ernesto Garzón Valdés states: "Latin Americans tend to be experts in cultivating the symbolic dimension of laws."[170] Rather than establishing realistic guidelines that gradually become more demanding over time, Argentine law often imposes unrealistic requirements *ab initio*.[171] Lawmakers frequently adopt norms knowing they cannot be generally obeyed,

167. Uki Goñi & Agencies, *175 Die in Argentinian "Death Trap" Club Fire*, THE GUARDIAN, (Dec. 31, 2004, at 19:07 ET), https://www.theguardian.com/world/2005/jan/01/argentina.ukigoni.

168. SABÁN GODOY, *supra* note 42, at 48.

169. Grondona, *supra* note 6, at 24.

170. Ernesto Garzón Valdéz, *Acerca del Concepto de Corrupci*ón [*About the Concept of Corruption*], *in* POWER, LAW, AND CORRUPTION 179, 190 (Miguel Carbonell & Rodolfo Vazquez eds., 1996).

171. *See* Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMPAR. L. 839, 845-46 (2003).

clinging to the hope that their mere existence will gradually lead individuals to adapt their conduct to the new requirements. These laws are often copied from more developed jurisdictions, without first assessing whether they are compatible with the conditions in which Argentine society operates.[172] But it so happens that the Argentine version is, at times, even stricter than the original. This pattern suggests that legislators and officials aim less to establish reasonable guidelines of conduct and more to demonstrate their zeal. The resulting culture of general non-compliance is not a problem that keeps Argentine regulators awake at night.

A clear example of this is Argentina's implementation of the International Treaty on Hazardous Effluents. This treaty defines hazardous effluents as substances listed in the First Annex that also possess characteristics described in the Second Annex. In contrast, the Argentine law considers a substance hazardous if it either appears in the First Annex *or* meets any characteristics described in the Second Annex.[173] Under this definition, even an ordinary business office qualifies as a creator of hazardous waste and must register in the Registry of Creators of Hazardous Waste provided for by law.[174]

It is difficult to muster a consensus for this critique. Precisely, what has been called *rhetorical adherence* to regulations is a hallmark of corrupt systems.[175]

But there are even less laudable reasons for sanctioning exaggerated rules. Exaggerated rules allow officials to grant exemptions without running a personal risk. Consider, for example, a safety standard: if the requirement of the standard is reasonable, any waiver can lead to an accident and thus make the official who granted it accountable. Conversely, if a rule is overly strict, meaning it demands more than a reasonable safety margin, an official's decision to grant a dispensation without exceeding the truly necessary minimum is unlikely to cause an accident or make the official accountable.

Regardless of the motive, unrealistic norms place those subject to them in a vulnerable position. The application of such a rule cannot be

172. *Id*.

173. *Contrast* Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, annex I & annex II, May 22, 1989, 1673 U.N.T.S. 57, *with* Law No. 24051, Jan. 8, 1992, B.O. (Arg.).

174. *Id.* at art. 4.

175. Garzón Valdéz, *supra* note 170, at 190.

general, as it would paralyze all activity in the sector. This is therefore one of the main triggers of discriminatory control. As American Professor Kenneth Culp Davis points out: Exaggerated criminal laws are a major avoidable cause of injustice because such laws inevitably lead to selective control, and cases are often selected for enforcement for irrational reasons.[176]

Even civil servants face institutional vulnerability. An honest official who must enforce an unreasonably onerous rule faces a dilemma: either he brings about the closure or bankruptcy of those he is supposed to regulate, or relax enforcement and face suspicion of corruption. Investigations into such officials are never resolved, left to expire through statute of limitations or rendered moot by inflation to mitigate its amount.[177]

Whether State control is uniform, targeting only the main deviations, or arbitrary, punishing some infringers and not others regardless of their non-compliance, such regulatory schemes replace the rule of law with the discretion of individual officials. Corruption then becomes a way of reconciling the demands of overly ambitious regulations with the limitations of reality.

For example, since 1966, the Province of Buenos Aires has enforced an industrial zoning law that required that all new industrial installations maintain an occupancy factor of 25%.[178] Constructing a ten-thousand-square-meter industrial plant required acquiring at least forty thousand square meters of land. Because this requirement made many investments unfeasible at the time, the enforcement authority was consulted and advised that the law would be applied "reasonably." However, in the absence of legal or regulatory guidelines, the notion of "reasonableness" was left to the discretion of the acting official.

Individuals engaged in activities subject to regulations that impose excessive or onerous requirements may promptly contest such rules on the grounds of unreasonableness. While this occasionally occurs, individuals often refrain from doing so. They benefit from the regulation indirectly because it creates a barrier for new entrants into the market.

---

176. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 91 (Illini Books 1971).

177. MATTHEW AMENGUAL, POLITICIZED ENFORCEMENT IN ARGENTINA: LABOR AND ENVIRONMENTAL REGULATION 158–59 (2016) (illustrating that Argentine agencies lack the capacity to enforce, making civil servants either look ineffective or risk being accused of corruption if they bend the rules).

178. *Decreto-Ley de Radicación Industrial* [Industrial Location Decree-Law], Law No. 7229, Nov. 15, 1966, B.O. (B.A. Prov., Arg.).

These operators are typically not subjected to strict enforcement, as doing so could lead to politically undesirable outcomes such as layoffs or bankruptcies. In contrast, new entrants face more rigorous application of the rule, as they have not yet established relationships or structures whose disruption would pose such risks.

Addressing this regulatory disfunction requires the adoption of a procedural safeguard already established in U.S. administrative law: the "notice and comment"[179] rulemaking process. Under this model, regulatory authorities must publish their intent to issue a regulation along with a description of its objectives. Interested parties may then submit analyses and comments, which the authority must consider,[180] and if the final regulation disregards any relevant observations, the authority must justify its reasoning. This process fosters more deliberate policymaking and facilitates subsequent judicial review of a rule's reasonableness.

Hernando de Soto proposes this same solution, to which he adds the need for the Administration to carry out a cost-benefit analysis of the probable social and economic effects of the regulation it proposes, so that "the discussions on the relevance of the projects do not engage in a merely legal analysis and take into consideration their possible effects, even for third parties."[181]

Argentina's Administrative Procedures Law of 1972, art. 7, subsection f, introduced a pioneering requirement of "proportionality" to validate administrative decisions.[182] This rule mandates a three-part test to validate administrative acts: the imposed obligations must be necessary, suitable for achieving their intended purpose, and proportionate, that is, they must not impose excessive burdens on individuals relative to the goal pursued. This principle has seen significant development abroad, particularly in the European Union, where courts have treated proportionality as a cornerstone of human rights under the

179. 5 U.S.C. § 553 (2018).

180. *Contrast* Decree No. 1172/03, Mar. 12, 2003, B.O. (Arg.) (making public hearings optional), *with Ley de Bases y Puntos de Partida para la Libertad de los Argentinos* [Law of Bases and Starting Points for the Freedom of Argentines]; *Ley de Bases y Puntos de Partida para la Libertad de los Argentinos* [Law of Bases and Starting Points for the Freedom of Argentines], *supra* note 1 (requiring a specific law to impose a public hearing before the issuance of a regulation).

181. DE SOTO ET AL., *supra* note 32, at 309.

182. *Ley de Procedimiento Administrativo* [Administrative Procedure Law], *supra* note 107, art. 7(f).

European Convention.[183] A similar concept exists in the United States: the cost-benefit analysis weighs the societal and individual costs of compliance against the benefits of the regulation.[184] Despite the existence of this rule, Argentine courts have used this doctrine only sparingly.[185]

Judicial control of regulations is at least as vital as the review of individual administrative decisions. Yet, in Argentina, regulatory oversight remains weak. The government has firmly resisted adopting the U.S. "notice and comment" framework, which would require transparency and public input before implementing new regulations. This resistance, combined with the legal presumption of validity of all government acts and judicial reluctance to scrutinize the technical aspects of regulations, leaves Argentine businesses vulnerable to unpredictable administrative discretion. In such an environment, the absence of reliable legal remedies creates incentives for corruption as a means of coping with administrative uncertainty.

While "notice and comment" procedures offer a partial solution, they are not universally effective. As discussed earlier, incumbent operators may prefer rigid rules that, while selectively enforced, serve to exclude new competitors. To address this dynamic, reform must include an additional safeguard: recognition of a *discriminatory enforcement defense*, enabling individuals to challenge the selective and inequitable application of regulations. This approach would reinforce the principle of equal treatment under the law and curb the use of regulations as a tool for corruption.

B. Excessive Granting of Discretionary Powers

As discussed above, corruption often exploits the discretionary powers of the public administration for private gain, whether for the benefit of an individual or of the intervening official, or of both. The broader the discretion, the greater the risk of corruption: discretion is

183. AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 183-84 (David Dyzenhaus & Adam Tomkin eds., 2012).

184. *See* Cass R. Sustein, *Is Cost Benefit Analysis for Everyone?*, 53 ADMIN. L. REV. 299 (2001); Cass R. Sustein*, The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, 114 COLUM. L. REV. 167 (2014).

185. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/03/2009, "Salas, Dino y otros c. Salta, Provincia de y Estado Nacional / amparo," La Ley [L.L.] (2009-1144-663) (Arg.).

the best breeding ground for corruption.[186] Kliegaard's classic formula, monopoly plus discretion minus transparency, captures the systemic conditions most conducive to corruption.[187]

However, some level of discretion is both inevitable and necessary. Laws cannot anticipate every factual scenario, and public administrators must often choose among alternatives to fulfill their mandates. Legal scholarship reflects this reality: while much has been written on the need to limit administrative discretion, no serious doctrine proposes its complete elimination. Kenneth Culp Davis argued that the effective functioning of governments depends on discretionary power.[188]

Recognizing the necessity of discretion does not eliminate the obligation to set its proper boundaries. Davis further argues that the goal must be to "eliminate all *unnecessary* discretionary power."[189] Similarly, other scholars have criticized the tendency of administrative bodies "to make discretionary what is regulated and to evade the Law."[190]

To address this problem, we must identify the systemic conditions that unjustifiably expand discretionary authority and examine the available legal mechanisms for curbing its abuse. Common abuses include: selective enforcement of regulatory violations; arbitrary granting or revocation of licenses or other legal benefits; deliberate delays in resolving petitions submitted by individuals; maintaining legal uncertainty in concessions and permits; and the overall instability of rights derived from administrative decisions. Each of these practices not only erodes legal certainty but also invites corrupt exchanges between public officials and regulated entities.

1. Discretion in the Selection of Controlled Parties

When the State imposes high compliance costs but fails to enforce those obligations uniformly, it creates a perverse incentive structure, as those who comply face a competitive disadvantage against those

186. *See* NIETO, *supra* note 4, at 195; RODRÍGUEZ-ARANA MUÑOZ, *supra* note 77, at 173; Vannucci, *supra* note 65, at 97.

187. Moreno Ocampo, *supra* note 8, at 124 (citing Dr. Robert Kliegaard, a Doctor of Economics at Harvard University).

188. DAVIS, *supra* note 176, at 216.

189. *Id.* at 217.

190. Perfecto Andrés Ibáñez, *Tangentopoli tiene Traducción al Castellano*, CORRUPCIÓN Y EL ESTADO DE DERECHO. EL PAPEL DE LA JURISDICCIÓN 105 (1996).

who do not. In effect, the system rewards noncompliance. The situation worsens when enforcement is not only selective but also arbitrary. As one author aptly observed, "sending the inspector" is something more than an expression with almost theatrical overtones; it becomes one of the most dangerous powers from the point of view of the necessary legal controls that prevent the private use of public powers."[191]

Unfortunately, arbitrary selection of individuals for administrative inspections or sanctions occurs more frequently than commonly acknowledged. Some scholars refer to the practice of targeting "criminal vedettes"[192] while others emphasize how "the choice of sectors to be inspected"[193] serves as a vehicle for corruption. In Argentina, enforcement agencies often investigate individuals or entities whose compliance surpasses the sectoral average. Such partiality enables the use of regulatory power as a tool for political persecution.[194] A notable example involves a major supermarket chain, among the country's top taxpayers, whose facilities meet exemplary hygiene standards. Despite this, it faced relentless inspections and repeated closure orders, all of which were overturned by the courts. Similar abuses have been condemned in the United States, where courts have held that retaliatory enforcement actions, such as targeting critics of the government, violate the First Amendment.[195]

A key procedural flaw enabling this abuse lies in how enforcement agencies and courts compartmentalize violations. Investigations focus narrowly on individual infractions, without regard for the broader pattern of conduct followed by either the accused or the enforcing agency.

First, the Courts should recognize a defense of general compliance. This defense is especially important in cases where agencies bring enforcement actions based on a large number of infractions that, while high in absolute terms, are negligible relative to the overall volume of regulated activity. Sanctions should reflect the regulated entity's overall compliance record. This would align legal outcomes with

191. SABÁN GODOY, *supra* note 42, at 44.

192. JUAN MARIA RODRIGUEZ ESTÉVEZ, EL DERECHO PENAL EN LA ACTIVIDAD ECONÓMICA [CRIMINAL LAW IN ECONOMIC ACTIVITY] 102 (1998) (citing FILLIPPO SGUBBI, EL DELITO COMO RIESGO SOCIAL [CRIME AS A SOCIAL RISK] 46 (Albaco de Rodolfo de Palma ed., 1998)).

193. SABÁN GODOY, *supra* note 42, at 47.

194. *See* Luis Cortina, *Negocios Bajo la Presion del Estado [Business Under State Presure]*, LA NACION, May 7, 2006.

195. Crawford-El v. Britton, 523 U.S. 574, 588 n.10 (1998) (first citing Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968); and then citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)).

the public interest: promoting substantial compliance rather than penalizing isolated or technical infractions.

Second, Courts should allow a discriminatory enforcement defense that considers not only the conduct of the accused but also that of the regulatory agency. A defendant should be permitted to demonstrate that widespread noncompliance exists, that the agency tolerates such behavior generally, and that enforcement has been selectively applied. If proven, courts should invalidate the sanction and order the regulatory agency to either revise the regulation or enforce it consistently across the industry. This would reintroduce fairness and transparency into the enforcement process and disincentivize the strategic manipulation of administrative power.[196]

In a similar vein, administrative agencies tasked with combating corruption must compare sanctioned actors with similarly situated individuals who are not sanctioned. To this end, agencies should maintain records of the inspections they carry out and the sanctions they apply, as trends are harder to justify than isolated acts. Those who "guard the custodians" would be surprised to discover that, with some frequency, those who are most controlled and sanctioned demonstrate a higher level of compliance than those who receive less attention from official censors.[197] Corruption may explain this anomaly: those who comply with the law are more reluctant to pay bribes, while those who fail to comply are the most inclined. It is not surprising, then, that corrupt officials tend to target the former.

Judges must understand the reality in which alleged violators brought before the bench operate.[198] As long as the judicial analysis is

196. *Cf.* DAVIS, *supra* note 176, at 164 (acknowledging that the case law is reluctant to accept this type of defense. It is worth noting that prosecutors in the United States have discretion in initiating criminal proceedings, unlike in Argentina where it is mandatory upon the presence of an alleged crime; in Argentina the discretionary selection of the individuals to be investigated is exercised at an earlier stage).

197. In February 2005 we learned from the press that while Aerolíneas Argentinas and Iberia (two of the major airlines that operate locally) were repeatedly checked to determine if their airplanes were used for drug trafficking, a smaller airline that took suitcases of drugs to Europe received, in the same period, only one visit from inspectors. This is based on the author's own experience.

198. *Cf.* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "S.R.L. Industria Maderera Lanín v. Nación Argentina," E.D. (1977-298-223) (Arg.) (holding the state responsible for the arbitrary actions of the administration against the plaintiff, for which it took into account the totality of the conduct of the entity); Pedro José Jorge Coviello, *Industria Maderera Lanín: un desconocido precedente de la Corte Suprema, reiteradamente citado en materia de control de razonabilidad de los actos de los poderes públicos* [*Lanin Wood Industry: An Unknown*

limited to comparing the conduct imputed to the transgressor with the applicable law, unrealistic norms will remain in force, and there will be no brake on the corrupt practice of tolerating some breaches and sanctioning others. Instead of operating with a flashlight that only illuminates a small sector of reality, it is necessary to *turn on the light*. Then it will be seen to what extent the norms are, and can be, obeyed. Current enforcement practices often punish individuals lacking political connections, not those who actually violate the law.

But judges alone cannot correct this imbalance. This is where nongovernmental organizations, universities, and study centers must also investigate and expose disparities in enforcement. Rather than expand formal requirements or adopt foreign norms, reform should focus on ensuring consistent enforcement. The tragedy of Cromañon that plunged the City of Buenos Aires into mourning,[199] will provoke, as it seems to have done, an awareness of the need to maintain strict control over the generalized compliance with the rules.

When a reduced selection of the universe to be controlled is unavoidable, the remedy would be to establish impartial mechanisms for making such a selection, removing it from the mere discretion of the enforcement authority. Such mechanisms could be randomized,[200] or the government could create independent boards required to make the selection based on objective grounds and not for persecutory purposes.

While excessive taxes or other official restrictive measures create conditions conducive to corruption, they do not inherently produce unfair competition if enforcement is consistent and comprehensive. Ethical standards in private activity erode when enforcement is selective or when the state imposes burdens and restrictions whose compliance will only be partially followed and sporadically enforced. Corruption thrives not merely due to the severity of the rule but because of the widespread perception that enforcement is rare and arbitrary.

2. The Multiplicity of Special Authorizations

Corruption also stems from excessive demands for special authorizations. At a meeting in Chile discussing possible regulatory measures, an Argentine consultant proposed that, as a control measure,

Precedent of the Supreme Court, Repeatedly Cited on the Manner of Control of the acts of Public Powers], 4 EL DERECHO 28 (2004).

199. *See* Goñi & Agencies, *supra* note 167.

200. RODRIGUEZ ESTÉVEZ, *supra* note 192.

special administrative authorizations should be required for certain minor activities. The reaction of the country's officials was unanimous: "In Chile, we have learned that special authorizations generate corruption. That is why the right thing to do is to establish in a general way the conditions that must be met to carry out certain activities and then to check whether or not those who carry them out comply with those conditions."[201]

Similar practices do not seem to exist in Argentina based on the numerous regulations requiring special authorizations. According to a private report, transporting food across two districts within the Province of Buenos Aires once required 14 separate authorizations. These overlapping jurisdictions create opportunities for bribery and regulatory abuse. For this reason, the state should reduce such permits, especially when they serve no clear purpose or when interjurisdictional duplication occurs. Where control is necessary, post-activity inspections are preferable to prior approvals.

The excessive number of special authorizations reflects the Argentine administration's tendency to micro-manage the economy. A historical analogy illustrates the problem: during the 1950's in Rome, Italy, traffic policemen directed cars not by alternating flow like a traffic light but by individually signaling vehicles to proceed, often arbitrarily, much like a conductor gesturing to an orchestra. This is exactly what the Argentine authorities like to do. Instead of granting general authorizations for categories of transactions, they prefer to authorize each transaction individually.

For example, during recent years of foreign currency scarcity, importers needed a specific authorization for each transaction. The disparity between the official exchange rate and the parallel market rate (the first being half of the second during most of these years),[202] created fertile ground for corruption and irregularities.

As economist Juan Carlos de Pablo aptly observes, this highlights the stark contrast between Argentina and the United States. "It is not necessary to stay long in the United States to realize how easy it is

201. As verbally reported to the author by the Argentine consultant present at the meeting.

202. David Malpass, *El Problema del Tipo de Cambio Paralelo: El Enfoque del Banco Mundial para Ayudar a las Personas en los Paises en Desarrollo* [*The Parallel Exchange Rate Problem: The World Bank's Approach to Helping People in Developing Countries*], BANCO MUNDIAL BLOGS (May 31, 2023), https://blogs.worldbank.org/es/voices/el-problema-del-tipo-de-cambio-paralelo-el-enfoque-del-banco-mundial-para-ayudar-las.

there to operate within the rules and how practically impossible it is to do so by violating them."[203] In Argentina, the situation is exactly the opposite. To give just one example, there are mass-market goods legally sold in the United States and throughout the developed world but prohibited in Argentina, though they are frequently smuggled into the country and openly sold at numerous street kiosks.

In Argentina, complying with the law has often been a complex and time-consuming endeavor due to the proliferation of formal requirements. In contrast, noncompliance is rarely monitored and even less frequently punished. The government's approach resembled placing a door in an open field and mandating that everyone cross through it; while honest citizens line up to follow the rule, others simply walk around it. This dynamic creates a sharp disparity: those who strive to follow the law face burdensome procedures, while those who flout it encounter minimal oversight or consequences, even when engaging in criminal behavior. [204]

Another context rife with opportunities for corruption arises when the Argentine government grants significant benefits, such as tax or customs exemptions, to those who participate in certain regulatory regimes or satisfy complex and onerous conditions. Because these schemes are intricate, they require equally complex oversight mechanisms. As a result, enforcement becomes both difficult and inefficient. Unsurprisingly, such regimes frequently give rise to abuse, with corruption serving to weaken already fragile monitoring systems. Argentina's experience with industrial promotion programs offers numerous examples of this phenomenon.[205]

In light of these challenges, competition, where feasible, often serves as a preferable alternative to regulation. Competitive markets

---

203. JUAN CARLOS DE PABLO, ARGENTINA 2024-2027- EL DESAFÍO ECONÓMICO DEL PRÓXIMO GOBIERNO [ARGENTINA 2024-2027- THE ECONOMIC CHALLENGE OF THE NEXT GOVERNMENT] 67 (2022).

204. A person who inherited a property tried to operate a restaurant there but soon found out that she could not run it profitably without employing undeclared waiters and thus cheating on social security taxes. However, when dismissed, these waiters sued and were entitled to collect from her considerable amounts as fines (to encourage private enforcement) which put her at risk of bankruptcy. She thus closed her restaurant and rented the property. The tenant also opened a restaurant and ran it profitably as he cheated on social security taxes too but was never sued because he openly carried a gun in his belt. This account is based on the author's own experience.

205. *See Misterio en San Luis* and *Un régimen cuestionado*, LA NACIÓN, May 3, 1998 (explaining that the province of San Luis had received $4,824 billion pesos (at the time, more than 1 billion USD) as a result of a special tax regime).

reduce the need for discretionary administrative decisions, thereby limiting the opportunities for corrupt influence. When regulation is necessary, such as in the licensing of certain industries, a more transparent approach is to permit entry to any applicant who satisfies clearly established legal or regulatory criteria. Authorities should then focus their efforts on monitoring ongoing compliance. This is far preferable to systems that grant officials broad discretion to approve or deny licenses based on subjective assessments of market conditions or the applicant's qualifications.

3. Delay in Resolving Approval Requests

In many instances, legal acts undertaken by private parties produce legal effects only after they have been approved by an administrative agency. For example, the purchase of controlling blocks of shares in a corporation requires approval by the enforcement authority under Argentina's Law on the Defense of Competition[206] and, in the case of financial institutions, such transactions must also be approved by the Central Bank.[207] Excessive delays in obtaining these approvals reflect the broader inefficiencies and institutional weaknesses of the Argentine state's administration of private transactions. The act of control seems to be more important than the controlled activity.

The Central Bank's own regulations reflected a broader disregard for the practical realities of private institutions. Under its rules, both the election and the re-election of the boards of directors of a financial institution required approval from the Central Bank. Without this approval, directors *who were re-elected* could not take office.[208] Given the length of time it typically takes the Central Bank to grant such approvals, often exceeding a year, these rules effectively left financial institutions without legally empowered leadership for extended periods. On their face, the regulations implied that institutions were to remain "headless" for months each year. Worse still, they rendered invalid all board meeting minutes signed by directors who had been elected but not yet approved. The absurdity of this outcome was so

206. *Ley de Defensa de la Competencia* [Competition Defense Law], Law No. 27442, arts. 9, 14 May, 15, 2018, B.O. (Arg.).

207. BANCO CENTRAL DE LA REPÚBLICA ARGENTINA [BCRA] [CENTRAL BANK OF THE ARGENTINE REPUBLIC], Autoridades de Entidades Financieras [Authorities of Financial Institutions] § 5.2.1 (2020).

208. *Id.* § 3.1.6.

apparent that even the Central Bank failed to take its own rules seriously in practice.[209]

Argentine law offers little recourse for such administrative dysfunction and the bureaucracy has impoverished it even more. The traditional rule holds that administrative silence at the request of the individual implies refusal, unless a rule states that silence implies consent.[210] Few exceptions exist. One example is the enforcement authority under the Law on the Defense of Competition, which must expressly deny a request within 45 days or else tacitly approve it. Yet, even this deadline proves illusory, as the agency may suspend the clock simply by requesting additional information.[211] Worse, some individuals who tried to invoke the doctrine of tacit approval reportedly received threats of retaliatory measures.[212]

A preliminary observation is in order here. Interpreting administrative silence as a denial is generally appropriate when individuals submit spontaneous petitions. Otherwise, the State would be inundated with baseless petitions in the hope that inaction would imply consent. But this logic fails when the law itself requires approval. In such cases, after a reasonable period, silence should be deemed approval.[213] If the State subjects individuals to the inconvenience of prior review, it must also ensure that the process is conducted efficiently. Where the State fails to create the necessary administrative agency, the solution is not to paralyze private activity (as some court precedents seem to imply) but rather to suspend enforcement of the restrictive law. Otherwise, the burden of administrative delay falls not on the politicians responsible

209. *See id*. § 3.1.2. (The rule has changed, and re-election is no longer subject to prior approval unless the Superintendent of Financial and Exchange Institutions provides otherwise).

210. *Ley de Procedimiento Administrativo* [Administrative Procedure Law], *supra* note 107, art.107, art. 10 (providing that silence meant no, except when the law otherwise provided).

211. *Ley de Defensa de la Competencia* [Competition Defense Law] Law No. 25156, arts. 13, 14 B.O. (Arg.); *cf. Ley de Defensa de la Competencia* [Competition Defense Law], Law No. 27442, *supra* note 206, arts. 14, 15 (Arg.) (highlighting current law attempts to remedy previous delays and providing that in some cases silence means acceptance).

212. Mario Zúñiga, *In Reforming Its Antitrust Act, Argentina Should Not Ignore Its Institutional Achilles Heel*, TRUTH ON THE MARKET (Jan. 16, 2024), https://truthonthemarket.com/2024/01/16/in-reforming-its-antitrust-act-argentina-should-not-ignore-its-institutional-achilles-heel/.

213. *See Ley de Procedimiento Administrativo* [Administrative Procedure Law], *supra* note 107, art.107, art. 10 (providing the current rule in Argentina by allowing administrative silence to be deemed approval but subject to many exceptions). *Cf. Ley de Bases y Puntos de Partida para la Libertad de los Argentinos* [Law of Bases and Starting Points for the Freedom of Argentines], *supra* note 1, art. 65 (introducing exceptions to Law No. 19549).

for inaction but on private individuals who are powerless to correct it. A striking example is the Tribunal for the Defense of Competition, mandated by Law 25156 of 1999 but never created. A federal court used this omission not to hold executive officials accountable but to penalize individuals who exercised their constitutional right to dispose of their property during the interim. [214]

Delays in resolving cases stem from an official's fear of liability, or at the very least, of incurring the criticism of their superior. This is especially true when the petition lacks political favor or presents ambiguities. In such cases, delay serves as a tactical pause, allowing the contentious elements of the request to emerge and the political landscape surrounding it to take shape. Only then does the official feel equipped to decide with a clearer understanding of the potential implications.

While such caution may occasionally prevent fraud, it imposes high costs on society and fails to prevent the gravest abuses. Legitimate business is routinely stalled in the name of oversight, yet, notoriously, an arms dealer once received Argentine citizenship and a passport with unprecedented speed due to political favoritism.

Officials are often discouraged from issuing timely decisions, as speed is suspected to reflect favoritism. This is because the timing of the administration's decision-making power is largely discretionary. Hence, this is one of the cases in which corruption is most widespread, even if the decision is often of little importance. As Alejandro Nieto observed of Spanish practices, "[i]f the Administration fulfilled its obligations on time, half of the bribes would disappear."[215] A genuine anti-corruption effort cannot ignore this aspect.

First, no law should condition private conduct to prior approval without first ascertaining whether if there are other control mechanisms that can be used, and if the matter is sufficiently important to justify such control. Second, no approval requirement should be

214. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/07/2007, "Belmonte, Manuel y Asociación Ruralista de General Alvear c. Estado Nacional – Poder Ejecutivo Nacional – Ministerio de Economía y Producción – Secretaría de Coordinación Técnica – Comisión Nacional de Defensa de la Competencia/ recuso de hecho," Fallos (2007-331-781) (Arg.).

215. ALEJANDRO NIETO, *La Función Pública y la Corrupción* [*Public Service and Corruption*], *in* DERECHO ADMINISTRATIVO Y APORTES PARA EL REDISEÑO INSTITUCIONAL DE LA REPÚBLICA [ADMINISTRATIVE LAW AND CONTRIBUTIONS TO THE INSTITUTIONAL REDESIGN OF THE REPUBLIC] 451 (María Graciela Reiriz ed., 2004).

enacted without assessing the capacity of the relevant agency. The ambition to control must be matched by sufficient resources. Finally, individuals should not be punished for proceeding without approval when the agency in question chronically fails to respond. For example, can a person who purchases the controlling shares of a radio station without the authorization required by law[216] be sanctioned when the competent authority did not grant, or deny any of the required authorizations for almost a decade?[217]

Tolerance for delays by the State in fulfilling its obligations occurs in various countries. For example, in Spain, scholars have noted that the State is "in permanent non-compliance with everything that it has agreed and even with what is imposed by law."[218] For this reason, the officials responsible for combating corruption should review the average delay of the various agencies in granting mandatory authorizations. Chronic delay, especially when there are exceptional cases of rapid decisions, is an indicator of possible corruption.

When prior State intervention is necessary, express approval may sometimes be substituted with alternatives such as:

(i) The mere communication of the private act, with which the communicated act enters into force immediately or after the expiration of a fixed period, without prejudice to the State's power to decide subsequently, if well-founded reasons exist, to terminate the effects of the communicated act for the future.

(ii) Silence for a certain period of time (or, subject to an extension, for a fixed period to prevent bureaucratic practices from distorting the norm) to be considered as tacit consent. Silence as assent is now a general rule, albeit with important exceptions, in France, Italy, and Spain. As indicated above, this rule was only recently introduced into Argentine law.

Possible approaches to address the issue include:

---

216. *See Ley de Radiodifusión* [Broadcasting Law], Law No. 22285, art. 46(f), Sept. 15, 1980, B.O. (Arg.) (supporting law); *cf.* Decree 1062/1998, art. 4, Sept. 22, 1989, B.O. (Arg.) (amending Law No. 22285, art. 46).

217. *See Un Amparo con Poca Frecuencia* [*An Injunction with Little Frequency*], DIARIO JUDICIAL (Mar. 27, 2023), https://www.diariojudicial.com/news-94637-un-amparo-con-poca-frecuencia (reporting on a 2023 case in which, beyond the procedural defects that led to the rejection of the action, there was evidence of a delay of more than 25 years in regularizing the legal situation of a broadcaster).

218. SABÁN GODOY, *supra* note 42, at 25.

(i) The reversal of the burden of proof based on a certain delay in deciding. In other words, after a period of silence, that the regulation would set according to the complexity of the matter, the administration would have to allege and prove the reasons for the non-issuance of the authorization, it would not be sufficient to allege the lack of necessary information. Thus, in the "*amparo por mora*" (a summary court proceeding to obtain the issuance of a decision by the administration), the requested administrative agency would not explain and prove the reasons for the delay but the reasons why it does not positively resolve the individual's request, so that the judge can take such a positive decision if he is not convinced by the reasons and evidence provided by the Administration.[219]

(ii) An inquisitive judicial attitude in the face of the refusal of approval, which admits, if requested by the petitioner, a comparative analysis of the decisions of the entity. The individual subject to the unlimited discretion of the official and skeptical of the depth of judicial control is an easy victim of corruption. On the contrary, the certainty that the rejection of the petition will be scrutinized by a court that will agree to delve into the technical aspects of the decision to determine its reasonableness, comparing it with other decisions of the same entity, is the best antidote to avoid incorrect attitudes. Likewise, knowing that future petitioners will be able to invoke an unduly tolerant precedent before the court will dissuade the official from favoring someone who only supports his or her application with improper offers. The use of electronic files now facilitates these controls.

It is emphasized that these solutions are intended exclusively for situations where legal provisions necessitate prior State involvement

219. *See Ley de Procedimiento Administrativo* [Administrative Procedure Law], *supra* note 107, art.107, art. 28; *see generally* David Andrés Halperin, *La acción de amparo por mora de la Administración* [*The Action of Amparo for Administrative Delay*], *in* LIBRO HOMENAJE AL PROFESOR JESÚS GONZÁLEZ PÉREZ [BOOK IN HONOR OF PROFESSOR JESÚS GONZÁLEZ PÉREZ] (Buenos Aires, Vol. 2, Hammurabi 2004); Miriam Mabel Ivanega, *Algunas cuestiones sobre el amparo por mora en el Derecho Procesal Administrativo* [*Some Issues on Amparo for Delay in Administrative Procedural Law*], *in* LIBRO HOMENAJE AL PROFESOR JESÚS GONZÁLEZ PÉREZ (Buenos Aires, vol. 2, Hammurabi 2004). *See also Ley de Procedimiento Administrativo* [Administrative Procedure Law], *supra* note 107, art. 28, as *amended by Ley de Bases y Puntos de Partida para la Libertad de los Argentinos* [Law of Bases and Starting Points for the Freedom of Argentines], *supra* note 1 (authorizing courts, when setting a deadline for the administration to decide, to warn that failure to issue a decision within the prescribed time will result in the petitioner's request being deemed approved).

to validate private actions, and do not apply to voluntary submissions by individuals.

Conversely, the relevant agency should only apply the law that it has been entrusted to implement. Delaying approval solely on the mere suspicion that other laws may have been violated effectively requires applicants to obtain a comprehensive certificate of general good conduct[220] before successfully carrying out any procedure. The agency's responsibility should be limited to notifying appropriate enforcement authorities of any suspected legal violations, without suspending or withholding the requested approval.

In Argentina, the prevailing administrative practice is exactly the opposite of what sound governance would require. The government often imposes obligations that are at odds with the interests of individuals (keeping prices below the rate of inflation, not distributing dividends, etc.) and then secures compliance by tying unrelated regulatory approvals to those obligations. These authorizations, which individuals and firms need to operate normally, are often made contingent on adherence to conditions that bear no relation to the legal purpose of the underlying regulatory scheme. For example, the Commission for the Defense of Competition made the authorization of a large economic concentration operation conditional on the realization of a significant investment by the acquiring party, an investment unrelated to the competitive impact of the transaction and which, if anything, exacerbated market concentration. This practice constitutes a "misuse of power": the exercise of lawful authority for purposes (even of a public nature) other than those intended by the legislature and, as such, is banned by the Administrative Procedure Law. Yet, in practice, this rule seems to have been tacitly abandoned.[221]

4. The Unnecessary Precariousness of Concessions and Permits for the Use of the Public Domain

A significant source of administrative discretion lies in the State's authority to revoke, for reasons of public interest or convenience,

220. *See* Manuel Andrés Pereira, *Políticas de Control Migratorio en Argentina: de las Tecnologías del Límite a las Tecnologías de la Frontera (1915-1950)* [*Migration Control Policies in Argentina: From Technologies of the Limit to Technologies of the Border (1915-1950)*], 106 COLOMBIA INTERNACIONAL 115 (2021).

221. *See Ley de Procedimiento Administrativo* [Administrative Procedure Law], *supra* note 107, art. 7(f).

concessions and permits for the occupation of the public domain. A similar situation of discretion arises when such authorizations expire and renewal is sought. This raises an important question: can and should administrative discretion in this area be more narrowly circumscribed?

It appears legally incorrect to describe all such authorizations as "precarious." Administrative law distinguishes between concessions (bilateral agreements whose termination for public convenience gives rise to a right to compensation) and permits (unilateral acts granting merely precarious rights, whose revocations do not give rise to compensation).[222] Yet in practice, these theoretically distinguishable situations are largely similar.

In the first place, there are laws that declare, in a general way, the precarious nature of both permits and concessions for the occupation of the public domain.[223] Second, it is common administrative practice to label as "permits" what are, in substance, true "concessions," thereby avoiding the legal consequences of termination.[224] Even in cases where the concession is not legally declared precarious, two factors significantly erode the concessionaire's position: (i) enforcing the right to compensation requires initiating litigation that may well exceed ten years, not counting the subsequent delays and vicissitudes of collection; and (ii) if *ante tempus* termination without fault of the concessionaire does not entail the right to compensation for lack of profits, as some rules provide,[225] it is easy to imagine the power possessed by public officials vis-à-vis those concessionaires.[226]

It is difficult to formulate general rules for these situations. Abuses involving private occupation of public land, often enabled by administrative inaction or even the willful complicity of public officials, are well documented. But a sound legal system should be able to distinguish cases where nonprofit institutions have lawfully occupied public land for decades, enhancing the nation's cultural and sporting life. For this reason, it is worth considering whether the law should recognize a

222. MIGUEL S. MARIENHOFF, TRATADO DE DERECHO ADMINISTRATIVO [TREATISE ON ADMINISTRATIVE LAW] 421-25, (Buenos Aires, Abeledo-Perrot., 5th ed. 1993).

223. Decree Law 9533 of Province of Buenos Aires, art. 28, May 23, 1980, B.O. (Arg.).

224. *See* GRECCO & MUÑOZ, *supra* note 85, at 68-76.

225. Decree No. 1023/2001, art. 12, Aug. 13, 2001, B.O. (Arg.).

226. *See* ANDRE DE LA LAUBADERE ET AL., TRAITE DE DROIT ADMINISTRATIF [TREATISE ON ADMINISTRATIVE LAW] 131-36, 210-14 (Paris: L.G.D.J.0, 2nd ed., 1984).

concession's perpetual character, conditioned on the continued fulfillment of the institution's public purposes,[227] when a nonprofit has legally occupied public land for an extended period (e.g., thirty years). This would prevent such long-standing occupations from being dismissed as temporary favors granted by a particular administration. In rare instances where the State must recover such property, it retains its power of expropriation, and reasonable limits on compensation could be established in advance.

An additional principle worth considering is that if a concessionaire of public domain property has made substantial investments (especially where such investments are stipulated in the concession terms), then, in the event of revocation of the concession for reasons of public convenience before its scheduled expiration, compensation should be provided before requiring the concessionaire to vacate the premises. Allowing a public official to expel the concessionaire while relegating it to protracted litigation, potentially lasting over ten years. to obtain compensation for unamortized investments can create a power imbalance that may encourage corrupt practices.

5. The Instability of Utility Concessions

The issue also arises as to why authorizations for private companies to operate public utilities are subject to fixed terms of duration and to potential early termination or "redemption" by administrative decision based on public interest considerations.

It is often argued that terms of duration are necessary to allow for early termination if technological advances render the existing service obsolete, a scenario most notably seen in the historical shift from gas to electric lighting.[228] However, this hypothetical advantage must be weighed against a significant downside: shorter concession terms increase opportunities for favoritism and improper business deals by public officials, as each expiration creates a new occasion for negotiation and potential influence.

Defenders of term limits also claim they encourage service improvement and protect the public interest, particularly through provisions requiring concessionaires to transfer all assets to the State at the

227. CÓDIGO CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. CIV. Y COM.] [CIVIL AND COMMERCIAL CODE] art. 1965, *supra* note 91 (Arg.) (mandating a ten-year limit for the revocable domain, but allowing for special rules to be established for the public domain).

228. *See* MARIENHOFF, *supra* note 222, at 614-15.

end of the term, free of charge. But this apparent benefit masks two hidden costs. First is the so-called "Hong Kong syndrome," a well-documented decline in investment as the concession nears expiration.[229] Second, the transfer is not truly cost-free. Under the established principles of public utility concessions, concessionaires are entitled to recover their full investment along with a reasonable return. This means that rates must be structured to amortize all investments, including those that will not be fully amortized by the end of the concession. In effect, users fund the gift of those unamortized assets to the State, which in turn uses them to negotiate with the next concessionaire.[230]

Why not, then, adopt the U.S. model, in which utility licenses are issued with no fixed terms of duration, but remain conditional on ongoing compliance with performance and service improvement standards, adjusting rates as needed? Argentina has already implemented similar approaches: in the privatization of telephones, licenses were granted without a term of duration, while electricity concessions extended up to 95 years.[231]

As for the State's ability to reclaim operation of a public utility for reasons of convenience, a process known as "redemption", this authority is rooted in the French doctrine that operating a *service public* is an inherently administrative function. We have challenged that doctrine elsewhere, and it should have no place in Argentine law.[232] At a

229. *See* Zhiguo He et al., *How Does Political Uncertainty Affect the Valuation of Long-Term Property Rights? Lessons From Hong Kong*, PROMARKET (Sept. 3, 2020), https://www.promarket.org/2020/09/03/how-does-political-uncertainty-affect-the-valuation-of-long-term-property-rights-lessons-from-hong-kong/ (demonstrating that when properties are subject to political uncertainty, they are sold at a more significant discount than those with promised protection, and the discount is higher when people's confidence declines or where residents feel more uncertain of the city's future).

230. *See* Paolo Di Rosa, *The Recent Wave of Arbitrations against Argentina under Bilateral Investment Treaties: Background and Principal Legal Issues*, 36 U. MIAMI INTER-AM. L. REV. 41, 45-46 (Fall 2004).

231. *See* Decree No. 731/89, art. 2, Bs. As., Sept. 12, 1989, B.O. (Arg.); JOSÉ R. DROMI, REFORMA DEL ESTADO Y PRIVATIZACIONES [REFORM OF THE STATE AND PRIVATIZATIONS] (Astrea de A. y R. Depalma, eds., 3rd ed., 1991) (discussing telephone privatization); CARLOS MANUEL BASTOS & MANUEL ANGEL ABDALA, TRANSFORMACIÓN DEL SECTOR ELÉCTRICO ARGENTINO [TRANSFORMATION OF THE ARGENTINE ELECTRICITY SECTOR] 243-46 (1st ed., 1993).

232. *See* Héctor A. Mairal, *La ideología del Servicio Público* [*The Ideology of Public Service*], 14 REV. DE DERECHO ADMINISTRATIVO 359 (1993) (challenging the doctrine that public service is an inherently administrative function).

minimum, however, the same prepayment rule suggested in an earlier section should apply here.[233]

6. The Instability of Any Right Arising from an Administrative Decision

The issue described in the previous sections reflects a broader legal problem. Argentine law grants a general legal authorization to revoke, for reasons of public interest, any decision that confers rights on individuals, provided compensation is paid for the resulting harm.[234] This effectively functions as a standing declaration of "public utility" enabling the expropriation of a valid right through administrative decisions alone, without a legislative declaration of utility, raising serious constitutional concerns. For this reason, some legal systems, such as Spain's, reject the rule outright.[235]

This rule also raises questions regarding the revocability of permits, concessions, and licenses granted under legislation that neither explicitly provides for nor excludes this ground for termination. This is particularly relevant to offshore exploration permits issued pursuant to Hydrocarbons Law 17319 and licenses granted under Audiovisual Communication Services Law 26522, where revocation on grounds of public convenience remains uncertain.

Moreover, under certain rules[236] and according to certain legal scholars,[237] compensation for lost profits is not available in cases of administrative revocation, further weakening the position of affected individuals.

Addressing this issue requires legislative reform to establish the opposite principle: revocation of decisions that confer rights should be permitted only when authorized by a specific law, or when those rights

233. *See id.*

234. *See Ley de Procedimiento Administrativo* [Administrative Procedure Law], *supra* note 107, art. 17.

235. GARCÍA DE ENTERRÍA ET AL., CURSO DE DERECHO ADMINISTRATIVO [Administrative Law Course] 716 (20th ed., 2022).

236. *Ley de Responsabilidad Estatal* [State Liability Law], Law No. 26944, art. 5, Aug. 7, 2014, [32943] B.O. (Arg.).

237. JULIO R. COMADIRA & LAURA MONTI, PROCEDIMIENTOS ADMINISTRATIVOS: LEY NACIONAL DE PROCEDIMIENTOS ADMINISTRATIVOS, ANOTADA Y COMENTADA [ADMINISTRATIVE PROCEDURES: NATIONAL LAW OF ADMINISTRATIVE PROCEDURES, ANNOTATED AND COMMENTATED] 390-96 (2002).

were expressly and validly granted on a revocable basis. In all other cases, compensation for lost profits should be the default rule.[238]

C. Legal Obstacles to the Abusive Exercise of Discretionary Powers

Certain legal mechanisms can serve as safeguards against the abusive exercise of discretionary powers. This section examines some of the most relevant tools available for that purpose.

1. Prior Controls

The two "readings" system,[239] requiring two successive approvals by the municipal legislature, is a well-established safeguard for granting exceptions to urban planning regulations and other general frameworks, as provided in paragraph 6 of Article 89 of the Constitution of the Autonomous City of Buenos Aires. Another common safeguard is the mandatory prior review by oversight bodies such as the Court of Accounts, established in various provincial constitutions, which may issue "observations" that suspend implementation of the decision in question.[240]

However, in practice, this type of control is not always effective. First, the possibility of overcoming the observation using an Executive decree, or even a decree of necessity and urgency (and thus with the force of law), allows the Executive to authorize non-compliance with the requirement or to justify such non-compliance *a posteriori*. In addition, partisan politics conspire against the independence of the control agency when the will of the Executive Branch supports a decision taken without meeting the legal requirements. In practice, when an effective sanction is absent, these decisions may be implemented, and any potential sanctions are postponed until those responsible are no longer in political office. The very proliferation of controls conspires

238. *See Ley de Procedimiento Administrativo* [Administrative Procedure Law], *supra* note 107, art.17 (providing compensation for loss of profits in the case of revocation for unilateral decisions, but not for contracts).

239. Art. 89(6), Constitución de la Ciudad Autónoma de Bs. As. (Arg.).

240. Domingo Sesín, *Tribunal de Cuentas. Importancia y Alcance del Control Previo. Nuevas Perspectivas* [*Court of Auditors. Importance and Scope of Prior Control. New Perspectives*], *in* CONTROL DE LA ADMINISTRACIÓN PÚBLICA [CONTROL OF PUBLIC ADMINISTRATION] 289 RAP (2003); JAVIER I. BARRAZA ET AL., EL CONTROL DE LA ADMINISTRACIÓN PÚBLICA [THE CONTROL OF PUBLIC ADMINISTRATION] 97-98 (Abeledo-Perrot ed., 1995) (explaining the national regime moved to a system of subsequent control).

against their effectiveness: "In this country of thousands of controls, there is really no real control because there are too many." Although this remark was made about Italy, it aptly describes the Argentine context as well.[241]

2. Citizen Participation

In certain situations, initial control of activities directly related to an individual's interests may be appropriately delegated to those individuals. This is what happens in the Province of Mendoza with the control of the water regime,[242] following the ancient example of the Water Tribunal of Valencia, whose origins date back to the thirteenth century.[243] This mechanism should be extended to encompass all situations in which public and private interests align rather than conflict.

Administrative appeals provide an important mechanism for citizen participation in governance by allowing individuals to challenge government decisions. Although a detailed discussion of administrative procedure falls within the broader scope of Administrative Law, a few key principles merit attention. These procedures favor public engagement in the oversight of state action, as individuals may challenge both the legality and appropriateness of administrative decisions. Standing extends to those asserting collective or diffuse interests; proceedings are cost-free, in contrast to often-prohibitive judicial litigation; the procedure favors informalism to benefit private parties; it adheres to the principle of objective truth;[244] and it imposes a duty on the administration to issue a decision.[245]

241. MONTANELLI & CERVI, *supra* note 44, at 308; s*ee also* VANNUCCI, *supra* note 65, at 98-99 (highlighting references from Italy and France).

242. Rodolfo Arland, *Cómo Controlar la Corrupción en la Prestación en un Servicio Público Vital* [*Controlling Corruption in the Provision of a Vital Public Service*], 8 REVISTA PROBIDAD 7 (May-June 2000).

243. *Id*.

244. *See generally* Corte Suprema de Justicia de la Nación (CSJN) [Supreme Court of Justice of the Nation], *Verdad Jurídica Objetiva [Objective Legal Truth]* April, 2024 (Arg.) (requiring the administration to make a decision based on the evidence and facts known by the administration, not only the facts and evidence presented).

245. AGUSTÍN GORDILLO, *Capitulo IX: El Procedimiento Administrativo. Concepto y Principios Generales* [*Chapter IX: The Administrative Procedure. Concept and General Principles*]*, in* TRATADO DE DERECHO ADMINISTRATIVO: LA DEFENSA DEL USUARIO Y DEL ADMINISTRADO [TREATISE ON ADMINISTRATIVE LAW: THE DEFENSE OF THE USER AND THE ADMINISTERED] 2 (8th ed., 2006).

Despite these characteristics, the system of administrative remedies is ineffective in practice. A significant structural flaw lies in the lack of independence of government attorneys, who typically belong to the same agency whose decision is under appeal. This institutional arrangement undermines impartial review. A more robust system would place these legal advisors within the Treasury Attorney's Office and protect them from arbitrary removal, ensuring greater independence.[246] The United States offers a model worth considering. "Administrative judges" are tasked with reviewing appeals of administrative decisions, but do not report to the same agency whose decisions they review. Instead, they operate under a different agency, preserving impartiality. An administrative appeal, in contrast to the prevailing practice in Argentina today, is a substantive process rather than a mere procedural formality. [247]

3. Transparency of Public Decisions

In a constitutional republic, the acts passed by or before the State, as well as the analysis and motives on which they are based, must, in principle, be public and, as such, accessible to all individuals. Many countries have enacted transparency laws that provide for this.[248] Argentine Law 27275, enacted in 2016, grants "every person" the right

246. *See* Julio R. Comadira, La Nacion (Jan, 9, 2005).

247. MAIRAL, *supra* note 106, at 424-25, 506.

248. *See* The Freedom of Information Act of 1966, Pub. L. No. 89-487, 80 Stat. 250; The Freedom of Information Act, Pub. L. No. 110-175 (2007) (codified as amended at 5 U.S.C. § 552); Loi 78-754 du 17 juillet 1978 modifiant certaines dispositions du livre IX du code du travail relatives à la promotion individuelle, au congé de formation et à la rémunération des stagiaires de la formation professionnelle [Law 78-754 of July 17, 1978 amending certain provisions of Book IX of the Labour Code relating to individual promotion, training leave and the remuneration of vocational training trainees], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 17, 1978, p. 2857; Loi 79-587 du 11 juillet 1979 relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administration et le public [Law 79-587 of July 11, 1979 relating to the motivation of administrative acts and the improvement of relations between the administration and the public], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 11, 1979 p. 1711; Loi 2000-321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations [Law 2000-321 of April 12, 2000 relating to the rights of citizens in their relations with administrations], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], April 12, 2000, p. 5646; art. 22-25; Decreto Legislativo 7 Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi [Legislative Decree 7 New Rules Regarding Administrative Procedure and the Right of Access to Administrative Documents], n. 241, 7 August 1990 (It.); Law 19/2013, Transparency, Access to Public Information, and Good Governance (B.O.E. 2013, 295) (Spain); Freedom of Information Act 2000, c. 36, § 8, (Eng.).

to "request and receive public information."[249] The law applies to all the public sector and also to private entities that perform public functions or receive public funds, but in these last two cases only in respect of the exercise of such functions or the use of such funds.[250]

To enhance accountability, the use of secret laws should be limited to the very exceptional cases where national defense is at stake. They must not serve as vehicles for covert payments to high-ranking public officials. Moreover, given Argentina's adoption of the Inter-American Convention against Corruption, which, under Article 75(22) of the National Constitution, holds superior status to ordinary legislation, one may question whether payments authorized under secret laws remain legally valid. The Convention obliges "the applicability of measures that create, inter alia, systems for the declaration of the income of public officials."[251]

4. Deepening Judicial Control

Since this subject extends beyond the focus of this work, it is only noted that allowing judicial courts to thoroughly review administrative decisions, including areas traditionally viewed as outside judicial oversight, such as cost/benefit analysis, may serve as a mechanism to address corruption. In the United States, this function is bolstered by the *hard-look* doctrine, which fosters such control.[252]

The following paragraphs highlight specific areas where this in-depth analysis is particularly relevant.

First, from a procedural perspective, oral presentations at court-appointed hearings may serve as an effective mechanism. The authority of civil servants is moderated when they are aware that they must explain and orally justify their decisions before a judge, who can then compare their rationale with that of experts presented by private parties.

---

249. *Ley de Derecho de Acceso a la Información Pública* [Right of Access to Public Information Law], Law No. 27275, Sept. 14, 2016, B.O. (Arg.).

250. *Id*. arts. 4, 7.

251. *Convención Interamericana contra la Corrupción* [Inter-American Convention Against Corruption Approval Law], *supra* note 45, art. 3(4); *see also* Gordillo, *supra* note 45 (arguing the Inter-American Convention is operative immediately).

252. STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 346-92 (8th ed., 2017).

A particularly important area for judicial oversight concerns the severity of the *quantum* of administrative penalties. In practice, authorities have imposed very high penalties that are nothing more than a punishment against individuals who refuse to pay a bribe, penalties meant "*pour (dé)courager les autres*." Such abuses could be curtailed if courts consistently applied a reasonableness standard, such as by comparing the penalty with analogous sanctions in jurisdictions whose legal models Argentina has adopted. Unfortunately, Argentine jurisprudence follows a very restrictive standard of review, holding that "the graduation of penalties belongs, in principle, to the scope of the discretionary functions of the administrative authority (. . .) and they can only be reviewed by the courts in cases of manifest arbitrariness or illegality." However, there have been instances in which the courts have reduced the imposed penalties. [253]

Closely related is the recurrent misuse of punitive powers. Argentine authorities routinely wield the full arsenal of sanctions offered by the legal system to punish private actors who deviate from government policy, even if such deviation is perfectly lawful. Once again, we observe a serious violation of the rule of law by the State itself. The penalties imposed by each law should only be applied for the purposes pursued by the respective law, as expressly required by Article 7(*f)* of the Administrative Procedures Law, a rule that, as we have already noted, has been forgotten. It is deeply troubling that public officials threaten to apply the Antitrust Law against those who do not conform to official wishes on price increases, without any adverse legal comment or reaction from the press or the public. This silence enables the normalization of unlawful state coercion.

IV. SHORTCOMINGS IN PUBLIC PROCUREMENT

Public procurement has long been viewed as a high-risk area for corruption. The picaresque in this regard is universal: a Spanish novel character says, "Mr. Mayor, I sell you a batch of ten thousand lanterns at the price of fourteen thousand lanterns. A bargain."[254]

In Argentina, much like in Brazil, procurement scandals have gained significant public attention. We define "major corruption" as a

253. HIISA 308 Fallos at 618 (Arg.).

254. *See also* JOHN T. NOONAN JR., BRIBES 453, 561, 577, 602 (1984) (describing real-life examples from U.S. history).

counterpart to minor corruption, noting that both exist together except in tyrannical regimes, where leaders restrict corruption to their own ranks. When there is no fear of oversight, lower and mid-level officials emulate the example of their superiors. In turn, senior officials prefer not to stir up scandals by denouncing their subordinates, since those scandals might have repercussions against them.

In this section, we will identify some shortcomings in public procurement that conspire against the transparency of procedures, as well as against the efficiency of government procurement, and thus facilitate corruption. Precisely, the adoption of systems for the acquisition of goods and services by the State "ensure the publicity, fairness and efficiency of such systems."[255] This falls under one of the categories of preventive measures outlined in the Inter-American Convention against Corruption. [256]

Given the State's immense purchasing power, improving efficiency and correctness in the acquisition of goods and services must necessarily have a beneficial effect on the national economy, by rewarding efficient and compliant sectors. On the contrary, tolerating practices such as corruption leads to the paradox of the "prize going to the worst." Put beyond the economic stakes, transparent procurement would serve an even greater civic purpose; it would help rebuild public trust in democratic institutions and the political class.

A. Who Decides and Who Should Decide

The first question that arises is: why entrust the management and implementation of procurement to political officials who, as a rule, are not experts in business administration or management tasks? On the contrary, procurement should be entrusted to career civil servants, ideally within a specialized agency operating under the control of the Ministry of Finance. This institutional redesign offers several benefits.

First, separating procurement responsibilities from political office would enhance oversight. Currently, large contracts made by high-ranking state officials often escape scrutiny because it implies

255. *Convención Interamericana contra la Corrupción* [Inter-American Convention Against Corruption Approval Law], *supra* note 45, art. 2.

256. *Id.* art. 3(5).

criticizing the political power of the day.[257] Timely criticism may prevent possible irregularities, but in Argentina, criticism is usually made *after the fact*, and this is usually only when the individual responsible is no longer in a position of political power. This results in limited oversight, which manifests as revenge rather than effective control.[258] If the individual responsible for determining the contract award does not hold significant political influence, any associated criticism may occur promptly rather than at a later stage.

Second, such separation would help reduce public spending by eliminating or reducing those contracts designed to raise funds for the individual official or for his or her political party. Furthermore, the proposed separation would support the integrity of political parties by ensuring that holding an elective or political office does not automatically grant authority over public resource management. This measure aims to deter individuals whose primary motivation for entering politics is personal financial gain.

Finally, oversight would be improved by clearly defining the responsibilities of career civil servants in contracting decisions. This approach would prevent situations in which civil servants defer accountability to political officials who may only be formally involved in procurement procedures that have largely been determined by the former. As Nieto says, "[i]n most of the procedures, the political authorities limit themselves to approving and signing the proposals presented to them by the officials."[259] The dissociation between actual decision-making power and legal-political responsibility fosters corruption by concealing who truly holds authority. A system that brings this responsibility into the open would make misconduct more traceable and preventable.

Naturally, many key decisions will remain under the authority of legislators and government officials, including policy determination, selection of public works, and the establishment of general guidelines for awarding contracts, such as preferences for cooperatives, small and medium-sized enterprises, or domestically owned firms. However, the selection of contractors and the management of expenditures, along

257. Vincente López, Letter to the Editor, *A Letter from the Civil Association,* LA NACIÓN, Aug. 4, 2016.

258. *See* Grondona, *supra* note 6, at 61.

259. NIETO, *supra* note 4, at 134.

with any associated risks of impropriety, would be removed from political influence.

This institutional decoupling would be welcomed by conscientious political officials, who pursue office out of genuine civic duty and who find themselves burdened by administrative procurement responsibilities. Consider the case of a university dean who would prefer to focus on academic leadership rather than navigating procurement procedures that expose her to personal liability for technical missteps.[260]

Since the crises of 2000 and 2001, Argentina has introduced several transparency measures in public procurement.[261] Nonetheless, progress needs to be made. One promising proposal comes from Gordillo, who has proposed adopting in Argentina the system of *qui tam* actions of U.S. federal law.[262] Such actions can be brought by any individual against a contractor who is alleged to have submitted fraudulent claims against the Government. The Government may initiate and prosecute the action; however, should it choose not to proceed, the whistleblower is permitted to continue the action independently. Successful claimants receive between 15% and 25% of the proceeds of the lawsuit or settlement.[263] It is estimated that during the first few years since this procedure was adopted in 1986, the U.S. Government recovered $2.2 billion in civil fraud penalties, and approximately $300 million was collected by individual whistleblowers.[264] This proposal deserves to be considered in Argentina.

---

260. *See* AGUSTÍN A. M. GARCÍA SANZ, CONTRATOS ADMINISTRATIVOS, LENGUAJE Y REALIDAD [ADMINISTRATIVE, CONTRACTS, LANGUAGE AND REALITY] 19 (2004) (explaining 95% of contracts in the University of Buenos Aires School of Medicine are made through direct contracting, and the national administration directly awards 50% of contracts). *But see* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/07/2000, "Servicios Empresarios Wallabies S.R.L. v. Provincia de Salta," Fallos (2000-323-1841) (Arg.) (the Supreme Court has rejected claims by contractors where contracts were awarded without prior competitive bidding).

261. Law No. 29412, June. 5, 2000, [CVIII] B.O. 1 (Arg.); Law No. 29712, Aug. 16, 2001, [CIX] B.O 1 (Arg.); Law No. 1023, Sep. 15, 2016, B.O. 1 (Arg.); *Ley de Ética en el Ejercicio de la Función Pública* [Ethics in Public Office Law], *supra* note 45.

262. AGUSTÍN GORDILLO, *El Informalismo y la Concurrencia en la Licitación Pública* (*Informalism and Attendance in Public Tendering*), *in* TRATADO DE DERECHO ADMINISTRATIVO Y OBRAS SELECTAS [TREATISE ON ADMINISTRATIVE LAW AND SELECTED WORKS] 729 (Dr. Mario Rejtman Farah ed., 1st ed., 2015).

263. *See* JOHN CIBINIC, JR. ET AL., FORMATION OF GOVERNMENT CONTRACTS 170-73 (3d ed., 1998).

264. DONALD P. ARNAVAS & WILLIAM J. RUBERRY, GOVERNMENT CONTRACT GUIDEBOOK 7-3 (2d ed., 1994).

B. The Stages of Contracting

Government procurement involves four main stages: public bidding, contract performance, payment, and final resolution of disputes. Each stage presents opportunities for corruption.

1. Public Bidding

Irregularities in public bidding often begin with the drafting of the specifications. Certain practices have become common and have therefore been expressly forbidden by the Government contracting regulations, such as requiring conditions that can only be met by a given bidder.[265]

But more subtle forms of discrimination exist. An example of this is establishing a deadline that, although compliant with legal minimum requirements, is in practice relatively brief for the submission of tenders. For long-term contracts involving significant business risk, such as public works concessions, the cost of preparing a bid may exceed one million dollars. Given this complexity, it is unlikely that a comprehensive bid can be prepared within the minimum period stipulated by current national regulations, 20 calendar days (or 40 calendar days for international bids). In one case, a call for bids for legal services was published at the end of December, just before the courts' summer recess, with the opening date set for early February. [266]

This practice can provide an advantage to those who receive advance notification of the upcoming call for tenders. In some cases, despite the complexity of the specifications, the time allowed for submitting offers has not been sufficient to complete the required formalities (notarial certifications, legalizations, translations, etc.) described in the tender documents.

The issue of excessive formalities should also be noted. For bidders who are not familiar with the process or who have not been informed in advance, this can discourage participation or increase the likelihood of procedural errors that may lead to challenges from other bidders. As Gordillo points out, "[b]ids submitted by foreign companies in national or international public tenders rarely comply exhaustively with all the formalities required by the specifications, to which,

265. Decree No. 1023/2001, art. 18 (Arg.).

266. This is based on the author's own experience.

however, they should conform in every detail according to the traditional doctrine."[267]

The solution to this problem is simple: require signature certifications and legalizations only from the winning bidder, after the award has been made. To safeguard against frivolous or bad-faith submissions, all bidders should provide a substantial, formally valid bid guarantee. This would serve to discourage irresponsible or fraudulent actions during the bidding process by requiring a formal bid guarantee of a specified amount from all bidders.

In practice, however, excessive formal requirements often serve a different purpose. To outsiders, they may signal diligence or rigor on the part of procurement officials. In reality, they often obscure questionable decisions behind a façade of bureaucratic thoroughness. These unnecessary formalities delay decisions that, if made impartially, could be resolved quickly. When decisions are not impartial, the delay becomes a tool for behind-the-scenes negotiation and opportunistic bargaining.

In one notable case involving the privatization of a major state-owned industrial enterprise, each bidding consortium was required to submit approximately one cubic meter of documentation—most of which proved unnecessary. Once the first submission box ("Envelope No. 1"), which contained all supporting documents along with the sealed offer ("Envelope No. 2"), was opened, it became clear that only two consortia had submitted bids. Both groups were composed of well-qualified companies. Recognizing the inefficiency of the process, the attorneys for both consortia jointly requested that the bidding authority expedite review of the eligibility documents so that the sealed bids could be opened the same day, rather than waiting several weeks, as required by the formal rules. The request was granted. Within two hours, counsel for both the government and the bidders reviewed the documentation and unanimously agreed that both consortia met the eligibility criteria. The offer envelopes were opened immediately, and the contract was awarded that same day, avoiding unnecessary delays that would have invited lobbying and undermined the transparency of the process. [268]

---

267. GORDILLO, *supra* note 262, at 730.

268. *See generally id.* at 744-46 (discussing Envelope No. 1, excessive documentation, and the correction of formal defects in the YPF privatizations).

This example underscores a broader concern: bidding procedures warrant suspicion if they impose short deadlines for bid submissions but allow long delays for qualifying bidders (whether originally established or resulting from extensions later awarded). To address this improper practice, it is recommended to allow sufficient timeframes for offer submission while maintaining brief deadlines for the selection of bidders and evaluation of submissions.

Additional restrictive practices include imposing excessively stringent qualification criteria that effectively exclude firms outside the circle of usual bidders. Similarly, drafters often insert one-sided, "leonine" contractual clauses that discourage participation or compel bidders to inflate their prices, unless they are confident they will receive favorable treatment from the contracting agency.[269] In major tenders, the appropriate remedy is to require an independent assessment by a reputable consulting firm or investment bank to evaluate the likely impact of such requirements and clauses on the pool of potential bidders.

Discrimination also occurs when the contracting agency reserves options that can drastically alter the financial equilibrium of the contract, the exercise of which can only be trusted by "friends of the house". For example, an agency might retain the option to advance 50% of the contract price upfront or repeatedly renew a short-term contract despite obligating the contractor to assume major risks at the outset. These practices deter genuine competition and skew the playing field. When such issues are brought to light, the agency should cancel the tender and remove the responsible officials to safeguard the integrity of any subsequent bidding process.

In practice, high-level tenders are often decided not by the official formally authorized to issue the award but by the most senior official with a vested interest in the outcome. This interest may not be corrupt in the narrow sense, for instance, a political official might favor awarding a contract to a foreign company to strengthen diplomatic ties with that company's country, but it still undermines fairness. If a minister lacks a direct interest but a deputy minister or undersecretary does, the latter may exert decisive influence. This dynamic repeats itself down the administrative hierarchy. This happens because neutral officials typically provide cautious, balanced opinions highlighting both

269. *See id.* at 809-10.

advantages and drawbacks. By contrast, an official with a strong preference often issues forceful, unqualified recommendations. Between the neutral official's desire to preserve an image of impartiality and the interested official's determination to achieve a specific outcome, the latter's position frequently prevails, at the expense of fair and transparent decision-making.

The remedy against this involuntary delegation of decision-making power is to limit administrative discretion in both the selection of bidders and the award of contracts. For this reason, this goal is best achieved through objective, automatic criteria.[270] For bidder pre-qualification, pass/fail standards grounded in clear and realistic guidelines are preferable to scoring systems, which inevitably introduce a certain degree of arbitrariness. Similarly, awarding contracts based solely on price enhances transparency. When price is merely one of multiple factors, particularly when those factors are vague or subjective, such as "national interest," the process becomes opaque and vulnerable to manipulation. In cases where bidders offer to pay the government (as in privatizations or concessions), upfront payment should be required to deter bidders from proposing inflated figures they later attempt to renegotiate. This discourages strategic overbidding and ensures the award goes to the most credible, not the most deceptive, bidder.

For the same reason, it is advisable to avoid the system of awarding concessions based on a promise of greater investments or a low rate of return. Instead, tender specifications should establish mandatory minimum investment levels and a fixed, non-negotiable rate of return. The contract should then be awarded to the bidder willing to pay the highest amount for the right to operate under those conditions.[271] This approach reduces the likelihood of post-award renegotiation and associated risks of corruption. If we look back at Argentina's privatizations in the 1990s, we will see that those that followed these principles, such as those involving gas distribution and transportation,

270. *See* Garzón Valdéz, *supra* note 170, at 34 (arguing that if discretionary decisions allow for bribery, then mechanical decisions are better than discretionary).

271. Fred Aarons, *Renegotiation of Concessions in the Latin American Context*, *in* CAN PRIVATIZATION DELIVER? INFRASTRUCTURE FOR LATIN AMERICA 111, 111 (Federico Basañes et al. eds., 1999).

experienced few renegotiations disputes, in contrast with less disciplined processes.[272]

Many instances of actual or apparent corruption, which are also detrimental to the State's reputation, could be prevented by recognizing that government tendering procedures serve multiple public objectives, all of which require equal consideration. Both efficiency and transparency are essential and must not be compromised for one another. For example, if following a public bidding process, the contracting authority enters into direct negotiations with the two top-ranked bidders, it may indeed secure a lower price than initially proposed. However, such post-bid negotiations fundamentally distort the competitive process, undermine transparency, and invite favoritism. Similarly, once the bid submission period has closed, the agency cannot eliminate a costly requirement from the tender, regardless of whether all bidders consent, and even if doing so would avoid the delay of restarting the process. The reason is clear: the agency cannot know which potential bidders were deterred by the original requirement and chose not to participate. Removing the condition after the fact unfairly alters the playing field and defeats the purpose of open competition.

One possible reform would be to enact a law that would allow access to international public tenders only to companies from those countries whose domestic legislation considers it a crime to bribe a public official of a foreign country, such as the United States under the Foreign Corrupt Practices Act, or Spain with similar announced statutes.[273] This restriction would create a dual enforcement mechanism: if corruption arises, both the Argentine authorities and the foreign government could investigate, thereby increasing the likelihood of detection and prosecution. The added oversight would serve as a deterrent and reduce the incidence of bribery in international procurement. This initiative bears some resemblance to the signing of an honesty pact in which the government and participating firms agree, in advance, to denounce corrupt practices. Under such an agreement, firms commit to denouncing officials who demand bribes, and the Government guarantees that none of its officials will make such demands.[274]

---

272. *See* David Stiggers, *Private Participation in Water and Wastewater Services in Trinidad and Tobago*, *in* CAN PRIVATIZATION DELIVER? INFRASTRUCTURE FOR LATIN AMERICA 245, 277-81 (Federico Basañes et al. eds., 1999).

273. AGUSTÍN GORDILLO, THE FUTURE OF LATIN AMERICA: CAN THE EU HELP? 117 (2003).

274. *See* Moreno Ocampo, *supra* note 8, at 53, 58-64.

Finally, one could envisage the creation of an independent public procurement office that would act as an "ombudsman" for public biddings, which would report to the Office of the Attorney General of the Treasury. This office would maintain delegations in each ministry and possess the authority to suspend a bidding process upon the identification of manifest defects reported by interested parties.[275]

2. Performance of the Contract

Contract execution often escapes public scrutiny, which tends to concentrate on the bidding stage. Once the competitors are defeated and resigned, the relationship is generally hidden from the eyes of strangers and develops between old acquaintances, the recurring contractor, and the same officials who have always been responsible for overseeing past contract performance.

It is a contradiction that is both illogical and problematic. Strict monitoring of the bidding process is ineffective if the contract's execution goes unchecked. Awarding a contract to the lowest bidder has little value if the delivered quantities or quality fall short and go unverified.[276] In the same way, the modifications to the contract, even those that may appear to be imposed unilaterally by the administration, distort the previous bidding process.[277]

At the performance stage, the issue of leonine clauses becomes particularly evident. Often justified by the need to sufficiently safeguard State interests, contractual provisions drafted by the administration may exhibit undue severity. Common features include stringent compliance deadlines, substantial penalties, and extensive powers granted to the State, enabling it to issue binding orders requiring

275. *See* Carlos Enrique Mamberti, *Contratación Pública y Corrupción*, *in* ADMINISTRACIÓN PÚBLICA & CORRUPCIÓN 257, 281-82 (2017) (proposing a special system of appeals to an administrative tribunal composed of specialized persons, operating at the pre-contractual stage); *see also* MAIRAL, *supra* note 106, at 858-60 (noting in France, there is a system of summary judicial remedies (*référés*), also for the pre-contractual stage).

276. Mirta Sotelo de Andreau, *Un nudo gordiao en la contratación pública: la corrupción* [*A Fat Knot in Public Procurement: Corruption*]*, in* EL DERECHO ADMINISTRATIVO DE LA EMERGENIA, IV [THE ADMINISTRATIVE LAW OF EMERGENCIES] 64-65 (2002).

