INTERNATIONAL LAW QUARTERLY

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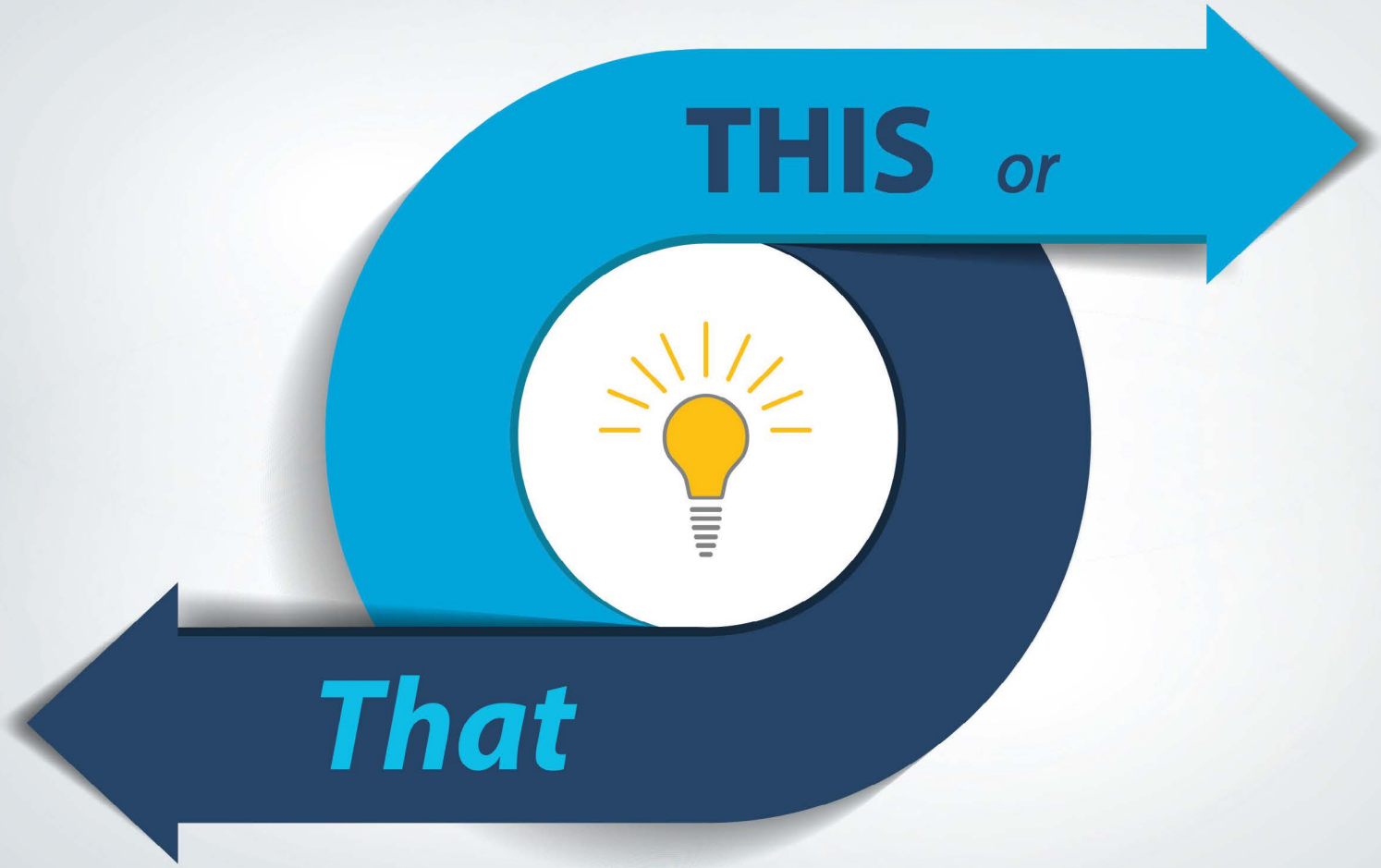

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Features

As part of the "This or That" theme of this edition, our first two pairs of articles are presented as companion pieces in which the authors each provide countervailing evidence and support for their conclusions. The latter four articles are standalone pieces that echo the "This or That" theme within the article itself.

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Message From the Chair
Elevating Our International Leadership


RICHARD MONTES DE OCA

Our Section continues to serve as an important forum for sharing knowledge, experience, and best practices pertaining to the practice of international law. Since the inception of my term as ILS chair, our Section's theme has been *Elevating Our International Leadership*. I'm proud of the success our Section has achieved in this regard this year.

iLaw: the ILS Global Forum on International Law – On 16 February, the ILS held its annual flagship conference, iLaw, in Miami. With nearly 250 registered attendees, the conference was sold out for the first time. We raised over US$90,000 in sponsorship and registrations, a new record. The conference had a spectacular program with amazing speakers in various tracks in International Arbitration, Litigation, and Transactions. We also had a fascinating keynote speaker on artificial intelligence, Ryan Abbott. Finally, we had a closing plenary session with all-star international general counsels. We were successful in securing speakers and attendees from more than fifteen countries. Ultimately, iLaw is becoming one of the premier international law conferences in the world. A special thank you to our iLaw committee co-chairs, Davide Macelloni and Adrian Nuñez, and the committee members.

The International Vis Pre-Moot Competition – On 17 February, the ILS held its annual Richard DeWitt Memorial Vis International Pre-Moot Competition at JAMS. The ILS is one of the few bar sections across the country that offers law students worldwide a pre-moot competition prior to participating in the Willem C. Vis International Commercial Moot Arbitration in Vienna. This year, more than sixty students from fourteen law schools competed, both in person and virtually from all over the United States, Latin America, South Africa, Asia, and the Middle East, including four teams from Florida (UM, Stetson, FIU, and FSU). We also had nearly seventy arbitrators participate. A special thank you to our Vis Pre-Moot Competition committee co-chairs, Andres Sandoval and Priscila Bandeira, and their committee members. I also want to recognize JAMS, MIAS, the Chartered Institute, and Hogan Lovells for their sponsorship and support.

Cooperation Agreements and Collaboration With Other Bar Associations and Organizations – Our Section has continued to engage in significant cooperation with foreign bar associations and organizations. In March, we met with a representative from the Paris Bar in Miami to plan our future collaboration. Further, our ILS leadership is planning our delegation to the International Bar Association (IBA) in Mexico City this September. I hope you will join us!

In May, Transnational Taxation Network and the ILS Tax Committee hosted a Joint Conference on the Intersection of Art and Tax at the Rubell Museum in Miami. We also co-hosted an exciting Miami Marlins Game Night with the Miami Finance Forum. Finally, ILS collaborated with the Miami-Dade Bar Association to host a Happy Hour at Biscayne Brewing.

The ILS Foreign Legal Consultant (FLC) Committee – The ILS is responsible for working with The Florida Bar and the NCBE to approve foreign attorneys to the Florida Supreme Court for certification. I am grateful to the FLC's committee chair and past ILS chair, Robert Becerra, and his committee for their exemplary work.

ILS Lunch and Learn Series – Our wonderful Lunch and Learn series continued this past quarter by featuring prominent international lawyer and past ILS chair Edward Davis, Jr. It was an interesting, engaging, and enjoyable lunch. I want to thank past ILS chair James Meyer for moderating and our host, Fiduciary Trust International.

***International Law Quarterly* (*ILQ*)** – This issue of the *ILQ*: "This or That" is a comparison edition that touches on insightful and controversial issues surrounding international law. The topics include various viewpoints on the war in the Middle East, immigration, AI, bribery, the Corporate Transparency Act, and consignment sales. I am grateful to all of the authors who contributed and to the *ILQ* editor, Jeff Hagen, and his committee for their tireless work on this outstanding publication.

On 20-21 June 2024, we will celebrate our collective success at our ILS Chair's Reception and will elect our Section's new leaders during our Executive Council Annual Meeting in Orlando, Florida. I'm looking forward to celebrating with each of you. It has been a privilege and pleasure to lead this great Section. I am grateful to all of our members and leaders for helping the ILS achieve its goals by *Elevating Our International Leadership* through *Commitment, Collaboration, and Celebration*!

Richard Montes de Oca

Chair, International Law Section of The Florida Bar

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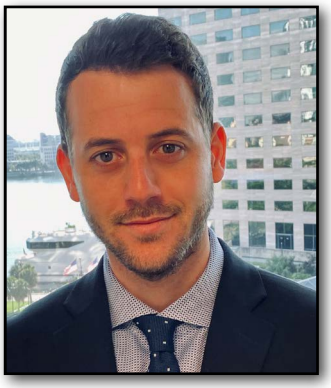
From the Editor . . .



JEFFREY S. HAGEN

The theme of this Spring 2024 edition of International Law Quarterly is "That or That." This esteemed publication often features articles sharing an author's unique viewpoint on an area of international law. In soliciting articles for this edition, our editors sought topics with multiple perspectives. Authors who penned articles contained in this groundbreaking edition of *ILQ* either (i) provided one school of thought on a subject matter with another author providing the countering view; or (ii) wrote about both sides of a legal issue themselves.

The despicable horrors of the 7 October 2023 invasion of Israel by Hamas, followed by the death, displacement, and despair suffered by Palestinians in Gaza, has held the world's attention in a vise grip that has not relinquished its pressure for even a moment. International law practitioners consistently solve complicated issues crossing both jurisdictional authority and cultural norms, but even we seem confounded by this heart-wrenching conflict. Fear of retribution for "taking a side" should not deter us from providing valuable insight unique to our ilk. As lawyers specializing in international law who hold American, democratic values and who also support human rights and dignity for all persons, I submit that we are better positioned to foster a common sense dialogue on this conflict than any other group of persons. I hope that the legal discourse in this edition provides the groundwork for more mutual understanding, as this is the only viable pathway to lasting peace in the region.

By authoring countervailing articles focusing on the crisis in Israel and Gaza, our own International Law Section members **Lyubov Zeldis** and **Richard Junnier** tackle this hot-button issue of our time with bravery, class, and facts. In "The Case for War – Democracy Shall Stand," Luba gives relevant background on the Middle East, defends Israel's response to October 7th and its right to exist, explains how Israel is not committing a genocide in Gaza, and discusses Hamas's violations of international law. In "Incitement and Genocide in Gaza," Richard takes the alternative view by systematically collecting the evidence of Israel's actions and behavior following October 7th, including its decimation of Palestinians' daily ability to survive in Gaza, ultimately concluding that genocide is occurring based on its definitional elements.

Additionally within this edition, there is a second set of paired articles comparing the advantages and disadvantages of EB-5 and E-2 visas. In "Foreign National Investors: Success Through EB-5 Immigration for 2024," **Edward C. Beshara** demonstrates why EB-5s are most advantageous, while in "Alternative Paths to Permanent Residence and the Reason a Foreign National May Want to Retain the E-2 Visa," **Larry S. Rifkin** provides his reasons why he prefers an E-2 visa over the EB-5.

The first several pages of our first four features alternate between articles so that the reader can visualize each author's viewpoints in real time without flipping.

Other topics concerning international law have varying perspectives as well. **Marycarmen Soto**'s article, "Corporate Transparency Act: Friend or Foe for U.S. Small Businesses," assesses the benefits and burdens of this new law and how it will impact our clients and practices. In the following article, "AI Regulation in Legal Practice: Striking the Balance Between Innovation and Accountability," **Theshaya Naidoo** tackles a concept we would be wise to become familiar with—using artificial intelligence in a law practice and its pros and cons. In their article entitled "Consignor's Blues – A Dark, Unknown Legal Paradigm," **Eric A. Assouline** and **Iris S. Rogatinsky** review common pitfalls with filing UCC-1s and what to do in particular situations. Finally, **Templeton Timothy** and **Christopher Noel** wrote about "FEPA: Combating the Demand-Side of Bribery," comparing the new extortion law with that of FCPA, the Foreign Corrupt Practices Act.

Additionally, **Ines Bahachille** wrote an article for our "Best Practices" column entitled "Top 10 Do's and Don'ts for In-House Counsels," which is a great read for both in-house and law firm attorneys alike.

Not to be overshadowed, we also present the ILS Section Scene, which in this edition features: (i) iLaw (which was sold out this year!); (ii) the ILS Pre-Moot Competition, and (iii) the ILS Lunch & Learn with Edward Davis. Lastly, we also feature a World Roundup in every edition of *ILQ*, with this one featuring legal updates from Africa, the Caribbean, China, India, the Middle East, North America, and Western Europe. We are actively soliciting new World Roundup regions—if you would like to write, please contact our editors!

In conclusion, some of the most complex international legal issues have more than one compelling argument; new laws have advantages and disadvantages; and existing legal frameworks can have several routes to a successful outcome. A key ingredient in providing our clients with the best legal advice possible is to provide them with all options available. In some cases, there is more than one sensical argument. I hope that after reviewing this edition of *ILQ*, you come to the realization that "This or That" is not always the "be all end all," but rather, sometimes "This *and* That" leads us to the answer.

Best regards,

Jeffrey S. Hagen

Editor-in-Chief

Harper Meyer LLP

This or That: Lyubov Zeldis's article on the conflict in Israel and Gaza

The Case for War[2] – Democracy Shall Stand

By Lyubov Zeldis, Fort Lauderdale

Dedicated to baby Kfir, the youngest hostage kidnapped on 7 October 2023, and to ALL of the children, Israeli and Palestinian, affected by the atrocities commenced and perpetrated by Hamas. "We mourn every innocent life lost."[1]

"Wherever men or women are persecuted because of their race, religion, or political views, that place must—at that moment—become the center of the universe." – Elie Wiesel, in his Nobel acceptance speech[3]

Early morning, October 7th • As the sun is rising in the desert sky • Stars of David, they took your life
But they could not take your pride.[4] – U2

Today Israel and the Hamas-Israel war indeed is "the center of the universe." On 7 October 2023, Hamas and other Palestinian armed groups launched a deadly assault into Israel.[5] Militants attacked civilian areas and perpetrated flagrant violations of international law, including capturing and forcibly taking hundreds of civilians as hostages.[6] At least 1,200 Israelis were killed, including 36 children, and more than 5,400 were injured; hostages were taken and killed,[7] and women and girls were brutally raped, including gang raped.[8] Hamas and other armed groups also continuously fired indiscriminate rockets toward Israel.[9] This was the largest calculated mass murder of Jews in a single day since the Holocaust.[10] The evidence is clear: the perpetrators themselves filmed and broadcast their attack and atrocities.[11] Following the attacks, Israel declared a war against Hamas.[12]

On 13 April 2024, Iran[13] attacked Israel: 170 drones, 120 ballistic missiles, and 30 cruise missiles.[14] The actions of Iran and its proxy Hamas not only constitute grave assaults on the

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This or That: Richard Junnier's article on the conflict in Israel and Gaza

Incitement and Genocide in Gaza

By Richard Junnier, Tallahassee

A child injured in Gaza cries as she waits for medical attention.

On 7 October 2023, Al-Qassam (Hamas's militant wing[1]) and other Palestinian armed groups massacred nearly 1,200 Israelis and wounded more than 5,000 others.[2] They kidnapped some 230 more, of which about 130 remain captive, including women and children.[3] There were widespread reports of rape and torture.[4]

In retaliation, as of 15 April 2024, 33,207 Palestinians have been killed, 75,933 injured, more than 70,000 housing units destroyed, and 1.7 million displaced.[5] With an estimated 70% of the dead being women and children,[6] the Gaza Strip "is the most dangerous place in the world to be a child."[7] With Israeli forces poised to attack Rafah, the last refuge for at least 1.5 million displaced Palestinians,[8] political and military promises to destroy all of Gaza and its population, as detailed below, are apparently about to be fulfilled.

This article discusses the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter "Genocide Convention"), its interpretation by international tribunals, and whether Israel's alleged intentional genocidal behavior and incitement fall within the Genocide Convention as presented by South Africa to the International Court of Justice. Where appropriate, statistics and events are updated since South Africa's 28 December 2023 Application to the Court.

This article concludes finding merit in the argument that Israel is inciting and intentionally committing acts of genocide through its vast and indiscriminate killings and its decimation of Palestinians' daily ability to survive. This intent is buttressed by Israel's targeted erasure of Gaza's history and culture and Israeli political, military, and cultural leaders' explicit incitement to erase—not just Hamas—but all of Gaza's civilians, women, and children en masse.

The Genocide Convention

According to Article II of the Genocide Convention:

[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:

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This or That: Lyubov Zeldis's article on the conflict in Israel and Gaza

state of Israel and its citizens—the only democratic country in the Middle East and a true ally and friend of the United States in the region—but they attacked and assaulted the entire democratic world and the very fundamentals of democracy itself; every value that the United States of America and the democratic free world stand for.

Democracy relies on actual factual knowledge,[15] not on propaganda, manipulation, or self-serving narrative. This article aims to help the reader understand and digest the facts of the Hamas-Israel war. It is not meant to address every aspect of the conflict, but rather aspires to impart factual knowledge in the following categories: (i) relevant background and key terms; (ii) ruling of the ICJ case *South Africa v. Israel*; (iii) Israel did not and could not commit genocide in Gaza; and (iv) Hamas's continuous violations of international laws: Hamas lies and provides unreliable information; Hamas and its controlled governmental agencies overinflate, manipulate, and fake the number of casualties; Hamas employs inhumane warfare tactics, using people as human shields, interfering with humanitarian aid to Gaza, and blending in with the civilians, thereby making it difficult to distinguish a civilian from military personnel. This article also briefly restates Israel's right of existence and self-defense.

Background and Key Terms

Israel is located in the Middle East, at the eastern end of the Mediterranean Sea[16] and is bound by Lebanon, Syria, Jordan, Egypt, and to the west by the Mediterranean Sea.[17] By comparison to other countries, its territory is small. It is only about 290 miles north-to-south and 85 miles east-to-west at its widest point.[18] Jerusalem is the seat of government and the capital.[19] The United States was the first country to recognize Israel as a state, in 1948, and the first to recognize Jerusalem as the capital of Israel, in 2017.[20] Israel is a parliamentary democracy, comprised of legislative, executive, and judicial branches.[21] As stated by the U.S. State Department, Americans and Israelis are united by the shared commitment to democracy, economic prosperity, and regional security.[22]

The State of Israel is the only Jewish nation in the modern period.[23] It is a home to Jews, which constitute about three-fourths of the total population of Israel, Arabs, which constitute more than one-fifth of the population, almost all of whom are Palestinians from Sunni Muslim (roughly three-fourths) or from Christian communities, as well as Druze and other ethnic Arabs who do not consider themselves Palestinians.[24]

The Gaza Strip, or **Gaza**, is a territory on the eastern coast of the Mediterranean Sea.[25] Gaza is bordered by Egypt on the southwest and Israel on the east and north.[26] It is slightly more than twice the size of Washington, D.C.[27] The population of the West Bank and Gaza is almost completely **Palestinian Arab**.[28]

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This or That: Richard Junnier's article on the conflict in Israel and Gaza

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group; or

(e) forcibly transferring children of the group to another group.

Under Article III, genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide are all international crimes whether they occur during peace or war.

Evidencing Alleged Genocidal Acts on Palestinians in Gaza

South Africa invoked the jurisdiction of the International Court of Justice through its Application Instituting Proceedings and Request for the Indication of Provisional Measures on 28 December 2023 (hereinafter "South Africa Application").[9] It accuses Israel of four categories of genocidal acts against the distinct group of Palestinians in Gaza:

(1) Killing large numbers of the Palestinian people;

(2) Causing serious bodily and mental harm to the Palestinian people;

(3) Deliberately inflicting conditions on life intended to bring about their physical destruction as a group through (a) expulsion and mass displacement, (b) denying access to adequate food and water, (c) cutting off access to medical care, and (d) deprivation of shelter, clothes, hygiene and sanitation; and

(4) Imposing measures intended to prevent Palestinian births.[10]

We will examine the veracity of the first three categories utilizing both examples cited by South Africa and from independent sources.

Killing the Palestinian people as a group. If indiscriminate killings are widespread with the intent of destroying a group, it becomes a factor in determining whether Israel intends the killing of the Palestinian people as a group.[11] It appears tens of thousands of Palestinians in Gaza are being killed indiscriminately, suggesting that they as a people, rather than just Hamas's military wing, are being targeted.

"Nowhere is safe in Gaza."[12] Though a lack of independent media reporting makes an accurate count difficult, it is likely more than 30,000 Palestinians have been killed since the end of February 2024, with another 10,000 presumed dead. Israel also claims its forces have killed more than 10,000 fighters in Gaza but has not provided evidence or detailed information to back up this estimate.[13]

According to Gaza's health ministry, 70% of those killed are women and children; however, casualties recorded in hospitals suggest the rate may be closer to 58%.[14] Historically, Gaza's health ministry's conflict estimates have been reliably like those calculated by the UN and Israel.[15] Relying on Israel's numbers, only one out of three killed are Hamas militants.[16]

Mass-indiscriminate attacks have also been reported such as the "Flour Massacre" on 29 February 2024, killing 112 Palestinians and injuring a further 760 as they attempted to collect food aid.[17] Other examples of potentially indiscriminate killings are:

- 19 October 2023—Attack on a church where 450 Christians sought refuge, killing 18 and injuring 12.[18]
- 20 October 2023—Attack on homes in al-Nuseirat refugee camp killing 28 civilians including 12 children.[19]
- 31 October 2023—Attack on a six-story apartment building in Gaza, without any apparent military target, killing at least 106 civilians including 54 children.[20]
- 24 December 2023—Air strike on Gaza's Maghazi refugee camp, killing at least 70.[21]
- 4 January 2024—A quadcopter, fighter jets, and artillery are used to bomb warehouses sheltering civilians in a non-evacuation zone.[22]

On 5 December 2023, Amnesty International issued a report claiming that some killings by Israel are indiscriminate citing the use of heavy bombs in densely populated areas.[23] They also examined two airstrikes and "did not find any indication that there were any military objectives . . . or that people in the buildings were legitimate military targets, raising concerns that these strikes were direct attacks on civilians."[24]

South Africa cites the utilization of "dumb" (unguided) bombs and heavy bombs weighing up to 2,000 pounds, also in highly dense areas.[25] This suggests that targeting is not limited to military aggressors and assets.