277. *See* Beltrán Gambier, *El Principio de Igualdad en la Licitación Pública y la Potestad de Modificar Los Contratos Administrativos* (1998) (Arg.) (explaining the phenomenon of contractual modifications and their possible contradiction with the principle of equality that governs public bidding); Public Sector Contracts Law arts. 203-07 (B.O.E. 2017, 272) (Spain) (In Spain, the scope of modifications during the execution of the contract has been severely limited, whether they are unilaterally imposed by the administration or agreed with the contractor).

immediate action. The sole recourse for contractors is often a claim for compensation, which may be resolved only after a prolonged judicial process. Such terms frequently appear explicitly or are presumed by virtue of principles rooted in the administrative contract theory, as derived from French law. This tendency toward overreach may stem either from a well-intentioned, yet misguided, effort to protect public interests or, less commendably, a desire to maintain the contractor in a subordinate position, thus increasing their responsiveness to administrative directives. Clauses that offer extensive protection to the State, even when introduced for legitimate reasons, may not align with public interest. When contractors perceive that these clauses are enforced strictly, it can lead to increased costs in public procurement. In the United States, the issue is clearly stated, "The American taxpayer is not willing to pay the cost of a risk-free contract," states the Federal Acquisitions Regulation.[278] This pattern is often seen in Argentina. Policies that appear to serve the public interest on the surface frequently produce the opposite effect in practice. To address this disconnect, public administration must move beyond legal formalism. Training should include not only administrative law but also essential principles of business administration, enabling officials to make decisions that are both legally sound and economically rational.

In this respect, classical Argentine administrative law theory has contributed to placing government contractors in a position of legal defenselessness. The sheer enumeration of the State's prerogatives in public contracts, paired with significant limitations on contractors' rights, often deters private entities from doing business with the government. For example, contractors are barred from invoking the *exceptio non adimpleti contractus* (i.e. the defense based on the default of the other party to the contract), even when the State, chronically short on funds, fails to perform its payment obligations.[279]

Among the State's unilaterally exercisable powers are the authority to modify or terminate contracts for reasons of public interest without compensating for lost profits, the right to issue binding directives to the contractor, and the ability to enter the contractor's premises to

278. 48 C.F.R. § 1.102-2(c)(2) (2025).

279. *See* Héctor A. Mairal, *De la Peligrosidad o Onutilidad de una Teoría General del Contrato Administrativo* [*On the Dangerousness or Uselessness of a General Theory of the Administrative Contract*], 180 EL DERECHO 773 (1999) (Arg.); Héctor A. Mairal, *Government Contracts Under Argentine Law: A Comparative Law Overview*, 26 FORDHAM INT'L L.J. 1716, 1734 (2002).

conduct inspections without prior consent.[280] At the same time, contractors must continue performing even when the State defaults. They must also challenge any adverse administrative decision within a matter of days and litigate during the life of the contract, or risk forfeiting their rights altogether.[281]

The current regime is undeniably oppressive, yet it has proven ineffective in shielding the State from excessive or exaggerated claims. Paradoxically, the same legal framework that emphasizes transparency during the contracting phase also imposes disproportionate burdens on contractors during performance. This contradiction overlooks a critical reality: the same abuses and inefficiencies that transparency rules seek to prevent at the bidding stage can resurface during contract execution, precisely because contractors are placed in a position of legal vulnerability.

Argentine administrative law has deviated significantly from the French model on which it was originally based. In France, when the State unilaterally modifies or terminates a public contract for reasons of general interest, it must compensate the contractor for both actual damages and lost profits.[282] Furthermore, French courts exercise more robust judicial review over the existence and sufficiency of the public interest invoked to justify such actions. Finally, the French State is reliably solvent.

The Argentine State claims powers similar to those exercised by the French State, yet refuses to compensate contractors for lost profits. Its invocation of the public interest receives comparatively weaker judicial scrutiny, and in recent decades, the State has repeatedly cited financial hardship to compel contractors to accept government bonds in lieu of payment and to pressure other creditors into restructuring their claims.[283] As a result, the legal position of Argentine contractors is markedly more precarious than that of their French counterparts. The misconduct frequently observed in public contracting in Argentina

280. *See* Decree No. 1023/2001, arts. 12, 13 (Arg.).

281. *See Ley de Procedimiento Administrativo* [Administrative Procedure Law], *supra* note 107, art. 23, recently *amended by Ley de Bases y Puntos de Partida para la Libertad de los Argentinos* [Law of Bases and Starting Points for the Freedom of Argentines], *supra* note 1.

282. ANDRÉ DE LAUBADÈRE ET AL., TRAITE DES CONTRATS ADMINISTRATIFS [TREATISE ON ADMINISTRATIVE CONTRACTS], VOL. II, 407-08, 556, 669 (2d ed., 1984).

283. *See Consolidación de Deuda Pública* [Public Debt Consolidation Law], Law No. 23982, Aug. 23, 1991, B.O. (Arg.); *Emergencia Económico-Financiera* [Economic and Financial Emergency Law], Law No. 25344, Nov. 14, 2000, B.O. (Arg.).

does not stem from an overly permissive legal framework favoring contractors. Rather, it arises from systemic deficiencies that expose contractors to legal uncertainty and abuse. In an environment where legal protections are lacking and where bribery often becomes the only effective safeguard, contractors are disincentivized from limiting their claims to what the contract strictly entitles them to. If integrity is not rewarded, opportunism becomes rational. Eventually, the Argentine State must recognize that the short-term advantages gained from this imbalance come at a long-term cost. Establishing legal rules that offer contractors genuine protections ultimately serves the State's own interests—by encouraging fair competition, reducing corruption, and attracting qualified participants to public procurement.

From this same perspective, the legislative practice of authorizing the renegotiation of contracts executed by prior administrations[284] undermines the principle of the State's continuity over time. It conveys a damaging message: each new government honors only the agreements it has signed and regards those of its predecessors with suspicion. This approach erodes legal certainty and fosters institutional instability. Moreover, it creates broad opportunities for discretionary renegotiation, conditions that are particularly vulnerable to corruption.

Interestingly, the administration's regular suppliers continue to contract under these rules without hesitation. Those familiar with administrative practice understand the extent to which the State asserts its prerogatives over essential contractors, those it cannot afford to do without. The potential for abuse is seen as an acceptable tradeoff for maintaining a regime that limits competition from new bidders, which is precisely what this exorbitant public procurement system achieves. In the worst cases, suppliers resort to bribery to ensure fair, or even favorable, treatment from the officials overseeing contract performance. In Italy, for example, large public works that span several years are often sustained not by the low initial bid prices, but by the profits generated through successive cost increases during the execution of the project.[285]

Addressing this problem requires a multi-pronged approach. One solution is to conduct an impartial review of standard procurement

284. *See Ley de Reforma del Estado* [State Reform Law], Law No. 23696, Aug. 18, 1989, B.O. (Arg.); *Emergencia Económico-Financiera* [Economic and Financial Emergency Law], *supra* note 283.

285. MONTANELLI & CERVI, *supra* note 44, at 300.

specifications, comparing them with those used in countries with efficient public procurement systems and incorporating recommendations from international organizations. Another is to outsource contract compliance oversight to specialized firms.[286] This latter recommendation does not assume that private actors are inherently more ethical than public officials, but rather acknowledges a key structural difference: individuals and private firms face legal and financial sanctions that rarely apply to public agencies. For example, a major international auditing firm collapsed in the wake of the Enron scandal, an outcome that has never befallen Argentina's public oversight bodies, despite their longstanding failure to prevent widespread corruption. The reason is clear: the State does not sue itself, and the officials it could sue often lack the financial means to be held accountable. In contrast, private firms typically carry liability insurance and possess substantial assets that are vulnerable to enforcement and bankruptcy proceedings.

3. Payment

The stage of administrative activity most vulnerable to corruption is the disbursement of payments to contractors. As Spanish scholar Alejandro Nieto observes, "[t]hose who claim what is theirs have to suffer continuous extortion and shower money on intermediaries, commission agents and administrators who mock them again and again until they are completely robbed." [287] In Argentina's public culture (and to a large extent its private sector as well), the payment of a debt often reflects not the fulfillment of a legal obligation but a discretionary favor. This mindset has become so entrenched that prompt payment to certain contractors is frequently treated as presumptive evidence of corruption, particularly when contrasted with the State's general pattern of delayed payments. This situation stems largely from the absence of effective legal remedies for unpaid contractors. Those who are not paid by the State do not have adequate legal means to obtain their funds quickly, which in turn fosters opacity and corruption. The lack of recourse often leads to a lack of transparency. [288]

286. The author witnessed how, on one occasion, a similar proposal was unanimously rejected by both civil servants and the contractors: the latter also preferred their performance to be controlled by the administration itself rather than by internationally renowned consultants.

287. NIETO, *supra* note 4, at 9.

288. *See* CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] [CIVIL AND COMMERCIAL PROCEDURE CODE] art. 195 (Arg.) (demonstrating laws

Delayed payment also undermines fiscal accountability. When the State regularly defaults on its financial obligations, it distorts price signals in public procurement. Vendors justify inflated bids by factoring in the risk and cost of delayed payments, making it nearly impossible to assess whether the State pays fair market prices. Thus, payment delays not only injure individual contractors but also compromise the broader integrity of public spending.

The State often fails to comply even with final court judgments. Legal scholar Jorge Sáenz offers a telling account of this conduct:

> After many years, the State will then compensate its creditors with a ridiculously low interest rate and pay with devalued bonds, cynically affirming that it has 'honored' the court ruling. Of course, to obtain this result, the creditor must have had to hire another professional to obtain the satisfaction of his right, with the consequent costs, not to mention the unholy ones that he may have had to bear. Or it will have had to mobilize the files of cronyism or political contacts, corrupt methods that are popular in the administrative sphere, for the administration to comply with the requirement of 'expeditious treatment' which, sarcastically, is mentioned in Article 1 of the Law of Administrative Procedure as the guiding 'principle' of that procedure.[289]

To promote transparency, the State should implement mechanisms that ensure automatic payment once the fulfillment of the respective contractual provision has been certified, as well as the payment of invoices and judgments in strict chronological order. Electronic record-keeping systems that log payments would increase transparency in the treatment of contractors and enable effective oversight of payment sequencing. This mechanism has already begun[290] and should remain a top priority for public authorities.

---

have attempted to protect the State from claims by individuals by prohibiting precautionary measures that affect State resources); *Consolidación de Deuda Pública* [Public Debt Consolidation Law], *supra* note 283, arts. 22, 165 (Arg.) (permitting delays of two to three years in the judicial enforcement of judgments); Pedro Aberastury, *Ejecución de Sentencias contra el Estado* [*Execution of Sentences against the State*], *in* DERECHO PROCESAL ADMINISTRATIVO [ADMINISTRATIVE PROCEDURAL LAW] 1699 (Jose Luis Depalma ed., 2004); *see also* MAIRAL, *supra* note 106, at 1039-43 (1st ed., 2021).

289. Jorge A. Sáenz, Introduction to Pedro Aberastury, *Ejecución de Sentencias contra el Estado* [*Execution of Sentences against the State*], *in* DERECHO PROCESAL ADMINISTRATIVO [ADMINISTRATIVE PROCEDURAL LAW], Prologue, (Jose Luis Depalma ed., 2004).

290. Decree No. 436/2000, art. 7(c) (Arg.); *see also* Decree No. 1023/2001, art. 9 (Arg.); Decree No. 1030/2001, art. 31-34 (Arg.) (promoting the use of computer technologies).

Additional or alternative mechanisms could further strengthen accountability. For example, in contracts financed by international loans, the lending institution or designated local bank should disburse payments directly to the contractor once performance is certified. This would bypass bureaucratic delays and reduce opportunities for corruption. Another option is to amend the Treasury's budget rules to prohibit the State from entering new contracts, except in essential cases, when existing contractual arrears surpass a predetermined threshold.[291] At the very least, why not allow contractors to suspend their work or supply when the State's arrears exceed a certain ceiling? This is the case in Spain when the State's arrears in a given contract reach four months.[292] In this way, the disorder or arbitrariness of the State in allocating budgetary resources would have repercussions on the civil servants, who are precisely the ones who can correct it, and not on the contractors, who are not responsible for this disorder and do not have the possibility of correcting it. Currently, contractors must continue to comply despite the State's arrears.[293] And the tax authorities want them to advance the rate of 21% value-added tax on the amounts owed by the State.[294] This unjust burden further distorts the relationship between public and private actors. Finally, why not allow expedited summary judgments against the State based on certifications of work completed?[295] Aren't *amparos* (summary actions) allowed against State measures of greater importance than the mere payment of a debt?

291. *See* Public Sector Contract Law art. 165 (B.O.E. 2017, 272) (Spain).

292. *See id.* at art. 198(5) (Spain) (providing contractors to suspend their work or supply when the State's arrears exceed a certain amount); Public Administration Contracts Act art 99(5) (B.O.E. 1995, 119) (Spain) (repealed and superseded by later legislation).

293. *See* MARIENHOFF, *supra* note 222, at 380 (explaining limits on contractor suspension rights); Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal [CFed.] [National Court of Appeals in Federal Administrative Litigation], 3/9/1982, "Rancevich c. Estado Nacional," El Derecho [ED] (1982-40-112) (Arg.) (allowing the contractor to suspend the performance of the contract only when the State's failure to comply with its own obligations reaches such an extreme that it is unable to comply with its own obligations); Decree 1023/2001, art. 13 (Arg.).

294. *See Ley de Impuesto al Valor Agregado* [Value Added Tax Law], Law No. 23349, art. 5(b), T.O. 1997 (Arg.); J.E. Tisocco, *Los deudores morosos e incobrables en el I.V.A.* [*Delinquent and Uncollectible Debtors in V.A.T.*], 78 PERIÓDICO ECONÓMICO TRIBUTARIO [ECONOMIC TAX NEWSPAPER] (1995) (Arg.).

295. *See, e.g.,* Corte Suprema de Justicia de la Nación [CSJN] [Supreme Court of Argentina], 15/05/1968, "Nación Argentina c. Finger, Rouede y Cía.," Fallos (1968-270-425) (Arg.) (demonstrating precedents do not admit summary collection proceedings against the Nation, based on the Law on Claims against the Nation, which establishes the declaratory nature of judgments issued against it).

Spain's 2017 Public Sector Contracts Law goes further; it authorizes precautionary measures compelling immediate payment of State debts.[296] Argentina should consider similar legal innovations to restore fairness and accountability in public contracting.

The issue of advance payments to contractors (which traditionally was 10% of the total amount of the contract, but recently has been higher) warrants separate attention.[297] Governments typically justify these advances to allow the initiation of the work. However, such payments often become vehicles for misappropriation. It is widely known, for example, that mayors commonly request their provincial (i.e. State) governments to advance them funds at the start of election cycles. These funds, ostensibly allocated for public works, frequently find their way back to political campaigns—minus the cost of signage announcing the upcoming project. To reduce such abuse, advance payments should be limited to the minimum amount strictly necessary to mobilize work. Independent professionals should audit the application of these funds. While money is inherently fungible, tighter oversight would at least make diversion more difficult and potentially reduce the scale of misuse.

Since 2002, the Argentine Government has increasingly interfered in the contracts granted to the private companies, many of which were created because of the privatization wave of the last decade of the 20th Century. This interference has taken two primary, non-transparent forms that facilitate corruption. First, although the government authorizes rate increases, private utility operators must deposit the additional revenue into public trusts. Government officials then manage these funds to award new contracts purportedly meant to satisfy the operator's investment obligations. This structure shifts control of the funds to political actors while shielding them from direct responsibility. Second, the government often mandates utility rates that fall below the actual cost of service. To fill the gap, it pays subsidies, usually insufficiently and selectively, to the operators. The courts should realize that, in Argentina, this system, although announced as a means to protect the user, constitutes an open invitation to corruption. As an alternative, where feasible, utilities should adopt a model of "cross

296. *See* Public Sector Contract Law art. 199 (Spain).

297. International Federation of Consulting Engineers (FIDIC), CONDITIONS OF CONTRACT FOR CONSTRUCTION FOR BUILDING AND ENGINEERING WORKS DESIGNED BY THE EMPLOYER 41 (1st ed., 1999).

subsidies," in which higher-income users pay slightly more to offset lower rates for economically vulnerable users. Unlike opaque state subsidies, this approach maintains market discipline, increases transparency, and reduces the opportunities for political manipulation.

4. Dispute Resolution

Currently, the State's mechanisms for resolving contractual disputes fail to satisfy both the State and the contractors. The State has become disillusioned with arbitral tribunals, going so far as to dissolve the long-standing Public Works Arbitral Tribunal in 2001, which had existed since 1947.[298] In high-profile cases, the state has frequently challenged arbitral awards before the Supreme Court with varying success.[299] Meanwhile, contractors lacking an arbitration clause must navigate an arduous and protracted dispute resolution process. This path typically includes at least six stages, namely: exhaustion of administrative remedies, lower court, court of appeals, Supreme Court review, and finally judgment enforcement, often triggering a renewed round of administrative and, eventually, judicial procedures. The full process can easily stretch over a decade, and sometimes as long as twenty years.[300] At some point during this legal odyssey, contractors may be compelled, under legislation consolidating public debt, to accept government bonds of questionable value instead of payment.[301]

Such extreme delays impair the ability to resolve disputes on the merits. By the time cases reach the evidentiary stage, public officials no longer recall the relevant facts, or claim not to, and the State's legal

298. Decree No. 11511/1947, Apr. 28, 1947, B.O. (Arg.), *repealed by*, Decree No. 1349/2001, Oct. 26, 2001, B.O. (Arg.).

299. *Compare* Corte Suprema de Justicia de la Nación [CSJN] [Supreme Court of Justice of the Nation], 05/11/2002, "Meller Comunicaciones S.A. U.T.E c. Empresa Nacional de Telecomunicaciones / demandas contra la Nación," L.L. (2002-B-906) (Arg.) (rejecting the State's challenge), *with* Corte Suprema de Justicia de la Nación [CSJN] [Supreme Court of Justice of the Nation], 01/06/2004, "José Cartellone Construcciones Civiles S.A. c. Hidroeléctrica Norpatagónica S.A. (HIDRONOR S.A.) / proceso de conocimiento," L.L. (2004-E-419) (Arg.) (admitting the State's challenge).

300. COMM. ON INT'L ECON. POL'Y & REFORM, REVISITING SOVEREIGN BANKRUPTCY 20 (Oct. 2013).

301. *See Consolidación de Deuda Pública* [Public Debt Consolidation Law], *supra* note 283; *Emergencia Económico-Financiera* [Economic and Financial Emergency Law], *supra* note 283 (explaining both bonds later defaulted; they were included among the public securities that the State offered to cancel at 25% of their face value); Resolución 158/2003 (Arg.) (deferred payments on public debt service contracted before December 31, 2001).

counsel must defend its position with limited information and scarce documentation. As a result, the State's defenses tend to be formalistic and often ineffective.

To address these shortcomings, reinstating arbitration would be a sensible reform. This is provided for in Law 27328 of 2016, governing public-private partnerships, which already provides for this possibility and additionally authorizes the creation of standing technical panels. These panels are constituted at the inception of the contract and remain in place throughout its performance.[302] As proposed in the first edition of this work and modeled on mechanisms developed by the International Chamber of Commerce,[303] these panels offer two key benefits: they secure contemporaneous input from government officials while still in office and provide timely relief for contractors facing abuse of authority. Reintroducing arbitration and adopting such mechanisms would enhance fairness, reduce delays, and restore credibility to the resolution of public contract disputes.

V. CONCLUSION

As this article has shown, Argentina's legislative and administrative frameworks—both in their drafting and implementation—often undermine efforts to combat corruption. Many of these rules, rather than curbing misconduct, unintentionally facilitate it: they create unnecessary or overly expansive opportunities for corrupt practices to flourish. Some function as breeding grounds for corruption; others promote it directly or fail to erect effective safeguards against it.

However, we recognize that honest public officials (who, in our opinion, are the majority) may view the proposals advanced here as misaligned with reality. These officials operate within a society that routinely resists legal compliance and, at its upper tiers, enjoys sophisticated counsel capable of outmaneuvering a State with limited institutional capacity and underfunded legal defenses.

From their perspective, overly broad regulations and severe sanctions may seem like necessary tools to correct this imbalance and

302. *Id.*; Decree 118/2017, art. 9(13), Feb. 17, 2017, B.O. (Arg.) (provision within Law No. 27328 establishing a method for calculating financial compensation in cases where a Public-Private Partnership contract is rescinded. The lack of practical validity of this law due to the problems of the national economy has so far prevented this mechanism from being tested in practice).

303. *See* International Chamber of Commerce, *Dispute Board of Rules* (Oct. 1, 2015) (explaining these rules went into effect on September 1, 2004, and the rules were updated in 2015 and 2018).

compel at least some level of legal adherence. Yet these same tools are frequently circumvented by those with proximity to political power or access to corrupt networks. As a result, the pursuit of compliance through increasingly complex rules often comes at the cost of expanding corruption's reach. When the State emulates European regulatory rigor without matching its institutional performance, it generates social, political, and economic consequences that exceed the scope of this article. Here, our focus is narrower: to highlight the civic and ethical costs of Argentina's current legal policy choices. In our view, those costs outweigh the marginal gains in legal compliance produced by these overreaching standards.

Therefore, if Argentina is to prioritize the fight against corruption and treat it as a true matter of genuine State policy, then every legislative or administrative initiative, especially those that require special authorizations, burdensome oversight mechanisms, or broad public interest tradeoffs, should also be evaluated from this point of view: Are the benefits of various kinds that the new law would entail greater than the social and political cost derived from the possible increase in corruption that it would produce? This is the critical question that Hernando de Soto proposes, and one that Argentine policymakers must begin to ask with urgency.[304]

Moving forward, Argentina should adopt a more proactive, institutionalized approach to anti-corruption policymaking. Just as an environmental impact study is required for certain infrastructure projects, policymakers should mandate a "moral impact study" before approving any bill or regulation that regulates an industry or sector of activity, or that otherwise creates opportunities for corruption.

This type of analysis could be entrusted to a permanent anti-corruption body, such as the Anti-Corruption Office.[305] Such a role would allow this Office to complement its function of investigation and

304. DE SOTO ET AL., *supra* note 32, at 309.

305. *See Ley de Ministerios* [Ministries Law], Law No. 25233, art. 13, Dec. 10, 1999, B.O. (Arg.) (creating the Anti-Corruption Office, which is responsible for the development and coordination of anti-corruption programs in the national public sector); José Massoni, *La Oficina Nacional Anticorrupción* [*The National Anti-Corruption Office*], *in* CONTROL DE LA ADMINISTRACIÓN PÚBLICA [CONTROL OF PUBLIC ADMINISTRATION] 681 (Revista Régimen de la Administración Pública, 2002).

denunciation, typically after the criminal act,[306] with preventive action and become less conflictive and more effective in combating the problem.[307] This preventive function, also contemplated by current legislation, is already entrusted to this agency, which has an area dedicated to improving regulations,[308] an objective related to the task we propose. Alternatively, or complementarily, non-governmental organizations with expertise in governance and integrity could undertake these assessments to ensure independence and pluralism in oversight.

The analysis of each proposed regulation could be based on a list of facets that favor corruption, many of which this article has examined. Each legislative or regulatory proposal could receive a score reflecting its exposure to corruption risks and the availability of alternative mechanisms that would achieve the same policy objectives more safely and transparently.

In time, such assessments would promote the development of regulations that balance public goals with administrative structures less conducive to corruption. Legislators, regulators, and the public would no longer be able to feign ignorance when enacting laws that expand the scope for corrupt behavior, especially when less risky alternatives exist and do not undermine governmental effectiveness. Argentina could even consider enacting a comprehensive Moralization Law, one that builds upon the principles outlined in this work, to formalize preventive mechanisms and reduce the structural opportunities for corruption. Given the overabundance of detection and punishment provisions in existing law, the time has come to shift focus toward systemic prevention and institutional design that disincentivizes misconduct at its root.

Of course, corruption does not reside solely within the State: as the saying goes, it takes two to tango. Historically, it was only the corrupt official who was punished and not the private individual who

306. *See Ley de Ministerios* [Ministries Law], *supra* note 305, art. 13 (Arg.); *see also Ley Orgánica del Ministerio Público* [Organic Law of the Public Ministry], Law No. 24946, arts. 26, 45, and 50, Mar. 30, 1998, B.O. (Arg.) (describing the functions of the Anti-Corruption Office).

307. *See* Decree 625/2000, Annex II, July 28, 2000, B.O. (Arg.) (stating that an objective of the Anti-Corruption Office is to "advise national public sector agencies to implement policies or programs for the prevention and fight against corruption."); *see* Decree 102/1999, arts. 2, 12, Dec. 23, 1999, B.O. (Arg.).

308. Nicolás Raigorodsky, *Políticas de prevención de la corrupción en el ámbito de los organismos de seguridad pública* [*Policies for the prevention of corruption in the field of public security agencies*], *in* ARGENTINE-BRITISH DIALOGUE – GOVERNABILITY AND DEMOCRACY 170-71 (2005).

bribed him.[309] Today, we recognize that both parties are complicit. The State inevitably reflects the character of the society that forms it, but the relationship is reciprocal. Society also takes shape in response to the incentives and messages it receives from the State. A corrupt State is, to a certain extent, the product of the corruption that exists within society, but at the same time the degree of corruption in society increases when its members notice not only that it helps to gain positions vis-à-vis the State and competitors, but that it is itself considered valuable conduct: "The internalization of a transgressive mentality is often experienced as a vernacular sign of cleverness and even personal brilliance, without noticing that such behavior degrades the individual who practices it and, at the same time, is socially projected as a community disvalue, which, in a perverse feedback, gravitates on the individual conscience, neutralizing or deforming it."[310] In such a society, nothing is more disheartening to an honest person, a civil servant, an investigator, a businessman, than to see others succeed through incorrect and illegal maneuvers. The message that the State sends to the population is deleterious: the system favors the unscrupulous over the principled.

Dismissing this reality by claiming that "it has always been this way" offers no solace, as there are popular songs that have pointed it out for more than half a century. Those who have lived through Argentina's recent history know that the phenomenon has only deepened over time. Nor is it any consolation to argue that corrupt officials represent only a small fraction of public servants. For example, a card club in which there is only one member suspected of cheating may continue to exist, but it only takes ten percent of the members to engage in that behavior for honest members to become discouraged and leave. In the same way, even a minority of corrupt actors can destroy institutional trust. Corruption often functions as a magnet, drawing high-stakes matters toward the very officials least suited to handle them. This phenomenon creates a kind of "forum of attraction" for corruption, in which power and influence disproportionately accumulate around those suspected of unethical behavior. Honest magistrates and public officials, by contrast, typically make no distinction regarding the importance of the cases they handle. In some instances, they may

309. JOHN T. NOONAN JR., BRIBES 690 (1984).

310. Comadira, *supra* note 45, at 496-97.

even prefer lower-profile matters, which pose lower reputational risk and are less likely to invite political pressure or unfounded accusations. Dishonest actors, on the other hand, actively seek out high-impact cases precisely because these offer the greatest opportunities for personal gain. As a result, it is not uncommon to find those with the most troubling reputations assigned to, or maneuvering into, positions of heightened authority over sensitive or valuable decisions.

Each person, depending on their political position, will identify those whom they will blame (in whose alleged misconduct they will believe without the need for proof, describing it as *symptomatic*) and those whom they will excuse (whose faults they will consider unproven or, in any case, *anecdotal*). But as a society, it is time to reverse these partisan reflexes. Reversing the spread of corruption must become a national priority and not merely the banner of a particular political party, but as a State policy common to all parties.

Improving the ethical conduct of the State would have direct, positive effects on public life. It would initiate a virtuous cycle in which incentives and rewards promote excellence and integrity rather than opportunism and dishonesty. However, ethical exhortations to civil servants are not enough to achieve this. Stalin is credited to have said that with a dozen St. Francis of Assisi, the Russian Revolution would not have happened.[311] The solutions that require a change in human nature are the province of religions and not of the social sciences. It's human nature to follow incentives. If we change the system, most people will adjust to the new system, not because they have morally transformed, but because they will adapt to the new stimuli.

We therefore conclude that it is not enough to combat the effects of corruption; we must target its structural causes. Among these, the legal causes are the most amenable to reform. The legal corrections proposed in this article will not eliminate corruption, but they would reduce the scope of corrupt behavior, particularly in situations where misconduct arises in the absence of correct mechanisms for resolving conflicts with the State or where poorly designed laws create unnecessary opportunities for abuse. We use the term "unnecessary" advisedly. There will always be official favors to grant, and restrictive rules whose non-application will produce benefits to those who irregularly obtain that favor or dispensation. The task is to determine which legal

311. John Piper, Lenin, Francis, and Paul (Dec. 22, 1981) (quoting Stalin), https://www.desiringgod.org/articles/lenin-francis-and-paul.

rules, whether granting privileges or imposing restrictions, should be removed as unworthy because they either fail to deliver meaningful public benefits (even if they do for the officials) or, more critically, because their negative social consequences outweigh the positive ones. Eliminating such provisions will simultaneously reduce the opportunities for corruption to flourish.

Public pressure to combat corruption will also increase. The spread of what we have called *petty corruption* turns many otherwise honest persons into accomplices, often unwittingly, of corrupt individuals and officials. While public denunciations of corruption have become commonplace, many still regard it as a necessary evil: a pragmatic, if regrettable, cost of operating within an imperfect society. Calls for the eradication of corruption will continue to be loud but not always sincere, as long as corruption persists as a system that large segments of the population must navigate to access basic services or protections. Meaningful reform will only become possible when individuals are no longer compelled to rely on corrupt practices as a matter of survival or efficiency. Moreover, eliminating the widespread petty corruption described at the beginning of this article would allow the concentration of anticorruption efforts on combating grand (i.e., high-level) corruption. At present, anticorruption mechanisms risk being diluted in their effectiveness by the sheer breadth of lower-level infractions currently under their purview.

Addressing the regulatory abuses outlined in this article will not compromise the public interest. On the contrary, more advanced legal systems can efficiently manage the general interest without the need for such abuses. Yet many civil servants are tempted to have a legal regime that allows them to always be right in the face of individuals, imposing their will on them unappealingly in reality, even if not in theory. The most extreme cases of this dynamic have been the subject of intense social criticism and legal repudiation, so well-known that these abusive policing practices have earned a popular nickname: "trigger-happy" enforcement. While administrative and tax laws may not result in physical violence, many of their provisions function as figurative "triggers," enabling bloodless but coercive actions that place individuals at the mercy of unchecked authority.[312] Such rules erode

312. *Ley Modificatoria del Código Fiscal* [Law Modifying the Tax Code] Law No. 13405, art. 13, Dec. 30, 2005, B.O. (B.A. Prov., Arg.); Letter to the Buenos Aires Legislature, Fundamentos de la Ley 13.405 [Fundamentals of Law 13.405], (Dec. 13, 2005) (Arg.) (amending the provincial

the dignity of individuals, corrode the integrity of public officials and the State itself, and end up encouraging corruption. Many of the most harmful examples are among those that we have examined in these pages.

Let us recall Lord Acton's enduring phrase: "*Absolute power corrupts absolutely.*"[313] The traditional norms of the rule of law not only safeguard the freedom of citizens but also serve to combat corruption. But the theoretical validity of these rules is not enough. These principles must be enforced in practice and must not be undermined by lower-ranking regulations or administrative distortions. In Argentina, there is a stark contrast between the constitutional principles–enshrined for more than a century and a half to shield individuals from governmental abuse—and the lived reality, in which poorly crafted regulations and misguided theories of administrative law routinely expose citizens to arbitrary and unchecked power. Juan Bautista Alberdi foresaw this danger when he warned that "Administrative Law must not be a fallacious means of eliminating or scuttling constitutional freedoms and guarantees."[314]

It is, of course, necessary to improve oversight mechanisms and ensure their effectiveness by making the oversight bodies independent from those whom they control (e.g., in the case of the legal advisers of each national department who should report to the office of the Attorney of the Treasury instead of the respective minister or secretary). Moreover, their findings should carry a suspensive effect, halting implementation of contested actions until proper review occurs. However, even these institutional safeguards, although necessary, are insufficient on their own.

"Corruption accompanies power like shadow accompanies the body," Alejandro Nieto observed.[315] It is, therefore, illusory to believe that Argentina can meaningfully reduce corruption without placing limits on the power currently exercised by public officials in the name of the State. There will be those who, while deploring corruption,

---

tax code to allow tax authorities to attach private bank accounts, real estate, and other assets by their own decision).

313. Letter from Lord Acton to Archbishop Creighton (Apr. 5, 1887) https://oll.libertyfund.org/titles/acton-acton-creighton-correspondence#.

314. Juan Bautista Alberdi, *Bases y Puntos de Partida para la organización política de la República Argentina* [*Bases and starting points for the political organization of the Argentine Republic*], *in* ACADEMIA NACIONAL DE CIENCIAS MORALES Y POLÍTICAS, 54-55 (2002).

315. NIETO, *supra* note 4, at 7.

believe that limiting the power of the State would undermine the best defense that the State makes of the public interests, and that the foreign examples of limitation of public powers that we have cited are inapplicable in our reality. Those who take this position will be reduced to advocating the improvement of the ethical quality of our rulers as the only solution to the problem, because continuing to add more sanctions and controls to those that already exist would have a diminishing return. These appeals to the morality of our rulers will be even more naïve than some of the solutions we propose in this article. Instead, let us not rely only on ethical invocations; let us limit the power of the Argentine State vis-à-vis its citizens, and we will see how corruption declines.

PROBLEMS IN THE INSTITUTIONAL DESIGN FOR THE DEFENSE OF COMPETITION: THE ARGENTINE EXPERIENCE

Miguel Ángel De Dios*

Abstract

This Article examines the institutional design of competition law enforcement in Argentina and the persistent challenges the country has faced in consolidating an effective and independent antitrust authority. Although Argentina has maintained antitrust legislation since the early twentieth century and formally adopted many international best practices in competition policy, the development of a stable institutional framework for enforcement has proven difficult. The Article situates Argentina's experience within the broader debate over the role of competition policy in economic development, particularly in emerging economies where institutional capacity and political dynamics may affect regulatory outcomes.

Drawing on comparative scholarship and empirical evaluations by international organizations, the Article analyzes key structural and operational dimensions of competition agencies—including independence, organizational structure, enforcement powers, and institutional resources. It traces the historical evolution of Argentine competition law from its early criminal-law origins through successive legislative reforms culminating in the modern framework established by Law 27.442. Despite these reforms, the Article argues that Argentina's primary challenge has not been the formal design of antitrust law, which

* Founding partner, De Dios & Goyena, Buenos Aires, Argentina; Abogado, Universidad de Buenos Aires; LL.M., University of Miami; Doctorate, Universidad del Salvador Argentina; Admitted to the New York Bar in 1991. Professor (with tenure) of Market Regulatory Law and Competition Law, Universidad del Salvador Argentina; former Senior Advisor to the Ministry of Economy's Secretariat for the Defense of Competition. Finally, the author thanks his wife, Livia Uriol, and his children, who have brought warmth and comfort to his daily life since they came into it.

largely reflects international standards, but rather the inconsistent implementation and institutional consolidation of its competition authority.

By examining legislative developments, peer-review assessments by organizations such as the OECD and UNCTAD, and empirical observations regarding agency performance, the Article identifies persistent obstacles including political influence, limited resources, and delays in establishing independent adjudicatory bodies. The Article concludes with recommendations aimed at strengthening the institutional framework for competition policy in Argentina, emphasizing the importance of agency independence, adequate resources, and coherent institutional design in promoting effective antitrust enforcement and supporting economic development.

I. INTRODUCTION 106
II. DEFENSE OF COMPETITION AS A DRIVER OF DEVELOPMENT 107
III. THE INSTITUTIONAL DESIGN OF COMPETITION AUTHORITIES 111
IV. THE LAWS FOR THE DEFENSE OF COMPETITION IN ARGENTINA 113
V. EXPERIENCE OF THE ARGENTINE COMPETITION AUTHORITY 121
A. Peer Reviewers' Reports 122
1. Competition Law and Policy in Argentina, Peer Review (2006) 123
2. CNDC Resources 125
3. Follow-up to the Nine Latin American Peer Reviews of Competition Law and Policy (2012) 132
4. Voluntary Peer Review of Competition Law and Policy: Argentina (2017) 135
B. The Evaluation of the System's Effectors 138
1. Sample Description 139
2. Perceptions of Satisfaction 142
3. Intertemporal Evaluation and the Latest Expert's Literature in Argentina 153
VI. AMENDMENTS TOWARDS THE FUTURE 171
A. The Opinion of International Experts on the Future of Competition in Argentina Considering Law 27.442 172

B. Evaluation of the Main Principles and Aspects the Institutional Design of the Competition Agency is Expected to Have 174
1. Antitrust Law Bills with Parliamentary Status in Recent Years 184
2. The Bills Under Treatment During the Government of President Alberto Fernandez 184
3. The Bill Proposed During the Administration of President Javier Milei 190
4. The Provisional Appointment of the Agency by the Administration of President Javier Milei 193
C. The Selection and Appointment of the Competition Agency Members: What is the Real Obstacle to Create the Agency as Provided for in the Legislation? 194
VII. CONCLUSION 204

I. INTRODUCTION

As it has been addressed in the past, Argentina, as other developing countries, has struggled over decades in adopting and setting forth antitrust rules which are reliable, predictable, and suitable to its needs.[1] Having antitrust laws since the beginning of the twentieth century, it has only about thirty years of effective practice and relative enforcement of its laws.[2] However, a distinctive feature of this period in Argentina is the inability to consolidate the institutional design of the antitrust agencies set by said laws.[3]

In this paper we will address the difficulties and implications in setting and consolidating institutions of antitrust in Argentina.

Part I addresses the discussions about the setting of antitrust rules in developing countries and reference the comparative alternatives and international 'best practices' of setting the institutional design of competition agencies. Part II reviews the legal framework and the

1. Miguel Ángel De Dios, *Antitrust in Developing Countries: A Report on Argentina*, 14 SW. J.L. & TRADE AM. 63, 63 (2007).

2. *See* MIGUEL ÁNGEL DE DIOS, EL DISEÑO INSTITUCIONAL PARA LA DEFENSA A LA COMPETENCIA: LA EXPERIENCIA COMPARADA Y EL CASO ARGENTINO [The Institutional Design for the Defense of Competition: The Comparative Experience and the Argentine Case] 15, 139 (2023).

3. *See* Miguel Ángel De Dios, *El Paradigma de la Independencia de las Agencias de Competencia* [The Paradigm of Competition Agency Independence], EL DIAL: CONTENIDOS JURÍDICOS (Mar. 31, 2021), https://www.drga.com.ar/png/paradigma_agencias_competencia.pdf.

evolution of the antitrust institutional design in Argentina. Part III makes a critical assessment of the practice in recent years and the difficulties in establishing an independent antirust agency. Finally, we make certain recommendations and conclusions to consolidate the antitrust policy and its agency in Argentina.

II. DEFENSE OF COMPETITION AS A DRIVER OF DEVELOPMENT

There is a consensus in the fields of economic, legal, and political sciences that competition is fundamental to a market economy and economic development.[4] In fact, competition favors innovation, promotes improvement in the product and service quality that companies offer to the market, induces companies to make their best efforts to lower their production costs, and finally results in price reduction to gain market share.[5] All of this translates into benefits for consumers because the ultimate goal of defense of competition is maximizing consumer's interest or surplus. But the promotion and defense of competition is also a fundamental instrument for the organization of an efficient and dynamic market economy, capable of incorporating the market into the intense process of innovation that characterizes the globalized economy.[6] These, in turn, are necessary conditions for economic development.

There is abundant literature in economic sciences supporting the importance of competition to increase productivity and economic growth.[7] The effective use and management of resources in the private sector is related to the level of competition in each country.[8] A higher level of competition promotes better managerial practices and nurtures a virtuous relationship between competition and productivity.[9]

In an ideal universe where markets could reach elevated levels of competition and thus achieve effective use, there would be no need for institutions to create regulations in order to achieve that ideal. However, this does not occur in the real world; on the contrary, markets

4. De Dios, *supra* note 1, at 15.

5. *Id*. at 15.

6. *Id*.

7. Manuel Toledo, *Fostering Competition, in* INSTITUTIONS FOR PRODUCTIVITY: TOWARDS A BETTER BUSINESS ENVIRONMENT 95, 98 (CAF – Dev. Bank of Lat. Am. 2018), https://scioteca.caf.com/bitstream/handle/123456789/1410/Institutions%20for%20productivity.pdf?sequence=1&isAllowed=y.

8. *See id.* at 97-98.

9. *See id.* at 100.

often fail to achieve a satisfactory level of competition.[10] Therefore, institutions play a fundamental role in guaranteeing competition and thus promoting the country's economic development and citizens' access to goods and services.[11] Regulating competition is crucial as part of the social infrastructure necessary for the development of businesses, as explained by Hall and Jones, who study productivity differences across countries.[12]

Thus, in order to protect and promote these competitive dynamics, rules and regulations must be established to prevent, deter, and correct practices that are contrary to fair competition, i.e., non-competitive or anti-competitive practices, and also to prevent concentration of companies that may enable such market agents to strengthen or consolidate their power in a way that is detrimental to competitiveness and, consequently, to consumer wellbeing. As noted by Nobel Prize-winning economist Jean Tirole, " . . . Economists have long extolled the virtues of markets. Unfettered competition protects consumers from the political influence of lobbies and forces producers to deliver products and services at cost. Unfortunately, competition is rarely perfect, markets fail, and market power—the firms' ability to raise price substantially above cost or to offer low quality—must be kept in check."[13]

It is only through a rigorous, and technically reliable, practice that anti-trust policy will achieve its objectives. Otherwise, the economic and social costs of active antitrust policies may outweigh their benefits.

Empirical evidence shows that the implementation of best practices in competition advocacy is a rare asset in developing countries.[14] Thus, it has turned out that the appreciation of this economic regulatory instrument and its implementation mechanisms have not always

10. John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 174 (2015).

11. Comisión Nacional de los Mercados y la Competencia, *Guía de la competencia para consumidores* [Guide to Competition for Consumers] (CNMC 2020), at 3, 13, https://www.cnmc.es/sites/default/files/editor_contenidos/CNMC/Gu%C3%ADa_competencia_consumidores_.pdf.

12. Robert E. Hall & Charles I. Jones, *Why Do Some Countries Produce So Much More Output Per Worker Than Others?*, 14 Q. J. ECON. 83, 84 (1999).

13. Jean Tirole, *Market Failures and Public Policy*, 105 AM. ECON. REV. 1665, 1665 (2015).

14. De Dios, *supra* note 1, at 115 (citing Enrico Alemani et al., *New Indicators of Competition Law and Policy in 2013 for OECD and non-OECD Countries*, ORG. FOR ECON. CO-OPERATION & DEV. (OECD) (Dec. 12, 2013), https://www.oecd.org/content/dam/oecd/en/publications/reports/2013/12/new-indicators-of-competition-law-and-policy-in-2013-for-oecd-and-non-oecd-countries_g17a243e/5k3ttg4r657h-en.pdf (explaining in detail a study on how competition advocacy is a rare asset in developing countries)).

been consistent or peaceful when it comes to emerging countries.[15] Indeed, the establishment of competition rules and their respective enforcement authorities have been questioned in economies where the limited scale does not allow the existence of several players in the same market, or where the incentives for market newcomers (due to their limited size) have usually been associated with the granting of special advantages or privileges.[16] The conditions for the establishment of legal monopolies in certain market niches were often associated with granting of special advantages to certain investors, rather than with strictly economic reasons to justify them.[17]

The 2018 Corporación Andina de Fomento (CAF) (Andean Development Corporation) or Development Bank of Latin America, Report on Economic Development (RED) analyzes an empirical study on how institutions, through competition regulation, impact productivity in many Latin American countries.[18] The level of competition is significantly lower in less developed Latin American countries.[19] Taking the Lerner index[20] as a measure, the graph below shows that in the most productive sector there is greater concentration in Latin American countries.[21]

15. Eleanor M. Fox, *Competition Policy: The Comparative Advantage of Developing Countries*, 79 LAW & CONTEMP. PROBS. 69, 82 (2016).

16. *See id.* at 83-84.

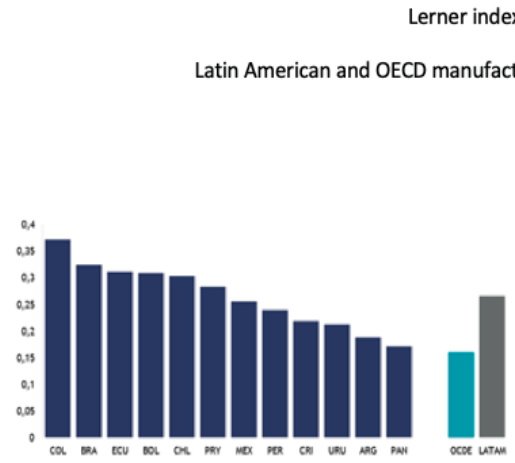
17. *Compare* STEPHEN HABER, CRONY CAPITALISM AND ECONOMIC GROWTH IN LATIN AMERICA xii (2002) (exploring how crony capitalism led officials to grant privileges to select industries by allowing them to monopolize domestic markets or shielding them from international competition), *with* FUNDACIÓN DE INVESTIGACIONES ECONÓMICAS LATINOAMERICANAS, LA REGULACIÓN DE LA COMPETENCIA Y DE LOS SERVICIOS PÚBLICOS: TEORÍA Y EXPERIENCIA ARGENTINA RECIENTE [Regulation of Competition and Public Services: Theory and Recent Argentine Experience] 85-86, 89, 402 (1998) (exploring how particular monopolies have in some instances operated legally, albeit under regulation, because of their ability to provide a type of public service (i.e., a "universal service")). *See also Legal Monopoly*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/economics/legal-monopoly/ (last visited Oct. 26, 2025) (rationalizing why a legal monopoly might be justified to achieve certain social-economic objectives).

18. *See* De Dios, *supra* note 1, at 6, 97-98.

19. *See id.* at 98.

20. *See id.* at 107.

21. *See id.*



Source: CAF based on data from INDSTAT2 (UNIDO, 2017)

The poor performance of Latin American institutions helps explain the lag with respect to more developed countries. The effort to strengthen institutions is mandatory to achieve economic development.[22] Development specialists at the Andean Development Corporation point out that the impact of competition policies is particularly strong when institutional aspects are improved, such as, for example, the level of independence of the competition authority and the extent of separation between judges and the agency conducting the investigations.[23] Renowned economist Paolo Buccirossi who studies the role of institutions for development, states that the effectiveness of competition policies "increases significantly when the judicial system is more efficient, the rule of law is stronger and the degree of compliance with laws is higher."[24] Cohesion between antitrust protection and the legal system is essential to achieve predictability and order in business. Thus, the arguments in favor of promoting pro-competitive policies,

22. Fernando Álvarez, Pablo Sanguinetti, & Manuel Toledo, *Institutions, Productivity, and Development, in* INSTITUTIONS FOR PRODUCTIVITY: TOWARDS A BETTER BUSINESS ENVIRONMENT 17, 29, 36 (CAF – Dev. Bank of Lat. Am. 2018), https://scioteca.caf.com/bitstream/handle/123456789/1410/Institutions%20for%20productivity.pdf?sequence=1&isAllowed=y.

23. Toledo, *supra* note 7, at 117 *(*citing Paolo Buccirossi, et al., *Competition Policy and Productivity Growth: An Empirical Assessment*, 95 REV. ECON. &STAT. 1324, 1324-25 (2013)).

24. Toledo, *supra* note 7, at 117 (citing Paolo Buccirossi et al., *Competition Policy and Productivity Growth: An Empirical Assessment,* 95 REV. ECON. & STAT. 1324, 1325 (2013)).

with their nuances or differentiated models, even in developing economies, are more vigorous than the reservations against.[25]

We can, therefore, assert that there is currently agreement on the benefits of implementing competition policies and regulations, not only in the developed economies of central countries, but also in emerging or developing countries. Basically, in heavily regulated economies, with unnecessary transaction costs for business development and, additionally with significant income asymmetries and vast sectors of the society living in poverty, competition advocacy should be a fundamental policy objective. We can also point out this objective based on two necessary aspects: (i) enabling the transformation of an over-regulated economy into a market economy with a system of predictable rules and a non-distortive regulatory system that promotes investment and development; but (ii) making sure that its institutional design is appropriate to guarantee the social legitimacy of the market as a mechanism for resource allocation.

III. THE INSTITUTIONAL DESIGN OF COMPETITION AUTHORITIES

Consensus on establishing antitrust regulation becomes weaker when it comes to deciding which should be the body responsible for enforcing the regulation and what organizational and functional characteristics such agencies should have.[26] As we have seen in different studies and empirical research,[27] national and international competition agencies are in constant evolution and development. In particular, discussions on the structural and operational features of the agencies' organization are constantly changing. This does not happen exclusively in developing countries, since even in countries with more vigorous economies and consolidated competition agencies in place, changes in their design are observed from time to time; but it is in countries with emerging economies, as is the case of Latin America, where special attention should be paid.[28]

---

25. U.N. CONF. ON TRADE & DEV., *The Role of Competition Policy in Promoting Economic Recovery* (2010) ¶ 18, https://unctad.org/system/files/official-document/tdxibp9_en.pdf.

26. Juan R. Cuadrado Roura & Marta Carrillo Neff, *Agencias de la Regulación y la Competencia: La Independencia y la Elección de un Modelo Multisectorial o Integrado* [*Competition and Regulatory Agencies: Independence and the Choice of a Multisectoral or Integrated Model*], 17 REV. ESPAÑOLA DE CONTROL EXTERNO 77, 77-78 (Sept. 2015).

27. *See generally* Miguel Ángel De Dios, *El Diseño Institucional para la Defensa de la Competencia: La Experiencia Comparada y el Caso Argentino* [*Institutional Design for the Defense of Competition: Comparative Experience and the Argentine Case*] (Ediciones DyD, 2023). *See generally* DE DIOS, *supra* note 2.

28. Toledo, *supra* note 7, at 98.

In our comparative study of competition agencies and Argentinian case law,[29] we make an exhaustive analysis of the regulatory design of each time period into which we divide the centennial experience of competition advocacy in Argentina. For this purpose, our starting point has been the conceptual framework provided by Professors William Kovacic and David A. Hyman in "*Competition Agency Design: What's on the Menu?"* which was published in the George Washington University Law Review[30] (a paper to which we will refer as "Kovacic-Hyman"), and then will further analyze the most important ones on competition. Specifically including the report on institutional design and organization of competition agencies presented by the working group on agency efficiency of the International Competition Network (referred to as the "ICN Report"),[31] Professor Frederic Jenny's, Chairperson of the OECD[32] Competition Committee, article[33] (referred to as "Jenny"), and finally, the work of the so-called GAL Project led by Professors Eleanor Fox of New York University and Michael J. Trebilcock of the University of Toronto (referred to as "GAL").[34]

Kovacic-Hyman identifies nine key issues to be considered in the design of competition agencies.[35] We have worked on the topics highlighted by the authors using a systematized approach, classifying and sorting themas structural issues and as operational issues in the institutional design of competition agencies.

We refer to structural aspects when we discuss, namely: (i) the paradigm of agency independence and its extent, i.e., the level of autonomy of the agency or the control to which the agency is subject, whether by the political leaders or other third parties, (ii) whether the agency should be structured as a collegial body composed of several members or as an entity chaired by a single official, (iii) whether the

29. *See* De Dios, *supra* note 1.

30. *See* William E. Kovacic & David A. Hyman, *Competition Agency Design: What's on the Menu?,* 8(3) EUR. COMPETITION J. (2012).

31. *See Report on Agency Effectiveness Through Organisational Design*, INTERNATIONAL COMPETITION NETWORK, (2019), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/AEWG-Organisational-design-2019-report.pdf.

32. *See generally id.*

33. *See Global Administrative Law*, INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE, https://www.iilj.org/gal/ (last visited Oct. 13, 2025).

34. *See* Eleanor M. Fox & Michael J. Trebilcock, *The Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project*, *in* THE DESIGN OF COMPETITION LAW INSTITUTIONS: GLOBAL NORMS, LOCAL CHOICES (Eleanor M. Fox & Michael J. Trebilcock eds., 2013).

35. *See* Kovacic & Hyman, s*upra* note 30, at 1.

agency should be established outside any other government agency or department or, on the contrary, should be inserted into another government agency or ministry; (iv) whether competition affairs are assigned to a single agency or whether there are various government agencies or departments responsible for competition law enforcement; and, finally, (v) whether the competition agency is structured as an administrative and/or judicial organization and what is the interaction between the administrative decision and its eventual judicial review.

Operational aspects of the agency's design involve the following: (vi) whether the agency shall exclusively tackle antitrust issues or may also operate in areas or issues such as consumer defense, commercial fairness, economic regulatory aspects of specific sectors, etc. (vii) whether its operations will exclusively include law enforcement or it may also participate in the formulation of free competition public policies; (viii) what are the tools it will use to carry out its tasks (powers, sanctions to be imposed, etc.); and, finally, (ix) which should be its internal administrative design.

We were then able to analyze and evaluate each of the above-mentioned topics together with the empirical work of ICN, Jenny and GAL and other special expert work on the functioning of competition agencies in particular. We compared these alternatives with the regulatory solutions established in the competition laws during the periods we call the modern age and the contemporary age of antitrust in Argentina.

As we will briefly see, from the formal legal standpoint the antitrust laws and agencies in Argentina have not significantly departed from the best international standards. However, the critical issue during recent decades was the difficulties in establishing and consolidating the antitrust agency in accordance with the provisions of the laws.[36]

IV. THE LAWS FOR THE DEFENSE OF COMPETITION IN ARGENTINA

Argentina has had antitrust regulations since the early decades of the twentieth century.[37] Market regulation has always been based on the constitutional exercise of state police power in economic matters.[38] Through several of its provisions, the National Constitution of 1853/60

36. See Germán Coloma, *The Enforcement of the Argentine Antitrust Law* (Universidad del Centro de Estudios Macroeconómicos de Argentina (UCEMA), Working Paper No. 748, 2020).

37. Marcelo den Toom, Godofredo Ortiz & Ilan Soae, *Argentina: Development and Enforcement of the Competition Regime in its First Century of Existence*, N° 4-2024 CONCURRENCES 1, 1 (2024) (Fr.).

38. Agustín Gordillo, *Tratado de Derecho Administrativo*, vol. 1, ch. V, El poder de policía, at 215–16 (11th ed., Fundación de Derecho Administrativo 2018).

establishes the principle of economic unity across the entire national territory, which should apply to the behavior of all economic agents.[39] In fact, Articles 9, 10, 11 and 12 of the National Constitution establish that the country constitutes a single space for the free movement of goods and eliminates internal customs.[40] Article 14 recognizes the right of individuals to move freely within the territory of the country, practice any lawful industry.[41] Article 17 establishes the inviolability of private property.[42] In the words of Juan Bautista Alberdi in the introduction of his book:

> The Argentine Federal Constitution contains a complete system of economic policy, insofar as it guarantees, by strict provisions, the free action of labor, capital and land, as main agents of production, ratifies the natural law of equilibrium that presides over the phenomenon of wealth distribution, and encloses in discrete and fair limits the acts that are related to the phenomenon of public consumption.[43]

The Constitution granted to Congress the power to legislate on customs and tax matters, the commercial and progress clauses contained in the Constitution of 1853/60 granted specific powers for the implementation and regulation of a single market across the national territory and, within this framework, the enactment of antitrust regulations.

However, any controversy on this power of state regulation was settled with the amendment of the Constitution in 1994.[44] In fact, such amendment adds to Article 42 of the National Constitution, the provision for regulating antitrust matters.[45] It establishes that the authorities shall provide for the defense of competition against all forms of market distortion and the control of natural and legal monopolies.[46]

The first regulatory antecedent is Law 11.210 (1923), which was a conceptual translation of sections 1 and 2 of the United States of

---

39. *See* Art. 9-12, 14, 17, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

40. *See id.* at Art. 9-12.

41. *See id.* at Art. 14.

42. *See id.* at Art. 17.

43. Juan Bautista Alberdi, *Sistema Económico y Rentístico de la Confederación Argentina [Economic and Revenue System of the Confederation Argentina],* ORGANIZACION DE LA CONFEDERACION ARGENTINA 359, 363 (Besançon, Imprenta de Jose Joaquin, 1858).

44. *See* Julian Peña, *New Competition Policy in Argentina*, at 6 (2018), https://revista.cade.gov.br/index.php/revistadedefesadaconcorrencia/article/download/416/208 (last visited Oct. 25, 2025) (citing Art. 42, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.)).

45. Art. 42, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.)

46. *Id.*

America ("USA") Sherman Law.[47] The law was called "repression of monopolies" and established in section 1 "Any agreement, pact, combination, amalgamation or merger of capitals, tending to establish or sustain a monopoly and profit with it, in one or more branches of production, land, fluvial or maritime traffic, or domestic or foreign trade, in one or several locations, or in the whole national territory, shall be declared a crime."[48] Article 2 also penalized acts which, regardless of any technical advance or economic growth, arbitrarily increased the profits of those executing them, keeping no proportion to the capital actually employed, and acts hindering or intended to hinder other living or legal persons from freely competing in production and domestic consumption or foreign trade.[49]

A few years later, Law 12.906 (1946) maintained the structure of the previous law but added the identification of certain specific collusive practices.[50] A regulatory decree of that time also authorized the Secretary of Industry and Commerce to conduct investigations and complaints within that regulatory framework.[51] The sanctions established by it were lodged as direct appeal before the National Criminal Justice. Both followed the U.S. antitrust model, in fighting against monopolization or attempts of companies to monopolize.[52] Both laws shared a criminal nature and had little or no effectiveness in refraining anticompetitive practices, because the enforcement authority did not have sufficient resources or technical capacity. Only a couple of sanctions have been effectively imposed thereunder.[53]

The first meaningful change in Argentine legislation was the enactment of Law 22.262 (1980).[54] This is the first time it constitutes a

47. Ariel Irizar and Pilar Moreyra, *Feliz Aniversario! 100 años de derecho de defensa de la competencia en Argentina Breve análisis de la persecución de cartels a lo largo de tiempo,* ABOGADOS (Sep. 11, 2023), https://abogados.com.ar/feliz-aniversario-100-anos-de-derecho-de-defensa-de-la-competencia-en-argentina-breve-analisis-de-la-persecucion-de-carteles-a-lo-largo-del-tiempo/33398.

48. COMISIÓN NACIONAL DE DEFENSA DE LA COMPETENCIA, *Breve análisis económico de la ley Argentina de defensa de la competencia* 111 (Arg.), https://www.argentina.gob.ar/sites/default/files/nota220116.pdf (last visited Nov. 7, 2025).

49. *See id.* at 112.

50. *See* Ley No. 12.906, 7 Nov. 1946, Represión de Monopolios y Trusts [Suppression of Monopolies and Trusts], Feb. 22, 1947, (Arg.).

51. *See* COMISIÓN NACIONAL DE DEFENSA DE LA COMPETENCIA, *supra* note 48, at 127.

52. Coloma*, supra* note 36, at 2.

53. *See* Guillermo Cabanellas de las Cuevas & Diego H. Serebrinsky, *Derecho Antimonopolio y Defensa de la Competencia* [*Antitrust Law and Defense of Competition*], tomo I, at 93 (4a ed. actualizada, Heliasta, Buenos Aires 1997) (citing Ley No. 11.210, art. 1 (1923) (Arg.)); *id.* art. 2.

54. *See* Coloma*, supra* note 36, at 2.

departure from the model in force in order to align our regulations with the model provided by the Treaty of Rome establishing the European Economic Community.[55] A deconcentrated administrative body was, therefore, created within the Ministry of Economy, called the National Commission for the Defense of Competition (CNDC).[56] A special administrative action procedure is established with judicial review of decisions before the National Court of Appeals in Economic Criminal Matters.[57] It introduces the concept of abuse of a dominant position of the European model, prohibits identified practices, and establishes criminal penalties for offenders.[58]

Although during the first years of the law's enforcement there was no substantial antitrust practice, as of the second half of the 1990s, the Ministry of Industry, Commerce and Mining provided resources to the CNDC, thus allowing a greater operational autonomy, and enabling modern antitrust practice.[59]

The enactment of Law 25.156 (1999) constitutes another milestone in the establishment of institutional design in antitrust matters. Such a law was, indeed, a major step forward towards the objective of creating an independent, collegiate, and cross-disciplinary antitrust agency.[60] The law follows the previous model in the identification of prohibited practices. It keeps the provision for a special action procedure before the enforcement authority.[61] However, it provides for the creation of a National Tribunal for the Defense of Competition (TNDC) whose members would be appointed through public competition.[62] The decisions of the TNDC would be subject to review by direct appeal before the Federal Chambers.[63] Law No. 89/2001, a

55. *Id*. at 2-3.

56. Ley No. 22.262, art. 6 (1980) (Arg.).

57. *Id.* at art. 27.

58. *Id.* at art. 28.

59. Organisation for Economic Co-operation and Development, *Competition Law and Policy in Latin America*, at 11 (OECD 2006), https://www.oecd.org/content/dam/oecd/en/publications/reports/2006/10/competition-law-and-policy-in-latin-america_g1gh7476/9789264015142-en.pdf.

60. Coloma*, supra* note 36, at 4.

61. Dictamen del Procurador Fiscal en *AMX Argentina S.A. c. Estado Nacional – Ministerio de Producción*, CAF 72376/2017/CA3CS1, Procuración General de la Nación, at 4–5 (Dec. 2020) (Arg.) (hereinafter "Dictamen AMX"), https://www.mpf.gob.ar/dictamenes/2020/LMonti/diciembre/AMX_CAF_72376_2017_CA3CS1.pdf.

62. *See* Organisation for Economic Co-operation and Development, *COMPETITION LAW AND POLICY IN LATIN AMERICA: A PEER REVIEW – ARGENTINA, Brazil, Chile, Mexico and Peru* (OECD Pulbishing, Paris 2006) at 12, https://www.oecd.org/content/dam/oecd/en/publications/reports/2006/10/competition-law-and-policy-in-latin-america_g1gh7476/9789264015142-en.pdf.

63. Dictamen AMX, *supra* note 61, at 5.

Regulatory Decree, established that the Secretary for the Defense of Competition would function as prosecutor before the TNDC.[64] Additionally, Law No. 25.156 introduced into the Argentine practice the procedure for the approval of economic concentration operations.[65] Finally, Executive Orders 20/1999 and 89/2001 regulating Law No. 25,156, closed the circle in terms of regulation of the new institutional design for the defense of competition in our country.[66] In fact, with the creation of the Secretary of Competition and the attribution of the necessary powers to be a party in the proceedings before the Tribunal (among others, to conduct investigations, file complaints, offer and produce evidence in the proceedings before the Tribunal), the roles of prosecutor and judge on antitrust matters submitted to the administrative tribunal were split.[67]

The TNDC was never constituted and since the enactment of the law, the CNDC, together with the Secretary of State under which the agency was administratively framed, remained "temporarily" performing the functions that the law attributed to the TNDC.[68] This certainly entailed a judicial dispute as to which was the law enforcement authority before the different Federal Chambers.[69] Law 26.993 (2014)

---

64. *See* Miguel Ángel De Dios, *Problemas del Diseño Institucional para la Defensa de la Competencia en la Argentina* [*Problems of the Institutional Design for the Defense of Competition in Argentina*]; *See* De Dios, *supra* note 2; La Ley 2001-B, 969 (Arg.), TR LALEY AR/DOC/18320/2001.

65. *See* Dictamen AMX, *supra* note 61, at 5; see Ley No. 25.156, de defensa de la competencia, Aug. 25, 1999, B.O. 16/9/99 (Arg.).

66. *See* Decreto No. 20/1999 (Pres. Nación Arg.), 15 Dec. 1999, B.O. No. 29293 (Arg.), available at INFOLEG, https://servicios.infoleg.gob.ar/infolegInternet/anexos/65000-69999/65958/norma.htm; *See* Decreto No. 89/2001 (Pres. Nación Arg.), 25 Jan. 2001, B.O. No. 29577 (Arg.), available at INFOLEG, https://servicios.infoleg.gob.ar/infolegInternet/anexos/65000-69999/65959/norma.htm.

67. *See* Federico Rossi, *Argentina's New Competition Law: The Modernisation of the Argentinian Competition Law Regime*, Competition Policy Int'l (CPI), May 21, 2018, available at https://www.pymnts.com/cpi-posts/argentinas-new-competition-law-the-modernisation-of-the-argentinian-competition-law-regime/ (last visited Nov. 8, 2025).

68. Organisation for Economic Co-operation and Development, *Fighting Bid Rigging in the Procurement of Public Works in Argentina*, at 79–80 (2019), https://www.argentina.gob.ar/sites/default/files/fighting-bid-rigging-procrument-public-works-argentina-en-web.pdf (last visited Nov. 5, 2025) (discussing Law No. 26.993 (Arg.)).

69. *See, e.g.*, Cám. Na. Apel. Penal Econ., Sala B, 19 May 2014, Principales Relojería Cotax / solicitud de intervención Ley, L.L. (Arg.), https://cndc.produccion.gob.ar/sites/default/files/fallos/CPE63885_2014_CA1.pdf; Cám. Na. Apel. Penal Econ., Sala B, 12 July 2013, Pfizer Inc. & Johnson & Johnson Corporation / diligencia preliminar cumplimiento art. 8, Ley No. 25.156 L.L. (Arg.), https://cndc.produccion.gob.ar/sites/default/files/fallos/12-07.pdf; Cám. Na. Apel. Penal Econ., Sala B, 28 June 2013, Shell Compañía Argentina de Petróleo / incidente de excepciones previas y infracción Ley 25.156, L.L. (Arg.), https://cndc.produccion.gob.ar/sites/default/files/fallos/c.1425.pdf (each noting that, despite more than a decade since Law 25.156's enactment, the

repealed the provisions of Law 25.156 for the creation of the TNDC and reverted the process of structuring an independent agency.[70] It thus established that the law enforcement authority would be appointed by the National Executive Power.[71]

In 2014, a sharp turn was taken with the enactment of Law No. 26.993. The text of Section 17 of the Antitrust Law (LDC) was replaced, and it then establishes that "The National Executive Power shall appoint enforcement authority for this law."[72] The initial bill sent by the Executive established that the enforcement authority would be the Secretary of Commerce.[73] This attribution of competence was modified in Congress and the issue was left to be resolved by delegation or when the Executive Power issues a new regulation or enforces the Antitrust Law.[74] Apart from the delay in the creation of the Tribunal, there were no political or economic sectors or experts in the area claiming its elimination. The bill sent by the Executive proposed the elimination of the TNDC and the appointment of the Secretary of Commerce as enforcement authority.[75] This decision to eliminate the TNDC broke the political consensus reached for the enactment of Law 25.156, in force at the time,[76] and went against several bills submitted

---

TNDC had not been constituted, and directing that the CSJN be informed so it might request the Executive to put the Tribunal in operation).

70. *See* Miguel Ángel De Dios, *Un Paso en Falso en el Diseño Institucional para la Defensa de la Competencia [A Misstep in Institutional Design for the Defense of Competition]*, 6 REVISTA DE DERECHO CONSTITUCIONAL (2015) (Arg.), https://www.boletinoficial.gob.ar/detalleAviso/primera/112190/20140919; Law No. 26.993, (Oct. 1, 2014) (Arg.), https://www.boletinoficial.gob.ar/detalleAviso/primera/112190/20140919.

71. Ley 26.993*, Sistema de Resolución de Conflictos en las Relaciones de Consumo* [Conflict Resolution System in Consumer Relations Law 26.993], BOLETÍN OFICIAL DE LA REPUBLICA ARGENTINA, 19 Sept. 2014 (Arg.), https://www.boletinoficial.gob.ar/detalleAviso/primera/112190/20140919.

72. *See id*.; Law No. 25.156, (Aug. 25, 1999) (Arg.), https://www.boletinoficial.gob.ar/detalleAviso/primera/7198751/19990920.

73. *Mensaje del Poder Ejecutivo Nacional No. 1250/14*, DIARIO DE ASUNTOS ENTRADOS NO. 120, EXPEDIENTE 0062-S-2014, (Aug. 5, 2014) (Arg.).

74. Miguel del Pino et al., *Comentarios a la Ley de Defensa de la Competencia,* at 28–29 (Thomson Reuters Argentina 2020), https://www.thomsonreuters.com.ar/content/dam/openweb/documents/pdf/arg/white-paper/Supl%20Ley%20de%20Defensa%20de%20la%20Comp_completo.pdf (last visited Nov. 5, 2025).

75. *See Mensaje del Poder Ejecutivo Nacional No. 1250/14*, supra note 73.

76. *See generally* Ley No. 25.156, (Aug. 25, 1999), (Arg.), https://www.boletinoficial.gob.ar/detalleAviso/primera/7198751/19990920; *see also* CÁMARA DE DIPUTADOS DE LA NACIÓN [Chamber of Deputies of the Nation], DIRECCIÓN DE INFORMACIÓN PARLAMENTARIA, *Debates del proceso de sanción de la Ley 25.156*, 1, 2, 7, 12, 15 (May 19, 1999) (Arg.) (statements of Representatives Gabrielli, Flores, Isquilla, and Dumon); CONGRESO NACIONAL, DIARIO DE SESIONES DE LA CÁMARA DE SENADORES 3122, 3303, 3308-9 (June 23, 1999) (Arg.) (statements of Sen. León, Sen. Feris, Sen. Avelín, and Sen. Maglietti) (demonstrating the parliamentary members'

to Congress in favor of maintaining the TNDC and the creation of a competition prosecutor's office under the scope of the Ministry of Economy.[77] Furthermore, neither in the presentations of the legislators of both Houses of Congress, nor in the sessions in the committees of the House of Representatives, were there any arguments in favor of eliminating the TNDC (at least to the best of our knowledge).[78] In fact, the bill came from the Executive as if by inertia, and that is how it was finally enacted.[79]

Finally, the enactment of Law 27.442 (2018) reestablished the path of previous precedents regarding the institutional design of the competition agency.[80] With the creation of a National Competition Authority (ANC) composed of the Tribunal for the Defense of Competition (TDC), the Secretariat of Instruction of Anticompetitive Behaviors (SICA) and the Secretariat for Economic Concentrations (SCE), the model of an independent, collegiate, cross-disciplinary agency was reestablished, with members elected by a procedure that includes a competitive examination and background assessment, the intervention of the Executive Power, and the confirmation of the Senate, among others. Other interesting features include absolute prohibitions of cartels, mobile thresholds for economic concentration operations, the leniency program, creation of a Specialized Chamber within the Federal Court of Appeals in civil and commercial matters to review the decisions adopted by the TDC. [81]

---

support for the TNDC during the debates regarding the enaction of Law 25.156); *see generally,* Ley 26.993, *supra* note 71.

77. *See* Congreso Naciona, *id.* at 3303, 3309 (Arg.) (statement of Sen. Leon and Sen. Maglietti referencing various bills created in support for the TNDC prior to the enaction of Law 25.156); *see generally* Cámara de Diputados de la Nación, *Proyecto de Resolución* (June 16, 2010) (Arg.), https://www.hcdn.gob.ar/proyectos/proyectoTP.jsp?exp=4285-D-2010; Cámara de Diputados de la Nación, *Ley 25.156 Modificaciones* (Dec. 9, 2013) (Arg.), https://www.hcdn.gob.ar/proyectos/proyectoTP.jsp?exp=7935-D-2013; *see generally* Cámara de Diputados de la Nación, *Proyecto de Ley 7288-D-2014*, Art. 19 (Sep. 16, 2014) (Arg.), https://www.hcdn.gob.ar/proyectos/proyectoTP.jsp?exp=7288-D-2014 (proposing the creation of the Tribunal Nacional de Defensa de la Competencia as a decentralized body after the enaction of Law 25.156).

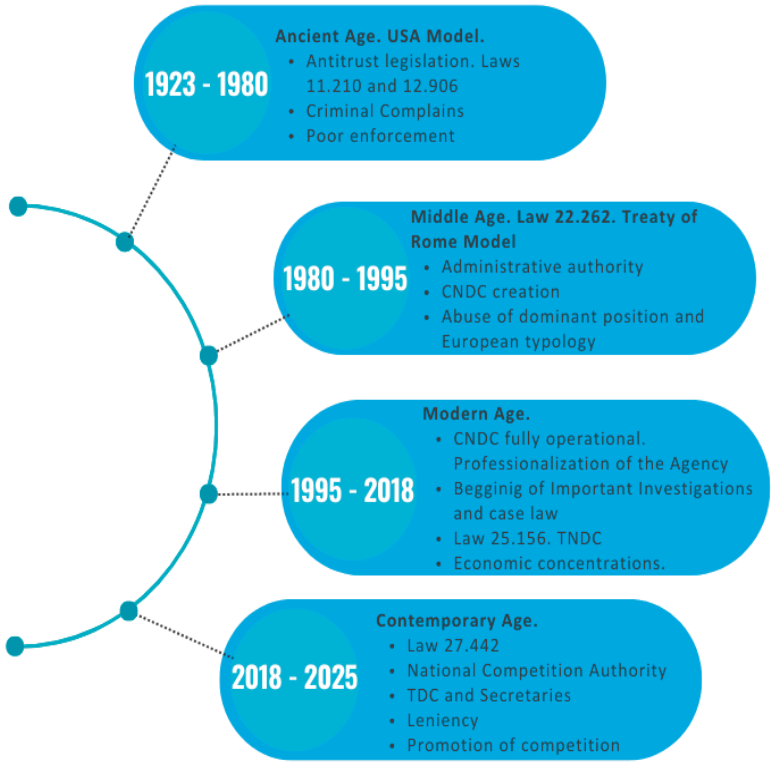
78. *See generally* Cámara de Diputados de la Nación*, Diario de sesiones de la Cámara de Disputados de La Nacion,* (Sep. 17, 2014) (Arg.), https://www.hcdn.gob.ar/sesiones/sesion.html?id=932&numVid=0&reunion=16&periodo=132 (asserting that none of the Chamber of Deputies' speakers explicitly debated that the TNDC was flawed or unnecessary).

79. *See id.* at 33.

80. *See generally* Law No. 27.442, (Apr. 9, 2018) (Arg.), https://www.boletinoficial.gob.ar/detalleAviso/primera/183602/20180515?busqueda=2.

81. De Dios*, supra* note 1, at 40 (citing Miguel Ángel De Dios, *El Desafío Del Regreso al Sendero Correcto en el Diseño Institucional [The Challenge of Returning to the Right Path in Institutional Design]*, *in* COMENTARIOS A LA LEY DE LA DEFENSA DE LA COMPETENCIA 59, 71 (2018)).

In short, in a timeline established as follows, we can identify different stages in the evolution of the regulatory design for the defense of competition in Argentina. Namely: (i) a first stage which we call the ancient age of competition policy with very little enforcement and few written case records, (ii) a second stage or middle age where the basic structure of a special agency is established and still exists today, (iii) a third stage or modern age where plenty of relevant precedents are created and the structure is updated, and; finally, (iv) a fourth stage or contemporary age where the law in force today is found.



V. EXPERIENCE OF THE ARGENTINE COMPETITION AUTHORITY[82]

From a formalistic standpoint, we have seen that the antitrust regulation in Argentina has not departed significantly with respect to the best international practices.[83] However, the proper questions shall be: What has been the experience of the competition authority in Argentina? What has actually happened since the enactment of the first antitrust law in our country and what were the learnings?

In order to answer those questions, analysis needs to go beyond the written antitrust laws and implementing enacted decrees, and instead conduct a critical assessment, with empirical support and qualitative analysis, of how it has functioned in, what we call, the modern age of antitrust in Argentina and what the projections are for, what we call, the contemporary age.

We first provide a critical review of the agency design and how it has evolved over time through the different periods considering the results achieved in each of them. In this chapter we analyze, as well, the performance evaluations conducted by the OECD (2006 and 2012) and UNCTAD (2017) peer reviewers, by confronting their conclusions with other relevant secondary sources.[84]

We have checked the perceptions of the agency's performance with the "effectors of the competition system", i.e., members, senior officials of the agency such as directors and heads of areas, professionals in law and economics who act before the agency and/or advise market agents, leaders, academics, and other researchers who have participated in the agency's reforms or designs over the last two decades.[85] The consultation with the system's effectors consisted in a survey that yields valuable results both regarding the independence the agency has had in its history, as well as the agency´s efficiency and effectiveness over the period called the modern age of antitrust in Argentina, 1995 to 2018.[86]

---

82. This part substantially includes the results of our research and analysis of our paper "*El Diseño Institucional para la Defensa de la Competencia*" (Institutional Design for the Defense of Competition); DE DIOS, *supra* note 2.

83. *See id.* at 203-04 (citing Richard Whish, *Comentarios y Evaluación General de la ley 27.442 desde una Perspectiva Europea del Derecho de la Competencia [Comment and General Assessment of Law 27.442 of 2018 from a European Competition Law Perspective]*, *in* COMENTARIOS A LA LEY DE DEFENSA DE LA COMPETENCIA 639, 639 (2018)).

84. *Id.* at 21-22.

85. *Id.* at 138.

86. *Id.*

Also, we cross-checked the above assessments with the investigation report on restrictive practices of competition and economic concentration operations and the review of the main cases resolved by the agency, using the competition agency's own sources as well as other research work. We conduct, at the same time, a critical review of the main cases as identified by the above-mentioned sources, as well as the results of our own considerations.

A. Peer Reviewers' Reports

The Competition Agency in Argentina was subject to evaluation by international organizations on several occasions during, what we call, the modern age of competition defense. Peer reviews are a central element of the cooperation of international agencies. Mechanisms may vary (on-site reviews, as in the case of those promoted by the OECD), ongoing performance review consultations (as in the case of those conducted by ICN), etc., but in all cases the reviews are based on the willingness of the countries under review to submit their laws and policies to substantial questioning by other states.[87] These processes generate valuable insights for the country under review and foster transparency, mutual understanding to promote exchange and growth in each respective country within the framework of a globalized economy.[88]

We can highlight the peer reviews conducted in 2006 and 2012 jointly by the Inter-American Development Bank and the OECD and another carried out in 2017 by UNCTAD on occasion of the United Nations Conference on Trade and Development.[89] Reviewers on such occasions were international experts, members, or former members of other competition authorities, who conducted their background study and assessment tasks over a period of 3 to 6 months, including in some cases staying in Argentina, interviewing CNDC officials and staff, independent experts, and professionals, among others.[90]

87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 144-45.

1. Competition Law and Policy in Argentina, Peer Review (2006)[91]

The IDB and OECD Competition Committee's cooperation enabled, during the early years of the twenty-first century, the undertaking and coordinating of the assessment of competition authorities in several Latin American countries.[92] At the annual meetings of the Latin American and Caribbean Competition Forum (LACCF), several important round tables and peer reviews of laws and institutions of each country were held.[93] Peer reviews of Brazil, Chile and Peru competition authorities had already been carried out at the time Argentina was being assessed.[94] The review was led by John W. Clark, PhD in Jurisprudence, who was then a consultant to the OECD and had previously worked for 27 years in the Antitrust Division of the U.S. Department of Justice.[95]

The report consists of several chapters referring to the assessment of the local economic context. As a starting point, the report focuses on the dynamics of competition policy which include: the content core and enforcement of the competition law (behaviors, horizontal agreements, vertical restrictions, and abuse of dominant position), the procedure in cases of anticompetitive behaviors, the connection of competition policy with unfair competition and consumer protection, mergers and economic concentrations (notification, review procedure and the most relevant cases since the provision for concentration control), competition policies in the regulated sectors (electricity, natural gas, telecommunications, the banking sector, airlines and airports, and ports), competition advocacy, judicial review of the authority's decisions, international aspects of competition law enforcement, etc.[96] The report also devotes a special chapter to institutional aspects analyzing the enforcement tools available to the authority, as well as economic and human resources, issues related to the authority independence, the

91. Comisión Nacional de Defensa de la Competencia, *Competition Law and Policy in Argentina* in *Latin American Competition Forum 2006: Documentation — Fourth Meeting*, 11–12 July 2006, San Salvador, El Salvador 278 (Organisation for Economic Co-operation and Development (OECD) 2006), https://www.oecd.org/content/dam/oecd/en/networks/latin-american-and-caribbean-competition-forum/LatinAmericanCompForum2006.pdf.

92. *See id.* at 280.

93. *Id.*

94. *Id.*

95. *Id.* at 276 (citing *John William Clark,* FUNERAL CHOICES, https://funeralchoices.com/obits/john-william-clark/).

96. *Id.* at 282-83.

culture of free competition and price agreements.[97] Finally, the report establishes several recommendations to be implemented in order to strengthen the culture, practice and institutionality of competition in Argentina.[98]

Let us first focus on the institutional aspects identified in the report.[99]

Regarding the enforcement tools available, as has been assessed, the authority has the necessary powers to enforce the law.[100] This applies both to basic investigative powers, including the power to conduct market studies, to hold hearings and receive statements, to examine books and documents, and to conduct searches with judicial authorization.[101] The report highlights the fact that the authority has the power to issue opinions on competition matters, draft its internal regulations, bring actions before the courts, act with the competent agencies in the negotiation of international agreements on competition policies, and enter into consent agreements in cases.[102] Finally, it considers the sanctions for non-compliance with the law, such as the power to issue cease and desist orders and, if necessary, to impose the fulfillment of conditions aimed at neutralizing the effects of such practices; to impose fines on individuals and legal entities for infringing behavior; and, in the case of abuse of a dominant position, to request the dissolution or restructuring of the dominant company.[103] Regarding the monetary value of fines, the report notes that the currency depreciation after the termination of the convertibility regime impacted significantly the value of fines.[104]

The report focuses on evaluating a central aspect of the agency's operational capacity, the agency's financial resources and personnel.[105] To help visualize, the report the table below demonstrates the budget for the five-year period between 2001 and 2005.[106]

97. *Id.* at 282.
98. *See id.* at 283.
99. *See generally id.* at 306.
100. *Id.*
101. *Id.*
102. *Id.*
103. *See id.*
104. *See id.*
105. *See generally id.*
106. *Id.* at 32.

2. CNDC Resources

Year	Budget in ARS	Budget in USD	Staff
2001	2.617.000	2,617,000	48
2002	2.497.202	713,572	41
2003	2.295.724	704,677	42
2004	2.161.697	745,412	48
2005	2.141.023	738,525	53

The table shows values in pesos and in US dollars to establish a constant currency for evaluating the allocation of resources. However, as the reviewer points out, the sharp drop in the amount in US dollars in 2002 was a consequence of the termination of the convertibility regime and the falling value of the Argentine peso.[107] Conversely, when the peso increased its value between 2003 and 2005, increases in dollars did not reflect a real growth in the agency's resources, but rather a strengthening of the peso.[108] The report also notes that the budget is mostly allocated to contracting locally rendered services, so that the peso values appropriately measure the funding provided to the agency during the period.[109] Among the arguments presented to the reviewers was the fact that occasionally some of the Commission's expenses had been absorbed by the budget of the Secretary of Commerce.[110] This is, however, one of the most critical points of the evaluation. Considering the cumulative inflation rate between the exit from convertibility and the date of the report (approximately 70%), the decrease in the budget is considered as a punitive measure against the agency.[111]

The report concludes that:

> [C]learly enough the Commission suffers from a total lack of economic resources, which has an impact on its staff. At the beginning of 2006, the five members of the Commission included three economists and two lawyers. The professional staff consisted of 22 economists and 11 lawyers. There were eight administrative staff members and three semi-exclusive non-professional assistants, making a total of 49 employees. There is, however, a further distinction among employees: contract staffing and permanent staffing. From year to year, there is an equal number of staff members in each of these staff groups. Contract terms are usually short, 3 or 6 months, although contracts may be renewed, which is usually the case. The salaries of

107. *Id.*
108. *Id.*
109. *Id.* at 33.
110. *Id.*
111. *See id.*

> contract personnel are higher than those of permanent staff, but on the other hand, contract employees do not receive benefits. In any case, salaries are frozen. This results in a high employee turnover, especially among contract staff. It is quite common for employees to leave the Commission for other public positions, at higher salaries. . . . a large number of highly qualified people left the Commission for better paid positions elsewhere, and it has been difficult to replace them.[112]

These considerations about the agency's staff also apply to the CNDC authorities, given that at that time their salaries were frozen, discouraging more qualified people from being tempted to fill the vacancies of members leaving.[113]

By mid-2006, the report found that unattractive salaries and high staff turnover had negatively impacted the agency's performance.[114] The report expressed a concern about the fact that the departure of people due to these circumstances meant that most of the staff lacked experience.[115] This is to the detriment of the agency's institutional memory, its efficiency and, in the reviewer's opinion, of its very essence.[116]

Finally, highlighting the opinion of the competition system operators, the report states that:

> Despite this [referring to the limitations mentioned above], the CNDC usually receives favorable comments from representatives of the private sector who interact with the Commission. The staff is often seen as a group of diligent professionals who act in a professional manner. Their work is considered to produce positive outcomes. For example, by Argentine standards, the time it takes for a typical merger review is not considered too long. As a rule, the Commission's decision on a merger is not the last in the series of governmental approvals required for such transactions. The quality of the Commission's decisions, especially with respect to mergers, deserves considerable respect. However, there is no doubt that the Commission is severely constrained by its budget.[117]

Finally, the report makes a number of recommendations to strengthen the institutionality, organization and functioning of the competition authority,[118] as follows:

---

112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *See id.* at 46-54.

(a) Creation of the National Tribunal for the Defense of Competition

The report found it an anomaly that almost seven years after the enactment of the Antitrust Law, the agency created by this law had not been established yet.[119] The report considered that the institutional design created by the law would allow addressing at least two of the fundamental problems faced by the agency at that time: insufficient budget and lack of independence.[120] It considered, in fact, that under Sections 17 and 25 it could operate as a self-sufficient agency with its own separate budget and entitled to charge fees (for example, for the notification of mergers).[121] The possibility of deciding on the allocation of its own resources was considered the right way to function in an autonomous manner.

The report further states:

> The creation of the Tribunal would significantly enhance the independence of the competition authority. Its members would be appointed on a competitive background examination by a quasi-independent jury and for a fixed term of office. It would have the power to issue enforceable decisions, reviewable only by the judicial courts. However, experts say it is politically impossible to confer on this body the independence currently provided by law.[122]

In 2005, when the report was written, a law amendment bill was under discussion. It provided, among other things, for (i) the appointment the CNDC members as members of the first NTDC (giving the Executive the power to fill the pending positions) and (ii) granting the Ministry of Economy the power of comptroller in special merger cases.[123] Such power was a widespread practice in many jurisdictions that maintained competencies within the executive branch to review and/or determine the approval or rejection of certain merger transactions.[124] The report argued that if the bill under discussion had been passed in Congress, such power should have been limited to matters of "prevailing public interest or other phrase to that effect" with the expectation that this veto power would rarely be used.[125] In fact, the bill

119. *Id.* at 48.
120. *Id.*
121. *See id.*
122. *Id.*
123. *See id.* at 35-36.
124. *See id.* at 48.
125. *Id.*

was not approved, and the regime of Law 25.156 remained untouched in that regard. [126]

(b) Increasing the Budget and the Power of the Competition Authority to Dispose of it

The report focuses on two main aspects. First, the need for a larger budget and second, the power to dispose of it.[127]

It warns that a competition authority such as the TNDC " . . . *will need more money to attract and retain qualified professionals at the staff and board levels."*[128] The agency's budget should return in real terms, at least, to 2001 levels.[129] The report warns on the fact that most of the employees have short term contracts, which causes high personnel turnover.[130] A larger budget would therefore enable having a larger, effective, and permanent staff. Notwithstanding the difficulties of public employment in Argentina and the recurrent salary freezes, the report recommends that, as an autonomous body, the agency should have full recruiting and hiring powers and be able to structure its professional staff in a more efficient manner.[131]

Finally, it reaffirms the fact that the agency's limited power to dispose of its budget (for which the signature of the Secretary of Commerce is needed) is detrimental to its normal performance and advises that this circumstance be modified.[132]

(c) Strengthening the Deployment of Anti-Cartel Activities

The report acknowledges the experience the agency had acquired in successful cases in the cement and liquid oxygen markets.[133] It thus weighs the significant benefits for strengthening competition policy " . . . *probably to a greater extent than any other enforcement action the authority might undertake.*"[134] The report states that fighting cartels would enhance the agency's reputation within the government and with the general public and contribute to raising competition

126. *See id.* at 36.
127. *Id.* at 48.
128. *Id.*
129. *Id.*
130. *Id.* at 48-49.
131. *See id.*
132. *Id.* at 49.
133. *See id.* at 14-15.
134. *Id.* at 50.

awareness in the country by helping the public understand how it benefits from strict and competent enforcement of antitrust rules.[135]

Fighting cartels should be, therefore, a top priority within the agency. The report proposes two changes to the law then in force to allow raising the maximum cap on fines and extending such penalties to natural persons.[136]

Two other anti-cartel suggestions in the report were aimed at establishing a leniency program and conducting proactive investigations, especially in the area of public procurement, i.e., initiating *ex officio* investigations of possible bid-rigging and price-fixing in government procurement and contracting.[137]

(d) Increasing Efficiency in Investigations of Anti-Competitive Behavior

The report warns about the backlog of anti-competitive behavior investigations, most of which do not seem to have positive results.[138]

In the reviewer's opinion, much of the backlog is due to the fact that individuals initiate and participate in the investigations conducted by the agency, but in reality, they are commercial or other kind of disputes that end up not being credible because they do not involve an actual infringement of the antitrust law.[139] This creates a bottleneck that hinders smooth progress of cases that would deserve the attention of anti-competitive behavior investigation teams.[140]

The report, therefore, proposes considering ways to summarily process private complaints that clearly do not describe violations of competition law, in order to shorten the time and reduce the resources required to reach the agency's decision.

It states that the procedures applicable in most cases where the agency decides to proceed with an investigation are cumbersome. Nor do they result, in most cases, in a conviction for anti-competitive practices.[141]

135. *See id.*
136. *See id.* at 49.
137. *See id.*
138. *See id.* at 21-22.
139. *See id.* at 50.
140. *See id.*
141. *Id.*

(e) Increasing Efficiency in Merger Control

In order to improve the efficiency of merger control, the proposal is to increase the notification thresholds.[142] This is mainly because they have been fixed in pesos in the law before the economic crisis of 2001/2002. The report also proposed shortening the time period for evaluating and approving operations, especially simpler ones (such as conglomerate operations).[143] Finally, it was critical about the right to appeal the agency's decisions regarding mergers. Consideration should be given to raising the thresholds for notification.

The report highlights the fact that the CNDC does not apply a critical approach when reviewing the private sector, because it takes too long to control mergers.[144] Notwithstanding this aspect regarding assessments in the private sector, shortening the time to review straightforward cases would positively result in freeing up some of the agency's scarce resources for more important tasks. The proposal is to revise the F1 form procedure for simplification and the F2 form to make it more specific to the market with problems, as judged by the agency.[145]

(f) Reviewing the Notification Regime in Place so that it Allows Parties to Consummate the Merger Before the Agency Completes its Review

The report argues that the law's regime allowing post-consummation notification of the merger transaction is inconvenient.[146] First, because it may significantly alter the agency's ability to achieve an effective remedy in the event of an anticompetitive transaction. Particularly, in those cases where the anticompetitive effects of a merger cannot even be mitigated by a divestiture of assets and considers that, if the transaction has already been consummated, due to the long-time frames for analyzing transactions, it does not seem possible to prevent the harm from occurring.

As long as there were no amendments to the law, in order to mitigate the problem, the agency should have the possibility to issue a

142. *Id.* at 51.
143. *Id.*
144. *Id.*
145. *See generally id.*
146. *Id.* at 52.

temporary order that companies "keep their operations separate" to allow for significant divestiture of operations and assets, if required.[147]

(g) Free the CNDC from as much Political Influence as Possible, Until the Actual Setup of the Tribunal for the Defense of Competition

The report puts special emphasis on this point and makes the following assessment:

> Since the CNDC took a more active role in 1996, it has enjoyed periods when it was free from political interference. This interference seems to be the case now, though, probably because it has joined the government in fighting inflation. By keeping prices at competitive levels, effective antitrust enforcement can be a force against inflation, though in this regard there are other macroeconomic factors which seem to be more important. In any case, if the Commission is to be an ally against inflation, it must be allowed freedom in the enforcement of antitrust law. To the extent its scarce resources are diverted to other causes, its antitrust enforcement responsibilities will languish.[148]

It is the reviewer's understanding that Law 25.156 was a crucial step forward in strengthening the independence of the competition authority, but failure to effectively implement it and a growing political influence over the agency undermined that objective.[149]

(h) Continue and Extend efforts to Build a Culture of Free Competition in Argentina

The report encourages the agency to continue and expand the various useful programs that were being implemented to help build a free competition culture in Argentina.[150] These initiatives could include regular conferences or seminars on competition policy open to the public, with the participation of the public and private sector. It also recommends building a good relationship with the media, which is fundamental to this effort.[151] Each of the Commission's major decisions should be accompanied by a press release (and even presented at a press conference), communication on the website must be improved, etc.

147. *Id.* at 53.
148. *Id.*
149. *See id.*
150. *See id.*
151. *Id.* at 54.

(i) Fostering Effective and Professional Relations with Judges Hearing Appeals in Antitrust Cases

The report recommends conducting activities, seminars, and exchanges with judges in charge of reviewing competition agency decisions.[152] It does not include any opinion on the convenience of having a specialized tribunal since it considered that the Federal Civil and Commercial Chamber of CABA was a "quasi-specialized tribunal." It did point out that all events should respect the relevant legal ethics.

(j) Expanding the Role of the Competition Quthority in Regulated Sectors

The report also recommends working in collaboration with regulators in different sectors.[153] It states that inter-agency cooperation seemed to work in the case of economic concentration operations, but there was little interaction in matters of anti-competitive behavior.[154]

3. Follow-up to the Nine Latin American Peer Reviews of Competition Law and Policy (2012)[155]

As a regular feature of the Latin American and Caribbean Competition Forum, the OECD and IDB jointly conduct peer reviews of competition agencies.[156] As part of the tenth anniversary of the Latin American and Caribbean Competition Forum in 2012, a follow-up of the nine peer reviews conducted so far was carried out, it was more specific than that of 2007. It focused on two issues: first, the assessment of the impact the agency's work had on pro-competitive regulatory reforms and, second, the criteria for prioritization and selection of issues in each agency.[157] To this purpose, a questionnaire was sent to each of the agencies in the jurisdictions that have been previously reviewed, including generic questions, since in some cases no specific recommendations had been made regarding these two topics of

152. *See id.*

153. *See id.*

154. *Id.*

155. *See* Organization for Economic Cooperation and Development (OECD) & Inter-American Development Bank (IDB), FOLLOW-UP TO THE NINE PEER REVIEWS OF COMPETITION LAW AND POLICY OF LATIN AMERICAN COUNTRIES: ARGENTINA, BRAZIL, CHILE, COLOMBIA, EL SALVADOR, HONDURAS, MEXICO, PANAMA AND PERU (2012), available at https://doi.org/10.1787/afe88063-en.

156. *See id.* at 3.

157. *See id.* at 8.

interest, and an assessment of the main benefits of peer reviews.[158] The main responses and conclusions for the Argentine agency were as follows.

(a) The Agency's Role in Pro-Competitive Regulatory Reforms

The CNDC noted that the peer review contributed to strengthening the competition culture in Argentina.[159] First, through the decision of the Ministry of Economy and Finance to establish an autonomous budget for the agency, which enabled improving its internal organization and activities.[160] Second, by promoting competition within the government, allowing it to participate on certain occasions in drafting bills, decrees, regulations, and resolutions.[161] Third, by conducting sectoral studies, as in the case of audiovisual services and the hydrocarbons sector (on contractual practices in gas trade).[162] Fourth, with regulatory recommendations on tariff barriers in the steel sector, and mobile number portability.[163]

(b) The Agency's Activities

(i) Case Selection and Prioritization

The CNDC noted that cases were selected on a case-by-case, non-public basis, considering several criteria for assigning priorities (potential consumer harm, complexity of case analysis, preliminary assessment of available evidence, and the possibility of obtaining additional evidence).[164] As had been already pointed out in the 2006 report, the limited budget and staff turnover were among the main restrictions to a better performance.[165] This was notwithstanding the budget increase that the agency had received between 2007 and 2011 by almost 250% at constant values.[166] This increase was reflected in the creation of new positions in the agency, which allowed for extended contracts,

158. *See id.*
159. *Id.* at 41.
160. *Id.*
161. *Id.* at 57.
162. *See id.* at 42.
163. *See id.*
164. *See id.*
165. *See id.*
166. *See id.*

increased salaries, and more organized and efficient working conditions.[167]

(ii) Anti-Cartel Enforcement Actions

One of the recommendations of the 2006 report was a proposal to amend the Antitrust Law then in force in order to introduce a procedure for the exemption and reduction of sanctions (although it was not approved by the Secretary of Domestic Trade).[168] A project to create a leniency program was also under study; this project was sent as a recommendation of the agency for its evaluation by the Executive Branch and Congress but did not even reach parliamentary status.[169]

(iii) Improving the Efficiency and Effectiveness of Investigations

The peer review had also recommended increasing the efficiency of investigations into anti-competitive behavior.[170] In response, the CNDC (i) considered the possibility of dismissing complaints when the complainants do not ratify them and the CNDC deems there is not enough evidence to pursue the complaint and (ii) proposed increasing the notification threshold and shorten the review periods for simple and complex transactions.[171]

No further progress was made with respect to the recommendations of the 2006 report, and at the time of the peer review there were still critical issues pending implementation (e.g., the Constitution of the Tribunal).

(iv) Overall Assessment of the Peer Review

The CNDC recognized the contribution of the peer review regarding (i) the establishment of an autonomous budget, which enabled a more effective distribution of resources according to the specific needs of each unit and (ii) the recommendation to implement the leniency program that was the basis for the law reform process years later.[172]

167. *See id.* at 42-43.
168. *See id.*
169. *See id.* at 43.
170. *See id.* at 59.
171. *See id.* at 43.
172. *See id.* at 41, 43-44.

4. Voluntary Peer Review of Competition Law and Policy: Argentina (2017)[173]

A subsequent peer review of the competition authority in Argentina was conducted five years after the last OECD review, carried out instead within the framework of UNCTAD.[174] Voluntary peer reviews on competition law and policy under the auspices of the United Nations are carried out at the annual meetings of the Intergovernmental Group of Experts on Competition Law and Policy and at the Inter-Ministerial Conferences. UNCTAD's Special Unit on Competition and Consumer Protection Policies conducts the review of the set of Principles and Rules on Competition within the framework of the United Nations.[175] This unit entrusted Professor Luis Berenguer Fuster, lawyer, former President of the Spanish Competition Court, former member of the Spanish Courts, and member of the Advisory Group of Experts of the Competition and Consumer Protection in Latin America (COMPAL) program, with the task.[176]

The report structure is similar to that of the OECD report. It first focuses on the economic context in Argentina and on the background of the Antitrust Law then in force. It is divided into special chapters for different topics, as follows: (i) anticompetitive agreements and practices, (ii) control of economic concentrations, (iii) behavior-related procedures (the administrative procedure as a supplemental rule), (iv) compensation for damages for infringements of competition rules, (v) behavior control procedure, (vi) sanctions to be applied, (vii) the judicial appeal of the authority's decisions, (viii) the promotion of competition, (ix) certain matters considered to be particularly relevant such as horizontal and vertical agreements, abuse of dominant position and the promotion of competition, and finally, (x) institutional matters related to the enforcement authority and the promotion of competition policy.[177]

In order to analyze the status of competition policy and institutional framework at the time of the report, Section 5 begins by

173. *See* UNITED NATIONS CONF. ON TRADE & DEV. (UNCTAD), *Voluntary Peer Review of Competition Law and Policy: Argentina* (UNCTAD/DITC/CLP/2017/1) (TD/B/C.I/CLP/46) (Apr. 26, 2017).

174. *See id.* at 2, 30.

175. *See* UNITED NATIONS CONF. ON TRADE & DEV. (UNCTAD), *Competition and Consumer Protection*, (last visited Nov. 12, 2025), https://unctad.org/topic/competition-and-consumer-protection.

176. *See* Luis Berenguer Fuster, FORO DE FOROS, https://www.forodeforos.org/ponentes/luis-berenguer-fuster/ (last visited Oct. 23, 2025).

177. *See* UNCTAD, *supra* note 175, at 5.

identifying the recommendations made by the OECD in 2006. It states: "Analysis of the actions implemented as of the approval of the report [OECD 2006] should lead to frankly disheartening conclusions . . . ".[178] After favorably considering the draft amendment of the antitrust law that was then under debate in Congress (and that would eventually become Law 27.442) and certain operational changes that were being carried out in preparation for a new legal regime (such as, delegation of operational powers to the CNDC by the Secretary of Commerce, new internal administrative organizational charts and reorganization of the agency's technical teams to make its performance more efficient, the allocation of greater budgetary resources, etc.), it goes on to state:

> [B]ut as of 2016, none of the reforms proposed by the OECD concerning institutional design had been implemented, independence had not been strengthened, the effectiveness of the fight against cartels had not been enhanced, merger control regime has not been modified and the leniency program has not been set. On the contrary, instead of creating the Tribunal, as a means of strengthening the independence of the system, the Secretary of Commerce has been permanently appointed as the Enforcement Authority.[179]

We were able to prove how important the problem of institutional design is in the interview we had with Professor Berenguer and other specialists.[180] The fact that the National Tribunal for the Defense of Competition has not been constituted as provided for in Law 25.156, its elimination by Law 26.993 and the appointment of the Secretary of Commerce as enforcement authority was an issue of special interest.[181] Berenguer had been President of the Spanish Competition Court and one of the facilitators of the subsequent change in the regime of the National Competition Commission that led to the creation of the highest authority of markets and competition in Spain, the CNMC.[182]

UNCTAD ultimately came to nine conclusions in their peer review report.

(1) The recommendations made in the 2006 OECD peer review remain valid. The report states, that in the years since the approval of these recommendations and up to 2016, no apparent decline in political influence was evident in the enforcement of competition rules.[183] It is

178. *Id.* at 39.
179. *Id.* at 40.
180. Based on personal knowledge and protected information.
181. *See* UNCTAD, *supra* note 175, at 13.
182. *See* Berenguer Fuster, *supra* note 176.
183. *See* UNCTAD, *supra* note 175, at 40.

acknowledged, though, that considerable progress has been observed in this regard since 2016.[184]

(2) Initiatives adopted since 2016 in the organizational structure of the CNDC are aimed at strengthening the independence and effectiveness of the competition authority.[185]

(3) The delegation of powers by the Secretary of Commerce in favor of the CNDC is in line with international best practices in antitrust matters.[186]

(4) The bill then under discussion in Congress represents an outward expression of the political powers' commitment in line with the recommendations made in the 2006 peer review.[187]

(5) The introduced bill addresses all the concerns raised on numerous occasions and expressed in 2006, such as raising the thresholds for the notification of concentration operations, regulating the suspensive effects of notification, implementing a leniency program and the creation of the Tribunal for the Defense of Competition.[188] The report considers that the system chosen for the appointment of the Tribunal members and their security of tenure during the full term of office in conformity with the bill, are suitable measures in order to strengthen the independence of the agency from political powers and economic interests.[189]

(6) The report states that until a new law is adopted, and in fact until it enters into force, it is necessary to make the best efforts to shorten the time periods for the processing of cases both regarding anti-competitive behavior and economic concentrations.[190] The recommendation was, then, that the time periods provided for in the law should be regarded as preclusive and not merely regulatory, as has been the case before.[191]

(7) The report also highlights the fact that the Commission has started to carry out important work in the promotion of competition.[192] However, it recommends encouraging its intensification since it is "a very suitable instrument to create a culture of competition."[193]

184. *Id.*
185. *See id.*
186. *See id.*
187. *See id.*
188. *See id.*
189. *See id.*
190. *See id.*
191. *See id.*
192. *See id.*
193. *Id.* at 41.

(8) It recommends providing the competition authority with "sufficient economic resources to enable it to exercise its functions without reliance on the political will of the Executive Power, and at the same time to identify more flexible forms of hiring staff."[194] The possibility of hiring highly qualified personnel would improve the agency's prestige.[195]

(9) Finally, it recommends facilitating the private enforcement of competition rules, proposing to offer the suitable procedures to ensure that parties damaged by infringements to the competition law may state a claim for the damage caused.[196] This would also create an additional deterrent effect to public prosecution of anti-competitive practices.

B. The Evaluation of the System's Effectors

In order to obtain empirical support and a critical evaluation of the functioning of the competition authority since 1995, the year when the competition agency was provided with significant human and material resources and the will of the political powers contributed to a substantial practice, we conducted a survey among the participants of the competition system, be they public officials, professionals, academics, etc., from 1995 to 2019, the period we call in this research the modern age of competition advocacy in Argentina.

The Objective of the Survey was presented to the respondents as follows:

> There is a general consensus that the enactment of competition regulation is beneficial for the economy, market agents and, in particular, consumers. However, this consensus is weakened when trying to establish which body shall be responsible for carrying out such regulatory functions and what organizational and functional characteristics competition agencies should have. This survey is intended to collect the opinions and perceptions of the system's effectors (whether public and/or private) on the institutional design of the competition agency in general and the agencies' performance in Argentina in the period from 1995 to 2019.

To facilitate the analysis of the findings, the survey will be divided into three parts. Namely, the sample description, the perceptions of satisfaction of the sample and the evaluation of the principles that should be considered in an ideal system.

194. *Id.*
195. *See id.*
196. *See id.*

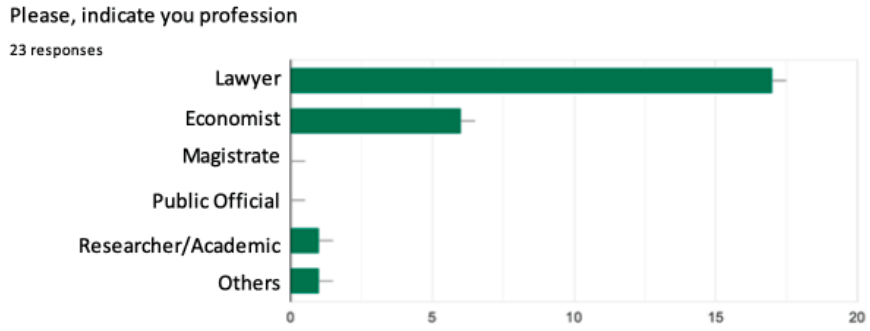
1. Sample Description

Respondents were told why they had been chosen and were asked to provide a description of their specialty and participation in certain processes during the time period of the research. This was communicated as follows:

> You have been selected as one of the effectors of the competition system in Argentina. This survey is anonymous. However, we will now ask you a few questions to allow us to further segment the analysis of the opinions resulting from the survey.
>
> Please answer all relevant questions.
>
> 1. Professional lawyer/ economist/ other/ none
> 2. Magistrate/public official/researcher/academic/ other.
> 3. Served as an official or employee in the competition agency between 1995/2019. [Yes/No]
> 4. Have you been involved (whether as an official, legislator, advisor, etc.) in the formulation or articulation of antitrust rules or provisions between 1995/2019? [Yes/No]

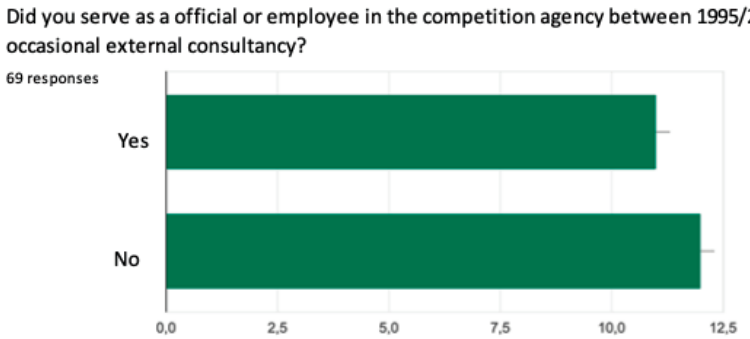
Respondents were allowed to answer anonymously. The survey was sent to more than 200 people who, met any of the following requirements: (i) have participated in the CNDC, either as members or hierarchical officials, as Director of different areas within the agency organizational structure; (ii) have acted regularly before the competition agency, either as lawyers, economists and/or consultants; and/or (iii) have been involved in the processes of discussion and modification of the institutional design between 1995 and 2019 by the merit of their experience or academic, professional or political background. The objective was to ascertain the perceptions these effectors had of the design and operation of the competition agency system at different points in time.

Responses showed an over-representation of professionals with a background in law, accounting for almost three quarters of the responses received, while just over one in four had a background in economics. Additionally, there is a smaller percentage who identify themselves as researchers/academics or doing other activities.



The over-representation of people with a background in law is seen as a favorable factor for evaluating the institutional design and its functioning from a legal perspective during the years under investigation. Either those who have participated in the competition agency as members or public officials or whose experience is the result of their professional performance before the competition agency.

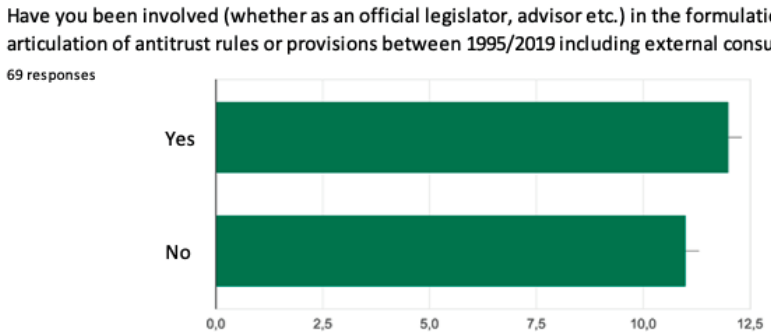
The graph below shows the direct participation in the competition agency or their performance before it.



Responses showed that 48% had served as an official or employee of the agency, while the remaining 52% did not. We also believe that the almost equal representation of those who have participated from both sides of the counter allows for a balanced load of perceptions. When evaluating results, the favorable bias of those who have participated in the agency is tempered by the broad time spectrum covered and the different conformations of the internal structures of the agency during that time. Some might argue that this could be understood as an over-representation of public agents when in the identification of potential respondents, the initial ratio was one out of three public officials or agents and two out of three who had never been members or officials

of the agency. But we understand that, with due consideration of the relevant caveats, the survey content allows a qualitative analysis of perceptions.

Regarding the participation in the processes of the regulation drafting or revision and design of the competition defense, the results also reached a certain balance.



Percentage values are inverted as compared to the previous question. This allows us to conclude that some respondents, even if they were not officials of the competition agency, did participate in the processes of regulatory modification. This may be due either to their institutional political participation (in the Executive Power or in the Congress) or to their participation in the open debate and discussion sessions in the agency or in congress committees. In fact, during the process of approval of Law 25.156, Law 26.993 and Law 27.442, consultations and debates were held both in the drafting stage under the scope of the Executive Power and in the meetings of the special committees in Congress.[197] We participated in two occasions. Together with experts, sectorial chambers, and consumer protection associations, we were invited to participate as speakers in discussion sessions of the Joint Commissions of Competition and Consumer Protection, and Budget and Finance and Constitutional Affairs of the House of Representatives.[198] And when the CNDC was in the process of drafting the bill, which later became Law 27.442, the competition authority invited us to express our opinions and suggestions ahead of time in an interesting formal session including the participation of stakeholders from

197. *See id.* at 30-31.; Luis Berenguer Fuster, *BROSETA incorpora a Luis Berenguer, expresidente de la CNC*, BROSETA, https://www.broseta.com/en/leading-international-expert-on-competition-law-luis-berenguer-joins-broseta/ (last visited Nov. 13, 2025).

198. Based on personal knowledge and communications with competition authorities.

the general public.[199] These external stakeholders were the ones we identified to include in the segment of participants who collaborated in the institutional design of the defense of competition regulation without actually having been officials.

2. Perceptions of Satisfaction

For the assessment of the agency's performance, which has been a central part of the survey, we made distinctions by themes, focusing on different evaluation perspectives and using a time frame fragmented in five-year periods.

(a) Conceptual Framework

The conceptual framework of the consultation can be divided into three distinct but complementary aspects. Namely, independence, efficiency and solvency, and effectiveness of the competition agency.

In fact, the first question aims at the core issue in the discussion on institutional design, namely the independence of the competition authority. As shown in this research, the issue of independence is always present in the debate and in the expert discussion forums when it comes to design the competition authority.

In a second part in the survey, a specific question is intended to evaluate the efficiency and solvency of the agency whether in the investigation of practices restricting competition or in the analysis of economic concentration operations.

Finally, the last part includes a third and a fourth question referring to the time the agency takes to solve issues under its responsibility, we intend to assess the effectiveness of the competition agency. We make a distinction between the prosecution of anti-competitive practices and the evaluation of mergers (except for the initial period of the survey when the latter was not yet regulated). This is because, as this research shows, since the entry into force of Law 25.156, the time, and resources available to the agency for corporate mergers oversight has increased significantly to the detriment of other investigations.[200] So evaluating both tasks could have a significant distorting effect on the overall agency assessment. By comparing the different assessments for

199. Based on personal knowledge and communications with competition authorities.

200. Melissa Petruzzello, *List of Presidents of Argentina*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/list-of-presidents-of-Argentina-2060769 (last visited Nov. 13, 2025).

the different areas of antitrust, we confirm that separating the perception of effectiveness has been a wise decision.

(b) Timeframe

The survey time frame has been segmented into five periods of five years each: 1995-99, 2000-04, 2005-2009, 2010-2014, and 2015-2019. The periods typically correspond to governments of the same political party, except for the period from 2000 to 2004, which alternates the administrations of Fernando De la Rúa, Eduardo Duhalde, and Néstor Kirchner, and the first year of the last period, 2015, which is the end of Cristina Kirchner's administration followed by the full term of Mauricio Macri. However, within each of the selected periods there are several officials who were temporarily in charge of the Ministries of Economy, Production and Secretary of Commerce.[201] This has an influence, since the CNDC was always under the scope of these areas and the agendas of the Ministers and Secretaries were always permeating to a greater or lesser extent the performance of the competition authority.

(c) The Results for the Different Periods

(i) 1995 – 1999

Prompts were as follows:

"1995-99 Very satisfied/somewhat satisfied/little satisfied/not at all satisfied"

a. Autonomy/independence from political authority

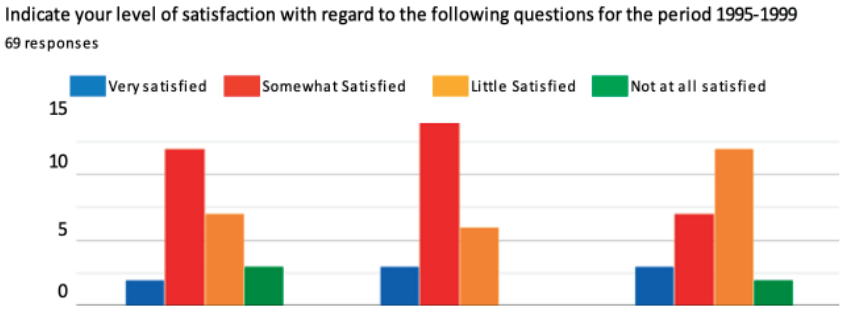
b. Analytical/technical/ solvency/ regarding key decisions

c. Speed and efficiency in the prosecution of anti-competitive behavior

d. Using a scale of 1 to 10, where 1 represents the lowest value and 10 the highest value in terms of satisfaction [you can optionally explain why]"

201. *See id.* at 15.; based on personal knowledge.

Results are represented in the graph below:



Autonomy/independence from political authority

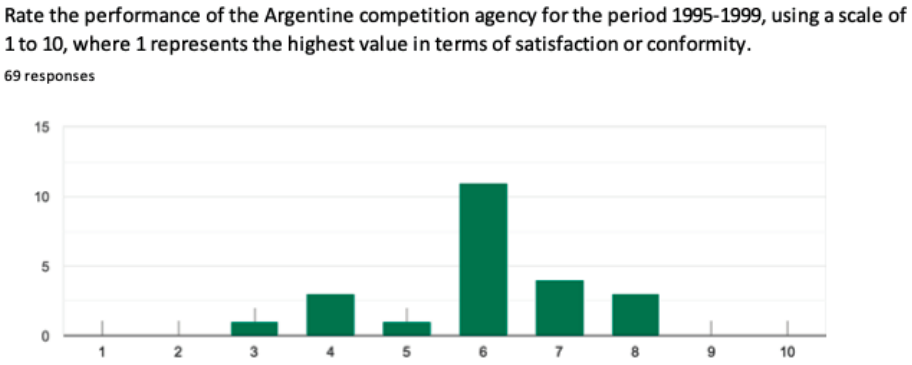
Analytical/technical solvency regarding key decisions

Speed/effectiveness in the prosecution of anti-competitive behavior

On evaluating the perceptions regarding the agency's independence, we observed that 52% of the respondents were somewhat satisfied and 9% were very satisfied. 30% were little satisfied and 9% not at all satisfied. The overall result is that the perception of the agency´s independence in this period is positive.

When we go on to evaluate efficiency and solvency, 61% of respondents are satisfied and an additional 13% are very satisfied. 26% are little satisfied and no respondent reported being not at all satisfied. As in this period the analysis of economic concentration operations was not regulated yet, the assessment of analytical and technical solvency of the decisions is restricted to anti-competitive behavior.

Finally, regarding the agency's effectiveness in performing its tasks, there is a more negative bias than in the previous cases. Here we only had as reference the prosecution of anticompetitive behaviors. The median has been 48% of respondents little satisfied and an additional 9% not at all satisfied. This makes a clearly negative result. Only 13% of respondents were very satisfied with the agency's effectiveness in this period and 30% somewhat satisfied.



The above graph reflects the overall rating of the agency's performance in the 1995-99 period. The median with 47.8% of the respondents renders a rating of six points and if we add that 17.4% rated it with seven points, we can conclude that almost two-thirds of the respondents rated the agency´s performance as good, 13% rated it as very good with eight points, 17.3% rated it as fair with four to five points and only 4.3% rated it as poor with three points.

The general evaluation ends up being positive, which is the same as the evaluation of the agency´s independence and its efficiency in anticompetitive behavior oversight.

(ii) 2000 – 2004

Prompts were as follows:

"2000-04 Very satisfied/somewhat satisfied/little satisfied/not at all satisfied".

a. Autonomy/independence from political authority

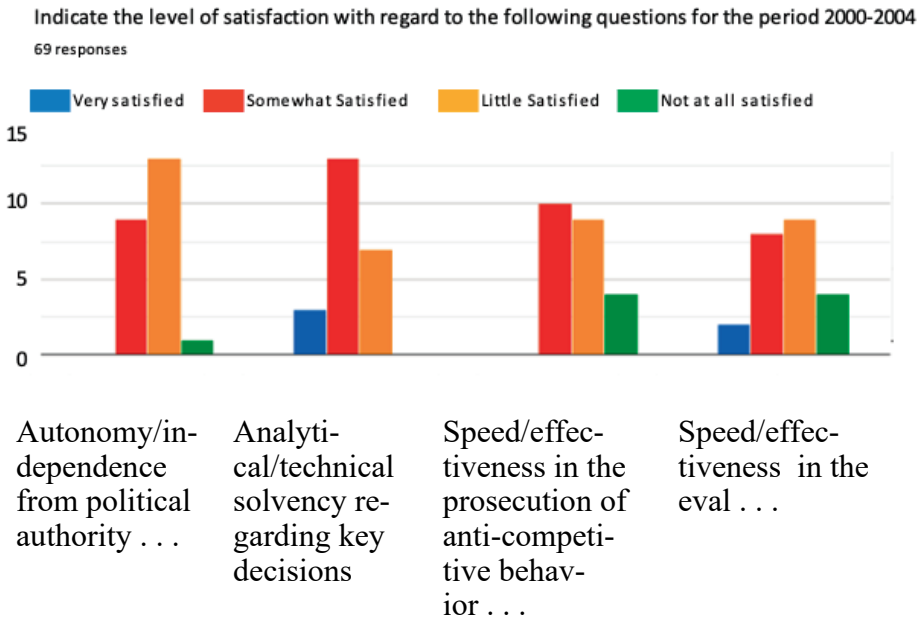
b. Analytical/technical/solvency/ regarding key decisions

c. Speed and efficiency in the prosecution of anti-competitive behavior

d. Speed and efficiency in the evaluation of mergers

e. Using a scale of 1 to 10, where 1 represents the lowest value and 10 the highest value in terms of satisfaction [you can optionally explain why]"

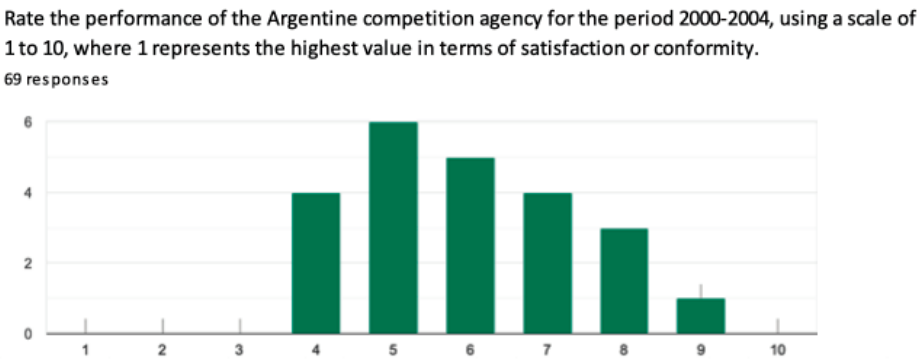
Results are shown in the graph below:



For this period, 57% of the respondents were little satisfied with the agency´s independence and 39% were somewhat satisfied, no very satisfied respondents and 4% not at all satisfied. We observe that the percentage of little satisfied respondents partially increased over somewhat satisfied and not at all satisfied respondents. There were no respondents that were reportedly very satisfied until the last period under study.

The agency´s efficiency and solvency for this period keeps almost the same rating as in the previous period. The study showed 57% of the respondents were somewhat satisfied with the agency's technical solvency and 13% were very satisfied, as in the previous period, and 30% of the total were little satisfied. No respondent reported being not at all satisfied regarding the agency's technical solvency. Although similar results, there was a slight increase of 4% in the number of respondents compared to the previous period. Also of note, the institutional breakdown in December 2001, right in the middle of this period, led to the early termination of President De la Rua's government, the beginning of Eduardo Duhalde's transitional term between January

2002 and May 2003, and finally the beginning of Nestor Kirchner's term.[202]



The graph above shows that the median rating is five points, representing 26.1% of the responses received, which if added to the four-point ratings, representing 17.4% of the total, gives a fair rating for 43.5% of the total survey. With 21.7% scoring six points and 17.4% scoring seven points, the agency's performance in this period was rated as good by 39.3% of the respondents. For 13% the performance deserved a rating of eight points and for 4.3% a rating of nine points, which represents 17.3% rating it as very good.

(iii) 2005 – 2009

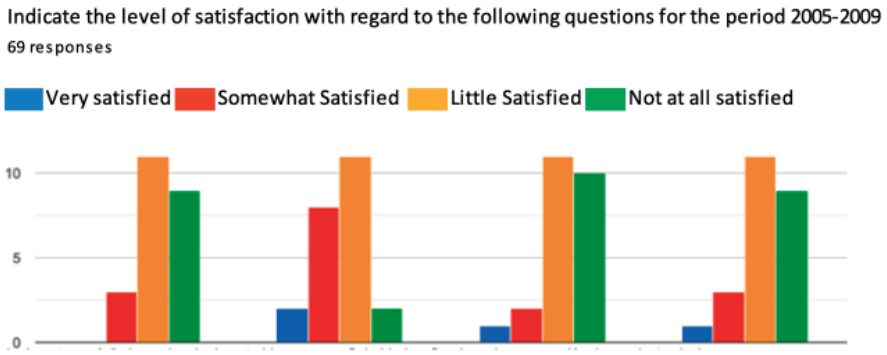
Prompts were as follows:

"2005-09 Very satisfied/somewhat satisfied/little satisfied/not at all satisfied".

a. Autonomy/independence from political authority
b. Analytical/technical/ solvency/ regarding key decisions
c. Speed and efficiency in the prosecution of anti-competitive behavior
d. Speed and efficiency in the evaluation of mergers
e. Using a scale of 1 to 10, where 1 represents the lowest value and 10 the highest value in terms of satisfaction [you can optionally explain why]"

202. *See* J. F. Hornbeck & Meaghan K. Marshall, *The Argentine Financial Crisis: A Chronology of Events,* CRS Rep. RL31582 (LIBRARY OF CONGRESS, CONG. RSCH. SERV., updated June 5, 2003) at 4-5, 13.

Results are shown in the graphs below:



Autonomy/independence from political authority . . .

Analytical/technical solvency regarding key decisions

Speed/effectiveness in the prosecution of anti-competitive behavior . . .

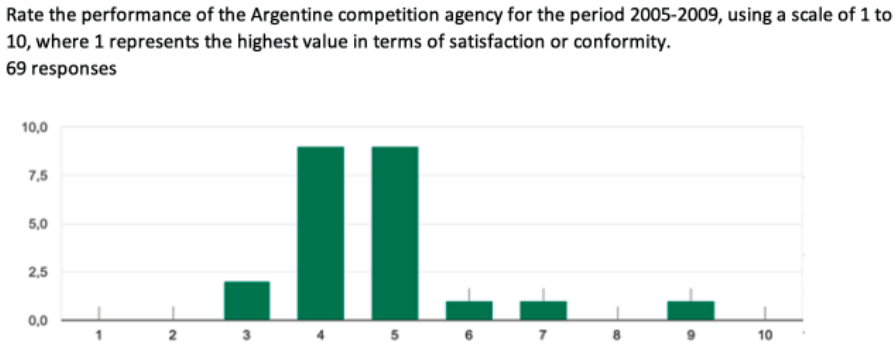
Speed/effectiveness in the eval . . .

Here, 48% of the respondents, stated that they were little satisfied with the agency's independence and the consideration of being not at all satisfied increased to 39% of the responses. Only 13% said they were somewhat satisfied, and no respondent reported being very satisfied.

The perception of the respondents regarding the agency's technical solvency began showing a clear decline. The number of very satisfied respondents went down to 9% and somewhat satisfied to 35%, which means that for the first time in the survey much less than half of the respondents reported a positive assessment of the agency´s efficiency. Instead, now, 48% of the respondents were little satisfied, while 9% were not at all satisfied.

As to the agency´s effectiveness in matters related to anti-competitive behavior, the median is 48% of the respondents being not at all satisfied, 43% were little satisfied. The percentage for somewhat satisfied respondents went down to 9% and only 4% were very satisfied.

We observe that the rating regarding effectiveness in the control of economic concentrations has declined as compared to the previous period, but it is better than that regarding behaviors for this period. Here, the median is again 48%, of respondents being little satisfied. Although 35% of respondents were not at all satisfied, this percentage is lower than in the previous period. Additionally, 13% of the respondents were somewhat satisfied and a consistent 4% were very satisfied.



The graph shows a performance rating of four points (with 39.1%) and five points (with 39.1%), which makes a total fair rating from 78.2% of the respondents. Alternatively, 8.7% of the respondents rated the performance with three points with an evaluation of poor performance. 8.6% rated it as good, with an equal number of votes with six and seven points, and finally, 4.3% rated it as very good.

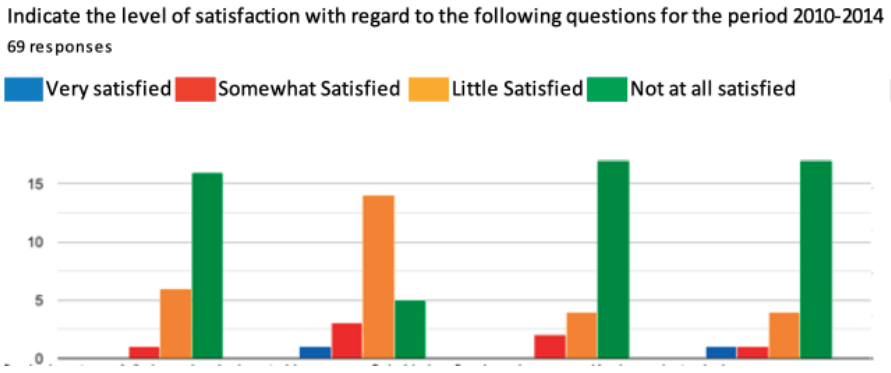
(iv) 2010 – 2014

Prompts were as follows:

"2010-14 Very satisfied/somewhat satisfied/little satisfied/not at all satisfied".

a. Autonomy/independence from political authority
b. Analytical/technical/ solvency/ regarding key decisions
c. Speed and efficiency in the prosecution of anti-competitive behavior
d. Speed and efficiency in the evaluation of mergers
e. Using a scale of 1 to 10, where 1 represents the lowest value and 10 the highest value in terms of satisfaction [you can optionally explain why]"

Responses are shown in the graphs below:



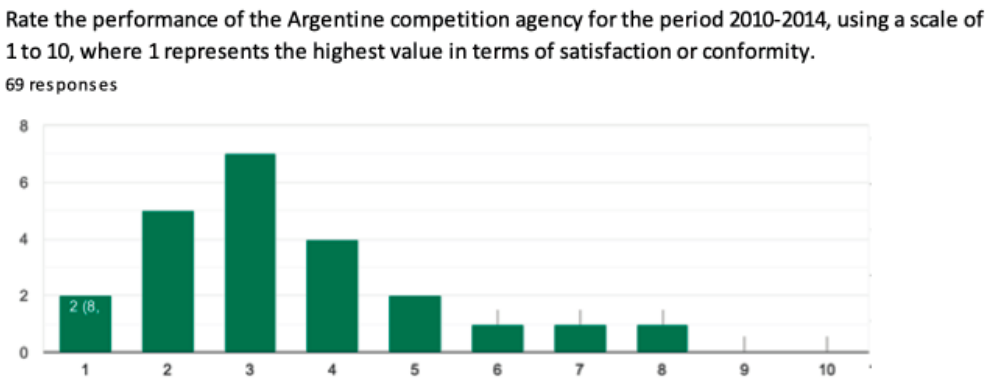
Auton-omy/inde-pendence from political authority . . .

Analytical/tech-nical solvency re-garding key deci-sions

Speed/effec-tiveness in the prosecu-tion of anti-competitive behavior . . .

Speed/effec-tiveness in the eval . . .

For this period, all aspects covered by the survey received the lowest ratings.



About 70% of the respondents reported they were not at all satisfied with the agency's independence, 26% of respondents were little satisfied and only 4% somewhat satisfied. In total, 96% gave a poor rating to the agency's independence.

The assessment of technical solvency was also negative. In this category, 61% said they were little satisfied, 22% not at all satisfied, 13% said they were somewhat satisfied, and 4% were very satisfied.

The prosecution of anti-competitive behavior had the most negative valuation. Reportedly, 74% were not at all satisfied with the

agency's performance in this area, 17% were little satisfied. Only 9% were somewhat satisfied. No respondent reported being very satisfied in this category.

Regarding the control of economic concentrations, 74% of the respondents were not at all satisfied, 17% were little satisfied. As to the rest of the responses, 4% were somewhat satisfied and another 4% very satisfied.

The graphs above show the falling trend in the rating of the agencies. The median is three points with 30.4% of the responses. Adding this to 21.7% rating with two points and 8.7% with one point, we obtain a total negative evaluation of the performance by 60.8% of the respondents. A total of 26.1% rated it as fair with four and five points and finally, the remaining 12.9% rated it as good or very good, with six to eight points.

(v) 2015 – 2019

Prompts were as follows:

"2015-19 Very satisfied/somewhat satisfied/little satisfied/not at all satisfied".

a. Autonomy/independence from political authority

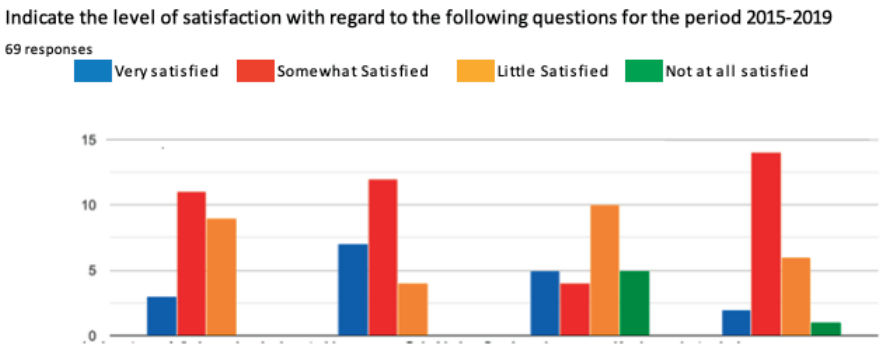
b. Analytical/technical/ solvency/ regarding key decisions

c. Speed and effectiveness in the prosecution of anti-competitive behavior

d. Speed and effectiveness in the evaluation of mergers

e. Using a scale of 1 to 10, where 1 represents the lowest value and 10 the highest value in terms of satisfaction [you can optionally explain why]"

Responses are shown in the graphs below:



Autonomy/independence from political authority . . .

Analytical/technical solvency regarding key decisions

Speed/effectiveness in the prosecution of anti-competitive . .

Speed/effectiveness in the eval . . .

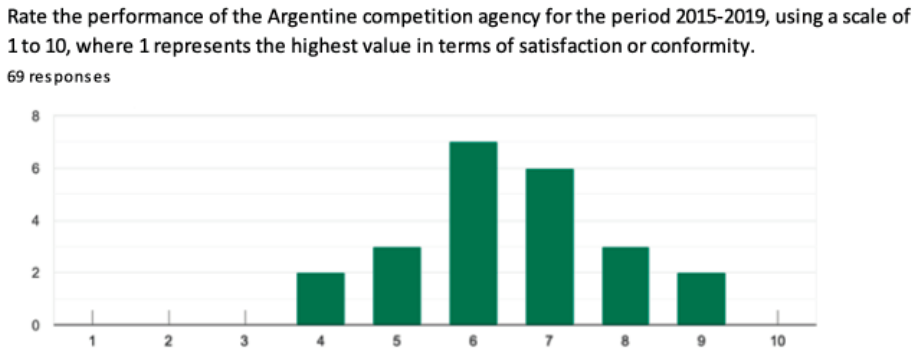
In this period there is a reversal in the indicators. The downward trend in the respondents' evaluations of all the items shown for the first four periods is reversed, though based on different criteria for this period.

With regard to the agency's independence, the first distinctive feature is that no respondent reported being not at all satisfied. The median lies at 48% of the respondents being somewhat satisfied. Additionally, 13% gave a positive indication responding they were very satisfied with the agency regarding this item, however, 39%, are still little satisfied in this area.

There has been no respondent not at all satisfied with the agency's technical solvency, and only 17% reported being little satisfied in this regard. The positive opinion is clear. The median at 52% of the respondents reported being somewhat satisfied and 30% very satisfied.

Indicators are not so positive regarding the agency's effectiveness. For the prosecution of behaviors, the median is 43% of the responses reporting little satisfaction and 17% were not at all satisfied.

Finally, the effectiveness regarding economic concentration operations had a positive assessment with 61% of respondents being somewhat satisfied, 9% very satisfied, 26% were little satisfied, and 4% not at all satisfied.



The graph above reflects in the overall assessment of the agency's performance the notes highlighted in the previous questions. The median is at six points with 30.4% of the responses, and if we add that 26.1% rated it at seven points, the overall survey results can be evaluated as good by 56.4%. Additionally, 20% rated it as very good with eight and nine points, while 2.17% rated it as fair with a scoring of four to five points.

3. Intertemporal Evaluation and the Latest Expert's Literature in Argentina

The peer reviews and the system effectors´ perceptions of the performance and difficulties faced by the competition authority are confirmed by the opinion expressed in several research papers and experts' publications.[203] As pointed out in several papers and studies, the causes for the agency's poor performance are associated to a poor institutional design as well as to other external factors that have been crucial.[204] To verify this circumstance, we confronted the peer reviewers' reports and the perceptions of the system's effectors with the specialized expert literature and the latest publications on design and practice of the competition authority in Argentina.

In order to frame and narrow down this part of the work, we will follow the scheme of evaluation across different time periods of topics including the agency's independence, efficiency through technical solvency and effectiveness regarding anti-competitive behavior and economic concentration operations.

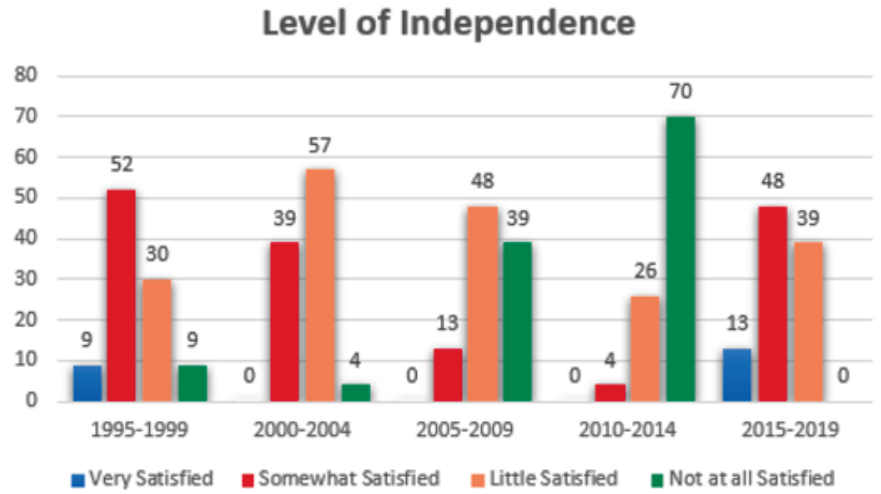
---

203. *See* UNCTAD, *supra* note 175, at 13, 15.

204. *See* Juan Carlos Sanguinetti, *Lineamientos Generales del Diseño Institucional de la Autoridad Nacional de la Competencia [General Guidelines for the Institutional Design of the National Competition Authority], in* COMENTARIOS A LA LEY DE DEFENSAS DE LA COMPETENCIA [COMMENTS TO THE DEFENSE LAW FROM THE COMPETITION] 75 (2018).

(a) The Agency's Independence

The graph showing the system's effectors perceptions from 1995 to 2019 establishes the following:



The significant drop in the agency's independence rating in the periods 2005-2009 and 2010-2014 is also depicted in experts' articles and academic publications in Argentina.[205] As stated there, the setback in competition matters between 2007 and 2015 is the result of a growing politicization of the decisions adopted by the agency and the limited application of sanctions.[206] The main cause for that has been the lack of a competition authority independent from the political power, with the necessary human and financial resources to effectively carry out the tasks assigned to it by law.[207] The recurrent interference of the Secretary of Commerce and the use of the CNDC to control prices and obtain information from companies has been most criticized for significantly affecting the agency's performance.[208]

205. *See* UNCTAD, *supra* note 175, at 39-40.

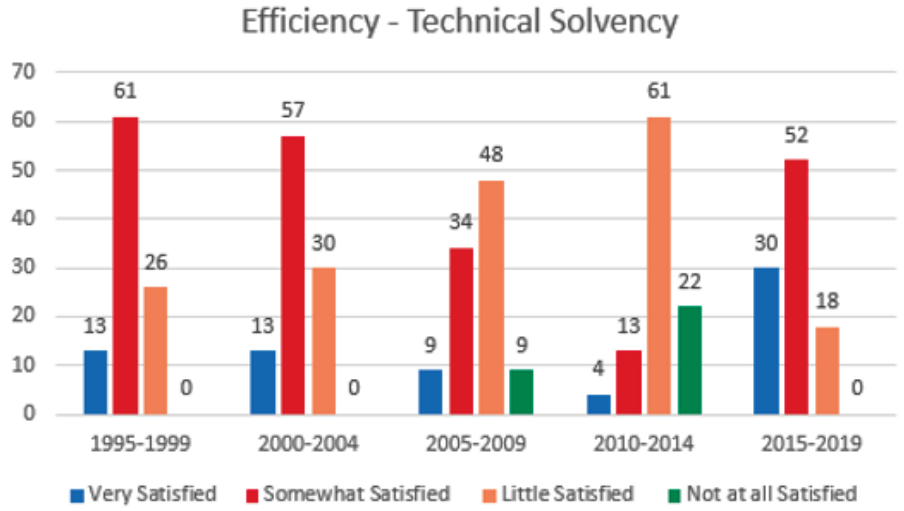
206. *Id.*; *See* Sanguinetti, *supra* note 204, at 75.

207. *Id.*

208. *See* Miguel del Pino, *La Protección de la Competencia en Argentina. Próximos Desafíos de Cara al Futuro (Competition Protection in Argentina: Upcoming Challenged for the Future), in* COMENTARIOS A LA LEY DE DEFENSA DE LA COMPETENCIA [COMMENTS TO THE DEFENSE LAW FROM THE COMPETITION] 25, 42 (2018); United Nations Conf. on Trade & Dev., *Competition and Inflation – Note by Argentina*, DAF/COMP/WD (2022) 110 (Nov. 14, 2022) at 5.

(b) The Efficiency and Solvency of the Agency

The evaluation of the system effectors also showed a decline in the consideration of the agency´s technical solvency over the periods under assessment with a recovery starting in 2016. However, this deterioration in efficiency and solvency is less pronounced than the other items compared. The graph below reflects this description.



The peer reviewers agreed in identifying the main cases solved up to 2005 as part of the work done by the OECD and up to 2017 as part of the work done by the UNCTAD which is when the studies were completed.[209] This is consistent with the opinion of the most recent doctrine.[210] Similarly, peer reviewers of various academic and research works found in specific cases of cartel practices and abuse of dominant position sanctioning during the first two five-year periods of this analysis the highest technical solvency.[211] This assessment is applicable to the development of investigation procedures and the economic and legal basis of the case. An effective control test to verify this has been the judicial review of these proceedings and the imposition of fines, where applicable, which have reached the Supreme Court itself. There are also some specific cases of assessment of economic concentration operations.[212]

209. *See* UNCTAD, *supra* note 175, at 21.
210. *See id.*
211. *See id.* at 19.
212. *See id.*

Next, we describe the main cases reported by peer reviewers and doctrine during the period under research.

(i) Portland Cement Case[213]

In this case, several cement companies and a petrochemical company were accused of developing a market distribution scheme for almost 20 years.[214] The investigation was initiated in 1999, after the publication of an article by the journalist Marcelo Zlotogwiazda, which detailed the cartel's alleged activities.[215] The article was written based on information received from a former employee of Loma Negra (one of the companies involved in the cartel), a source that the journalist initially decided not to disclose.[216] It was then impossible to verify the complete information in the newspaper article, which delayed the process in its initial stage.[217] However, the facts of the case and the journalist's testimony requested by the agency allowed the CNDC to initiate an *ex officio* investigation through which sufficient circumstantial evidence was gathered to prove the unlawful conduct.[218] The agreement had been structured by the industry's trade chamber, the Association of Portland Cement Manufacturers (AFCP).[219] The AFCP's members, through a monthly spreadsheet that collected data on each of its members, exchanged information about their production, deliveries, and sales.[220] The agency obtained the documentation through a search of the AFCP offices.[221] Even though the CNDC decided not to request the judge to extend the search to each of the companies involved in the investigation, numerous e-mail exchanges were found from the files obtained where the infringing companies expressed their consent and the importance of such exchange of information for them.[222] The investigation also revealed meetings between the members as a "place to collude," although it was impossible to know the

213. *See* Comisión Nacional de Defensa de la Competencia (CNDC), Dictamen 513, Expte. No. 064-012896/1999*,* "Loma Negra Cía. S.A., Cemento San Martín S.A., Juan Minetti S.A., Corcemar S.A., Cementos Avellaneda S.A., Cementos El Gigante S.A. y Petroquímica Comodoro Rivadavia S.A.," (Arg.) (July 25, 2005).

214. *See id.* at 1.

215. *See id.* at 1, 28.

216. *See id.* at 19.

217. *See id.* at 3.

218. *See id.* at 23.

219. *See id.* at 13.

220. *See id.* at 3, 58.

221. *See id.* at 23.