It appears that Israel has killed a disproportionate number of civilians through indiscriminate attacks. This suggests that the

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This or That: Lyubov Zeldis's article on the conflict in Israel and Gaza

Hamas is a militant group designated by the United States as a terrorist organization.[29] It was founded in 1987 and gained notoriety for a campaign of suicide bombings and other attacks on Israelis.[30]

Hamas, **Hezbollah**,[31] and **Houthis**,[32] all international terrorist armed organizations, declared themselves to be part of the Iranian-led "axis of resistance"[33] against Israel, the United States, and the wider West and are **calling for Israel's destruction**.[34] Iran is designated by the United States as a country sponsoring terrorism.[35]

In early 2006, Hamas won the Palestinian Legislative Council election and took control of the Palestinian Authority (PA) government and of the Gaza Strip.36 Over the past sixteen years of its rule, Hamas has smuggled countless weapons into Gaza, and has diverted billions in international aid, not primarily to build schools, hospitals, or shelters to protect its population from the dangers of the attacks it launched against Israel over the past many years, but rather to turn massive swathes of the civilian infrastructure into perhaps the most sophisticated terrorist stronghold in the history of urban warfare.37 The main goal of Hamas, as articulated in its revised charter issued in 2017, is the destruction of the State of Israel.38 The original charter of Hamas stated, "The day of judgment will not come about until Muslims fight the Jews and kill them."39 As further manifested by repeated public calls by Hamas leadership, the attacks of 7 October 2023 were perpetrated with a stated goal of destroying the State of Israel and purging it of its nine million residents from "the [Jordan] River to the [Mediterranean] Sea."[40]

IDF, the Israel Defense Forces, is the Israeli army. In its own words, defense is its mission—security is its goal. "We believe that courage, loyalty and diversity, unified by the common goal of defense are essential to our mission."[41] IDF has only one goal in its war against Hamas: dismantle the Hamas terrorist organization's military and administrative capabilities.[42] It is widely known that Israel's other goal is to secure the return of all hostages held in Gaza.

International Court of Justice – *South Africa v. Israel*

On 29 December 2023, South Africa, which enjoys a close relationship with Hamas[43] despite Hamas being a designated terrorist organization,[44] filed an Application with the International Court of Justice (ICJ or Court) instituting proceedings against Israel concerning alleged violations by Israel of its obligations under the Genocide Convention in relation to Palestinians in the Gaza Strip.[45] The Application also contained a request for the indication of provisional measures.[46] The applicant requested the Court to indicate provisional measures in order to "protect against further, severe and irreparable harm to the rights of the Palestinian people under the Genocide Convention" and "to ensure Israel's compliance with its obligations under the Genocide Convention to not engage in genocide, and to prevent and to punish genocide."[47]

Following is a chronology of events related to the case:

- 11-12 January 2024 – Public hearings were held on the request for the indication of provisional measures submitted by South Africa.[48]
- 23 January 2024 – Nicaragua, referring to Article 62 of the Statute of the Court, filed in the Registry of the Court an Application for permission to intervene "as a party" in the case.[49]
- 26 January 2024 – The Court delivered its Order on South Africa's request.[50]
- 16 February 2024 – The Registrar transmitted to the parties the Court's decision on South Africa's communication dated 12 February 2024, in which that State called upon the Court urgently to exercise the power conferred on it by Article 75, paragraph 1, of the Rules of Court.[51]
- 28 March 2024 – The Court indicated additional provisional measures following a request made by South Africa on 6 March 2024.[52]

To summarize, **the Court did not find evidence to decide whether Israel had committed genocide in Gaza but instead directed Israel to comply with its obligations under the Genocide Convention**—to which Israel has been a party since 1950.[53] The decision addressed only the "provisional measures."[54] As Israel's defense showed, South Africa's claims are certainly not clear-cut, especially given Israel's right to defend itself after Hamas's 7 October attack on Israel.[55] The Court did not try to order Israel to end the war in a way that would leave Hamas in power in Gaza[56] (distinguished from a decision against Russia in which ICJ ordered Russia to immediately suspend its military operations in Ukraine).[57]

The decision refuted the argument advanced by Israel's critics that death and destruction in Gaza are sufficient to establish a violation of the Genocide Convention.[58] South Africa misinterprets the Genocide Convention, which requires an intent to destroy a national, ethnical, racial, or religious group, as such, in whole or in substantial part.[59] Israel presented evidence that its intent was focused on defeating Hamas,

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This or That: Richard Junnier's article on the conflict in Israel and Gaza

military assaults are on the Palestinians in Gaza rather than an attempt to specifically target Hamas.

Causing serious bodily and mental harm on the Palestinian People is evidenced by high and disproportionate civilian casualties (particularly those of children), degradation, and use of untargeted weapons in high-density areas.

By the beginning of April, more than 70,000 Palestinians had been wounded.[26] Burns and amputations are commonplace from the use of white phosphorous (a smoke screen that can burn the inside of flesh) in densely populated areas.[27]

According to an emergency coordinator with Doctors Without Borders:

> our surgeons had to operate on 1-year-olds, 2-year-olds who had to be amputated from one leg or two, one arm or two . . . I'm speechless when I try to think of the future of [these] children. It's generations of children who will be handicapped, who will be traumatized. The very children in our mental health program are telling us that they would rather die than continue living in Gaza now.[28]

For those without physical wounds, there have been emotional ones caused by inhumane degradation with large numbers of civilians, including children, being arrested, blindfolded, forced naked in the cold, and herded onto trucks and taken to places unknown.[29] When released from detention, there are claims of torture; degrading treatment; and deprivation of food, water, shelter, and access to toilets.[30]

For the voyeuristic, images of mutilated and burned corpses juxtaposed with videos of Israeli armed attacks are circulated on Israeli social media on a Telegram channel called '72 Virgins—Uncensored.[31]

Deliberately inflicting conditions on life intended to bring about Gaza Palestinians' physical destruction as a group. The jurisprudential factors to consider with respect to this element of genocide are: (i) expulsion and mass displacement; (ii) destroying adequate access to food and water; (iii) removing access to medical care; and (iv) deprivation of shelter, clothes, hygiene, and sanitation.[32]

Expulsion and mass displacement. By the end of 2023, it was estimated that 85% of Gaza Palestinians were forced out of their homes.[33] Israel had issued a continuous succession of evacuation orders, the first on 13 October 2023, demanding 1.1 million Palestinians move from North Gaza to the South within twenty-four hours.[34] Fleeing through major escape arteries and despite being in safe zones, displaced Palestinians were greeted with degrading treatment, arbitrary arrest, and killings.[35] Israel has posted detailed maps online dividing Gaza into a patchwork of hundreds of small areas, supposedly to warn of airstrikes but without identifying where the displaced should escape.[36] The UN secretary-general has referred to the people of Gaza as "human pinballs—ricocheting between ever-smaller slivers of the south, without any of the basics for survival."[37] Even refugee camps don't escape the bombs and shelling.[38] From a practical standpoint, these forced evacuations have become permanent as 355,000 homes have been destroyed—approximately 60% of Gaza housing.[39] The South Africa Application calls the forced displacements "genocidal, in that they are taking place in circumstances calculated to bring about the physical destruction of Palestinians in Gaza."[40]

Should this displacement continue with an Israeli attack on Rafah, The UN high commissioner for human rights has a dire warning: "A potential full-fledged military incursion into Rafah—where some 1.5 million Palestinians are packed against the Egyptian border with nowhere further to flee—is terrifying, given the prospect that an extremely high number of civilians, again mostly children and women, will likely be killed and injured."[41] As civilians try to leave Rafah to return to the north, they have been greeted with tanks and gunfire.[42]

There is no doubt that a substantial number of Gaza-Palestinians have been displaced. While this alone is insufficient to prove genocide, this displacement evidences genocide when it is combined with deprivation of food, water, medical care, and other resources necessary for daily survival.[43]

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This or That: Edward Beshara's article on EB-5 and E-2 visas

Foreign National Investors: Success Through EB-5 Immigration for 2024

By Edward C. Beshara, Maitland

Foreign national investors who wish to obtain temporary or permanent residency in the United States through investment may pursue either an E-2 visa or an EB-5 visa. These two visa programs are attractive options to many investors, and having a knowledgeable, experienced, and professional team is of great importance in obtaining a successful E-2 or EB-5 visa outcome for the foreign national investor.

E-2 Visas

Who are E-2 investors?

Investors who desire to obtain E-2 investor visas are foreign nationals wishing to enter the United States on a temporary basis to invest in, develop, and direct their own U.S. business.

An E-2 investor visa is a nonimmigrant visa that allows foreign entrepreneurs to live and work[1] in the United States based upon a substantial investment in a U.S. business, with a recommended personal investment of US$100,000.

The E-2 visa is only available for citizens of E-2 treaty countries.[2]

E-2 investors may bring dependents into the United States with them, i.e., spouse and unmarried children under twenty-one years of age.

E-2 dependents do not have to be citizens of the E-2 country.[3]

Benefits of the E-2 Visa

Owning and directing their own U.S. business is a faster way for foreign investors to get into the United States, via the E-2 visa. Such investors can hire other people to manage their business, but the E-2 visa offers investors a way of physically being in the United States while operating their own business for a temporary, fixed period of time.

The E-2 visa is valid for three months to five years depending on the investor's country of origin, with unlimited extensions for the E-2 visa or two-year extensions of stay, based upon current laws and regulations.

It allows the E-2 petitioner and spouse to live and work anywhere in the United States, allows children access to U.S. public education, and can allow for tuition savings at many universities. An E-2 investor's spouse is eligible for employment authorization incidental to status and can work for any U.S. employer.[4]

While an E-2 visa does not directly lead to permanent residency and a green card, it offers foreign nationals the

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This or That: Larry Rifkin's article on EB-5 and E-2 visas

Alternative Paths to Permanent Residence and the Reason a Foreign National May Want to Retain the E-2 Visa

By Larry S. Rifkin, Miami

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The EB-5 Investor Visa Program has become a popular and attractive option for affluent foreign nationals looking to immigrate to the United States, and many attorneys advise qualifying clients of this option as a path to Lawful Permanent Resident (green card) status. The Immigrant Investor Program provides an opportunity for qualified investors to obtain permanent residence in the United States by investing in a local project that creates at least ten full-time jobs for U.S. workers. As the minimum investment is at least US$800,000, this immigrant visa option is tailored to clients of sufficient financial means. However, attorneys and marketing companies often fail to advise the foreign nationals of the risks inherent in the process or advise them of the official timelines for this process.

As law practitioners, it is our duty to disclose all the risks and benefits of a client's legal options so the client can make an informed decision. This article will discuss the risks in the EB-5 Immigrant Investor Program and offer viable alternatives to foreign nationals and attorneys practicing in this field of law.

EB-5 Immigrant Investor Program

General Provisions

The EB-5 Immigrant Investor Program was created by Congress in 1990 to stimulate the U.S. economy through job creation and capital investment by foreign investors.[1] Currently, the minimum capital investment amount is US$1,050,000, or US$800.000 if the business is located in a Targeted Employment Area, which is defined as a rural area or an area that has experienced high unemployment.[2] An EB-5 investor must invest the required amount of capital in a new commercial enterprise that will create full-time positions for at least ten qualifying employees.[3] A qualifying employee is a U.S. citizen, Lawful Permanent Resident, or other immigrant authorized to work in the United States, including a conditional resident, temporary resident, asylee, refugee, or a person residing in the United States under suspension of deportation.[4] EB-5 investments are normally made in EB-5

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This or That: Edward Beshara's article on EB-5 and E-2 visas

opportunity to transition to permanent residency by qualifying for immigrant visas, such as the EB-5 investor visa process.

EB-5 As a Good Follow-Up Process for E-2 Investors

A nonimmigrant E-2 visa offers many benefits, but it is still limited compared to U.S. permanent residency status. As an example, the E-2 investor may no longer desire to direct or oversee their own U.S. business because of the overhead and financial responsibility, but their status depends on the continued operation of the business. In comparison, the EB-5 visa process allows foreign nationals to be independent once they obtain U.S. unconditional permanent residency.

If the E-2 investor's children are approaching twenty-one years of age and wish to continue to live in and work and/or study in the United States, or even get married, they will need another status, as they can only be derivatives of their parent's E-2 visa status until their twenty-first birthday. These children, however, can be protected by the EB-5 option.

As noted, children twenty-one or older no longer qualify as E-2 dependents and either have to leave the country or obtain different visas for themselves, but as long as they are under twenty-one when the EB-5 petition is filed and do not subsequently "age out," they can obtain conditional and unconditional Lawful Permanent Resident status with their parents through EB-5.

Concurrent Filing

Even though an EB-5 petition may take years to be processed, the new laws passed by the EB-5 Reform and Integrity Act of 2022 (RIA)[5] allow EB-5 petitioners and their family members to concurrently file for adjustment of status via an I-485 application at the same time they file an I-526 or I-526E petition. Further, with the I-485, an individual can also file applications for work authorization and travel authorization, which, once granted, offer many of the benefits of a green card, such as the ability to live and work in the United States and to travel in and out of the United States. These ancillary applications typically take only a few months to be processed.

When children under twenty-one years of age file their I-485 application, this "freezes" their age to help ensure they can remain in the United States even if it takes years for the EB-5 petition to be adjudicated. That is, children older than twenty-one years of age can file their application and receive their conditional permanent residency cards, as long as the EB-5 petition I-526/E was filed before the child turned twenty-one years of age. The solution is that the child, within one year after the approval of the I-526/526E petition, files an application for residency with the U.S. Citizenship and Immigration Services (USCIS) or starts correspondence and payment with the National Visa Center for the residency process through the U.S. Consulate. Another benefit of transitioning from E-2 to EB-5 is that the E-2 investment amount may qualify toward the EB-5 investment amount requirement in the same business, i.e., if they are investing in their own direct U.S. EB-5 business.

EB-5 Visas

Who are EB-5 investors?

In the EB-5 category, EB-5 investors may include foreign national investors who are interested in investing their personal funds in their own EB-5 direct business or investing their personal funds into an EB-5 regional center project. EB-5 investors may also include a principal who is involved in or desires to form an EB-5 regional center project and recruit potential foreign national investors for their EB-5 project. The purpose of the EB-5 business or project is to use the EB-5 investments from the foreign national investor to financially grow their U.S. business or project.

Foreign national investors and principals of EB-5 regional center projects are becoming more sophisticated and demand substantial expertise and experience from the EB-5 practitioners to represent and achieve their EB-5 goals promptly and effectively.

EB-5 Procedure: Investment Minimums

The current EB-5 laws, regulations, and policies are based upon the new EB-5 Reform Integrity Act of 2022 (RIA). Based upon this new law, an EB-5 investor can invest their own personal funds into a direct EB-5 project that is their own business. That is, for a direct EB-5 investment into one's own business, there can be only one EB-5 investor.[6]

In comparison, the EB-5 investor may invest their personal funds into an EB-5 regional center project, managed and operated by independent operators and developers.

Alternatively, the EB-5 investor may invest their personal funds into their own EB-5 regional center project; however, to be compliant there needs to be, at a minimum, two EB-5 investors of an EB-5 regional center project. For the EB-5 investor who wishes to invest with another EB-5 investor into their own project that will be considered an EB-5 regional

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regional centers, which are designated by U.S. Citizenship and Immigration Services (USCIS) for participation in the Immigrant Investor Program.[5] As of 4 April 2023, there are 640 approved regional centers across the country;[6] however, note that USCIS specifically states that approval of a regional center does not in any way constitute USCIS's endorsement of the center's activities, nor does it guarantee compliance with U.S. securities laws, nor does it minimize or eliminate the risk to the investor.[7]

Procedure

The first step in the process of obtaining Lawful Permanent Residence through the Immigrant Investor Program is for the regional center to request approval of the investment offering through an associated commercial enterprise with USCIS by filing Form I-956F.[8] Normally, upon approval of the project application, the investor will then file the immigrant petition (Form I-526E) with USCIS.[9] Once the immigrant petition has been approved and an immigrant visa is available, an immigrant investor may apply for an immigrant visa with the U.S. Department of State or, if eligible, an adjustment of status if in the United States.[10] The approval of the immigrant visa by the Department of State or adjustment of status by USCIS confers conditional permanent residence on the immigrant investor and the investor's spouse and children under twenty-one years of age.[11] Conditional permanent residence is valid for two years.[12] Within the ninety-day period prior to the expiration of the conditional permanent residence status, the immigrant investor must file Form I-829 to remove the conditions on residence and obtain Lawful Permanent Residence, valid for ten years.[13]

Risks With the EB-5 Program

While the EB-5 Immigrant Investor Program appears to be a direct and viable manner for investors with the required capital funds available to seek Lawful Permanent Residence in the United States, potential investors should be cognizant of several risks before initiating this process.

Capital Risk

EB-5 visa regulations require that the investor's capital be "at risk," and no guarantees are allowed to be offered to the investor on any return on the investment or of the capital itself.[14] Evidence of mere intent to invest or of prospective investment arrangements entailing no present commitment is insufficient to show the investor is actively in the process of investing.[15] The funds must be irrevocably committed to the project. In addition, if the immigrant petition is denied, the investor loses the funds and approval of the immigrant petition is not guaranteed. In the third quarter of its 2021 fiscal year, USCIS denied 18.6% of the I-526 petitions received during that period; in the fourth quarter of its 2023 fiscal year, USCIS denied 35.2% of the I-526 petitions received.[16] A greater than one-in-three chance of losing an investment of at least US$800,000 is a significant risk that investors should be made aware of before engaging in this program. Investors should conduct their due diligence and carefully research the projects and regional centers that will be in charge of their investments, paying especially close attention to the clauses in the contract regarding potential denial of the immigrant petition.

Fraud

Investors in the EB-5 program must be aware of possible scam commercial enterprises. Due to the prevalence of fraud in the EB-5 Immigrant Investor Program, on 9 October 2013, the U.S. Securities and Exchange Commission's (SEC's) Office of Investor Education and Advocacy and USCIS issued an Investor Alert to warn individual investors about fraudulent investor scams that exploit the program.[17] In June 2018, the Senate Committee on the Judiciary conducted a hearing entitled "Citizenship for Sale: Oversight of the EB-5 Investor Visa Program," wherein reform measures were requested due to instances of fraudulent commercial enterprises.[18] In one such enterprise, Bill Strenger, the general manager of Jay Peak, a ski resort in Vermont, flew around the world, wooing foreign investors, and raised US$350 million for the business through the EB-5 program.[19] In 2016, SEC officials seized the ski resort and accused Mr. Strenger and his business partner of perpetrating a "massive fraud" and misusing more than half of the money raised in a Ponzi-like scheme.[20] Such instances of fraud should make potential investors wary of scam commercial enterprises.

Administrative Delays With the Process

On 18 July 2023, USCIS announced it was updating its visa availability approach to I-526 immigrant petitions to prioritize the adjudication of petitions for which an immigrant visa was immediately available or would be available soon.[21] The purpose of this update was to enable the Investor Program Office (IPO) "to increase processing efficiencies, reduce the backlog and Form I-526 completion times, and support consistency and accuracy in adjudications."[22]

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Corporate Transparency Act: Friend or Foe for U.S. Companies?

By Marycarmen Soto, Aventura

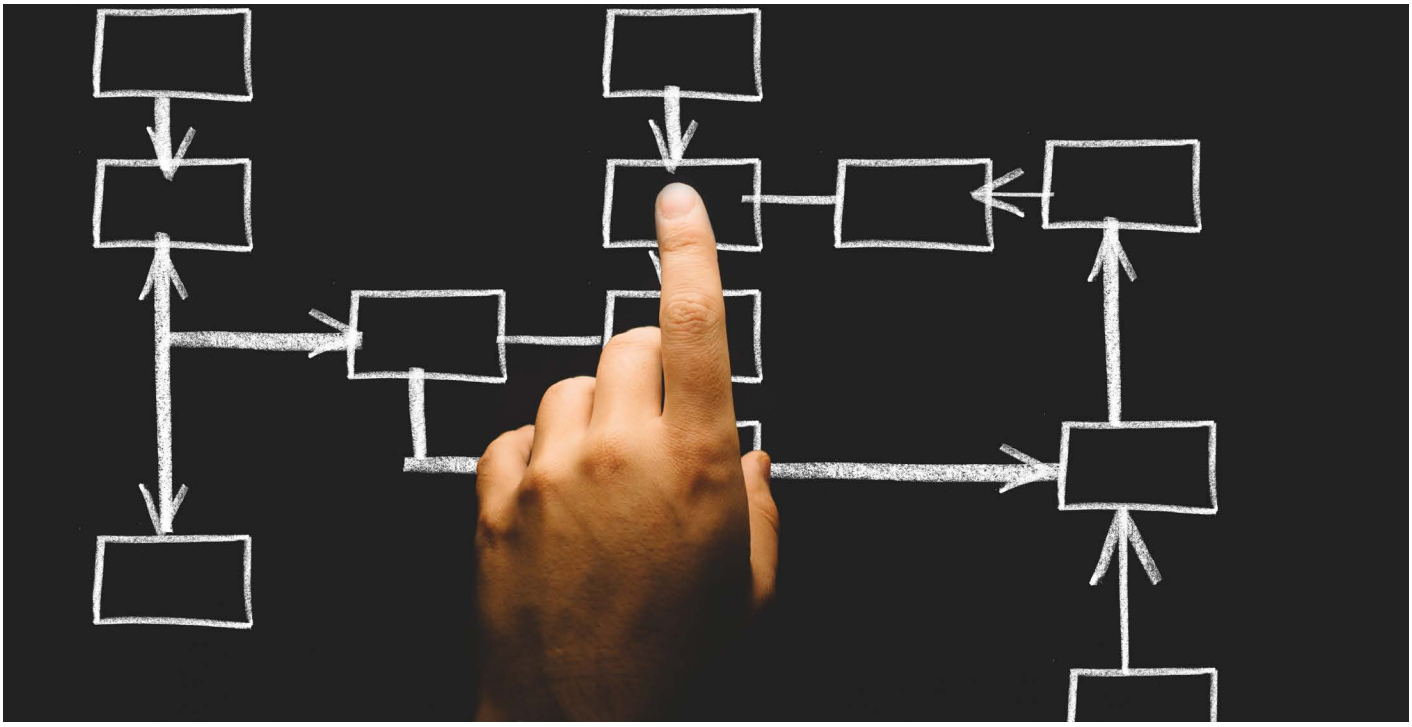

Image by Gerard Van de Leun, flickr.com/photos/1000photosofnewyorkcity/5550878218, CC BY 2.0

The Corporate Transparency Act (CTA, Title LXIV of the National Defense Authorization Act for Fiscal Year 2021) was enacted on 1 January 2021 to curtail the use of U.S. business entities for illicit financial purposes, corruption, terrorist financing, tax evasion, and money laundering activities, among other crimes.[1] According to the U.S. Department of Treasury's Financial Crimes Enforcement Network (FinCEN), the CTA is expected to help address the proliferation of financial crimes throughout the U.S. financial system from the use of legal entities as shell and front companies that conceal the identity of their beneficial owners. The CTA aims to create a registry of natural persons who ultimately own or control companies doing business in the United States, thereby increasing transparency and enhancing government oversight to help deter financial misconduct.