222. *See id.* at 26-27.

content of these meetings.[223] It was especially important for the agency to verify the existence of audits carried out by the AFCP to verify the truthfulness of the information provided by the companies and, ultimately, the fulfillment of the market distribution agreements.[224] This enabled the agency to verify that, when one of the participants in the Province of Chubut decided to sell at lower prices and to customers who "belonged" to other cartel members, the discipline mechanism that the sustainability of a cartel requires worked effectively.[225] Thus, the remaining companies collectively "attacked" the "wayward" company's market with super-aggressive pricing, forcing this company to readjust to the cartel's pricing and customer sharing terms.[226] In some cases, evidence of specific price-fixing agreements was also obtained.[227] Moreover, relevant economic evidence allowed the agency to verify the high idle capacity of the industry during the investigated period (between 1981 and 1999), reaching almost 53% of the installed capacity per year, subject to the so-called competitive market test, which contributed to provide evidence of the effective practice of cartelization.[228] The CNDC argued in this case that: (i) the relevant market was the production and commercialization of Portland cement at a national level, (ii) the accused companies represented 100% of cement production in the domestic market during the period under investigation, (iii) imports did not represent a competitive threat to domestic incumbents, (iv) proven agreement on quotas and shares on a national scale, fixing uniform sale and agreement terms and conditions to offer inflated prices in public bids and exchange of sensitive information, and (v) practices could not be justified on economic efficiency grounds.[229] The accused companies along with others, put up as their main defense that it was impossible for the agency to prove the damage to the general economic interest resulting from the alleged conduct.[230] Based on the evidence obtained, the agency rejected the defense put up by the infringing companies and fined four of them and the

223. *See id.* at 27-28.
224. *See id.* at 67.
225. *See id.* at 167.
226. *See id.* at 90.
227. *See id.* at 82.
228. *See id.* at 43.
229. *See id.* at 6-7.
230. *See id.* at 138.

AFCP.[231] The total fine amounted to $309,729,289.[232] The agency's decision was subject to review by the National Economic Criminal Court, which on August 26, 2008, confirmed the administrative decision.[233] Finally, the Supreme Court of Justice rejected the extraordinary appeals filed by the companies, and the sentences imposed became final.[234]

(ii) Liquid Oxygen Case[235]

The investigation was initiated in 2001 by the CNDC based on several healthcare establishment complaints which stated that they were unable to acquire liquid oxygen from competitors of their usual supplier.[236] When there was a bidding process for the supply of liquid oxygen, the offers submitted belonged only to the incumbent suppliers, or any other alternative offer was much higher than that of the usual suppliers.[237] Thus, the Secretariat of Competition, Deregulation and Consumer Protection instructed the CNDC to begin an investigation into the medical liquid oxygen market.[238] When defining the relevant market, the agency found that liquid oxygen was a highly concentrated market, which is why the access for new suppliers encountered significant barriers to entry.[239] The agency was able to carry out a surprise search on the companies involved [240] and relevant evidence was obtained.[241] Documentary evidence (letters, handwritten papers, memos, and internal notes) and e-mail exchanges collected during the searches proved that, over a period of at least five years, the investigated companies had held permanent meetings and agreed on the terms of a cartelized practice.[242] Through its investigation, the CNDC made the

231. *See id.* at 12-13.

232. Alfredo O'Farrell & Miguel del Pino, Argentina, in *The Public Competition Enforcement Review* 1, 4 (Law Bus. Research 2009).

233. *Id.* at 23.

234. Cementeras S.A. & Ors., Exp. ADJ-0.270291001368051783 (C.S.J.N. Aug. 26, 2008), https://www.cij.gov.ar/adj/pdfs/ADJ-0.270291001368051783.pdf.

235. Comisión Nacional de Defensa de la Competencia (CNDC), Dictamen 510/2005, Expte. No. 064-011323/2001 "Liquid Oxygen," p. 1, (Arg. July 15, 2005).

236. *See id.* at 4.

237. *See id.* at 94.

238. *See id.* at 1.

239. *See id.* at 67.

240. The companies investigated were Praxair Argentina S.A, Air Liquide Argentina S.A., A.G.A. S.A., and Indura Argentina S.A.

241. *See id.* at 2.

242. *See id.* at 6.

following determinations: (i) Oxygen price varied substantially both in the market in general and in the prices offered by each company individually since, liquid oxygen is a homogeneous product.[243] In this way, liquid oxygen was sold to different customers at different prices and the difference was not justified by quantity discounts or otherwise on market grounds. Customers were reluctant to submit offers in bids (public hospitals): generally, no company participated in bidding processes, except for the incumbent company.[244] Refusal to provide a quote (private health-care establishments) was the same as in the preceding case, but with the private health-care establishments.[245] Some companies refused to quote or quoted exorbitant prices.[246] Market sharing and price fixing by companies involved sharing the market through the method explained in the preceding paragraphs.[247] Access restriction to competitors is a concern, given that the advancement in new technologies could jeopardize the possibility to charge supra-competitive prices derived from the alleged non-competition agreement, Indura, Air Liquide, Praxair and AGA which try to restrict the development of new technologies, especially the so-called PSA technology.[248] Therefore, these companies would restrict a competitor's access to the market. The four reported companies were fined a total of $70,300,000 for engaging in a false competitive practice and agreeing on prices and client allocation with an artificial price increase to the detriment of the general economic interest.[249]

(iii) Other Cartel Prosecution Cases

The 2017 peer reviewers' report and other more recent works related to the Cement and Liquid Oxygen cases point at other noteworthy cartel prosecution cases resolved by the agency.[250]

(i) The Automotive Cartel,[251] the agency found some of the parties involved in a price fixing mechanism (absence of effective

243. *See id.* at 3.

244. *See id.* at 6.

245. *See id.* at 5-6.

246. *See id.* at 6.

247. *See id.*

248. *See id.*

249. *See id.* at 138.

250. *See* del Pino, *supra* note 208, at 39 (citing Comisión Nacional de Defensa de la Competencia (CNDC), Dictamen No. 510 (Arg.) (July 25, 2005); s*ee also* Comisión Nacional de Defensa de la Competencia (CNDC), Dictamen No. 513 (Arg.) (July 25, 2005)).

251. Comisión Nacional de Defensa de la Competencia (CNDC), Dictamen No. 271/2014, Expte. No. 0000803/2008 *Cartel Automotor* [Automotive Cartel] (Dec. 12, 2014) (Arg.).

competition, cartel practices, refusal to transfer tax benefits to prices, etc.).[252] The main evidence was the parallel behavior adopted among the investigated companies, which resulted in a much higher price than that in Chile, under the same market conditions and benefits.[253] The agency imposed a total fine of $ 1,060,245,904.[254] The case was reviewed by the Federal Court of Appeals of Comodoro Rivadavia which revoked the decision because the parallel behavior noted by the agency was no more than an argument related to the structure of the markets that facilitated collusion, but without sufficient evidence to confirm the materiality of the behavior attributed to the investigated parties.[255]

(ii) The Medicinal Gelatins Cartel[256] was the result of a nine-year investigation by the agency following an anonymous complaint about concerted practices during bidding processes carried out by private healthcare facilities and public hospitals.[257] Four pharmaceutical laboratories and three individuals representing the investigated companies were fined a total of $40,000,000[258] for the former and $600,000[259] for the latter. The decision was reviewed by the Court of Appeals for Economic Criminal Matters.[260]

(iii) The Bariloche Medical Center Cartel[261] was the result of a collusive agreement within the medical care market.[262] The agency issued an injunction against the accused parties, which remained in force throughout the investigation to immediately stop the practice carried

252. *See id.* at 3-4.

253. *See id.* at 36.

254. *See id.* at 5-6.

255. *See* Cámara Federal de Apelaciones de Comodoro Rivadavia [Fed. Ct App. Comodoro Rivadavia], 13/8/2015, Honda Motors Argentina S.A. & Others c. Estado Nacional – Secretaría de Comercio, 2015-81 (Arg.).

256. Comisión Nacional de Defensa de la Competencia (CNDC), *Memorias 2015–2017* 48 (Dec. 2018) (Arg.).

257. *Id.*

258. *Id.* at 49.

259. *Id.*

260. *See* Comisión Nacional de Defensa de la Competencia (CNDC), Dictamen 705/2015, Expte. No. S01-064-0320435/2006, *Gelatinas Medicinales* [Medicinal Gelatins Cartel] 108 (Dec. 4, 2015) (Arg.).

261. *See* Comisión Nacional de Defensa de la Competencia (CNDC), Dictamen 510/2005, Expte. No. 0063196/2013, "Sanatorio San Carlos, S.A.," at 1463, (Mar. 13, 2018) (Arg.) (holding the collusive agreement between the medical centers (i) fixed prices and (ii) imposed on traveler's medical assistance companies the contracting and commercial conditions care insured students' care. It began with the Argentine Chamber of Assistance Service Companies filing a complaint against all the private health-care establishments in the city of Bariloche).

262. *See id.* ¶ 224.

out by the medical center.[263] Finally, the accused parties were found responsible for the cartelized practice and fined for a total of $320,950,[264] which was calculated according to the level of participation in the cartel and benefits obtained by each of them.[265]

(iv) Abuse of Dominant Position in the Liquefied Petroleum Gas Market (YPF)[266]

The case was initiated by an *ex officio* investigation by the CNDC in August 1997, as a corollary of a market study that indicated the existence of several striking circumstances in the sales of bulk Liquefied Petroleum Gas (LPG).[267] The case dealt with significant increases in sales prices to fractionator plants from late 1992 to 1997 that were not due to higher production costs,a context of quasi-standstill domestic demand,significant increase in production and export of LPG,and existence of a growing gap between sales prices to fractionator plants and export prices.[268] The relevant market was defined as the bulk supply of LPG (a by-product of natural gas production) nationwide. Taking into consideration both supply and demand, the agency concluded that neither the petrochemical sector nor the fractionator plants had an effective possibility of substituting LPG for another product.[269] On the supply side, the existence of significant market entry barriers to import the product led to the conclusion that there was no substitutability either.[270] It was concluded, then, that YPF was in a dominant position in that market. The purpose of the investigation was to verify whether YPF was behaving as a dominant company.[271] This implemented a policy of restricting domestic supply to keep the selling price to fractionator plants artificially high compared to export prices.[272] YPF's practice of (i) exporting a "disproportionate" volume of its production at prices below its domestic prices and (ii) imposing clauses in its

263. *See id.* at 1.

264. *See id.* ¶ 284.

265. *See id.* ¶ 275.

266. *See* Comisión Nacional de Defensa de la Competencia (CNDC), Dictamen No. 314/99, Expte. No. 064-002687/97, "YPF, S.A.," at 1 (Mar. 22, 1999) (Arg.).

267. *See id*.

268. *See id.* at 2.

269. Comisión Nacional de Defensa de la Competencia [CNDC], *Memoria 1999-2001* [Triennial Report] (1999-2001), at 19 (Arg.) (concluding that both the petrochemical sector and fractionators "no contaban con la posibilidad efectiva de reemplazar el GLP por otro producto.").

270. *See id*. at 31.

271. *See id.* at 2.

272. *See id.* at 4.

export agreements prohibiting the reimportation of the product constituted an exploitative abuse of dominant position.[273] The CNDC imposed on YPF (i) the cessation of what it considered a discriminatory arbitrage between the domestic and export markets with the obligation to eliminate the clauses prohibiting reimportation from its export agreements and (iii) a fine equal to $109,644.[274] The decision was appealed before the Court of Appeals for Economic Criminal Matters which was upheld by the Supreme Court of Justice by rejecting the extraordinary appeal filed by the accused party.[275]

(v) Other Important Restrictive Practices

Namely:

(i) The Clorox Case[276] is a type of exclusive abuse of a dominant position in the bleach market.[277] Clorox imposed (i) more burdensome conditions on distributors if they purchased products from competitors or other companies or (ii) offered distributors certain economic incentives for offering competitors' products at artificially soaring prices.[278] The agency fined the company for a total of $50,000,000.[279]

(ii) The Royal Canin Case[280] has its origins in a complaint made by a distributor of Royal Canin products in the pet food market based on certain exclusionary sales denials and discrimination in the relevant market.[281] The case was resolved through an agreement between the

273. *See id.* at 27.

274. *See id.* at 30, 34 (imposing the maximum fine provided for in Law 22.262 in force at that time. This was 120% of the illicit profit obtained over the period of the practice ($91,370,000USD). Given the convertibility regime in force at the time, the fine imposed represented the sum of $109,644,000USD in constant currency, the highest fine imposed which has been upheld in court during what we called "the Modern Age" of the competition agency in Argentina).

275. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 2/7/2002, "Yacimientos Petrolíferos Fiscales S.A./ recurso de hecho," Fallos (2002-325-1702) (Arg.).

276. Ministerio de Economía y Finanzas Públicas [Ministry of Economy and Public Finance], Resolución No. 65/2015, Clorox Argentina S.A. (17 Apr. 2015) (Arg.).

277. *See id.* at 9-10.

278. *See id.* at 75-77.

279. *Id*. at 10.

280. *See id.* at 30, 34 (imposing the maximum fine provided for in Law 22.262 in force at that time. This was 120% of the illicit profit obtained over the period of the practice ($91,370,000USD). Given the convertibility regime in force at the time, the fine imposed represented the sum of $109,644,000USD in constant currency, the highest fine imposed which has been upheld in court during what we called "the Modern Age" of the competition agency in Argentina).

281. *See id.* at 9-10.

parties by means of a commitment presented by the defendant offering greater benefits than the prosecution of the case.[282]

(vi) Economic Merger Operations

The cases identified by the peer reviewers' report within the OECD that are also highlighted by the doctrine up to 2005 are the following: (i) Oca/ Correo Argentino S.A.,[283] a concentration in the postal services market including the former State-owned company and its main competitor in the national territory, the only two networks of such magnitude.[284] This was the first of the few cases in which a merger was rejected; *(ii) Quilmes/ Brahma*a merger operation in the beer production, marketing and distribution market which was approved in 2003 but subject to specific conditions, including the disinvestment of a plant and four beer brands and the granting of certain distribution commitments to a new market competitor;[285] *(iii) Bimbo/ Fargo*[286] concentration in the national bread and bakery markets that was approved with conditions that had to be reviewed up to a decade later.[287]

The 2017 peer reviewers' report carried out by the UNCTAD focused on concentration operations which were after the previous report.[288] Thus, among the main ones, it is worth mentioning (iv) Cablevisión/*Multicanal* which resulted in the definition of the so-called pay TV market through the approval of a voluntary commitment submitted by the merger parties;[289] (v) *Telecom/Telefónica*[290], through a preliminary procedure, the CNDC investigated whether Telefónica de

282. *See id.* at 3-4.

283. OECD & IDB, *supra* note 155, at 58 (citing Resolución No. 64, Comisión Nacional de Defensa de la Competencia (CNDC), Dictamen No. 226, "Correo Argentino S.A." (Mar. 9, 2001) (Arg.) (explaining that the CNDC rejected the merger of the two principal national competitors in postal services because, although smaller competitors existed, only the merging firms operated nationwide networks covering basic mail, telegraph services, money transfers, business services, packages, high-security shipments, and international courier services, and the transaction would eliminate the main competitor and give the merged firm substantial market power)).

284. *See* Comisión Nacional de Defensa de la Competencia (CNDC), Dictamen No. 226, "Correo Argentino S.A." at 4 (Mar. 9, 2001) (Arg.).

285. OECD & IDB, *supra* note 155, at 30.

286. In re Bimbo–Fargo Concentration, Dictamen No. 395 (Conc. 418), Comisión Nacional de Defensa de la Competencia, Expte. S01:0302940/2004 (Arg.) (Sept. 10, 2004).

287. *Id.*

288. *See* UNCTAD, *supra* note 175.

289. In re Cablevisión S.A. Concentration, Dictamen No. 637 (Conc. 596), Secretaría de Comercio Interior, Expte. S01:0373486/2006 (Arg.) (Dec. 7, 2007).

290. In re Pirelli Concentration, Dictamen No. 1123 (Conc. 741), Comisión Nacional de Defensa de la Competencia, Expte. S01:0277520/2007 (Arg.) (Oct. 13, 2010).

España (Telefónica Argentina's parent company) should be notified of the share purchase in a subsidiary of the Pirelli group (Telecom Argentina's parent company) in the telephone and internet market which has led to an innovation in the prior control concept and notification criteria;[291] (vi) *Iberia/British Airways*[292] a market concentration in the cargo and passenger transportation market that was approved under conditions of route maintenance and price monitoring;[293] and (vii) *Hoyts/ Cinemark Argentina,*[294]a market concentration for the operation of multi-screen cinema complexes, which was approved on the basis of a commitment submitted by the merger parties.[295]

291. *Id.*

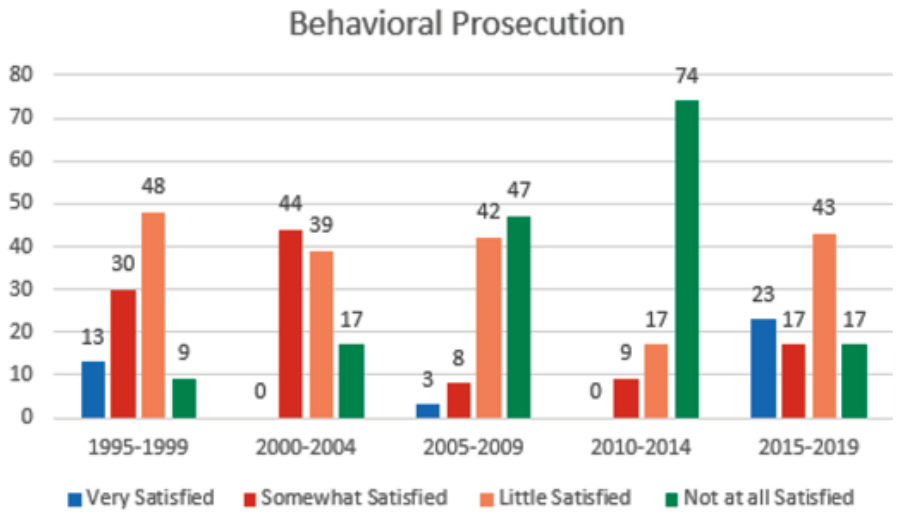
292. In re Iberia–British Airways Concentration, Dictamen No. 1094 (Conc. 840), Comisión Nacional de Defensa de la Competencia, Expte. S01: 0252139/2010 (Arg.) (Feb. 2, 2015).

293. *Id.*

294. Comisión Nacional de Defensa de la Competencia, *Hoyts General Cinema South America Inc. Y Cinemark Argentina Holdings Inc. (CONC 938)*, ARGENTINA.GOB (June 5, 2015) (Arg.), https://www.argentina.gob.ar/defensadelacompetencia/hoyts-general-cinema-south-america-inc-y-cinemark-argentina-holdings-inc-conc.

295. *Id.*

(vii) The Dynamic Efficiency of the Agency



As we have seen above, the perception of the system's effectors reflects a declining assessment as of 1999 and a relative upturn in the last five years as of 2016.[296] The graph reflects this evolution.

This assessment is confirmed by what was stated by the peer reviewers both in 2005 and 2017, as they conclude after evaluations and recommendations of specific actions to be taken to tackle this trend.[297]

To corroborate these conclusions and to add a quantitative perspective on the agency's effectiveness in dealing with anticompetitive behavior, we can look at the number of cases initiated and resolved by the agency during that period. Below is a descriptive graph of the periods under investigation in which the information is available.

296. Esteban M. Greco, Lucia Quesada, and Federico A. Volujewicz, *Argentina: Competition Authority,* 2017 GLOB. COMPETITION REV. (SPECIAL ISSUE).

297. *See generally Competition Assessment Reviews: Argentina*, OECD https://www.oecd.org (2006); UNCTAD, *supra* note 175.

CNDC[298] Anticompetitive Behavior Statistics								
							Sanctions	
Year	Cases	Commitment	File	Acceptance of Explanations	Rejections	Referral to other Organizations	Fine	Cease and Desist Order/ Other Obligations
1999	17	1	-	9	4	-	3	-
2000	15	1	-	7	5	-	2	-
2001	20	-	-	8	9	-	3	-
2002	33	2	1	12	16	-	2	-
2003	20	1	1	9	7	-	2	-
2004	29	2	4	10	13	-	0	-
2005	52	2	12	17	15	1	5	-
2006	8	-	3	-	2	1	2	-
2007	11	1	6	3	1	-	0	-
2008	14	-	5	4	-	3	2	-
2009	-	-	-	-	-	-		-
2010	16	3	5	-	1	-	7	-
2011	5	-	-	-	-	-	3	2
2012	46	4	19	11	3	4	2	3
2013	14	3	6	-	-	-	5	-
2014	2	1	-	-	-	-	1	-
2015	8	3	1	-	-	-	4	-
2016	51	-	43	5	1	2		-
2017	104	1	95	3	3	1	1	-
2018	17	-	11	1	1	1	3	-
Total	482	25	212	99	81	13	47	5

Between 1999 and 2018, the agency resolved a total of 482 cases of anti-competitive behavior for any of the causes described in sections 1 and 2 of the laws in force at the time.[299] The first distinctive feature

298. Pino, *supra* note 74, at 38.
299. *Id.*

is that less than 10% resulted in the imposition of a fine.[300] If we add the five cases in which there was some other measure imposed on the accused parties (e.g., a cease-and-desist order or some other obligation that the parties had to comply with), the total sanctions imposed do not exceed 11% of solved cases. Of those proceeding without any sanction, 20% were terminated due to acceptance of the explanations provided by the parties, and almost 17% were directly rejected.[301] This may be because, as noted in the peer reviewers' reports, many of the complaints pursued purposes other than anticompetitive practices investigations and more related to a different type of commercial disputes. However, the fact that almost 43% were filed without any final decision of acquittal or sanction is meaningful.[302]

The lack of activity in the prosecution and sanctioning of cartels is also significant. The CNDC reports that since its creation in 1980 and up to 2018, it has investigated a total of 56 cases, of which only 20 resulted in sanctions.[303]

The same analysis can be made concerning the economic concentration control. The system effectors pointed out a deterioration since 1999, when Law 25.156 entered into force, having a significant rebound from 2016 onwards.[304] The graph below reflects this evolution.

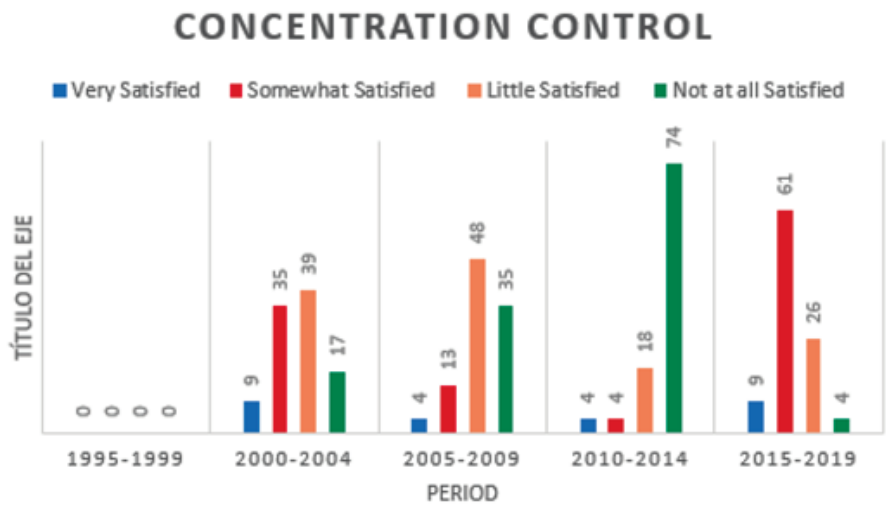
300. *Id.*

301. *Id.*

302. *Id.*

303. Gabriela Ariela Irizar, Carla Antonella Boidi, *La Persecución de Carteles en la República Argentina [The Prosecution of Cartels in the Argentine Republic]*, *in* COMENTARIOS A LA LEY DE DEFENSA DE LA COMPETENCIA, vol. 3, at 3 (Miguel del Pino, Pablo Trevisán & Demetrio A. Chamatropulos eds., 2018).

304. *See Id.*



The information available on the CNDC website also allows comparing these assessments with the statistical support of the economic operation cases that were analyzed and resolved by the competition agency in this period.

CNDC[305] Anticompetitive Behavior Statistics						
Year	**Cases**	**Approved - Section 13. a)**	**Approved - Section 13. a) with Condition**	**Subject to Section 13. b)**	**Rejected - Section 13. c)**	**Exempt from Notification**
1999	7	6	1	0	0	-
2000	160	147	8	5	0	-
2001	98	92	2	3	1	-
2002	25	23	0	1	1	-
2003	40	35	1	2	1	-
2004	44	39	1	4	1	-
2005	42	37	2	3	0	-
2006	56	54	0	2	0	-
2007	33	31	1	0	1	-
2008	38	34	2	2	0	-
2009	45	40	2	3	0	-
2010	43	35	0	8	0	-
2011	40	31	1	8	0	-
2012	34	29	0	5	0	-
2013	46	40	0	6	0	-
2014	45	40	2	2	0	1
2015	26	19	0	7	0	-
2016	117	117	0	0	0	-
2017	200	197	0	1	0	2
2018	63	60	1	1	0	1
Total	**1202**	**1106**	**24**	**63**	**5**	**4**

Of the total number of cases resolved, 92% of the concentration operations were approved without any kind of conditioning and/or subordination.[306] A little more than 7% were approved with some type of conditioning (2%), which means that the operation is not appealable before any administrative authority (unless this information has been

305. Pino, *supra* note 74, at 30-31.

306. *Id.* at 31.

provided based on false or erroneous evidence) or subordinated to compliance with a disinvestment or other type of condition (5%).[307] Finally, it is worth noting that the total number of rejected operations is equal to 0.41% of those submitted to the agency for consideration and that, since 2007, no concentration operation has been rejected.[308]

This data leads some of the most qualified doctrine to have an extremely negative view of the effectiveness of the competition agency.[309]

Thus, for example, the expert and professor Guillermo Cabanellas (H) argues that, in general, the Argentine experience has not been able to count on " . . . *a minimally effective antitrust regime . . . [t]here has been a succession of laws imposing or substantially modifying the applicable regime . . . without any of them having a minimally acceptable effectiveness*."[310] In his opinion, this is so regardless of the opportunity and quality of the cases and decisions that the agency has made over time.[311] First, he points out the stages in which effective enforcement has been abandoned or suspended by the competition authority itself.[312] Even though, during the period covered by this investigation, the authorities have "totally abstained" from initiating investigations or imposing sanctions. Secondly, he considers that the antitrust sanctioning regime has been weak or absent from implementation in such a way that it has induced economic agents not to restrict themselves from continuing or executing harmful competition practices as provided for by the law.[313] Finally, Cabanellas states that the coexistence of the antitrust provisions with legal regimes of State intervention in the economy against market mechanisms in which competition policy and legislation are developed has been detrimental to the establishment of a competition culture necessary for the consolidation of antitrust practices.[314] At this point, the author focuses on the regime of Law 20.680 (Supply Law) and its amendments which, by granting the Secretary of Commerce the possibility of regulating "*extensively and*

307. *Id.*

308. *Id.*

309. *Id.*

310. See Guillermo Cabanellas (h.), *Comentario y Valoración General de la Nueva Ley de Defensa de la Competencia [General Commentary and Assessment of the New Competition Law]*, *in* COMENTARIOS A LA LEY DE DEFENSA DE LA COMPETENCIA, vol. 3, at 3 (Miguel del Pino, Pablo Trevisán & Demetrio A. Chamatropulos eds., 2018).

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

intensively almost all economic activity," leaves no margin for the market forces, which are the core of competition policies.[315]

What have been the reasons for this failure? The main reason attributed by Cabanellas is the "*lack of a minimum consensus, at the different levels of society, regarding the need for an adequate antitrust regime.*"[316] The main actors, such as companies and consumers, resort to different alternatives other than demanding the effective implementation of an antitrust law.[317] Consumers, far from seeking to complain about the abuse of producers and traders, prefer solutions in "magic formulas" such as price control.[318] On the other hand, the business sector, far from promoting competitive conducts to grow in the market and maximize profits, prefers to seek protection with agreements where the main market organizer is the State itself. The big players of this sector use their lobbying power to avoid the enforcement of antitrust law even when there are flagrant infringements.[319].

In summary, in the opinion of Professor Cabanellas, the antitrust regime is a legal transplant from those countries where it has had political and social roots.[320] Argentina, however, does not have enough economic and social power to enforce it.

Professor Cabanellas' extremely negative point of view is not shared by most of the specialized doctrine. As evidenced in cases shown and peer reviews and experts' opinions, and although the lack of consolidated competition culture among market players and political leaders has been a negative external factor, the antitrust commission has had periods in which it has been able to solve cases of anticompetitive practices and economic concentration operations with relative technical solvency and efficiency.[321]

VI. AMENDMENTS TOWARDS THE FUTURE

The enactment of Law 27.442 attempts to address the deficiencies in the institutional design that were highlighted in the previous chapter

315. *Id.* at 4.
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.*
321. *See* Fernando C. Aranovich, *Monopolios: El Encanto de la Inflación, el Arrepentimiento y la Burocracia" [Monopolies: The Charm of Inaction, Regret and Bureaucracy]*, *in* COMENTARIOS A LA LEY DE DEFENSA DE LA COMPETENCIA, 23, 24 (Miguel del Pino, Pablo Trevisán & Demetrio A. Chamatropulos eds., 2018).

to strengthen the competition system in Argentina.[322] To what extent will these regulatory amendments allow necessary advances to build a more vigorous competition culture and practice, or what additional tools will be needed to achieve this goal? First, we will review the opinions of international experts who had the opportunity to express their views on the amendments to Law 27.442. Next, we are going to analyze the opinions of the system effectors and other experts on what would be the main aspects to keep in mind regarding the future of antitrust practice in Argentina. We will also review the difficulties in establishing the National Competition Agency and the amendments to the law that have been submitted to Congress during this period.

A. The Opinion of International Experts on the Future of Competition in Argentina Considering Law 27.442[323]

The institutional design outlined in Law 27.442 was welcomed by the international experts who were consulted.[324]

Professor Richard Whish has stated that Law 27.442 places the antitrust system substantially at the same level as the best antitrust practices of other countries worldwide.[325] First, he points out that it has been helpful for the law to adopt the recommendations made by the peer reviewers in the OECD reports in 2006.[326] Then, he highlights among the aspects of the institutional design that (i) the creation of the National Competition Authority aligns the situation in Argentina with the practice in the European Union (EU), where, as a general rule, decisions are taken by independent competition authorities (either the European Commission for the EU or national entities within each member country); and (ii) the creation of a special appeal court.[327] This model is not followed by most of the countries of the EU but it is the model followed by the United Kingdom, which has the Competition Appeal Tribunal that allows developing technical expertise in the event

322. *See generally* Ley de Defensa de la Competencia [Defense of Competition Law], Law No. 27.442, B.O. May 15, 2018 (Arg.).

323. *Id.*

324. *Id.*

325. See Richard Whish, "*Comment and General Assessment of Law 27.442 of 2018 from a European Competition Law Perspective,*" *in* COMENTARIOS A LA LEY DE DEFENSA DE LA COMPETENCIA [Comments to the Defense Law from the Competition], 639, 639 (Miguel del Pino, Pablo Trevisán & Demetrio A. Chamatropulos eds., 2018).

326. *Id.* at 639-40.

327. *Id.* at 639.

of a judicial review.[328] In his work, Whish also highlights the fact that the law is stricter than its regulatory precedents in terms of horizontal mergers.[329] This is so because section 2 of the law set forth the presumption of illegality, the increase of sanctions as variables adjusted to the illicit turnover or profit, the implementation of the leniency program, and the possibility of claiming damages.[330] Finally, he argues that " . . . *The changes made are substantial and place Argentina next to the best antitrust practices of other countries in the world (not only in Latin America). The decade ahead will be remarkably interesting!*"[331]

Folguera Crespo and Solano Díaz[332] also point out that the legislative effort to achieve both the functional and financial independence of the competition authority may require adhering to the following guidelines: (i) to allow the Tribunal for the Defense of Competition to formulate its budget and submit it to the Executive Power, (ii) to impose a fee for the review of concentration operations to support the agency's ordinary expenses, and (iii) to allow the National Competition Authority to be an autonomous entity concerning the Executive Branch, with legal and financial capacity.[333] The authors also point out that the design chosen takes into consideration an entity separation between the investigative work and the adoption of decisions under those models that guarantee due process.[334] This is a model similar to the one used in some EU states, such as Spain, and it is contrasted with the organization established in the EU, that is believed to be imperfect.[335]

Professor Javier Tapia,[336] after a comparative evaluation of certain aspects of the Chilean experience (particularly those related to the

328. *Id.* at 641.

329. *Id.*

330. *Id.* at 642.

331. *Id.* at 650.

332. *See* Jaime Folguera Crespo & Pablo Solano Diaz, *La Nueva Ley de Defensa de la Competencia Argentina: Algunas Consideraciones Desde la Perspectiva Europea* [*Argentina's New Competition Law: Some Considerations From a European Perspective*], *in* COMENTARIOS A LA LEY DE DEFENSA DE LA COMPETENCIA 663, 677 (Demetrio A. Chamatropulos et. al. eds., Thomson Reuters La Ley, 2018).

333. *Id.*

334. *Id.* at 677.

335. *Id*.

336. *See* Javier Tapia, *Comentario y Valoración General de la Nueva Ley de Defensa de la Competencia Argentina desde el Derecho Chileno* [*General Commentary and Assessment of the New Argentine Competition Defense Law From the Perspective of Chilean Law*], *in* COMENTARIOS A LA LEY DE DEFENSA DE LA COMPETENCIA 703, 703, 706-708 (Demetrio A. Chamatropulos et al. eds., Thomson Reuters La Ley, 2018).

design of the agency and judicial review), argues that it is enough to quickly review the new legislation to notice that it is a well-thought-out regulation.[337] This is because it includes the standards commonly accepted by doctrine, and it is also in line with the advances that have been made in other jurisdictions.[338] Tapia affirms that these two institutional aspects allow us to state that we are in the presence of a "modern" regulation.[339] First, the design of the National Competition Authority, which points at the criterion of independence as a decision-making body, is correct for the political emancipation of the agency.[340] Second, the creation of a special judicial review court whose judicial review is based on the consideration given to the administrative instance with competition matters in the early stages.[341] The experience gained by the special court over time through the repetition of cases will allow a harmonious interplay that contributes to building a legal competition culture. Finally, Tapia concludes that the new competition legislation in Argentina allows him to be optimistic, and says " . . . *in good hands, and with the support of the entire economic-legal and political community, it is possible to predict increasingly better health and an extended duration. With this, we will witness significant progress in the protection of competition in the Argentine markets, for the sake of the society at large.*"[342]

B. Evaluation of the Main Principles and Aspects the Institutional Design of the Competition Agency is Expected to Have

In order to look into the future of the competition agency in Argentina, we wanted to take the opportunity to gather the perceptions of the system effectors. Thus, we set out to identify the main issues to be considered when establishing the appropriate institutional design for the competition agency. To avoid ending up criticizing recent regulation, we have tried a more general consultation of perceptions on principles and/or tangible solutions for implementing or consolidating the agency.

To identify the key issues to be addressed in the competition agency institutional design in a way that verifiable opinion parameters

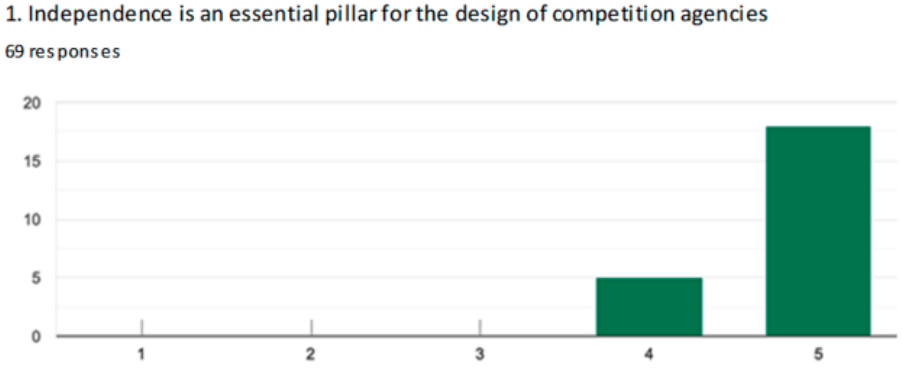
337. *Id*.
338. *Id.* at 703.
339. *Id.*
340. *Id.* at 705-06.
341. *See id.* at 707-08.
342. *Id.* at 713.

among the respondents can be established, we tailored eleven conceptual and empirical statements resulting from our research. The purpose was to measure the degree of agreement or disagreement with these statements, which were presented as follows:

> Evaluation of key aspects of the Institutional Design
>
> Please indicate your degree of agreement/disagreement with the following statements? Use a scale of one to five to express your agreement, where one represents fully disagree and five fully agree.

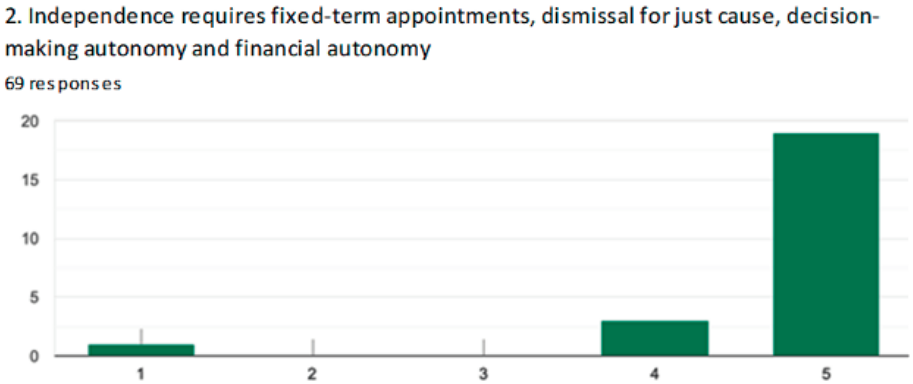
The graphs below each statement show the answers obtained.

(a) "Independence is an essential pillar for the design of competition agencies."



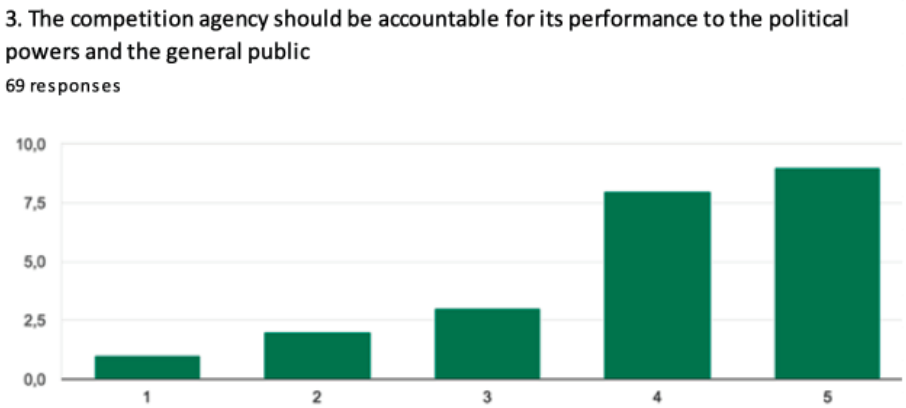
78% of the responses chose the highest rating, and 22% chose the second highest rating. Respondents reach an overall rating of 330 points out of a maximum score of 345 points. This is consistent with the rating given by the peer reviewers and the review of national and international doctrine on the subject.

(b) "Independence requires fixed-term appointments, dismissal for just cause, decision-making autonomy and financial self-sufficiency."



When consulting the aspects that should be considered for the agency's independence, the rating continues to be extremely high. More than 82% of the survey respondents chose the highest rating, 13% only one point lower, and a little more than 4% chose the lowest rating. The overall rating achieved a total score of 324 out of 345 points, which is slightly less than the statement about the importance of independence as a general idea.

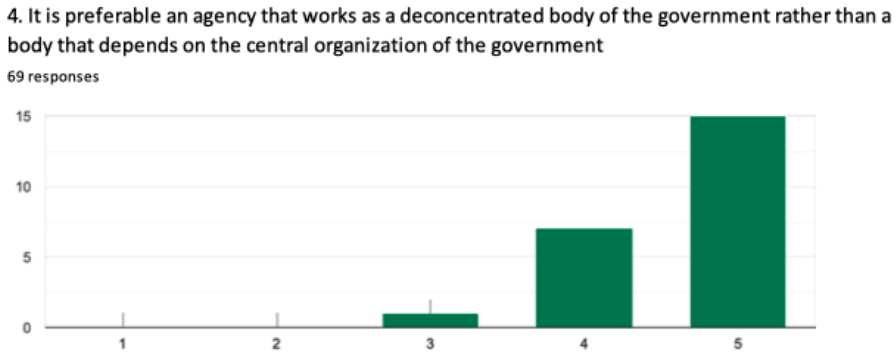
(c) "The competition agency should be accountable for its performance before the political powers and the general public."



Although agency accountability is closely related to the issue of independence, the responses to this statement were more scattered. Thus, only 39% of the survey respondents chose the highest rating for the statement on accountability.

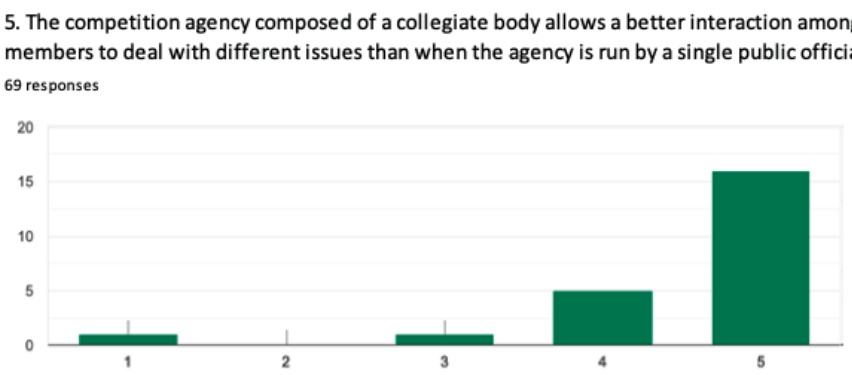
Almost 35% of them chose the second highest rating. About 13% believed that the answers to this statement deserved three points, 9% two points, and 4% one point. The overall rating for this statement is only 273 out of 345 points.

(d) "It is preferable to have an agency that works as a deconcentrated body of the government rather than a body that depends on a ministry."



An agency that does not report to a government department also got a high rating, 65% percent of the respondents rated it with five points, 30% with four points, and the remaining 5% three points. Therefore, the statement in favor of the agency being a deconcentrated from the public administration obtained an overall rating of 318 out of 345 points.

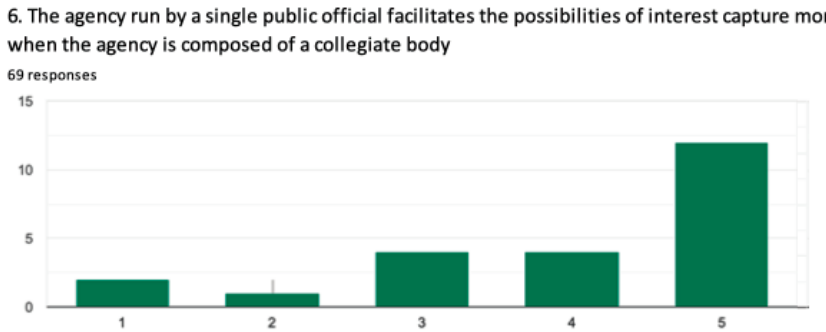
(e) "When the competition agency is a collegiate body there is better interaction among its members to deal with different issues than when the agency is run by a single public official."



Almost 70% of the respondents were in favor of the agency being an interdisciplinary collegiate body, which therefore rendered the highest rating.

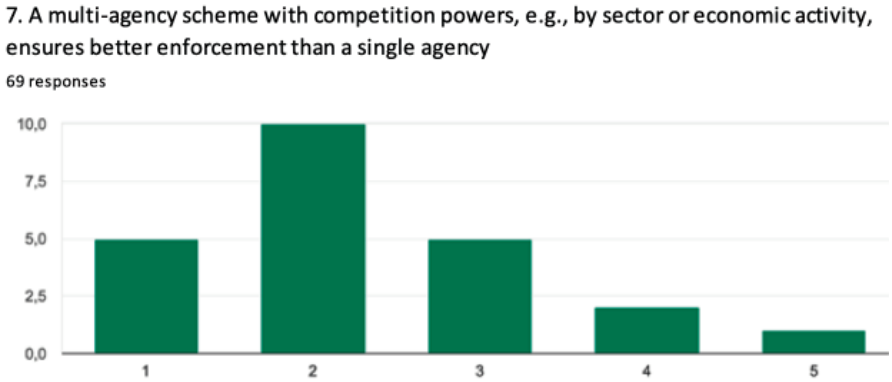
Almost 22% of the respondents rated it with four points. Slightly more than 4% rated it with three points, and another was 312 out of 345 points.

(f) "The agency run by a single public official enables interest capture more than when the agency is a collegiate body."



This statement refers to one of the recurring difficulties in the public management of regulatory entities, which is the advantages and/or disadvantages of having a collegiate body or a single public official responsible for management. Although a majority of 52% of the respondents gave the highest rating to the principle that the collegiate body makes interest capture more difficult, the answers were widely scattered. Just over 17% rated it with four points and another 17% with three points, 4% of the respondents rated this statement with two points, and almost 9% with only one point. The total rating was 276 out of 345 points.

(g) "A multi-agency scheme with competition powers, e.g., by sector or economic activity, ensures better enforcement than a single agency."



This statement was contrary to the experience in Argentina to challenge the survey respondents and significant changes in the structure of the institutional design. The responses showed a refractory attitude. The average reached 43.5% with a rating of two points. Almost 22% of the respondents rated it with only one point and another 22% with three points. Almost 8.7% of them chose four points , and only slightly more than 4% chose five points. The total rating for this statement was 159 out of 345 points.

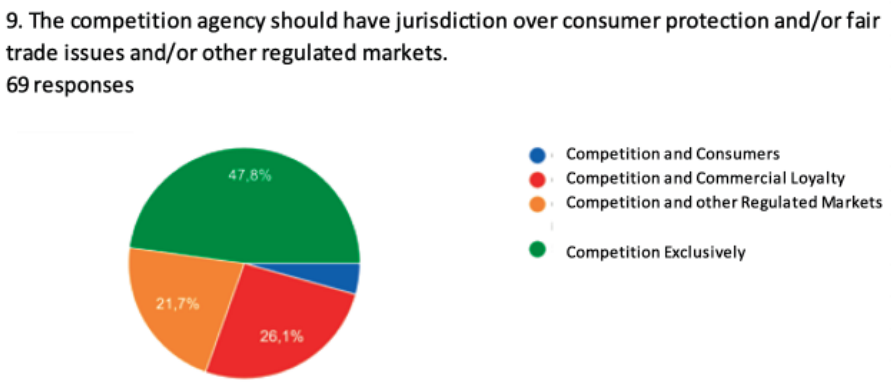
(h) "The division of functions, areas and teams for investigative tasks with respect to the adjudication of cases strengthens the guarantee of due process."



This statement points at the issue that has most divided experts in law and economics in the analysis of the institutional design. This design has not been generally the case in the traditional structure of the Argentinian design but rather only exceptionally present. However, the highest scale rating was given to this statement by 43.5% of the

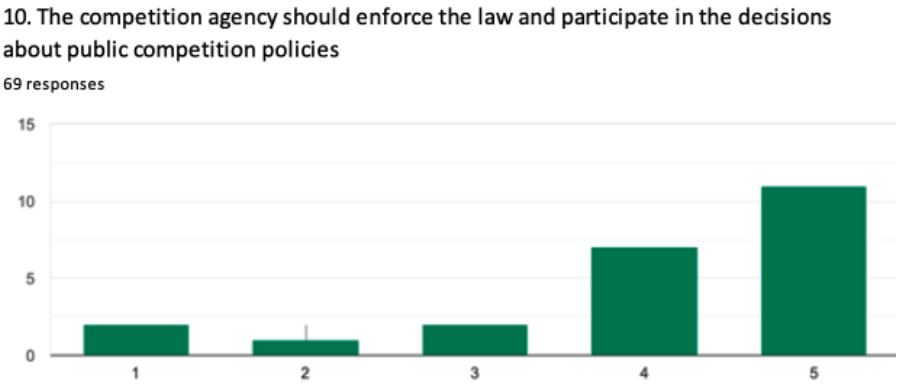
respondents, and another 43.5% gave the statement four points. Almost 9% of them gave it three points and 4% two points. Thus, the overall rating for this statement was 294 out of 345.

(i) "The competition agency should have jurisdiction over consumer protection and/or fair-trade issues and/or other regulated markets."



With this statement, we attempt to explore the view that the institutional design may depart from the Argentine experience and give the competition agency other issues within its jurisdiction. To facilitate the answer, we indicate possible combinations. As a result, almost half of the respondents chose to exclusively maintain competition issues within its jurisdiction. The fact that only 4.4% of the responses proposed the combination of competition and consumer protection was significant enough since it indicates that the general perception, despite the respondents' qualified training and/or experience, is to separate the two subjects. Thus, 26% of the respondents considered the convenience of attributing jurisdiction over other regulated markets, and almost 22% considered combining competition and fair-trade issues.

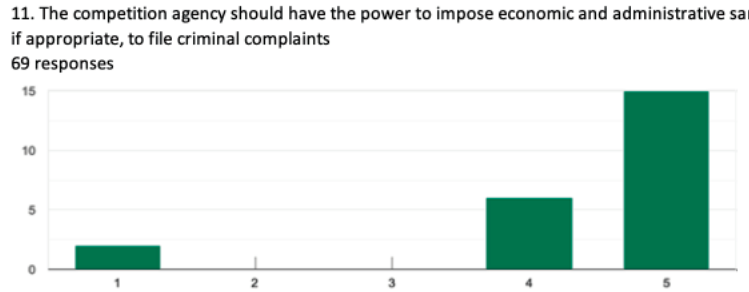
(j) "The competition agency should enforce the law and participate in the decisions about public competition policies."



This statement refers to the agency's performance in what is called competition advocacy and implies assigning a more proactive and politicized role to the agency.

Responses were diverse. Almost 48% rated it with five points and 30% with four points. Almost 8% rated it with three points, 4% two points, and almost 9% only one point. Hence, we can state that a clear majority favorably considered the possibility of the agency doing competition advocacy, as is currently the case in agencies worldwide. The overall rating was 279 out of 345 points.

(k) "The competition agency should have the power to impose economic and administrative sanctions and, if appropriate, to file criminal complaints."



This question was aimed at verifying how the respondents valued the possibility of the agency having the power to impose sanctions and even file criminal complaints. About 65% of the respondents rated this favorably with the maximum rate. About 26% rated it with four points. Almost 9% of the respondents were opposite to the majority and rated

it with only one point. Thus, the overall rating was 303 out of 345 points.

As we noted in Part III of the survey, we left it up to the participants to suggest proposals for regulatory changes. The question was phrased as follows:

"From your experience or knowledge, what improvements or proposals would you suggest to the institutional design established by Law 27.442?"

The following are some of the responses:

1. Promote private action for damages, in order to achieve a double objective: to promote the reporting of anti-competitive practices and to strengthen the "awareness" about the impact of non-compliance with these rules.

2. It should not be so complicated to appoint the members of the competition agency. This has led to a deadlock in appointments, and now we "are left floating adrift" on this issue for many years to come.

3. The effective conformation of the National Competition Authority, which should be tested before proposing any type of modification to the institutional design.

4. There is a myth about the need for an independent body through a technical candidate selection process. There is no such body in the developed world or elsewhere. The relevance of "antitrust" decisions has such a significant impact on the economic structure and even political effects . . . that it must necessarily be articulated with State policies.

5. *I fully agreement with having a this favorably decentralized and autonomous body within the scope of the Executive Power. I agree with its organizational structure, it seems to me functional and optimal at an operational level. Perhaps in the Secretariat of Anti-competitive Conduct Instruction, I would place a multidisciplinary auxiliary team to make investigations even more professional and flexible.*

6. I agree with having the members of the National Competition Authority appointed by the Executive Power and recruiting them on the basis of a previous public selection process based on background, requiring them to submit a sworn statement of their own and their family's assets, in compliance with the Financial Information Unit (UIF) requirements in general.

7. Criminal penalties should be included for any infringement on competition regulations and due consideration should be given

to the design of a completely autonomous authority, independent from any political power. Adopting a system like the one in Chile.

8. I agree with the design. The problem is that it has not been implemented. 1- An administrative body separate from the technical body for accountability. 2- Hybrid UK system with one executive head and collegiate support. 3- Prosecution Scheme. 4- Revision of the objective "To benefit the consumer", I visualize it as a broader purpose. Competition has benefits of interest that transcend the market and consumers (industry development, R&D positioning, international competitive improvement, generation of foreign exchange via exports). 5- Sanctioning-promoting scheme. 6- Not unify with Consumer until competition maturity is achieved, only then unification could be considered. 7- - Centralized operational organization based on Divisions focused on Specific Strategic Categories and a generic or general Category – Definitely implementing the National Competition Authority organization simplifying members appointment.

9. Establishing thresholds more in line with the economic activity of our country, the entry into force of the Agency and the prior notification regime, to the extent that the agency and/or authority has the resources and can guarantee agility and compliance with the legal deadlines.

10. Better balance of powers between public officials and Court. In hindsight, I would not have opted for a public candidate selection process.

11. Administrative splitting of the areas of the Secretariats from those of the Court. Facilitate the mechanism for member appointment in order to speed up this process. Provide public disclosure of annual reports to facilitate transparency of decisions.

12. I would review Decree 480/219 and amend everything that modifies the spirit of Law 27.442, for example, what refers to the different hierarchies and ranks among the members of the National Competition Authority provided for in Decree 480/19, in a different manner than the one established by Law 27.442.

1. Antitrust Law Bills with Parliamentary Status in Recent Years

Seven years have elapsed since the enactment of Law 27.442 without having put into operation the National Competition Agency.[343] Both Houses of Congress have submitted bills for the creation of the National Competition Agency, which have had different parliamentary status aiming to solve the dilemma of the agency's structure and make additional amendments to the current law.[344] We will analyze the bills submitted during the administration of President Alberto Fernandez (2019-2023) and those submitted by the administration of President Javier Milei (2024).

2. The Bills Under Treatment During the Government of President Alberto Fernandez

Within the framework of the first extraordinary session of the Senate (HSN) on February 4, 2021, the bill duly submitted by the Senator for the Province of Corrientes, Claudia Almirón, proposing several amendments to Law No. 27.442, was approved.[345] The bill was the subject of heated debate during its treatment.[346] One of the crucial points of the debate and controversy centered on the issue of the agency's independence.[347]

Senator Almirón, in defense of her bill, stated the following:

> Actually . . . 2 years have passed, and the authorities have still not been appointed. The amendments we are proposing today, regarding the appointment of the national competition authorities, have to do not only with facilitating the effective appointment -which has not happened yet, and which we have also discussed with many legislators, including those of the opposition, who understood that the public candidate selection process defined by Law 27.442 has become cumbersome, but also with facilitating the

343. *See* Marval O'Farrell Mairal, *New Step Toward Creating a Competition Authority*, LEXOLOGY (Apr. 4 2025), https://www.lexology.com/library/detail.aspx?g=0d89cad8-d560-428c-8210-edfd12aa4edb.

344. Wolters Kluwer Competition Blog, *Main Developments in Competition Law and Policy: 2024 – Argentina* (Jan. 2024), https://legalblogs.wolterskluwer.com/competition-blog/main-developments-in-competition-law-and-policy-2024-argentina/.

345. Miguel Ángel De Dios, *El Paradigma de la Independencia de las Agencias de Compentencia. El Dilema entre Independencia versus la Rendición de Cuentas Politica* [*The Paradigm of the Independence of Competition Agencies. The Dilemma Between Independence Versus Political Accountability*], EL DIAL (March 31, 2021), https://www.eldial.com/nuevo/nuevo_diseno/v2/doctrina2.asp?id=13772&base=50&t=d.

346. *See* SENADO ARGENTINA, VERSIÓN TAQUIGRÁFICA, SESIÓN EXTRAORDINARIA, PERÍODO 138, 29A REUNIÓN – 1A SESIÓN EXTRAORDINARIA, 65-68 (Feb. 4, 2021).

347. *Id.* at 34.

> subsequent actions that the enforcement authority should take . . . .What we are suggesting . . . with this amendment is that, precisely, the Executive Power, through the Ministry of Productive Development, should be the one to appoint these authorities, guaranteeing it rapidly, because this is what the issue requires: that it should be done in an expeditious manner. But the truth is that this appointment made by the Executive Power, through the Ministry of Productive Development, must be guaranteed under conditions of suitability, of equality in access to positions and, above all - this is an incorporation that was provided for in this regulation - that it also be in accordance with the gender perspective and under conditions of parity. . . . [those who may be concerned] . . . . about hand-picked appointment . . . of those who are going to take office in the National Tribunal for the Defense of Competition . . . I am not going to bother you anymore, because the truth is that such appointment is going to be reviewed by the Comisión de Acuerdos (Confirmation Committee) of this Senate, where all political forces are represented; where each political force can make its consultations, can evaluate the suitability of each of the positions to be appointed, and where the different provinces are represented.[348]

Then, the Senator also points out that:

> No member of the National Competition Authority, in the three years prior to being appointed, may have been associated with any consulting firms or any other firm related in some way with the companies that will be controlled . . . Another amendment we are going to introduce has to do with providing institutional stability to the agency -because the Senate has the institutional quality and the control to do so. Therefore, we are going to additionally provide for Tribunal for the Defense of Competition -its authorities- to submit an annual report to this National Senate at the beginning of the legislative period."[349]

Senator Almirón was joined in the defense of the bill by Senator Parrilli, with additional arguments on the need to strengthen the monitoring of foreign direct investment, the comparative experience to protect the national economy, and other aspects incorporated by him into the bill.[350]

The most well-founded criticism from opposition senators was made by Senator Martín Lousteau, who after reviewing the history of the competition agency from the enactment of Law 25.156.[351] The Senator recalled that the initial bill resulting in the enactment of Law 27.442 was drafted by himself when he was a Congress Representative

348. *Id.* at 34-35.
349. *Id.* at 36-37.
350. *Id.* at 39-42.
351. *Id.* at 42-47.

and reintroduced by other legislators when the bill had lost its parliamentary status.[352] He highlighted the importance of the agency's independence in the model of both preceding laws and the mechanism for appointing its members and pointed out the following:

> What was the appointment process provided for in the law? [he refers to law 27.442] In Section 20: a public candidate selection process by background and competition; with a jury that was the Treasury Attorney of the Nation, the Minister of Economic Development, with the participation of a representative of the National Law Academy and a representative of the Argentine Association of Political Economy; and the Minister, in case of a tie, had a double vote. After that, shortlists were submitted and based on those lists, the Executive Power decided. There was a publication, there were observations and then, it must be confirmed by the Senate . . . what we are saying today is that this is too cumbersome, that it is very complex. To tell the truth, is politics really unable to solve this complex process and who can expect then it will solve mergers, acquisitions, market interventions, competition defense? How complex, how difficult it is to have such low self-esteem to say that we cannot decide on a simple public candidate selection through a background examination program! . . . . Not now: now the procedure is internal within a ministry. It stays under the orbit of the ministry. And then, once again, as it happened with another Secretary of Domestic Trade, we have the possibility of political interference. I insist on this matter, with the possible consequences, it is a huge problem and a huge mistake. Curiously enough, this bill is called 'bill amending the Law for the Defense of Competition to improve the structure of the enforcement authority.' It is called 'improving the structure of the enforcement authority.[353]

The debate was not limited to the parliamentary sphere, it also touched upon the press, specialized magazines, and social media, with abundant and substantial criticism.[354]

The bill approved in the HSN replaces the mechanism for selecting the National Competition Authority (Autoridad Nacional de la

352. *Id.* at 43.

353. SENADO ARGENTINA, *supra* note 346, at 46.

354. *See* Luis Barry, *Una nueva amenaza a la defensa de la competencia [A new threat to the defense of competiton],* LA NACION, (Dec. 15. 2020) https://www.lanacion.com.ar/opinion/una-nueva-amenaza-defensa-competencia-nid2540107/; PUBLIC STATEMENT FROM THE BAR ASSOCIATION OF THE CITY OF BUENOS AIRES, *Ley De Defensa De La Competencia Una Reforma Innecesaria Y Que No Protege La Competencia [Competition Defense Law An Unnecessary Reform That Does Not Protect Competition]* (Feb. 10, 2021); Pablo Trevisán, *Argentine Competition Law: A Hurried and Suspicious Reform,* LINKEDIN, https://www.linkedin.com/pulse/argentine-competition-law-hurried-suspicious-reform-pablo-trevis%25C3%25A1n/?trackingId=kieHj4p%2BRcS%2FZfeYZFJukA%3D%3D (last visited Oct. 19, 2025).

Competencia) ("ANC") members under Section 20 of Law 27.442 which states that:

> The Executive Power shall appoint the members of the National Competition Authority at the proposal of the Ministry of Productive Development of the Nation, or the one that in the future replaces it, who shall meet all the requirements related to behavior, technical qualifications in the subject matter and other requirements under Section 19 of this law. The selection will be carried out under the scope of the National Ministry of Productive Development Nation, within the framework of a public, open, and transparent procedure that guarantees conditions of equality, gender parity and suitability.[355]

It eliminates the procedure of prior competition and background provided for in the regulation still in force.[356] It also establishes that "Candidates shall submit a sworn statement of their assets, of those of their spouse and/or cohabitants," and of those of the marital partnership and shall comply with other provisions set forth in Section 6 of Law 25.188 on Ethics in the Exercise of Public Office and its regulations.[357] They must also attach another sworn statement in which they must include the list of the civil associations and commercial companies they are members of, or have been members of in the last five (5) years, the list of clients or contractors of the last five (5) years within the framework.[358] The list is allowed by the rules of professional ethics in force, the law, accounting or consulting firms to which they have been part of as appropriate, and in general any type of commitment that may affect the impartiality of their judgment due to their activities, those of their spouse, their ascendants and descendants in first degree, in order to allow an objective evaluation of the existence of incompatibilities or conflicts of interest.[359] The Anticorruption Office shall make a report before the appointment of the candidates about the actual or potential conflicts of interest that may arise by the sworn statements mentioned in the preceding paragraph.[360] Likewise, a report shall be requested from the Federal Administration of Public Revenues (AFIP), preserving tax secrecy, regarding the compliance with tax obligations of the persons eventually proposed."[361] The required sworn statement

355. SENADO ARGENTINA, *supra* note 346, at 65.
356. *Id.*
357. Ley No. 27.442, May 15, 2018, [33.870] B.O. 3, 8 (Arg.).
358. *Id.*
359. *Id.*
360. *Id.*
361. De Dios, *supra* note 345, at 11.

imposes a duty to provide background information in case they have been part of the aforementioned entities or organizations and the request for information to the AFIP.[362] All of which should be read to evaluate the suitability and transparency of the candidates.[363]

Further on, the bill maintains the possibility for third parties to express their opinion and, in this way, participate in the candidate selection process.[364] Hence, Section 22 sets forth that:

> Citizens, non-governmental organizations, professional associations and consumer and user associations, academic and human rights entities may, within fifteen days of the publication stipulated in section 21 of this law, submit to the Ministry of Productive Development and to the President of the Honorable Senate of the Nation, in writing and in a well-founded and documented manner, the observations they consider important to express regarding those candidates included in the pre-selection process.[365]

Notwithstanding the submissions made, within the same period, civil society organizations and experts, professionals and academics with recognized trajectory and prestige in the matter may be requested to provide a well-founded opinion.[366]

The bill states that the appointment of the ANC members will require the confirmation of the HSN and allows the Executive Power to make provisional appointments during the time it takes to get such confirmation.[367] Each member of the National Competition Authority will serve for a term of four years and may be reelected only once.[368]

Finally, regarding accountability, it establishes that the members of the ANC must submit an annual management report to the HSN at the beginning of each legislative term and that any of them may be removed from office by the Executive Power when the grounds outlined in the Antitrust Law are met.[369] This requires a prior non-binding opinion of an *ad hoc* committee composed by the Chairpersons of the Consumer, User and Competition Defense Committee of the House of Representatives, the Industry and Commerce Committee of the Senate, the Chairpersons of the House of Representatives, and of the Senate.[370] In the event of a tie within this *ad hoc* committee, the vote of the

362. *Id.*
363. *Id.*
364. Ley No. 27.442, art. 22.
365. *Id.*
366. De Dios, *supra* note 345, at 12.
367. Ley No. 27.442, art. 23.
368. *Id.* at art. 24.
369. *Id.*; *author's personal knowledge.*
370. *Id.*

President of the House of Representatives shall break the tie.[371] In the House of Representatives, there are other recent bills drafted by members from the opposition equally intended to replace the mechanism of public candidate selection by competition for the authorities of the ANC.[372]

Every time we were able to participate in the discussion on the institutional design of the competition agency, we defended the importance of maintaining its independence as a basic pillar of its organization. We have also defended the benefits of having a selection procedure that includes a previous public competition for candidates.

We can agree with the aforementioned proposals stating that the amendment to the Antitrust Law must take special consideration in establishing an independent competition agency. But without denying the benefits of a selection procedure for the ANC candidates that includes a public competition process, we do not believe that the rule of the agency's independence should be subsumed to the establishment of a candidate selection process as provided for in Laws 25.156 and 27.442. Undoubtedly, it is regrettable that political circumstances have frustrated the candidate selection process during 2019; I can attest to the enormous effort and reliability of many of its participants and of several of those deservedly selected during the first competitions.[373] It is clear to us that the modifications in the selection process are aimed at streamlining the appointment mechanism to fill vacancies in the ANC and "debureaucratize" the political selection of candidates, but it does not change the fact that the positions are finally filled by the Executive Power with the confirmation of the HSN.[374] Is the proposed modification a meaningful change in the status of the National Competition Authority pursuant to the law in force? A deep analysis of this legislative amendment appears to show otherwise. First, according to the wording of the enacted law, for the pre-selection of candidates just a simple majority is required in the Jury, two votes correspond to the government (one to the National Treasury Attorney and the other to the Minister of Productive Development) and the other two votes to the science academies (one to the National Academy of Law and the

371. *Id.*

372. Proyecto de Ley, 27.422, CÁMARA DE DIPUTADOS DE LA NACIÓN (Arg.).

373. *See* Resolución Conjunta 1/2019, Feb. 12, 2019, [34.054] B.O. 60 (Arg.); Resolución 84/2019, Mar. 27, 2019, [34.083] B.O. 21 (Arg.); Resolución 146/2019, Apr. 25, 2019, [34.101] B.O. 27 (Arg.); Resolución 638/2019, Oct. 2, 2019 [34.210] B.O. 15 (Arg.); Decisión Administrativa 1798/2020, Oct. 6, 2020, [34.490] B.O. 18 (Arg.).

374. SENADO ARGENTINA, *supra* note 346, at 65.

other to the Argentine Association of Political Economy).[375] However, in the event of a tie, the Minister of Productive Development has a double vote.[376] It could be, therefore, argued that the government's influence at this stage of the selection process is still strong, if not decisive. The difference with the current legislation is that the mandatory participation of the aforementioned academies (a provision that was also present in Law 25.156) has been removed.[377] If this bill becomes law, the candidate selection process will be carried out by a ministry of the Executive Power without any external participation whatsoever.[378] The bill establishes that it must be "public, open and transparent, guaranteeing conditions of equality, gender parity and suitability."[379] The bill set forth the possibility that public applicants, i.e., citizens, NGOs, professional associations, associations for the defense of consumers and users, and academic and human rights entities make the pertaining observations before both the Executive Power and the HSN.[380] It also establishes that the Ministry of Productive Development may request the opinion of civil society organizations and experts, professionals and academics with recognized trajectory and prestige in the matter as a way of "mitigating" the effects of having removed from the legislation the participation of law and economics academies during the process.[381]

As mentioned above, the bill generated some criticism, as it was claimed that it affected the independence of the agency. This bill lost parliamentary status but served to raise the issue.[382]

3. The Bill Proposed During the Administration of President Javier Milei

On December 10, 2023, the new government of President Milei took office.[383] One of the first measures of his government was to send to Congress an omnibus bill with substantial reforms in different areas. This bill was called the "Proyecto de Ley de Bases y Puntos de Partida

375. *See id.* at 45.

376. *See id.* at 46.

377. *See* Ley de Defensa de la Competencia, *supra* note 322, at art. 18.

378. *See* SENADO ARGENTINA, *supra* note 346, at 55.

379. See SENADO ARGENTINA, *supra* note 346, at 65.

380. *Id.*; Ley de Defensa de la Competencia, *supra* note 322, at art. 22.

381. *See* SENADO ARGENTINA, *supra* note 346, at 35.

382. *See* Ley de Defensa de la Competencia, *supra* note 322, at art. 81.

383. *The Inauguration of Javier Milei has Argentina Wondering what President it will Get*, NPR, Dec. 10, 2023, https://www.npr.org/2023/12/10/1218430385/the-inauguration-of-javier-milei-has-argentina-wondering.

para la Libertad de los Argentinos" (Bill on the Foundations and Starting Points for the Freedom of Argentinians).[384] Section 58 of the bill states the repeal of Law 27.442, the Antitrust Law (LDC), and the approval of a new legislation to replace it.[385] This project is part of a deep and extensive process of economic deregulation.[386]

Notwithstanding the repeal of the LDC, practically all of its provisions are incorporated into the new bill and its structure was replicated. However, there are a couple of critical issues regarding the agency design and the mechanism for the appointment of its members that we will consider next.

The bill establishes a new institutional design of the competition agency.[387] Thus, it creates the Markets and Competition Agency (AMC), headed by a Secretary, and the Tribunal for Defense of Competition (TDC), composed of five members, of which at least two must be lawyers and two economists.[388] Both agencies would be decentralized and autonomous within the scope of the Executive Power and would replace the National Competition Authority created by Law 27.442.[389] Notwithstanding the aforementioned difference in the institutional design, the Markets and Competition Agency and the Tribunal for Defense of Competition (TDC) have the powers that Law 27.442 granted to the Agency.[390] The distinctive feature is that it establishes a functional division between the role of research and preliminary investigation of the Markets and Competition Agency[391] and the role of review and allocation of the TDC.[392]

According to the Bill, the Secretary in charge of the AMC will be appointed by the National Executive Power through a public, open, and transparent selection procedure that guarantees the suitability of the candidate.[393] The candidate must be a lawyer or an economist, an Argentine citizen, and must have a background that proves suitability

384. *Ley de Bases y Puntos de Partida para la Libertad de los Argentinos [Law of Bases and Starting Points of the Freedom of Argentines]*, Proyecto de Ley, Biblioteca del Congreso de la Nación (Arg.), Registro No. 2023-153350572-APN-JGM, 2023, at 4 [hereinafter the Freedom Bill].

385. *Id*. at art. 61.

386. Decreto 70/2023, Dec. 20, 2023, [DNU-2023-70-APN-PTE] B.O, at 4 (Arg.).

387. *See* Freedom Bill, *supra* note 384, at art. 13.

388. *Id.* at art. 28.

389. *Id.* at art. 26.

390. *Id.* at art. 70.

391. *Id.* at art. 22.

392. *Id.* at art. 26 & 28.

393. Resolución Conjunta 1/2019, art. 2.

for the performance of the position.[394] The exercise of the duties requires exclusive dedication and is incompatible with any other public or private activity, except part-time teaching.[395]Any political activity is prohibited for the duration of their term of office.[396] It establishes a complex removal procedure with the intervention of the Legislative Power to guarantee stability during the term of office.[397]

The TDC will have full legal jurisdiction to act in public and private matters and will have its headquarters in the Autonomous City of Buenos Aires but may act, be established, and hold meetings anywhere within the country.[398] The president of the TDC will exercise the legal representation and administrative functions of the organization and will be composed of five members, of which at least two will be lawyers and the remaining two must have a master's or PhD degree in Economics.[399] The members shall be appointed by the National Executive Power through a public, open, and transparent selection procedure that allows evaluation of the candidates suitability.[400] Each member of the TDC shall serve for a term of five years. [401]

Any of the members of the TDC may be removed from office by the National Executive Power when the grounds provided for under the law in force[402] are met, with the prior binding opinion of a bicameral committee composed of the chairmen of the Consumer, User, Competition Defense Committees of the House of Representatives, Industry, Commerce Committee of the Senate, and the presidents of the House of Representatives and the Senate.[403] In case of a tie, the vote of the President of the House of Representatives will decide.[404] Only two chapters of the Antitrust Law were not incorporated into the bill, the one creating the Specialized Antitrust Chamber (Chapter XI of the Antitrust Law[405]) and the regime for the promotion of competition (Chapter XIII of the Antitrust Law).[406]

394. Freedom Bill, *supra* note 384, at art. 19-20.
395. *Id*. at art. 20.
396. *Id.*
397. *Id.* at art. 25.
398. *Id.* at art. 26.
399. *Id.* at art. 27-28.
400. *Id.* at art. 28.
401. *Id.* at art. 32.
402. *Id.* at art. 25.
403. *Id.*
404. *Id.*
405. Ley 27.442, arts. 68-70.
406. *Id.* at arts. 74-78.

Indeed, the bill establishes a simpler mechanism for the appointment of the public officials in charge of the competition agency that does not have to resort to a previous public candidate selection process.[407] It is also worth mentioning that initially, the bill did not require the confirmation of the Senate for the appointment of the TDC members, but this requirement was later introduced in the debates within the House of Representatives' Committee.[408] As in Law 27.442, there is an instance of public scrutiny in the process of public officials' selection.[409] The bill includes the public selection procedure currently regulated in the LDC so that citizens, NGOs, professional associations, and academic entities may submit comments regarding the candidates.[410] Additionally, the opinion of relevant organizations in the professional, judicial, and academic fields may be requested for their assessment.[411]

4. The Provisional Appointment of the Agency by the Administration of President Javier Milei

A relevant institutional development took place in Argentina during 2025, during the elaboration this paper, concerning the long-postponed implementation of the National Competition Authority (Autoridad Nacional de la Competencia, ANC) established by Law No. 27,442. Following a prolonged period in which the legal framework for an independent and collegiate competition authority formally existed but remained operationally incomplete, the Executive Branch adopted a significant—albeit transitional—step toward activating the institutional design envisaged by the statute.

In November 2025, by means of Decree No. 810/2025[412], the President appointed in commission the President and two members of the Competition Tribunal, as well as the heads of the Secretariat for Anticompetitive Conduct and the Secretariat for Economic Concentrations, thereby allowing the ANC to begin exercising its core functions. These appointments followed a public, merit-based selection process conducted throughout 2025 in accordance with the procedures set forth in

407. *Id.* at art. 20.

408. *See generally id.* at art. 22.; based on personal knowledge.

409. *Id.* at art. 22.

410. *Id.*

411. *Id.* at art. 23.

412. Boletín Oficial de la República Argentina, Decreto 810/2025, AUTORIDAD NACIONAL DE LA COMPETENCIA (17 Nov. 2025), https://www.boletinoficial.gob.ar/detalleAviso/primera/334595/20251117 (last visited Dec. 22, 2025).

Law No. 27,442 and its implementing regulations, including competitive examinations, evaluation of professional backgrounds, interviews, and the submission of shortlists by a multi-sector jury. However, the process (i) failed to complete the full five members of the Competition Tribunal and left two of the members to be appointed in a future selection process and, (ii) pursuant to the Constitution and the statute itself, the definitive consolidation of those appointments made remains subject to confirmation by the Senate, which at the time of writing is still pending.

From the standpoint of institutional design, this development constitutes a meaningful departure from the longstanding transitional enforcement arrangements that characterized Argentine competition policy for more than two decades. The activation of the ANC marks the first effective attempt since 1999 to implement a decentralized and autarkic authority with separated investigative and adjudicative functions. At the same time, the reliance on in commission appointments underscores the persistence of an incomplete institutional cycle. While this mechanism enables the authority to operate and mitigates the enforcement vacuum identified throughout this paper, it also introduces an element of institutional fragility, insofar as the temporary nature of the appointments may affect perceptions of independence, stability, and insulation from political influence.

Accordingly, the 2025 appointments should be understood as a transitional institutional solution rather than the full completion of the reform process initiated by Law No. 27,442. They confirm the central thesis advanced in this paper: that the effectiveness of competition policy in Argentina depends not only on the formal adoption of international best practices in statutory design, but also on the completion and durability of appointment mechanisms, the political economy of enforcement, and the consolidation of institutional independence over time. The definitive validation of this reform will ultimately depend on the completion of the constitutional confirmation process and the sustained operation of the ANC as an autonomous and stable authority.

C. The Selection and Appointment of the Competition Agency Members: What is the Real Obstacle to Create the Agency as Provided for in the Legislation?

We can see that the different bills to amend the Antitrust Law have several aspects to consider. These drafts of the bill maintain the general structure of the current law (as the model of the last 25 years) with changes that present few substantial characteristics but with a common

denominator: to simplify the candidate selection process for the competition agency.

Strictly speaking, the change in the candidate selection process for the authorities of the competition agency seems to focus on the elimination of the pre-selection process with external "decision-making" participation.[413] Is the pre-selection process a common procedure among other competition agencies around the world?

The answer is no. The prior candidate selection process for the authorities of the competition agency is not the most popular mechanism in comparative legislation. This is demonstrated by the cases of prestigious agencies such as the European Commission itself, the agencies of Spain, England, Germany, France, Italy, Denmark, Holland, Greece, Czech Republic, etc., as far as Europe is concerned. Neither is the case of the USA, Canada, Japan, Israel, Australia, or New Zealand's antitrust agencies.[414] Meanwhile, in the region, Brazil, Colombia, Ecuador, etc., do not contemplate prior candidate selection process either.[415]

413. *Id.* at art. 20.

414. *See infra* note 416, 419, 421.

415. *See infra* note 421, 423, 430.

COUNTRY	**NAME OF THE AUTHORITY**	**FORM FOR APPOINTMENT**
1. Australia	Australian Competition and Consumer Commission	By the Governor-General.[416]
2. Spain	National Commission on Markets and Competition (CNMC)	The members of the Board, including the President and the Vice-President, will be appointed by the Government, by Royal Decree, under the basis of a proposal by the Minister of Economy and Competitiveness, from among persons of recognized prestige and professional experience in the subject market.[417]
3. Israel	Israel Competition Authority (ICA)	It is chaired by the Director General, who is chosen by the Prime Minister, with the recommendation of the Ministry of Economy and Industry. The minister must choose the Director-General from a list that has been prepared by a formal committee.[418]
4. Belgium	Belgian Competition Authority (BCA)	The president of the BCA will be appointed by the King by a decree deliberated the Council of Ministers. The president must pass the exam regarding professional skills. Further details and the examination program are determined by the King.

416. HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ECONOMICS, FINANCE AND PUBLIC ADMINISTRATION, *Review of the Australian Competition and Consumer Commission Annual Report 1999-2000* (Sept. 2001), at 2, https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=efpa/accc9900/report.htm. (Austl.) (last visited Oct. 22, 2025).

417. RÉSEAU MÉDITERRANÉEN DES AUTHORITÉS DE RÉGULATION [MEDITERRANEAN NETWORK OF REGULATORY AUTHORITES], *CNMC (Comisión Nacional de los Mercados y la Competencia),* https://www.rirm.org/en/cnmc-comision-nacional-de-los-mercados-y-competencia-2/ (Spain) (last visited Oct. 23, 2025).

418. OECD, *Competition Law and Policy in Israel* 49 (2011), https://www.oecd.org/content/dam/oecd/en/publications/reports/2011/11/competition-law-and-policy-in-israel_g1g127a1/9789264097667-en.pdf.

		Attorney General for Competition. The representative is chosen by the King and must pass an exam.[419]
5. Brazil	Administrative Council for Economic Defense (CADE)	The President is chosen by the President of the Nation with the agreement of the Senate. The President of the CADE is appointed by the President of Brazil and confirmed by the Federal Senate.[420]
6. Canada	Competition Bureau	The Governor in Council appoints the Commissioner of Competition.
7. Czech Republic	Office for the Protection of Competition.	The President of the Czech Republic appoints the Chairperson of the Office for the Protection of Competition, based on a proposal from the Government.[421]
8. Colombia	Competition Protection – Superintendency of Industry and Commerce	Superintendent Delegate for Competition Protection – Appointed by the Superintendency.[422]
9. Uruguay	Commission for the Promotion and Defense of Competition (CPDC)	The President appoints its three members, acting in the Council of Ministers.[423]

419. Code de droit économique [Code of Economic Law] (Book IV: "Protection de la concurrence" (Competition Act of 3 April 2013)), art. IV.17 §§ 1–2 (Belg.), https://www.belgiancompetition.be/en/about-us/publications/competition-act-3-april-2013.

420. *Ley No. 12.529, de 30 de novembro de 2011 [Law No. 12.529 of Nov. 30, 2011]*, DIÁRIO OFICIAL DA UNIÃO, art. 6 (Braz.), https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12529.htm?utm.

421. *Public Administration in the Czech Republic,* (David Sláma & Filip Zavřel eds., Překlady, s.r.o. trans., Ministry of the Interior 2018) (Czech.).

422. SUPERINTENDENCIA DE INDUSTRIA Y COMERCIO [SUPERINTENDENCE OF INDUSTRY AND COMMERCE], "International Relations," https://sedeelectronica.sic.gov.co/international relations. (Colom.).

423. *Ley No. 18.159 de 20 de julio de 2007, Promoción y Defensa de la Competencia [Law No. 18.159 of July 20, 2007, Promotion and Defense of Competition]*, DIARIO OFICIAL DE LA REPÚBLICA ORIENTAL DEL URUGUAY, art. 22, https://docs.uruguay.justia.com/nacionales/leyes/ley-18159-jul-20-2007.pdf. (Uru.).

10. Honduras	Commission for the Defense and Promotion of Competition (CDPC)	The three Commissioners are appointed by the National Congress, selected from a list of three candidates proposed by organizations and institutions as follows: Three candidates are proposed by the Honduran Counsel for the Private Enterprise; Three candidates proposed by the Forum of National Convergence; Three candidates proposed by the Competitive National Commission. Three candidates proposed by the Executive Power; Three candidates proposed by the Professional College of University Professionals.[424]
11. Nicaragua	National Institute for the Promotion of Competition (PROCOMPETENCIA)	The Board of Directors, which consists of a President and two Directors, is appointed by the President and confirmed by the National Assembly.[425] They are chosen from shortlists presented by the Superior Council of Private Enterprise, the Nicaraguan Council of Micro, Small, and Medium Enterprises, and the Ministry of Development, Industry, and Trade.[426]
12. Venezuela	Superintendence for the Promotion and Protection of Free Competition (Procompetition)	The Superintendent is freely chosen by the President of the Republic.[427]

424. *Ley para la Defensa Promoción de la Competencia [Law for the Defense and Promotion of Competition]* (Decreto No. 357-2005), art. 61 (Hond.), https://www.wipo.int/wipolex/en/legislation/details/10469.

425. *Ley No. 601, Ley de Promoción de la Competencia [Law No. 601, Law on the Promotion of Competition]*, art. 7, LA GACETA, No. 206, Oct. 24, 2006, http://digesto.asamblea.gob.ni/consultas/normas/shownorms.php?idnorm=MTk1NjI=#:~:text=n)%20Las%20dem%C3%A1s%20que%20le%20confiera%20la%20presente%20Ley (Nicar.).

426. *Id.*

427. *Ley para Promover y Proteger el Ejercicio de la Libre Competencia [Law to Promote and Protect the Exercise of Free Competition]*, GACETA OFICIAL, No. 34.880, art. 21 (Dec. 13, 1991) (Venez.), https://venezuela.justia.com/federales/leyes/ley-para-promover-y-proteger-el-ejercicio-de-la-libre-competencia/gdoc/?utm.

13. Denmark	Danish Consumer Council	Danish Competition and Consumer Authority.[428]
14. Ecuador	Superintendency for the Control of Market Power (SCPM)	The Superintendent is appointed by the Council of Citizen Participation and Social Control through a list of three candidates sent by the President of the Republic.[429]
15. France	Competition Authority (Autorité de la Concurrence)	It has 5 permanent and 12 non-permanent members. Of the 5 permanent members, the President is appointed by the President of the Republic and confirmed by the Senate. The other 4 are directly appointed by the President of the Republic by decree.[430]
16. Germany	Federal Cartel Office (FCO)	The President of the FCO is appointed by the Federal Government.[431]
17. Greece	Hellenic Competition Commission (HCC)	The President and Vice-President are elected by the Congress and then appointed by the Minister of Economy. The remaining 6 members are elected by the Minister of Economy.[432]
18. Italy	Italian Competition Authority (Autorità Garante della	One Chairperson and three members who are jointly appointed by the

428. DANISH COMPETITION & CONSUMER AUTHORITY, "The Competition Council," (Den.), https://en.kfst.dk/about-us/organisation/the-competition-council?utm.

429. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT & INTER-AMERICAN DEVELOPMENT BANK, *Ecuador: OECD-IBD Peer Reviews of Competition and Policy* 13 (2020) (Ecuador), https://www.oecd.org/en/publications/2021/09/oecd-idb-peer-reviews-of-competition-law-and-policy-ecuador-2021_bc4b5e49.html.

430. AUTORITE DE LA CONCURRENCE [COMPETITION AUTHORITY], "*Le Collège,"* [The Board] (Fr.), https://www.autoritedelaconcurrence.fr/en/college#:~:text=Permanent%20members-,The%20President%20and%20the%20four%20Vice%2DPresidents%20perform%20their%20functions,decree%20of%20the%20French%20President.

431. Germany, in COMPETITION ENFORCEMENT AGENCIES HANDBOOK 2019 (Pallavi Guniganti ed., Law Bus. Rsch. Ltd. 2019), at 122, https://files.lbr.cloud/public/Germany-QA-GCR-HCEA-2019.pdf?VersionId=Nfv7CVvSJ.u5qVUkSBbMDGxL8p4OvzjQ&utm.

432. *See Law 3959/2011 on the Protection of Free Competition* (codified 2025), art. 12 (Greece), HELLENIC COMPETITION COMMISSION, https://www.epant.gr/en/legislation/protection-of-free-competition.html?utm. (Greece).

	Concorrenza e del Mercato)	Presidents of the House of Representatives and the Senate.[433]
19. Japan	Japan Fair Trade Commission (JFTC)	One Chairperson and four commissioners. These members are appointed from among experts in law or economics by the Prime Minister with the consent of Parliament. The appointment and dismissal of the chairperson is certified by the Emperor.[434]
20. The Netherlands	Netherlands Authority for Consumers and Markets (ACM)	One Chairperson and two commissioners. All three of them are appointed by the Minister of Economy.[435]
21. New Zealand	Commerce Commission	Four to six members, including the Chairperson. They are appointed by the General Governor.[436]
22. United States	Federal Trade Commission (part of the Department of Justice)	The five commissioners are appointed by the US President and subject to Senate confirmation. The President of the Nation appoints the President of the FTC from among the 5 members. The Division is led by an Assistant Attorney General, elected by the US President, and confirmed by the Senate.[437]

Whether the procedure has a public candidate selection process or not, what seems to be essential is that an independent competition agency can finally be established in Argentina pursuant to the

433. *See* AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO [ITALIAN COMPETITION AUTHORITY], "*Who We Are*," https://en.agcm.it/en/about-us/#:~:text=The%20Italian%20Competition%20Authority%20 (It.).

434. *Kōtō Bōeki Dōsei Hō (Antimonopoly Act) [Act on Prohibition of Private Monopolization and Maintenance of Fair Trade]*, art. 29 (Japan), available at https://www.jftc.go.jp/en/legislation_gls/amended_ama09/amended_ama15_08.html.

435. Organisation for Economic Co-operation and Development (OECD), *Annual Report on Competition Policy Developments in the Netherlands, 2014* (DAF/COMP/AR(2014)40) (2015).

436. Commerce Act 1986 (N.Z.) s 9.

437. U.S. DEPARTMENT OF JUSTICE, *Antitrust Division Leadership,* https://www.justice.gov/atr/antitrust-division-leadership.

regulations enacted.[438] Since enactment of Law 25.156 at the end of 1999 up to the present – and its amendments through Laws 26.993 and 27.442 - and in relation to the institutional design of the agency, there has only been a little more than three years of coincidence between the competition authority set forth by law and the authority who performed the duties.[439] The CNDC created by Law 22.262 in 1980 has been a sort of "institutional highlander" since the aforementioned laws could not repeal it.[440] The effective impossibility of conforming the TNDC provided for by law 25.156 during fifteen years (1999-2014)[441] and the National Competition Authority provided for by law 27.442 during seven years since its sanction (2018-2025)[442] are the best answer to Senator Lousteau's rhetorical question. Evidently, politics in Argentina does not seem to find it possible to carry out a simple candidate selection process for the conformation of the competition agency.

The problem seems to go beyond the procedure of appointing the members of the competition agency through a background checking process, and it is more likely to be related to the interference of politics throughout this process. What underlies the discussion is the interest or distrust of the control of circumstantial majorities in the game of power and decision-making on behalf of the government when it comes to making decisions about the agency. We have testified the diversity of institutional solutions to finish with the tension between agency independence and accountability to discourage the fight over the mechanism for appointing the agency members. Thus, it would be a matter of seeking a way out of the tension between the technical independence versus the legitimate will of the economic policy expressed by the government in office (which prevents the conformation of an agency outside the organizational chart of and subordination to the Secretary of State in which the agency is institutionally incorporated) and switch to a constructive game of dialogue with a governmental agency that is "less" dependent or "more" independent than

438. *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), *OECD Economic Surveys: Argentina 2025* 103-104 (2025), https://www.oecd.org/en/publications/oecd-economic-surveys-argentina-2025_27dd6e27-en/full-report.html.

439. *See generally* Marcelo den Toom, Godofredo Agustín Ortiz & Ilan Daniel Soae, *Argentina: Development and Enforcement of the Competition Regime in Its First Century of Existence,* 4–6, Concurrences (Nov. 2024) (Arg.), https://www.concurrences.com/en/review/issues/no-4-2024/international/argentina-development-and-enforcement-of-the-competition-regime-in-its-first; based on personal knowledge.

440. *See generally id.* at 3, 5.

441. *See id.* at 5.

442. *See id.*

what we have known so far but that can be finally instituted and put into operation. I here accept with boldness and benefit of inventory, the argumentation of most modern theories in favor of broadening the spaces of inclusive dialogue used by the new dialogic constitutionalism to be applied to the institutional design of the competition agency.[443]

This cooperative institutional dialogue is what we included in Decree 89/2001, which regulates Law 25.156, to enforce the operation of the Secretariat for the Defense of Competition, Fair Trade, and Consumer Protection within the proceedings before the National Tribunal for the Defense of Competition.[444]

Clearly, we were not able to imagine that the tension regarding the agency's independence and its constitution would continue uninterrupted for another two decades. However, experience indicates that this has been an insurmountable obstacle in the institutional practice of competition in Argentina. Moreover, any observer who steps back from the immediate discussion about the constitution of the competition agency and the appointment of its members might wonder how it is possible that for several decades, a legal system could coexist in parallel to the real functioning of the agency. That this fact generates a negative net result (in this case for the antitrust practice) but is nevertheless in force *sine die*.

Thus, the issue seems to be even deeper than the policy's distrust about the competition agency's control. Part of its explanation can be found in the endemic Argentinian problem of anomia described by Professor Carlos Santiago Nino in his renowned essay "Un país al margen de la ley" (A country outside the law).[445] Nino exhaustively reviews this problem with examples that evidence the history of Argentina since colonial times and its recurrent disregard for the generalized refusal to comply with the rules.[446] He also argues that the lack of compliance with the legislation in the country has constituted a sort of "dumb anomia" because systemic non-compliance with rules generates an inefficient, low-productivity, and unfair Pareto social outcome.[447] In his essay, Nino allows us to prove how the massive non-

443. *See generally* Roberto Gargarella, *The New Dialogic Constitutionalism* 4 (2022), https://www.derecho.uba.ar/academica/posgrados/2014-roberto-gargarella.pdf.

444. Marval O'Farrell Mairal, *Competition Law in Argentina,* (Oct. 10, 2023), https://www.marval.com/publicacion/defensa-de-la-competencia-en-la-argentina-5229&lang=en.

445. Carlos Santiago Nino, *Un País al Margen de la Ley* [*A Country Outside the Law*] (Buenos Aires: Emecé Editores 1992).

446. *Id.* at 53-54, 58.

447. *See id.* at 31-32.

compliance with legal, moral, social, etc., rules in Argentina have prevented its institutional strengthening and democratic consolidation and is part of the phenomenon of the country's incomplete development.[448] Out of this framework of anomia in Argentina, it seems difficult to explain how the institutional design of a government agency (in this case for the defense of competition) can be sustained without enforcement, without effective implementation, for decades and that huge efforts of argumentation and public discussion about such matter seem to exist in a parallel reality.[449]

Thus, the National Tribunal for the Defense of Competition (or the National Competition Authority, whatever semantic reference we use to name the creation and constitution of an independent competition agency) seems to have been condemned to the myth of Sisyphus, carrying each time the heavy stone of its technical and political discussion in the scope of the National Executive Power.[450] Drafting a bill to be submitted to the National Congress, the subsequent debate and parliamentary approval, the sanction and enactment of the law, the preparation and drafting of the selection process for candidates and the implementation of the agency, to finally fail at the pinnacle of the task of its creation and implementation and start carrying the same stone again *sine die*.[451]

In the last twenty years, I have personally been part of the stone-pushing tasks on several occasions, for example, as head of the legal area in the Secretariat for the Defense of Competition and Consumer Affairs, when I participated in the drafting of the National Executive Decree 89/2001 which regulates Law 25.156 of the National Executive Power. Also, in debates in the House of Representatives Committees as a guest expert to discuss the adoption of Law 26.993.[452] Again, during the discussion of the draft bill of Law 27.442 in the CNDC.[453] At the seminar with the commissioners of the agency appointed by

448. *See id.* at 53-54, 58.

449. *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), *Global Forum on Competition: Contribution from Argentina, DAF/COMP/GF/WD(2016)1*, (Dec. 3, 2024), https://www.argentina.gob.ar/sites/default/files/daf-comp-gf-wd20161en_230623_102951.pdf.

450. *See generally* Mario Zúñiga, *In Reforming Its Antitrust Act, Argentina Should Not Ignore Its Institutional Achilles Heel,* TRUTH ON THE MARKET (Jan. 16, 2024), https://truthonthemarket.com/2024/01/16/in-reforming-its-antitrust-act-argentina-should-not-ignore-its-institutional-achilles-heel/.

451. *See generally id.*

452. *Id.*

453. *Id.*

Milei's Government and experts that we organized at Universidad del Salvador last May 2024 to discuss the new bill. As regards public debate, as reflected in some of the quotes made here, I have participated in presentations at academic or professional conferences or seminars, through papers published in legal journals, and as an opinion columnist in newspapers. Finally, this research is intended to make a new systemic contribution from the academia in the hope of finally getting out of the circular inertia that prevents us from institutionally establishing the antitrust agenda in Argentina.

VII. CONCLUSION

The defense of competition is an institution with its own rules of economics and law. As a public policy tool, it finds its genesis and evolution starting at the end of the 19th century in the USA. During the second half of the 20th century, it takes a key role in Europe, and in the early decades of the 21st century, it reaches a global dimension with presence in the five continents. Sequentially, the growth of market power of certain players since the second industrial revolution, the strengthening of the capitalist economy in the West, the interdependence between nations and globalization, together with the need for States to establish rules to correct the so-called market failures, have been the reasons why the defense of competition around the world become, in turn, an instrument of government, an area of business organization, a field of professional development for economists and lawyers and, finally, a growing object of study in schools of economics and law.

As a result of this work, the basic notions and fundamental provisions of the antitrust institute have been incorporated into Argentine law for more than a century and are part of our current legislation.

Also, as we have pointed out throughout this paper, the institutional design of the competition agency is a central issue for the development of a solid, technically strong, and effective competition practice. By reviewing the menu of options available to competition agencies for the definition of their structural and organizational aspects, we have been able to verify that there is not a unique model followed by the most important competition agencies in the world. Additionally, we know that a model in force in a specific country cannot be eternal, neither do international organizations consider that there is a unique institutional design of competition agency that can work for all jurisdictions and in all circumstances. When we analyzed the different works on institutional design of antitrust agencies, such as those of

Kovacic-Hyman, the GAL project, Jenny's report within the framework of the OECD and the work done by the ICN together with the evaluation of Argentine and comparative regulations we can prove that the agency´s institutional design takes into account certain basic fundamental principles but that the legal solutions vary according to various political, economic, social and legal factors of each jurisdiction and that they must be considered case by case.

In this paper, we have been able to critically review the experience of the competition agency in the period from 1995 to 2019. For this purpose, we have the opinion of international organizations such as the OECD in 2006 and 2012 and UNCTAD in 2017, which promoted the peer reviews, providing perspectives on the functioning of the agency, the evaluation of its performance, and suggestions for its evolution and improvement.[454] In addition, the expert opinions on work and publications, the perceptions of the system's effectors through the survey, and the case studies of the prosecution of anti-competitive conduct and economic concentration operations provided us with substantial information and confirmatory guidelines for our proposed hypothesis.

We have been able to verify that in those instances in which the agency has enjoyed greater operational autonomy and professionalism when resolving cases, it has been able to issue more solid rulings with severe sanctions against practices of abuse of dominant position, as in the liquefied petroleum gas case or the cartelized practices in the liquid oxygen or cement case. This is equally applicable to the economic concentration cases such as the rejection of Oca/Correos, the conditions imposed on Brahma/Quilmes, and, despite greater political influence, the solvency in the market definition in Cablevision/Multicanal or the efficiency of the preliminary investigation in Telefónica/Telecom. The perception and assessment of the agency's independence followed a downward curve during the period analyzed, but it is in the results of the cases evaluated according to the considerations of the peer reviewers and the opinion of the experts where the satisfaction and appreciation regarding the efficiency and effectiveness of the agency is reflected. The results of the perceptions of the system's effectors and the assessments of the peer reviewers and other experts showed a somewhat flatter trend for technical solvency than for effectiveness in solving cases. The agency´s best practice has been seen in cases where decisions could be made based on antitrust reasons, at the expense of the

454. *See generally* Comisión Nacional de Defensa de la Competencia, *supra* note 91; UNCTAD, *supra* note 173.

institutional design that did not contribute to allow an independent practice consolidated over time. When there was interaction with the Secretary of State to which the agency was subordinated, or when the cases did not involve a prevailing political interest, the decisions taken were more suitable. Putting a competition agency into operation within an institutional design that grants it relative autonomy will be a significant step forward in preventing this condition of being tied to the moods of government officials.

Undoubtedly, an important standard for the evaluation of the most important cases mentioned was the judicial review to which they have been subjected. This judicial review is evident when observing that in all the antitrust cases mentioned, the accused parties were able to file the corresponding appeals. The same happened in the cases of claims of the parties involved in economic concentration operations or whenever there was a change in political orientation that attempted to modify the agency´s decisions.

When assessing the judicial review of the agency's solvency in the resolution of such cases, judicial control of due process and the preservation of the guarantee of defense at trial are present.[455] Even more, in all those major cases, the decisions were upheld by the courts of appeal, and, in the case of certain fines, they were in turn confirmed by the Supreme Court.[456]

As we have seen, the design of the competition agency established by Law 27.442 with the creation of the National Competition Authority, as well as the creation of the TNDC through Law 25.156, is a step in the right direction towards creating a collegiate, interdisciplinary, autonomous competition agency. We know that this will contribute to the professionalization of the agency and focus it specifically on market competitiveness and consumer protection issues. The risk that the Argentine experience involves is that this agency (the TNDC for fifteen years or the ANC for seven years so far) might never be consolidated. Either because of the fear of politicians of losing control over an important regulatory instrument in the hands of "technicians" or because of the "pleasure" experienced by the government responsible for the selection process and agency setup, which slows down the process, and, in the end, the agency is never actually set up. The 2025 activation of the National Competition Authority, a major step forward

455. Pedro Aberastury, *Judicial Control of Administrative Competition Law Decisions in Argentina, in* DEFERENCE TO THE ADMINISTRATION IN JUDICIAL REVIEW 23-37 (Guobin Zhu ed., Springer 2020) (ebook).

456. *Id.* at 25.

though still institutionally incomplete, underscores the urgency of the recommendations advanced in this paper, particularly those aimed at strengthening independence, stability, and the full institutional closure of Argentina's competition regime.

In our opinion, we must repel the recurring ghosts that have prevented the formation of an institutionally independent agency. This is the greatest challenge that our legal and political context presents us with. Only once the competition agency is up and running will it be able to acquire internal strength, gain reputation with other government agencies and market agents, and thus enable the promotion and consolidation of a culture of competition in Argentina. So then measures should be taken to correct this defect ever lingering on us. For example, we could strengthen (i) the aspects that make the agency accountable to the public to give "comfort" to the policy regarding the probable technical isolation of the agency (as, for example, with the institutional proposal of periodic reporting to Congress), (ii) interaction with other government agencies in cases involving issues related to regulated sectors of the economy (with non-binding consultations as in the case of economic concentration operations), and/or (iii) "debureaucratize" or facilitate the selection of the agency members (such as a public and transparent procedure for candidates proposed by the Executive Power with the Congress confirmation) to overcome "the difficulties that the policy has had" to complete a public competition such as those established in laws 25.156 and 27.442.[457] These measures could be a kind of sub-optimal scenario to the solution that we consider most appropriate, but which is necessary to overcome the inertia of recent decades. It is our opinion that the intervention of a Secretary of State for competition and consumer protection within the regulated process before the agency, as was the attempt with Decree 89/2001, allowing it to function as a competition prosecutor's office before the TNC, could be a more effective means for us to allow "institutional dialogue" between the competition agency and the government. However, we understand that some of the mechanisms may be plausible proposals without having to perform major surgery on the current design.[458]

We understand that the separation between the TDC and the SICA and SCE secretariats, even within the National Competition Authority, is also a step in the right direction for splitting the investigation

457. Based on personal knowledge.

458. Based on personal knowledge.

function and the resolution of the antitrust cases. However, having unified in the person of the TDC President the institutional and administrative responsibility of the National Competition Authority (including the Secretariats) will demand a cooperative activity between the TDC and the Secretariats that will be a challenge to face. This could generate some mechanism of financial or operational control of the TDC over the Secretariat to the detriment of separating those roles, as we have pointed out. The action dynamics between these agency areas should prove that the fear of such risks will not take place.

Aspects related to due process and the guarantee of defense in court should be considered in the agency´s internal organization and own rules of procedure. This will be one of the first tasks that the National Competition Authority will have to carry out once it is established. The experience of the CNDC itself at times when it had less political interference and its judicial review give us reasons to be optimistic about this.

Law 27.442 is in line with the guidelines and international best practices, so we know that the establishment of the National Competition Authority is the first step. As regards the other aspects, we have pointed out that they have not been resolved in the way we consider most optimal, and they might be susceptible to adjustment, if necessary, once the agency is up and running.

In this regard, the institutional developments that took place in Argentina during 2025—particularly the partial activation of the National Competition Authority—provide a concrete illustration of the dynamics analyzed throughout this paper and further reinforce the relevance and urgency of the recommendations set forth herein.

Setting up and consolidating the National Competition Authority shall be deem as the main factor in promoting a strong culture of competition among market players and government policy makers so that the legal interest protected by antitrust law, which is to promote the competitiveness of markets and consumer welfare, can be effectively pursued.

PROSECUTING CRIMES AGAINST HUMANITY IN IRAN: PATHWAYS FOR JUSTICE AND LEGAL ACCOUNTABILITY

Pegah Banihashemi*

DEDICATION

This article is dedicated to my beloved aunt, Farkhondeh Monemi, whose unjust execution and courageous path of resistance have been a lasting source of inspiration for me. As I hold the small, knitted gift she once sent me from Bandar Abbas prison, I hold close the memory of her vibrant spirit. This article is also dedicated to the Monemi family, who endured immense suffering as a result of this tragedy; to my parents-especially my mother, Noushin Monemi, who mourned the execution of her sister for many years and, decades later, passed away on the same day of that execution; and finally, to all the families of political prisoners who were executed in Iran after the 1979 Islamic revolution and who have borne profound and enduring pain.

Abstract

The 1979 Islamic Revolution in Iran was a significant turning point in the nation's history, as it led to the establishment of the Islamic Republic. However, the consequences of this Revolution have included nearly a half-century of political executions that have provoked international debate and condemnation, most recently observable in the harsh and often arbitrary death penalties meted out to protestors and even passive online supporters of the Women, Life, Freedom Movement. This paper will examine routes to justice for the aggrieved and accountability for the Iranian regime and bad actors within the regime under international law, beginning with an exploration of how the executions qualify as crimes against humanity under the Rome Statute, examining whether the International Criminal Court would have

* Pegah Banihashemi, J.S.D. Candidate, University of Chicago Law School LL.M., M.A., LL.B.

jurisdiction, and finally exploring how universal jurisdiction might be leveraged. The analysis of available remedies illuminates how Iran's longstanding and ongoing practice of political executions does not fit easily into existing legal solutions under international law. In conclusion, this analysis proposes reforms to international humanitarian law to better account for cases in which ongoing crimes against humanity terrorize populations for decades on end. Creating more robust options for prosecuting such crimes could give the international community the ability to disrupt the more severe brutalities of autocratic regimes and provide stronger protections for universal human rights.

I. INTRODUCTION 211
II. THE HISTORICAL CONTEXT OF IRAN'S UNLAWFUL EXECUTIONS 214
A. From Revolution to Repression (1979-1981) 215
B. Escalation of Political Executions (1980s) 215
C. Continued Executions in the 21st Century 216
D. The Systematic Use of Executions as State Policy 217
III. QUALIFYING IRAN'S MASS EXECUTIONS AS CRIMES AGAINST HUMANITY 217
A. Elements of the Crime 219
B. Establishing Intent Through Iranian Penal Law and Practice 220
1. Legal Framework 221
2. Islamic Punishment 221
3. Capital Punishment 222
4. Role of the Judiciary 222
5. Criminalization of "Un-Islamic" Behavior 224
6. Rights of Women and Minorites 224
7. Role of Revolutionary Courts 226
C. The Significance of Moharebeh and Efsad e Fil Arz in Islamic Penal Law 226
1. Islamic Penal Code Chapter Eight, Articles 279-285: Moharebeh (Enmity Against God) 227
2. Islamic Penal Code Chapter Nine, Articles 286-288: Efsad e Fil Arz ("Armed Rebellion and Corruption on Earth") 227
D. The Applicability of the Rome Statute, Article 7 229
IV. PATHWAYS TO ACCOUNTABILITY: JURISDICTION AND LEGAL BARRIERS 232
A. Iran and the Rome Statute 232

B. International Criminal Court Feasibility 234
C. The Utility of Universal Jurisdiction in Pursing Justice for Iran's Executions 235
D. Limitations of Universal Jurisdiction 236
E. Hamid Nouri and Universal Jurisdiction in Sweden 238
V. NEEDED REFORMS TO INTERNATIONAL HUMAN RIGHTS LAW 239
VI. CONCLUSION: TOWARD GREATER ACCOUNTABILITY FOR CRIMES AGAINST HUMANITY 242

I. INTRODUCTION

Farkhondeh Monemi turned twenty-years-old on October 20, 1982, and on that same day, she was executed by hanging in Bandar Abbas prison in Iran.[1] She was a political activist who was abruptly arrested and charged with moharebeh ("enmity against God") and efsad-e fel-arz ("corruption on earth").[2] Following her arrest, she was held for months under harsh and inhumane conditions, without access to a fair or transparent judicial process.[3] After a summary and expedited proceeding lacking basic procedural safeguards, she was sentenced to death and executed within hours, without access to legal counsel or any meaningful opportunity to mount a defense.[4] Her family was denied the right to a final visit. On the evening before her execution, she contacted them by telephone and stated that she was being taken to the gallows. By the time her family arrived at the prison, the execution had already been carried out, and they were not permitted a final meeting.[5] Like many other families of political prisoners at the

1. *Omid, A Memorial in Defense of Human Rights in Iran: Farkhondeh Momeni,* ABDORRAHMAN BOROUMAND CTR. FOR HUMAN RIGHTS IN IRAN, https://www.iranrights.org/memorial/story/-4375/farkhondeh-momeni (last visited Dec. 8, 2024).

2. Islamic Penal Code: The Islamic Republic of Iran, translated by Mohsen Mir Mohammad Sadeghi, (Nov. 20, 1991, translated Aug. 29, 1995).

3. HUMAN RIGHTS CTR. FOR THE VICTIMS OF FUNDAMENTALISM, *The Condition of Political Prisoners and Environmentalist Activists in Iran: A Report to the United Nations Universal Periodic Review* (Oct.–Nov. 2019).

4. Farkhondeh Monemi was my mother's sister, and as such I have been able to gather more details of her arrest, detention, and execution than would be otherwise available, hence the choice to use her experience as a case study to show a representative experience of political executions in Iran post-revolution. Sources used include interviews with family members, and review of letters written by F. M. while in prison, preserved by my family. Conducted and reviewed by the author (Jan. 15, 2024).

5. *Id.*

time, her family was denied the ability to hold customary mourning ceremonies or to conduct a proper burial.[6] Many individuals executed on political grounds were interred in undisclosed or remote locations.[7] In addition, security forces, including the Islamic Revolutionary Guard Corps (IRGC), were reported to have desecrated the graves of executed dissidents, reinforcing a broader pattern of intimidation that extended beyond the individual to their families and communities and left relatives and associates in fear of further persecution.[8]

Monemi's execution is emblematic of the thousands of extrajudicial killings carried out by the Iranian regime since the 1979 Revolution as a means of political repression.[9] Because of the lack of transparency, the true scale of these killings is effectively unknowable, with many victims buried in undisclosed locations or anonymous mass graves, but estimates of the post-Revolution death toll range from 11,000 to well over 20,000.[10] Monemi's fate was not an anomaly but part of a larger state policy that has persisted for decades, targeting political activists, ethnic and religious minorities, and dissidents under vaguely defined criminal charges.

Iran's execution policies, both historically and in their ongoing application, raise profound legal and moral questions. This article argues that the regime's systematic use of capital punishment constitutes a crime against humanity under international law. The legal framework governing crimes against humanity—most notably articulated in

---

6. MEHDI ASLANI, KALAGH VA GOL-E SORKH [THE CROW & THE RED ROSE: MEMORY OF PRISON] 308-309 (2009).

7. "Few, if any, Iranians have not heard of Khavaran Cemetery, which for a long time was used as a burial ground for Tehran's Christian Armenians and Baha'is. The cemetery is now surrounded by high concrete walls to conceal the crimes committed by the Islamic Republic. In the early 1980s, it was turned into a graveyard for executed political prisoners because – as Ayatollah Khomeini, the founding father of the Islamic Republic, said – leftist political prisoners were "apostates" who must not be buried with Muslims." *See* Khavaran Cemetery: *A Symbol of Repression against Baha'is, Mass Executions*, IRANWIRE, (May 2, 2023), https://iranwire.com/en/bahais-of-iran/116123-khavaran-cemetery-a-symbol-of-repression-against-bahais-mass-executions/#google_vignette.

8. "When Khomeini issued the following fatwa: 'Burying infidels in Muslim cemeteries is not allowed,' this fatwa became an excuse for a group of Khomeini's disciples to exhume the executed prisoners and remove them from their final resting places." *See* ASLANI, *supra* note 6, at 308-09.

9. Monemi's name, for instance, is listed in a 1985 addendum to the *Mojahed* magazine alongside 12,208 other people who were executed or killed in Iran just between June 1981 and September 1985. *See Omid, A Memorial in Defense of Human Rights in Iran: Farkhondeh Momeni*, *supra* note 1.

10. *History of the Mass Executions in 1980s,* IRAN TRIBUNAL, https://irantribunal.com/mass-executions/history-of-mass-executions-in-1980s/ (last visited Sep. 10, 2025).

Article 7 of the Rome Statute—provides a means of assessing whether Iran's actions meet the threshold for international prosecution. To this end, this article examines the historical, legal, and procedural dimensions of Iran's execution practices, as well as potential avenues for accountability.

The first section provides a historical account of Iran's use of mass executions, beginning with the immediate post-revolutionary purges between 1979 and 1981, the escalation of state-sanctioned killings during the 1980s—including the 1988 prison massacres—and the continuation of these practices into the twenty-first century. While the scale and frequency of executions have fluctuated, the pattern has remained consistent: when the regime perceives a challenge to its authority, executions intensify. This historical backdrop demonstrates how capital punishment has functioned not as an ordinary penal sanction but as an entrenched instrument of state control.

The second section analyzes Iran's execution policies through the lens of international law. Under the Rome Statute, crimes against humanity encompass acts committed as part of a widespread or systematic attack against a civilian population. This section establishes how Iran's conduct satisfies these criteria, focusing on the structural and legal mechanisms that have facilitated decades of unlawful executions. It further explores how the Iranian penal system has codified these abuses, enabling the government to claim a veneer of legality while systematically violating fundamental human rights.

Having established that Iran's executions qualify as crimes against humanity, the third section turns to the question of accountability. The most obvious avenue for prosecution—the International Criminal Court (ICC)—is severely constrained by jurisdictional limitations, as Iran is not a party to the Rome Statute. This section examines whether alternative pathways to ICC jurisdiction exist, such as a Security Council referral or prosecution based on the nationality of perpetrators. Given the practical obstacles to ICC prosecution, the section also considers the potential of universal jurisdiction, which allows national courts to prosecute grave international crimes irrespective of where they were committed. The landmark prosecution of Hamid Nouri in Sweden, for his role in the 1988 prison massacres, serves as a case study in how universal jurisdiction may be leveraged to hold Iranian officials accountable.

Despite these legal mechanisms, significant barriers remain. The fourth section addresses the structural limitations of international law that have allowed Iran's government to act with impunity. Diplomatic

immunity shields high-ranking officials from prosecution, while jurisdictional hurdles prevent many states from exercising extraterritorial authority. Additionally, political considerations frequently obstruct the enforcement of international human rights law. While existing frameworks have produced isolated successes—such as the Nouri case—they have thus far failed to meaningfully deter or punish Iran's systematic human rights abuses.

The final section considers legal reforms necessary to strengthen accountability for crimes against humanity. It argues that international legal institutions must adopt measures to close impunity gaps, including limiting diplomatic immunity for individuals accused of egregious human rights violations, standardizing the application of universal jurisdiction, and enhancing international cooperation in evidence-gathering and prosecution. Without such reforms, authoritarian regimes will continue to exploit weaknesses in the international legal order, ensuring that systematic rights violations persist unchecked.

The Iranian government's long history of political executions, and its continued reliance on the death penalty as a tool of suppression demand urgent international scrutiny. As this article will demonstrate, Iran's execution policies are not simply a matter of domestic criminal law; they are crimes of a magnitude that international law was designed to address. Holding perpetrators accountable is not only a legal necessity but a moral imperative. Until the international community strengthens mechanisms to prosecute state-sponsored atrocities, Iran and regimes like it will continue to wield execution as a weapon against dissent—without consequence, and without justice.

II. THE HISTORICAL CONTEXT OF IRAN'S UNLAWFUL EXECUTIONS

The Islamic Republic of Iran was founded on a revolutionary promise of justice and self-determination, yet its consolidation of power was marked by widespread political violence and systematic executions. From the immediate aftermath of the 1979 Revolution to the present day, the regime has leveraged mass executions as a tool of political repression, targeting perceived opponents, ideological dissenters, and marginalized groups. These executions, carried out under vaguely defined criminal charges such as *Moharebeh* (Enmity Against God) and *Efsad e Fil Arz* (Corruption on Earth), have persisted as a state policy, peaking during moments of political unrest. Understanding the historical trajectory of these unlawful executions is crucial to assessing the Iranian regime's deliberate entrenchment of extrajudicial

killings and its violations of international human rights law. This section examines the evolution of Iran's execution practices from the post-revolution purges of 1979 to the contemporary suppression of opposition movements, illustrating how state-sanctioned violence has remained a defining feature of governance in the Islamic Republic.

A. From Revolution to Repression (1979-1981)

The 1979 Islamic Revolution overthrew the monarchy of Mohammad Reza Pahlavi and established the Islamic Republic under Ayatollah Ruhollah Khomeini.[11] Initially, the revolution was supported by a diverse coalition of leftist, nationalist, and religious factions, all believing they were working toward a more democratic and independent Iran. [12] However, Khomeini rapidly consolidated power, eliminating opposition through mass arrests and executions. [13]

By February 1979, revolutionary courts, led by Sadeq Khalkhali, sentenced dozens to death within days.[14] By April, Iran was declared an Islamic Republic, and a widespread purge ensued. Within two years, an estimated 3,500 people were executed**,** including political activists, intellectuals, and former government officials.[15]

B. Escalation of Political Executions (1980s)

Following the revolution, the regime institutionalized executions as a tool of repression. The 1980s saw dramatic surges in state

---

11. AL-KHOMEYNI, AYATOLLAH. AL-HUKUMA AL-ISLAMIYAH [ISLAMIC GOVERNMENT] (2nd Ed. Beirut: Dar al-Tali'ah lil taba'ah wa-al Nashr, 1979).

12. Sociologist Chahla Chafiq was a 25-year-old Marxist activist during the revolution and describes the mix of groups working against the monarchy, "Right before the revolution, I became part of a circle of Marxist-Leninists and joined a left student organization. There were so many groups underground, and once the revolution started, they all came out. They were all attracting a lot of members from the student movements. There was the Tudeh party, which was the classic pro-Soviet party, and there was Fedayeen, an urban guerilla party more similar to the Cuban leftist movement. . . . My group was close to a third party, Line Three, which was the independent left. We believed that the Soviets were an imperialist force, so that's why we were not pro-Soviet. There were so many different parties. There was also the Mujahedin [People's Mujahedin Organization of Iran], which mixed a Muslim line in with the leftism." *See* Bani Khosnoudi, *How Iran's Theocrats Allied With – and Then Crushed – the Left,* JACOBIN (Oct. 24, 2022), https://jacobin.com/2022/10/chahla-chafiq-iranian-left-khomeini-protests-feminism.

13. G. Bhagat, *Khomeini: Leader of Islamic Revolution in Iran,* 48 INDIAN J. POL. SCI. 31, 31-41 (1987).

14. "Most Iranians were astonished when the ayatollah later announced that he was going to establish a theocratic state," *See* Sadeq Saba, *World: Middle East Analysis: The Forces for Change*, BBC NEWS (Feb. 2, 1999), http://news.bbc.co.uk/2/hi/middle_east/269799.stm.

15. Khosnoudi, *supra* note 12.

violence, particularly after the Mojahedin-e Khalq (MEK) protests of 1981**.** These protests led to a brutal crackdown, with Amnesty International documenting hundreds of political executions annually. [16]

A defining event was the 1988 mass executions, when thousands of political prisoners—primarily MEK members and leftist activists—were executed in 32 cities under a fatwa issued by Khomeini**.**[17] Amnesty International describes this as an "ongoing crime against humanity."[18]

C. Continued Executions in the 21st Century

The regime has maintained its pattern of mass executions, unpunished and unabated, through many uprisings of the Iranian people, such as the Green Movement that challenged the overturning of democratic election results in 2009, with hundreds of individuals killed, disappeared, and arrested.[19]

Most recently, the regime again put these same repressive and authoritarian practices to use to crush the Women, Life, Freedom protest movement following the death of Mahsa Amini at the hands of the Morality Police in 2022, arresting over 20,000 protestors and killing 500, with many put to quick deaths without proper trials.[20]

For years after the widespread protests in 2022**,** executions have again surged. In 2023, 834 known executions took place—the second-highest number in recorded history.[21] A 2024 human rights report

16. *White Revolution*, ENCYCLOPEDIA BRITANNICA (Feb. 14, 2022), https://britannica.com/topic/White-Revolution.

17. *Id.*

18. "Hundreds of modern shopping centers, mostly owned and operated by the Shah's friends, popped up all over Iran, seriously hurting the small shopkeepers or baazaris, the heart of the cities' economic systems. Innumerable Americans and other Westerners were lured to big positions, and this became quite intolerable for the new elite who had aspired to share the new prosperity." *See* Bhagat, *supra* note 13, at 31-41.

19. Ian Black, *Iran Should Face Smarter Sanctions, says Mohsen Makhmalbaf*, THE GUARDIAN (Nov. 25, 2009), https://www.theguardian.com/world/2009/nov/25/iran-mohsen-makhmalbaf-sanctions.

20. Yousra Samir Imran, *Grief to Action: The Woman Life Freedom Movement One Year On*, THE NEW ARAB (Sep. 16, 2023), https://www.newarab.com/features/grief-action-woman-life-freedom-movement-one-year.

21. Robert C. de Camera, *The Shah as Tyrant: A Look at the Record,* WASH. POST, (Mar. 22, 1980), https://www.washingtonpost.com/archive/opinions/1980/03/23/the-shah-as-tyrant-a-look-at-the-record/218c6a8e-dcb7-4168-ac9c-8f23609f888f/.

found that Iran's regime employs executions as a tool of political repression and societal control.[22]

D. The Systematic Use of Executions as State Policy

This history illustrates a clear pattern: when Iran's regime faces significant internal dissent, it leverages mass executions to consolidate power.[23] Despite repeated international condemnations, these executions have continued unchecked for over four decades. The persistence of these practices underscores the failure of international legal frameworks in holding perpetrators accountable.

Existing mechanisms such as the International Criminal Court (ICC) and universal jurisdiction have struggled to address systematic state crimes on this scale. This failure raises urgent questions about the need for legal reform to strengthen international accountability mechanisms and intervene in ongoing atrocities.

Given the Iranian regime's extensive and deliberate use of mass executions to eliminate political opposition, it is essential to examine how these acts align with established definitions of crimes against humanity under international law. The Rome Statute, which governs the International Criminal Court (ICC), provides a legal framework for prosecuting such crimes, defining specific actions that qualify as crimes against humanity. By assessing Iran's execution policies through the lens of the Rome Statute, we can determine whether and how these systematic killings meet the legal threshold for international accountability. The following section will analyze these definitions in detail and evaluate the applicability of international legal mechanisms in holding Iranian officials accountable.

III. QUALIFYING IRAN'S MASS EXECUTIONS AS CRIMES AGAINST HUMANITY

This section will affirmatively prove that the Iranian regime's use of executions, in terms of governing structure and penal law, aligns with the International Criminal Court's definition of crimes against humanity, specifically Article 7 of the Rome Statute, as excerpted from

22. James A. Bill, *Power and Religion in Revolutionary Iran*, 36 MIDDLE E.J. 22, 22-47 (1982).

23. Amnesty International recorded only two political executions in Iran after mid-1977, and the U.S. government found no reports of torture. Further, the number of political prisoners was reduced from an estimated 3,500 in 1977 down to 2,100 in 1978 according to the Red Cross. *See* de Camera, *supra* note 21.

the United Nations Office on Genocide Prevention and the Responsibility to Protect.[24]

Article 7 is excerpted below in its entirety for the purposes of showing that many of the definitional elements of crimes against humanity are met by the Iranian regime's manner of conducting executions, and it is not just the executions themselves but also the surrounding circumstances and means by which the executions were conducted that could be addressed in international courts of law. Further analysis will show how Article 7's broader list of acts qualifying as crimes against humanity are identifiable in the conduct of the Iranian regime in reference to their longstanding practice of mass executions.

Article 7: Crimes Against Humanity

1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

a. Murder;

b. Extermination;

c. Enslavement;

d. Deportation or forcible transfer of population;

e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

f. Torture;

g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

h. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

i. Enforced disappearance of persons;

j. The crime of apartheid;

24. U.N. OFFICE ON GENOCIDE PREVENTION & THE RESPONSIBILITY TO PROTECT, *Definitions: Crimes Against Humanity,* https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml (last visited Nov. 23, 2023).

k. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

a. 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack . . .

A. Elements of the Crime

Crimes against humanity need not take place during war or formal armed conflict and, like genocide, can take place during peacetime.[25] Examining Article 7(1) of the Rome Statute provides a definition of the crime that requires the following main elements:

- A *physical element* - the commission of one or more in a list of ten acts (see above) or "Other inhumane acts"[26]
- A *contextual element* - "when committed as part of a widespread or systematic attack directed against any civilian population";[27] and
- A *mental element* - "with knowledge of the attack"[28]

The United Nations Office on Genocide Prevention and the Responsibility to Protect interprets further the Rome Statute's Article 7 regarding the elements of the crime, defining 'widespread' as relating to a large number of victims or occurrence over a broad geographical area, and defining 'systematic' as 'a methodical type of violence'. [29]

Further, the Office on Genocide Prevention specifies that while Article 7(2)(a) states that crimes against humanity 'must be committed in furtherance of a state or organizational policy,' and that perpetrators must be shown to have acted with knowledge of the attack and that their actions were part of it, there is not a requirement for a policy to be explicitly documented or adopted.[30] Similarly with intent, there is no requirement to prove targeting of a specific group (except in cases of persecution), and no requirement to prove an 'overall specific

25. *Id.*

26. Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90.

27. *Id.*

28. *Id.*

29. UNITED NATIONS OFFICE ON GENOCIDE PREVENTION & THE RESPONSIBILITY TO PROTECT, *supra* note 24.

30. *Id.*

intent'—a simple intent to commit any of the specified acts is sufficient.[31]

Iran's impunity in committing crimes against humanity was recently reinforced in a newly published report from a UN Fact-Finding Mission of the United Nations Human Rights Council. The Mission, appointed under Resolution S35/1 to investigate abuses during the Women, Life, Freedom Movement, reported that "institutional discrimination against women and girls enabled human rights violations and crimes against humanity".[32] The Fact-Finding Mission documented 'at least 551 protestors' killed by security forces including 49 women and 68 children while also finding evidence of extrajudicial killings.[33] The Mission further documented 'at least nine young men' to have been 'arbitrarily executed' with dozens more at risk of the same fate, reporting that 'State authorities at the highest levels encouraged, sanctioned and endorsed human rights violations, while state security forces participated in the commission of crimes under international law.[34]

B. Establishing Intent Through Iranian Penal Law and Practice

The Islamic Revolution in Iran in 1979 brought about significant changes to the country's penal law and legal system, changes which enabled the regime to leverage executions and extrajudicial killings as a tool of oppression and lever of power.[35] Examining the key differences between the penal law before and after the Islamic Revolution is a useful means of demonstrating the explicit intent of the regime to carry out executions in a larger context of human rights abuses in a manner contravening international law, and the knowledge of the actors carrying out the enforcement. The Iranian Penal Code post-revolution shows many formalized violations of international treaties and instruments. This next section examines how the policy and

31. *Id.*

32. U.N. Human Rights Council, Res. adopted by the Human Rights Council on Nov. 24, 2022, *Deteriorating Situation of Human Rights in the Islamic Republic of Iran, Especially with Respect to Women and Children*, U.N. Doc. A/HRC/RES/S-35/1 (Nov. 29, 2022).

33. *Id*.

34. U.N. Human Rights Office of the High Comm'r, *Iran: Institutional Discrimination Against Women and Girls Enabled Human Rights Violations and Crimes Against Humanity in the Context of Recent Protests, UN Fact-Finding Mission Says* (Mar. 8, 2024).

35. Sophie Abdullah, *Iran Executions Rise Sharply to 834 Last Year "To Instill Societal Fear," Report Says*, BBC NEWS, (Mar. 5, 2024), https://www.bbc.com/news/world-middle-east-68480284.

application of it satisfy the mental element of this crime against humanity and show that its commission was part of a larger and well documented state policy.

1. Legal Framework

Before the Revolution: Iran's legal system was based on a mix of civil law, customary law, and elements of Islamic Law. It was heavily influenced by the Western legal tradition and was largely secular in nature, thanks in part to the secularization initiatives of the former Shah's monarchy.[36]

After the Revolution: Legal reforms were aimed at creating a system thoroughly steeped in Islamic Law, specifically the Shi'a interpretation of Islamic jurisprudence, known as "Shari'a Law." The Islamic Republic of Iran's constitution explicitly mandated that all laws and regulations must be consistent with Islamic principles,[37] but in August 1982, Khomeini went further, declaring that "the old judicial apparatus must be transformed into an Islamic justice. Any law which is incompatible with shari'a is not a law . . . The Guardian Council and the Higher Judiciary Council must . . . annul old laws which are contrary to shari'a law. Anyone who applies them is guilty and must be put on trial and receive the punishment he deserves."[38]

2. Islamic Punishment

Before the Revolution: The penal code was more secular, and punishments were generally in line with international legal norms. Capital punishment was used but not as extensively as after the Revolution.[39]

After the Revolution: The post-revolutionary legal system incorporated Islamic punishments, including flogging, amputation, and stoning for certain crimes, in addition to the death penalty.[40] Islamic principles of retribution (Qisas) and Diya (blood money) were also applied in cases of murder or bodily harm.[41]

36. Bhagat, *supra* note 13.

37. ASGHAR SCHIRAZI, THE CONSTITUTION OF IRAN: POLITICS AND THE STATE IN THE ISLAMIC REPUBLIC 293-94 (John O'Kane trans., 1997).

38. 3 Hossein Mehrpur, MAJMU'EH-YE NAZARIYAT-E SHORA-YE NEGAHBAN [COMPILATION OF THE OPINIONS OF THE GUARDIAN COUNCIL] 184 (1992).

39. de Camera, *supra* note 21.

40. Islamic Penal Code, *supra* note 2.

41. *Id.*

3. Capital Punishment

Before the Revolution: Capital punishment existed in the legal system but was not as frequently applied. Executions were typically carried out by hanging.[42]

After the Revolution: Ayatollah Ruhollah Musavi Khomeini, as the leader of the Iranian government, advised officials in both his criminal and judicial systems 'not to hesitate to kill the opposition'.[43] He employed typical dehumanizing techniques of an autocrat[44], declaring anyone who opposed him politically as an infidel and irreligious, while many of those executed were in fact deeply religious people who were only opposed to the Khomeini government's practice of excluding other beliefs.[45] As such, the use of the death penalty significantly increased after the revolution, and Iran hence maintained one of the highest execution rates in the world.[46] Executions may be carried out in numerous ways, including hanging, stoning, and, in some cases, by firing squad.[47]

4. Role of the Judiciary

Before the Revolution: The judiciary was largely independent, and the legal system was based on a mix of civil and customary law. The courts operated with a degree of separation from religious authorities. Judges within the system were traditionally trained lawyers and professionals.[48]

After the Revolution: The judiciary became more closely tied to religious authorities and subjugated to the authority of the Supreme Leader.[49] Religious clerics play a significant role in the legal system, particularly in interpreting and applying Islamic Law.[50] A new Revolutionary Court was introduced wherein judges are either mullahs who are not trained in law and need only to have attended an Islamic school,

42. de Camera, *supra* note 21.

43. Aida Ghajar, *Blood-Soaked Fatwas: How Khomeini Turned Homicide into Policy in Iran*, IRANWIRE (June 9, 2022).

44. RUTH BEN-GHIAT, STRONGMEN: MUSSOLINI TO THE PRESENT (W.W. Norton & Co., 2020).

45. *Decree of Imam Khomeini on Infidel*, Archives of Ba'hai Persecution in Iran.

46. Bijan Baharan, *Iran/Death Penalty: A State Terror Policy* (INT'L FED'N FOR HUM. RTS., Apr. 2009), at 8–9.

47. Islamic Penal Code, *supra* note 2.

48. Azadeh Niknam, *The Islamization of Law in Iran*, 212 MIDDLE E. REP., 17, 20 (Fall 1999).

49. Bill, *supra* note 22, at 30-31.

50. Niknam, *supra* note 48, at 18.

or they are legacy judges from within the system who are heavily under the influence of the mullahs and deferring to Islamic Law.[51] These judges create their decisions based on an extratextual and extremist interpretation of the Quran that aligns with the aims of the autocratic regime in its oppression of free speech, free expression, freedom of religion and many other strictures.[52] This results in criminalization of behaviors and freedoms included in the Universal Declaration of Human Rights.

In the 'Revolutionary Courts' created to expedite executions of regime opponents, criminal procedure was not followed, even though it was technically the 'law of the land' at the time. For example, legal notifications and the right to appeal were blatantly and regularly ignored, along with a host of other protections. In this way, the Revolutionary Courts resembled the field courts, where the death sentence is known before the trial, and meetings are convened only for appearance.[53]

At the time of the Monemi case detailed in this analysis, Ayatollah Mohammad Mohammadi Gilani, who was a member of the Assembly of Experts and was appointed by Khomeini to preside over his newly formed Islamic Revolutionary Court,[54] made a short trip from Tehran to Bandar Abbas and within a few hours announced her death sentence along with the executions of dozens of other political activists and student protestors, then returned to Tehran on the same day.[55]

Gilani was known to supporters of the regime as a hero of the Islamic Revolution and died peacefully in Tehran, aged eighty-six. His obituary noted his involvement in thousands of executions, including rumors of ordering or at least approving of, the execution of his own sons, and a systematic persecution of Baha'i people in Iran.[56]

---

51. *Id.*

52. *Id.*

53. *See supra* note 4, regarding interviews with family members.

54. Golnaz Esfandiari, *Obituary: Iranian Revolution's Willing Executioner,* RADIO FREE EUR./RADIO LIBERTY (July 10, 2014).

55. *Id.*

56. Human rights activists and opponents of the regime call Gilani "a ruthless judge who played a significant role in the executions of a large number of regime opponents – possibly including his own sons – in the 1980s. Rights groups say the executions took place after summary trials that lasted a few minutes." *See* Esfandiari, *supra* note 54.

5. Criminalization of "Un-Islamic" Behavior

Before the Revolution: Iran's criminal justice system was based on the French system. Pre-trial work was written, non-public, and non-defensive; and trials were oral, causal and defensive.[57]

Under the Shah, although the official religion of Iran was Islam, the judicial system in Iran was based on French law and was established based on codified law. In the penal code, the punishments were largely based on Western legal principles, and punishments, such as whipping and stoning, were rarely, if ever, inflicted.[58] In fact, in June of 1965, the Iranian legislature passed a law declaring whipping to be an obsolete sentence in most instances. Although the death penalty was in the criminal law, judges also rarely issued death sentences.[59]

Even though the laws on the principles of criminal trials were not approved by the legislature and were put into effect on a temporary basis, the law was the basis of criminal proceedings in the country. During its 97-year life, this law underwent many changes and reforms.

After the Revolution: The post-revolution legal system introduced laws criminalizing behaviors deemed un-Islamic, such as the consumption of alcohol, extramarital relationships, and homosexuality.[60] These laws were not as prominent in the legal system before the revolution and went a long way to encoding 'persecution against identifiable groups' in contravention of Article 7, Section h.[61]

6. Rights of Women and Minorities

Before the Revolution: Several decades before the Islamic Revolution, Iranian society was a traditional and religious society. But under the former Shah's rule, reforms equalized the rights of men and women, perhaps to help the Shah win the support of his Western allies while still allowing him to retain a chokehold on the power and wealth of Iran. For example, the Shah gave Iranian women the right to vote and participate in elections while maintaining a monarchy wherein elected leadership was relatively powerless.[62] Several years before the

57. Mahmoud Akhondi, Criminal Procedure Code, 1368 [1989/90].

58. de Camera, *supra* note 21.

59. *Id.*

60. Niknam, *supra* note 48.

61. Rome Statute, *supra* note 26, art. 7.

62. "In the 1960s, during what we call the White Revolution, the Shah's regime was doing show reforms, like giving women the right to vote. (It was absurd because the right to vote in a

revolution, the family protection law was approved.[63] This law, for example, set the minimum marriage age for girls at 18 and changed many women's rights in family law in favor of women.[64]

Regarding the rights of minorities, such as the rights of LGBT+ people, it should be noted that special protections were not explicit in most countries' legal systems at the time. Therefore, even though there were no special protective laws in this regard in Iran, people in these classes were not specifically tried or tortured either.[65] Even in the 70s, some political and cultural figures were implicitly homosexual, but they were not prosecuted or fired. In fact, historian Afsaneh Najmabadi claims that pre-Revolutionary Tehran "had a reputation in the West as being a gay paradise."[66] The Shah's moves towards secularization also meant that as part of the so-called White Revolution, non-Muslims were also allowed to run for and hold office.[67]

After the Revolution: The legal status of women and religious minorities underwent drastic changes. Women's rights have been limited in areas such as family law, inheritance, and dress code. Religious minorities, such as Baha'is, have faced deep discrimination and persecution including forced disappearances, confiscation of property, imprisonment and executions which Human Rights Watch and the UN argue amounts to crimes against humanity.[68] Baha'is and other ethnic and religious minorities are routinely deprived of rights to education, employment, property, religious practice, expression. Morality Police and judicial authorities cooperate in arresting, detaining and convicting these minorities of offenses against national security, and other 'offenses' that have been enshrined in the Iranian Penal Code.[69]

---

monarchy, where you can't really pick your leader, makes no sense.)" *See* Khosnoudi, *supra* note 12.

63. *White Revolution*, *supra* note 16.

64. *Id.*

65. de Camera, *supra* note 21.

66. Afsaneh Najmabadi, *Reading Transsexuality in "Gay" Tehran (around 1979)*, *in* THE TRANSGENDER STUDIED READER: Volume 2 379 (Susan Stryker & Aren Aizura eds., 2013).

67. *The Evil Precedents of Iran's Khomeini*, IRAN NEWS WIRE (Feb. 4, 2019), https://iran-newswire.org/khomeinis-evil-precedents-in-iran/.

68. *U.N. Report on Discrimination Against Baha'is,* THE IRAN PRIMER (U.S. INTS. OF PEACE) (Mar. 17, 2022), usip.org.

69. Baha'is are commonly convicted under Article 620 of the Islamic Penal Code which involves assembly and collusion to act against national security, or Articles 498 and 499 (belonging to a group against the state), in addition to Articles 500 and 698 which relate to spreading falsehoods. *See U.N. Report on Discrimination Against Baha'is, supra* note 68.

7. Role of Revolutionary Courts

Before the revolution, there was no court that wanted to issue a verdict based on absolute Shari'a law. Criminal courts were the courts where all criminal offenses were dealt with; no special or separate 'Islamic' courts existed.[70] After the Revolution, Revolutionary Courts were established to deal with political and security-related offenses. These courts have been criticized for their lack of transparency and due process and have been associated with human rights abuses.[71]

It's important to note that the impact of these changes has been a subject of ongoing debate, both within Iran and internationally. While the Islamic legal framework has become a defining feature of Iran's legal system, there are also diverse interpretations and practices within the country, and reform efforts continue to be a topic of discussion and contention. Still further elements of Islamic Penal Law can also be found to be in contravention of the Rome Statute and other instruments, specifically the elements of *Efsad e Fil Arz* and *Moharebeh*, as they are capital offenses that allow for execution.

C. The Significance of Moharebeh and Efsad e Fil Arz in Islamic Penal Law

Islamic Penal Law in Iran addresses the issues of "Moharebeh" (Enmity Against God) and "Efsad e Fil Arz" (Corruption on Earth).[72] Both the construction of these code sections and the methods and means of their application in context lead to frequent and consistent contraventions of the Rome Statute and other international law. These are two separate, serious, yet vaguely delineated charges with roots in the Qur'an which have been frequently used to convict and condemn Iranian political opposition, marginalized populations, and activists since the early days of the current regime through to the latest rounds of retaliation and oppression following the widespread Mahsa Amini protests.[73] Moharebeh and Efsad e Fil Arz are capital offenses under Iranian law, and the regulations for these crimes are defined separately in the Islamic Penal Code of Iran.

---

70. Niknam, *supra* note 48, at 212.

71. Bill, *supra* note 22, at 22–47.

72. Islamic Penal Code, *supra* note 2.

73. Connor Bradbury, *The Iran Primer: Harsh Sentences for Iranian Protestors,* U.S. INST. OF PEACE (July 26, 2023).

1. Islamic Penal Code Chapter Eight, Articles 279 – 285: Moharebeh (Enmity Against God)

"Moharebeh" is understood to mean "enmity against God," although the Iranian Penal Code Article's title is sometimes translated into English as "Armed Violation of the Public Security," and the offense is described as "drawing weapons with the intent of taking life, property or a female member of the people, or threatening them, in such manner that results in insecurity in the environment."[74] Several inferences are necessary to understand Moharebeh as a crime against God. First, we must understand that the term 'public security' here is not primarily referring to the welfare of the people, but more so to the secure operations of the political state or regime. Second, since the Iranian theocratic regime conflates their rule with the divine rule, criminal acts against the Islamic Republic or compromising national security are looked upon as being directly against God, or "Moharebeh". This crime includes activities aimed at altering or undermining the Islamic system of governance, as well as aiding those involved in such acts.[75] Moharebeh crimes are strictly punished, with Chapter Eight, Article 282 calling for death, crucifixion, amputation or banishment, at the sole discretion of the judiciary and with no further guidance as to which option should be applied to what circumstances.[76] In practice, despite there being four possible punishments including banishment for Moharebeh, judges almost unanimously apply the death penalty to persons found guilty of this crime, though this practice has been criticized and called into question by human rights organizations and Iranian legal experts alike.[77]

2. Islamic Penal Code Chapter Nine, Articles 286-288: Efsad e Fil Arz ("Armed Rebellion and Corruption on Earth")

Efsad e Fil Arz is the second capital offence of Qur'anic origins frequently used--in conjunction with Moharebeh- to quell and cull Iran's political opposition and marginalized populations. Article 286 defines the charge as applying to any person who "widely" commits crimes against the physical integrity of persons, the security of the

74. Islamic Penal Code, *supra* note 2, ch. 8, arts. 279-85.

75. *Id.*

76. Islamic Penal Code, *supra* note 2, ch. 8, art. 282.

77. *Islamic Law Experts Question Basis of Iran's Death Sentences,* IRAN INT'L (Dec. 11, 2022).

country, criminal libel, or disorder in the State economic system."[78] The Article notes that this charge should apply in cases of severe disruption to the public order of the state, or damage on a widespread scale, but at the same time, it can be used to criminalize activities as vague as spreading lies and 'corruption' or distributing 'dangerous' materials.[79] Further, the language of this Article broadens criminal actions to include damage to public or private property and criminalizes anyone "who becomes an accessory to" any of the named actions.[80] In this way, we can imagine, for instance, that a contributor to a 'dangerous' student newspaper, someone who carries that newspaper across campus, the professor who taught the student journalists, and the company that sold them the ink are all potentially guilty of Corruption on Earth.

Chapter Nine, Article 287 specifies that "Any group that makes armed rebellion against the foundation of the system of the Islamic Republic of Iran shall be deemed to be a rebel. And should [the group] use arms, its members will be sentenced to the death penalty."[81] In practice, many people charged with *Efsad e Fil Arz* are errantly accused of "using arms" at peaceful protests. The definition of 'armed rebellion' is conspicuously absent from the Penal Code, and in the additional absence of a fair trial or presumption of innocence, the accused have little to no recourse. Additionally, the group nature of this Article's language can be used to extend death sentences to those with little to no affiliation or personal connection to a given incident. For instance, all those attending a vigil or peaceful protest where one individual chalks a pavement or sets something on fire could then be accused of being part of that group and therefore eligible for execution. For that matter, a complete bystander or taxi driver could be accused by association of place and time, or for appearing to become an accessory to such actions. The language of this Article, which seems to be merely vague, thus turns its enforcement into an instrument of terror and oppression. For instance, a child walking down the street during the Mahsa Amini protests, on her way to the shop for eggs or bread, could wind up arrested en masse and accused of Corruption on Earth.