Every year, U.S. states foster millions of small businesses that form corporate entities such as corporations, limited liability companies, and other corporate structures.[2] Few jurisdictions in the United States require legal entities to disclose any information about the beneficial owners of the entity or the natural persons who create the entity. In fact, most U.S. jurisdictions promote anonymity, secrecy, and limited oversight, and carry minimal information requirements. For example, a Delaware entity may be owned by anyone who resides anywhere, the company can be operated internationally, and it does not have to report its assets. Such lax regulations and the ability to hide the owner's real identity, as well as financial details, certainly facilitate the exploitation of complex and dense corporate structures to launder the proceeds of illicit activities.

For corporate law practitioners, particularly those who work with international clients, the CTA posts a familiar set of challenges wedged between balancing the nuances of the CTA and delivering effective and sound client advice. On the one hand, one may deduce, albeit the recent court ruling from a federal district court in the Northern District of Alabama on the constitutionality of the CTA, that at the heart of Congress's enactment of the CTA rests a legitimate concern to prevent and combat illicit activity while minimizing the burden on businesses.[3] The latter is difficult to accept, however, in that the CTA imposes mandatory disclosure requirements of personal information to the federal government, or the

beneficial owners risk the threat of civil and criminal penalties, making consequential the need for legal counsel.

On 30 September 2022, FinCEN issued its final rules and regulations (Rule), implementing the Beneficial Ownership Secure System (BOSS) as a central nonpublic database platform for the collection, secure storage, and maintenance of beneficial ownership information (BOI).[4] The Rule requires most U.S. entities, subject to certain statutory exemptions, to file BOI reports with FinCEN. The Rule describes who must file the BOI report, the information that must be provided, and the timelines for filing the BOI report. Reporting companies are required to file BOI reports electronically on BOSS, the government's database platform. BOI reports contain information about the entity itself, each of its beneficial owners, and each company applicant.[5]

While FinCEN is expected to store BOI reports in a confidential manner, one cannot help but wonder whether BOSS will be capable of handling the sheer volume of companies expected to file BOI reports commencing on 1 January 2024, the date the CTA officially came into effect.[6] Moreover, in September 2023, FinCEN published a Small Entity Compliance Guide (Guide) to help small businesses comply with the requirements of the Rule, thereafter updating the Guide in December 2023.

What is a reporting company?

The term reporting company means a corporation, limited liability company, or other similar entity that is created by the filing of a document with a secretary of state or a similar office under the law of a state or Indian tribe; or formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a state or Indian tribe.[7]

Who is a beneficial owner and a company applicant?

A beneficial owner is a natural person who owns or controls at least 25% of a reporting company, directly or indirectly, or exercises substantial control over the company. A company applicant is an individual who directly files or is primarily responsible for the filing of the document that creates or registers the company as a domestic reporting entity or first registers a foreign entity to do business in the United States.[8]

It goes without saying that determining which individuals need to be reported to FinCEN requires an understanding of the Rule and corporate governance law. A thorough review of a reporting company's corporate and other ancillary documents, such as management agreements if the entity owns real estate, for instance, general contracts, and bank account authorization, is key in determining the beneficial ownership and company applicant information to properly comply with the CTA.

What information needs to be reported?

A reporting company must deliver to FinCEN specific information for each beneficial owner of the reporting company. Such reported information includes: (a) full legal name; (b) date of birth; (c) current residential or business street address; (d) unique identifying number from an identification document such as a U.S. or foreign government non-expired passport, U.S. state identification, or U.S. driver's license (when the beneficial owner is a U.S. person); and (e) the image of such identifying document.[9] By the same token, a reporting company must deliver to FinCEN: (a) full legal name; (b) trade name or "doing business as" name; (c) street address of principal place of business in the United States or the U.S. address where the business is conducted; (d) jurisdiction of formation; and (e) taxpayer identification number.[10] To the extent any reported information changes, such information must be updated within thirty calendar days after the date on which any change occurs.[11]

What are the due dates for BOI filing?

For companies created or registered to do business before 1 January 2024, the BOI reporting deadline is 1 January 2025.[12] For companies created or registered to do business on or after 1 January 2024, but before 1 January 2025, a report must be submitted within ninety calendar days after creation or registration becomes effective.[13] For companies formed on or after 1 January 2025, the deadline to file a report is within thirty calendar days from when the reporting company was created.[14]

Arguably, the intent of the CTA is to help prevent and battle illicit activity, perhaps at the expense of congressional overreach.[15] When attempting to comply with the due date for filing BOI reports, newly formed entities, for example, must apply and obtain an employer identification number (EIN) from the Internal Revenue Service (IRS). One cannot help but wonder whether the federal government is out of touch with reality in the imposition of these strict deadlines. Practically speaking, the processing time between applying for and obtaining an EIN varies depending on factors such as the method of application, the IRS application volume and workload, the entity type, etc. It is possible that a reporting company may not obtain the EIN in time to file the BOI report within the ninety calendar days deadline. This is yet another tribulation for legal practitioners balancing client expectations against FinCEN's critical date timeframes.

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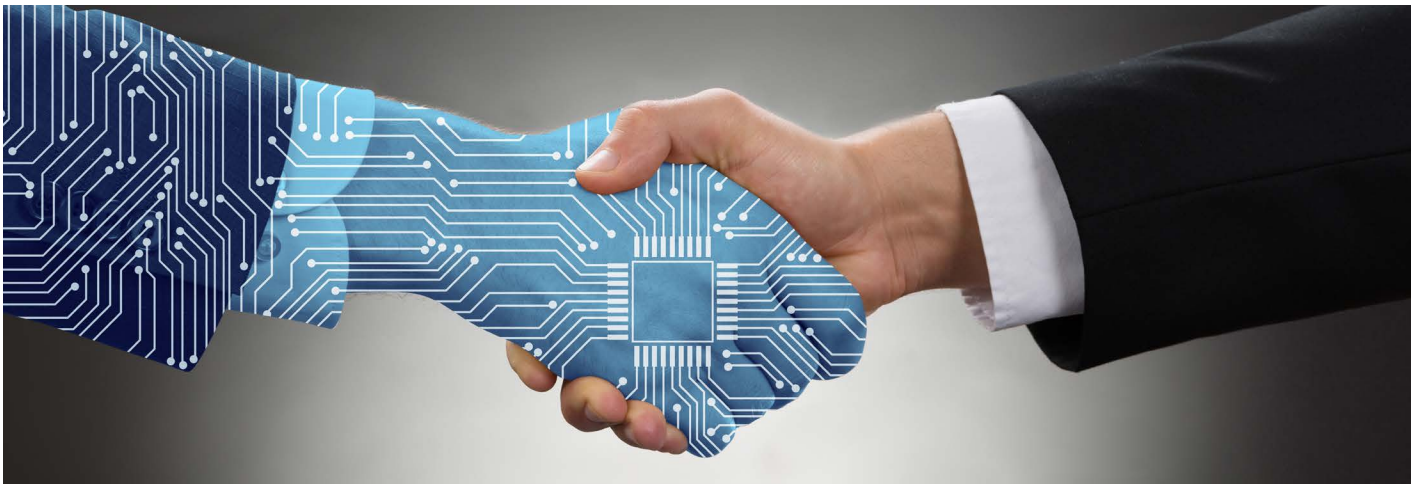
AI Regulation in Legal Practice: Striking the Balance Between Innovation and Accountability

By Theshaya Naidoo, Umgungundlovu, KwaZulu-Natal, South Africa



The rapid advancement of artificial intelligence (AI) has fostered significant debate around the impact and implication of these emerging technologies. While it is obvious that AI offers significant advantages across various industries, these technologies simultaneously raise concerns regarding job displacement, privacy compromises, and ethical considerations, with academics suggesting that AI has disproportionate disadvantages.[1] AI has been broadly integrated into legal practice despite the debate surrounding ethics, regulatory frameworks, and the necessity of protecting the rights of individuals against the application of AI.[2]

Undoubtedly, the integration of AI into legal practice has facilitated the elimination of redundant tasks to ensure legal professionals are able to focus predominantly on complex cases,[3] thus streamlining the legal process. However, as with any technological advancement, the incorporation of AI into the legal profession raises significant questions about its benefits and detriments. Consequently, the diverse application of AI has necessitated the development of legal frameworks to ensure the efficient addressing of the negative impacts of these technologies to ensure the benefits are leveraged. The primary purpose of this research is to analyse the multifaceted impact of AI regulation on the legal profession, weighing its advantages against its challenges and evaluating the dynamic role of (human) legal practitioners in a landscape being increasingly shaped by intelligent machines.

AI regulation can be defined as the categorization and supervision of AI systems with the primary purpose of understanding their functions across various sectors through the establishment of AI standards and knowledge-driven systems within a digital context, ensuring adaptation of the dynamic global norms for different types of AI technologies.[4] While AI regulation is paramount, conventional regulatory frameworks may not adequately address AI due to several fundamental limitations, such as the inability of these frameworks to keep up with the rapid advancements in AI capabilities, thus perpetuating a gap where emerging AI systems may operate outside the scope of current regulations. Regulatory efforts of these technologies are further impeded by their opaque decision-making processes, with traditional regulations not being able to adequately address the broad scope and diverse risks associated with AI technology.

However, the development and integration of AI into legal frameworks have proved to have diverse consequences that necessitate a comprehensive examination of legal, ethical, and societal implications to ensure all applications of AI prioritize fairness and transparency and comply with legal norms. Specifically, within the legal profession, the accurate definition of the legal personality of AI has become pertinent. However, challenges have been evident due to the absence of consciousness and moral agency within AI systems, thus complicating the conventional notion of legal personality. Furthermore, from a broader perspective, the dynamic

nature of AI significantly outpaces regulatory efforts. Thus, there is often insufficient time for regulatory frameworks to adapt to the emerging (and consistent) adaptations of these technologies.

Therefore, it becomes necessary not solely to reevaluate the nature of AI laws but also to integrate nuanced, innovative approaches to the regulation of AI to foster accountability and transparency in AI-driven decision-making. This means that the establishment of legal personhood for AI must not solely consider the technical capabilities of AI systems but also their societal impact, ethical implications, and alignment with fundamental legal principles.

Necessity of AI Regulation

While jurisdictions are taking steps to establish broad AI regulations, these conventional legal frameworks inadequately address the ethical considerations specific to AI use within legal practice. Specifically, within the context of legal practice, traditional legal frameworks may struggle to keep pace with the dynamic nature, rapid development, and implementation of AI, thus making them unsuitable for regulating AI in legal practice. For example, the EU AI Act was proposed in 2021, and three years later, in 2024, it has not been broadly and holistically enforced. Consequently, this extended timeframe does not reflect the consistently (and potentially unilaterally) evolving nature of AI. This means that the integration of AI in various aspects of legal practice necessitates guidelines and principles that can be immediately enforced to ensure potential risks associated with this technology are mitigated. Hence, the measures proposed below offer a more adaptable solution, allowing legal professionals to proactively consider ethical implications and to ensure that AI serves the cause of justice in a rapidly evolving technological landscape.

The specific application of AI technologies within legal practice emphasizes the necessity of accurately establishing the legal status of AI, with the primary purpose of founding boundaries for legal personhood in AI to ensure the effective functioning of these technologies within the legal framework of society.[5] Consequently, the integration of a legal framework that regulates AI necessitates comprehending the definition of legal boundaries, ethical considerations, and accountability when AI applications are utilized. However, the determination of the legal status of AI for legal personhood presents significant challenges. Specifically, the attribution of traditional legal characteristics like rights and obligations to AI systems raises complex questions. For example, to what extent can liability be imposed on an AI system for its outputs, and how would accountability be established, and to whom: the developers, the users, or the AI itself?

Holistically, it can be suggested that the legal profession has a responsibility to implement responsible AI principles due to the absence of a comprehensive legal framework that guides both technical and non-technical stakeholders through the Software Development Life Cycle.[6] Within legal practice, fairness in decision-making is paramount, specifically in areas like sentencing, case prioritization, and legal advice; thus, the incorporation of responsible AI principles will ensure the development and application of AI systems adhere to ethical standards, thus promoting the integrity of legal proceedings. Responsible AI principles advocate for transparency and accountability in AI algorithms and decision-making processes; thus, the integration of these principles will encourage legal practitioners to understand the intricacies of AI-driven outcomes. Especially within the context of legal practice, this transparency is necessary to promote the principles of justice and to enable scrutiny of AI decisions. Further, this human-centric approach underpinned by responsible AI principles ensures that while AI in legal practice is positioned and trained to assist on various legal tasks, ultimate decision-making authority remains vested in humans, protecting against potential ethical lapses. This means that the inherent adaptability and flexibility of AI principles encourage legal professionals to stay abreast of rapid technological advancements, ensuring that regulations reflect emerging ethical concerns.

Emerging startups have prioritized ethical AI practices through the conscious adoption of unconscious bias training and recruitment of diverse programs, thus ensuring responsible AI is prioritized.[7] The significance of this approach lies in its departure from conventional legal frameworks, which may not inherently address the ethical implications of AI technology. In contrast to traditional legal paradigms, which primarily focus on regulatory compliance and legal standards, this approach by startups may be appropriately adapted within a legal domain as it constitutes a proactive stance toward ensuring fairness, equity, and transparency in legal decision-making processes. As opposed to the adoption of conventional legal norms, it is necessary to recognize the need for a multifaceted approach that integrates ethical considerations into the development and deployment of AI technologies within the legal domain. Consequently, this alternative legal framework reflects the dynamic nature of legal practice, where technological advancements necessitate a reevaluation of traditional approaches to accommodate ethical imperatives in an increasingly complex and interconnected legal landscape.

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Consignor's Blues – A Dark, Unknown Legal Paradigm

By Eric N. Assouline and Iris S. Rogatinsky, Miami

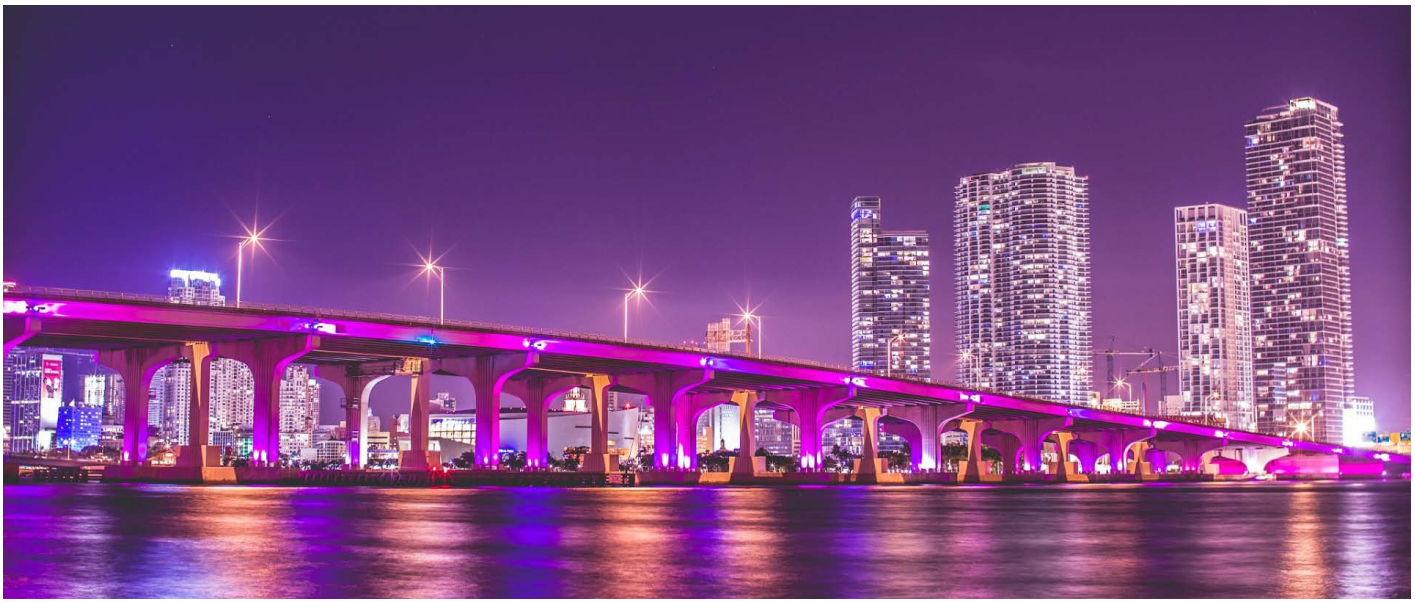

Image by GoodFon

Over the past several years, the international sale of goods on consignment in South Florida has grown, much like the state's population, economy, and its importance as an international destination for business. In fact, over the last two decades, and in particular in the last few years, South Florida's international economy has increased at a faster pace than most of the rest of the nation.[1] Few consignors of goods are aware of the existence of a dark, unknown legal paradigm regarding how to best protect themselves, and all too often they find themselves with a relatively unfortunate local surprise when their goods are sold in Florida. In most cases, the consignor learns of its fate when it is too late to do something to protect itself.

In particular, goods sold on consignment are generally the subject of an agreement between the seller of the goods, known as the consignor (who oftentimes is not from Florida or may even be from a foreign country), and a local reseller of the goods, known as the consignee. These consignment agreements can be in the form of a formal contract, but often they are only documented through purchase orders sent from the local Florida consignee to the consignor, and in return, invoices are sent from the foreign consignor to the local Florida consignee. Notably, with the expansion of WhatsApp as a toll-free means to communicate internationally, and much to the chagrin of business lawyers who prefer more formality, this app has become a leading method of informal international business communication.

Regardless of how the consignment agreement is documented, the consignor entrusts the local consignee to resell the goods sent from the consignor at an agreed price and with the proceeds shared among the consignor and the consignee. Some consignees do virtually all their business on consignment, but many, if not most, do not.

As with most legal scenarios, whether international or domestic, during normal business times when sales are being made and there are no problems, all is well. However, what happens if the local consignee runs into financial trouble and has to seek redress in a U.S. insolvency proceeding, such as a federal bankruptcy filing, or a filing under a state-specific court proceeding called an assignment for the benefit of creditors (ABC)? Generally, when a consignee files for bankruptcy or an ABC, the court will appoint a neutral third-party fiduciary. In the case of a bankruptcy court, the fiduciary will be a bankruptcy trustee, and in the case of a state court ABC, it will be an assignee. At first glance, one would think the terms that guided the parties' relationship before the insolvency proceeding would be binding on the trustee or the assignee. Although that is what most consignees think, that is not the law. In fact, this is why, without adequate knowledge and protection, ignorance of the law will soon have the consignor singing the blues.

Under Florida law, consignments are governed by Florida's Uniform Commercial Code (UCC), which is codified in Florida's state statutes (and which are similar to most other states' statutes). A consignment sale from the consignor to the consignee, *for resale by the consignee*, is known under the law as a "sale or return."[2] Under such a consignment arrangement, the consignor and the consignee have a private agreement, and the public is generally not aware of its existence or its terms.

According to Article 9 of Florida's UCC, to put the world on notice of the existence of a claim by the consignor's claim to the goods that are in the possession of the consignee, the consignor is required to file a financing statement with the State of Florida, often known as recording a UCC-1.[3] Further, section 679.319 of the Florida Statutes governs the rights and title of a consignee and provides that "while the goods are in the possession of the consignee, the consignee is deemed to have rights and title to *the goods identical to those the consignor had or had power to transfer.*"[4]

Most if not almost all international consignors who were surveyed for this article were not aware of the legal requirement to file a UCC-1 in order to perfect their security interest in consigned goods that are in the consignee's possession. In fact, most consignors surveyed were in utter disbelief that their property, which was not paid for by the consignee but was only in the consignee's possession to be resold, could be seized by the bankruptcy trustee or the ABC assignee and sold, without regard to the consignor's claim of ownership (other than the consignor having an unsecured claim in the insolvency proceeding, which all too often results in no payout at all).

"This" is the starting point where many consignors find themselves singing the blues because they were not aware of the legal requirement to publicly file a financing statement. Not good. Is there a "that"? Yes, luckily there is. But like most issues in the law, it is not as black and white as the issue of whether the consignor did or did not record a UCC-1.

Florida courts have found this unknowing forfeiture by the consignor by not satisfying the UCC filing requirement to be unfair. So, according to the case law that has developed in Florida (and other states may have a different case law based exception), the consignor may have a chance to rescue itself from the consignor's blues. For a consignor to overcome the statutory requirement to record a UCC-1, the consignor has the burden to prove to the court that is overseeing the bankruptcy or the ABC that: (1) the consignee is substantially engaged in consignment sales; and (2) the consignee's creditors were "generally aware" that the consignee is generally engaged in consignment sales.[5]

Accordingly, notwithstanding the presumption that consigned goods are held by the consignee on a sale or return basis, this presumption may be overcome, and the priority of the filing party's creditors can be defeated by the consignor.[6] The same two-step analysis is also followed in a bankruptcy context, which generally follows state law consignment principles.[7]

According to *Rayfield Investment Co. v. Kreps*, the leading Florida state court case on this subject, in order for the consignor to demonstrate "substantial engagement," the consignor is required to prove to the court's satisfaction that more than 20% of the consignee's inventory was being sold on a consignment basis.[8] To show that the consignee's consignments were "generally known," the consignor must show that a majority of the consignee's creditors were aware that the consignee was substantially engaged in consignment sales.[9]

Generally, if a consignor finds itself in this unfortunate predicament, it is when the bankruptcy case or the ABC case has already been filed by the consignee and the consignor can no longer record a UCC-1. But in both bankruptcy cases and ABCs, early in the case is the time to immediately start to work on the substantial engagement exception to the filing requirement.

Early in a bankruptcy or an ABC, there is a formal interview of the filing party. In a bankruptcy case, the initial interview of the filing party (the consignee) is known as the Section 341 First Meeting of Creditors.[10] In a Florida ABC, it is statutorily required that the assignor (the consignee in our example) sit for a sworn examination.[11] This first meeting and examination of the filing party is a good time to start building a record about the extent of the filing party's sales on consignment.