There are only two exceptions noted in Chapter Nine to the provision of the death penalty for *Efsad e Fil Arz*. The first is if the court

78. Islamic Penal Code, *supra* note 2, ch. 9, art. 286.

79. *Id.*

80. *Id.*

81. Islamic Penal Code, *supra* note 2, ch. 9, art. 287.

fails to establish an intent to cause extensive disruption or damage on a large scale.[82] The second exception to the death penalty is "when members of the rebel group are arrested before any conflict occurs or a weapon is used". For such occasions, imprisonment is prescribed.[83]

Efsad e Fil Arz was applied to many officials of the deposed Pahlavi dynasty after the Revolution, including Mohammad Reza Shah and most of his family members. In this way, Sadegh Khalkhali, the Sharia Ruler of the first Revolutionary Court, was able to issue a death sentence in absentia or execute anyone arrested without further process. Other people executed under this charge included Nader Jahanbani, Farrokhro Parsa, Nematullah Nasiri and Shahriar Shafiq. Moharebeh and *Efsad e Fil Arz* entered the Iranian legal system in the Hudud and Punishment Law (1361) and is reiterated in the Islamic Penal Code (1370), which replaced it.[84]

It is essential to note that these regulations are interpreted and enforced based on Islamic principles and religious morality. The application and interpretation of these concepts and penalties can vary depending on the political and judicial context. Additionally, the legal and judicial system in Iran is subject to ongoing changes and debates, and interpretations may evolve over time—with the result being that political opponents can be newly defined and discriminated against based on the need of the autocratic government to quash dissent and maintain absolute power.

D. The Applicability of the Rome Statute, Article 7

The first condition of meeting the definition of crimes against humanity set out in the Rome Statute is that the acts must be committed 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.[85]

The political executions carried out on an ongoing basis, and further oppression and deprivation of human rights of whole segments of the Iranian civilian population meet this condition. [86] The systematic changes apparent after the revolution served to support the extermination of political opponents as incidental as young students attending

82. *Id.*

83. *Id.*

84. Mohammad Ja'far Habibzadeh & Seyed Doraid Mousavi Mojab, *Legality Principle of Crimes and Punishments in Iranian Legal System*, 1 J. OF EDUC. RSCH. AND REV., 108-14 (2006).

85. Rome Statute, *supra* note 26, art. 7.

86. *Id.*

peaceful protests, and the practice has persisted systematically, with knowledge, for 43 years and counting.

Even pre-execution, the subject of our case study, Farkhondeh Monemi, (likely along with thousands of others) suffered several conditions qualifying as crimes against humanity, including 7(d) *forcible transfer of population*, 7(e) *Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law,* 7(h) *Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law and* 7(i) *Enforced disappearance of persons*.[87]

Of the specific list of acts listed under the first condition in Article 7, Iran's ongoing practice of political executions easily includes seven out of the eleven enumerated circumstances, and possibly more. Just in the accounts examined in this paper, we can see a case for establishing murder, extermination, imprisonment or other severe deprivation of physical liberty, torture, persecution against an identifiable group on political, cultural, religious, gender or other grounds, enforced disappearance, and "other inhumane acts intentionally causing great suffering or serious injury to mental or physical health."[88]

Therefore, a cursory read of Article 7(1) gives an assurance that the Iranian regime leaders' conduct in the Monemi case and throughout the regime's history evinces a pattern including a majority of the specific acts referenced as crimes against humanity. Indeed, the latest UN OHCHR Fact-Finding Mission documented many of these acts, and in addition to murders and extermination, documented cases of imprisonment, torture, rape and enforced disappearance.[89]

Further, Article 7(2)(a) specifies that "an attack directed against any civilian population" is defined as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".[90]

Iran's attacks on its civilians have been in the thousands (if not hundreds of thousands), and clearly in accordance with the post-Revolutionary changes to penal law and the judiciary, such attacks were

87. *Id*.

88. *Id.*

89. U.N. Human Rights Office of the High Comm'r, *supra* note 34.

90. Rome Statute, *supra* note 26, art. 7(2)(a).

'pursuant to or in furtherance of a State' policy meant to secure and maintain the inextricable control of the Iranian authoritarian regime. The recent Fact-Finding Mission confirmed this qualifier in reference to the regime's actions in the aftermath of the Women, Life, Freedom Movement as well, noting that 'State authorities at the highest levels encouraged, sanctioned and endorsed human rights violations".[91]

The political executions also seem to clearly meet both the contextual and mental elemental requirements laid out under Article 7(1), which do not need to be carried out in a wartime environment to meet the definition of crimes against humanity, but that they must meet two conditions.[92]

To meet the requirement for contextual element, the acts must be large scale, widespread (over a large geographical area), or systematic.[93] Because the political persecutions of opposition have been carried out by the tens of thousands, over the entire country of Iran, and have shown over a period of 43 years to follow a similar, mechanized pattern involving police actions, deprivation of due process, inhumane imprisonment, brutal execution methods and ensuing continued persecution and psychological torture of victims' families, it would be difficult to argue an International Criminal Court case against an integral regime actor would fail to satisfy this element.

The second element to be satisfied in bringing a case is that it must be proven that the perpetrator acted with knowledge of the attack and that his or her action is part of that attack.[94] Satisfying this element would be more specific to the individual charged and the range of circumstances in scope of the case, but constructing a specific case for a specific actor is outside the scope of this essay, which instead is aimed at establishing the general feasibility of assembling a successful criminal case in the International Criminal Court. Again, with a carefully constructed case, it would seem difficult to imagine an inability to show that individuals participating in mass executions of peaceful protestors and activists including underage minors would not have been acting with an understanding of the widely published policies and dehumanizing rhetoric of the Ayatollah, at the behest of the Ayatollah, and with the intent of crushing any opposition or challenge to his totalitarian leadership, especially since the Ayatollah took actions such

91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*

as issuing written fatwas and ongoing condemnations of many groups.[95]

Considering the alignment between the Article 7 definition and the Iranian Regime's 43-year track record of well-documented aggressions toward its civilian populations, there is potential to hold Iranian regime members accountable for their actions under international criminal law on a definitional basis, should the proper jurisdiction be available. The next section explores potential methods of establishing standing, and the challenges and shortcomings thereof, under current international law.

IV. PATHWAYS TO ACCOUNTABILITY: JURISDICTION AND LEGAL BARRIERS

While Iran's systematic executions meet the legal criteria for crimes against humanity, the next challenge is determining whether international legal mechanisms can be leveraged to hold perpetrators accountable. Jurisdiction is a fundamental barrier to enforcement, as Iran is not a signatory to the Rome Statute, and its leaders have deliberately avoided international scrutiny. However, certain legal pathways—such as prosecution through the International Criminal Court (ICC) or the application of universal jurisdiction—may offer avenues for justice. This section will explore these options, assessing their feasibility, limitations, and potential for reform to close the impunity gaps that have allowed Iran's regime to act without accountability. The first step is examining Iran's relationship with the Rome Statute and whether it provides a viable legal basis for prosecution.

A. Iran and the Rome Statute

According to the United Nations, although crimes against humanity are not codified in a separate and specific treaty of international law, the prohibition of such crimes has been considered "a peremptory norm of international law, from which no derogation is permitted, and which is applicable to all States".[96]

Being a more recent instrument of international law, the first question of jurisdiction is temporal in nature. The Rome Statute was drafted and adopted in 1998 and applies to crimes committed in the 120 states'

95. *Decree of Imam Khomeini on Infidel*s, *supra* note 45.
96. *Id.*

territories or by their nationals after the Rome Statute's entry into force on 1 July 2002.[97]

This timeframe would, unfortunately, disqualify individuals responsible for the 1980 post-Revolution slaughter from being tried and held accountable under the Rome Statute. However, more recent applications of the same machinery, like the regime crackdowns on the Green Movement and Women Life Freedom movement, would fall into the time period, and the patterns, laws, and consistent and ongoing rhetoric established in post-Revolution Iran could serve to buttress the contextual and mental elements of any case brought, to remain relevant in this way.

The second question is whether the Statute applies to the persons in the State of Iran. By becoming a signatory to the Rome Statute, a State agrees to submit itself to the jurisdiction of the International Criminal Court regarding the crimes included in the Statute, which makes for clear-cut jurisdictional authority for a case to be brought.

Iran had joined many human rights conventions before the Islamic Revolution. The monarchy sought to maintain Iran's position as a leading country in the international arena. Mohammad Reza Shah Pahlavi tried to show that the state of democracy in Iran was aligned with his Western allies.

Iran was not among the first signatories of the Rome Statute upon its initial adoption in 1998; however, Iran became a signatory shortly afterwards, on 31 December 2000 (along with the United States, incidentally). The Statute, though, has not been ratified in either the U.S. or Iran, with the U.S. indicating it no longer intends to ratify, and Iran remaining silent on its intentions.[98]

Without ratification in place, it seems doubtful under present political circumstances that an easy path to using the International Criminal Court as an instrument to hold Iranian perpetrators of crimes against humanity to account could exist, and more likely that a criminal case under the Rome Statute might take place only after the current regime would be removed or collapse on its own accord. Although technically, a State which is not a party to the Rome Statute may decide to accept the jurisdiction of the ICC, it is hard to imagine the autocratic, theocratic regime of Iran willing to sign up for accountability in this regard, unless a schism might be found inside the regime where factions are turning on factions.

---

97. *Rome Statute of the International Criminal Court,* UNITED NATIONS TREATY COLLECTION (2019), https://treaties.un.org.

98. *Id.*

There might be a less obvious way of bringing a case. For instance, the ICC may claim jurisdiction if the alleged perpetrator is a national of a State Party. If an egregious actor within the Iranian regime held a nationality of one of the State Parties, that person could be charged even if the crime was committed in a non-State territory.[99] This presents a significant opportunity to hold the worst actors accountable, as some members of the Iranian regime may have held dual nationalities at the time of their offending activities. The last, and most hopeful option available under the Rome Statute is also more complicated and time-consuming, and seems politically infeasible at the present time. The United Nations Security Council (UNSC) can refer alleged atrocity crimes committed in any country to the Office of the International Criminal Court Prosecutor. This process requires the successful passage of a resolution authorized by the United Nations Charter and can be vetoed by any permanent member of the UNSC.[100]

The current permanent member States of the UNSC include Russia, China, the U.S., U.K., and France. Though this route is theoretically viable, and jurisdiction would then apply, considering Russia's current political alignment to Iran and aggressions against NATO member States, it would seem to have an almost zero chance of success at moving forward unless the UNSC permanent member States shifted or a radical change occurred in geopolitical alignments.

B. International Criminal Court Feasibility

So, can Iran's most egregious offenders be held to account in the International Criminal Court to find some mechanism of support for the members of the Iranian public who have long been in search of a more just governing system for themselves?

It would seem many of the conditions for such litigation is unquestioningly met, such as whether the acts being committed meet the ICC definition of crimes against humanity.

Jurisdiction within the ICC is also theoretically achievable via multiple routes, but each route presents steep hurdles or is politically infeasible unless current alignments radically change. With the limited efficacy of the ICC and the Rome Statute, it may be useful to explore alternative options.

---

99. *Id.*

100. ABA-ICC PROJECT, *How the ICC Works,* https://how-the-icc-works.aba-icc.org (last visited Oct. 25, 2023).

C. The Utility of Universal Jurisdiction in Pursuing Justice for Iran's Executions

The Center for Justice and Accountability explains that "International law recognizes that certain crimes are so serious that the duty to prosecute them transcends all borders".[101] This is the underlying principle of universal jurisdiction, which can be applied to certain serious crimes that violate international law—many of the same crimes detailed and defined under the Rome Statute, such as crimes against humanity, war crimes, genocide, and torture.

"Universal Jurisdiction is based on the idea that since perpetrators who commit such heinous crimes are *hostes humani generis*—' enemies of all mankind'—any nation should have the authority to hold them accountable, regardless of where the crime was committed or the nationality of the perpetrator or the victim".[102]

This principle, first codified in the Geneva Conventions in 1949[103], would seem to have been constructed for cases such as the Iranian executions, where some form of international jurisdiction would be necessary to address grave offences.

Universal jurisdiction cases offer recourse where the Rome Statute and the ICC fall short. For instance, whereas the Rome Statute largely applies when offenders are citizens of a State which is signatory and has ratified the treaty, universal jurisdiction creates the capability to seek redress without regard to nationality or geography restrictions, providing that the country in which a case is brought has laws permitting its courts to exercise universal jurisdiction.

Additionally, whereas the Rome Statute only applies to crimes committed after its adoption in 2002, universal jurisdiction has broader temporal jurisdiction as it was introduced post-World War II as part of the Geneva Conventions, and most of the grave crimes it addresses are not subject to statutes of limitations.

Article 29 of the International Criminal Court Convention emphasizes that crimes against humanity and war crimes are not subject to any statute of limitations. Before the adoption of the International

101. CTR. FOR JUSTICE & ACCOUNTABILITY, *Universal Jurisdiction*, https://cja.org/what-we-do/litigation/legal-strategy/universal-jurisdiction/ (last visited Jan. 9, 2024).

102. *Id.*

103. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31.

Criminal Court, the United Nations Convention also specified that the statute of limitations does not apply to such crimes.[104]

If leveraging universal jurisdiction to address Iranian political executions, the formation of a case must be considered. For instance, would a private plaintiff be required? And, if so, does this limit the scope of harms addressed? A cursory examination finds that in most countries with universal jurisdiction incorporated into their criminal laws, private plaintiffs are allowed to bring a complaint, but they are not required to. Therefore, a prosecutor can file a complaint on behalf of the state.[105]

Indeed, the recent report of the UN Fact-Finding Mission concluded that, in the absence of effective remedies and in light of the systemic and historic impunity for violations in Iran, Member States should explore avenues for accountability both domestically and internationally--calling on States to apply the principles of universal jurisdiction without procedural limitations.[106]

D. Limitations of Universal Jurisdiction

Diplomatic immunity presents a hurdle to the application of universal jurisdiction. International customs and laws establish judicial immunity for heads of state and many government officials. Without such immunity, heads of state would be dissuaded from travelling and engaging in diplomacy. If a head of state commits a crime against humanity in their own country and then travels to another country for political purposes, can they be arrested and prosecuted using the principle of universal jurisdiction? In the Case Concerning the Arrest Warrant of 11 April 2000, *Democratic Republic of the Congo v. Belgium*, for instance, the ICJ found that high-ranking government officials such as the president and foreign minister enjoy diplomatic immunity even if they are accused of war crimes or crimes against humanity.[107] [108]

---

104. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73.

105. AMNESTY INT'L, LEGAL MEMORANDUM ON UNIVERSAL JURISDICTION 9 (1999), https://www.amnesty.org/en/wp-content/uploads/2021/06/ior530022001en.pdf (last visited Jan. 7, 2024).

106. U.N. Human Rights Office of the High Comm'r, *supra* note 34.

107. *Case Concerning the Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3 (Feb. 14).

108. *Case Concerning Certain Criminal Proceedings in France* (Congo v. Fr.), Judgment, 2003 I.C.J. (Dec. 9).

In another case, the International Court of Justice stated that the French police investigation of the Congolese President as a witness in the arrest case violated the criminal immunity of the heads of foreign countries.[109]

A 2009 Human Rights Watch analysis of universal jurisdiction cases found few cases being brought to trial (fewer than 20 in a 15-year period). Further, most of the alleged perpetrators brought to trial were low or mid-level officials who were living in the territory of the state exercising jurisdiction.[110]

If high-ranking officials are not subject to universal jurisdiction, brutal regimes will continue to act with impunity, as only mid- or low-ranking members are subject to prosecution and punishment.

Physical presence of the accused and of witnesses can be another limiting factor in universal jurisdiction cases. Article 14(d) of the International Covenant on Civil and Political Rights states that a defendant has the right "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing . . . "[111]

So, the presence of the accused is required by international law, which greatly impedes states' ability to bring suit against the worst perpetrators of human rights violations. Even if an accused is present in a country and is unprotected by diplomatic immunity, a proceeding may be highly challenged if key witnesses are not motivated to travel and testify, and states do not have the authority to compel witnesses from other countries to comply. Trials in absentia might be applicable in a universal jurisdiction case if the criminal laws of the country where the proceedings are held allow for it.

The fact that universal jurisdiction relies on the laws of the country in which the case is brought can also present limitations. For instance, not all countries incorporate universal jurisdiction into their criminal code, and some countries have statutes of limitations that would supersede the traditions and conventions of international law. For example, in *Public Prosecutor v. Karl Hass and Erich Priebke*, the Supreme Court of Argentina agreed to the extradition of Nazi captain Erich

109. *Id*.

110. HUM. RTS. WATCH, BASIC FACTS ON UNIVERSAL JURISDICTION (Oct. 19, 2009), https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction (last visited Jan. 2, 2024).

111. International Covenant on Civil and Political Rights art. 14(3)(d), Dec. 16, 1966, 999 U.N.T.S. 171.

Priebke accused of war crimes, to Italy, but the Italian court initially refused him, citing the passage of time.[112] [113]

E. Hamid Nouri and Universal Jurisdiction in Sweden

Hamid Nouri was arrested in Stockholm in November 2019, after travelling to Sweden on personal business.[114] The Swedish authorities used universal jurisdiction to arrest and charge him for his role in the mass executions of thousands of prisoners who opposed the Iranian Regime in 1988.[115] After 92 hearings, including extensive eyewitness testimony and other direct evidence, Nouri was found guilty of war crimes and mass murder by the Stockholm District Court in July of 2022.[116] Sentenced to life in prison, he appealed the case, and in December of 2023, the Svea Court of Appeal 'upheld in all major regards' his conviction.[117]

Nouri's trial and conviction are a landmark event in the efforts to hold the Iranian Regime accountable for its many crimes against humanity. Over thirty years have passed since the mass executions in which he participated, and no other regime actors have been held accountable. Thousands of Iranians died unjust and unnecessary deaths, and for the first time, one of the agents of those executions was tried in a Western country.

As autocratic regimes routinely seek to suppress freedom of expression,[118] information about these atrocities spread slowly, and international awareness was limited. The reopening of Nouri's case also represents an opportunity for the atrocities of the Iranian Regime to be exposed on the global stage and to raise awareness of the need for change in Iran.

---

112. *Public Prosecutor v. Hass*, Corte Militare di Appello [Military Ct. of Appeal] Mar. 7, 1998, *aff'd*, Corte Suprema di Cassazione [Supreme Ct. of Cassation] Nov. 16, 1998 (It.).

113. J.A. Consigli, *The Priebke Extradition Case Before the Argentine Supreme Court*, 1 Y.B. INT'L HUMAN. L. 496 (1998).

114. Mark Klamburg, *A Swedish Court Just Upheld the Conviction of a Former Iranian Official. It's a Warning to All Perpetrators of Atrocity Crimes*, ATLANTIC COUNCIL (Dec. 20, 2023), https://www.atlanticcouncil.org/blogs/new-atlanticist/a-swedish-court-just-upheld-the-conviction-of-a-former-iranian-official-its-a-warning-to-all-perpetrators-of-atrocity-crimes/.

115. *The Swedish Court of Appeal Confirmed Hamid Nouri's Life Sentence*, EURONEWS (Dec. 19, 2023), https://parsi.euronews.com/2023/12/19/appeal-verdict-due-in-ex-iran-officials-trial-in-sweden.

116. *Id.*

117. Klamburg, *supra* note 114.

118. BEN-GHIAT, *supra* note 44.

As families of the victims experienced a long-sought hope for some sense of justice, the Iranian Courts took a different turn on December 10, 2023, charging a Swedish diplomat they'd been holding in prison with spying for Israel and the most serious crime of 'corruption on earth', which is punishable by the death penalty.[119] This move represents Iran's attempts to put pressure on Sweden to release Nouri and indicates an escalation in the Regime's retaliatory policing and court actions, which also include threatening to impose the death penalty against a previously detained Iranian-Swedish dual national.[120]

As is evident from the Nouri case, while universal jurisdiction has proven to provide some accountability and justice for Iran's mass executions, accountability is effectively limited to lower-level actors and the Regime continues to act with impunity, with the most responsible parties still protected.

V. NEEDED REFORMS TO INTERNATIONAL HUMAN RIGHTS LAW

International law and human rights conventions promise a window of hope to achieve accountability and end impunity. However, in practice, the utility of international law meets many barriers such as jurisdictional limitations, failures of ratification or adoption, and home country laws including statues of limitations. Nevertheless, when millions of people are imprisoned by tyranny and dictatorship, and domestic activism for change becomes impossible, a persistent hope lies in finding and enacting meaningful reforms to strengthen enforcement of international law through the United Nations.

As explained in this article, thousands of people have been sentenced to death in political and unfair trials in Iran and subsequently lost their lives. Many families are experiencing generational trauma and suffering due to the grief of these executions. Thousands of parents grew old and died without witnessing justice.

In this situation, how can international law stop the impunity of dictators and the atrocities they commit? Can we one day expect a global consensus to curb government executions through international law when politics seem to intrude upon such agreement? With the failure of Iran to ratify the Rome Statute, the most feasible route to holding

119. *Swedish EU Diplomat Jailed in Iran Faces Charges of Spying for Israel,* FRANCE24 (Dec. 10, 2023), https://www.france24.com/en/asia-pacific/20231210-swedish-eu-diplomat-jailed-in-iran-faces-charges-of-spying-for-israel.

120. *Rights Group Warns of Iran Executing Swedish Dual National*, IRAN INT'L (Dec. 23, 2023), https://www.iranintl.com/en/202312239993.

their worst perpetrators accountable under the Statute seems impossible to pursue in the current geopolitical moment. Even if the United Nations Security Council (UNSC) referred the alleged atrocity crimes to the Office of the International Criminal Court Prosecutor, a resolution would have to be authorized by the United Nations Charter without a veto from any permanent member of the UNSC.[121] Given the massive tensions between the U.S. and Russia, and Russia's strategic ties to Iran, this could not be viewed as a likely route to prosecution absent a major reshuffle of the world order.

Given the failure of the Rome Statute as an accountability measure in this instance, the concept of Universal Jurisdiction would seem to hold promise, but again a raft of limitations seems to hamper the pursuit of justice through this route. The Center for Justice and Accountability explains that "International law recognizes that certain crimes are so serious that the duty to prosecute them transcends all borders".[122] So why haven't Iran's worst actors been uniformly brought to justice in a way that would curtail the continuation of their ongoing crimes against humanity?

International customs and laws that establish diplomatic immunity for heads of state and government officials seem to nullify the utility of Universal Jurisdiction and thereby erode the efficacy of international human rights law. Human Rights Watch found less than 20 universal jurisdiction cases brought in a 15-year period, where most of the alleged perpetrators were low or mid-level officials.[123] If diplomatic immunity results in heads of state having no accountability for the gravest crimes, this should be a subject for further study and reform. International governing bodies should look for legal jurisdictional means to safeguard against the potential political abuse of universal jurisdiction while not exempting certain persons from accountability for crimes against humanity.

Other reforms that might facilitate enforcement of international human rights law include recognizing exceptions to physical presence rules when alleged crimes reach a certain level of severity, scale, and persistence. Many high-level actors within authoritarian countries rely on international travel and communication with other countries for the survival of their governments. In this situation, if they know that international travel will not be safe for them, and there will be a possibility

121. ABA-ICC PROJECT, *supra* note 100.

122. CTR. FOR JUSTICE & ACCOUNTABILITY, *supra* note 101.

123. HUM. RTS. WATCH, *supra* note 110.

of opening court cases against them, they would be incentivized to stop or minimize the worst atrocities against innocent people.

International governing bodies should also explore the feasibility of an international form of universal jurisdiction, or at the very least, resolutions and recommendations to State Parties to adopt a more uniform practice, since the exercise of this principle currently relies on the laws of states, and many states have varying statutes of limitations, or lack universal jurisdiction procedures entirely. However, the implementation of universal jurisdiction at a truly international level faces significant political resistance. Many states fear that such an expansive mechanism could be weaponized against them, either through politically motivated prosecutions or through cases that infringe on their sovereignty. For instance, powerful nations may be reluctant to support universal jurisdiction reforms due to concerns over how their own officials and military personnel might be targeted. Moreover, smaller states may fear retaliation from dominant geopolitical actors if they exercise universal jurisdiction in cases that challenge global power structures.

Despite these obstacles, international bodies could address such concerns by ensuring that universal jurisdiction mechanisms contain safeguards against politically motivated cases while maintaining their effectiveness in prosecuting the gravest crimes. For example, a centralized oversight committee within the United Nations could be tasked with reviewing universal jurisdiction claims to prevent abuse while still holding perpetrators accountable. Additionally, a consensus-driven treaty mechanism could outline specific, high-threshold criteria for cases that qualify under universal jurisdiction, thereby mitigating fears of overreach while reinforcing accountability for crimes against humanity.

Absent the exploration of reforms to create more truly universal enforcement, the heads of governments will remain free to carry out factional executions and other crimes against humanity without fear of the consequences of their tyranny and what may await them in the International Criminal Court. Reforms and amendments to instruments like the Rome Statute and diplomatic immunity, physical presence laws, and universal jurisdiction could create needed authority in the gravest of cases when the crimes alleged rise to the level of those enumerated in the Geneva Conventions and Rome Statute.

The balance of jurisdiction and sovereignty in international law is a challenge second only to enforcement, but this doesn't mean the status quo should be looked upon as sufficient. Finding effective solutions

that will gain the support of the international community is complex, but the failure to explore avenues of change and reform not only leaves generations of people suffering under authoritarian regimes in Iran and around the world; it also turns international governing bodies more of an advisory versus an enforcement status, which harms their credibility and creates threats to their future support.

VI. Conclusion: Toward Greater Accountability for Crimes Against Humanity

In the case of Iran's long history of executions, there are limited instances where, under current laws, universal jurisdiction can and should be applied with all force, as in the case of Hamid Nouri. However, we can see from recent waves of renewed political executions that current international governing structures are insufficient to curb the impunity of Iran's regime. Millions of Iranians should not have to wait for a catastrophic invasion or a bloody revolution before they can hope for justice. After over 40 years, the international community should step in to consider changes to conventions, statutes, and policies so that the growing number of victims' families can one day witness the trials of the leaders who perpetrated such grave harms to so many.

International law and human rights conventions promise a window of hope to achieve accountability. However, in practice, the utility of international law meets many barriers, such as jurisdictional limitations, failures of ratification or adoption, and home country laws, including statutes of limitations. Nevertheless, there is a self-interest for every citizen in every member state to ensure that when millions of people are imprisoned by tyranny and dictatorship, and domestic activism for change becomes impossible, there is some feasible route for enforcement of international law through the United Nations.

As demonstrated throughout this analysis, thousands of people have been sentenced to death in political and unfair trials in Iran and subsequently lost their lives. Many families are experiencing generational trauma and suffering due to the grief of these executions. Thousands of parents and siblings grew old and died without witnessing justice. The continued impunity of Iranian government officials underscores the urgent need for enhanced legal mechanisms and international coordination to hold perpetrators accountable for crimes against humanity.

In conclusion, this analysis proposes five key recommendations for legal reform: reforming universal jurisdictions; closing loopholes for diplomatic immunity; strengthening the ICC; enhancing international judicial cooperation; and leveraging targeted sanctions. First, it is important to move toward greater uniformity in universal jurisdiction mechanisms. The Hamid Nouri case shows that while universal jurisdiction has proven to be a valuable tool in the fight against impunity, its effectiveness is currently limited by jurisdictional inconsistencies and procedural hurdles. The international community should work toward greater standardization in how states apply universal jurisdiction, ensuring it is not arbitrarily limited by procedural technicalities. International governing bodies, such as the United Nations, should develop a framework that encourages all states to incorporate universal jurisdiction into their domestic legal systems, removing unnecessary barriers to prosecution.

Second, the current application of diplomatic immunity often shields high-ranking officials from prosecution, even in cases of egregious crimes against humanity. International law should seek to create specific exemptions to diplomatic immunity for individuals accused of systematic and widespread human rights abuses. A global convention on limiting immunity for crimes against humanity has been in development, led by Professor Leila Sadat since 2008, drawing from existing principles in the Rome Statute and the Nuremberg precedents. In December of 2024, the U.N. General Assembly approved Resolution 79/122 aimed at closing the 'gap of impunity' currently allowing crimes against humanity to continue undeterred, and at last this treaty will be sent to negotiations for adoption.[124]

Third, the role of the International Criminal Court (ICC) must be improved. While the ICC has played a crucial role in prosecuting war crimes and crimes against humanity, it remains constrained by political considerations and jurisdictional limitations. States should be encouraged to ratify the Rome Statute, particularly those with a history of impunity for human rights violations. Additionally, international advocacy should focus on empowering the ICC with greater authority to initiate investigations into non-signatory states where overwhelming evidence of crimes against humanity exists.

Fourth, the system of international cooperation in evidence gathering can be improved. Many universal jurisdiction cases struggle due

124. *Professor Sadat's Crimes Against Humanity Initiative Reached a Historic Milestone*, WASH. UNIV. SCH. L. (Jan. 8, 2025), https://law.washu.edu/professor-sadats-crimes-against-humanity-initiative-reached-a-historic-milestone/.

to difficulties in obtaining credible evidence and witness testimony. To counteract this, international organizations and human rights advocacy groups should establish more robust mechanisms for documenting atrocities, preserving evidence, and supporting victims in providing testimony safely. A global repository of human rights violations, managed by an independent international body, could facilitate more effective prosecutions across multiple jurisdictions. Finally, even in the absence of direct legal accountability, individually targeted economic and travel sanctions can act as deterrents against human rights violators. Coordinated efforts among democratic nations to impose visa bans, asset freezes, and other personal restrictions on known perpetrators of mass executions and other crimes against humanity could serve as a form of pressure and de facto accountability. The current limitations of international law do not mean that accountability is impossible. Instead, they highlight the need for a multi-pronged approach that includes legal reform, diplomatic pressure, and persistent advocacy. Human rights organizations, scholars, and policymakers must work together to push for these reforms, ensuring that international law evolves to meet the realities of modern-day autocratic repression.

Advocacy groups should continue to document and raise awareness of human rights abuses, particularly through high-profile campaigns that bring global attention to the ongoing executions in Iran. Legal scholars and policymakers must collaborate to draft proposals for closing legal loopholes and expanding mechanisms for prosecution. Governments committed to human rights should increase funding and support for institutions like the ICC and the UN Human Rights Council to strengthen their capacity to hold perpetrators accountable.

Despite the complexities involved, the pursuit of justice must remain relentless. The Iranian regime's continued use of political executions as a means of consolidating power serves as a stark reminder that international law must be both strengthened and enforced. Finding effective solutions that gain the support of the international community is challenging, but the failure to explore avenues of change and reform not only leaves generations of people suffering under authoritarian regimes—it also erodes the credibility of international human rights institutions. Without action, the world risks turning these bodies into advisory institutions rather than enforcement mechanisms.

The legacy of those executed in Iran should serve as a catalyst for international legal reform. If human rights are to have meaning beyond rhetoric, then global legal institutions must rise to the challenge,

ensuring that no regime can act with impunity and that those who commit crimes against humanity will one day face justice.

Author's Note: Hamid Nouri, a former Iranian prison official convicted and sentenced to life imprisonment in Sweden for his role in the 1988 mass executions, was released in June 2024 as part of a prisoner exchange between Iran and Sweden and returned to Tehran.[125]

125. *See* Bijan Bazargan, *The Pardoning and Release of a Convicted Iranian War Criminal Is a Crime in Itself*, ATLANTIC COUNCIL (June 27, 2024), https://www.atlantic-council.org/blogs/iransource/pardoning-hamid-noury-war-criminal-crime-bijan-bazargan/; AMNESTY INT'L, *Iran: Authorities Continue Crimes Against Humanity in Relentless Persecution of Families Seeking Truth and Justice for 1988 Massacre*, MDE 13/8181/2024 (2024), https://www.amnesty.org/en/documents/mde13/8181/2024/en.

MIND OVER MATTER: CONTRACTING AWAY COGNITIVE LIBERTY

*Julianna Montano**

Abstract

In the rapidly evolving field of neurotechnology, both private and government entities have discovered how to take advantage of the information we can track from the brain. Today, brain data is being used for many purposes from tracking worker productivity to helping people with quadriplegia regain the ability to type. However, in that same world, a billion-dollar market thrives on the sale of personal data, a practice most people tacitly or unknowingly accept in exchange for a curated digital experience.

With the rise of consumer EEG sensors, and brain-computer interfaces (BCI) such as Elon Musk's Neuralink, that allow a third party to surveille and engineer your brain, a new type of freedom enters the conversation on human rights—cognitive liberty. Cognitive liberty refers to the right to think independently and autonomously, to use the full power of your own mind, and to engage in multiple modes of thought. As today's neurotechnology continues to blur the lines between man and computer, can we contract away our cognitive liberty the same way we do other forms of personal data? And as the age-old question in philosophy goes—just because we can, should we?

This article argues that cognitive liberty should be recognized as a fundamental human right protected by law. However, allowing individuals to contract away their cognitive liberty poses significant ethical and legal risks, since control over one's own mental processes and consciousness is the essence of what makes us human. International

* Julianna Montano is a SCALE student graduating in December 2025 and a staff editor for the Journal of International Law. She has a bachelor's degree in Philosophy, Politics and Law and a bachelor's degree in Pharmacology and Drug Development from the University of Southern California. The author thanks Professor Jonathan Miller, faculty advisor to the Journal for helping to sharpen this paper topic into a cohesive article. She also thanks her family, whose support and sacrifice make it possible for her to pursue her ideas and passions without limit.

law must protect against the voluntary waiver of cognitive liberty, absent medical justification, because current international frameworks for waiving human rights do not adequately address the unpredictable risk of cognitive manipulation. Furthermore, cognitive liberty anchors other inalienable rights that are simply too valuable to contract away. Finally, while Chile is a pioneer in the protection of neurorights, their framework does not sufficiently protect individuals from the potentially irreversible consequences of cognitive manipulation.

I. INTRODUCTION 247
II. THE CHALLENGE OF ACHIEVING UNEQUIVOCAL WAIVER OF COGNITIVE LIBERTY AND INFORMED CONSENT 250
A. Informed Consent and Medical Waivers 251
B. Informed Consent and Waivers for Non-Medical Purposes 255
III. COGNITIVE LIBERTY ANCHORS OTHER INALIENABLE RIGHTS 259
A. The Right to Personal Integrity 260
B. The Right to Life 262
C. Anchoring All Inalienable Human Rights 263
IV. CHILE'S ASPIRATIONAL EFFORTS TO PROTECT NEURORIGHTS 265
A. Chile's Development of Neurorights Protections 265
B. Chile's Pioneering Step for Neurorights 268
C. Weakness of Chile's Approach 269
D. The Need for Additional Guidance 270
V. CONCLUSION 272

I. INTRODUCTION

Cognitive liberty is defined as the right to think independently and autonomously, to use the full spectrum of your own mind, and to engage in multiple modes of thought.[1] Unlike freedom of thought, which focuses on the freedom of *what* to think, cognitive liberty focuses on *how* to think.[2] For instance, one's hatred of pineapple on pizza is functionally different from one's taste buds rejecting the flavor of warm,

1. *See Frequently Asked Questions,* CTR. FOR COGNITIVE LIBERTY & ETHICS (Sep. 15, 2003), https://www.cognitiveliberty.org/ccle1/faqs/faq_general.htm.

2. *See* Tharin Pillay, *Rethinking the Right to Freedom of Thought: On Drug Policy, Neurotechnology, and the Case for Cognitive Liberty*, 29 INT'L J. HUM. RTS. 213, 226 (2024).

sweet fruit on tangy tomato sauce. Or, on a more serious note, the way someone contemplates death may change depending on whether they have taken an antidepressant in the morning. If we think of the brain as a camera, cognitive liberty aims to protect against others distorting or obstructing its lens. A scratch or warp in the lens's glass affects every image it captures, in a way that cannot be changed by simply adjusting the lighting or angle of a scene. Hence, cognitive liberty is all about perception. Proponents of cognitive liberty believe that our perception should be free of external manipulation, control, and alteration[3] —that we reserve the right to use and maintain our "lens" however we choose.

Historically, the simple right to freedom of thought has been enshrined in legal instruments like Article 18 of the Universal Declaration of Human Rights (UDHR)[4] and the International Covenant on Civil and Political Rights (ICCPR).[5] Both recognize the right as nonderogable, meaning it cannot be suspended even during public emergencies.[6] However, these protections were conceived in a time when direct manipulation of thought was technologically unfeasible, making them largely symbolic. Today, the tangible potential for brain surveillance and manipulation has transformed these once-theoretical rights into urgent imperatives. In recent years, there has been a greater push to recognize cognitive liberty as an international human right due to the increasing prevalence of psychoactive drugs and technologies that directly interact with the brain.[7] "Mind-control" devices are no longer a thing of science fiction novels. In January of 2024, Elon Musk's Neuralink became the first human implantation of a brain-computer interface.[8] The Neuralink device is designed to record neural activity which is then translated into actions through external computer devices.[9] This

3. *See* Marcello Ienca & Roberto Adorno, *Towards New Human Rights in the Age of Neuroscience and Neurotechnology,* 13 LIFE SCI., SOC'Y & POL'Y. 5, 10 (2017).

4. G.A. Res. 217 (III) A, *Universal Declaration of Human Rights*, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) art. 18.

5. International Covenant on Civil and Political Rights art. 18, *opened for signature* Dec. 16, 1966, 999 U.N.T.S 171 (entered into force Mar. 23, 1976).

6. *Absolute Rights,* AUSTL. GOV'T ATT'Y GEN.'S DEP'T., https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/absolute-rights (last visited Mar. 7, 2025).

7. *See generally* Rafael Yuste, Jared Genser & Stephanie Herrmann, *It's Time for Neuro-Rights: New Human Rights for the Age of Neurotechnology*, 18 HORIZONS 154, 154-55 (2021).

8. Isobel Asher Hamilton & Beatrice Nolan, *Neuralink's First Human Patient Has Been Revealed: Here's How We Got Here,* BUS. INSIDER (Mar. 22, 2024), https://www.businessinsider.com/neuralink-elon-musk-microchips-brains-ai-2021-2.

9. *Id.*

has become a ground-breaking evolution in treatments specifically for quadriplegia.[10]

Given the rapidly expanding landscape of neurotechnology, recognition of cognitive liberty as a standalone human right is essential for bridging this gap. Unlike rights that can be exercised externally, such as freedom of speech or assembly, cognitive liberty governs the internal domain of thought—a realm fundamental to individuality and free will.[11] Without robust protections, individuals risk losing control over their most intimate domain, compromising not only autonomy but also the foundation of other freedoms. This notion is well supported by legal scholars globally, with many recognizing it as a natural extension of the freedom of thought that aligns with the trend of neuro-technological advancements.[12] That said, one of the most contentious issues surrounding cognitive liberty is whether such a critical right can—or rather, *should*—be voluntarily waived.

Jan Christoph Bublitz, a German legal scholar and consultant to the United Nations, whose research focuses on the intersection of philosophy, law, and cognitive science,[13] tackled this issue, coining cognitive liberty as a right to "mental self-determination."[14] In other words, cognitive liberty is an individual's right against others interfering with their mind or making any regulations commanding them to do so.[15] Therefore, if an individual is in possession of such a right, they can also relinquish it and allow others to interfere with it. Bublitz further argues that formulating the right as an inalienable right, where the right-holder is not entitled to waive them, is controversial.[16] He notes that courts invoke such rights, not to protect the interest of an individual, but rather to protect against violations of dignity and uphold the integrity of these natural laws.[17] For instance, the inalienable right to life is hotly debated because while there is a right to not have your life

10. *Id.*

11. *See* Liz Mineo, *Fighting for Our Cognitive Liberty*, HARV. GAZETTE (Apr. 26, 2023), https://news.harvard.edu/gazette/story/2023/04/we-should-be-fighting-for-our-cognitive-liberty-says-ethics-expert/.

12. *See* Marcello Ienca, *On Neurorights*, 15 FRONTIERS ON HUM. NEUROSCI. 1, 4 (Sep. 24, 2021).

13. *Homepage of Jan Christop Bublitz*, https://www.chrisbublitz.de/ (last visited Mar. 7, 2025).

14. Jan-Christoph Bublitz, *My Mind is Mine!? Cognitive Liberty as a Legal Concept*, *in* COGNITIVE ENHANCEMENT 233, 252 (Elisabeth Hildt & Andreas G. Franke eds., Springer, 2013).

15. *Id.* at 252.

16. *Id.* at 253.

17. *Id.*

taken away from you, a right to suicide does not immediately follow.[18] Bublitz's main trouble with a paternalistic approach to cognitive liberty is that if the prohibition of unwanted mind-interventions is meant to protect primarily an individual's interests, then restricting individuals' from exercising those interests at-will is needlessly a prohibition against themselves and their self-determination.[19] He then contends that critics will nonetheless have to accept that there are exceptions where waiver should be allowed, such as for therapeutic purposes, and therein lies the added challenge of arguing and applying these exceptions consistently.[20]

While Bublitz's argument raises important considerations about self-determination, it overlooks the profound risks associated with contracting away cognitive liberty, risks that extend beyond the individual to the broader societal fabric.

The thesis of this paper takes a hard stance against such waivers, emphasizing that allowing individuals to contract away their cognitive liberty poses significant ethical and legal risks. Control over one's mental processes and consciousness is the essence of humanity itself, and as such, international law must establish robust safeguards to prevent the voluntary waiver of cognitive liberty, except in cases of compelling medical justification. Current frameworks for waiving human rights fail to address the unpredictable consequences of cognitive manipulation, underscoring the need to redefine the ethical scope of a waiver. Moreover, cognitive liberty underpins other inalienable rights—such as freedom of thought, personal integrity, and the right to life—that are too vital to be compromised. While Chile has pioneered efforts to protect neurorights, its approach lacks the specificity needed to prevent the potentially irreversible harms of cognitive manipulation. As neurotechnology advances, the international community must act decisively to protect this foundational right.

II. THE CHALLENGE OF ACHIEVING UNEQUIVOCAL WAIVER OF COGNITIVE LIBERTY AND INFORMED CONSENT

Cognitive liberty must be recognized as an inalienable right because it is not easily waived under international frameworks that govern the relinquishment of other significant, yet alienable, rights. There is ongoing debate about whether an individual can formally waive their

18. *Id.*
19. *Id.* at 255.
20. *Id.* at 253.

freedoms under conventions such as the European Convention on Human Rights (ECHR).[21] Such discussion primarily centers on whether the person has made a legitimate and voluntary decision to forgo their right in a specific situation like a contractual agreement. That said, the European Court of Human Rights, has progressively recognized that a waiver must be, "made in an unequivocal manner and must not run counter to any important public interest."[22] Various international instruments support the idea that the unequivocally of a waiver hinges upon informed consent.[23] The extent that an individual is informed of the impact of their decisions reinforces the unambiguity and voluntariness of those decisions.[24] But what does informed consent look like in the context of an ever-evolving study such as neuroscience?

A. Informed Consent and Medical Waivers

To better understand the concept of informed consent in this context, we can examine approaches to waivers in medical interventions. The Declaration of Helsinki notes that physicians must inform the patient of the risks involved and potential benefits of the intervention. [25] Needless to say, obtaining informed consent to this extent should be relatively straight-forward, like warning labels on medication bottles or an hours-long consultation with a doctor prior to a major operation. However, the scope of neuroenhancement and cognitive manipulation is still being studied today. So long as there are still many unknowns about the long-term side effects of direct manipulation of the brain, states should be wary of allowing others to contract away their protection with simple medical consent forms.

Accordingly, Bublitz acknowledges that when people harm themselves and there are severe negative consequences, states can intervene for paternalistic reasons. He then states that where neuroenhancers "live up to their promise," or are, in other words, effective, the risk of negative consequences is more tolerable.[26] Yet, as of 2024, the risks of

21. Nelly Arakelyan, *Waiver of Human Rights: A Right or a Challenge?*, 28 ADMIN. L. & PROCESS 5, 8 (2020).

22. *Id.* at 13.

23. *See* Olivier De Schutter, *Waiver of Rights and State Paternalism Under the European Convention on Human Rights*, 51 N. IR. LEGAL Q. 481, 489 (2000).

24. *Id.*

25. *See* World Med. Ass'n, *Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects*, JAMA (Nov. 27, 2013), https://jamanetwork.com/journals/jama/fullarticle/1760318.

26. Bublitz, *supra* note 14, at 256.

neurotechnologies are not as well-documented as perhaps the risks of prolonged pharmaceutical use.[27] Besides the Neuralink, deep brain stimulation (DBS) is another known procedure that directly stimulates brain activity through wire implants and is commonly performed on patients with Parkinson's disease.[28] DBS is known to have temporary side effects such as sensory changes, mood changes, seizures, and general risks associated with invasive surgery such as heart problems, infection, hemorrhaging.[29] These risks are inarguably serious but nonetheless well observed and more importantly, communicable to a patient seeking DBS treatment. A study on Parkinson's disease indicates that 72.5% of patients experience an improvement in motor function after DBS, with a patient satisfaction rate of 92.5%.[30] These statistics exemplify Bublitz's argument: when the benefits of a practice clearly outweigh its risks, there is less need for government regulation or intervention.

However, this argument does not present a definitive case for advocates of cognitive liberty waivers. Proponents of DBS often claim that the technology is "reversible," but this assertion is increasingly being scrutinized for its lack of nuance.[31] While the DBS implants can be turned off or physically removed with minimal immediate damage, new research has introduced the possibility that prolonged stimulation of this sort may produce long-term neural alteration underlying the persisting clinical effect.[32] Additionally, the mere absence of evidence about the long-term effects of DBS should weaken the reliability of its reversibility claims.[33] Furthermore, the FDA initially rejected Neuralink's application for clinical trials in 2022 due to lack of clear evidence that the device could be safely removed without causing

27. *See* Jonathan R. Wolpaw, *Neurotechnologies May Change the Brain in Unpredictable Ways*, *in* RISKS & CHALLENGES OF NEUROTECHNOLOGIES FOR HUMAN RIGHTS 15, 15 (UNESCO, 2023).

28. *See Deep Brain Stimulation,* MAYO CLINIC (Sep. 19, 2023), https://www.mayoclinic.org/tests-procedures/deep-brain-stimulation/about/pac-20384562.

29. *See id.*

30. Frederick L. Hitti et al., *Long-term Outcomes Following Deep Brain Stimulation for Parkinson's Disease*, 132 J. NEUROSURGI. 205, 208-209 (2019).

31. Jonathan Pugh, *No Going Back? Reversibility and Why It Matters for Deep Brain Stimulation*, 45 J. MED. ETHICS 225 (2019).

32. *Id.* at 226 (citing Diane Ruge et al., *Shaping reversibility? Long-term deep brain stimulation in dystonia: the relationship between effects on electrophysiology and clinical symptom,* 134 BRAIN 2106, 2106-15 (2011); Diane Ruge et al., *Long-term deep brain stimulation withdrawal: clinical stability despite electrophysiological instability*, 342 J. NEUROL. SCI. 197-99 (2014)).

33. *Id.* at 227.

permanent brain damage.[34] While Neuralink later on announced that they successfully removed an implant from a pig named Dorothy in a way that left her allegedly, "healthy, happy, and indistinguishable from a normal pig," removal procedures have never been performed on a human.[35] In early 2024, a Neuralink device was slightly retracted from their first human patient's back, and the company opted to tweak the software of the device rather than removing the implant or reattaching or adjusting the wires itself.[36] These uncertainties that are reluctantly highlighted by tech-optimists underscore the inherent risks of neurotechnology and challenge the premise that their benefits justify reduced regulation or unrestricted waivers.

To compare, psychoactive substances such as cannabis are among the clearest examples of brain-altering substances that are criticized for doing more harm than the purported good. Medical cannabis is increasingly used in the treatment of severe and chronic pain, multiple sclerosis, epilepsy, Crohn's disease, and Alzheimer's disease.[37] Despite growing public support for decriminalizing this form of "alternative medicine," supported by prevalent historical use across cultures, and the publication of over 30,000 cannabis-related studies over the past two centuries.[38] Many argue that, overall, the evidence shows the risks of long-term use—such as substance dependence and effects on brain development—outweigh its therapeutic benefits.[39] As a result, cannabis remains an illicit drug in most countries.[40]

In contrast, neurotechnology is a relatively recent innovation and lacks the extensive historical record and research base of cannabis. Yet, it is unlikely to face the same public skepticism and government

34. *See* Rachel Levy & Marisa Taylor, *U.S. regulators rejected Elon Musk's bid to test brain chips in humans*, *citing safety risks,* REUTERS (Mar. 2, 2023), https://www.reuters.com/investigates/special-report/neuralink-musk-fda/.

35. Leah Crane, *Elon Musk demonstrated a Neuralink brain implant in a live pig*, NEW SCIENTIST (Aug. 29, 2020), https://www.newscientist.com/article/2253274-elon-musk-demonstrated-a-neuralink-brain-implant-in-a-live-pig/.

36. *See PRIME Study Progress Update—User Experience,* NEURALINK BLOG (May 8, 2024), https://neuralink.com/blog/prime-study-progress-update-user-experience/.

37. Stephanie Watson & Kim Painter, *Medical Marijuana: Benefits and Side Effects*, WEBMD, https://www.webmd.com/a-to-z-guides/medical-marijuana-faq (last visited Oct. 4, 2025).

38. *See* Jeremy Y. Ng & Nathan Change, *A biometric analysis of cannabis and cannabinoid research literature*, 4 J. CANNABIS RSCH. 25 (2022).

39. *See* Nicola Black et al., *Cannabinoids for the treatment of mental disorders and symptoms of mental disorders: a systematic review and meta-analysis*, 6 LANCET PSYCHIATRY 995, 1004-07 (2019).

40. *See Countries Where Weed Is Illegal 2025*, WORLD POPULATION REV., https://worldpopulationreview.com/country-rankings/countries-where-weed-is-illegal (last visited Aug. 3, 2025).

pushback like cannabis. A key difference is that neurotechnology does not carry the same political ostracism or social stigma that has historically hindered cannabis from entering the mainstream. Therefore, it would be surprising if neurotechnology as a therapy faced similar delays in achieving widespread acceptance. However, the likelihood of sooner and greater public acceptance should not be interpreted as a justification for allowing individuals to waive their right to cognitive liberty to access neurotechnology. Instead, it signals a greater urgency to assess the risks of waiver and to confront the challenges that may accompany therapeutic neurotechnology's probable rapid and widespread use.

Moreover, unlike neurotechnology, cannabis use does not involve a third-party intervention; there is no external entity implanting a device into the brain and thus, no need for consent or waiver. The psychoactive effects of cannabis are entirely internal and self-contained. In contrast, neurotechnology establishes a continuous interface with the brain, producing not only internal therapeutic effects but also monitorable external outputs and data. This ongoing interaction introduces unique privacy and autonomy concerns that cannabis use does not.[41] As a result, the balance of benefits and risks in neurotechnology involves, not only concerns related to health and physiology, but also concerns of personal integrity and individual welfare which are not easily communicated when ensuring informed consent.

Notwithstanding these additional privacy and autonomy concerns, invasive neurosurgical procedures often represent a patient's last resort. At this stage, individuals are more willing to accept significant medical risks, even in the absence of thorough extensive research, for the possibility of relief from debilitating conditions.[42] Informed consent then hinges upon understanding the uncertainty of treatment itself—on being informed about the opacity of the risks. The mere prospect of neurotechnology's life-changing outcomes drives government approval of its continued research and experimentation.[43] Despite Neuralink's notable lack of transparency regarding its U.S. clinical trials,[44] the company announced that it will be expanding its clinical

41. *Id.*

42. *See* L.Y. Cabrera et al., *Authentic Self and Last Resort: International Perceptions of Psychiatric Neurosurgery*, 45 CULT. MED. & PSYCHIATRY 141 (2020).

43. *See* Hermann Garden & David Winickoff, *Issues in Neurotechnology Governance* at 7 (OECD, SCI., TECH. & INDUS. Working Paper No. 11, 2018).

44. *See* Andrew Ko & Nancy S. Jecker, *Elon Musk's Neuralink has Concerning Lack of Transparency and Could be Vulnerable to Hacking, Ethicists Warn*, LIVE SCIENCE (Feb. 19,

research in Great Britain.[45] Additionally, international human rights frameworks, such as Article 7 of the ICCPR, explicitly allow for voluntary participation in experimental medical procedures, even those involving life-threatening risks, provided informed consent is given.[46] This emphasizes the ethical and legal validity of waivers in medical contexts where interventions offer critical therapeutic value. However, when waivers are sought for non-essential purposes, their justification becomes far less clear and demands heightened regulatory oversight.

B. Informed Consent and Waivers for Non-Medical Purposes

Waiving cognitive liberty for non-medical purposes introduces unique ethical and legal challenges, especially when neurotechnology is used primarily for enhancement or convenience rather than medical necessity. Unlike therapeutic interventions, non-medical uses of neurotechnology often lack clear and measurable benefits to offset the potential risks. These risks include not only the possibility of physical harm but also more abstract threats to autonomy, identity, and cognitive integrity—dimensions of human existence that are poorly understood and difficult to quantify. This lack of clarity calls into question the validity of informed consent in non-medical contexts, especially when individuals may not fully comprehend the implications of waiving their cognitive liberty.

Neurotechnologies are increasingly being applied in non-medical contexts, transforming industries such as entertainment, education, and workplace management.[47] These primarily rely on noninvasive brain-computer interfaces and external electroencephalogram (EEG) sensors that record the electrical activity of the brain.[48] Such electrical activity can then be translated into information about brain function from emotional arousal to mental wellbeing.[49] In education, similar wearable devices are used to recognize students' preferred learning styles.[50] Such

2024), https://www.livescience.com/health/neuroscience/elon-musks-neuralink-has-concerning-lack-of-transparency-and-could-be-vulnerable-to-hacking-ethicists-warn.

45. *Musk's Neuralink to Test Brain Chips in Clinical Study in Great Britain*, REUTERS (July 31, 2025), https://www.reuters.com/investigates/special-report/neuralink-musk-fda/.

46. International Covenant on Civil and Political Rights, *supra* note 5, at 175.

47. *See* Marcello Ienca & Effy Vayena, *Direct-to-Consumer Neurotechnology: What Is It and What Is It for?*, 10 AJOB NEUROSCI. 149, 150 (2019).

48. *Id.*

49. *Id.* at 149 (citing Dan Ariely & Gregory S. Berns. *Neuromarketing: The Hope and Hype of Neuroimaging in Business*, 11 NAT. REV. NEUROSCI. 284 (2010)).

50. *See* Bingxue Zhang et al., *Design and Implementation of an EEG-Based Learning-Style Recognition Mechanism*, 11 BRAIN SCI. 613, 613-15 (2021).

neurotechnologies are even marketed as direct-to-consumer devices that can be used for improving meditation, stress management, and mindfulness.[51] Further, military and defense agencies are exploring implantable brain-computer interfaces (BCI) for controlling drones and monitoring soldiers' cognitive states to optimize performance in high-pressure environments.[52] Not to mention neuromarketing tools can be used to analyze brain responses to advertisements to refine marketing strategies.[53]

Furthermore, growing fascination with biohacking and integrating technological enhancements into daily life reflects a global trend towards self-empowered health and democratized science.[54] However, this enthusiasm warrants concern because it blurs the boundaries between voluntary adoption of technology and the involuntary or indirect loss of autonomy. Unlike personal data, which individuals often waive knowingly or willingly, brain activity and its responses to stimuli are not entirely under our conscious control.[55] Lack of agency over our cognitive processes make the potential exploitation of neurotechnologies particularly troubling, raising ethical questions regarding the extent to which individuals can genuinely consent to interventions or manage their implications. As neurotechnologies continue to permeate non-medical industries, it is important to consider the risks they pose to cognitive liberty and autonomy.

Proponents of non-medical neurotechnological waivers often rely on arguments about user control and the reversibility of interventions. For example, devices marketed for cognitive enhancement frequently emphasize that users can "pause" or "disengage" the technology at will. This model treats neurological data as something akin to digital data, where legal frameworks like Europe's General Data Protection Regulation (GDPR) requires that when users use opt-in to share their

51. *See* Andrew Y. Paek et al., *Concerns in the Blurred Divisions Between Medical and Consumer Neurotechnology*, 15 IEEE SYS. J. 3069, 3078 (2020).

52. Anika Binnendijk, Timothy Marler & Elizabeth M. Bartels, BRAIN-COMPUTER INTERFACES: U.S. MILITARY APPLICATIONS AND IMPLICATIONS, AN INITIAL ASSESSMENT (RAND Corporation, 2020) (citing Jack Corrigan, *The Pentagon Wants to Bring Mind-Controlled Tech to Troops*, NEXTGOV, (July 17, 2018), https://www.nextgov.com/emerging-tech/2018/07/pentagon-wants-bring-mind-controlled-tech-troops/149855/).

53. Paek et. al., *supra* note 51, at 3077.

54. *See* Jozef Keulartz & Henk van den Belt, *DIY-Bio-Economic, Epistemological and Ethical Implications and Ambivalences* 12 LIFE SCI., SOC'Y AND POL'Y 7 (2016).

55. *See The Battle for Your Brain: Defending the Right to Think Freely in the Age of Neurotechnology* at 9-10, 21-22 (St. Martin's Press, 2023) (creating a hypothetical scenario where an employee sees a co-worker and subconsciously feels romantic feelings, triggering a change in the brain activity recorded on his company-provided headset).

private data or waive their right to privacy, they retain the right to withdraw their consent and delete their shared data.[56] However, brain activity and its associated responses are intrinsically tied to a person's identity and consciousness. Once manipulated, the effects on an individual's cognitive processes may be irreversible or poorly understood, especially if prolonged use alters neural pathways or induces long-term psychological changes. Thus, it is unclear whether waivers for biotechnological interventions can ever truly meet the criteria for informed consent when the consequences are so deeply enmeshed with an individual's cognitive identity and social relationships.

Furthermore, reversibility fails to address how brain data may be recorded, stored, and used in ways that influence how a third-party monitor treats or responds to an individual. External monitoring and surveillance may produce unequal power dynamics; for instance, employees may feel coerced into using productivity-enhancing devices to remain competitive or meet employer expectations, even if they have reservations about the potential risks.[57]

There is also a broader societal risk in normalizing waivers for non-medical biotechnological applications. As these technologies become more integrated into daily life, they risk creating a culture where cognitive liberty is treated as a commodity, available for trade or sacrifice in exchange for convenience or perceived enhancement.[58] For example, in educational or consumer settings, individuals may feel pressured to adopt neurotechnologies to keep pace with societal demands for efficiency and optimization. This commodification of mental autonomy not only devalues the inherent dignity of cognitive liberty but also sets a dangerous precedent for the erosion of other fundamental rights. The cumulative effect is a slippery slope where the boundaries of acceptable neurotechnological interventions are continually pushed, raising the stakes for individuals and societies alike.

Moreover, the use of neurotechnology to enhance or control mental states complicates how legal liability is assigned. Philosopher Stephen Rainey of Technische Universiteit poses a hypothetical scenario

56. Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, art. 7, 2016 O.J. (L 119) 1 (EU) [hereinafter GDPR].

57. Tara Francis Chan, *China is Monitoring Employees' Brain Waves and Emotions – and the Technology Boosted One Company's Profits by $315 million*, BUS. INSIDER (Apr. 30, 2018), https://www.businessinsider.com/china-emotional-surveillance-technology-2018-4.

58. *See* Bublitz, *supra* note 14, at 259-62.

in which two BCI users, Smith and Jones, get into a car accident.[59] Smith argues that his brain-computer interface, marketed as a tool to maximize concentration, made him a safer driver and that this enhancement should absolve him of liability.[60] Jones, by contrast, contends that his BCI was designed to significantly influence brain activity, and therefore he should not be held responsible for the device's failure to prevent the accident.[61]

Rainey uses this scenario to illustrate the "responsibility gap" created by the hybrid nature of neurotechnology.[62] While the initial decision to use a neural device is a human one, the resulting mental state is technologically influenced—raising questions about whether users can or should be held fully accountable for their actions.[63] These questions stem directly from the waiver of cognitive liberty. By using devices that alter their mental states, both Smith and Jones relinquished some control over their actions.

This raises broader concerns about not only individual autonomy but also the societal consequences of permitting technologies that disconnect people from full agency in the real world. If Smith's argument prevails, regulators may be forced to consider whether individuals are negligent for not waiving their cognitive liberty in order to enhance concentration while driving.[64] If Jones's argument succeeds, regulators must then grapple with whether waiving cognitive liberty can absolve an individual's liability entirely when their behavior is controlled by malfunctioning technology.[65]

Anticipating such legal dilemmas adds yet another layer of complexity to the doctrine of informed consent. When existing legal frameworks have yet to recognize this kind of agentic relationship in which an individual may have little to no control over their actions, it becomes increasingly difficult to fully inform users of the legal risks.

The scope of non-medical neurotechnology is expansive and continues to permeate various aspects of daily life, creating more uncertainty around its impact on both individual wellbeing and broader societal structures. As with many technologies, individuals often

59. *See* Stephen Rainey, *An Anticipatory Approach to Ethico-Legal Implications of Future Neurotechnology*, 30 SCI. AND ENG'G. ETHICS 1, 4-5 (2024).

60. *Id.*

61. *Id.*

62. *Id.* at 5.

63. *See id.* at 4.

64. *See id.* at 6-7.

65. *See id.*

sacrifice elements of personal freedom to access modern conveniences, often without fully understanding or foreseeing the long-term consequences for themselves or for society. To prevent the erosion of cognitive liberty, waiver must account for both personal and legal risks, ensuring that the adoption of non-medical neurotechnologies remains ethical, practical, and grounded in informed choice.

III. COGNITIVE LIBERTY ANCHORS OTHER INALIENABLE RIGHTS

It has been emphasized throughout this paper that the uncertainties of developing neurotechnology warrant making cognitive liberty a non-derogable right. In spite of this, the question remains of whether cognitive liberty should be waivable anyway. At this point, an appeal to futility becomes very attractive. Everything has a catch, everything has its risks, big and small—so who cares about whether the long-term risks of cognitive manipulation are unknown? From a technical standpoint, a right is not truly inalienable if an exception is made for medical justifications. We encounter the same dilemma when it comes to the right to life and related right to suicide. The greatest takeaway from this issue is that humans have trouble governing one another's humanity. While it is easy to regulate actions, it is not as easy to regulate the very essence of what makes us human. If the essence of humanity lies in elements such as consciousness, individuality, and social relationships—as emphasized across numerous philosophical traditions[66] — then the control center behind these very elements must be considered equally fundamental. From this perspective, it becomes evident that cognitive function is as integral to our humanity as the act of breathing or the beating of a heart. If life itself is defined by the presence of our brain, then protecting cognitive liberty is not merely a moral or philosophical obligation but a practical necessity for preserving human dignity. To treat cognitive liberty as waivable or conditional is to risk undermining the very foundation upon which all other rights and freedoms depend.

Cognitive liberty's centrality to our understanding of humanity makes it the cornerstone of all inalienable rights. While rights such as freedom of thought, personal integrity, and the right to life are often considered distinct, cognitive liberty serves as the thread that connects and supports them. It transforms abstract concepts like freedom of

66. *See* John F. Dovidio & Martijn van Zomeren, *Introduction: The Human Essence, in* THE OXFORD HANDBOOK OF THE HUMAN ESSENCE 3-18 (Martijn van Zomeren & John F. Dovidio eds., 2018).

thought into tangible protections against risks of external interference and manipulation. This interconnectedness not only strengthens the case for cognitive liberty as an inalienable right but also highlights its indispensability in safeguarding other fundamental freedoms.

A. The Right to Personal Integrity

Cognitive liberty also reinforces the right to personal integrity, a cornerstone of human dignity. Article 7 of the ICCPR prohibits torture, cruel treatment, and any acts that degrade human autonomy or integrity.[67] While this right has traditionally been applied to protect individuals from physical harm, the advent of neurotechnologies requires additional protections against mental and cognitive interference. Whether through BCIs, psychoactive substances, or EEG monitoring, direct manipulation of cognitive processes can profoundly alter an individual's sense of self, stripping autonomy in ways that physical coercion cannot.[68] The imperative to preserve cognitive liberty becomes even more urgent with the advent of neurotechnologies that aim to reduce the "friction" between thought and action.[69] For example, traditional tools like a mouse or keyboard require intermediary steps: thinking about an action, then physically executing it.[70] Neurotechnologies bypass these steps by enabling direct brain-to-device interactions, creating seamless control over external systems.[71] While these advancements facilitate unprecedented efficiency and integration, they also position neurotechnology as an intermediary for how individuals control their lives, risking potential manipulation.

The military's exploration of BCIs exemplifies these risks, highlighting how waiving cognitive liberty can expose individuals to threats against their personal integrity.[72] BCIs, envisioned for enhancing communication, decision-making, and human-machine collaboration, offer significant operational benefits on the battlefield. However,

67. International Covenant on Civil and Political Rights, *supra* note 5, at 175.

68. *See* Oliva Scott, *Understanding the Debate on Neurorights and Personal Identity in Neurotechnology,* ALL. FOR CIVIC ENGAGEMENT BLOG (Sep. 6, 2024), https://ace-usa.org/blog/research/research-technology/understanding-the-debate-on-neurorights-and-personal-identity-in-neurotechnology/.

69. Luisa Rodriguez & Keiran Harris*, Nita Farahany on the Neurotechnology Already Being Used to Convict Criminals and Manipulate Workers*, 80,000 HOURS (Dec. 7, 2023), https://80000hours.org/podcast/episodes/nita-farahany-neurotechnology/.

70. *Id.*

71. *Id.*

72. *See* Binnendijk, Marler & Bartels, *supra* note 52, at 25 (citing Ienca & Adorno, *supra* note 3).

their use introduces profound ethical and legal concerns.[73] For instance, BCIs in military applications could subject soldiers to external control or monitoring of their cognitive states, thereby enabling unprecedented invasions of mental autonomy.[74] While monitoring stress levels, cognitive workload, or emotional states might optimize performance, these enhancements could increase soldiers' utility in combat, often at the cost of their autonomy.[75]

Consider a scenario in which a soldier equipped with a BCI implant gains complete control over an arsenal of drones. An adversary seeking to hijack or neutralize these drones might target the individual with the implant, shifting the focus from dismantling the weapons to disabling the human operator. This dynamic effectively merges the brain and the weapon, needlessly exposing the individual to risks to their physical and cognitive integrity. Furthermore, the potential for hacking or external manipulation of BCIs raises the alarming possibility of adversaries influencing a soldier's thoughts or actions and compromising their mental autonomy.[76]

The UN has already expressed concern regarding such neurotechnological advancements, stating, "Currently, compliance with fundamental principles on the battlefield, such as human dignity, agency, and humanity, cannot be meaningfully ensured."[77] They have also advised against the use of such neurotechnology for coercive purposes, such as reducing soldiers' need for sleep, while advocating for strict limitations on non-coercive uses.[78] These concerns are compounded by the power asymmetries in military contexts,[79] where soldiers' willingness to tolerate or expose themselves to human rights violations is shaped by a complex bureaucratic system that relies on their sacrifice. Waiving cognitive liberty represents a dangerous proposition in which neurotechnological interventions could grant governments excessive

73. *Id.* at 10.

74. *Id.* at 25.

75. *Id.*

76. *Id.* at 22.

77. HUM. RTS. COUNCIL, Impact, Opportunities and Challenges of Neurotechnology with Regard to the Promotion and Protection of All Human Rights, U.N. Doc. A/HRC/57/61, at 13 (2024) (citing Development, Concepts and Doctrine Centre, Human Augmentation: The Dawn of a New Paradigm (U.K. Ministry of Defence, 2021), at 52; Sebastian Sattler et al., *Neuroenhancements in the Military: A Mixed-Method Pilot Study on Attitudes of Staff Officers to Ethics and Rules,* 15(1) NEUROETHICS (2022)).

78. *See* HUM. RTS. COUNCIL, *supra* note 77, at 8 (citing Michael Tennison & Jonathan Moreno, *Neuroscience, Ethics, and National Security: The State of the Art*, 10 PLOS BIOL. 3 (2012)).

79. *See id.*

discretion to control and manipulate neuro-enhanced soldiers in tenuous circumstances like combat.

Anchoring the right to personal integrity in cognitive liberty allows international law to more effectively address the unprecedented challenges posed by neurotechnology. Unlike physical injuries, disruptions to cognitive integrity leave no visible scars but can deeply affect an individual's identity, autonomy, and sense of self. Third parties such as governments may also take advantage of the technology to augment individuals for their own gain and political purposes. Therefore, it is critical to recognize cognitive liberty as an essential component of personal integrity that protects both the physical and mental autonomy of individuals.

B. The Right to Life

Cognitive liberty is deeply intertwined with the way we live life, not merely as a biological condition but as a state of conscious self-awareness. Philosophical traditions, such as John Locke's theory of personal identity, emphasize that life's essence lies in the continuity of thought and consciousness.[80] Similarly, certain Buddhist principles equate consciousness with the essence of life itself, suggesting that awareness and mental clarity are the foundations of existence and spiritual growth.[81] Both perspectives highlight the brain not just as a biological organ but as the seat of identity, agency, and autonomy. Without cognitive freedom, this essence is compromised. The ability to think freely, reflect, and engage with the world is fundamental to a life of meaning and purpose.

Exploring this relationship further requires new dimensions to what has traditionally been understood as "the right to life." Legally, this right is often interpreted narrowly as protections against being killed or the arbitrary deprivation of life.[82] However, there is a strong argument to expand this understanding to include the right to control one's own life. Cognitive function and perception are inseparable from the human experience. Accordingly, the right to life involves not only protection against the loss of life, but also the ability to shape how we perceive, interpret, and engage with the world around us.

---

80. Jessica Gordon-Roth, *Locke on Personal Identity*, STANFORD ENCYCLOPEDIA OF PHIL. (Feb. 11, 2019), https://plato.stanford.edu/entries/locke-personal-identity/.

81. Christian Coseru, *Mind in Indian Buddhist Philosophy*, STANFORD ENCYCLOPEDIA OF PHIL. (Dec. 3, 2009), https://plato.stanford.edu/entries/mind-indian-buddhism/.

82. *See Article 2: Right to Life*, EQUAL. & HUM. RTS. COMM'N (Jun. 3, 2021), https://www.equalityhumanrights.com/human-rights/human-rights-act/article-2-right-life.

By recognizing cognitive liberty as foundational to the right to life, international law can affirm that mental autonomy is essential to living a meaningful and self-directed existence. Just as protections for physical integrity are designed to prevent bodily harm, safeguards for cognitive liberty are necessary to ensure individuals retain control over their thoughts, emotions, and decisions. This approach reframes the right to life as not only physical survival but also the freedom to think, reflect, and experience life without interference. It ensures that technologies designed to enhance the mind serve to strengthen human agency, rather than erode it, preserving the authenticity of individual thought and action that define the human condition.

Philosophical debates surrounding dualism[83], which questions whether the mind and body are truly separate, may shift as technology increasingly serves as an intermediary between internal thoughts and physical actions, making their connection more apparent. This emerging reality suggests that the mind and body are deeply interconnected and should be treated as a unified whole. Protecting both under the right to life to secure both mental and physical autonomy is vital to preserving the core of what it means to be human in a neurotechnological age.

C. Anchoring All Inalienable Human Rights

With the brain serving as the control center for all human actions and thoughts, there is no inalienable right recognized by international human rights law that is not inherently grounded in cognitive liberty. This connection becomes clearer when considering why humans are deemed deserving of such rights in the first place. The drafters of the Universal Declaration of Human Rights (UDHR) emphasized the intrinsic and inviolable dignity of all humans as the foundation for these rights.[84] Dignity, as articulated in the preamble and reiterated throughout the document, was intentionally left undefined to serve as a universal concept.[85]

The UDHR drafters relied on dignity as a heuristic concept to ground human rights universally while avoiding metaphysical or

83. Justin Skirry, *René Descartes: The Mind-Body Distinction*, INTERNET ENCYC. OF PHIL., https://iep.utm.edu/descartes-mind-body-distinction-dualism/ (last visited Mar. 7, 2025).

84. *See* Glenn Hughes, *The Concept of Dignity in the Universal Declaration of Human Rights*, 39 J. RELIGIOUS ETHICS 1, 3 (2011).

85. *See id.*

religious disputes.[86] This universality reflects the shared recognition that dignity is an essential feature of human existence, one that binds humanity together despite differences. Many traditions interpret dignity as the key ontological difference between humans and other animals, rooted in the uniquely evolved use of our brains.[87] In this sense, our cognitive faculties and consciousness become the very source of our dignity.