Asking questions geared toward determining if the 20% threshold can be met is very important in these types of proceedings. Also, inquiring as to the extent of the filing party's bank or its lender's knowledge as to the filing party's consignment sales can help strengthen the consignor's case. Loan applications may even ask about any percentage of goods sold on consignment, which the filing party or their lender should seek in discovery.[12]

In both the bankruptcy and the ABC context, while this issue may be resolved by motion, it technically should be resolved by the consignor filing an adversary proceeding. Filing an adversary proceeding prompts court determination regarding the goods the consignor claims do not belong to the filing party (the consignee) but instead belong to the

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FEPA: Combating the Demand-Side of Bribery

By Christopher A. Noel and Templeton N. Timothy, Miami

Few global legal issues can be solved with just one approach, or by being addressed from only one angle. Such is the case when it comes to battling bribery and corruption involving foreign officials outside of the United States. After decades of the United States being limited to prosecuting the supply-side of bribery transactions, Congress has finally enacted legislation to combat the demand-side of bribery through its passage of the Foreign Extortion Prevention Act. Not only does the Foreign Extortion Prevention Act target those who accept bribes, it also requires the Department of Justice to publish the highest profile enforcement actions each year. This article describes the Foreign Extortion Prevention Act and analyzes how this new legislation will fit into and affect the global framework aimed at prosecuting the bribery of foreign officials.

Overview of FEPA

On 23 December 2023, President Joe Biden signed the Foreign Extortion Prevention Act (FEPA) into law as part of the National Defense Authorization Act.[1] Under FEPA, it is unlawful for any covered person or entity to "demand, seek, receive, [or] accept" anything of value on behalf of themselves, another person, or a nongovernmental entity. FEPA has a considerably broad scope, criminalizing bribery schemes regardless of whether the benefit was conferred directly or indirectly—indeed, the text of the statute does not even make a meaningful distinction between a "foreign official" acting in an official capacity and one acting in an unofficial capacity. After initially defining a foreign official somewhat intuitively—as any official or employee of a foreign government, agency, department, or instrumentality—FEPA goes on to draw from previously enacted statutes with existing definitions. For example, a "foreign official" under FEPA also includes a "person" as defined under the Foreign Corrupt Practices Act (FCPA), a "senior foreign political figure" as defined by the Department of Treasury, as well as a "public international organization" as designated by the International Organizations Immunities Act. The fact that these definitions are expressly incorporated into FEPA underscores how the new legislation is not intended to be a standalone enforcement tool, but rather a part of a comprehensive framework for combatting bribery and corruption globally.

FEPA's breadth does not stop with its statutory definitions; the statute also permits—if not requires—extraterritorial application. FEPA applies to any person within the territories of the United States, and encompasses any transactions that make use of the mail or other U.S. instrumentalities of interstate commerce. Moreover, Congress specifically drafted FEPA to also apply to foreign companies that issue securities regulated by the Securities and Exchange Commission (SEC). Moreover, the statute applies in any location that has been defined as a "domestic concern" under the FCPA. While the reach of FEPA is patently broad, we have not yet seen how U.S. courts will interpret FEPA's extraterritorial application. FEPA also cabins itself by expressly disclaiming the right to

enforce behavior that would violate certain provisions of the Securities Exchange Act of 1934 and the FCPA, no matter the theory of liability.

Penalties for violators of FEPA include fines of up to US$250,000 or three times the money value of the object of the transaction. People who violate the statute could also face up to fifteen years in prison, in addition to monetary fines.

Differences Between FEPA and the FCPA

The FCPA is a longstanding law that acts as the other side of FEPA's anti-bribery coin.[2] While the FCPA has always criminalized the act of offering a bribe, FEPA operates to fill in the gaps and targets acts that constitute receiving a bribe. Both statutes cover all U.S. persons, and both extend coverage to include foreign issuers of securities. However, one significant difference between the two anti-bribery statutes is where Congress has placed the onus to act. A corporation, if covered by the FCPA, must affirmatively ensure it is accurately maintaining its books and must develop and implement an adequate system of internal accounting controls. FEPA, by contrast, imposes no requirement on any of the covered entities to ensure the statute is not being violated under their roofs.

Notably, while FEPA appears to spare imposing monitoring obligations on its subjects, it does not have the same scheme for the Department of Justice (DOJ), FEPA's enforcement authority. FEPA requires the DOJ to review its enforcement actions from the previous year and provide a comprehensive report to committees in the U.S. House of Representatives and the U.S. Senate, as well as publish the report on its website. Per statutory mandate, the attorney general must work with the secretary of state to detail demands by foreign officials from U.S. companies, the efforts of foreign governments to prosecute such cases, and what diplomatic efforts of the United States operate to protect U.S. companies. Finally, the report must summarize the major enforcement actions taken, penalties imposed, and the effectiveness of the DOJ's actions, and detail what resources or legislative action is needed for adequate enforcement under FEPA. While the DOJ compiles press releases and makes its enforcement actions under the FCPA publicly available, there is no single comprehensive report and analysis, as is required under FEPA.

Anti-Bribery Enforcement Around the World

FEPA is not the first law of its kind, nor is it even one of the most aggressive versions of anti-bribery legislation that exists in the world right now. The UK Bribery Act of 2010 (UK Bribery Act) is far-sweeping legislation the criminalizes any UK citizen or person located within its borders from paying or receiving—directly or indirectly—a bribe.[3] Like FEPA, the UK Bribery Act applies in both the public and private sectors. One important characteristic of the UK law is that it creates a mechanism through which companies may be liable under the act, even if they did not participate in or have knowledge of the bribery. However, the UK Bribery Act provides that a corporation may escape liability upon a showing that it implemented adequate procedures to prevent the bribery.

Another law with similar aims as FEPA is a French law known as the Sapin II Act.[4] The Sapin II Act obligates corporations or groups of corporations to create and implement anticorruption mechanisms. Similar to the DOJ for FEPA, the French Anticorruption Agency (*Agence Française Anticorruption*) is the monitoring and enforcement agency, which can impose steep fines, and violations can even result in the company being monitored by the French government. The Sapin II Act also allows nongovernmental organizations (NGOs) like Anticor to commence proceedings related to corruption matters. In addition, the French law explicitly provides for the protection of whistleblowers.

Analyzing last year's FCPA enforcement data offers no discernible enforcement pattern, nor does it reflect that the DOJ is focusing on any particular region. To the contrary, FCPA enforcement actions in 2023 spanned both corporate and individual actors and prosecuted briberies connected with Brazil, Venezuela, Honduras, Indonesia, and India. Indeed, if the FCPA enforcement actions are indicative of any trend regarding the geographic scope of FEPA enforcement actions, one can conclude that the DOJ will not focus on any one region but will continue to prosecute claims from various parts of the world. For example, Transparency International examines countries against the 100-point Corruption Perceptions Index (CPI), where 100 is very clean and 0 is highly corrupt. While the aforementioned countries span the globe, each of them scores below 40 on the CPI.[5]

Practical Implications

Given FEPA's recent implementation, one can only speculate the practical effect the new law will have on anti-bribery enforcement, whether domestic or foreign. However, analyzing how FEPA fits into the already robust framework of global anti-bribery enforcement efforts offers glimpses of what effects may arise. FEPA prohibits people from accepting items of value in return for being influenced to perform any official act, and further criminalizes accepting items of value in return for being induced to violate the official duty of the foreign official or person.

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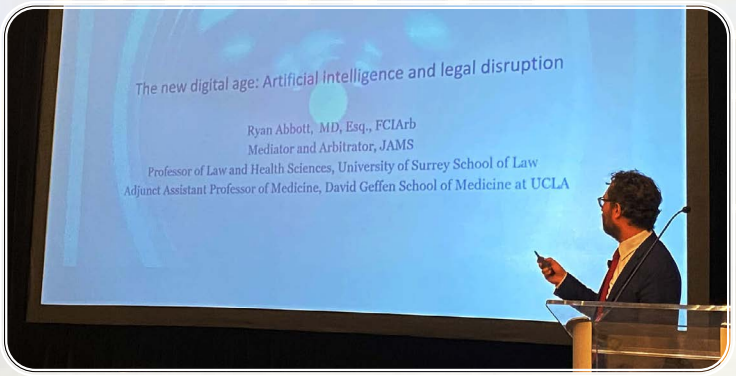
iLaw 2024
16 February 2024 • JW Marriott Marquis, Miami

The iLaw conference is the International Law Section's annual flagship event. iLaw 2024 featured opening and closing plenary sessions; a keynote address on the topic "The New Digital Age: Artificial Intelligence and Legal Disruption" by Ryan Abbott; and three parallel tracks on (1) international arbitration (sponsored by AAA-ICDR), (2) international litigation, and (3) international business transactions. The conference is the premiere international law conference in Florida and is attended by legal practitioners from the United States, Canada, Europe, and Latin America. This year saw the event's first sold-out crowd, with 250 international law practitioners gathering at the JW Marriott Marquis in Downtown Miami for iLaw 2024.

The day before iLaw, on 15 February 2024, the International Law Section conducted its executive council meeting at the offices of Greenberg Traurig PA, and iLaw attendees enjoyed an opening cocktail reception sponsored by Fiduciary Trust International at Boulud Sud, a Mediterranean restaurant in Downtown Miami.

Opening plenary session: 2024 Cybersecurity and Data Privacy Trends: U.S., International and Cross-Border Rules, Compliance, Best Practices and Enforcement, with Max Teia, Victoria Beckman, Michael McLaughlin (moderator), and Javier Fernandez-Samaniego

ILS Treasurer Davide Macelloni introduces keynote speaker Ryan Abbott, MD, Esq., FCIArb, mediator and arbitrator, JAMS; professor of law and health sciences, University of Surrey School of Law; and adjunct assistant professor of medicine, David Geffen School of Medicine, UCLA.



Ryan Abbott offers insights into how artificial intelligence is disrupting the legal profession during his keynote address.

ILQ Editor-in-Chief Jeff Hagen speaks on the benefits of publishing an article in the *International Law Quarterly*.

iLaw 2024, *continued*

The AAA-ICDR Updates on the Current State of Affairs in International Arbitration, with Anibal Sabater, Katie Gonzalez, L. Andrew S. Riccio, and Luis M. Martinez

A Changing World Order: Impacts on International Business, with Fernando Rivadeneyra, Nouvelle Gonzalo, Robert M. Kossick, Olga Torres, and Frederic Rocafort (moderator)

So You're an International Arbitrator: How to Approach and Handle Some of the Issues That May Arise, with Erica Franzetti, Gisela Paris, Greg Fullelove, Luis M. Martinez, and Katharine Menéndez de la Cuesta (moderator)

Investment Arbitration Reports – The ICSID Report, New ICSID Rules and Code of Conduct, with Silvia Marchili (moderator), Carlos Ramos-Mrosovsky, Meg Kinnear, and Arif Hyder Ali

U.S. Financial Crime Enforcement in LatAm Jurisdictions, with Barbara Llanes (moderator), Jed Dwyer, Frank La Fontaine, Diego Sierra, and Marcelo Ribeiro de Oliveira

International Construction Arbitration, Infrastructure Projects, with Sovereigns: Keeping the Project Moving Forward, Conflict Management Options, Cultural Differences and Off-Ramps to Consider, with Luis M. Martinez (moderator), Ulyana Bardyn, Roberto Henandez-Garcia, Martin Gusy, and Annie Lespérance

Litigation Around Innovation, with Daniel Maland (moderator), Robert Nai-Shu Kang, José Antonio Arochi, Yvonne Lee, and Lisa M. Lanham

Litigation Around Innovation, with Daniel Maland (moderator), Robert Nai-Shu Kang, José Antonio Arochi, Yvonne Lee, and Lisa M. Lanham

iLaw 2024, *continued*

Hot Topics in International Litigation, with Ed Mullins (moderator), Meredith Schultz, Andres Rivero, Giacomo Bossa, and Carlos F. Osorio

Protecting Your Rights and The Money Chase, with Michael Fernandez (moderator), Stuart Cullen, Nyana Miller, Edgar Zurita, and Frederico Singarajah

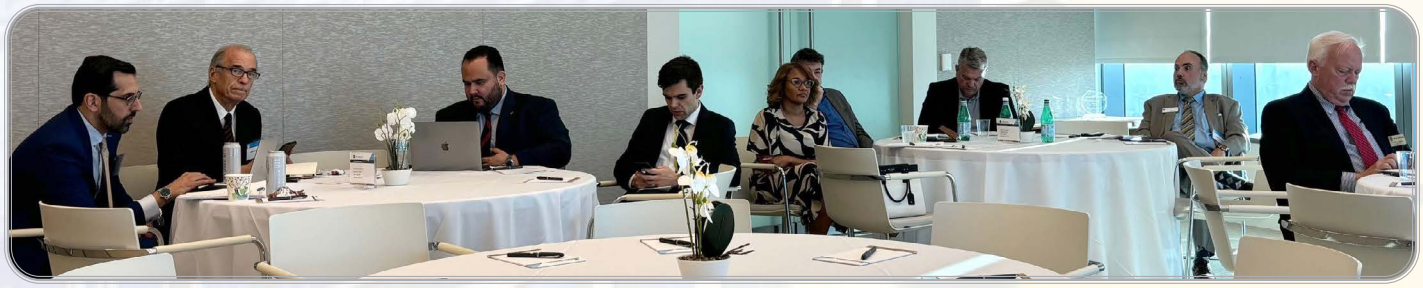
Closing plenary session: The International General Counsel SWOT (Strengths, Weaknesses, Opportunities, Threats), with Augusto Aragone, Ines Bahachille, Michael Gabel, Effie Silva, Willie Hernandez, and Richard Montes de Oca (moderator)

Keep it Moving, Miami: Challenges Facing International Transport Companies in a Shrinking World Economy, with Tiffany Compres, Gary Birnberg (moderator), Steve Irick, Ariel Diaz, and Helen Warner

We aren't in Kansas Anymore, Toto: the Do's and Don'ts of Doing Business in Latin America, with Jorge de Hoyos Walther, Alex Hao, Eva Perez Torres (moderator), Violeta Longino, James M. Meyer, and Juan Carlos Tristán

iLaw 2024 ILS Executive Council Meeting

The International Law Section conducts an executive council meeting, led by ILS officers Davide Macelloni (treasurer), Ana Barton (chair-elect), Richard Montes de Oca (chair), and Cristina Vicens (secretary) and attended by members via Zoom and in-person.



iLaw Opening Cocktail Reception

ILS members and guests enjoy an evening of networking during the cocktail reception at Boulud Sud.

Davide Macelloni, Ryan Abbott, Richard Montes de Oca, and Eve Perez Torres

Alix Apollon, Santiago Gatto, and Richard Montes de Oca

Javier Fernandez-Samaniego, Richard Montes de Oca, Frederico Singarajah, and Alex Hao

Susanne Leone and Nouvelle Gonzalo

Davide Macelloni, Richard Montes de Oca, and Adrian Nuñez

Adrian Nuñez, Ruzbeh Hosseini, Arnie Lacayo, and Nyana Miller

ILS Pre-Moot Competition 17 February 2024 • Miami

The ILS Richard DeWitt Memorial Vis Pre-Moot Competition was held the day after iLaw 2024 in JAMS's Miami, Florida offices, with a cocktail reception in Hogan Lovells. This dynamic educational program bridges the gap between theory and practice, preparing students for the prestigious 31st Willem C. Vis International Commercial Arbitration Moot in Vienna.

The ILS continued its tradition of offering an innovative, hybrid competition by combining in-person and virtual oral arguments, all with the goal of providing practical training, fostering a deeper understanding of international commercial law, and preparing students for resolving complex international business disputes.

Thanks to our ILS Superstars for their leadership of the event. Pictured are ILS Chair-Elect Ana Barton, ILS Pre-Moot Co-Chair Andres Sandoval, ILS Pre-Moot Co-Chair Priscila Bandeira, and ILS Chair Richard Montes de Oca.

Congratulations to the team from Stetson University College of Law, who took first place in the competition.

Congratulations to the team from the University of Miami School of Law, who took second place in the competition.

Congratulations to the team from Florida State University College of Law, who took third place in the competition.

Congratulations to Ms. Vanessa Pilatova of Case Western Reserve University School of Law (right), who received the Burt Landy Award for Best Oralist, awarded by the Miami International Arbitration Society (MIAS Chair Silvia Marchili pictured left).

Congratulations to Ms. Alexandria Santamaria of the University of Miami School of Law, who received an Honorable Mention for her performance as an oralist. Pictured are Professor Paula C. Arias, director of UM Law's International Moot Court Program, Ms. Santamaria, and ILS Pre-Moot Co-Chairs Priscila Bandeira and Andres Sandoval.

ILS Lunch & Learn With Edward Davis
3 April 2024 • Coral Gables

On 3 April 2024, Fiduciary Trust International hosted the ILS Lunch & Learn at their office in Coral Gables, Florida. Edward H. Davis, Jr., an ILS past chair and founding shareholder of Sequor Law, shared his experiences as a certified fraud examiner. Ed conducts financial fraud investigations, prosecutes civil claims for fraud, and pursues misappropriated assets, having tracked such funds in jurisdictions across the globe, including Japan, The Bahamas, Latin America, Switzerland, and Liechtenstein, among others. Thank you to Fiduciary Trust International for hosting this event and to Jim Meyer from Harper Meyer LLP for moderating the discussion.

Jim Meyer and Ed Davis

Participants enjoy lunch as Ed Davis shares his experiences in the practice of international law.

ILS Lunch & Learn participants

WORLD ROUNDUP

AFRICA

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African Continental Free Trade Area marks three years, shows some success.

The African Continental Free Trade Area (AfCFTA) became operational on 1 January 2021, with the goals to drive intra-African trade and foster economic integration across the continent, thus remedying past trade practices where African countries imposed more restrictive trade measures among themselves, preferring to trade with non-African countries. In fact, a 2019 report showed that only 14.4% of official African exports went to other African countries, a small fraction compared with the 52% in intra-Asian trade, 49% in North American trade, and 63% between European nations in the same year.[1] Three years have passed since AfCFTA went into effect, providing an opportunity to reflect on its successes.

Unfortunately, we found no official data or report card produced by the African Union or any other African government-based agency detailing a progress report of the agreement. Perhaps this is due to the COVID-19 pandemic that put all African nations and the rest of the world into lockdown, slowing the agreement's progress. Though no data or reports have been produced so far, there are a few cases of note that were facilitated by an African Union-led initiative deployed to enable the implementation of the agreement. Specifically in 2022, the African Union introduced a pilot program called the AfCFTA Guided Trade Initiative.[2] Eight countries were eligible to participate in the program and ninety-six products were approved for trade in the pilot program.[3] In accordance with the program's requirements, in 2022, Kenya and Rwanda shipped some locally made car batteries and coffee to Ghana, marking the first-ever shipments under the AfCFTA.[4] It was also the first time that African countries used the AfCFTA Rules of Origin certificate as part of their shipment process, thus making it eligible for lower customs tariffs.[5] Following Kenya and Rwanda's lead, in January 2023, South Africa exported refrigerators, home appliances, and mining equipment to unnamed neighbors.[6] However, in all three cases, it is unclear how much the traded products between these countries were worth in total, or how much lower the tariffs were for all three exporting parties, as no official data have been provided for the shipments.

Despite the limited and/or lack of data on AfCFTA progress, the agreement continues to hold immense potential to transform Africa's economic landscape. Addressing challenges that may hinder its progress will be crucial for achieving the agreement's full potential.

Ngosong Fonkem *is an attorney at Harris Bricken Sliwoski LLP, an international law firm based in Seattle, Washington, USA. Mr. Fonkem received a B.A. from University of Wisconsin-Green Bay (2008), J.D./M.B.A. from West Virginia University College of Law (2011), and LL.M. from Tulane Law School (2012). Information on his co-authored book,* Trade Crash: A Primer on Surviving and Thriving in Pandemics & Global Trade Disruption, *is available at https://www.tradecrash.com/.*

Endnotes

1 Fin. Times, https://www.ft.com/content/bc612590-d38e-4d08-a1e1-0e7f5e19be30.

2 Pavithra Rao, *AfCFTA's Guided Trade Initiative takes off, set to ease and boost intra-African trade*, African Renewal, 12 Oct. 2022, https://www.un.org/africarenewal/magazine/october-2022/afcfta%E2%80%99s-guided-trade-initiative-takes-set-ease-and-boost-intra-african-trade.

3 *Id.*

4 Mariama Diallo, *Kenya Ships First Batches of Batteries, Tea Under AfCFTA Pact,* VOA News, 10 Oct. 2022 https://www.voanews.com/a/kenya-ships-first-batches-of-batteries-tea-under-afcfta-pact-/6783688.html.

5 *A year of trading under AfCFTA – a Rwandan Businesswoman's Story,* African Newspage, https://www.africannewspage.net/2023/10/a-year-of-trading-under-afcfta-a-rwandan-businesswomans-story/.

6 *South Africa makes first shipment of products under AfCFTA*, GBC Ghana Online, https://www.gbcghanaonline.com/news/business/afcfta-shipment/2024/.

CARIBBEAN

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Nevis introduces administrative, management changes.

Recently Nevis introduced numerous changes affecting the ongoing administration and management of Nevis companies. The main changes are summarized below.

Electronic Documents and Signatures – The Nevis Registry will now issue all corporate documentation in electronic format.

Issuance of hard copy corporate documents will require a special request and will incur additional fees.

Documents bearing electronic signatures will now be accepted in respect of IBCs and LLCs. From 1 April 2024, all documents will be issued in electronic format. Wet ink signatures are still required for trusts and foundations.

New Record-Keeping Requirements – Companies are now obligated to keep all articles, minutes, consent actions, notices, and other documents they have filed, as well as registers of the companies, including names and addresses of shareholders or members, directors or managers, and beneficial owners. If these registers are not kept with the registered agent, the registered agent must be provided with the physical address where the registers are kept. Noncompliance with this requirement will render the company liable to a penalty up to US$10,000.

It is important to point out that the registered agent of an IBC or LLC is required to maintain its records on that entity for a minimum of six years after the date on which the entity is dissolved or otherwise ceases to exist.

Bearer Shares Banned – Corporations can now only issue shares in registered form. Bearer shares will no longer be permitted. Any IBCs that have previously permitted issuance of bearer shares must convert the bearer shares to registered shares. Also, companies whose articles allow conversion to bearer shares were required to amend the articles to remove this option by 11 March 2024.

***Fanny Evans** is a partner at Morgan & Morgan and is admitted to practice law in the Republic of Panama. She focuses her practice on corporate services, estate planning, and fiduciary services. Her portfolio of clients includes banks and trust companies, family businesses, corporate practitioners, and private clients. From 2011 until mid-2017, Mrs. Evans served as executive director and general manager of MMG Trust (BVI) Corp., the Morgan & Morgan Group's office in British Virgin Islands. Prior to becoming head of the BVI Office, she served as fiduciary attorney in a local firm focusing on corporations and trusts. Mrs. Evans is member of the Society of Trust and Estate Practitioners (STEP). She is fluent in Spanish, English, and Italian.*

CHINA

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Hong Kong adopts national security legislation.

On 23 March 2024, the Safeguarding National Security Ordinance came into effect in Hong Kong, just four days after the Legislative Council voted to approve it. This new legislation is to be distinguished from the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, enacted in 2020 by China's Central Government.

Hong Kong authorities have long sought to implement national security legislation, citing Article 23 of the Basic Law, which essentially serves as the region's constitution. Article 23 provides that Hong Kong "shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in [Hong Kong], and to prohibit political organizations or bodies of [Hong Kong] from establishing ties with foreign political organizations or bodies."

Initial efforts to pass Article 23 legislation after Hong Kong's handover to China were shelved after massive protests. In the face of pro-democracy protests in the region, China eventually imposed its own national security law in 2020, but Hong Kong authorities continued their push for local legislation, which they claim is needed to address "legal loopholes" remaining even after the imposition of Beijing's 2020 law.

State secrets law now more expansive.

On 27 February 2024, the Standing Committee of the National People's Congress approved a revision of the Law on Guarding State Secrets, which entered into force on 1 May 2024. The law was originally adopted in 1988 and revised in 2010. Approval of the revised law was fast-tracked, with two readings instead of the usual three.

Under the previous regime, state secrets were broadly defined as "matters related to national security and interests" (Article 2). Previous Article 9 (revised Article 13) identifies some general subject matters that state secrets might concern, yet essentially codifies the ability of the authorities to label any information whatsoever a state secret.

The new legislation further expands the scope of protected information, to encompass "work secrets" (Article 64), vaguely defined as matters that, while not rising to the level of state secrets, could have an adverse impact if revealed. While the revised law indicates that additional guidance will be provided, the unclear nature of what could be considered a work secret is for now raising concerns within the business community.

Data export limits relaxed.

On 23 March 2024, the Cyberspace Administration of China promulgated the Provisions on Promoting and Regulating the Cross-border Flow of Data, bringing much-needed clarity to entities that export data from China. Article 3 stipulates that data collected in the context of "activities such as international trade, cross-border transportation, academic cooperation, and cross-border manufacturing and marketing" is exempt from control measures such as applying for a security assessment, provided it does not contain personal information or important data.

Article 2, in turn, establishes that data not explicitly identified as "important" will not be treated as such, and hence not subject to the stricter requirements that apply to the treatment of such data under other relevant legislation such as the Personal Information Protection Law. Uncertainty over whether data could potentially be considered "important" by the authorities has been a source of concern for foreign companies doing business in China.

The provisions also carve out situations where the export of personal information is permitted, without a requirement for control measures. Foreign companies that employ staff in China, for example, are now able to transfer the personal information of such staff to their headquarters abroad, if "it is truly necessary . . . for the implementation of cross-border human resources management" (Article 5(2)). Also exempt is the transfer of personal information "for the purpose of concluding or performing a contract to which an individual is a party, such as cross-border shopping" (Article 5(1)).

Frederic Rocafort *is an attorney at Harris Bricken Sliwoski, LLP, where he specializes in intellectual property and serves as coordinator of the firm's international team. He is also a regular contributor to the firm's China Law Blog. Previously, Mr. Rocafort worked in Greater China for more than a decade in both private and public sector roles, starting his time in the region as a U.S. consular officer in Guangzhou. Mr. Rocafort is licensed in Florida, Washington State, and the District of Columbia.*

INDIA

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Supreme Court of India strikes down Electoral Bond Scheme in a landmark judgment for transparency in political funding.

In a historic judgment on 15 February 2024, the Supreme Court of India unequivocally declared the Electoral Bond Scheme, introduced in 2017 under the Finance Act, unconstitutional. This decision came as a response to the legal challenge posed in Miscellaneous Application No. 486 of 2024, with the State Bank of India (SBI) as the applicant against the Association for Democratic Reforms, among others, marking a pivotal moment in India's ongoing battle for transparency in political funding.

The scheme, envisioned by then Finance Minister Arun Jaitley, was promoted to ensure clean and legitimate financial contributions to political parties. By allowing donors to anonymously purchase bonds from authorized branches of the State Bank of India, the scheme purported to eliminate the flow of unaccounted money in politics. However, its implementation raised severe constitutional and ethical questions, leading to its scrutiny by the apex court.

The Supreme Court's judgment was anchored on three critical concerns:

1. Right to Information: The scheme's provision for anonymity directly contravened citizens' right to information under Article 19(1)(a) of the Constitution, undermining the transparency essential for a healthy democratic process.
2. Risk of Quid Pro Quo and Extortion: The anonymity it afforded could facilitate undue favors in enabling "the capture of democracy by wealthy interests" and in turn, erode the integrity of the political landscape.
3. Unlimited Corporate Donations: By removing caps on corporate donations and enabling contributions through shell companies, the scheme posed a significant threat to the fairness of electoral competition and opened doors to foreign interference, thereby threatening the nation's sovereignty.

In a bold move, the court invalidated the scheme and mandated the disclosure of all bond transactions recorded from its inception till the date of judgment. This directive aimed to peel back the layers of secrecy and provide a comprehensive view of the financial dealings between corporate entities and political parties. The judgment emphasized the need for a robust framework that ensures transparency and accountability in political funding, asserting that the integrity of democratic institutions must be preserved against the corrupting influence of unchecked financial power.

In conclusion, the Supreme Court's decision to strike down the Electoral Bond Scheme is a testament to the judiciary's role in safeguarding democracy. It reaffirms the importance of transparency, accountability, and fair play in the political domain, setting a precedent for future legislative and policy decisions in India and potentially inspiring similar scrutiny in democracies worldwide.

Neha S. Dagley *is a Florida commercial litigation attorney who has, for the last nineteen years, represented foreign and domestic clients across multiple industries and national boundaries in commercial litigation and arbitration matters. A native of Mumbai, Ms. Dagley is fluent in Hindi and Gujarati. She is co-chair of the Asia Committee of The Florida Bar's International Law Section. She is pursuing an advanced LL.M. in air and space law at Universiteit Leiden in the Netherlands.*

Yavana Chitrarasu*, from Singapore, is an aspiring undergraduate student with a passion for sustainable food solutions. A proactive intern at a cultured meat startup, she has demonstrated a keen interest in innovative approaches to addressing environmental challenges. She eagerly awaits the start of her journey to further explore her interests in sustainability and the law.*

MIDDLE EAST

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Kuwait considers new judicial arbitration law.

Kuwait's Council of Ministers has finalized the preparation of a draft concerning a proposed law on judicial arbitration. The objective of this new draft law is to enhance the arbitration sector in Kuwait. The proposed legislation is slated to annul Law No. 102 of 2013, which previously constrained the jurisdiction of arbitration bodies to disputes involving amounts exceeding 500,000 Kuwaiti dinars.

Saudi Arabia and Permanent Court of Arbitration ink cooperation deal.

In March 2024, Saudi Arabia and the Permanent Court of Arbitration in the Hague signed a memorandum of understanding (MoU). The MoU is aimed at enhancing areas of cooperation and studying the conclusion of a host country agreement in accordance with applicable regulations and laws.

Omani Supreme Court allows review of award.

In a recent decision, the Omani Supreme Court allowed a lower court to reopen the merits of an arbitration award that was sought to be enforced in Oman against an Omani company. The Omani Supreme Court found that although the award was issued by an ICC tribunal under English Law seated in London for the benefit of a Qatari company, since the award was being enforced against an Omani company this was enough to invoke the Omani courts' jurisdiction to reopen and review the merits of the award.

By way of context, the claimant in the arbitration proceedings sought to enforce the award against the respondent (a company incorporated in Oman). The respondent challenged enforcement and sought to have the Omani Court of Appeal reconsider the merits of the award. The Supreme Court held that as a matter of Omani law, Omani lower courts have jurisdiction over Omani nationals and companies that are incorporated in Oman. Accordingly, Omani courts did have jurisdiction to hear the underlying merits of the dispute.

Questions raised over ICC tribunal's power to award legal fees in Dubai.

In enforcement proceeding of an ICC award in Dubai, an award debtor challenged the award on a number of bases. Despite ultimately upholding the majority of the award, the Dubai Court of Cassation disallowed the part of the ICC award that required the award debtor to pay the award creditor's costs of the arbitration. In disallowing this part of the award, the Court of Cassation determined that the tribunal had exceeded its power in granting a costs order for legal fees. In coming to this decision, the Court of Cassation considered that a party was only entitled to its legal costs under *"a provision derived from the law . . .",* or if provided for in the relevant arbitration agreement by an *"explicit and clear provision."*

Regarding the first criteria, the Court of Cassation considered Article 46(1) of Federal Law No. 6 of 2018. The Court of Cassation considered that this provision provides an exhaustive list of costs that are awardable by tribunals and that the provision did not include the award creditor's costs of the arbitration.

As to the second criteria, an *"explicit or clear"* provision within the arbitration agreement itself allowing for the award of legal costs, the Court of Cassation did not identify any provision obliging either party to pay the other's legal expenses. This was despite the fact that the arbitration was held pursuant to the ICC Rules, and, notably, the applicable ICC Rules do provide the authority for tribunals to award legal costs. The court did not appear to consider the ICC Rules, which may have been incorporated by reference into the arbitration agreement.

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NORTH AMERICA

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American Bar Association (ABA) issues guidance to U.S. lawyers on the use of artificial intelligence (AI) in the legal profession.

In the wake of several high-profile, and embarrassing, missteps by U.S. lawyers using AI, the ABA Task Force on Law and Artificial Intelligence has taken steps to address the legal challenges raised by the use of AI, particularly in the courtroom. The ABA Task Force states that its mission is to "(1) address the impact of AI on the legal profession and the practice of law, and related ethical implications; (2) provide insights on developing and using AI in a trustworthy and responsible manner; and (3) identify ways to address AI risks."

As the ABA's model rules for lawyers contain significant guidance for lawyers, and include a "duty of competence" that extends to technical competence, the ABA has previously stated that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology," ABA Model Rule 1.1., Comment (8). Accordingly, in 2023, the ABA passed ABA Resolution 604, which "[u]rges organizations that design, develop, deploy, and use AI systems and capabilities to follow certain guidelines and urges Congress, federal executive agencies, the Courts, and State legislatures and regulators, to follow these guidelines in legislation, legal decisions, and standards pertaining to AI."

Members of the ABA Cybersecurity Legal Task Force focused on transparency, stating that people should know when they are engaging with AI rather than a real person, and also that such people should be able to challenge the outcomes or decisions made by AI when appropriate.

Ontario Superior Court upholds finding of jurisdiction in class action brought against cryptocurrency platform Coinbase.

In mid-April 2024, the Ontario Superior Court of Justice upheld a finding of jurisdiction over crypto platform Coinbase, which sought to dismiss and for a finding of forum non conveniens (FNC). The plaintiffs had argued that Coinbase had mishandled its digital assets leading to the plaintiffs' losses. When the plaintiffs initially dealt with Coinbase, they did so under an agreement stating that disputes would be subject to the laws of Ireland and England. By 2023, however, Coinbase had shifted its operations and agreements to Canada. Despite the various jurisdictions in which Coinbase had operated with regard to the plaintiffs, the court declined to dismiss on jurisdictional grounds, although it left open the possibility of an FNC challenge in the future.

Mexico asks International Court of Justice (ICJ) to expel Ecuador from UN following a raid on Mexican Embassy in Quito.

In early April 2024, Ecuadorian police scaled the walls of the Mexican Embassy in search of former Ecuadorian Vice President Jorge Glas, who had sought asylum within the Mexican Embassy in Quito to avoid arrest. Police raided the Mexican Embassy to arrest Glas and held at gunpoint Mexican Chief Diplomatic Officer Roberto Canseco, who was thrown to the ground. The raid was successful in arresting Glas.

As a result of the late-night raid, Mexico appealed to the ICJ to expel Ecuador from the UN, calling Ecuador's actions a violation of international law. Mexico has also severed its diplomatic ties with Ecuador over the embassy raid, and the Organization of American States (OAS) also stated that the situation was handled poorly; OAS Secretary-General Luis Almagro said neither "the use of force, the illegal incursion into a diplomatic mission, nor the detention of an asylee are the peaceful way toward resolution of this situation." Ecuador has defended its decision to order police forces to storm the embassy and arrest Glas, reaffirming a commitment to bringing corrupt officials to justice and questioning whether Glas met the standards to receive political asylum.

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WESTERN EUROPE

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France becomes world's first country to protect abortion rights in its constitution.

France has entrenched abortion as a "guaranteed freedom" in its constitution following an overwhelmingly decisive vote (both houses of the French Parliament voted 780 to 72 in favor of the amendment, reaching the three-fifths majority needed to amend the French constitution) at a special congress held in Versailles in March 2024. President Emmanuel Macron spearheaded this initiative following the United States Supreme Court's overturning of *Roe v. Wade*, a case that had established the right to abortion as part of the constitutional right to privacy.

Despite abortion being legal in France since 1975, this move, which comes amidst global challenges to abortion access and reproductive rights, marks a significant step forward in safeguarding individual autonomy and ensuring informed decision-making regarding sexual and reproductive health care. This historic vote is a global first in explicitly safeguarding abortion rights within a national constitution, signaling a victory for civil society organizations advocating for reproductive justice.

European police seize luxury assets of more than €600 million in alleged COVID-19 fraud.

In a high-profile operation, European police confiscated Lamborghinis, Rolex watches, cryptocurrencies, luxury villas, and other expensive items as part of an investigation into an alleged €600 million COVID-19 fraud scheme. Following an investigation led by the EU prosecutor, eight individuals were arrested while fourteen were placed under house arrest and two were prohibited from practicing their profession. Arrests occurred across Austria, Italy, Romania, and Slovakia. The operation, which spans multiple countries, aims to unravel a complex network suspected of exploiting pandemic relief funds.

According to the European Public Prosecutor's Office (EPPO), a criminal organization is suspected of orchestrating a fraud scheme between 2021 and 2023 to deceive Italy's recovery packages. In 2021, the group purportedly applied for non-repayable grants that were available to aid small- and medium-sized enterprises. However, it seems the group fabricated false balance sheets to show the companies as active and profitable, although the companies were, in fact, inactive fictitious entities. After receiving approximately €600 million from the Italian National Recovery and Resilience Plan (NRRP), the group allegedly transferred the funds to bank accounts in Austria, Romania, and Slovakia and utilized artificial intelligence, cryptocurrencies, and offshore cloud servers to perpetrate and conceal the fraud.

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Best Practices: Top 10 Do's and Don'ts for In-House Counsels

By Ines Bahachille, Miami

As a native Venezuelan, granddaughter of Syrian-Catholic immigrants, and a U.S. citizen, I have always valued cultural and geographical diversity. I have very much enjoyed working with various employers, in diverse industries, and in different parts of the world, over my almost thirty-year career in the law profession.

Choosing to be an in-house counsel was not always easy for me because of my entrepreneurial mindset. During my career, despite offers to move to the business side, I decided to stay in the legal profession, committing to serve business by being a "business leader with legal expertise."

During all these years, I have evolved personally and professionally, realizing that having a seat at the table is not something the legal department in every company will gain automatically. Some places view in-house counsel as part of the "back office," so to be "at the front" is uncommon.

It took a great deal of my energy, passion, patience, and personal beliefs to fight the good fight to have a seat at the table, making the function of in-house counsel deserving of what is considered to be a great partner. It is my belief that we are there to do the right thing, to simplify, to help grow the company, to apply breakthrough thinking, and to take informed risks. Achieving all of this is not an easy undertaking.

In the journey to achieve my goals, I found that observing what I did not want to become and focusing on what I would like to learn was always helpful. Feedback and self-awareness also helped me to understand that "perception is reality."

The following is a summary of what I have learned on this exciting path, which some have called "best practices." This comes from a humble space and does not mean my advice is correct for all practitioners in all situations. It is meant to help generations of in-house counsels to succeed and excel in this entertaining profession. I hope you enjoy it!

1. Academic Formation: In a multi-disciplinary team, lawyers may have a higher academic formation than their peers serving in other functions because of the requirements of the legal profession (e.g., LLM in a specialty). Do not use this card to position yourself. You are not your resume; you are you, and within a team we are all equal at the table.

2. Peer Relationships: You are not working with lawyers all the time. Make sure the language you use is one that people who are not in the profession can understand! This will help to build relationships faster. Be sure to ask others first if they want context, background, and education on a topic. Most of the time they will not, so be prepared to use fewer words, with solid content.

Best Practices, continued

3. Dress Code: Watch the dress code in your company and try to adapt, without losing authenticity. If I had worn my suits when I worked for an internet company years ago, I am positive I would not have fit in at all. Sometimes being "too formally different" may intimidate people.

4. Talking Too Much or Not Enough? During meetings, talk if you must, even if the topic is not related to your legal world. I love an expression from my native country that says, "You do not have to be the parsley in all the soups," but there are times when we need to be that parsley or when we can express our opinions, even if they are not legal opinions. If you work in a company where you can only speak about the profession you represent, think about whether or not it is the place for you. Having said that, measure your comments and participation, watching out for extremes (saying too much or too little).

5. In the Bubble: Do not confuse "confidentiality" with being kept apart from other teams and functioning "in a bubble." I worked in a company where the legal department was by itself on the underground floor. I moved upstairs and brought the entire legal department with me. Confidentiality was still maintained by using quiet rooms, and let's be honest, not everything is confidential. The dynamics changed, work became more agile, and the value we added was evident and appreciated.

6. Authenticity: Be yourself and allow people to know that "lawyers are people." We do have our hobbies, life, families, etc. It is possible to build relationships with colleagues in other departments within the business. Respect, trust, and friendship can coexist, even if you are not always that popular when you need to address what people sometimes do not want to hear. We must have integrity, and that is not up for discussion.

7. Who Is Your Audience? Learn and read your audience, including law firms and external providers. You might need to fine-tune and adapt yourself to different stakeholders, depending on the desired outcome. In an M&A transaction, for example, it is appropriate to become more technical when you are at the same table as legal experts, but if you are at the table with others in the business, this probably will be unnecessary. Strategy and business mindedness are essential for this role.

8. Relax: You do not need to know all the answers. It is OK to say, "I do not know and will find out." Surround yourself with strong and savvy people and teams. Always ask questions and understand the facts before jumping to conclusions, even when your instincts and experience want to take over your thinking.

9. Overthinking: Too many explanations are not always welcome. Ask first to understand what the other person is looking for. Also educate them about what you do so they can understand why "urgency is not the same as a priority."

10. Laugh About Yourself and Have Fun: Laugh about yourself from time to time. Care about your team genuinely and feel proud and not guilty to have chosen this profession! We are privileged to be lawyers, and in my case, in-house counsel.

The truth is we can learn the business end to end. We usually interact with all the areas, and we can understand our impact clearly. It has never been easy, though, and times are changing. The opportunity is there to demonstrate the great value we can bring. The sky is the limit.

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ILS Fantasy Football League Crowns Champion in Year 2!

By Jeff Hagen, Miami

JENNIFER MOSQUERA

Congratulations to Jennifer Mosquera of Sequor Law in Miami, Florida, for becoming the new champion of the ILS Fantasy Football League! Jennifer is also our World Roundup editor, so this year the trophy remains in-house at *ILQ*!

Fantasy football allows friends and colleagues an opportunity for networking and bragging rights, and the league was a resounding success. The league comes together officially in August, with sixteen teams hailing from both inside the state of Florida and in international destinations. Below is the full list of participants and their team names. Thirteen teams from the first season participated again, and the last three on the list were new participants—including the winner in her first season.

Jacqueline Villalba (Lawyered Up)

Richard Montes de Oca (Richard's Big Dogs)

Ana Barton (Ana's Rookie Season)

Cristina Vicens (DakStreet Boys)

Laura Reich (Laura's Best Try!)

Jeff Hagen (Luxury Tax Legends), league commissioner

Daniel Coyle (Wagon ZFG)

Marycarmen Soto (MC Hamler Time)

Jorge de Hoyos Walther (Jorge's Steel Curtain)

Mel Schwing (Battlin' Barristers)

Omar Ibrahem (Trippin)

Sherman Humphrey (Sherman's Sunday Saints)

Juan Mendoza (Tua's Revenge)

Jennifer Mosquera (Jennifer's Unrivaled Team)

Davide Macelloni (Davide's Dazzling Team)

Dan Visoiu (The Bucharest Vampires)

Several big matchups turned the tide of the season for particular teams:

Week 2: Jennifer Mosquera, a k a Jennifer's Unrivaled Team, defeated another newcomer in Davide Macelloni, a k a Davide's Dazzling Team, 115 to 69 behind George Picken's performance. Unbelievably, Jennifer did not lose again the entire season. Wow!

Week 14: Tua's Revenge defeated MC Hamler Time 112 to 82 behind a strong performance by Rachaad White. This ultimately resulted in MC Hamler Time dropping down to the seventh place seed, where the following week these two teams faced off AGAIN in the playoffs, with the same result. Tua's Revenge only scored 92 in that matchup and likely would not have advanced to the championship without that Week 15 matchup, so this one was very important for seeding.

Week 17: Jennifer's Unrivaled Team defeated Tua's Revenge, 129 to 104, for a resounding victory. The first place seed won the title for the second year in a row! Justice prevails.

Now that two years of the ILS Fantasy Football League have concluded, it is safe to say there will be even more competitive fire among next year's participants. If you would like to join in the fun, please do not hesitate to reach out to me as we re-form the league for round THREE this summer. Until then, good luck with your draft prep!