By anchoring all inalienable rights in cognitive liberty, we affirm that autonomy over mental processes is the bedrock of human dignity. Cognitive liberty is not simply one right among many but the precursor of all other inalienable rights. Without the freedom to think and process autonomously, other rights lose their meaning. The right to life, for instance, is deprived of its essence, freedom of thought becomes an empty guarantee, and protections against torture or coercion are rendered useless. Such interconnectedness demonstrates why cognitive liberty cannot be conditional or waivable.

The recognition of cognitive liberty as a naturally non-derogable right supports the idea that it should be reconceptualized as part of existing human rights rather than established as a novel one.[88] This approach addresses concerns about "rights inflation," which warns against the proliferation of standalone rights that could dilute the impact of the human rights framework.[89] Treating cognitive liberty as an extension or pillar of existing inalienable rights can ensure it is robustly protected without fragmenting the system or introducing a categorically new right that may require new exceptions or limitations.

Neurorights provide a critical framework for adapting established human rights to the challenges posed by advancing neurotechnologies.[90] Recognizing cognitive liberty as a non-derogable extension of existing rights allows international law to address emerging vulnerabilities, such as malicious brain manipulation or the exploitation of brain data, without losing sight of its foundational principles.[91] This

86. *See id.* at 8.

87. *See* José Justo Megías Quirós, *Ser Humano y Animales: Estatuto Ontológico y Jurídico Diferentes* [Human Beings and Animals: Different Ontological and Legal Status], 31 CUADERNOS DE BIOÉTICA 59, 59 (2020).

88. *See* José M. Muñoz & José Ángel Marinaro, *Neurorights as Reconceptualized Human Rights*, 5 FRONTIERS POL. SCI. 1, 3 (2023).

89. *See* Ienca & Andorno, *supra* note 3, at 9.

90. *See* Christoph Bublitz, *Neurotechnologies and Human Rights: Restating and Reaffirming the Multi-Layered Protection of the Person*, 28 INT'L J. HUM. RTS. 782 (2024).

91. *See id.* at 783.

approach ensures that human rights remain dynamic and responsive to the ethical challenges of the 21st century.[92]

IV. CHILE'S ASPIRATIONAL EFFORTS TO PROTECT NEURORIGHTS

The ongoing advancement of neurotechnologies presents unprecedented challenges to the legal frameworks intended to safeguard human rights. Chile's pioneering effort to recognize neurorights within its Constitution represents a significant step forward in adapting to these challenges, but it also underscores the complexities of implementing such protections in practice.[93] While the amendment signals a proactive approach to addressing the ethical and legal risks posed by neurotechnologies, it simultaneously reveals critical gaps that limit its effectiveness. These gaps are most evident in the lack of specificity regarding how neurotechnological data is regulated, the ambiguity surrounding enforcement mechanisms, and the absence of robust consent frameworks tailored to this rapidly evolving field. Such shortcomings highlight a pressing need for additional regulatory guidance to ensure that the principles enshrined in the neurorights framework translate into tangible protections for individuals. Until such guidance is established, the scope and impact of cognitive liberty waivers are latent.

Chile's approach exemplifies how nations can take a leading role in shaping the discourse around neurotechnologies, but it also serves as a reminder that the regulation of such emerging fields requires continuous adaptation. The need for clarity, enforceability, and international collaboration has never been greater, as neurotechnological applications grow increasingly global in scope. Without these elements, the risks of exploitation, misuse, and uneven enforcement may weaken the very rights Chile seeks to protect.

A. Chile's Development of Neurorights Protections

In October 2021, Chile became the first country in the world to legally recognize neurorights by amending its Constitution.[94] The amendment states that "scientific and technological development shall be at the service of people and shall be carried out with respect for life

92. *See id.*

93. *See* Sergio Ruiz et al., *Neurorights in the Constitution: From Neurotechnology to Ethics and Politics*, 379 PHIL. TRANSACTIONS ROYAL SOC'Y B: BIOLOGICAL SCI. 1, 2 (2024).

94. *Id.* at 1.

and physical and mental integrity."[95] This groundbreaking move aims to protect individuals from potential abuses arising from neurotechnologies, such as brain-computer interfaces, cognitive surveillance, and manipulation of mental processes.[96] The legislation also emphasizes the ethical use of such technologies, requiring them to respect mental integrity and human dignity.[97] Thus, personal brain data receives the same status as an organ such that it cannot be bought or sold, trafficked, or manipulated.[98]

Chile's neurorights framework was shaped by growing awareness of the ethical dilemmas posed by neurotechnology.[99] Influenced by collaboration with neuroscientists and ethicists, such as those associated with Spanish neurobiologist Rafael Yuste's NeuroRights Initiative, the Chilean government recognized the urgency of acting before neurotechnologies became ubiquitous.[100] The legislation reflects an anticipatory approach, aiming to establish guardrails before the risks of cognitive manipulation become widespread and irreversible.[101] This foresight was further informed by increasing public discourse on the potential dangers of unregulated neurotechnologies, including the ability to alter thought patterns, surveil brain activity, and influence decision-making.[102]

Despite its pioneering amendment, Chile's broader efforts to enshrine neurorights into a new constitution faced setbacks. In 2022, a referendum to adopt a new constitution with more robust and explicit neurorights protections failed to pass.[103] This rejection left the original amendment intact but highlighted the challenges of achieving widespread public consensus on such forward-looking policies. The absence of the proposed broader protections has raised questions about the enforceability and specificity of the existing framework. This lack of specificity in Chile's existing framework became particularly

95. *Id*. at 3-4; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] (Aug. 8, 1980), art. 19.

96. *See* Ruiz et al., *supra* note 93, at 3.

97. *See id.* at 3-4.

98. Lorena Guzmán H., *Chile: Pioneering the Protection of Neurorights*, UNESCO COURIER (last updated Oct. 13, 2023), https://courier.unesco.org/en/articles/chile-pioneering-protection-neurorights.

99. *See id*.

100. *See id*.

101. *See id*.

102. *See id*.

103. *See* John Otis, *Chileans Have Rejected a New, Progressive Constitution*, NPR (Sep. 5, 2022), https://www.npr.org/2022/09/04/1121065756/chile-constitution-referendum.

apparent in the case of *Girardi Lavin v. Emotiv*, which tested the practical application of the constitutional amendment.[104] The case illustrated the complexities of enforcing neurorights protections in the face of emerging neurotechnological abuses and the pressing need for more detailed regulatory mechanisms.[105] The plaintiff, former Chilean senator Guido Girardi Lavin, alleged that Emotiv Inc., a company specializing in consumer EEG devices, had violated his neurorights by collecting and processing his brain data without clear consent.[106] The plaintiff argued that the use of his brain activity data for commercial purposes, including targeted advertising and product development, infringed upon his mental privacy and autonomy.[107] Emotiv countered by asserting that Girardi had voluntarily agreed to the data collection through a user agreement, and that the harms claimed were speculative rather than tangible.[108] However, Lavin contends that this was an adhesive contract, where he would be unable to make optimal use of the device without accepting Emotiv's terms of services.[109] The court ultimately grappled with whether the collection of brain data could constitute a violation of cognitive liberty and whether such harms could be deemed sufficiently concrete under existing legal frameworks.[110] In a landmark ruling, Chile's Supreme Court ordered Emotiv to delete all personal brain data collected from Senator Girardi and instructed Chilean authorities to determine what is legally appropriate to ensure the commercialization and use of the Emotiv Insight.[111] This case illuminated the challenges of applying broad constitutional protections, like those in Chile's neurorights amendment, to specific instances of technological abuse. It also highlighted the need for more precise regulatory frameworks to address the evolving risks associated with neurotechnology.

104. *See* Corte Suprema de Justicia [C.S.J.] [Supreme Court], 9 agosoto 2023, *Girardi Lanvin, Guido c. Emotiv Inc.*, Rol de la causa No. 105065-2023, Constitucional (Chile).

105. *See id.*

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.*

110. *See* Hunter T. Carter, Neural Rights: Landmark Ruling, ARENTFOX SCHIFF: NEWS (Oct. 18, 2023), https://www.afslaw.com/perspectives/news/neural-rights-landmark-ruling.

111. *See id*.

B. Chile's Pioneering Step for Neurorights

Chile's amendment is laudable for its proactive stance, positioning the country as a global leader in protecting mental integrity.[112] It serves as a model for other nations by demonstrating that legal systems can adapt to technological challenges before, they fully materialize. Additionally, Chile's recognition of neurorights underscores the necessity of framing cognitive liberty as a matter of public interest, paving the way for international discourse and potential treaty frameworks. Chile's framework reflects not only a bold legal initiative but also a profound respect for the contributions of academics and scientists in shaping its direction. The country's commitment to engaging with experts in neuroscience and law has allowed its legislation to be both scientifically informed and ethically focused.[113] Such academic partnerships exemplify the importance of interdisciplinary dialogue in addressing challenges at the intersection of technology and human rights. Other nations should look to Chile's collaborative strategy as a blueprint for navigating the complexities of regulating neurotechnologies. Each country brings its own academic strengths, resources, and cultural perspectives to the table, creating a rich global tapestry of research and insights into this rapidly expanding field. A collaborative approach that draws on these diverse academic traditions not only enhances the legitimacy, consistency, and effectiveness of regulatory frameworks but also fosters international solidarity in protecting cognitive liberty.

The inherent challenge for neurotechnology is that the private sector often shapes the scope and priority of potential regulation.[114] The rate of technological development, the questions that arise from conflicts between private actors, and the practical realities of what can be regulated direct federal and state action accordingly. This dynamic makes Chile's proactive legislative effort even more remarkable. Despite not being at the forefront of neurotechnology development or facing immediate pressures from commercial trends, Chile has chosen to address these emerging risks head-on. Its leadership shows that the importance of safeguarding cognitive liberty transcends market-driven imperatives, highlighting the universal significance of these rights.

112. *See* Beth Do et al., *Privacy and the Rise of Neurorights in Latin America*, FUTURE PRIV. F. (Mar. 20, 2024), https://fpf.org/blog/privacy-and-the-rise-of-neurorights-in-latin-america/.

113. *See* Ruiz et al., *supra* note 93, at 3.

114. *See* Hermann Garden et al., Responsible Innovation in Neurotechnology Enterprises (OECD SCI. TECH. & INDUS. Working Paper 2019/05, 2019), https://dx.doi.org/10.1787/9685e4fd-en.

This proactive stance serves as a testament to the principle that human rights protections should not wait for the exigencies of technological or commercial forces but must instead reflect society's most fundamental values.

C. Weaknesses of Chile's Approach

While Chile's constitutional amendment to protect neurorights is a groundbreaking step, it is not without significant shortcomings. The amendment was largely declarative, calling specific attention to the need for scientific advancements that also respects the right to physical and mental integrity. It mandates regulation of such advancements but leaves the critical term, "mental integrity,"[115] undefined. This vagueness creates uncertainty about the scope of protection and the standards by which violations will be assessed. It remains unclear what constitutes an infringement on mental integrity: Is it the collection of brain data, direct manipulation of cognitive processes, or even subtle influences on decision-making? Without clear definitions, the enforcement of these protections' risks becoming inconsistent or overly reliant on judicial interpretation, which can lead to uneven application and potential loopholes.

The case of *Girardi v. Emotiv* further illustrates the challenges posed by Chile's undefined framework.[116] While the court ultimately ruled that there was a constitutional violation, it deferred to Chile's designated authorities to determine whether brain data requires its own special category of protections and to define how it might be encompassed within existing regulations for other forms of personal data.[117] This decision underscores the inherent difficulty in regulating neurotechnology as an ever-evolving field. Courts lack the expertise to make these determinations themselves and acknowledge that neurodata has unique characteristics, though they cannot yet predict with certainty what information such data might reveal as technology advances.

Unlike biological materials like DNA, which can be directly linked to an individual, brain data such as electric activity and brain waves collected by devices like Emotiv's Insight cannot (yet) be traced

115. *See* María Isabel Cornejo-Plaza, Roberto Cippitani & Vincenzo Pasquino, *Chilean Supreme Court Ruling on the Protection of Brain Activity: Neurorights, Personal Data Protection, and Neurodata*, 15 FRONT. PSYCHOL. 1, 4 (2024).

116. *See id*. at 1.

117. *See id.* at 6.

back to its source, especially when it has been anonymized.[118] However, the court's decision acknowledged the possibility that anonymized brain data could become identifiable in the future as technology evolves.[119] This acknowledgment reflects the inherent tension in this area of law: while neurotechnology remains underexplored and its potential for misuse is uncertain, the proactive establishment of legal protections seeks to prevent harm before it materializes.

Researcher, Marcello Ienca, anticipated this issue, stating that "sporadic nature" of academic discovery in nanotechnology leads to "semantic-normative ambiguity and conceptual confusion."[120] Meaning, while people have a general understanding of what mental integrity entails and can envision potential abuses, legislators struggle to define these concepts precisely. Consequently, Chile established broad protections to preemptively guard against feared dystopian scenarios like those depicted in science fiction. Here, Chile created a bright line but very broad constitutional right to mental integrity while relying on future technological developments to substantiate the broader implications for misuse and violations that we fear may become possible. Such "hypothetical dangers" were central to Emotiv's defense in this case.[121] However, the fact that the Chilean Supreme Court did not accept the argument that hypothetical danger equates to "no danger" indicates that they, too, wish to be proactive. By ruling against Emotiv, the Court has effectively passed the baton to the original architectures of the law, urging them to provide more detailed guidance and regulations to address these emerging challenges.

D. The Need for Additional Guidance

The hope is that additional guidance will provide accountability mechanisms that clarify what remedies are available to individuals whose mental privacy has been compromised or whether companies can be held liable for unintentional infringements. This gap diminishes the current framework's effectiveness in safeguarding cognitive liberty, as rights without enforceable remedies can become little more than symbolic gestures. Moreover, guidance should address the global nature of neurotechnological risks. Many neurotechnology companies operate internationally, and the cross-border nature of data collection

118. *See id.* at 2.

119. *Id.* at 3.

120. Ienca, *supra* note 12, at 6.

121. *See* Cornejo-Plaza, Cippitani & Pasquino, *supra* note 115, at 2.

and processing complicates enforcement. Without collaboration with other nations or the establishment of international standards, Chile's protections may be threatened by practices occurring beyond its jurisdiction. A coordinated global effort to complement and reinforce Chile's pioneering work is needed.

Additionally, Chile's framework would benefit from addressing several other gaps that limit its practical applicability. For instance, the current legislation lacks specificity regarding how neurotechnological data should be classified, stored, and accessed. Without clear regulations, companies and researchers may exploit ambiguities, potentially exposing individuals to misuse of their brain data. Guidance is also needed to establish clearer consent mechanisms, ensuring that individuals fully understand and agree to the ways in which their neural data will be used.[122] The rapid pace of neurotechnological innovation makes it increasingly difficult for consumers to grasp the implications of their consent, particularly when dealing with complex or proprietary technologies.

Another critical gap lies in defining oversight and enforcement authorities.[123] Chile's framework does not yet provide a clear roadmap for which regulatory bodies will monitor compliance or how violations will be penalized. This lack of clarity could result in inconsistent enforcement, undermining the credibility and effectiveness of the protections.

These gaps only further highlight how current iterations of the law leave individuals unprepared with the unilateral power to waive their cognitive liberty. Even if these gaps are addressed, the question remains: is there a world where the law could fully and adequately address all the unknowns presented by neurotechnology? Perhaps. But does that mean cognitive liberty should then become waivable? Not necessarily. Even with complete knowledge of the risks, there remains a broader ethical question about how far humanity should integrate itself with digital tools. This is not just a legal or technological challenge but an existential one. Where does the boundary lie between enhancement and dilution of our humanity?

Similar issues with foresight and integration are evident in the regulation of artificial intelligence. AI regulation, while still an ongoing process, struggles to address ethical, social, and economic implications for a technology that is already prevalent—even more than direct-to-

122. *See id.* at 4, 6.
123. *See id.* at 4-5.

consumer neurotechnology.[124] This comparison underscores the magnitude of the task for legislators: if progress is slow for a widely adopted technology like AI, the path to comprehensive guidance for a still-evolving technology like neurotechnology will likely require even greater effort and long-term commitment. Addressing these challenges with proactive, and more importantly, iterative, globally coordinated efforts will be essential for ensuring the robust protection of cognitive liberty in the face of rapid technological change.

Alternatively, Chilean legislators might consider explicitly incorporating brain data into their existing personal data protection laws. A precedent for this approach exists in Colorado, USA, where in April 2024, Governor Jared Polis signed an amendment to the Colorado Privacy Act that expanded the definition of "sensitive data" to include "biological data" encompassing neural data.[125] While this regulation is still in its infancy, and practical assessment of its efficacy is yet to be conducted, it currently restricts the collection and use of brain data. However, questions remain about how it will adapt to future technologies that may necessitate either more lenient or stringent regulatory approaches. Through this approach, cognitive liberty is incorporated into a waivable context like the right to privacy, but only to a certain degree. Here, one would waive their cognitive liberty as it only pertains to data collection but not cognitive liberty as a principle. Still, this method may encounter challenges as neurotechnology applications and potential misuses become more apparent—at this point, that is an inherent aspect of regulating any emerging technology.

V. CONCLUSION

Cognitive liberty is not merely a theoretical construct; it is the cornerstone upon which our humanity rests. As neurotechnologies continue to evolve at an unprecedented pace, the need to recognize and protect cognitive liberty as an inalienable right becomes increasingly urgent. Chile's pioneering efforts offer a vital starting point, demonstrating how constitutional protections can preemptively address the

124. Rahul Tongia, *Why Regulating AI Can Be Surprisingly Straightforward, When Teamed with Eternal Vigilance*, WORLD ECON. F. (May 28, 2024), https://www.weforum.org/stories/2024/05/why-regulating-ai-can-be-surprisingly-straightforward-providing-you-have-eternal-vigilance/.

125. *See* Sigal Samuel, *Your Brain's Privacy Is at Risk. The US Just Took Its First Big Step Toward Protecting It*, VOX (Apr. 18, 2024), https://www.vox.com/future-perfect/24078512/brain-tech-privacy-rights-neurorights-colorado-yuste; H.B. 24-1058, 74th Gen. Assemb., Reg. Sess. (Colo. 2024).

ethical and legal dilemmas posed by these technologies. Yet, the gaps in its framework underscore the challenges of regulating an evolving field where the risks are still emerging.

The international community must take inspiration from Chile's leadership while striving for a globally coordinated approach. Clear definitions, enforceable remedies, and robust oversight mechanisms are imperative to prevent the exploitation of cognitive liberty. By anchoring cognitive liberty within the framework of existing non-derogable rights, we can ensure that it is treated with the gravity it deserves without fragmenting the human rights landscape. This approach avoids the pitfalls of rights inflation while reinforcing the centrality of mental autonomy to all other freedoms. Furthermore, protections must account for the diverse applications of neurotechnology, from medical therapies to non-essential enhancements, ensuring that individual dignity and autonomy are preserved across all contexts. The question of whether cognitive liberty can be voluntarily waived remains one of the most pressing ethical issues of our time. Even when the risks of neurotechnology are understood, humanity must still confront how far we are willing to integrate our cognitive processes with digital tools in the name of convenience or efficiency. This is not merely a legal or regulatory issue—it is an existential question about the very essence of what it means to be human.

PATENTLY UNFAIR: UNLOCKING ACCESS TO INSULIN THROUGH COMPULSORY LICENSING

*Sioneh Azarian**

Abstract

This article addresses the ongoing and urgent issue of global access to insulin. Insulin's original patent was sold for one dollar to help keep this revolutionary medication open and accessible to those that need it. Unfortunately, pharmaceutical companies are now profiting on the necessity of insulin, driving the cost higher and higher, knowing diabetics have no alternatives. This note proposes the solution of compulsory licensing to help more diabetics worldwide afford the treatment they desperately need. Part One explores the way pharmaceutical companies use patent thickets and evergreening to maintain control over and artificially inflate the price of insulin. Part Two argues that compulsory licensing will facilitate the entry of more biosimilar alternatives to insulin thus providing more affordable options for diabetics. Part Three highlights the devastating consequences of insulin inaccessibility that has forced diabetics to ration their insulin, travel, and participate in underground networks. Diabetics go to such drastic measures because they need insulin to live. High and low blood glucose levels, when left untreated, will cause permanent and severe damage to one's body. Insulin is a lifesaving medication, and there needs to be meaningful reform to ensure access to it.

* Sioneh Azarian received her J.D. from Southwestern Law School in May 2026. She holds a B.A. in English Literature from the University of Southern California. During the 2025-2026 academic year, she served as a Lead Article Editor for the Southwestern Journal of International Law. She is grateful to her family and friends for their consistent support and motivation, and to Professor Thompson-Bell for inspiring her to be a better writer and advocate. Ms. Azarian extends special thanks to the Center for Endocrinology, Diabetes, and Metabolism at Children's Hospital Los Angeles.

I. INTRODUCTION 275
II. INSULIN COMPANIES ABUSE PATENT LAW TO KEEP THE MARKET INSULATED 278
A. Patent Thickets 279
B. Patent Evergreening 280
C. What is Compulsory Licensing? 281
D. How do Compulsory Licenses Help Aid the Insulin Crisis? 282
III. COMPULSORY LICENSING WILL FACILITATE THE ENTRY OF MORE BIOSIMILAR AFFORDABLE ALTERNATIVES TO "BRAND NAME" INSULIN 285
A. Explanation of Biologics and Biosimilars 285
B. The System of Getting Biologics and Biosimilars Approved 286
C. The Consequences of this Ineffective System 286
IV. THE INACCESSIBILITY OF INSULIN HAS FORCED DIABETICS TO RATION THEIR INSULIN, TRAVEL, AND PARTICIPATE IN UNDERGROUND NETWORKS 289
A. Rationing Insulin 289
B. "We are a community, we take care of each other" 291
C. Pharmaceutical Tourism 293
V. CONCLUSION 296

I. INTRODUCTION

Before the discovery of insulin, managing diabetes was a nightmare.[1] French physician Pierre Piorry would advise patients to have a very high calorie diet to counter the calories being lost in urine.[2] Following the failure of these high calorie diets, other French and American physicians started introducing low calorie and low carbohydrate diets.[3] Some of these diets were extremely harsh calling for only 450 calories a day, leaving the patient malnourished and in extreme cases, dead due to starvation.[4] Mitchell Laza, the Director of the Institute for Diabetes, Obesity, and Metabolism at Perelman School of Medicine,

1. *See* The History of a Wonderful Thing We Call Insulin, AM. DIABETES ASS'N (July 2019), https://diabetes.org/blog/history-wonderful-thing-we-call-insulin.

2. *See* Ignazio Vecchio et al., *The Discovery of Insulin: An Important Milestone in the History of Medicine*, 9 FRONT. ENDOCRINOLOGY 1, 2 (Oct. 23, 2018), https://www.frontiersin.org/journals/endocrinology/articles/10.3389/fendo.2018.00613/full.

3. *Id.*

4. The History of a Wonderful Thing We Call Insulin, *supra* note 1.

said that "[f]or most of human history, a diagnosis of diabetes was a death sentence."[5]

In 1910, Sir Edward Albert Sharpey-Schafer theorized that there was a substance secreting from the pancreas that is capable of controlling glucose metabolism, and he called the substance "insulin," from the Latin word "insula" which means island- in reference to the Langhrans island.[6]

In 1921, Dr. Frederick Banting and his junior assistant Charles H. Best performed a pancreatomy on a dog and took the insulin from that dog, purified it, and then shot it back into the animal.[7] That dog experienced a successful decline in blood glucose following the procedure.[8] The first human to be administered insulin was fourteen-year-old Leonard Thompson.[9] Prior to the insulin treatment, Thompson weighed only 65 pounds, and he was in diabetic ketoacidosis.[10] Following the treatment, his blood sugar declined 75 percent and he was able to live thirteen more years.[11] Teddy Ryder was a five-year-old weighing only twenty-six pounds and insulin allowed him to live until seventy-six.[12] The improvement in quality of life is staggering. The new insulin treatment allowed Thompson and Ryder to experience many more years and live those years with significantly better health than they had before. These boys are only two examples of people who were positively impacted by insulin, but diabetics all around the globe were affected positively by this new treatment option.

In 1921, Banting and Best signed an agreement with the University of Toronto's health entity Connaught Antitoxin Laboratories.[13] Due to the rapidly growing demand for insulin, the University of Toronto agreed with Eli Lily and Company, giving Eli Lily the exclusive rights to manufacture and distribute insulin.[14] The scientists did not attempt to profit personally from the discovery until they were forced to when "they became aware that a competitor's patent could interfere

5. Kristen de Groot, *100 years of Insulin,* PENN TODAY (July 26, 2021), https://penntoday.upenn.edu/news/100-years-insulin.

6. Vecchio et al., *supra* note 2.

7. Gary F. Lewis & Patricia L. Brubaker, *The Discovery of Insulin Revisited: Lessons for the Modern Era*, 131 J. CLINICAL INVESTIGATION, 1, 2, 5 (Jan. 4, 2021).

8. *Id.* at 5.

9. *Id.* at 6.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

with their work in Toronto and could even, potentially shut them down."[15] In December 1922, Banting and Best sold their patent rights the University of Toronto for one dollar each.[16]

In 1923, Banting and MacLeod were awarded the Nobel Prize for Physiology or Medicine.[17] Banting once said, "[i]nsulin does not belong to me, it belongs to the world."[18] Banting's sentiment seemed to resonate with much of the world in the early stages of insulin development. There were urgent actions to make insulin more affordable through price reductions in the United Kingdom and the United States from the 1920s to the 1940s.[19] This, paired with scientists' sale of their patent rights for only one dollar, suggests that the world understood just how important this discovery truly was, and they were committed to maintaining access to this amazing, new medication. Unfortunately, this initial mission and purpose of keeping insulin accessible is now just a faint fantasy.

There is a global crisis in access to insulin.[20] Some countries struggle with affordability, while others grapple with availability.[21] With respect to availability, storing insulin is difficult in developing nations because insulin will go bad if it gets too cold or too hot.[22] Unopened insulin is meant to be stored at 2-8 degrees Celsius, and once it is opened insulin can be stored at room temperature (25-30 degrees Celsius).[23] This is difficult for countries with warmer climates because the room temperature exceeds the requirement. Additionally, it may be difficult to store insulin in a cold space for people with "limited access to refrigeration or reliable electricity."[24] There is recent research that suggests insulin may be able to stay stable if stored in temperatures up to thirty-seven degrees Celsius.[25] Thus, making access to insulin much easier for warmer-climate countries. There is also a push for developing thermostable insulins for the benefit of countries and patients who

15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. World Health Organization [WHO], *Keeping the 100-year-old Promise: Making Insulin Access Universal*, at 1, (2021), https://iris.who.int/server/api/core/bitstreams/0e4435c6-9f8c-4246-80e1-b2e61a6ae036/content.
20. *Id.* at 2.
21. *See id.* at vii.
22. *Id.* at 10.
23. *Id.*
24. *Id.*
25. *Id.*

struggle with access to cold storage or electricity.[26] New medical developments are great, but they are useless if people are not able to access the new technologies.

The reason this paper highlights the issue with insulin is that there is other scholarship pertaining to the pricing and patenting of other medications. Some other medications also have generic, affordable alternatives that insulin does not have. Furthermore, diabetics' reliance on insulin as a life-saving medication creates this devastating situation of "'grateful victims' who, left without any alternatives, pay the exorbitant prices of the medicines for their survival."[27] Pharmaceutical companies know just how essential insulin is, and they have abused the patent system and hurt diabetics for far too long. Compulsory patent licensing is necessary to aid this issue because it will reduce anticompetitive practice, it will open the doors to more biosimilars, and diabetics around the world deserve better.

II. INSULIN COMPANIES ABUSE PATENT LAW TO KEEP THE MARKET INSULATED

There is tension between patent law and anticompetition law. The Supreme Court of California stated, "[t]o Protect competition in the marketplace, antitrust law prohibits agreements that create or perpetuate monopolies. Patent law, in contrast, grants temporary monopolies to inventors to encourage the development of useful innovations."[28] However, what happens when those monopolies exceed the twenty-year temporary limit they were supposed to be granted? Insulin manufacturers use a variety of methods to prolong their patent protection and sustain their control over the market.[29] There are three large pharmaceutical companies that supply most of the world's insulin: Eli Lily, Novo Nordisk, and Sanofi.[30] The World Health Organization explains one reason why these companies have control on the market, "manufacturing biological medicines (including insulins) requires a higher

26. *Id.* at 31.

27. Rhyea Malik, *Striking a Balance Between Patent Rights and Access to Essential Medicines Through the Use of Compulsory Licenses - Comparative Study of Indian and Malaysian Patent Laws*, 42 J. MALAY. & COMPAR. L. 27, 42 (2015) (citing C. Abboud et al., *The Price of Drugs for Chronic Myeloid Leukemia (CML) is a Reflection of the Unsustainable Prices of Cancer Drugs: From the Perspective of a Large Group of CML Experts*, 121 BLOOD FORUM 4439, 4400 (2013)).

28. In re Cipro Cases I & II, 348 P.3d 845, 850 (Cal. 2015).

29. *See* WHO, *supra* note 19.

30. *Id.*

level of engineering and facility requirements."[31] This may explain part of the reason why the market for insulin is dominated by so few companies; however, the various patents that these companies file pose an even greater barrier to accessing insulin. These companies abuse the patent system by filing new patents for small incremental changes, thus increasing the longevity of their control over the product.[32] This abuse of the patent system is also an anticompetitive practice because it keeps other companies from entering the market and allowing consumers a chance to have options. A piece by the California Lawyers Association offers many examples of how companies abuse the patent and market strategies to extend the normal duration of patent exclusivity.[33]

A. Patent Thickets

One way of prolonging patent protection is by creating "patent thickets."[34] A patent thicket is a group of patents that cover a single product. The anticompetitive result of such a thicket is that it deters competitors from trying to challenge it because litigating for a large group of patents costs too much and takes too much time.[35] Drug manufacturers counter this point by arguing that the process of creating a pharmaceutical drug inevitably requires several different innovations, thus requiring several patents.[36] An example of such a dispute was *In Re: Lantus Direct Purchaser Antitrust Litigation*.[37] In this case, FWK Holding, LLC sued Sanofi-Aventis U.S LLC alleging that Sanofi engaged in anticompetitive conduct by improperly listing patents in the FDA Orange Book.[38] There have been similar disputes brought by the Federal Trade Commission (FTC) challenging more than a hundred improper patent listings in the FDA's Orange Book. In 2023, Lina Khan, chair of the FTC spoke to Leila Fadel from NPR about the pending action. Khan said, "[s]o this is a book where firms are able to list patents, and they're only supposed to list patents covering active drug

31. *Id.*

32. *See* Anders Olsen et al., *Patents and Regulatory Exclusivities on FDA-Approved Insulin Products: A Longitudinal Database Study, 1986-2019,* 20 PLOS MED. 1, 12-15 (2023).

33. *See* DeForest McDuff, Mickey Ferri & Noah Brennan, *Patents and Antitrust in the Pharmaceuticals Industry,* 31 CAL. LAW.'S ASS'N 127, 136 (2021).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

ingredients . . . and instead, we have found that firms are listing device patents that have absolutely nothing to do with the active ingredient."[39] This will be explained in further detail when discussing biosimilars, but one way that insulin manufacturers create thickets is to list device patents, such as the needle or dial on an insulin pen device.

B. Patent Evergreening

Another method for extending patent protection is called evergreening. The strategy of patent evergreening is when a company seeks "additional patents on an already patented product as the existing patents approach expiration."[40] Patents can easily be evergreened if the standard for patent protection is low, therefore companies are able to make minor reformulations that are deemed sufficient to extend the patent life of a medicine.[41] This extension of the patentee's exclusive rights over a product prevents competition.[42]

India's Supreme Court curbed the practice of patent evergreening in *Novartis AG v. Union of India & Others*.[43] In this case, the Indian Supreme Court found that Novartis was seeking to patent a mere modification of a known drug and that Novartis would need to present evidence of a difference in therapeutic efficacy between the different forms of drugs.[44] This case was essentially a win for the generic drug companies in India that wanted to continue producing affordable drugs.[45] The Novartis' court's efficacy standard has served as a model legislation for countries that have difficulty finding a balance between enforceable intellectual property rights and access to medicine. The Philippines' "Cheaper Medicines Act" is nearly identical to section 3(d) of India's Patents Act of 1970, where this efficacy standard stems

39. *The FTC is Threatening Legal Action Against Drugmakers Over Patent Abuses,* NAT'L PUB. NEWS (Nov. 8, 2023), https://www.npr.org/2023/11/08/1211459920/the-ftc-is-threating-legal-action-against-drug-makers-over-patent-abuses.

40. McDuff, Ferri & Brennan, *supra* note 33, at 137.

41. *Id.*

42. *Id.*

43. *See* Joli Patel, *India's Crack Down on the Practice of Pharmaceutical Evergreening: The 2013 Novartis Decision*, 85 UKMC L. REV. 503, 509 (2017).

44. *See id.* at 532-33 (citing *Novartis AG v. Union of India* [2013] 13 S.C.R. 148); *see also id.* at 160.

45. *Id.* at 535 (citing *Indian Supreme Court Decision on Novartis Case a Victory for Access to Medicines in Developing Countries*, DOCTORS WITHOUT BORDERS (Apr. 1, 2013), https://www.doctorswithoutborders.org/latest/indian-supreme-court-decision-novartis-case-victory-access-medicines-developing-countries).

from.[46] As wonderful as this decision is, there is a much simpler solution than leaving every dispute to various countries' judicial systems to review and interpret. Compulsory patent licensing will confront companies that participate in anticompetitive behavior and allow other companies to finally have a chance to compete.

C. What is Compulsory Licensing?

A compulsory license allows other manufacturers to use a patented product without the permission of the patent holder.[47] "It is one of the flexibilities in the field of patent protection included in the World Trade Organization's agreement on intellectual property: the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement).

The TRIPS agreement Section 5, Article 31 is titled "Other Use Without Authorization of the Right Holder" and it sets the terms for compulsory licenses.[48]

Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

(a) authorization of such use shall be considered on its individual merits; (b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall,

---

46. *See id.* at 537 (first citing Zoee Lynn Turrill, *Finding the Patent Balance: The Novatis Glivec Case and the Trips Compliance of India's Section 3(D) Efficacy Standard*, 44 GEO. J. INT'L L. 1555, 1569 (2013), https://heinonline.org/HOL/P?h=hein.journals/geojintl44&i=1593; Peter Ollier & Emma Barraclough, *Pharma's Indian Challenge*, 172 MANAGING INTELL. PROP. 21, 23 (Sept. 2007), https://heinonline.org/HOL/P?h=hein.journals/manintpr172&i=23; and Edith R. Hechanova *Cheaper Medicines Act Signed into Law,* 181 MANAGING INTELL. PROP. 136, 142 (2008), https://heinonline.org/HOL/P?h=hein.journals/manintpr181&i=142).

47. *Id.* at 524-25 (citing World Trade Organization, *Fact Sheet: TRIPS and Pharmaceutical Patents – Obligations and Exceptions,* (last visited Sep. 30, 2025) https://www.wto.org/english/tratop_e/trips_e/factsheet_pharm02_e.htm).

48. *See Agreement on Trade-Related Aspects of Intellectual Property Rights*, art. 31, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 319, 333.

nevertheless, be notified as soon as reasonably practicable . . . (h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization; (i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member; (j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member; (k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur.[49]

D. How do Compulsory Licenses Help Aid the Insulin Crisis?

There are already international examples of compulsory licenses being used in Malaysia and India.[50] Malaysia was the first member state of the World Trade Organization to grant a compulsory license for an AIDS drug.[51] This compulsory license was granted by the Malaysian Ministry of Health due to unsuccessful price negotiations with patent holders.[52] Malaysia also contracted with a generic drug company to import three compulsory licensed drugs from India.[53] As a result of this, the price of the drugs was available for one seventh of the original price, and 2,500 additional HIV patients were able to access treatment.[54] In 2012, India granted its first compulsory license to a generic drug company for the production of an anti-cancer drug.[55] This compulsory license was granted after a large drug company rejected a voluntary license of a patented drug that the generic company was

49. *Id.* at 333-34.
50. Malik, *supra* note 27.
51. *Id.* at 28.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*

seeking.[56] Due to this, thousands of Indian kidney and liver cancer patients have access to the medicine they need for a fraction of the original price.[57] These are real-life examples of the success of compulsory licenses in helping aid in access to medicine.

The TRIPS Agreement allows, in times of national emergency, member states to waive the requirement of the proposed user making reasonable efforts to obtain authorization from the rights holder.[58] This allows governments to act before a public health crisis becomes an epidemic.[59] The process for compulsory licensing can be lengthy and this is one exception for expediting the process in response to some national emergency.[60] One example of how members have fully utilized this agreement is Malaysia's grant of three "government authorized" compulsory licenses for patented antiretroviral medicines after the 2001 Doha Declaration affirmed that crises related to HIV/AIDS, tuberculosis, malaria, and other epidemics count as national emergencies of extreme urgency.[61]

A recent global example of a public health crisis and emergency is the Coronavirus pandemic. There is an international drug purchasing facility called Unitaid, and Unitaid created the Medicines Patent Pool (MPP), "an independent non-profit foundation . . . with the mission to improve the health of people in low- and middle-income countries by increasing 'access to quality, safe, efficacious, more appropriate and more affordable health products, including through a voluntary patent pool mechanism.'"[62] Pfizer entered into an agreement with MPP to

---

56. *Id.* at 28-29 (citing *Natco Pharma Ltd. v. Bayer Corp.*, Compulsory License Application No. 1 of 2011 (Controller of Patents, Mumbai 2012), available at https://www.globalhealthrights.org/wp-content/uploads/2015/11/Natco-v-Bayer.pdf).

57. *Id.*

58. *See id*. at 40 (citing *see Agreement on Trade-Related Aspects of Intellectual Property Rights*, art. 31, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 3, 1869 U.N.T.S. 319, 333, available at https://ipindia.gov.in/writereaddata/portal/ipoact/1_31_1_patent-act-1970-11march2015.pdf; The Patents Act, No. 39 of 1970, Imdia Code (1970), § 92(1); Patents Act 1983, Act 291 (Malay.) § 84(1)(a); *id.* at 84(1)(b)).

59. *See id.*

60. *See id.* (citing The Patents Act, No. 39 of 1970, India Code (1970), § 92(1)).

61. *Id*. at 40-41 (citing WTO, *Declaration on the TRIPS Agreement and Public Health*, ¶ 5 (Nov. 14, 2001), WTO Doc. WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002), available at https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.pdf).

62. Chenglin Liu*, Beyond Compulsory Licensing: Pfizer Shares Its COVID-19 Medicines with the Patent Pool*, 25 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 24 (2023) (first citing Unitaid, *Impact Story - Medicines Patent Pool: Voluntary Licenses Can Make Medicines More Accessible* (Dec. 2007), available at https://unitaid.org/assets/impact-story_medicines-patent-pool.pdf; then citing Medicines Patent Pool Foundation, *Statutes of 8 July 2010*, art. 3 (last visited Mar. 19, 2025), https://medicinespatentpool.org/who-we-are/statutes-by-laws-policies).

license the intellectual property rights for Paxlovid, a medication used to treat COVID-19.[63] Leading up to this decision by Pfizer, shareholder activities were pushing Pfizer to "broaden access to COVID-19 vaccines."[64] Oxfam and other global health activities were able to place some pressure on Pfizer through Rule 14a-8, from the SEC Act of 1934.[65] The rule allows "shareholders who have continuously held at least $2,000 in market value of the company's securities for at least three years to submit a proposal to be included in the company's proxy card."[66] The activists were successful in getting their proposal on Pfizer's proxy card bringing it to the attention of other shareholders.[67] Pfizer also requested that the SEC exclude the proposal, which brought this activist movement to the general public's attention.[68] The public pressure, paired with the activist's persistence, played a role in Pfizer entering into the voluntary agreement with MPP.[69] As great as this agreement is, voluntary licensing is not enough to meet the global demand for medications or vaccines. Voluntary licensing is certainly a step in the right direction, but compulsory licensing would push more companies to share their technologies.[70]

Through the TRIPS agreement, compulsory licensing is a greater threat that countries can wield over rights-holders.[71] The word "threat"

63. *Id.* at 2 (citing *Nirmatrelvir*, PUBCHEM NAT'L LIBR. OF MED. (2025), https://pubchem.ncbi.nlm.nih.gov/compound/Nirmatrelvir).

64. *Id.* at 35 (citing Peter Loftus, *Pfizer, Moderna and J&J Face Shareholder Pressure to Broaden COVID-19 Vaccine Access*, WALL ST. J. (Mar. 27, 2022), https://www.wsj.com/articles/pfizer-moderna-and-j-j-face-shareholder-pressure-to-broaden-covid-19-vaccine-access-11648373402).

65. *See id.* at 35-36 (citing Peter Loftus, *supra* note 64; 17 C.F.R. § 240.14a-8 pmbl. (2021); *id.* § 240.14a-8(b)(1)(i)(A)–(D); *id.* §240.14a–8(d); Letter from Rule 14a-8 Review Team, U.S. Sec. & Exch. Comm'n, to Margaret M. Madden, Sr. Vice President & Corporate Secretary, Chief Governance Counsel, Pfizer Inc. (Feb. 23, 2022), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2022/oxfampfizer022322-14a8.pdf); Pfizer Inc., *Breakthroughs That Change Patients' Lives: Proxy Statement for 2022 Annual Meeting of Shareholders and 2021 Annual Report on Form 10-K* (Mar. 17, 2022), https://s206.q4cdn.com/795948973/files/doc_financials/2021/sr/Pfizer-Proxy-2022.pdf.

66. *Id*. (citing 17 C.F.R. § 240.14a-8 (2021)).

67. *Id.* at 37.

68. *Id.*

69. *Id.* at 38 (citing *Bolivia Outlines Vaccine Import Needs in Use of WTO Flexibilities to Tackle Pandemic,* WTO (May 12, 2021), https://www.wto.org/english/news_e/news21_e/dgno_10may21_e.htm).

70. *See id.* at 40.

71. *See id.* (citing Siva Thambisetty et al., *The TRIPS Intellectual Property Waiver Proposal: Creating the Right Incentives in Patent Law and Politics to End the COVID-19 Pandemic,* LSE Law, Society and Economy Working Paper No. 06/2021*,* at 27, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3851737).

has a negative connotation, but the companies alone cannot be trusted to do the right thing. In the face of a global pandemic, Pfizer had to face criticism from shareholders and the public just to enter a voluntary agreement that has multiple limitations. It is not as if the agreement with MPP requires Pfizer allow any facility that wants to make Paxlovid to make it. The agreement is narrowly tailored to certain countries, certain facilities, and Pfizer has the final word on whether a company can use the license or not.[72] The unfortunate reality is that companies need to be faced with the threat of compulsory licensing to guide them towards helping ensure public welfare in times of emergency.

Compulsory licenses can also reduce anticompetitive practices in the insulin industry by introducing more biosimilar options for consumers.

III. COMPULSORY LICENSING WILL FACILITATE THE ENTRY OF MORE BIOSIMILAR AFFORDABLE ALTERNATIVES TO "BRAND NAME" INSULIN

A. Explanation of Biologics and Biosimilars

Biologics often come from living organisms so they have a complex structure.[73] "A biosimilar is a biologic that is highly similar to another biologic that is already FDA-approved (known as the original biologic).[74] The FDA started treating insulin as a biologic in 2020, thus opening the door for insulin biosimilars and interchangeable insulins to develop and be approved by the FDA.[75] Despite the difference between generics and biosimilars defined below, it is easy to consider a biosimilar like a generic drug. Biosimilars are just as effective as the original biologic, with perhaps a few minor differences.[76] There is an additional requirement for a drug to be considered an "interchangeable biosimilar."[77]

---

72. *See id.* at 27-29.

73. *Biosimilar and Interchangeable Biologics: More Treatment Choices*, U.S. FOOD & DRUG ADMIN. (2023), https://www.fda.gov/consumers/consumer-updates/biosimilar-and-interchangeable-biologics-more-treatment-choices.

74. *Id.*

75. Robin Feldman & Gideon Schor*, Purple is the New Orange: A Comparison of Competitive Information (?) in Generics and Biologics*, 2024 U. ILL. L. REV. 1075, 1077.

76. *Biosimilar and Interchangeable Biologics: More Treatment Choice, supra* note 73.

77. *Id.*

B. The System for Getting Biologics and Biosimilars Approved

Under the Hatch-Waxman act, a non-biologic company "must identify all patents it owns that could be reasonably asserted in protection of the drug" upon approval by the FDA.[78] The FDA then includes that information in the publicly available Orange Book.[79] However, companies that manufacture biologics need not disclose this kind of information.[80] Instead of mandating transparency of patent ownership, the biosimilar system simply hopes that the information will become available once a biosimilar drug tries to enter the market and runs into patent law disputes.[81] Once that information reveals itself in litigation, it is publicly released in the Purple Book.[82] This is incredibly ineffective. It is also very unfair to the company that takes the time to manufacture a biosimilar (already an arduous process), and then they must encounter a patent dispute to reveal information. If companies were made to disclose their patents, then smaller companies would know what to avoid. The counterargument is that this system, which only requires information once needed, actually saves time.[83] But the extra time that it takes for large multinational pharmaceutical companies and the FDA to publish this information saves time later because there will be less litigation.

C. The Consequences of this Ineffective System

Due to the disastrous system described above, biosimilars have only been launched by the same three large pharmaceutical companies within the United States.[84] This essentially expands their oligarchy and prevents other companies from developing biosimilars and granting more options to the consumer. These large companies act like petulant children when faced with a slight revenue decrease as more options

78. Feldman & Schor*, supra* note 75 (citing 21 U.S.C. § 355(b)(1)(A)(viii)).

79. *Id.* at 1079 (citing 21 U.S.C. § 355 Subsection IV.B.1. at 1103-04; Michael J. Schellhous*, Improving Access to Emerging Lifesaving Drugs: Solving the Disclosure Problem Within the Patent Dance*, 15 ST. LOUIS U. J. HEALTH L. & POL'Y 201, 209 (2021)).

80. *Id.* (citing Subsection IV.B.1, *supra* note 79; 42 U.S.C. § 262(i) (2021)).

81. *Id.* (citing Kurt R. Karst, *The "Purple Book" Makes Its Debut!*, FDA L. BLOG (Sep. 9, 2014), https://www.thefdalawblog.com/2014/09/the-purple-book-makes-its-debut).

82. *Id.*

83. *Id.*

84. WHO, *supra* note 19, at 8.

enter the market. Sanofi is a prime example.[85] The company relies on the judicial system anytime it wants to block a potential competitor.[86] Sanofi filed a lawsuit alleging infringement against Merck & Co when that company filed for approval of a biosimilar version of Lantus. Just the simple action of filing the lawsuit triggered a pause on FDA approval of Merck's drug "for up to 30 months unless a court rules in favor of Merck earlier."[87] Running to the courthouse allows the major companies to temporarily bar smaller companies from receiving FDA approval. Sanofi even went as far as to sue a fellow large, multinational corporation: Eli Lilly.[88] Eli Lily and Sanofi eventually reached a settlement agreement and kept the dispute from being litigated.[89] The settlement allowed Lily to keep going with drug development so long as they paid Sanofi royalties. If Eli Lily, a major international pharmaceutical company that is arguably on the same level as Sanofi, cannot afford to go to court and fight, then who can? How can this ineffective system for facilitating biosimilars work when no company dares to litigate against the big three? Despite the resources large pharmaceutical companies have, it is hard to believe that the constant litigation is an effective or enjoyable use of their time. Smaller companies that are trying to create biosimilars do not have the money or time to litigate. Hence, lengthy and pricey patent litigation is a deterrent to most companies that do not dare try to file for approval of a biosimilar in fear of an impending lawsuit.

A common counterargument is why don't companies just create biosimilars once the patents for insulin expire. That is because of the various other patents on insulin pen delivery devices.[90] Insulin needs to be administered somehow, and pharmaceutical companies trying to compete with the big three companies would need to put in money, time, and resources to "designing and manufacturing a pen device and/or related cartridge that does not infringe on any patent for any existing pen device or cartridge."[91] There are only so many ways to

85. *See* Joe Cantlupe, *Sanofi aims to block Merck's Lantus Biosimilar*, BIOPHARMA DIVE (Sep. 20, 2016), https://www.biopharmadive.com/news/sanofi-aims-to-block-mercks-lantus-biosimilar/426644/.

86. *Id.*

87. *FDA tentatively approves Merck's copycat of Sanofi's Lantus*, REUTERS (July 24, 2017), https://www.reuters.com/article/us-merck-co-fda idUSKBN1A52BN/.

88. Cantlupe, *supra* note 85.

89. *Id.*

90. Feldman & Schor, *supra* note 75, at 1088 (citing Markus Reitzig, *Strategic Management of Intellectual Property*, 45 MIT SLOAN MGMT. REV. 35, 39 (2004)).

91. *Id.*

make a dial that spins on an insulin pen. This is yet again another example of how patent thickets discussed above bar other companies from entering the market. Similar patent thickets are created with other medications and medical devices such as inhalers and eyedroppers. An FTC challenge to improper listing included device patents such as "the dispenser cap on a multidose eye dropper or the cap strap on an inhaler, which just keeps the inhalers in place."[92] The FTC Chair, Khan, said that these improper listings of device patents "may in fact be resulting in Americans having to pay hundreds, if not thousands, of dollars more than they should be."[93]

Even if companies were able to create brand new devices that do not infringe on any of the patents within the thicket, there is also no guarantee that diabetics who are used to one delivery device will immediately switch to another.[94] Diabetics get comfortable using what they know how to use- it's human nature. Type one diabetes is a chronic condition, meaning that from the age a diabetic is diagnosed, they must live with the condition until the day they die. Diabetes technology is evolving constantly. Insulin pumps are undoubtedly more convenient than using syringes and pens to constantly poke oneself, but older type one diabetics cannot be expected to learn how to use a brand-new piece of technology at the rapid rate at which they are evolving. Some elders struggle with adapting to new smartphones and computers. Some newer insulin pumps look and work like smartphones, so it is dangerous to give them to people who are not accustomed to newer technology, because if they hit the wrong button, they could deliver too many doses of insulin and end their life.

The current system for biosimilars and biologics is meant to release information about relevant patents once a biosimilar drug begins entering patent rights disputes. That information is meant to be published in the publicly available Purple Book. However, two biosimilar insulin drugs have emerged, and yet there is still no patent or exclusivity information available for any of the thirty insulin products listed in

92. *The FTC is Threatening Legal Action Against Drugmakers Over Patent Abuses*, *supra* note 39.

93. *Id.*

94. *See* Feldman & Schor, *supra* note 75, at 1088 (citing Michael S. Sinha, *Costly Gadgets: Barriers to Market Entry and Price Competition for Generic Drug-Device Combinations in the United States*, 23 MINN. J.L. SCI. & TECH. 293, 312–13 (2022); Jing Luo & Aaron S. Kesselheim, *Evolution of Insulin Patents and Market Exclusivities in the USA*, 3 LANCET DIABETES & ENDOCRINOLOGY 835, 837 (2015)).

the Purple Book.[95] How have two biosimilars emerged and there is no more information in the book than there was before they emerged? What is the point of this arduous, annoying process if the FDA still fails to give future competitors a chance to know about potential patent disputes?

The current system for facilitating biosimilars is riddled with ineffective FDA publications and patent law disputes dominated by lucrative, international pharmaceutical companies. Compulsory patent licensing will create a more streamlined pathway for affordable biosimilars to enter the market and grant diabetics fair options.

IV. THE INACCESSIBILITY OF INSULIN HAS FORCED DIABETICS TO RATION THEIR INSULIN, TRAVEL, AND PARTICIPATE IN UNDERGROUND NETWORKS.

Compulsory licensing is necessary to aiding this issue because diabetics deserve better.

A. Rationing Insulin

A report from the Human Rights Watch aptly titled, "If I'm Out of Insulin, I'm Going to Die" has a section on the human cost of unaffordable insulin.[96] Diabetics around the world have been forced to go through dire measures to stay alive. Many diabetics ration their supply of insulin by taking less than they should to stretch the supply.[97] Travis Paulson, a forty-eight-year-old diabetic from Minnesota, rationed his insulin for a dangerous amount of time.[98] Paulson had no choice but to ration because he had lost his job during the economic recession in 2007.[99] Rationing insulin can have various harmful consequences on

95. *Id.* at 1081 (citing *Orange Book Data Files*, U.S. FOOD & DRUG ADMIN. (Dec. 12, 2019), https://www.fda.gov/drugs/drug-approvals-and-databases/orange-book-data-files; *See* Skylar Jeremias, *Lilly Plans to Launch Insulin Biosimilar at 78% Discount to Lantus*, AJMC CTR. FOR BIOSIMILARS (Mar. 2, 2023), https://www.centerforbiosimilars.com/view/lilly-plans-to-launch-insulin-biosimilar-at-78-discount-to-lantus).

96. *If I'm Out of Insulin, I'm Going to Die: United States' Lack of Regulation Fuels Crisis of Unaffordable Insulin*, HUM. RTS. WATCH 1, 4 (Apr. 12, 2022), https://www.hrw.org/sites/default/files/media_2022/04/us_insulin0422_web.pdf.

97. *Id.* at 5.

98. *Id.* at 36, 41 (citing Telephone Interview with Travis Paulson (Apr. 29, 2021)).

99. *Id.* at 41.

one's body.[100] Paulson had to have dozens of eye surgeries over the past decade to repair the damage.[101]

The Human Rights Watch also notes that economically vulnerable individuals are disproportionately impacted by the high out of pocket costs.[102] This then negatively impacts their standard of life because "the money needed to acquire this lifesaving medicine can come at the expense of food, rent, and secure living conditions."[103] The disproportionate impact is also unfortunately reflected in the prevalence and severity of diabetes in racial and ethnic minorities.[104] Black adults are more than twice as likely as white adults to be hospitalized for diabetic ketoacidosis.[105] A study also revealed that white respondents were eighteen percent less likely to ration insulin than the average, meanwhile Black respondents were twenty percent more likely to ration insulin than the average.[106] Latino respondents were about ten percent more likely to ration than the average.[107]

As a result of this rationing, there have been emergency access laws granted in parts of the United States of America.[108] This includes Kevin's Law and the Alec Smith Insulin Affordability Act. Kevin Houdeshell was a diabetic that passed in 2014 because he ran out of his prescription for insulin refills, he could not contact his doctor during the holiday season to refill the prescription, and the pharmacy he went to did nothing to help.[109] Thus, Kevin was forced to ration his insulin and experienced diabetic ketoacidosis.[110] Kevin died in his apartment alone at the age of 36.[111] This death could have been avoided if the pharmacist gave Kevin an emergency vial or other supplies to last him until his doctor was back in office. Kevin's law "allows a pharmacist to use their professional judgement if a doctor cannot be reached to authorize a prescription and dispense an emergency supply

100. *Id.*

101. *Id.*

102. *Id.* at 45.

103. *Id.* at 5.

104. *Id.* at 6.

105. *Id.* at 47 (citing *Factors Contributing to Higher Incidence of Diabetes for Black Americans,* NAT'L INSIT. OF HEALTH (Jan. 18, 2018), https://www.nih.gov/news-events/nih-research-matters/factors-contributing-higher- incidence-diabetes-black-americans).

106. *Id.* at 6.

107. *Id.*

108. *Kevin's Law*, T1INTERNATIONAL, (Dec. 23, 2024), https://www.t1international.com/media/assets/file/Kevins_Law_Fact_Sheet.pdf.

109. *Id.*

110. *Id.*

111. *Id.*

of a chronic maintenance drug."[112] Eighteen states have passed some version of Kevin's law.[113] State legislation varies with what kinds of medications are covered and what quantity of medication the pharmacist can give.[114] The Alec Smith Insulin Affordability Act has a safety net program within it to allow qualifying diabetics access to emergency supplies if they are in urgent need of them.[115] "Under the law, eligible individuals in urgent need of insulin can go to their pharmacy once in a 12-month period and receive a one-time, 30-day supply of insulin for a $35 co-pay."[116] The law's name comes from Alec Smith, a 26-year-old man from Minneapolis.[117] Alec died because he was uninsured and could not afford to pay out of pocket, so he was forced to ration his insulin.[118] This state legislation is inspiring but devastating. These laws were triggered by two young diabetics suffering horrible consequences for simply not being able to afford the medicine they need. These two young men are among thousands of other diabetics across the nation and across the globe who have been forced to take smaller doses of insulin than they need. Insulin is not a drug you can stretch out because the effects of rationing are so severe. Dr. Laura Nally, a pediatric endocrinologist, stated, "[i]nsulin isn't the type of medication you can go two to three days without. People have to get insulin somehow."[119] When diabetics are in need of insulin, they turn to one another.

B. "We are a community, we take care of each other"[120]

There is an avid underground network of diabetics helping one another access the life-saving medicine they need.[121] A research study

112. *Id.*

113. *Id.*

114. *Id.*

115. *See No One Should Have to Choose Between Affording their Lives and Affording to Live*, OFFICE OF MINN. ATT'Y GEN. (Mar. 15, 2021), https://www.ag.state.mn.us/Office/Communications/2021/03/15_InsulinAffordabilityAct.asp.

116. *Id.*

117. *See id.*

118. *Id.*

119. Kaitlin Sullivan, *The High Cost of Diabetes Drugs has Led to a Flourishing Black Market*, NBC NEWS (Feb. 9, 2023), https://www.nbcnews.com/health/health-news/diabetes-medications-high-costs-flourishing-black-market-rcna67480.

120. Michelle L. Litchman et al., *The Underground Exchange of Diabetes Medications and Supplies: Donating, Trading, and Borrowing, Oh My!,* 14 J. DIABETES SCI. AND TECH., 1000, 1003 (2020).

121. *See id.* at 1006-07.

observing the prevalence of and factors surrounding the underground exchange of diabetic supplies.[122] These activities include: donating, trading, borrowing, and purchasing.[123] The research noted that participants felt compelled to donate because they did not want to see fellow diabetics suffering and stressing "due to inability to access basic diabetic needs."[124] People find these networks of other diabetics that share their surplus supplies through social media.[125] There are also mutual aid groups such as Mutual Aid Diabetes (MAD).[126] MAD's website states that the group was "formed in response to the insulin crisis"[127]

Michelle Litchman, the medical director of the Intensive Diabetes Education and Support Program at the University of Utah, was shocked that some participants in the underground networks are insured. Perhaps the image of someone that participates in the "black market" of diabetic supplies does not line up with the typical image of an individual that has health insurance. People like to assume that this issue could never exist for them or someone like them. They assume this only applies to the absolute poorest person they could imagine so it doesn't affect them in any shape or form. However, one should care about an issue even if it does not directly affect them because we should have empathy for our fellow humans. Also, the issue does indeed affect middle-class, insured individuals that think it could never apply to them. The actual number of people that have participated in these networks is hard to determine because of the secretive nature of trading supplies. I, myself, have had to rely on a diabetic friend to loan me a continuous glucose monitor sensor because of issues regarding physician authorization and how many sensors my insurance allowed per month. I have had type-two diabetics in my family give me surplus insulin pens that are extremely useful when my insulin pump malfunctions, and I still need to manage my glucose. It is no exaggeration to say that without these donations, I would not be alive.

Eric Douds, a type one diabetic, participated in these online groups of diabetics donating and trading supplies.[128] Douds has had difficulty

122. *Id.* at 1000.

123. *Id.*

124. *Id.* at 1003.

125. *See* Markian Hawryluk, *Diabetes patients turn to underground insulin networks as Covid-19 exposes limits of copay caps*, CNN HEALTH (Oct. 1, 2020), https://www.cnn.com/2020/10/01/health/insulin-copay-caps-sharing/index.html.

126. *See About MAD*, MUTUAL AID DIABETES (Dec. 23, 2024), https://mutualaiddiabetes.com/about-mad/.

127. *Id.*

128. Sullivan, *supra* note 119.

finding an affordable health insurance because he freelances as a videographer.[129] Douds said, "[r]ight now, it's easier for me to get medicine from the diabetes community than it is for me to figure out America's insurance system."[130] This statement is bittersweet in its emphasis on the strength of the diabetic community and its critique of the complexity of the health insurance system. Annalisa Van den Bergh, a diabetic in the same groups as Douds, shared his sentiment and said, "[t]he diabetes mutual aid community is more reliable than [any] insurance or doctor I've had. We're literally keeping each other alive."[131]

In a report, the World Health Organization said that "As a major and complex public health problem, diabetes cannot be addressed simply through a top-down approach in the absence of community involvement."[132] It is cruel to put the weight of this massive issue on the diabetics who are suffering as a result of the issue. Diabetics are not at fault for this crisis, so why should they be the ones responsible for solving it? Massive, international pharmaceutical companies are responsible for keeping the patents under lock and key; thus, restricting people's access to cheaper, more readily accessible alternatives. The companies that have insulated the insulin market should be the ones being held responsible for aiding this crisis. Diabetics have created these mutual aid groups and social media networks out of necessity. These generous diabetics are not the solution to the problem; if anything, they demonstrate just how much compulsory licensing is necessary to put an end to this crisis.

C. Pharmaceutical Tourism

Another way diabetics try to help themselves and others access insulin is by travelling abroad where insulin is cheaper. Paulson consistently travels to Canada to be able to afford his own supply and purchase a surplus of vials to donate to diabetics in need.[133] Paulson crossing the border to buy insulin has helped him avoid rationing his insulin.[134] A six-month supply costs around $700 USD in Canada, that

129. *Id.*

130. *Id.*

131. *Id.*

132. WHO, *supra* note 19, at 36.

133. *If I'm Out of Insulin, I'm Going to Die: United States' Lack of Regulation Fuels Crisis of Unaffordable Insulin*, *supra* note 96, at 36 (citing Telephone Interview with Travis Paulson (Apr. 29, 2021)).

134. *Id.* (citing *A Painful Pill to Swallow: U.S. vs. International Prescription Drug Prices*, H. COMM. ON WAYS AND MEANS COMM. STAFF 1, 52 (Sept. 2019), https://democrats-

same amount of money would only cover two vials in the United States.[135] Novolog is more than 92 percent cheaper per dose than in the U.S.[136] But, many diabetics cannot travel elsewhere to access cheaper medicine so unfortunately, they are forced to reckon with the high prices in the United States. Quinn Nystrom, a diabetic who organized a trip to Canada, acknowledged that she was lucky to be able to make the trip because many other diabetics couldn't afford to miss work.[137] Forcing diabetics to choose between life-sustaining medicine they so desperately need and the job that provides them the income to keep purchasing that medicine is a major indicator of how horrendous the insulin crisis truly is. Like the mutual aid groups and emergency access litigation described above, pharmaceutical tourism is not a long-term solution to the insulin access crisis. Nystrom also says, "Coming to Canada is not a long-term solution; coming to Canada is putting a Band-Aid on a gunshot wound."[138] The economic impact of pharmaceutical tourism also demonstrates just how widespread the crisis is. The global medical tourism market is projected to grow from $13.98 billion in 2021 to a $53.51 billion in 2028 at a compound annual growth rate of 21.1% in 2021-2028.[139]

Pharmaceutical tourism has become so mainstream that some states have programs to help citizens that plan on travelling abroad for the purpose of purchasing medication. The Public Employee Health Plan (PEHP) in Utah includes a voluntary Pharmacy Tourism Program. This program allows certain members "who use any of 13 costly prescription medications . . . the insurer will foot the bill to fly the patient and a companion to San Diego, then drive them to a hospital in

waysandmeans.house.gov/sites/evo-subsites/democrats-waysandmeans.house.gov/files/documents/U.S.%20vs.%20International%20Prescription%20Drug%20Prices_0.pdf).

135. *Id.* at 36 (citing Telephone Interview with Travis Paulson (Apr. 29, 2021)).

136. *Id.* (citing *A Painful Pill to Swallow: U.S. vs. International Prescription Drug Prices*, H. COMM. ON WAYS AND MEANS COMM. STAFF 1, 52 (Sept. 2019), https://democrats-waysandmeans.house.gov/sites/evo-subsites/democrats-waysandmeans.house.gov/files/documents/U.S.%20vs.%20International%20Prescription%20Drug%20Prices_0.pdf).

137. *Caravan of Americans Battling Diabetes Heads to Canada for Affordable Insulin*, CBS NEWS (July 2, 2019), https://www.cbsnews.com/news/insulin-caravan-battling-high-drug-prices-in-the-us-diabetes/.

138. *Id.*

139. Michael R. Agostino, *Travel-for-Treatment Provides Access to Cost-Effective Prescription Drugs*, PHARMACY TIMES (June 19, 2023), https://www.pharmacytimes.com/view/travel-for-treatment-provides-access-to-cost-effective-prescription-drugs (citing Jignesh Rawal*, U.S. Medical Tourism Market*, FORTUNE BUS. INSIGHTS (Sep. 1, 2025), https://www.fortunebusinessinsights.com/u-s-medical-tourism-market-108968).

Tijuana, Mexico, to pick up a 90-day supply of medicine."[140] The program is probably very helpful to the members that use any of the thirteen medications covered in the program. However, there is something deeply unsettling about a state committing that much money and time to a program that effectively just takes the underlying issue of pharmaceutical unaffordability and ships it elsewhere. Instead of passing local measures to combat this issue, it is as if the state has just made peace with the fact that drugs are expensive in the United States.

According to the FDA, it is technically "illegal for individuals to import drugs into the United States for personal use."[141] There is debate on whether there is any true risk of being arrested for participating in pharmaceutical tourism.[142] The act of travelling for medication has become so widespread and normalized. "The U.S. government estimates that close to one million people in California alone cross to Mexico annually for health care, including to buy prescription drugs. And between 150,000 and 320,000 Americans list health care as a reason for traveling abroad each year."[143] Utah state representative, Norm Thurstone, is not worried about potential prosecution and he says, "this sort of purchase for personal use is a widely established practice."[144] Nathan Cortez, a law professor at Southern Methodist University, also acknowledges that the FDA typically doesn't care about people bringing back small amounts of medication; however, Cortez warns that the FDA could change its mind on a whim and become much stricter.[145]

There is tension between patent law and public welfare. On one hand, it is devastating and horrific to see diabetics suffering because they cannot access insulin. On the other hand, developing life-saving medicine takes a lot of time and resources so the people that go through all that effort should be granted protection via patent rights. There is a belief in intellectual property law that without the safety net of intellectual property protection and rights, people will no longer create. Though this may be true for some people who seek out intellectual property protection, the scientists that originally discovered insulin serve as an excellent example of people that do not need money or

140. Bram Sable-Smith, *American Travelers Seek Cheaper Prescription Drugs in Mexico and Beyond*, NPR (Feb. 11, 2019), https://www.npr.org/sections/health-shots/2019/02/11/691467587/americans-seek-cheaper-meds-in-mexico.

141. *Id.*

142. *See id.*

143. *Id.*

144. *See id.*

145. *Id.*

credit as an incentive to create. Banting and the other scientists sold their patent rights for only one dollar.[146] They gave up their intellectual property protection in support of greater access to insulin. There is no way to fully appease either side, but compulsory licenses balance public welfare and intellectual property concerns. Compulsory licenses, under the TRIPS agreement, require adequate renumeration to the original patent owner.[147] Thus, compulsory licenses compensate the patent owner while still increasing the availability of insulin. The rights holder is happy because they receive some royalties, the licensee is happy because they receive the license to create, and the person consuming the patented product is happy because they have greater access to the medicine they need to survive. Compulsory licensing will help fix this global crisis harming diabetics.

Diabetics going through dire measures just to survive and help one another deserve better than the current state of insulin accessibility, and compulsory licenses are necessary to help fix this issue.

V. CONCLUSION

There are multiple factors that contribute to the issue of insulin accessibility. There are also multiple actors in the line of people from manufacturer to patient. Insulin manufacturers, insurance companies, prescription drug benefit managers (PBMs), pharmacists, endocrinologists, and patients are among many others. Recently, the Federal Trade Commission (FTC) has brought action against the three largest PBMS.[148] The FTC says that the action is brought against these groups for "engaging in anticompetitive and unfair rebating practices that have artificially inflated the list price of insulin drugs, impaired patients' access to lower list products, and shifted the cost of high insulin list prices to vulnerable patients."[149] Other administrative agencies like the FDA and the United State Patent and Trademark Office are other administrative agencies that can hold companies accountable. This is

146. Lewis & Brubaker, *supra* note 7, at 6.

147. Malik, *supra* note 27, at 28 (citing Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 31, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 3, 1869 U.N.T.S. 319, 333; TRIPS Agreement, art. 31; Martin Khor, Compulsory License and Government Use to Promote Access to Medicines: Some Examples, (Third World Network 2014), https://www.twn.my/title2/books/pdf/CompulsoryLicense.pdf).

148. *FTC Sues Prescription Drug Middlemen for Artificially Inflating Insulin Drug Prices*, F.T.C. (Sept. 20, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-sues-prescription-drug-middlemen-artificially-inflating-insulin-drug-prices.

149. *Id.*

one avenue for the United States to begin chipping away at the issue of insulin accessibility. While that is hopeful, the issue still exists globally outside of just the United States.

Additionally, insulin is only the tip of the iceberg. Diabetes management includes insulin delivery devices that vary from a simple syringe and vial to an insulin pump that you charge and update like a smartphone. Diabetes management also includes blood glucose surveillance and that requires a glucose meter with test trips, lancets, and a poking device or some kind of continuous glucose monitor. The more advanced technology like the insulin pump and continuous glucose monitors have their own supplies including cartridges, sensors, transmitters, etc. Safe to say, diabetics require lots of moving parts to manage their blood sugar and stay healthy. Each product has a price and a patent barrier to it. As mentioned before, some of the devices even have patents on miniscule parts of the device so companies cannot create any kind of pen device.[150] Putting aside the expansive range of diabetic supplies, the issue of accessibility exists for many other lifesaving medications. India and Malaysia have already utilized compulsory licensing to help broaden access to HIV/AIDS treatment.[151] Compulsory licensing has been and can be used a helpful tool for various other medications. It is shown to help more people gain access to life-saving treatment. Insulin just happens to be the focus of this paper because it is essential to many diabetics, and there is not enough scholarship about insulin patent licensing.

Over 420,000,000 people are living with diabetes.[152] Three in four people with diabetes live in low- and middle-income countries.[153] The United States spent $760 billion in total diabetes-related health expenditures in 2019.[154] This is not an issue that can go away on its own. There must be some action taken to help the diabetics around the world that are finding a way to survive despite the growing difficulty of

150. *See* Feldman & Schor*, supra* note 75, at 1088 (citing Marcus Reitzig*, Strategic Management of Intellectual Property*, 45 MIT SLOAN MGMT. REV. 35, 38-39 (2004)).

151. Malik, *supra* note 27, at 28 (citing Marcus Meland*, Malaysia Issues World's First Compulsory License*, LAW360 (Feb. 26, 2004), https://www.law360.com/articles/1035; Khor, *supra* note 147, at 1, 9).

152. WHO, *supra* note 19, at 3.

153. *See id.* (citing *Worldwide trends in diabetes since 1980: a pooled analysis of 751 population-based studies with 4.4 million participants*, 387 LANCET 1513, 1521 (2016), https://www.thelancet.com/action/showPdf?pii=S0140-6736%2816%2900618-8); IDF Diabetes Atlas 1, 34 (Int'l Diabetes Fed'n 2019), https://diabetesatlas.org/resources/previous-editions/.

154. *Id.* (citing IDF Diabetes Atlas, *supra* note 153).

accessing insulin. Three major companies engage in anticompetitive behavior bending the rules of patent law to keep other companies from entering the market. In addition to this, the current system for allowing biosimilars protects large biologic-producing companies from being transparent about what patent rights they currently possess so smaller companies must enter the arena of drug manufacturing blind and susceptible to lawsuits. This is extremely unfair to diabetics that are desperately seeking out less expensive insulin. Diabetics of all socioeconomic backgrounds deserve access to the insulin their body needs. The diabetics that are travelling, rationing, and donating their surplus supplies deserve better than the current oligarchy of companies controlling the price of insulin.

There are various solutions that could potentially combat the issue of insulin accessibility, but an increase in compulsory licensing strikes at the very heart of the problem with companies maintaining control over the market.