Jeff Hagen *(Luxury Tax Legends) is the commissioner of the ILS Fantasy Football League, the editor-in-chief of* International Law Quarterly, *and is a partner at Harper Meyer LLP.*

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which had attacked Israel on 7 October 2023.[60] South Africa will now have to establish that Israel had an intent to destroy Palestinians in Gaza, in whole or in substantial part—not by inference alone, but by proof of actual intent.[61] Though it will take years for the Court to render a decision on the merits, South Africa is highly likely to fail.[62]

It is important to note that in its Order, the Court made it clear that Israel's leaders have the "responsibility to speak with authority and an understanding of Israel's international legal obligations. Inflammatory statements give ammunition to Israel's adversaries." Further, "the requirement that Israel report within one month on the measures taken to comply with the Genocide Convention is an opportunity, not a sanction, to provide more evidence—such as recently declassified cabinet minutes—explaining the intent behind Israel's war to remove Hamas from power in Gaza."[63]

Experts believe that IDF's mission "to dismantle the military and governance infrastructure of Hamas in Gaza, and to secure the freedom of Israeli hostages in Hamas captivity, does not inherently clash with the Court's stipulations that Israel must 'take all measures within its power' to prevent inflicting death or injury on 'the Palestinians in Gaza' per se and must also provide them with 'basic services and humanitarian assistance.'"[64] Israel has asserted consistently that it continues to perform in precisely this manner, despite the complex circumstances of fighting a terrorist group embedded among a civilian population.[65] **Most critically from Israel's perspective, the ICJ refrained from issuing any call for an immediate cease-fire.[66]**

It is important to note, the Court's holding did not state that Israel is violating international law.[67] Moreover, it did not hold that Israel's use of force to achieve this aim abides by the right of self-defense under the UN Charter and is in accordance with the law of armed conflict and international humanitarian law.[68] Nor did it order Israel to end the war against Hamas—which is what South Africa sought and what the Court previously ordered with respect to Russia's war of aggression on Ukraine. Instead, the ICJ simply instructed Israel to comply with the Genocide Convention—which, as a signatory of that convention since 1950, it is already obliged to do. While South Africa's allegations against Israel may have been, as the current U.S. administration states, "meritless, counterproductive, and completely without any basis in fact whatsoever," the ICJ's mid-of-the road approach was reasonably expected.[69]

Israel did not commit and cannot be accused of genocide.

As already stated, should the case be heard on the merits, based on the evidence presented before ICJ and the current development of the conflict, South Africa will not prevail as it will not be able to demonstrate that Israel committed acts of genocide against the people in Gaza.

The Applicable Law: To combat the atrocities committed during the Second World War, the Genocide Convention was adopted by the General Assembly of the United Nations on 9 December 1948 and signified the international community's commitment to ***never again***.[70] It is the first human rights treaty adopted by the General Assembly of the United Nations, and Israel is a party to the Convention.[71]

Raphael Lemkin, a Polish Jew who witnessed the unspeakable horrors of the Holocaust, is credited with coining the term genocide.[72] The existing legal lexicon was simply inadequate to capture the devastating evil that the Nazi Holocaust unleashed.[73]

The Convention was set apart to address a malevolent crime of the most exceptional severity.[74]

Not every conflict is genocidal.[75] The crime of genocide in international law, and under the Genocide Convention and international law, is a uniquely malicious manifestation.[76]

This or That: The Case for War, continued

It stands alone amongst the violations of international law as the epitome and zenith of evil.[77] It has been described correctly as the "crime of crimes."[78]

ICJ held in *Yugoslavia v. Belgium* that the Genocide Convention was not designed to address the brutal impact of intensive hostilities on the civilian population, even when the use of force raises "very serious issues of international law" and involves "enormous suffering" and "continuing loss of life."[79] The threat or use of force cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention, and the ICJ's ruling particularly instanced bombings as lacking the element of intent in the circumstances.[80]

Professor Malcom Shaw asserted on behalf of Israel: "if claims of genocide were to become the common currency of armed conflict, whenever and wherever that occurred, the essence of this crime would be diluted and lost."[81] The key component of genocide, the intention to destroy a people in whole or in part, is totally lacking on the part of Israel.[82]

What Israel seeks by operating in Gaza is not to destroy people, but to protect people, its people, who are under attack on multiple fronts, and to do so in accordance with the law, even as it faces a heartless enemy determined to use that very commitment against it.[83] "Israel is fighting Hamas terrorists, not the civilian population."[84]

Israel aims to ensure that Gaza can never again be used as a base for terrorism. As the prime minister of Israel reaffirms, Israel seeks neither to permanently occupy Gaza nor to displace its civilian population.[85]

"It is impossible to understand the armed conflict in Gaza, without appreciating the nature of the threat that Israel is facing, and the brutality and lawlessness of the armed force confronting it."[86]

First of all, Israel is engaged in a war with a genocidal terrorist organization, and the ongoing hostilities create various operational and logistical challenges that are intentionally exacerbated by Hamas's strategy of warfare, which includes the unlawful exploitation of civilians and civilian infrastructure, as well as utter disdain for civilian suffering, regardless of whether those civilians are Israeli or Palestinian.[87] Hamas has systematically and unlawfully embedded its military operations, militants, and assets throughout Gaza within and beneath densely populated civilian areas.[88] It has built an extensive warren of underground tunnels for its leaders and fighters, several hundred miles in length, throughout the Gaza Strip, with thousands of access points and terrorist hubs located in homes, mosques, United Nations facilities, schools, and perhaps most shockingly, hospitals.[89]

The humanitarian situation in Gaza clearly is not a result of Israel's actions alone. Israel has real concern for the humanitarian situation and innocent lives, as demonstrated by the actions it has and is taking.[90]

Israel continuously undertakes humanitarian initiatives.

Israel's conduct is inconsistent with its critics' allegations of genocidal intent. Israel, throughout the present hostilities, has undertaken various humanitarian initiatives: providing ongoing coordination of access to humanitarian supplies, making extensive efforts to mitigate civilian harm, demonstrating a willingness to compromise operational advantage for the benefit of Palestinian civilians (for instance, by giving advance warning and conducting close quarters combat), taking humanitarian pauses in fighting, following specific directives by the War Cabinet and IDF addressing the humanitarian situation, and much more—which cannot possibly be reconciled with a genocidal intent to destroy a group in whole or in part.[91]

For instance, Israel and Cyprus agreed on the establishment of a maritime corridor that will allow aid delivery directly to Gaza following security inspections.[92] The UN senior humanitarian and reconstruction coordinator for Gaza, Sigrid Kaag, welcomed this development.[93]

On 13 March 2024, a ship carrying 200 tons of food left Cyprus in order to reach Gaza via the maritime corridor.[94] The IDF is involved in constructing the pier and in finalizing the details concerning security arrangements for its operation and the supply route leading from the pier. A U.S. Navy ship carrying the equipment necessary for constructing the pier has already set sail from Virginia.[95]

Humanitarian airdrops into Gaza have continued to grow in number.[96] In addition to the parachuting on 21 February 2024 of four tons of supplies donated by the United Kingdom and Jordan, between 26 February and 9 March, Israel facilitated the airdrop into Gaza of approximately 1,138 aid packages, in cooperation with Egypt, Jordan, the United Arab Emirates, Qatar, Belgium, France, and the Netherlands.[97] The United States carried out nine airdrop operations between 2-13 March in coordination with Israel, parachuting into Gaza more than 35,000 meal equivalents and 28,000 bottles of water.[98] Challenging these humanitarian efforts is the fact that international organizations in Gaza are required to coordinate their activities with a terrorist organization that

controls all governmental ministries in the area.[99] This creates dependence on Hamas when delivering and distributing humanitarian aid.[100] This has enabled Hamas to take control of humanitarian supplies, after their access into Gaza has been facilitated by Israel, and to divert them from their intended civilian destination.[101]

Israel conducts direct military operations NOT intentional killing of the Palestinian population.

On 11 February 2024, Israel conducted a direct military operation directed at military targets and enabled the release of two Israeli hostages—Fernando Merman, aged 60, and Luis Har, aged 70—from over four months in captivity.[102] Hamas, however, continues to demonstrate its contempt for the law and human life, including by refusing to release the hostages immediately and unconditionally.[103]

Israel issues warnings to the civilians in Gaza prior to commencing military operations.[104] For instance, the Office of Israel's Prime Minister made it clear that any potential military operation is intended to target Hamas battalions in Rafah and requires the preparation and approval of plans concerning the protection of civilians.[105] On 9 February 2024, the Office of the Prime Minister of the State of Israel issued the following announcement:

> It is impossible to achieve the goal of the war of eliminating Hamas by leaving four Hamas battalions in Rafah. On the contrary, it is clear that intense activity in Rafah requires that civilians evacuate the areas of combat.[106] Therefore, Prime Minister Benjamin Netanyahu has ordered the IDF and the security establishment to submit to the Cabinet a combined plan[107] for evacuating the population and destroying the battalions.[108]

This announcement is in line with Israel's commitment under international humanitarian law to minimize harm to civilians, even as Hamas—in its utter contempt for life and for the law—continues its abhorrent strategy of seeking to maximize such civilian harm through its ongoing attacks against Israeli civilians and through its systematic use of Palestinian civilians and civilian objects as human shields in Gaza itself.[109] Hamas exploits crowds of civilians to create disorder in order to target troops and prevent them from asserting control over the distribution of humanitarian aid.[110] Active militaries are frequently encountered.[111]

Clearly, the humanitarian suffering in Gaza must be addressed.[112] Painfully, there are civilian casualties in a war. In this war, these realities are the painful result of intensive armed hostilities that Israel did not start.[113] They are the harsh effects of urban warfare against a genocidal terrorist organization whose strategy is to maximize civilian harm in utter contempt for life and for the law, and which continues to hold hostages and openly declare its intention to repeat the horrors of 7 October.[114] Other difficulties are a direct result of Hamas's strategy that seeks to use civilians as human shields and to exacerbate and exploit the already difficult situation.[115] Israel has, moreover, identified extensive abuse by Hamas in using United Nations Relief and Works Agency (UNRWA) facilities for military purposes, including the organization's Gaza headquarters as well as numerous schools.[116] To illustrate, the IDF discovered a tunnel shaft near an UNRWA school that led to an underground terror tunnel that served as a significant asset of Hamas's military intelligence and also passed under UNRWA's headquarters, which supplied the tunnel with electricity. Weapons and ammunition were found hidden in numerous other UNRWA facilities.[117]

The true number of casualties in Gaza is hard to ascertain.

John Kirby, National Security Council spokesman, stated: "We all know that the Gazan Ministry of Health is just a front for Hamas. It's a—it's run by Hamas, a terrorist organization. I've said it myself up here: We can't take anything coming out of Hamas, including the so-called Ministry of Health, at face value."[118]

The number of civilian casualties in Gaza must be carefully verified. Sadly, "despite a demonstrable record of manipulation designed to exaggerate the deaths of women and children (and minimize the numbers of men—the targets of Israeli military action), these numbers have become the data of record, used without qualification" by many.[119]

First, as stated above, due to who is reporting the numbers, the number of deaths may not be accurate.[120] Second, it must be determined how many of the casualties are in fact militants, how many were killed by Hamas fire, how many were civilians taking direct part in hostilities, and how many were the result of legitimate and proportionate use of force against military targets.[121]

Analysts and scholars suggest that Hamas misstates, inflates, and manipulates the numbers of casualties.

From 26 October to 10 November 2023, the Gaza Health Ministry released daily casualty figures that included both a total number and a specific number of women and children.[122] Abraham Wyner, professor of statistics and data science at The Wharton School of the University of Pennsylvania and faculty co-director of the Wharton Sports

This or That: The Case for War, continued

Analytics and Business Initiative, concluded that "the total civilian casualty count is likely to be extremely overstated. Israel estimates that at least 12,000 fighters have been killed.[123] If that number proves to be even reasonably accurate, then the ratio of noncombatant casualties to combatants is [by applicable statistical standards] low: at most 1.4 to 1 and perhaps as low as 1 to 1.[124] By historical standards of urban warfare, where combatants are embedded above and below and into civilian population centers, this is a remarkable and successful effort to prevent unnecessary loss of life while fighting an implacable enemy that protects itself with civilians."[125]

A similar conclusion was reached by another scholar, Danielle Pletka, a distinguished senior fellow in foreign and defense policy studies at the American Enterprise Institute (AEI), focusing on U.S. foreign policy generally and the Middle East specifically.[126] Pletka stated: "If Hamas is correct that the [IDF] in Gaza have killed 30,000 or so people, and if Israel is correct that, as of late February, the number of Hamas terrorists killed is around 12,000, the civilian-to-combatant ratio (an important measure of collateral damage in war) is in the range of 1.5:1—in other words, 1.5 civilian deaths for every combatant death. And while there is some disagreement within the scholarly community over the question of what is a "normal" ratio—with some suspect research (echoed by the United Nations) suggesting it can be as high as 9:1—there are few recent conflicts where the ratio has been so low as it is in Gaza."[127]

Hamas continuously makes false statements and claims.

In October 2023, Hamas falsely claimed that 471 were killed by an alleged Israeli attack on al-Ahli Hospital in Gaza City.[128] The "attack" turned out to be a misfired missile launched by Palestinian Islamic Jihad that damaged an area adjacent to the hospital, and most experts concluded that deaths totaled half the reported number or even fewer.[129]

A detailed Washington Institute for Near East Policy study of the reporting on casualties in the Hamas–Israel war reveals numerous discrepancies.[130] For example, on 19 October 2023, Hamas officials reported that a total of 3,785 Gazans had died since the war's inception, 307 more than the day before. Hamas also reported that for that same 24-hour period (18-19 October), 671 children had died.[131] In other words, more children "died" than deaths reported overall.[132] On 18 October, per Hamas, 25% of total deaths from the war were children.[133] One day later, that percentage magically jumped from 25% to 40% of total deaths.[134] The math doesn't add up.[135]

A week later, according to the Hamas-run Ministry of Health, the death toll for 26-27 October 2023 stood at 481 Gazans total; but also per the Ministry, 626 women and children died in that same two-day period.[136] Two days later, Hamas announced that 328 women and children had been killed in a 24-hour period, even though the Health Ministry data inconsistently showed that 302 Gazans in total had died,[137] and within that 24-hour period (like many others), no men were reported to have died—only women and children.[138] On 7 November, per the data, only four men died.[139] In other words, on days when hundreds of Gazans allegedly lost their lives, none of them were men.[140]

As of 7 November 2023, the Hamas Ministry of Health stopped reporting deaths, assigning that task to the Government Media Office.[141] The media office, in turn, freely admitted that it was deriving at least half of its own numbers from unreliable public media reports.[142] The cumulative problems of unreliable Hamas reporting, battlefield uncertainty, the media's lack of information, and, additionally, media bias suggest that the numbers of fatalities and casualties emanating from Gaza as "authoritative" have been increasingly untethered to reality.[143]

The United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) warned in December 2023 that it could not defend the numbers because of the use of "unknown methodology" by Hamas sources.144 UNOCHA also removed any mention of fatality subtotals from its reports at that time.145 And after 11 January 2024, the office stopped claiming that 70% of Gazan deaths were women and children.146

Hamas is so deeply embedded in civilian areas—both to use civilians as human shields to protect its fighters and to exploit and fan international sympathy over the civilian death toll—that even they do not know definite numbers.[147]

Statements by Hamas officials make clear the terrorist organization's disregard for the loss of civilian life not only in Israel but also in Gaza.[148]

Hamas senior leader Khaled Mashal stated on 19 October 2023 that he views the current loss of civilian life in Gaza—brought about by Hamas's strategy of using human shields—as essential: "No nation is liberated without sacrifices . . . In all wars, there are some civilian victims. We are not responsible for them."[149]

Hamas senior leader Ismail Haniyeh, commenting on the loss of civilian life in Gaza on 26 October 2023: "The blood of the women, children and elderly [. . .] we are the ones who need this blood, so it awakens within us the revolutionary spirit."[150]

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Israel has the right to exist and the right to defend itself.

For Israel, this is an existential war. Israel is fighting for its basic right to exist, to protect its citizens from terrorism, and to defend its borders from hostile enemies.[151] Professor Vaughan Lowe wrote: "The source of the attack, whether a state or non-state actor, is irrelevant to the existence of the right" to defense. "Force may be used to avert a threat because no-one, and no state, is obliged by law passively to suffer the delivery of an attack."[152]

As the president of the European Commission proclaimed on 19 October 2023: "There was no limit to the blood Hamas terrorists wanted to spill. They went home by home. They burned people alive. They mutilated children and even babies. Why? Because they were Jews. Because they were living in the State of Israel. And Hamas's explicit goal is to eradicate Jewish life from the Holy Land. These terrorists, supported by their friends in Tehran, will never stop. And so, Israel has the right to defend itself in line with humanitarian law.[153] And in the face of this horror, there is only one possible response from democratic nations . . . We stand with Israel." She further noted: "The Palestinian people are also suffering from Hamas's terror. And there is **no contradiction** in standing in solidarity with Israel and acting on the humanitarian needs of Palestinians."[154]

Israel is fighting for the safety of its citizens. Israel is fighting for the return of its hostages. Israel is also fighting for democracy: for protection of every democratic country from the militant evil regimes. As Elie Wiesel said in his Nobel acceptance speech: "We must always take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormentor, never the tormented. Sometimes we must interfere."[155]

It is clear that "sometimes" is now.

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Editor's Note: This article provides sources and statistics current through 22 April 2024, the date of the article's submission.

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Destroying access to adequate food and water. 1.1 million Gazans, around half the population, were experiencing "catastrophic" shortages of food, with around 300,000 now facing famine-scale death rates.[44] Referring to the population as "human animals," starting on 9 October 2023, Israel declared a "complete siege," cutting off electricity, food, water, and fuel to all of Gaza.[45]

As of the end of 2023, only one bakery was operating in Gaza.[46] According to the WHO, 93% of Gaza is facing a crisis of hunger, and high levels of malnutrition, "experiencing an extreme lack of food and starvation . . ." as part of a "cruel campaign . . . against the whole population of Gaza."[47] They further caution of a complete deprivation of "water, food, anything which is necessary for any sort of life."[48] These issues are exacerbated by continued bombings on bakeries; water facilities; the last operational mill; and razing of agriculture, including land, crops, orchards, and greenhouses.[49] Oxfam and Human Rights Watch accuse Israel of using the tactic of starvation as a "weapon of war" against the Palestinians of Gaza.[50]

As of 23 March 2024, about 7,000 aid trucks were waiting for entry from Egypt to Gaza, with international humanitarian agencies blaming Israel in what UN Secretary-General António Guterres has called a "moral outrage."[51] On 10 April 2024, the Israeli defense minister promised to open up a new border crossing to "flood Gaza with aid,"[52] but as discussed below, he has also promised that he will allow Gaza "no food, no water, no fuel."[53]

Water pipelines have been shut; the only desalinization plant is non-functioning; and as of the end of 2023, only 1.5 to 1.8 liters of clean water per person was available each day for drinking, washing, food preparation, sanitation, and hygiene.[54]

Destroying access to medical care. After six months of war, twenty-six out of thirty-six hospitals are shutdown, with the remaining ten barely functioning[55]—out of fuel and medicine, raided by Israeli forces, or damaged in fighting.[56] There are no working hospitals in North Gaza, where injured patients are "waiting to die."[57]

At the end of January, at least 311 doctors, nurses, and other health care workers had been killed.[58] Medics and first responders are detained in secret locations without outside communication.[59] Targets of aggression include hospital generators, oxygen stations, and water tanks.[60] Similarly, there have been repeated attacks on ambulances, medical convoys, and first responders.[61] Doctors and medics have been killed and disappeared, including the director of Al Shifa and his staff.[62]

One emergency medical coordinator compared Al Ahli Arab Hospital as a hospice without a level of care—"no food, no fuel, no water . . . and almost no IV fluids available."[63] The WHO has warned that the situation "could be tantamount to a death sentence" for hospital patients in Gaza.[64]

Scrawled on a white board in a Gaza hospital is "We did what we could. Remember us." Those were the words of Dr. Mahmoud Abu Nujaila—since killed in a hospital airstrike.[65] Palestinian hospitals have morphed into "death zones" and scenes of "bloodbath . . . death, devastation and despair . . . place[s] where people are waiting to die."[66]

While there are narrow parameters allowing a country to attack a hospital, it must do so in accordance with international humanitarian law.[67] An attack may be justified if the hospital is engaged in military activity beyond that needed for self-defense or to care for wounded enemy combatants not presently engaging in hostilities.[68] Even under those circumstances, the attacker must: (1) warn the hospital with a timeline allowing for the cessation of military activity or the transport of patients; (2) the attack must adhere to the principle of proportionality and be targeted toward the military activity while protecting patients and civilians; and (3) active measures should be taken to help the hospital resume patient care as soon as possible.[69] Assuming Israel's claim that Hamas partially uses hospitals for military activity is correct, between the indiscriminate targeting discussed above, the specific deprivation of materials necessary to care for patients, the complete destruction of the hospitals without a contingency plan to efficiently restore health care services, and the rhetoric promising to erase all of Gaza as discussed below, it seems unlikely that Israel has fulfilled its obligations to qualify for this limited exception.

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Those same calamities discussed above have led to *deprivation of shelter, clothes, hygiene, and sanitation* through the destruction of homes and water and sewage facilities. As of 2 April 2024, the sanitation system delivers less than 5% of its previous output, and there has been US$18.5 billion in damage to critical infrastructure.[70]

If the facts above are true, there is overwhelming evidence of expulsion and mass displacement; destroying adequate access to food and water; removing access to medical care; and deprivation of shelter, clothes, hygiene, and sanitation.

Evidencing Intent and Incitement to Commit Genocide

Intent to commit genocide is based upon the totality of the circumstances.[71] Israel's specific intent to commit genocidal acts can be proved through a myriad of behaviors. Discussed below is the implicit intent expressed through cultural genocide[72] as well as more direct expressions including dehumanizing statements from senior public officials, military officers, the soldiers themselves, and other prominent members of Israeli society. These statements do not require much commentary other than many of them also meet the legal definition of direct and public incitement to commit genocide.[73]

Public Officials

- *The prime minister of Israel*, at first glance potentially referring to Hamas, used references to "bloodthirsty monsters,"[74] shortly after airstrikes had killed more than 2,670 Palestinians, including 724 children.[75] Addressing the Knesset, he expressed that Israel was engaged in "a struggle between the children of light and the children of darkness, between humanity and the law of the jungle."[76] But any benefit of the doubt that he was solely referring to Hamas and Hezbollah becomes less plausible when he repeatedly invoked the story of Amalek both publicly and then directly to Israeli soldiers and officers.[77] From Amalek: "Now go, attack Amalek, and proscribe all that belongs to him. Spare no one, but kill alike men and women, infants and sucklings, oxen and sheep, camels and asses."[78]
- *The president of Israel* showed no ambiguity when on 12 October 2023 he expressly made no distinction between militants and civilians when asked about the barrage on Gaza and reducing the impact on more than two million Gaza civilians: "It's an entire nation out there that is responsible. It's not true this rhetoric about civilians not aware, not involved . . . and we will fight until we break their back bone."[79]
- *The Israeli defense minister*, when addressing the Army, explained that they were "imposing a complete siege on Gaza. No electricity, no food, no water, no fuel. Everything is closed. We are fighting human animals . . ."[80] and "Gaza won't return to what it was before. We will eliminate everything."[81] To accomplish these goals, he announced that he had "removed every restriction" from Israeli forces.[82]
- *The Israeli national security minister*: "To be clear, when we say that Hamas should be destroyed, it also means those who celebrate, those who support, and those who hand out candy—they're all terrorists, and they should also be destroyed."[83]
- *The Israeli minister of energy and infrastructure*: "All the civilian population in Gaza is ordered to leave immediately . . . They will not receive a drop of water or a single battery until they leave the world."[84] He further tweeted "Humanitarian Aid for Gaza? No electrical switch will be turned on, no water hydrant will be opened and no fuel truck will enter . . . ."[85]
- *The deputy speaker of the Knesset* proclaimed "Now we all have one common goal—erasing the Gaza Strip from the face of the Earth."[86]
- *Members of the Knesset* have repeatedly insisted that there are no innocent Palestinians in Gaza, even asserting that "the children of Gaza have brought this upon themselves"[87] and "there should be one sentence for everyone there—death."[88]

Military Officials

- *The Israeli coordinator of government activities in the territories* warned "the citizens of Gaza are celebrating instead of being horrified. Human animals are dealt with accordingly. Israel has imposed a total blockade on Gaza, no electricity, no water, just damage. You wanted hell, you will get hell."[89]
- *Major General Giora Eiland (ret.)* says, with seeming half-hearted caveats: "we have to prevent others from giving assistance to Gaza . . ."[90] He further stated that "Israel has no interest in the Gaza Strip being rehabilitated."[91] Undeterred, he explained "[w]hen the entire world says we have gone insane and this is a humanitarian disaster—we will say, it's not an end, it's a means."[92] As far as the destruction of Gaza to end the Palestinian way of life, he acknowledges that he aims to "create such a huge pressure on Gaza, that Gaza will become an area where people cannot live . . . we should prevent any possible assistance by others . . . ."[93] As for forced displacement, he promised "Israel needs to create a humanitarian crisis in Gaza . . . [which] will become a place where no human being can exist."[94] He also explained that the United States should

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back a hospital bombing "even if there are thousands of bodies of civilians in the streets afterward."[95]

- *The head of coordination of government activities in the territories* announced "[w]hoever returns here, if they return here after, will find scorched earth. No houses, no agriculture, no nothing. They have no future."[96]

Israeli Defense Forces

A 95-year-old reservist, dressed in fatigues and driven around in an army vehicle, chants: "finish them off and don't leave anyone behind. Erase the memory of them. Erase them, their families, mothers and children . . . If you have an Arab neighbour, don't wait; go to his home and shoot him."[97] This was meant to boost morale.[98]

Uniformed soldiers have been filmed singing "May their village burn, May Gaza be erased,"[99] "we know our motto: there are no uninvolved civilians," and have been filmed chanting "to wipe off the seed of Amalek."[100]

Prominent Members of Israeli Society

Media reports have called for Gaza to be "erase[d]"[101] and turned into a "slaughterhouse."[102] According to another, "Hamas should not be eliminated" but rather "Gaza should be razed."[103] One media analyst is more explicit: "[t]here are no innocents . . . There is no population. There are 2.5 million terrorists."[104] A former Knesset member also left no room for ambiguity:

> I tell you, in Gaza without exception, they are all terrorists, sons of dogs. They must be exterminated, all of them killed. We will flatten Gaza, turn them to dust, and the army will cleanse the area. Then we will start building new areas, for us, above all, for our security.[105]

According to recent polling, 72% of Israelis support the halt of humanitarian aid to Gaza.[106]

Cultural genocide of the Palestinian way of life alone does not qualify as genocide under the Genocide Convention, but it can be considered when determining intent to commit genocide.[107] Cultural genocide can be accomplished through the destruction of everyday life; a people's historical records and sites; religious and cultural institutions; and the mass murder of teachers, journalists, artists, humanitarians, and other people of prominence. The goal is not necessarily to kill members of the group, but to eliminate a civilization. In totality with the actus reus described above, in this author's opinion, it seems clear that an alleged cultural genocide is a part of a larger physical genocide.

Among the destruction are holy places and historic neighborhoods,[108] the Palace of Justice,[109] the Palestinian Archives,[110] Gaza's Old City,[111] Gaza City's libraries,[112] all four of Gaza's universities,[113] Gaza's cultural centers including the Center for Manuscripts and Ancient Documents,[114] 8 ancient Gaza sites and landmarks,[115] 318 Muslim and Christian religious sites,[116] and 74% (352) of schools.[117]

There have also been killings of cultural leaders: at least 103 journalists,[118] at least 209 teachers and educational staff,[119] two university presidents,[120] intellectuals, public figures, eminent scientists, filmmakers, writers, singers, deans of universities, linguists, playwrights, novelists, artists, musicians, poets, and a host of local legends known for their selfless commitment to the indigent.[121]

There are also the personal histories—the bulldozing of cemeteries; photographs and family records gone forever along with multi-generation families; and the killing, maiming, and trauma of a generation of children.[122]

To complete the psychological conquest, the Israeli Army has erected its flag over Gaza City's Palestine Square.[123]

Do Palestinian civilians have a duty to overthrow Hamas to be protected by international humanitarian law?

It should be self-evident that civilians and civilizations should not be "erased" over the sins of their governments. In judging the moral culpability of Gaza Palestinians in contributing to their own plight, context is necessary. Here is a simplified encapsulation:

In 1947, in response to the Holocaust, the UN decided that Palestine should be divided into separate Arab and Jewish states.[124] Israel was established the next year, but hundreds of thousands of Arab Christians and Muslims were already living there.[125] After three wars between Israel and Arab counties, Israel occupied the West Bank and the Gaza Strip (still recognized by the UN as Palestinian territory) displacing hundreds of thousands of Palestinians.[126] Since, Israel has expanded their settlements, considered illegal by the UN,[127] throughout the occupied territories—though in 2005, Israel abruptly withdrew its military and settlements from Gaza.[128]

This created a power vacuum that Hamas, a terrorist organization,[129] would fill.

Islamic-extremist Hamas's origin began as an organization called the Islamic Center, which was an Israeli-sanctioned charitable offshoot of the Palestinian chapter of the Muslim Brotherhood.[130] Hamas itself was founded in 1988 during a Palestinian uprising called the first intifada.[131] In response

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to the uprising, Israel killed thousands and decimated the Gaza economy by blockading food, fuel, and freedom of movement.[132] Hamas and other liberation organizations responded with brutal civilian killings—including rocket attacks and suicide bombings. This led to more poverty and chaos in Gaza as Hamas and Israel traded horrific attacks, with each blaming the other for instigation.[133]

From its origin, Hamas's goal is the destruction of Israel who it perceives as an illegal occupier.[134] Hamas wants a return to its historical territory.[135] It shunned the peace process of Yassar Arafat's Fatha as ineffective and contrary to Hamas's refusal to recognize Israel and their desire to control all land from the Mediterranean Sea to the Jordan River.[136]

Hamas rose to influence coupling militant resistance with charitable endeavors such as building schools and clinics, and by digging tunnels to create a food supply from Egypt (and a cache of weapons).[137]

As Israeli forces withdrew from Gaza, Hamas decided to participate in the 2005 elections, and an angry and disillusioned populace, demanding change, voted them into power.[138] Desperate people elect radical governments, but this shocked the world—including Hamas.[139] This ignited a diplomatic nightmare that ultimately led Hamas to temporarily share power with the Fatah, a part of the Palestine Liberation Organization who were the pursuers of a two-state solution.[140] This did not last long. There was a bloody coup and civil war that killed thousands, and there has not been an election since.[141]

Today, Palestinians in Gaza live under militaristic authoritative rule that violently represses dissent and its citizens' (especially women's) fundamental human rights.[142] Some, particularly in the Israeli rhetoric exemplified above, argue that the citizens of Gaza have a duty to overthrow their fundamentalist dictatorship to enjoy the protections of international humanitarian law. A review of international law fails to identify any such requirement.

It appears that Israel has engaged in acts of genocide and some of its leaders have engaged in incitement to genocide.

Note that none of the above allegations have been proven before the International Court of Justice. However, the evidence presented, if true, indicates mass indiscriminate killings of the Palestinian people in Gaza, causing them serious bodily and mental harm, and deliberately inflicting conditions on life intended to bring about their physical destruction as a group.

Genocide is an intentional crime. Intent can be proven both explicitly through the words and rhetoric of public and military officials and the totality of the conduct, including the attempted erasure of a people's culture. In this case, where there are genocidal acts, cultural destruction, and statements inciting genocide from government and military officials, there is a strong case that Israel, as of 15 April 2024, has and is engaging in genocide, as defined by the Genocide Convention, with its political, military, and cultural leaders inciting that genocide.

Israel has a right to defend itself—its right to exist—but even in war, it must do so within the constraints of international humanitarian law. Yes, Hamas is their governing body (through force),[143] but Palestinians in Gaza have a right to exist, too.

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Editor's Note: This article provides sources and statistics current through 15 April 2024, the date of the article's submission.

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107 *Prosecutor v. Krstic*, Case No. IT-98-33-A, Judgment, ¶ 580 (Int'l Crim. Trib. for the Former Yugoslavia, 19 Apr. 2004*). Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment, ¶ 691 (Int'l Crim. Trib. for the Former Yugoslavia, 1 Sept. 2004). *See also Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, ¶¶ 517–518 (Int'l Crim. Trib. for the Former Yugoslavia, 31 July 2003) (affirming that the destruction of cultural institutions cannot qualify as an act of genocide under any of the categories of Article II of the Genocide Convention). But such destruction may be used to determine genocidal intent.

108 *South Africa's Application*, 2023 I.C.J. Pleadings (*S. Afr. v. Isr.*) at 55–56 ¶ 91.

109 *Id*. at 55 ¶ 89.

110 *Id*.

111 *Id*. at 56 ¶ 91.

112 *Id*. at 55 ¶ 90.

113 *Id*.

114 *Id*. at 55 ¶ 91.

115 *Id*. at 55–56 ¶ 91.

116 *Id*. at 56 ¶ 92.

117 *Id*. at 56 ¶ 91.

118 *Id*. at 34 ¶ 49.

119 *Id*.

120 *Id*. at 55 ¶ 90.

121 *Id*. at 56 ¶ 93.

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123 *Id*. at 57 ¶ 94.

124 *E.g*., Rund Abdelfatah et al*, Throughline*: A History of Hamas, Nat'l Pub. Radio (16 Nov. 2023, 3:00 am), https://www.npr.org/transcripts/1198908227 (last visited 13 Apr. 2024). This program summarizes the history of Hamas and the context through which it came to power. This article condenses that summary to the parts most relevant for discussing the narrow question of how the terrorist organization was elected to lead the Gaza government.

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126 *Id*.

127 S.C. Res. 2334, (23 Dec. 2016).

128 Abdelfatah, *supra* note 124.

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130 Abdelfatah, *supra* note 124.

131 *Id*.

132 *Id*.

133 *Id*.

134 *Id*.

135 *Id*.

136 *Id*.

137 *Id*.

138 *Id*.

139 *Id*.

140 *Id*.

141 *Id*.

142 Robinson, *supra* note 129.

143 Abdelfatah, *supra* note 124.

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center project, the EB-5 company can affiliate with an existing EB-5 regional center company that has the designation to allow such affiliation.

The RIA requires the following minimum investment amounts:

- If the investment is going to be in a project located in either a rural area, area of high unemployment, or infrastructure project, then the minimum investment is US$800,000.
- If the investment is in a project not located in a rural area and not located in an area of high unemployment, that is, a non-rural area or non-targeted employment area, then the minimum investment is US$1,050,000.[7]

The RIA supports the legal concept known as "the process of investing." For example, if there is a US$800,000 minimum investment requirement, the investor is permitted initially to invest their personal funds of US$500,000 if they can show they have an additional US$300,000 in liquid assets and can invest the balance of US$300,000 of their personal funds to be committed to the EB-5 project over the next several months with the balance to be paid by a certain date.

All EB-5 projects are required to show the creation of ten U.S. jobs for each EB-5 investor as a result of the EB-5 investment funds being committed to the EB-5 business. In a direct EB-5 business, the EB-5 investor has to show that the EB-5 business, as a result of the EB-5 investment, has created positions for ten direct full-time employees held either by U.S. citizens or U.S. permanent residents.

The EB-5 business can show that the employees are full time and are U.S. citizens or are U.S. permanent residents by a completed I-9 form with supporting documentation, although not all acceptable I-9 documentation will prove that an employee is a U.S. worker, so additional evidence may be needed. In addition, EB-5 businesses may enter into the E-Verify program to support and show evidence of the hiring of employees who are either U.S. citizens or permanent residents.

In comparison, the EB-5 regional center project, based upon the RIA, regulations, and policies, can show that jobs were created as a result of the investment through the use of U.S. immigration accepted methodologies and mathematical calculations. That is, economists can show through economic models such as Redyn[8] and Rims II[9] that the required number of jobs have been created directly and/or indirectly as a result of the investment into the project.

For instance, the economic models can be used to show

that as a result of the investment funds and/or traditional funds from banks being used for construction expenditures, indirect jobs have been created and therefore comply with the job creation requirements for an EB-5 regional center project. However, the RIA limits the number of economically indirect jobs to a maximum of 90% of the required number of jobs, meaning 10% must be economically direct jobs. If construction jobs are counted, and construction lasts less than two years, only 75% of the indirect construction jobs may be counted, and the number is reduced in proportion to the amount of time less than two years that construction takes to be completed.[10]

EB-5 Procedure: Regional Center Structures

To be clear, EB-5 investors never invest directly in a regional center. They invest into a new commercial enterprise (NCE) affiliated with a regional center, and that entity is either the job-creating entity (JCE), though this is exceedingly rare, or it loans or invests the proceeds of the EB-5 investment into a separate JCE. The EB-5 regional center investment is therefore usually described as either an equity model or a loan model.

The equity model means that the EB-5 investor's investment can be invested into an NCE that is also a JCE. The EB-5 investor will be an equity owner of this legal entity NCE/JCE, or the investor will invest in the NCE, which will then make an equity investment into the JCE. Either way, the investor must always make an equity investment into the NCE.

Alternatively, the EB-5 investor may have his or her capital deployed by the NCE through the loan model. That is, the EB-5 investor will commit his or her personal funds into the NCE and will become an equity owner of this NCE, a separate and distinct legal entity. Then the NCE will enter into a loan agreement with a separate legal entity known as the JCE. The JCE will usually be the company that owns the land and

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where the development of the EB-5 project will occur, such as a hotel, warehouse, or residential community.

The JCE will enter into a loan agreement, as stated above, in which it will agree to repay the loan after an agreed-upon number of years. The JCE may even guarantee, through collateral, the repayment of the loan to the NCE (though not directly to the investor).

Notably, the EB-5 investor invests his or her personal funds into an EB-5 project at 100% risk, because there can be no redemption agreement or a guarantee for the repayment of the investment. However, in this scenario, not all is lost. The EB-5 investors do not personally loan the funds to the JCE, but to the contrary, the NCE, in which they have made their investment, enters into the loan agreement. That is, the loan agreement is between the legal entity NCE and the legal entity JCE.

In respect to the JCE, the JCE will use the loan funds for the business such as construction expenditures that will lead to the required job creation.

Current USCIS policy allows the JCE to obtain short-term, temporary bridge financing to commence business prior to obtaining the EB-5 capital. EB-5 capital can then replace this bridge financing and claim credit for jobs created using that bridge financing. This is a common practice but must be in compliance with the new RIA 2022.

It is nearly always the case that the JCE will be using, as an example, traditional loans from banks or other sources in addition to EB-5 funds for construction expenditures. EB-5 investors may claim credit for all jobs created by a project, not just the jobs created by their invested funds. These construction expenditures will be used as an input into the economic model, which will show the required jobs will or have been created.

Post RIA 2022: Compliance Requirements for EB-5 Regional Center Projects

First, before an EB-5 regional center project can accept EB-5 investors funds into their project, the EB-5 regional center project will have to prepare and file a form I-956F with USCIS. The I-956F will include the offering documents (the private placement memorandum and the subscription agreement, etc.), the business plan, the economic report, and the affiliation agreement with regional center, etc.

Once the EB-5 regional center project receives either the receipt of the filing of the I-956F or proof that after ten days of mailing the I-956F was received by USCIS (as an example, recently USCIS has been sending out fee receipt letters showing the I-956F was received by USCIS, and then weeks or months later, sending an official receipt notice), then the EB-5 investor can also file their I-526E petition under these circumstances.

Before this I-526E petition filing, the EB-5 investor will have transferred their personal funds to an escrow account or an operating account of the NCE, and only then will the EB-5 investor file his or her I-526E petition with proof that the I-956F has been filed with USCIS.

Once USCIS issues a receipt notice of the filing of the I-526E petition, then the EB-5 regional center project can start using the EB-5 investors funds, moving the funds from escrow into the NCE and then transferring the funds to the JCE for use in the EB-5 regional center project.

Another requirement of the RIA 2022 is the use of third-party fund administrators to oversee the transfer of EB-5 funds to the EB-5 project to be used for certain agreed-upon expenditures and to assist with audits and site visits. The purpose of this requirement is to preserve the integrity of the EB-5 program and to make sure the EB-5 investors funds are used according to the laws governing EB-5s, and what has been contemplated by the EB-5 investors, as stated to them by the EB-5 regional center project, which includes the business plan and the economic report. Yearly audits or filings by the EB-5 regional center project with USCIS show compliance with the RIA laws and regulations.

In addition to the above-stated forms that must be filed with USCIS, the EB-5 regional center project must also disclose any finders or agents and their finder's fees for referring EB-5 investors to the EB-5 project. Those finders, in turn, are required to file an I-956K form with USCIS.[11]

In addition, the EB-5 regional center project must prepare and file the I-956H forms to demonstrate to USCIS the principals of the regional center, the NCE, and the JCE.[12]

The EB-5 Project Team of Professionals

For effective EB-5 representation, besides the assistance of an experienced and knowledgeable EB-5 attorney, there is an equal need to have an experienced, specialized, and well-known team of the professionals required by the EB-5 immigration laws, regulations, and policies.

The team of professionals includes the EB-5 immigration attorney, the securities attorney, the economist, the business plan writer, the EB-5 regional center, and the EB-5 fund administrator.

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The background, experience, and credibility of these team members will be well received by the EB-5 investor clients and the adjudicators of EB-5 petitions filed at the USCIS EB-5 office.

In regard to the team of professionals, the EB-5 immigration attorney serves as the "quarterback," coordinating and directing the team members to provide the required information and supporting documentation in accordance with U.S. EB-5 immigration laws, regulations, and policies. The EB-5 attorney provides direction as to timeline goals and the realistic time it will take for the professional team members to supply the required documentation for filing an I-956F.

The EB-5 regional center project is supported by the following:

- comprehensive business plan
- economic report
- securities documents
- escrow agreement and operating agreement

All members of the team of professionals are crucial in preparing these documents.

The EB-5 Investors and Their Requirements

First, EB-5 investors must clearly show in the filing of their I-526/E petition authentication of the lawful source of the investment funds to be committed to the EB-5 project. Typically this will be the personal bank account of the EB-5 investor containing the EB-5 investor's funds, which will then be transferred to the EB-5 project. The starting point will be that the EB-5 investor's personal bank account has the required amount of funds. Next, the investor must show how he or she acquired those funds, and how they were deposited into the bank account.

The funds may be acquired and deposited into the investor's bank accounts in several ways. For instance, those funds could have been sourced from the business activities of the EB-5 investor or could have been derived from the EB-5 investor's past salaries, bonuses, dividends, or distributions. Alternatively, and/or in addition to the above sources, the EB-5 investor's funds could have been derived from the EB-5 investor's assets located in his or her own country or in the United States. That is, these assets could involve real estate, either residential or commercial, in which the EB-5 investor obtained a mortgage against these assets and the EB-5 investor will transfer the mortgage money into a personal bank account to be used to fund the EB-5 investment.

In addition, the EB-5 investor may have used personal funds to acquire wealth management products, such as money market accounts, bonds, and treasuries, from banks in his or her own country or in the United States. Once the EB-5 investor has paid cash for these wealth management products, then the investor may approach the bank, and the bank may then loan the investor funds and money against these assets. Then, the loan funds may be transferred to the personal bank account of the EB-5 investor, which will then be used for the EB-5 investment.

The banks may not require the investor to pay back a loan against these wealth management products, as the banks will state they will receive the dividends from these wealth management products and use these dividends to pay off the loan that was made to the EB-5 investor.

Another way the EB-5 investor may obtain personal funds to be deposited into a bank account to be used for the EB-5 project is through a gift, usually from a family member or friend. The gift donor will have to show through documentary proof the authentication of the lawful source of funds and that these funds were a gift to the EB-5 investor.

The EB-5 Investors and the Return of Funds After the Investment Commitment

The EB-5 investor's funds that are invested with an EB-5 project must be sustained with the EB-5 project for a certain period of time before there is any possible return of funds to the EB-5 investor.

Before the RIA of 2022, the legal requirement was that the EB-5 investment funds by the EB-5 investor had to be sustained and kept with the EB-5 project at least until the end of the conditional permanent residency of the EB-5 investor.

In addition, besides this minimum legal requirement, the offering documents could also clearly state the date and period of time that had to take place before there could be any possible return of funds, as an example from the JCE to the NCE and then to the EB-5 investor. That is, the NCE would have a loan agreement with the JCE, and the JCE through the offering documents would state that the loan could be extended beyond the period of the ending date of the conditional permanent residency for a year or two. In such a case, the possible return of funds would be after the expiration of the conditional permanent residency.