SEIZING THE DIGITAL FUTURE: WHY THE UNITED STATES MUST JOIN THE DIGITAL ECONOMY PARTNERSHIP AGREEMENT

*John Camara**

Abstract

The rapid expansion of the digital economy has revolutionized global trade, making data the cornerstone of modern commerce. However, the absence of a unified international framework for digital trade has led to regulatory fragmentation, increased compliance costs, and stifled innovation. The Digital Economy Partnership Agreement (DEPA) offers a flexible solution by establishing a modular framework that addresses critical issues such as cross-border data flows, artificial intelligence (AI) governance, and cybersecurity. Unlike rigid trade agreements, DEPA's adaptable structure allows for continuous updates, ensuring it remains relevant as digital trade evolves.

This article argues that the United States must join DEPA to advance its economic, strategic, and geopolitical interests. First, U.S. participation would harmonize digital trade rules, reducing regulatory conflicts and fostering global innovation. Second, it would enable the U.S. to counter China's growing influence in digital governance, ensuring that DEPA's principles align with democratic values and open markets. Finally, by leveraging DEPA's living agreement model, the

* John Matthew Camara is a full-time 3L student at Southwestern Law School (SW), graduating in May 2026. He served as a staff editor for the Southwestern Journal of International Law during the 2024–2025 academic year. This note was awarded first place in the 2024–2025 Andrew P. Vance Memorial Writing Competition sponsored by the Customs and International Trade Bar Association (CITBA) and Georgetown University Law Center. He holds a B.A. in Economics and International Relations from Hobart and William Smith Colleges (HWS) in Geneva, New York. The author extends his sincere gratitude to his family, friends, and mentors for their support throughout his academic journey. He is also thankful to the 2025–2026 staffers and editors for their diligence in editing and publishing this volume. He is especially grateful to Professors Jonathan Miller, David Aronofsky, and Alexandra D'Italia, JD, as well as HWS Professors Judith McKinney and Scott McKinney, PhD, for their invaluable guidance and thoughtful feedback on this note from both legal and economic perspectives.

U.S. could lead efforts to develop a comprehensive global framework for digital trade. Building on this foundation, DEPA offers the U.S. a strategic opportunity to shape the future of global digital trade.

I. INTRODUCTION 301
A. Background of the Digital Economy Partnership Agreement 302
B. DEPA's Modular Approach 303
C. DEPA's Key Provisions 305
D. Where is the United States? 307
II. UTILIZING DEPA'S FLEXIBILITY TO HARMONIZE FAVORABLE DIGITAL TRADE RULES 308
A. Global Digital Trade's Fragmented Landscape 308
B. Three Approaches to Digital Trade 310
C. Promoting the U.S. Approach Through DEPA 313
D. Supporting U.S. Business Operations in Global Trade 315
E. Enhancing Consumer Trust Through Cybersecurity and Data Protection 316
III. COUNTERING CHINA'S GROWING INFLUENCE AND ESTABLISHING U.S. LEADERSHIP IN DIGITAL TRADE AND ARTIFICIAL INTELLIGENCE 318
A. China's Growing Influence 318
B. The Rise of Artificial Intelligence in the U.S. and China 320
C. DEPA as a Platform for Shaping AI Governance 322
D. The Risks of China's Influence in DEPA 324
IV. BUILDING A FOUNDATION TOWARDS A COMPREHENSIVE GLOBAL DIGITAL TRADE FRAMEWORK ... 326
A. The Need for a Unified Approach to Digital Trade 326
B. DEPA's Modular Approach to Trade Negotiations 327
C. The Strategic Importance of U.S. Membership 327
D. Other Possible Options for the United States? 329
V. CONCLUSION: EMBRACING LEADERSHIP IN THE DIGITAL ERA 331

I. INTRODUCTION

As *The Economist* first coined in a 2017 article, data has replaced oil as the world's most valuable resource.[1] Today, cross-border data flows generate more economic value than global trade in goods.[2] However, the rapid pace of digital innovation has outstripped the capacity of existing regulatory frameworks to address emerging issues such as data privacy, cybersecurity, artificial intelligence (AI), and e-commerce. This regulatory lag has created a confusing web of rules and regulations for businesses and governments, underscoring the urgent need for a comprehensive framework in digital trade governance.

The Digital Economy Partnership Agreement (DEPA)[3] represents a groundbreaking response to this challenge. Initially signed by Singapore, Chile, and New Zealand, DEPA is the first trade agreement exclusively designed for the digital economy. DEPA's provisions address critical issues in digital trade, including cross-border data flows, digital identity, cybersecurity, and ethical AI standards.

While the first and second Trump administrations have been skeptical of multilateral trade agreements, DEPA presents a unique opportunity that aligns with its broader economic strategy. Unlike traditional trade pacts, DEPA's flexible modular structure allows the United States to adopt provisions that directly serve its interests, particularly in digital trade, a sector where the U.S. seeks to maintain its competitive edge. As global digital governance becomes increasingly fragmented, DEPA can advance U.S. trade priorities without requiring deep economic integration or extensive regulatory commitments.

This Note argues that United States (U.S.) participation in DEPA is crucial to its national and economic interests for three main reasons: 1) DEPA's flexible framework provides a means for harmonizing favorable digital trade rules for U.S. businesses and consumers; 2) U.S. participation is necessary to counter China's influence in setting digital governance norms, particularly for artificial intelligence; and 3) DEPA offers a platform to lay the groundwork for a comprehensive global framework for digital trade.

---

1. *The World's Most Valuable Resource Is No Longer Oil, but Data*, THE ECONOMIST (May 6, 2017), https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data.

2. *Data Flows*, INT'L CHAMBER OF COM., https://iccwbo.org/global-insights/digital-economy/data-flows/ (last visited Oct. 18, 2025).

3. Digital Economy Partnership Between Republic of Chile, New Zealand, and the Republic of Singapore [2020] NZTS 2020/02 (signed Jun. 11, 2020, entered into force 7 January 2021) [hereinafter DEPA].

A. Background of the Digital Economy Partnership Agreement

Digital trade encompasses all trade in goods and services that are digitally ordered and/or digitally delivered.[4] In facilitating this trade, data flows across borders between servers.[5] With the advent of digital trade, issues unique to this area of trade emerged.[6] These challenges concern data privacy and data localization as well as potential new liabilities with rapidly evolving technologies, including AI and blockchain.[7] In recognizing these challenges, Chile, New Zealand, and Singapore, as 'small, outward facing, trade-dependent countries,' saw an opportunity to shape global digital trade rules in furtherance of open markets and inclusive trade.[8] Accordingly, Chile, New Zealand, and Singapore launched trilateral talks in pursuit of a plurilateral agreement to establish the regulatory landscape for digital trade and its emerging technologies on May 17, 2019.[9]

These three economies (and Brunei) previously collaborated in trade negotiations, which resulted in the Trans-Pacific Strategic Economic Partnership or the 'P4 Agreement' in 2005.[10] The P4 laid the groundwork for further cooperation in trade across several Pacific Rim countries in Asia, the Pacific, and the Americas, culminating with the signing of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in 2018.[11]

Chile, New Zealand, and Singapore concluded their negotiations on January 21, 2020, and jointly developed the Digital Economy Partnership Agreement (DEPA).[12] Chile, New Zealand, and Singapore, as

4. DANIELLE M. TRACHTENBERG, CONG. RSCH. SERV. IF12347, DIGITAL TRADE AND DATA POLICY: KEY ISSUES FACING CONGRESS (2024).

5. *Id.*

6. *Id.*

7. *Id.*

8. Press Release, Minister for Trade and Indus. of Sing., Minister for Trade and Exp. Growth of N.Z., Vice Minister of Int'l Econ. Aff. of Chile, Joint Ministerial Statement on the Substantial Conclusion of Digit. Econ. P'ship Agreement ("DEPA") Negot. (Jan. 21, 2020), Annex B, para. 2–3.

9. Press Release, Ministry of Trade and Indus. of Sing., Ministry of Commc'n and Info. of Sing. & Infocomm Media Dev. Auth., Sing. Leads the Way in the New Digit. Econ. P'ship Agreement with Chile and N.Z. (May 17, 2019).

10. Trans-Pacific Strategic Economic Partnership Between Republic of Chile, New Zealand, the Republic of Singapore, and Brunei Darussalam [2005] NZTS 2006/09 (signed 18 July 2005, entered into force 28 June 2006).

11. Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTTP") [2018] NZTS 2018/10 (signed 8 March 2018, entered into force 30 December 2018).

12. Joint Ministerial Statement on the Substantial Conclusion of Digit. Econ. P'ship Agreement ("DEPA") Negot., *supra* note 8.

the original DEPA Parties, signed the agreement on June 11, 2020[13] Scholars identify DEPA as going beyond that of a pure trade agreement by addressing the broader issues of the digital economy such as digital identity and data privacy.[14] Rather, DEPA is a 'living agreement' open to other World Trade Organization (WTO) countries so long as they meet its standards.[15] Indeed, South Korea entered negotiations to join and successfully acceded to DEPA on May 3, 2024.[16] As of October 2025, nine other countries announced their intention to join as well: China, Canada, Costa Rica, Peru, the United Arab Emirates (UAE), El Salvador, Ukraine, Thailand, and Uruguay. [17] To evolve as technology changes and new challenges arise, DEPA's scope is "wide, open, and flexible."[18] This adaptability is enshrined under Article 16.3: Amendments, enabling parties to amend the agreement when necessary, and such amendments become an integral part of the agreement.[19]

B. DEPA's Modular Approach

DEPA is noteworthy for its 'modular structure.' With its unique design, DEPA is sectioned into several subject-specific 'Modules' that cover a wide range of issues in the digital economy whose implementation has the following objectives: "facilitate seamless end-to-end digital trade; enable trusted data flows; and build trust in digital systems."[20] The Modules function as "building blocks within a building

13. Press Release, Ministry of Trade & Industry Sing., *Singapore, Chile, and New Zealand Sign Digital Economy Partnership Agreement Electronically* (June 12, 2020), https://www.mti.gov.sg/Trade/Digital-Economy-Agreements/The-Digital-Economy-Partnership-Agreement.

14. *See*, Mira Burri, *Towards a New Treaty on Digital Trade*, 55(1) J. WORLD TRADE 77, 91-2 (2021) (discussing DEPA).

15. *Id.* at 92.

16. Press Release, Ministry of Trade & Industry Sing., *Joint Press Release on the Successful Accession of the Republic of Korea to the Digital Economy Partnership Agreement* (May 3, 2024), https://www.mti.gov.sg/Newsroom/Press-Releases/2024/05/Joint-Press-Release-on-the-successful-accession-of-the-Republic-of- Korea-to-the-Digital-Economy.

17. Ministry of Trade and Industry of Singapore, Digital Economy Partnership Agreement (DEPA), https://www.mti.gov.sg/Trade/Digital-Economy-Agreements/The-Digital-Economy-Partnership-Agreement (last updated Oct. 23, 2025).

18. Burri, *supra* note 14, at 91.

19. DEPA, *supra* note 3, art. 16.3.

20. Robert Fay & Dan Ciuriak, *Digital Economy Partnership Agreement Is a Big Step Forward: Canada Should Join*, CTR. FOR INT'L GOVERNANCE INNOVATION (Apr. 14, 2022), https://www.cigionline.org/articles/digital-economy-partnership-agreement-is-a-big-step-forward-canada-should-join/.

block."[21] Traditionally, individual free trade agreements (FTAs) are often considered in their totality.[22] However, with the DEPA and its modular structure, prospective countries have more options. A country can sign onto the agreement in its entirety.[23] Alternatively, another country can detach specific modules from the agreement and incorporate them in their domestic policies and/or future trade agreements.[24]

Box 1: DEPA Modules covering various digital trade issues[25]	
Module 1	Initial Provisions and General Definitions
Module 2	Business and Trade Facilitation
Module 3	Treatment of Digital Products and Related Issues
Module 4	Data Issues
Module 5	Wider Trust Environment
Module 6	Business and Consumer Trust
Module 7	Digital Identities
Module 8	Emerging Trends and Technologies
Module 9	Innovation and the Digital Economy
Module 10	Small and Medium Enterprises Cooperation
Module 11	Digital Inclusion

21. Giridharan Ramasubramanian, *Building on the Modular Design of DEPA*, E. ASIA FORUM (July 10, 2020), https://eastasiaforum.org/2020/07/10/building-on-the-modular-design-of-depa/.

22. *Id.*

23. *Id.*

24. *Id.*

25. *See generally*, DEPA, *supra* note 3 (containing 10 modules addressing each subject and an introductory provision with Definitions of terms of usage in digital trade).

The remaining modules deal with the operation and implementation of the DEPA:

Box 2: Modules covering DEPA operation and implementation[26]	
Module 12	Joint Committee and Contact Points
Module 13	Transparency
Module 14	Dispute Settlement
Module 15	Exceptions
Module 16	Final Provisions (with regard to amendments, entry into force, accession procedures, and withdrawal)

This modular structure is not without precedent; it mirrors the WTO's General Agreement on Trade in Services (GATS)[27] and other plurilateral agreements, which similarly allow countries to choose commitments on a sector-by-sector basis rather than adopting an agreement in its entirety. For example, under GATS, WTO members commit only to specific service sectors. DEPA applies this same logic to digital trade, enabling countries to selectively adopt modules covering issues such as AI governance, cybersecurity, and cross-border data flows. This flexibility makes DEPA particularly appealing for countries with divergent domestic regulatory frameworks, including the United States.

C. DEPA's Key Provisions

In outlining DEPA's key rules and principles for digital trade within the Modules, it is important to note that DEPA outright replicates several provisions from the CPTPP and mirrors other rules from the United States-Mexico-Canada Agreement (USMCA) and the United States-Japan Digital Trade Agreement (DTA). These mirrored provisions are consistent with adopting the United States approach to digital trade,[28] which will be further discussed in Part II.

---

26. *See id.*

27. General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

28. *See* Burri, *supra* note 14 at 88.

Concerning personal information (under Module 4, Article 4.2), DEPA Parties recognize the importance of protecting the personal information of participants in the digital economy.[29] In alignment with that principle, DEPA provides (using the same language from Article 14.8 of the CPTPP) that "each Party shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of electronic commerce."[30] DEPA extends this provision to include "digital trade" at the end.[31]

DEPA's provisions involving cross-border data flows also mirror the rules established by the CPTPP. In particular, 'Article 4.3: Cross-Border Transfer of Information by Electronic Means' under Module 4 uses verbatim language from Article 14.11 of the CPTPP, wherein the "Parties affirm their level of commitments relating to cross-border transfer of information by electronic means."[32] Article 4.3's inclusion, as derived by the CPTPP, indicates the DEPA Parties' commitment to support easy and free flows of data across borders. However, in aligning with the CPTPP's exceptions, paragraph 3 of Article 4.3 in DEPA will not prevent the adoption of inconsistent domestic measures to achieve a "legitimate public policy objective."[33]

Article 4.4 of the DEPA and Article 14.11 of the CPTPP are almost identical in ensuring that the Parties of their agreements do not "require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory."[34] Similarly, DEPA pulled provisions from the CPTPP in the language of the articles covering customs duties (Article 3.2) and digital products (Article 3.3). In both the DEPA and the CPTPP, parties cannot impose customs duties on electronic transmissions between "a person of one Party and a person of another Party."[35] The DEPA and the CPTPP provide for the 'Non-Discriminatory Treatment of Digital Products,' wherein parties cannot "accord less favorable treatment to digital products created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or to digital products of which the author, performer,

29. DEPA, *supra* note 3 art. 4.2.
30. *Id.*; CPTPP, *supra* note 11, art. 14.8.
31. DEPA, *supra* note 3, art. 4.2.
32. *Id.* art. 4.3; CPTPP, *supra* note 11, art. 14.8.
33. DEPA, *supra* note 3, art. 4.3; CPTPP, *supra* note 11, art. 14.8.
34. DEPA, *supra* note 3, art. 4.4; CPTPP, *supra* note 11, art. 14.13.
35. DEPA, *supra* note 3, art. 3.2; CPTPP, *supra* note 11, art. 14.3.

producer, developer or owner is a person of another Party, than it accords to other like digital products."[36]

The DEPA does contain different language from the CPTPP concerning paperless trade, but DEPA's Article 2.2 and the CPTPP's Article 14.9 still maintain the importance of it as the digitalization of the world progresses.[37] Regardless, the DEPA is noteworthy in tackling digital issues not covered in most agreements, including the CPTPP. Module 8 recognizes the rapid evolution of 'emerging trends and technologies' such as financial technology (fintech)[38] and artificial intelligence (AI).[39] Accordingly, 'Article 8.2: Artificial Intelligence' in Module 8 employs softer language and calls for promoting the adoption of such ethical and governance frameworks that support the responsible use of AI technologies.[40] In developing these AI governance frameworks, DEPA calls for the consideration of the internationally-recognized principles of "explainability, transparency, fairness, and human-centered values."[41] Overall, DEPA's provisions outline the general digital trade rules the original Parties conceived in order to reach their objectives in promoting seamless and trusted flows of data across borders.

D. Where is the United States?

Despite the significance of DEPA, the United States remains notably absent from the agreement. This absence is increasingly untenable as the U.S. faces mounting challenges in the global digital trade arena. China, through its initiatives, is aggressively exporting its model of digital governance, which emphasizes state control and data localization. At the same time, U.S. technology companies face regulatory conflicts across jurisdictions, from the European Union's General Data Protection Regulation (GDPR) to varying domestic privacy and taxation laws. These developments highlight the risks of regulatory fragmentation and the strategic cost of ceding leadership in setting global digital trade standards.

This Note proceeds as follows. Part II explores how DEPA's modular framework can harmonize U.S. and global digital trade rules while

36. DEPA, *supra* note 3, art. 3.3; CPTPP, *supra* note 11, art. 14.4.
37. DEPA, *supra* note 3, art. 2.2; CPTPP, *supra* note 11, art. 14.9.
38. DEPA, *supra* note 3, art. 8.1.
39. *Id*. art. 8.2.
40. *Id*.
41. *Id*.

accommodating domestic regulatory complexities. Part III examines the growing influence of China in digital trade and artificial intelligence and argues that U.S. participation in DEPA is essential to counter this trend. Part IV considers the potential of U.S. involvement in DEPA to serve as a foundation for a comprehensive global framework on digital trade. This Note concludes by emphasizing the critical importance of U.S. leadership in DEPA to secure its economic, strategic, and ethical interests in the digital economy.

The stakes for U.S. involvement in DEPA extend far beyond economics. Digital trade rules will define the contours of the 21st-century global economy, influencing everything from privacy rights to national security. If the U.S. fails to engage, it risks ceding this vital space to competitors like China, jeopardizing both its economic leadership and its vision for an open and secure digital future. Joining DEPA is not merely a policy choice; it is a strategic imperative to safeguard U.S. influence in the digital age.

II. UTILIZING DEPA'S FLEXIBILITY TO HARMONIZE FAVORABLE DIGITAL TRADE RULES

As digital trade continues to grow, regulatory fragmentation poses significant challenges for businesses operating across borders. The lack of a unified framework increases compliance costs, creates legal uncertainties, and stifles innovation. DEPA's modular structure provides an adaptable solution that allows the United States to selectively adopt provisions that align with its domestic regulations while promoting global consistency. This section explores how DEPA can help the U.S. harmonize digital trade rules, reduce regulatory burdens, and reinforce its leadership in global trade. By examining the fragmented digital landscape, DEPA's alignment with existing U.S. trade agreements, and the benefits for American businesses, including small and medium enterprises (SMEs), this section contends that DEPA provides an essential framework for shaping international digital trade norms in a way that supports U.S. economic and strategic interests.

A. Global Digital Trade's Fragmented Landscape

As briefly touched upon in Part I, digital trade poses unique challenges. Accordingly, economies around the world adopted policies to tackle these issues. Even with the growing relevance of this issue, at the multilateral level, the World Trade Organization (WTO) has failed to reach an international agreement to address all aspects of digital

trade in a comprehensive manner.[42] Understandably, the 1995 WTO agreements on trade lack dedicated provisions on trade issues that emerged during the digital age. Otherwise, WTO Members agreed not to impose customs duties on electronic transmissions.[43] However, this agreement is only a temporary moratorium that Members must periodically extend by consensus rather than a permanent prohibition.[44]

In December 2017, 71 WTO members initiated exploratory work to begin negotiations on trade-related aspects of e-commerce.[45] These trade discussions (with 82 eventual members) lasted for about five years. On July 26, 2024, Australia, Japan, and Singapore (as co-convenors) released the WTO 'joint statement initiative on electronic commerce'.[46] However, this agreement only covers "less controversial issues"[47] including 1) enabling electronic commerce; 2) openness and electronic commerce; 3) trust and electronic commerce; 4) transparency, cooperation, and development; 5) telecommunications; and 6) institutional arrangements including dispute settlement, implementation, etc.[48] Crucially, the agreement lacks language on other important issues related to digital trade including "cross-border data, localization mandates, discriminatory treatment of digital products, or source code."[49] Moreover, the United States (through the Office of the U.S. Trade Representative or 'USTR') withdrew from these discussions on October 24, 2023 in order to "give Congress room to regulate big tech firms."[50]

With the lack of a comprehensive WTO agreement as well as the U.S. withdrawal from international digital trade negotiations, the

42. Zhihan Tian, *Cracking the Digital Spaghetti Bowl: A Recipe for Streamlined Global Trade*, MICH. J. INT'L L. BLOG (Nov. 2023), https://www.mjilonline.org/cracking-the-digital-spaghetti-bowl.

43. *Id.*

44. Frank J. Schweitzer, Ian Saccomanno & Naoto Nelson Saika, *The Rise of Artificial Intelligence, Big Data, and the Next Generation of International Rules Governing Cross-Border Data Flows and Digital Trade—Part I*, 1 GLOB. TRADE L.J. 98, 104 (2024).

45. Ministerial Conference, *Joint Statement on Electronic Commerce*, WTO Doc. WT/MIN (17)/60 (Dec. 13, 2017).

46. World Trade Organization, *Joint Statement Initiative on Electronic Commerce*, WTO Doc. INF/ECOM/87 (July 26, 2024).

47. *See* Schweitzer, Saccomanno & Saika, *supra* note 44, at 109.

48. *Id.* at 112.

49. *World Trade Organization Publishes Agreement on Electronic Commerce*, GLOBAL DATA ALLIANCE (July 26, 2024), https://globaldataalliance.org/news/world-trade-organization-publishes-agreement-on-electronic-commerce/.

50. David Lawder, *U.S. Drops Digital Trade Demands at WTO to Allow Room for Stronger Tech Regulation*, REUTERS (Oct. 25, 2023), https://www.reuters.com/world/us/us-drops-digital-trade-demands-wto-allow-room-stronger-tech-regulation-2023-10-25/.

United States ceded ground to other countries around the world to develop their own digital trade rules. Accordingly, countries have devoted chapters to digital trade in new preferential trade agreements and/or instituted domestic and foreign policies related to digital trade (that could be described as a 'spaghetti bowl of digital trade rules'),[51] effectively creating "a new, albeit fragmented, governance framework for the data-driven economy."[52] Within this landscape, three approaches to digital trade (as developed by the largest economies in the world) emerged.

B. Three Approaches to Digital Trade

For recent trade agreements, the United States has consistently incorporated provisions addressing digital trade, with notable examples including the now-defunct Trans-Pacific Partnership (TPP) (which was continued as the CPTPP without the United States), the United States-Mexico-Canada Agreement (USMCA), and the US-Japan Digital Trade Agreement (DTA).[53] These provisions comprise what scholars consider as the U.S. approach to digital trade.[54] These provisions prohibit measures such as imposing customs duties on electronic transmissions, discriminating against foreign digital products, restricting cross-border data transfers, mandating local data storage, or requiring the transfer of source codes.[55]

Through the General Data Protection Regulation (GDPR),[56] the European Union (EU) adopts a firm stance on prioritizing privacy over the unrestricted flow of data.[57] The GDPR views privacy as a fundamental human right.[58] Accordingly, it restricts the transfer of personal

51. *See* Tian, *supra* note 42, at 2.

52. Pablo Trigo Kramcsák & Michelle Bordachar Benoit, *The Potential Impact of the Digital Economy Partnership Agreement on the Future of Cross-Border Personal Data Flows*, DIGITAL TRADE ALLIANCE (Oct. 5, 2023) https://dtalliance.org/2023/10/05/the-potential-impact-of-the-digital-economy-partnership-agreement-on-the-future-of-cross-border-personal-data-flows/.

53. *See* Burri, *supra* note 14, at 88, 90.

54. *Id.* at 90.

55. *Id.* at 84.

56. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), 2016 O.J. (L 119) 1.

57. Frank J. Schweitzer, Ian Saccomanno & Naoto Nelson Saika, *The Rise of Artificial Intelligence, Big Data, and the Next Generation of International Rules Governing Cross-Border Data Flows and Digital Trade—Part II*, 1 GLOB. TRADE L.J. 173, 181–82 (2024).

58. Henry Gao, *Data Regulation in Trade Agreements: Different Models and Options Ahead*, *in* DIGITAL TRADE AND DATA REGULATION: EMERGING MODELS AND THE FUTURE OF GLOBAL RULES 324, 328–29 (2021).

data outside the EU unless the destination country is deemed to provide adequate data protection.[59] This policy has created ongoing tensions with the United States, as EU courts have repeatedly issued rulings limiting data transfers between the two economies due to concerns over privacy standards.[60] Additionally, the EU passed data-related domestic laws that affect the United States such as the Digital Markets Act (DMA).[61] The act identifies digital services across borders as under its purview.[62] A CSIS study showed that EU regulations in the tech sector resulted in an estimated $22–$50 billion in compliance costs for U.S. service providers.[63] In addition, as of November 2024, Apple is set to be the first company to face fines under the DMA as EU regulators charged that the company has breached the EU's tech rules.[64]

China's approach to digital trade is currently relatively modest.[65] China's provisions focus on trade facilitation measures.[66] These include a moratorium on customs duties for electronic transmissions, the recognition of electronic authentication and electronic signatures, protections for personal information in e-commerce, the promotion of paperless trading, the establishment of domestic legal frameworks for electronic transactions, and ensuring that consumers engaging in e-commerce receive a level of protection comparable to that provided in traditional commerce.[67]

For Chinese domestic laws, internet activity and data usage have long been subject to strict authoritarian regulation, covering both the hardware required to access international networks and the content permissible online.[68] Many foreign websites are filtered or blocked, reflecting China's cautious approach to the free flow of data, and in 2017, China enacted the Cybersecurity Law, mandating that operators of critical information infrastructure store any personal data collected

59. *Id.* at 329.

60. *Id.* at 328–29.

61. Thibault Denamiel et al., *Beyond Economics: How U.S. Policies Can Undermine National Security Goals*, CTR. FOR STRATEGIC & INT'L STUD. (May 3, 2024), https://www.csis.org/analysis/beyond-economics-how-us-policies-can-undermine-national-security-goals.

62. *Id.*

63. *Id.*

64. Foo Yun Chee, *Apple Set to Face Fine Under EU's Landmark Digital Markets Act, Sources Say*, REUTERS (Nov. 5, 2024), https://www.reuters.com/technology/apple-set-face-fine-under-eus-landmark-digital-markets-act-sources-say-2024-11-05/.

65. *See* Gao, *supra* note 58, at 329.

66. *Id.*

67. *Id.*

68. *Id.* at 330.

or generated within China locally.[69] This requirement contrasts sharply with U.S. efforts to eliminate data localization mandates in international trade agreements.[70] Additionally, privacy protection in China is relatively underdeveloped.[71] It was only introduced into the legal framework in 2009, and it includes broad exemptions for government actions.[72]

Evidently, more and more countries are following the approaches by the EU and China in prioritizing data localization over the free flow of data across borders. There is an increasing number of countries pursuing data localization measures with nearly 100 such measures implemented across 40 countries by early 2023.[73] Over half of these measures were introduced after 2015, highlighting a recent significant increase in their adoption. These measures are becoming progressively restrictive.[74] By 2023, more than two-thirds of the measures required local storage and processing of data, often without allowing for alternative arrangements or exceptions.[75] This trend underscores a tightening approach to data globally.[76]

The United States had the opportunity to push for its approach in global digital trade rules during the negotiations that culminated with the development of the WTO joint statement on e-commerce.[77]Notably, the agreement prohibits customs duties on electronic transmissions, which aligns with the U.S. approach.[78] However, as discussed earlier, the United States withdrew from these negotiations before these talks concluded.[79] Although the agreement adopted the U.S. approach to digital trade, the U.S. withdrawal itself signals an opening for other countries to pursue their own global digital trade rules.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Chiara Del Giovane, Janos Ferencz & Javier López González, *The Nature, Evolution and Potential Implications of Data Localisation Measures*, OECD Trade Policy Paper No. 278 (2023).

74. *Id.* at 12.

75. *Id.*

76. *See id.* at 12–13.

77. *See* Burri, *supra* note 14, at 94.

78. *Id*.

79. Lawder, *supra* note 50.

C. Promoting the U.S. Approach Through DEPA

The lack of consistent rules and regulations increases compliance costs and disrupts the seamless flow of goods, services, and data across borders. This issue is particularly acute for U.S. businesses due to the absence of a unified federal data privacy law.[80] Without federal action from the executive or legislative branches, individual states have adopted their own regulations, such as the California Consumer Privacy Act (CCPA) and Virginia's Consumer Data Protection Act (CDPA).[81] These fragmented policies create additional challenges to establishing national leadership, as a cohesive approach is critical to supporting the domestic tech sector effectively.[82]

The proliferation of state-level regulations increases the regulatory burden on businesses, which must navigate and comply with multiple, sometimes incompatible, sets of standards rather than adhering to a single federal framework.[83] These inconsistencies not only complicate compliance but also pose significant challenges for U.S. companies competing on a global scale.[84]

The Digital Economy Partnership Agreement (DEPA) provides a solution to these challenges by offering a harmonized yet flexible framework for digital trade. DEPA's modular structure enables member countries to adopt provisions selectively, ensuring that their regulatory priorities are respected.[85] This flexibility makes DEPA an ideal platform for reinforcing consistent rules that reduce fragmentation while furthering innovation and economic growth.

Furthermore, DEPA's provisions are modeled after the U.S. approach. As discussed in Part I, DEPA features language similar and sometimes identical to that in the CPTPP, USMCA, and DTA.[86] Article 4.4 prohibits unnecessary data localization requirements involving the location of computing facilities, ensuring that businesses can store and process data where it is most efficient.[87] By removing these barriers, DEPA facilitates the seamless movement of data, enabling

80. *See* Denamiel et al., *supra* note 61.

81. DANIEL CASTRO, LUKE DASCOLI, & GILLIAN DIEBOLD, THE LOOMING COST OF A PATCHWORK OF STATE PRIVACY LAWS 4-5 (2022).

82. *Id.* at 1.

83. *Id.*

84. *See id*. (estimating that, absent federal privacy laws, state privacy laws could impose out-of-state costs exceeding $1 trillion over a 10-year period).

85. Ramasubramanian, *supra* note 21.

86. Burri, *supra* note 14, at 92.

87. DEPA, *supra* note 3, art. 4.4.

companies to operate on a global scale. At the same time, Article 4.2 emphasizes the importance of protecting personal data, striking a balance between data mobility and privacy.[88]

For the United States, these provisions (as modeled by the U.S. approach) offer significant benefits. Major U.S. tech companies, such as Amazon, Microsoft, and Google, rely on cross-border data flows to deliver services, support AI development, and facilitate global e-commerce.[89] Data localization laws in key markets impose considerable costs on these businesses.[90] Based on OECD business survey findings, businesses report significant cost increases due to data localization measures.[91] Local storage requirements without flow restrictions are estimated to raise data management costs by approximately 16%.[92] However, when combined with restrictions on data transfers, costs rise dramatically by around 55%.[93] Furthermore, 8% of surveyed businesses indicated that stringent data localization measures could entirely prevent them from operating internationally.[94]

By joining DEPA, the United States would advocate for international rules that protect data mobility while maintaining high standards of privacy and security. U.S. membership in DEPA would incentivize other major economies to adopt DEPA's principles. Moreover, DEPA's provisions align with ongoing domestic discussions about federal privacy legislation. Although the U.S. currently lacks a unified approach to data privacy, DEPA's emphasis on transparency and accountability complements existing state laws. [86A] This alignment demonstrates that the United States can join DEPA without compromising its regulatory autonomy. Aside from harmonizing digital trade rules, certain DEPA provisions would also support U.S. businesses and promote consumer trust.

88. *Id.* art. 4.2.

89. *See generally* Volker Brühl, *Big Tech, the Platform Economy and the European Digital Markets*, 58(5) INTERECONOMICS 274, 274 (2023).

90. *See generally* NIGEL CORY & LUKE DASCOLI, HOW BARRIERS TO CROSS-BORDER DATA FLOWS ARE SPREADING GLOBALLY, WHAT THEY COST, AND HOW TO ADDRESS THEM (2021) (explaining that restricting data flows has a statistically significant impact on a nation's economy).

91. *See* Giovane, Ferencz & López González, *supra* note 73, at 17–28.

92. *Id.* at 17.

93. *Id.*

94. *Id.*

D. Supporting U.S. Business Operations in Global Trade

Efficient trade operations are critical for businesses navigating the complexities of global commerce. However, traditional trade processes, which are often reliant on paper-based systems, are slow, expensive, and prone to errors.[95] There is concern that the U.S. approach in digital trade rules, which the first Trump administration supported based on the digital trade provisions in the USMCA and DTA,[96] overwhelmingly favors Big Tech companies and their interests.[97] Accordingly, several congress members supported the USTR withdrawal from WTO e-commerce negotiations in order to hold Big Tech accountable.[98] However, small and medium enterprises (SMEs), in particular, struggle to meet the administrative burdens of international trade and would benefit from adopting and promoting favorable digital trade rules under the U.S. approach.

As the U.S. Chamber of Commerce notes, SMEs, unlike larger corporations with diverse product offerings, service lines, and greater resources, often struggle to absorb the additional costs associated with data localization, forced technology transfers, and inconsistent regulatory enforcement targeting U.S. firms.[99] The withdrawal of U.S. support in addressing cross-border data restrictions in spaces such as the WTO statement on e-commerce paves the way for more countries to implement forced data localization and other barriers to critical data flows.[100] This would further complicate the ability of smaller businesses to transfer data internationally, placing them at a significant

95. *See Paperless Trading: How Does It Impact the Trade System,* WORLD ECON. F., 4 (Oct. 2017), https://www3.weforum.org/docs/WEF_36073_Paperless_Trading_How_Does_It_Impact_the_Trade_System.pdf.

96. *See* Tian*, supra* note 42 (citing Leslie L. Rossman & Joshua S. Hanan, *Trump's Promise to Make America Manufacture Again: USMCA and the Rhetoric of Neoliberal Exception*, NAT'L. COMMC'N. ASS'N. (Feb. 19, 2019), https://www.natcom.org/publications-library/trumps-promise-make-america-manufacture-again-usmca-and-rhetoric-neoliberal/#:~:text=Home%20%C2%BB%20Publications%20Library%20%C2%BB%20Trump's%20Promise,resource:%202019%20Current%20Commentary%20Feb%20Political%20Communication).

97. *See* Rishab Bailey & Melinda St Louis, *Big Tech's Broken Record: Supply Chains Hearing Edition*, PUB. CITIZEN (May 10, 2024), https://www.citizen.org/news/big-techs-broken-record-supply-chains-hearing-edition/; Lawder, *supra* note 50.

98. *See generally* DEPA, *supra* note 3, art. 4.2 (establishing transparency and accountability as requirements for personal data protection).

99. Isabelle Isco, *How USTR's Digital Trade Reversal Will Hurt Small Businesses*, U.S. CHAMBER OF COM. (Nov. 20, 2023), https://www.uschamber.com/international/trade-agreements/ustr-digital-trade-reversal-will-hurt-small-businesses.

100. *Id.*

disadvantage.[101] U.S. membership in DEPA would signal to other countries the importance of the U.S. approach to the free flow of data across borders and opposition to data localization measures.

DEPA's provisions for the adoption of digital identity frameworks and paperless trading systems would also support SMEs. Article 7.1 encourages the development of interoperable digital identity frameworks, which allow businesses and consumers to verify their identities securely and efficiently.[102] These systems reduce fraud, enhance trust, and facilitate cross-border transactions. Meanwhile, Article 2.5 supports the use of electronic invoicing (e-invoicing), streamlining trade documentation and reducing transaction costs.[103] For the United States, these digital trade provisions would be particularly important. SMEs play a vital role in the U.S. economy, accounting for nearly half of the country's GDP and employing approximately 61 million people.[104] However, SMEs often lack the resources to navigate complex international trade regulations.[105] By adopting DEPA's provisions on digital identities and e-invoicing, the United States could simplify trade processes, making global markets more accessible to smaller businesses. In addition, these provisions align with existing U.S. initiatives to modernize trade infrastructure. For example, the U.S. Customs and Border Protection agency has increasingly adopted paperless systems to expedite cargo clearance.[106] DEPA's emphasis on paperless trading in Article 2.2 would complement these efforts, fostering greater efficiency across the supply chain.

E. Enhancing Consumer Trust Through Cybersecurity and Data Protection

Consumer trust is essential for the growth of the digital economy. However, high-profile data breaches and cybersecurity threats have eroded confidence in online systems. Without robust protections, consumers may be reluctant to participate in digital trade, limiting its potential. DEPA prioritizes consumer trust through provisions on

101. *Id.*

102. DEPA, *supra* note 3, art. 7.1.

103. *Id.* art. 2.5.

104. Stephanie Ferguson Melhorn, Makinizi Hoover, & Isabella Lucy, *Small Business Data Center*, U.S. CHAMBER OF COM. (May 20, 2024), https://www.uschamber.com/small-business/small-business-data-center.

105. *See* Brühl, *supra* note 89.

106. U.S. Customs & Border Prot., CBP Goes Paperless for Global Entry, CBP, https://www.cbp.gov/newsroom/local-media-release/cbp-goes-paperless-global-entry.

cybersecurity and data protection. Article 5.1 promotes international cooperation on cybersecurity, encouraging member countries to adopt best practices and share information about emerging threats.[107] Additionally, Article 6.3 emphasizes the importance of protecting consumer rights in e-commerce, ensuring that buyers have access to accurate information and effective dispute-resolution mechanisms.[108]

For the United States, these provisions align with domestic priorities. The U.S. government has already taken steps to enhance cybersecurity through initiatives such as the Cybersecurity and Infrastructure Security Agency (CISA) and the National Institute of Standards and Technology (NIST) Cybersecurity Framework.[109] By joining DEPA, the United States could extend these efforts to the international stage, fostering greater collaboration on global cybersecurity challenges.

Policymakers argue that committing to global standards could limit a country's ability to pursue its own policies. This concern was highlighted when the United States withdrew from WTO negotiations on e-commerce in October 2023, citing the need to retain flexibility for implementing stronger domestic regulations on technology and digital trade.[110] This move underscores the tension between adhering to international frameworks and preserving national policy autonomy. However, DEPA's modular structure addresses these concerns by allowing countries to adopt provisions selectively.[111] This flexibility ensures that member states can align their commitments with domestic priorities while also benefiting from the agreement's broader framework.

For the United States, this approach strikes an ideal balance between flexibility and consistency. By participating in DEPA, the U.S. can influence the development of international standards while retaining control over its regulatory agenda. Moreover, DEPA's provisions are designed to complement, rather than replace, existing national laws, ensuring that participation does not compromise sovereignty.

---

107. *See* DEPA, *supra* note 3, art. 5.1.

108. *See id.* art. 6.3.

109. *See generally* CYBERSECURITY & INFRASTRUCTURE SECURITY AGENCY, U.S. DEP'T OF HOMELAND SEC., https://www.cisa.gov/about; *see* U.S. DEPARTMENT OF COMMERCE: NAT'L INST. OF STANDARDS & TECH., NIST CYBERSECURITY FRAMEWORK; *see* 2.0 SMALL BUSINESS QUICK-START GUIDE, (2024), https://www.nist.gov/itl/smallbusinesscyber/nist-cybersecurity-framework-0.

110. Lawder, *supra* note 50.

111. Ramasubramanian, *supra* note 21.

DEPA represents a unique opportunity for the United States to address the challenges of regulatory fragmentation while fostering innovation and growth. Its provisions on cross-border data flows, digital identities, and emerging technologies offer practical solutions to the complexities of digital trade. Moreover, its living agreement model ensures that the framework remains adaptable to future developments. By joining DEPA, the United States can reinforce harmonized rules that reduce compliance burdens, enhance consumer trust, and support SMEs. At the same time, it can maintain the flexibility needed to protect domestic priorities. In doing so, the U.S. strengthens its own digital economy both domestically and globally.

III. COUNTERING CHINA'S GROWING INFLUENCE AND ESTABLISHING U.S. LEADERSHIP IN DIGITAL TRADE AND ARTIFICIAL INTELLIGENCE

China is rapidly expanding its influence in global digital trade through initiatives like the Digital Silk Road and its participation in the Regional Comprehensive Economic Partnership (RCEP). Beijing's model of digital governance, which emphasizes state control, data localization, and surveillance, stands in direct contrast to the open-market, privacy-centric approach championed by the United States. If China successfully joins DEPA without U.S. involvement, it could reshape the agreement's provisions to align with its regulatory preferences, undermining DEPA's foundational principles. This section highlights China's strategic ambitions in digital trade and artificial intelligence (AI) governance, the risks of allowing China to dominate digital trade rule-making, and how U.S. membership in DEPA would serve as a counterweight to Beijing's growing influence. By leveraging DEPA's living agreement model, the U.S. can shape emerging technology regulations, reinforce democratic values in AI governance, and prevent China from tilting global digital norms in its favor.

A. China's Growing Influence

China's growing influence in the global digital trade space has become a significant geopolitical and economic challenge for the United States. Initiatives such as the Digital Silk Road (DSR), a key component of China's Belt and Road Initiative[112], have expanded Beijing's

112. *See* Su Dan, *Digital Silk Road Development Enables Connectivity, Prosperity*, BELT AND ROAD PORTAL (Apr. 17, 2024), https://eng.yidaiyilu.gov.cn/p/0N79SEI5.html.

technological reach by providing infrastructure and digital services to developing nations, often accompanied by strict data localization requirements and state-centric internet governance models.[113] China has reportedly invested approximately $79 billion in projects related to the DSR, with expectations that its financial support for these initiatives will increase significantly throughout the 2020s.[114] Additionally, China's participation in the Regional Comprehensive Economic Partnership (RCEP)[115] has further solidified its role in shaping regional trade dynamics in Asia, with limited U.S. involvement in the Asia-Pacific region to counterbalance this influence.[116]

In this context, U.S. leadership in digital trade agreements such as DEPA is critical. The United States' absence in key multilateral frameworks has created a vacuum that China has adeptly filled, promoting its authoritarian vision of digital governance. By contrast, DEPA provides an opportunity to advance the U.S. approach for openness and innovation, which counterbalances the restrictive and state-controlled approach championed by Beijing.

Recent U.S. policy actions underscore the urgency of re-engaging in the digital trade arena. The trade war with China during both Trump administrations highlighted the complexities of economic interdependence, particularly because of China's unfair trade practices. Measures such as the 2022 CHIPS Act[117] and the 2024 TikTok ban[118] upheld by the Supreme Court[119] emphasized the need to address security risks associated with China's digital and technological influence. However, these actions alone are insufficient to construct a cohesive global strategy.

China's expressed interest in joining DEPA further demonstrates the stakes involved. If Beijing succeeds in shaping the agreement to align with its preferences, it could undermine DEPA's original principles of free data flows, digital trust, and interoperability. U.S.

113. *See generally* Assessing China's Digital Silk Road Initiative, COUNCIL ON FOREIGN REL., https://www.cfr.org/china-digital-silk-road/ (last visited Jan. 17, 2025).

114. *See id.*

115. Regional Comprehensive Economic Partnership Agreement, Nov. 15, 2020, https://cil.nus.edu.sg/about-us/.

116. *See* Jennifer Kavanagh & Mariano-Florentino Cuéllar, *U.S. Engagement in the Indo-Pacific: Don't Trade Away Trade*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Jun 25, 2024), https://carnegieendowment.org/research/2024/06/us-engagement-in-the-indo-pacific-dont-trade-away-trade?lang=en.

117. CHIPS and Science Act of 2022, Pub. L. No. 117-167, 136 Stat. 1366.

118. *See* Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50, 138 Stat. 955 (2024).

119. *See* TikTok, Inc. v. Garland, 604 U.S. 56, 73 (2025).

membership is essential to ensuring that the agreement remains aligned with the U.S. approach to digital trade.

B. The Rise of Artificial Intelligence in the U.S. and China

Artificial intelligence (AI) as an emerging technology is at the heart of the digital revolution. AI technologies underpin innovations in autonomous vehicles, healthcare, financial systems, and national security. With applications in almost every sector, AI has become a key driver of economic growth and a strategic asset in global competition. The United States and China are the top two players in the AI race, accounting for the majority of global investment, talent, and growth in the field.

According to a Stanford University report on AI, the U.S. and China together make up the majority in global AI research and development spending.[120] By objective measures, the United States leads the world in AI development and private investment, with its companies, universities, and think tanks producing groundbreaking advancements in machine learning models.[121] At the same time, China is looking to increase its influence and development in AI as it seeks to be the United States' primary AI competitor. According to a recent report from the International Data Corporation (IDC), China is projected to more than double its investment in artificial intelligence to approximately $27 billion by 2026, with over half of this spending allocated to the hardware market.[122] China has demonstrated strong competitiveness in AI since Chinese startup DeepSeek unveiled its DeepSeek-V3 model in December 2024.[123] The startup's research paper questioned whether U.S. companies could maintain their AI lead, as it claimed to have trained the model using only a fraction of the computing power relied on by major US-based AI firms.[124]

The importance of artificial intelligence to the United States cannot be understated. The U.S. artificial intelligence market was valued

120. STANFORD UNIV. INST. FOR HUMAN-CENTERED ARTIFICIAL INTELLIGENCE, THE 2025 AI INDEX REPORT (2025), https://hai.stanford.edu/ai-index/2025-ai-index-report.

121. *Id.*

122. Ben Wodecki, *China Set to More Than Double AI Spending by 2026*, DATA CTR. KNOWLEDGE (Oct. 14, 2022), https://www.datacenterknowledge.com/ai-data-centers/china-set-to-more-than-double-ai-spending-by-2026 (citing *IDC's Worldwide AI and Generative AI Spending – Industry Outlook Generative AI*).

123. *See* Cade Metz, *What to Know About DeepSeek and How It Is Upending A.I.*, N.Y TIMES (Jan. 27, 2025), https://www.nytimes.com/2025/01/27/technology/what-is-deepseek-china-ai.html.

124. *Id.*

at approximately USD 103.7 billion in 2022 and is projected to grow significantly, reaching an estimated USD 594 billion by 2032.[125] The seven largest AI companies in the world are U.S.-based,[126] including Apple, Alphabet, Meta, and NVIDIA. On a federal policy level, federal agencies are increasingly identifying applications for artificial intelligence within their operations.[127] In 2024, agencies reported over 1,700 potential use cases for AI, representing a significant increase of approximately 500 examples compared to 2023.[128] The second Trump administration also foresees the importance of AI. President Trump recently appointed White House staff members whose policy platforms center on artificial intelligence, including Silicon Valley veteran David Sacks as AI czar[129] and Sriram Krishnan as the Senior Policy Advisor for Artificial Intelligence within the White House Office of Science and Technology Policy.[130] In addition, President Trump announced a $500 billion private sector investment to fund AI infrastructure in a joint venture called Stargate.[131] To guide this national effort, the White House released America's AI Action Plan in July 2025, laying out a three-pillar strategy: accelerating AI innovation, building domestic infrastructure such as data centers and semiconductor facilities, and leading in international AI diplomacy and security.[132] The plan,

125. Benjamin Stratton, *AI Industry Growth Statistics*, BLUE TREE DIGITAL (Oct. 18, 2025), https://bluetree.digital/ai-industry-growth-metrics/.

126. *See* Denamiel et al., *supra* note 61, at 5.

127. Jory Heckman, *Trump Administration's AI Team Comes into Focus as Agencies Reach 1,700 AI Use Cases,* FED. NEWS NETWORK (Dec. 23, 2024), https://federalnewsnetwork.com/artificial-intelligence/2024/12/trump-administrations-ai-team-comes-into-focus-as-agencies-reach-1700-ai-use-cases/.

128. Jory Heckman, *Trump Administration's AI Team Comes into Focus as Agencies Reach 1,700 AI Use Cases*, FED. NEWS NETWORK (Dec. 23, 2024), https://federalnewsnetwork.com/artificial-intelligence/2024/12/trump-administrations-ai-team-comes-into-focus-as-agencies-reach-1700-ai-use-cases/ (citing U.S. CHIEF INFO. OFFICERS COUNCIL, 2024 FEDERAL AI USE CASE INVENTORY (2024), https://cg-f7a6dbc1-b791-40b1-9eeb-e725679c82c9.sites.pages.cloud.gov/demo/gsa/cio.gov-redo/policies-and-priorities/ [https://cg-f7a6dbc1-b791-40b1-9eeb-e725679c82c9.sites.pages.cloud.gov/demo/gsa/cio.gov-redo/policies-and-priorities/Executive-Order-13960-AI-Use-Case-Inventories-Reference/]).

129. Andrew R. Chow, *What Trump's New AI and Crypto Czar David Sacks Means for the Tech Industry*, TIME (Dec. 10, 2024, at 2:14 ET), https://time.com/7200518/david-sacks-new-white-house-ai-crypto-czar-trump-administration/.

130. Gyana Swain, *Trump Taps Sriram Krishnan for AI Advisor Role Amid Strategic Shift in Tech Policy*, CIO (Dec. 23, 2024), https://www.cio.com/article/3629924/trump-taps-sriram-krishnan-for-ai-advisor-role-amid-strategic-shift-in-tech-policy.html.

131. Steve Holland, *Trump Announces Private-Sector $500 Billion Investment in AI Infrastructure*, REUTERS (Jan. 21, 2025, at 19:42 PT), https://www.reuters.com/technology/artificial-intelligence/trump-announce-private-sector-ai-infrastructure-investment-cbs-reports-2025-01-21/.

132. EXEC. OFF. OF THE PRESIDENT, WINNING THE RACE AMERICA'S AI ACTION PLAN (2025).

developed pursuant to Executive Order 14179, frames AI as essential to national security and American prosperity, calling for deregulation, expanded federal adoption, workforce retraining, and protection of U.S. technological leadership.[133]

Given the strategic importance of AI, establishing international rules for its development and use must be a top priority for the United States. However, the values and priorities of the U.S. and China differ significantly. The overwhelming consensus in the United States is that responsible artificial intelligence requires "fairness, transparency, privacy, human safety, and explainability."[134] In contrast, China's AI governance model is intertwined with its broader digital trade approach, which emphasizes state control and the use of AI for surveillance and social management.[135]

For the United States, DEPA's adaptability is a significant advantage. As a global leader in technological innovation, the U.S. is uniquely positioned to shape the rules governing emerging technologies. For instance, the United States could use DEPA's living agreement framework to advocate for international standards in line with DEPA's consideration on ethical AI usage, including "transparency, fairness, and human-centered values" under Article 8.2.[136] Through DEPA's amendment process under Article 16.3,[137] the U.S. can propose AI provisions that align with its approach in digital trade rules and responsible AI governance. These standards would not only ensure responsible AI development but also protect U.S. companies from unfair competition in markets with less rigorous regulations.

C. DEPA as a Platform for Shaping AI Governance

DEPA provides an ideal platform for the U.S. to shape international AI governance. Article 12.4[138] of DEPA includes provisions for cooperation on emerging technologies, including AI. These provisions emphasize ethical AI practices, transparency, and innovation, aligning closely with U.S. priorities. DEPA's AI provisions are "open-ended

133. *Id.*; Exec. Order No. 14179, 90 Fed. Reg. 8741 (Jan. 23, 2025).

134. Darrell M. West, *Six Steps to Responsible AI in the Federal Government*, BROOKINGS INST. (Mar. 30, 2022), https://www.brookings.edu/articles/six-steps-to-responsible-ai-in-the-federal-government/.

135. Jing Cheng & Jinghan Zeng, *Shaping AI's Future? China in Global AI Governance*, 32 J. CONTEMP. CHINA 794, 798-804 (2023).

136. DEPA, *supra* note 3, art. 8.2.

137. *Id.* art. 16.3.

138. *Id.* art 12.4.

and indeterminate, which does not make it possible to specify the scope of these non-binding commitments, nor does it provide clear guidelines on the framework that the Parties should develop."[139] However, these broad provisions leave room for further development by the United States. By joining DEPA, the U.S. could lead efforts to expand these provisions, advocating for rules that promote responsible AI development while addressing key challenges such as algorithmic bias, data privacy, and intellectual property protection. Through the amendment process outlined in Article 16.3,[140] the United States can propose AI governance provisions for their inclusion and advocate that DEPA member countries follow suit in their own domestic policy areas.

As the global leader in artificial intelligence, the United States is poised to be at the forefront of identifying and addressing emerging issues arising from the rapid advancement of AI technologies. Among these challenges, intellectual property (IP) and copyright protections stand out as current challenging areas. The unique ability of AI systems to generate creative works, from written content like scripts to visual art, raises profound questions about authorship, ownership, and the scope of existing legal frameworks. The United States is well-positioned to pioneer provisions for DEPA that balance the interests of creators, AI developers, and end-users. By tackling these issues early, the U.S. can shape global norms and standards, ensuring that IP and copyright policies remain fair, forward-looking, and conducive to continued technological progress.

China has already begun addressing this issue by introducing IP protections for AI-generated works under its domestic laws.[141] If China were to influence DEPA's rules, it could push for provisions that favor its state-led and restrictive approach. To counter this, the U.S. could advocate for expanded AI provisions within DEPA that explicitly protect IP rights. Currently, there is ongoing legislation such as the NO FAKES Act, which aims to protect creators from unauthorized digital replicas.[142] DEPA allows the United States to enshrine

139. Kramcsák & Benoit, *supra* note 52, at 32.

140. *See* DEPA, *supra* note 3, art. 16.3.

141. *See* Loke-Khoon Tan, James Lau & Harrods Wong, *China: A Landmark Court Ruling on Copyright Protection for AI-Generated Works*, GLOB. LITIG. NEWS (May 8, 2024), https://global-litigationnews.bakermckenzie.com/2024/05/08/china-a-landmark-court-ruling-on-copyright-protection-for-ai-generated-works/.

142. Nina Frazier, *NO FAKES Act Introduced in the Senate: Protecting Artists' Rights in the Age of AI*, RECORDING ACAD. (Aug. 9, 2024, at 08:44 PT), https://www.recordingacademy.com/advocacy/news/no-fakes-act-introduced-in-the-senate/.

these provisions through Article 16.3's amendment process.[143] Such provisions incentivize productivity in creative industries such as film and music by ensuring that creators are compensated for their contributions. Additionally, these rules would provide clarity for businesses operating in international markets, reducing the risk of disputes and fostering a level playing field.

By establishing these rules, the U.S. could set the standard for ethical AI usage, compelling future DEPA members to adopt these norms as a prerequisite for engaging in trade with the U.S. Other countries, including the United Kingdom, India, and Singapore, are actively developing their own AI systems[144], which makes it imperative for the U.S. to define the rules for how AI is used in global trade. Doing so would not only secure the ethical application of AI but also ensure that U.S. businesses and consumers benefit from robust protections. Furthermore, by codifying these rules in DEPA as amendments proposed through Article 16.3, the United States can extend its influence, shaping the global AI landscape to align with democratic values and responsible AI usage, while maintaining its leadership in the digital economy.

D. The Risks of China's Influence in DEPA

China's interest in joining DEPA poses significant risks. While DEPA is currently aligned with US-based principles of openness and fairness, China's potential influence could shift the agreement toward more restrictive norms. If China were to join DEPA, it could advocate for provisions that prioritize state access to data and limit cross-border data flows. This would undermine the agreement's foundational principles that follow the U.S. approach and disadvantage U.S. companies, which thrive in open and competitive markets. China's approach to AI governance prioritizes efficiency and control over transparency and accountability. For example, China has deployed AI technologies to monitor public behavior, suppress dissent, and enhance state surveillance.[145] If these priorities were incorporated into DEPA, they could erode trust in the agreement and discourage participation from the United States itself.

---

143. *See* DEPA, *supra* note 3, art. 16.3.

144. *Global AI Power Rankings: Stanford HAI Tool Ranks 36 Countries in AI*, STAN. UNIV. INST. FOR HUM.CENTERED A.I. (Nov. 21, 2024), https://hai.stanford.edu/news/global-ai-power-rankings-stanford-hai-tool-ranks-36-countries-in-ai.

145. *See* Ilaria Mazzocco, *The AI-Surveillance Symbiosis in China*, BIG DATA CHINA (July 27, 2022), https://bigdatachina.csis.org/the-ai-surveillance-symbiosis-in-china/.

It remains uncertain whether China will ultimately gain membership, as its approach to digital trade governance significantly diverges from the U.S.-based approach championed by DEPA Parties. These differences mean substantial challenges to overcome during the negotiation process for China's potential integration into the agreement. Previously, China has struggled to join similar multilateral and regional trade agreements, such as the post-U.S.-withdrawal CPTPP. [146]

However, this can be attributed to the "poison pill" provision in the USMCA.[147] The provision, known as "Article 31.10" in the USMCA, prevents Canada and Mexico from forming trade agreements with what the agreement identifies as "non-market economies" like China.[148] If a USMCA country forms an agreement with a non-market economy, the other two countries have the right to terminate the USMCA with that country.[149]

Canada and Mexico are both members of the CPTPP.[150] The USMCA's poison pill means that Canada and Mexico would likely never allow Chinese accession into the CPTPP. However, although Canada has announced its interest in joining DEPA, it is still not currently a member of the agreement.[151] As a result, Canada is currently unable to directly oppose or influence the decision regarding China's potential membership into DEPA. This dynamic could open the door for China's eventual inclusion.

To counter the possibility of China joining DEPA and expanding its influence over the agreement's direction, the United States must act decisively by joining DEPA itself. U.S. membership would provide a critical counterweight to China's potential efforts to shape DEPA's provisions in ways that align with its state-centric and restrictive digital governance model. Without U.S. leadership, China could gain significant leverage among DEPA Parties, potentially steering the agreement away from its U.S.-based principles of openness, transparency, and the free flow of data. Failure to act risks ceding influence to China,

146. Shannon Tiezzi, *Will China Actually Join the CPTPP?*, DIPLOMAT (Sep. 17, 2021), https://thediplomat.com/2021/09/will-china-actually-join-the-cptpp/.

147. *Id.*

148. *Id.*

149. *Id.*

150. *See* CPTPP, *supra* note 11, annex 1-A.

151. *Minister Ng Announces Canada's Request to Join the Digital Economy Partnership Agreement*, GLOB. AFFS. CAN. (May 22, 2022), https://www.canada.ca/en/global-affairs/news/2022/05/minister-ng-announces-canadas-request-to-join-the-digital-economy-partnership-agreement.html.

jeopardizing possible strategic and economic benefits that the U.S. could attain through DEPA membership.

IV. BUILDING A FOUNDATION TOWARDS A COMPREHENSIVE GLOBAL DIGITAL TRADE FRAMEWORK

The absence of a comprehensive global framework for digital trade has created uncertainty for businesses and policymakers alike. Without clear international rules on data privacy, cybersecurity, and AI, nations have adopted divergent regulatory approaches, leading to inefficiencies and increased trade barriers. DEPA presents a viable path toward a global digital trade system, as its flexible, modular design allows countries to gradually integrate into a broader international framework. This section argues that U.S. participation in DEPA would not only enhance its influence over digital trade rules but also serve as a stepping stone toward a future multilateral agreement. By joining DEPA, the U.S. can demonstrate the benefits of structured digital trade governance, encourage wider international adoption, and lay the groundwork for a comprehensive global framework that aligns with democratic values and economic openness.

A. The Need for a Unified Approach to Digital Trade

In a rapidly evolving digital landscape, the absence of a comprehensive global framework for digital trade poses significant challenges. As nations adopt divergent rules on cross-border data flows, privacy, cybersecurity, and artificial intelligence (AI), businesses face mounting compliance costs, and economic opportunities remain underutilized. The patchwork of national and regional regulations hinders innovation, creates inefficiencies, and reduces predictability for companies operating in global markets.

The Digital Economy Partnership Agreement (DEPA) provides a foundational framework for addressing these challenges. DEPA was designed as a modular and flexible agreement that could serve as a template for global cooperation on digital trade.[152] With its growing membership and scalable provisions, DEPA is emerging as a viable platform for establishing consistent international rules for the digital economy. U.S. participation in DEPA would not only enhance its influence but also lay the groundwork for a broader multilateral

152. *See* Ramasubramanian, *supra* note 21.

framework that reflects the U.S. approach of openness, transparency, and trust.

B. DEPA's Modular Approach to Trade Negotiations

As discussed in Part I, one of DEPA's most significant innovations is its modular structure, which allows member countries to adopt specific provisions incrementally based on their own capacities and policy priorities.[153] This approach enables countries with varying levels of digital trade readiness to participate meaningfully without committing to a comprehensive overhaul of their domestic regulations all at once.[154] For instance, DEPA's Modules cover a wide array of topics from artificial intelligence governance to cybersecurity and digital inclusion, which allow nations to selectively adopt provisions that align with their strategic goals.[155]

This modularity is particularly appealing for future trade negotiations, as it offers a framework that balances flexibility with consistency.[156] Nations hesitant to engage in comprehensive agreements due to concerns over the lack of regulatory autonomy [157] by providing a clear pathway for countries to gradually adopt these digital trade provisions, DEPA establishes a foundation that other countries and future multilateral or regional agreements can emulate.

By joining DEPA, the United States can amplify the benefits of this modular framework, demonstrating its potential as a model for broader international adoption. U.S. participation signals to other nations that this approach is both practical and effective, encouraging hesitant countries to explore the agreement's benefits. Over time, the modularity of DEPA could serve as a template for creating a comprehensive global digital trade framework that accommodates diverse economic and regulatory environments.

C. The Strategic Importance of U.S. Membership

The United States is at the forefront of digital innovation, hosting the largest technology companies in the world and driving global

153. *Id.*

154. *Id.*

155. *See* DEPA, *supra* note 3, arts. 5.1-2, 8.1 & 11.1.

156. *See generally* Ramasubramanian, *supra* note 21 (discussing the modular structure of the Digital Economy Partnership Agreement (DEPA) as an innovative framework for international digital trade governance and future plurilateral cooperation).

157. *Id.*

technological advancements. As discussed in Part II, the U.S incorporated digital trade provisions addressing cross-border data flows, the prohibition of data localization mandates, and the protection of digital intellectual property in previous agreements including the USMCA and DTA (the U.S. approach as discussed in Part II). Joining DEPA would build on this legacy and enable the United States to shape international norms, promote interoperability, and strengthen alliances by collaborating with like-minded nations to counter protectionist trends and establish trust in cross-border data flows.

By demonstrating the benefits of a unified digital trade strategy, DEPA membership could inspire other nations to adopt similar principles, creating a domino effect that drives global alignment back to the U.S. approach of digital trade. This process would involve building consensus on critical issues such as intellectual property protections, consumer data rights, and mechanisms for resolving digital trade disputes. The U.S., with its vast technological resources and expertise, is uniquely positioned to lead this effort.

Moreover, the geopolitical implications of U.S. leadership in digital trade are profound. As authoritarian regimes seek to assert control over the internet and establish restrictive digital ecosystems, the U.S. has an opportunity to champion its vision of a free and open digital economy. This vision aligns with the U.S. approach of openness and promotes innovation, entrepreneurship, and the equitable distribution of digital benefits. By leveraging its influence through DEPA, the U.S. can counterbalance competing models that prioritize state control and censorship.

DEPA membership can serve as a catalyst to attract other countries that might otherwise be reluctant to join. Despite the growing number of countries applying to join DEPA, much of the world has not announced their intention to apply. However, U.S. involvement would lend credibility to DEPA and demonstrate the benefit of joining such an agreement. This can lead to a ripple effect that encourages broader participation among non-member countries by highlighting the advantages of aligning with a global leader in technology and innovation.

The lack of U.S. leadership in recent years has contributed to the rise of data localization measures worldwide. Without a strong advocate for free data flows and digital trust, many nations have pursued restrictive policies that require data to be stored and processed within their borders.[158] These measures stem from concerns for protecting

158. *See* Foo, *supra* note 64.

national security interests, protecting the "privacy of their citizenry, ensuring greater economic opportunities for domestic digital players, and maintaining public order."[159] However, the proliferation of data localization requirements has fragmented the global digital economy, increased compliance costs, and hindered global trade.[160] U.S. leadership is essential to reverse this trend and establish a framework that balances national interests with the need for an open and interoperable global digital ecosystem.

D. Other Possible Options for the United States?

The absence of U.S. involvement in key international negotiations, such as the WTO Joint Statement Initiative on E-Commerce, has left a vacuum that other nations have filled with divergent approaches to digital trade.[161] This lack of coordination has made it more challenging to develop a comprehensive global framework.[162] U.S. participation in DEPA provides the necessary leadership to bridge these divides and build momentum toward a comprehensive global digital trade framework.

According to the Center for Strategic and International Studies, critics argue that a non-binding arrangement such as DEPA lacks the enforceability and impact of a formal treaty.[163] However, several counterarguments highlight the advantages of DEPA.[164] First, DEPA's "soft" rulemaking and norm-setting framework has demonstrated its effectiveness in other settings.[165] The Asia-Pacific Economic Cooperation (APEC) forum has achieved significant progress in areas like digital governance using similar methods, as it has successfully advanced digital governance through voluntary frameworks and

159. Kaitlyn Tsai, *Regulation of Data Localization and How the Legal Profession Can Play a Role*, 34 GEO. J. OF LEGAL ETHICS 1355, 1356 (2021) (first citing Joshua P. Meltzer, *Data and the Transformation of International Trade*, BROOKINGS INST. (Mar. 6, 2020), https://www.brookings.edu/articles/data-and-the-transformation-of-international-trade/; then citing Martina F. Ferracane, *Restrictions on Cross-Border Data Flows: A Taxonomy* 2 (ECIPE Working Paper No. 1/2017, 2017), https://ecipe.org/wp-content/uploads/2017/11/Restrictions-on-cross-border-data-flows-a-taxonomy-final1.pdf; and then citing Benjamin Wong, *Data Localization and ASEAN Economic Community*, 10 ASIAN J. INT'L L. 158, 159 (2020)).

160. Tsai, *supra* note 159, at 1356.

161. *See* Schweitzer, Saccomanno & Saika, *supra* note 44, at 113.

162. *Id.*

163. Matthew P. Goodman, *DEPA and the Path Back to the TPP*, CTR. FOR STRATEGIC & INT'L STUD. (July 15, 2021), https://www.csis.org/analysis/depa-and-path-back-tpp.

164. *Id.*

165. *Id.*

consensus-building initiatives.[166] For instance, APEC's Cross-Border Privacy Rules (CBPR) system has facilitated interoperability between different economies without imposing rigid legal obligations.[167] Second, by joining DEPA, the United States could swiftly begin advocating for the development of rules and norms in the global space.[168] This approach avoids the lengthy and complex process of formal trade negotiations, enabling the U.S. to establish leadership and shape the global digital trade landscape more efficiently.[169]

Another option for the United States is to negotiate new bilateral digital trade agreements as it has with Japan under the 2019 US-Japan DTA.[170] This is an approach championed by the first Trump administration in its strategy of pursuing bilateral over multilateral trade agreements.[171] Negotiating new bilateral digital trade agreements would be lengthy and resource-intensive.[172] The inclusion of digital trade provisions in the USMCA and DTA illustrates the U.S. prioritizing such standards during trade with key partners like Canada, Mexico, and Japan. However, it is unlikely that the U.S. would allocate similar time and resources to develop standalone bilateral agreements with countries it deems less critical to its trade priorities.

In this context, joining the Digital Economy Partnership Agreement offers a more practical and efficient alternative. DEPA's existing framework provides a ready-made platform for engaging with a broader range of countries without the need for extensive bilateral negotiations.[173] By docking onto DEPA, the U.S. could streamline its engagement in shaping global digital trade norms while avoiding the

166. *Id.*

167. ASIA-PACIFIC ECONOMIC COOPERATION, APEC CROSS-BORDER PRIVACY RULES SYSTEM POLICIES, RULES AND GUIDELINES 11 (Nov. 2019), https://cbprs.org/wp-content/uploads/2019/11/4.-CBPR-Policies-Rules-and-Guidelines-Revised-For-Posting-3-16-updated-1709-2019.pdf.

168. Goodman, *supra* note 163.

169. *Id.*

170. International Trade Administration, *Japan – Trade Agreements*, U.S. Dept. of Commerce (Jan. 2, 2024), https://www.trade.gov/country-commercial-guides/japan-trade-agreements.

171. *Bilateral or Multilateral: Which Trade Partnerships Work Best,* KNOWLEDGE AT WHARTON (Apr. 27, 2017), https://knowledge.wharton.upenn.edu/article/bilateral-multilateral-trade-partnerships-work-best/.

172. NIGEL CORY, INFO. TECH. & INNOVATION FOUND., U.S. OPTIONS TO ENGAGE ON DIGITAL TRADE AND ECONOMIC ISSUES IN THE ASIA-PACIFIC 5 (Feb. 2022), https://www2.itif.org/2022-apac-digital-trade.pdf.

173. *See* Pablo M. Garcia & Andrés Rebolledo, *The Digital Economy Partnership Agreement, a Milestone in Trade Negotiations,* INTER-AM. DEV. BANK (Sep. 15, 2020), https://blogs.iadb.org/integration-trade/en/the-digital-economy-partnership-agreement-a-milestone-in-trade-negotiations/.

delays and inefficiencies associated with negotiating multiple new agreements from scratch. This approach allows the U.S. to focus its resources on influencing and strengthening DEPA's provisions, ensuring they align with its strategic objectives and reinforcing its leadership in the global digital economy.

By joining DEPA, the United States can counter competing governance models, particularly those advanced by authoritarian regimes, and champion a vision of a free and inclusive digital economy. This proactive engagement will not only enhance the credibility and influence of DEPA but also set a precedent for future global agreements. Additionally, U.S. participation could catalyze broader membership, encouraging hesitant nations to adopt high-standard digital trade principles and fostering a more integrated and interoperable global economy. Embracing DEPA is not just a practical step; it is a vital one for securing American leadership in the digital age.

V. CONCLUSION: EMBRACING LEADERSHIP IN THE DIGITAL ERA

The Digital Economy Partnership Agreement (DEPA) presents the United States with an unparalleled opportunity to reclaim its leadership in the evolving digital trade landscape. As the global economy becomes increasingly reliant on digital commerce, the need for a cohesive, scalable, and forward-thinking framework for digital trade has never been more urgent. DEPA's modular approach offers a dynamic platform to address emerging challenges in areas like artificial intelligence, data privacy, and cybersecurity while providing the flexibility needed to accommodate diverse domestic and international priorities.

By joining DEPA, the U.S. would not only align itself with like-minded nations but also shape the rules of the digital economy in accordance with democratic values of openness, transparency, and trust. Such participation would serve as a counterbalance to authoritarian governance models, particularly those championed by China, which threaten to fragment the global digital ecosystem and impose restrictive norms that undermine innovation and fair competition.

Moreover, U.S. membership in DEPA would lay the foundation for a comprehensive global framework on digital trade. It would send a powerful signal to the international community that the United States remains committed to fostering economic resilience, protecting intellectual property, and promoting the free flow of data across borders. This leadership would also incentivize other countries to join DEPA, creating a ripple effect that harmonizes digital trade rules globally.

The stakes are too high for the U.S. to remain on the sidelines. Without decisive action, the United States risks ceding influence to competitors and allowing protectionist and restrictive policies to dominate the global digital trade landscape. Joining DEPA is not only an opportunity; it is a strategic imperative. By embracing this agreement, the United States can secure its leadership in the digital economy, safeguard its strategic interests, and set an influential precedent for the equitable and innovative future of global trade.

Vol. XXXII, No. 1 SOUTHWESTERN JOURNAL OF INTERNATIONAL LAW Pages 1 to 336 2026