The new RIA 2022 states that the investment must be sustained for at least two years after the initial investment, and if the necessary jobs are created for that investor, then the EB-5 funds can be returned through legal means to the EB-5 investor. However, there have been no new regulations

interpreting the meaning of this law regarding sustainment of investment in respect to the new RIA 2022, and the exact start and end of the two-year period is still somewhat uncertain, creating an additional risk in the program. Investors should therefore not necessarily look to get their money back in the shortest period of time but evaluate any potential time frame with their immigration attorney to assess the potential risks.

As a result, the EB-5 industry has clearly stated that sustainment of the investment funds of the investor should be based upon the clear understanding of the old law and regulations, stating that the sustainment should be at least until the end of the conditional permanent residency, and also in addition can be governed by the offering documents signed by the investor, as to when there can be a return of investment funds.

Clearly, regardless of the laws regarding sustainment, what really governs the return of the EB-5 investment for the investors are the documents signed by the investors as to when there can be a return of capital, whether it's after the conditional permanent residency, the repayment of the loan, or the approval of the I-829 petition. Therefore, the RIA 2022 does not truly apply to the EB-5 process for the EB-5 investor.

First, the EB-5 investor may invest personal funds into an EB-5 project whether it be his or her own direct EB-5 project or an EB-5 regional center project. The EB-5 investor may be present in the United States and make the investment or may be present in another country.

Second, there is an opportunity under the RIA 2022 for the investor to file his or her EB-5 petition to show a commitment of funds to the EB-5 project and concurrently, when filing the EB-5 petition, to file an application for conditional permanent residency together with any spouse and minor children who may also be present in the United States.

The law and regulations clearly state that the EB-5 investor and family members may have entered the United States in a nonimmigrant legal status, namely as visitors with a B-2 visitor visa, not the Electronic System for Travel Authorization (ESTA), or they may have entered as a nonimmigrant under F-1 student status or be in the United States under another nonimmigrant status, such as E-2. They entered the United States as nonimmigrants with the intent to temporarily stay in the United States and after their temporary status expires, to leave the United States.

After their entry into the United States, the nonimmigrant and his or her family members may change their mind about continuing to be in the United States as nonimmigrants and now wish to apply for an adjustment of status, which is legally allowable under the U.S. immigration laws, in this case under the EB-5 program, to conditional permanent residency.

Therefore, when the EB-5 investor says he or she wants to file an EB-5 petition, the I-526E, the petitioner can concurrently file as an investor, and the spouse and their minor children under twenty-one can file their I-485 applications for conditional permanent residency together with their application for employment authorization. They can also concurrently file their application for advance parole, which allows them to leave and reenter the United States.

The EB-5 Advantages

Set Asides and Concurrent Filing

The U.S. Department of State has allowed new provisions called set-asides in the Visa Bulletin. That is, a certain percentage of visas available under the EB-5 program for investments in rural areas, or in areas of high unemployment, or in areas under infrastructure have been set aside to capture those EB-5 investors who wish to invest in these particular categories or areas. As a result, the set-aside categories are available to foreign nationals regardless of which country they were born in.

These set-asides are especially advantageous for foreign national investors who were born in China or India. Investors born in either country faced several years of what is called retrogression, in other words, time delays from the time the EB-5 petition is filed to the time they can actually apply for conditional residency. Under the set-aside provisions, if the foreign investor was born in China or India and now has entered the United States in a nonimmigrant legal status, the investor can now also concurrently file his or her application with family members for conditional permanent residency at the same time he or she files the I-526E petition. This is a huge advantage for foreign nationals who are in the United States and wish to stay and move forward with their conditional permanent residency.

The EB-5 Investor's Path to Conditional Permanent Residency

Once the EB-5 investor files the EB-5 petition and either concurrently files his or her application for conditional permanent residency in the United States or waits for the I-526E petition to be approved and then pursues a conditional permanent residency visa through the U.S. Consulate, the EB-5 investor and family members can obtain conditional permanent residency for a period of two years.

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Before the end of that two-year period, the EB-5 investor will have to file a form I-829 with USCIS: a petition to remove the conditions of his or her conditional permanent residency to obtain unconditional full permanent residency.

The I-829 petition filed by the EB-5 investor must clearly show the investment was sustained, the investor remains with the project, and the required number of jobs per investor were created either directly or indirectly and/or induced.

The EB-5 regional center project will usually supply documentary proof for the investor to file with the I-829 petition to clearly show the investment was sustained. This can be done through the EB-5 regional center project's tax returns showing there was no return of funds to investors and the individual EB-5 investors' own tax returns showing they did not receive funds into their bank accounts since the time of filing their I-526E petition.

Once the I-829 is approved, the investor, spouse, and minor children age twenty-one and younger at the time of filing the I-526 petition will receive their unconditional permanent residency cards in the mail at a U.S. address.

The EB-5 Investor's Path to U.S. Citizenship/Naturalization

Once the EB-5 investor can show he or she has been a U.S. resident since the date of obtaining conditional permanent residency for a period of five years, then the EB-5 investor, spouse, and/or family members can, after that five-year period, apply for U.S. naturalization.

Conclusion

The EB-5 investor and/or EB-5 regional center project should always have the confidence that the EB-5 practitioners and team of professionals have the knowledge, expertise, and experience to represent all parties competently to achieve their EB-5 goals.

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Endnotes

1 An E-2 investor may only work for the E-2 investment company.

2 For a list of countries that have an E-2 visa, see the U.S. Department of State website, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fees/treaty.html.

3 *See* 8 U.S.C. 101(a)(15)(E)(ii), 8 C.F.R. 214.2(e).

4 *See* https://www.uscis.gov/newsroom/alerts/uscis-updates-guidance-on-employment-authorization-for-e-and-l-nonimmigrant-spouses.

5 Public Law 117–103.

6 *See* 8 U.S.C. 1153(b)(5)(E)(i).

7 *See* 8 U.S.C. 1153(b)(5)(C).

8 http://www.redyn.com/.

9 https://www.bea.gov/resources/methodologies/RIMSII-user-guide.

10 *See* 8 U.S.C. 1153(b)(5)(E)(iv).

11 *See* 8 U.S.C. 1153(b)(5)(K).

12 *See* 8 U.S.C. 1153(b)(5)(H).

This or That: Alternative Paths to Permanent Residence, continued from page 17

Despite these efforts, the official posted processing timeline for adjudication of I-526 petitions on USCIS's website for non-Chinese nationals is 55.5 months (it is eighty-eight months for persons born in mainland China).[23] For Form I-829, Petition by Investor to Remove Conditions on Permanent Residence, USCIS's posted processing time for all applicants is sixty-one months.[24] Taking USCIS's official posted processing times at face value, the timeline for an investor to obtain Lawful Permanent Residence in the United States through the EB-5 Immigrant Investor Program, including the two years of conditional residence, is over eleven years! Investors should be cognizant of these inflated processing times and the administrative delays in the process.

Alternatives to the EB-5 Program

E-2 Treaty Investor Visa

For foreign investors seeking to reside in the United States, the nonimmigrant E-2 investor visa has some advantages over the EB-5 program. The first and principal requirement to qualify for an E-2 visa is treaty nationality: the foreign investor must be a national of a country with which the United States maintains a treaty of commerce and navigation.[25] While the United States has treaties with more than forty countries, including most of the European Union and some countries in South and Central America, some notable exceptions include Brazil, China, and India. Nationals of countries that do not have the requisite treaty do not qualify for the E-2 visa.

Another important distinction is that the E-2 visa is a nonimmigrant visa while the EB-5 program allows applicants with approved immigrant petitions to apply for Conditional Permanent Residence and, eventually, Lawful Permanent Residence. However, the E-2 visa can be extended indefinitely, as long as the enterprise that is the basis of the visa remains operational. The E-2 visa may be a preferable option for tax reasons and may serve as a bridge for the investor to be lawfully present in the United States while processing a family petition or labor certification to obtain Lawful Permanent Residence.

If the E-2 investor meets the nationality requirement, the investment amount required is much less than the US$800,000 to US$1,050,000 required for the EB-5 program. While the statute does not delineate a clear dollar amount for the investment, the regulations require that the investment be "substantial based on the proportionality test" and may not be "marginal."[26] The Foreign Affairs Manual does state that E-2 investments "constituting 100 percent of the total cost could normally qualify for a business requiring a startup cost of $100,000, for example."[27] In practice, US$100,000 to US$150,000 is a substantial investment amount in the majority of posts abroad. This is a significantly smaller investment amount than the funds required for the EB-5 program.

Similar to the EB-5 program, the E-2 visa requires that the investor's funds be at risk;[28] however, another advantage that E-2 investors have over EB-5 immigrant investors is that they exercise greater control of the funds and the investment since they are entering the United States to develop and direct the enterprise.[29] Unlike in the EB-5 context, the investment funds are not managed by a regional center or a third party. Additionally, it is less likely an E-2 investor will be scammed of his or her investment funds because the dollar amounts are smaller, and if the E-2 investor is investing in an existing business, a valuation will be required to determine the investor paid fair market value for the business.

Another advantage for the E-2 visa holder is the processing timeline. Once the investment has been made, commercial space has been leased, and the business is generating income, the E-2 applicant can apply directly with the U.S. Consular Post abroad. The average time for the scheduling of the nonimmigrant visa interview after the E-2 packet is submitted to the U.S. Consulate is approximately eight to twelve weeks in most countries. At that time, the applicant will be scheduled for a visa interview and be queried about the investment. If the visa request is approved, the E-2 visa will be stamped in the applicant's passport. The duration of the visa depends on the particular country's reciprocity schedule with the United States and ranges from twelve months to five years.

This or That: Alternative Paths to Permanent Residence, continued

Tax Consequences

E-2 visa holders may not want to seek Lawful Permanent Resident (green card) status in the United States, as Lawful Permanent Residents are treated as a U.S. tax resident and taxed on their worldwide income.[30] Nonimmigrants of financial means with foreign sources of income and assets may prefer not to be taxed on their worldwide income. E-2 visa holders, on the other hand, are taxed solely on their U.S. income, unless they meet the substantial presence test for the current calendar year.[31] An E-2 visa holder meets the substantial presence test if he or she is "physically present in the United States on at least 31 days in the current year and 183 days during the three-year period that includes the current year and the 2 years immediately before that, counting:

- All the days you were present in the current year, and
- 1/3 of the days you were present in the first year before the current year, and
- 1/6 of the days you were present in the second year before the current year."[32]

If the total number of days under this formula is 183 days or more, then the E-2 visa holder will be taxed on his or her worldwide income.[33] However, as E-2 visa holders can be physically present in the United States as much or as little as possible, they can manage their days in the United States so they do not exceed 182 days under the formula to avoid being taxed as a U.S. resident on their worldwide income. A nonimmigrant client's tax consequences upon obtaining Lawful Permanent Residence should be disclosed to the client prior to initiating any paperwork. As attorneys, we should inform our clients of the tax consequences or refer them to seek the advice of a tax attorney or a CPA experienced in dealing with foreign nationals.

Labor Certification

A permanent labor certification issued by the Department of Labor (DOL) allows a U.S. employer to hire a foreign worker to work permanently in the United States.[34] The process can be filed for someone who is lawfully in the United States or who is abroad. Nationals of mainland China, India, Mexico, and Philippines experience serious backlogs in certain employment-based categories, so they need to monitor the Visa Bulletin monthly.[35] A common strategy for persons in lawful nonimmigrant status in the United States, such as students (F-1), professionals (H-1B), and treaty investors (E-2) seeking permanent residence, is to use their nonimmigrant visa as a bridge to allow them to remain in the United States while they process their Lawful Permanent Residence through a labor certification. The U.S. employer must be willing to undergo the labor certification process, which includes the filing of a prevailing wage request, conducting recruitment in the designated area, and submitting an application certifying to the DOL that no qualified workers applied for the position.[36] The DOL then reviews the case and "must certify to the USCIS that there are not sufficient U.S. workers able, willing, qualified and available to accept the job opportunity in the area of intended employment and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers."[37]

After certification by the DOL, the U.S. employer may file the immigrant petition (I-140) with USCIS on the beneficiary's behalf, demonstrating its continuing ability to pay the offered wage set by the DOL as of the priority date and establishing that the applicant qualifies for the position as advertised.[38] If USCIS approves the immigrant petition, the priority date is current, the beneficiary and derivative family members are in lawful nonimmigrant status, and there are no issues of admissibility, the beneficiary and family may seek adjustment of status to Lawful Permanent Residence with USCIS. Alternatively, the beneficiary and family may proceed with consular processing of their immigrant visas. When the cases are approved, the beneficiary and family will be granted Lawful Permanent Residence (ten-year green cards), not conditional residence (two-year), like EB-5 applicants initially receive.

Compared to the EB-5 program, the posted timelines for the processing of the labor certificate with the DOL and the processing of the immigrant petition and green card applications with USCIS are approximately three to four years. This timeline is considerably shorter than the eleven years posted for EB-5 applicants to obtain Lawful Permanent Residence. In addition, there is no capital risk with the labor certification process.

Another important distinction between the labor certification process and the EB-5 investment program is that the labor certification process is not dependent on an investment creating ten full-time jobs, as in the EB-5 context. The beneficiary's only obligation in the labor certificate process is the requirement that he or she work for the petitioning sponsor when the Lawful Permanent Residence (green card) is approved.

The labor certification process is a viable alternative to the EB-5 program, as it has no capital risk, no danger of scam business ventures, much shorter processing times, and

This or That: Alternative Paths to Permanent Residence, continued

leads applicants directly to permanent residence rather than conditional permanent residence.

Conclusion

Immigration law practitioners should inform clients of the risks associated with the EB-5 Immigrant Investor Program and advise them to conduct their due diligence on any regional centers or commercial enterprises. There are safer, more viable alternatives available for certain foreign nationals, such as an E-2 nonimmigrant visa or the labor certification process.

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Endnotes

1 *About the EB-5 Visa Classification*, USCIS, https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/about-the-eb-5-visa-classification.

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16 *Form I-526 Data Dashboard*, IIUSA, https://iiusa.org/i526data/.

17 *Investor Alert: Investment Scams Exploit Immigrant Investor Program*, U.S. Securities and Exchange Commission, https://www.sec.gov/oiea/investor-alerts-bulletins/investor-alerts-ia_immigrant.

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19 Sheelah Kolhatkar, *"The Rural Ski Slope Caught Up In An International Scam,"* THE NEW YORKER (29 Jan. 2024), https://www.newyorker.com/magazine/2024/02/05/the-rural-ski-slope-caught-up-in-an-international-scam.

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22 *Id*.

23 *Check Case Processing Times,* USCIS, https://egov.uscis.gov/processing-times/.

24 *Id*.

25 *E-2 Treaty Investors,* USCIS, https://www.uscis.gov/working-in-the-united-states/temporary-workers/e-2-treaty-investors.

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28 *Id*. at 9-6(B).

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30 *Tax information and responsibilities for new immigrants to the United States,* IRS, https://www.irs.gov/individuals/international-taxpayers/tax-information-and-responsibilities-for-new-immigrants-to-the-united-states.

31 *Substantial Presence Test,* IRS, https://www.irs.gov/individuals/international-taxpayers/substantial-presence-test.

32 *Id*.

33 *Id*.

34 *Permanent Labor Certification*, U.S. Department of Labor, https://www.dol.gov/agencies/eta/foreign-labor/programs/permanent.

35 *Visa Bulleting For March 2024,* U.S. Department of State, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2024/visa-bulletin-for-march-2024.html.

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Inactive Entity Exemption and the Unknown

As alluded to earlier, entities that qualify for an exemption are not required to submit BOI reports to FinCEN, including the subsidiaries of certain exempt entities, such as large operating companies (provided the subsidiary's ownership interests are controlled or wholly owned, directly or indirectly, by the large operating company). The Rule lists twenty-three specific types of exemptions. While one can spend countless hours pondering the intricacies of these exemptions, in my experience, most clients' questions, be they domestic or foreign nationals, relate to the inactive entity exemption and whether such exemption applies to their particular facts.

According to the Rule, an inactive entity is not a reporting company if it meets certain criteria.[16] Specifically, an entity that (1) was in existence on or before 1 January 2020, (2) is not engaged in active business, (3) is not owned by a foreign person, either directly or indirectly, in whole or in part, (4) has not experienced any change in ownership in the previous twelve months, (5) has not sent or received any funds in an amount greater than US$1,000 in the previous twelve months, and (6) does not hold any assets, whether in the United States or abroad, including any ownership interest in any corporation, limited liability company, or other similar entity, qualifies for the inactive entity exemption.[17] Fairly simple, right?

Truth is, there are inherent flaws in the application of this exemption from a practical standpoint. To add insult to injury, it is nonsensical that such exemption applies to a U.S. person but not a foreign person. Simply put, there is no logic behind precluding a foreign person from qualifying under this exemption when the individual meets the exemption criteria but happens to be a foreign person, but for a misguided presumption that a foreign national is more inclined to criminal activity. The law is also vague regarding compliance requirements of dissolving companies, whether the dissolution commenced in 2023 and the actual dissolution occurred in 2024, or whether both the commencement and dissolution occurred wholly within 2024. What of those companies that have been administratively dissolved by their state, as opposed to those that file for voluntary dissolution; are these companies required to file a BOI report? Every unanswered question leads to uncertainty and skepticism, particularly when providing legal advice to foreign clients. In most of these questionable scenarios, I opt to delay filing of a BOI report until further guidance from FinCEN—albeit running against the clock and the risks it may entail.

Image by Gerard Van de Leun, flickr.com/photos/1000photosofnewyorkcity/5550878218, CC BY 2.0

A trust is not a reporting company, but not so fast.

A trust is not a reporting company since it is neither created nor registered by the filing of a document with a secretary of state or similar office.[18] In certain jurisdictions, however, a trust files certain documents with the state court. Whether "similar office" encompasses a state court remains to be determined. Inevitably, legal practitioners may reach different conclusions when advising a client on whether the trust needs to file a BOI report.

Further, while a trust may not form part of a reporting company's definition, a trustee of a trust may exercise substantial control in a reporting company through the corpus of a trust such as by exercising control rights associated with shares held in trust or by directly or indirectly holding ownership interest in a reporting company, in which case the trustee would form part of a reporting company's BOI report.[19] In a trust, the settlor transfers legal ownership of the trust assets to a trustee, which may be an individual or a corporation. Such trustee manages the trust assets on behalf of the beneficiary based on the terms of the trust. Thus, a trustee may have authority to dispose of trust assets, a beneficiary may have authority to demand distribution of trust assets, and a settlor may have the right to revoke trust assets or revoke the trust and may therefore be part of a reporting company.[20]

This or That: CTA: Friend or Foe, continued

While trusts are excluded from the definition of a reporting company, the government's concern that trusts can easily fall victim to money laundering activity is unquestionable. Because trusts enjoy a greater degree of privacy and autonomy than other corporate vehicles, it is simpler to utilize a trust instrument to shield the identity of a beneficial owner and perpetuate fraud and illicit financial activity. For perpetrators, a trust is the perfect tool for illegitimate business activities.

A Foreign Client's Quandary

The CTA may provide beneficial owners with an opportunity to examine their business entity structure to achieve consistency, among other possible benefits, in corporate governance matters. For a U.S. person, the review of corporate documents and modifications in the company structure may be time consuming without being overwhelmingly cumbersome, absent complicated structures such as those of multi-layered corporations. The foreign businessperson, however, inevitably requires a denser corporate structure to transact business in the United States and will therefore have additional challenges to grapple with. Consequently, most foreign nationals utilize multi-tier corporate structures to conduct business in the United States, primarily as a means against hefty estate tax liabilities and taxes on gains realized after the disposition of U.S. real property interests.

The standard corporate structure generally utilized by a foreign person is the foreign entity as shareholder of the U.S. entity. The foreign entity will likely include a number of directors and officers with little to no connection to the United States. Such directors and officers may nevertheless meet the definition of beneficial owners, albeit indirectly, of the U.S. reporting company by virtue of the power and authority they wield over the affairs of the foreign entity. Sometimes, such directors and officers may not even be known to the ultimate shareholders of the U.S. company. These directors and officers are appointed as outside directors by the governing bylaws of the foreign company with decision-making power over the foreign entity.

For international law practitioners, the realm of complex corporate structures is loaded with endless factual scenarios that may include that of a trust that owns a foreign entity that in turn owns a reporting company. This is where a U.S.-trained attorney with knowledge and expertise in corporate matters is most useful. Such practitioner must evaluate the complexities of the multidimensional structures and help determine whether the foreign directors, foreign officers, nominees, intermediaries, custodians, or agents involved in either the offshore companies and the foreign or domestic trusts qualify as beneficial owners under the reporting company. Similarly, to determine compliance in view of these complexities, it behooves the client to have a U.S. practitioner work alongside a foreign attorney with corporate law experience from the jurisdiction in question to help interpret corporate documents and the applicable laws of the foreign jurisdiction. Likewise, there is a definite benefit to having legal practitioners fluent in more than one language as it facilitates the reading of corporate governing documents and application of CTA requirements to same.

Challenges for Clients and Legal Practitioners

Compliance with the CTA brought about significant financial implications for foreign and domestic business clients and corporate law practitioners. Challenges are not just labor intensive considering the time allotted to client communication and guidance, review of a reporting company's corporate and ancillary documents, and the filing of the BOI report. For U.S. businesses, compliance with the CTA may be overwhelming in that business owners must organize their information and documentation for the review of counsel in anticipation of filing the BOI report. In connection therewith, depending on the complexity of the corporations, clients may experience higher legal fees. Foreign nationals similarly face difficulties, but struggle with a heightened distrust of government and interference from same.

To effectively manage the client's needs, legal practitioners must come up with practical solutions to these challenges. For example, there is value to having a team of support staff dedicated to CTA compliance and to the collection of information from clients (considering the time and effort dedicated to the process), reassuring the client throughout the process that there is no cause for concern provided the reported information is accurate and transparency is maintained.

As you may determine, the challenges presented by the CTA are ongoing, and this remains the case recently, due to the federal district court ruling in the Northern District of Alabama from March 2024 in the case of *National Small Business United v. Yellen* on the constitutionality of the law and congressional overreach.21 While FinCEN appealed the district court case and a verdict is pending, it is my humble opinion that FinCEN will ultimately prevail on appeal, based on a number of factors that relate to the government's reasoning for enacting the CTA, such as the CTA being a crucial mechanism for fighting

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and advancing national security. Having said this, in lieu of overturning the law, I anticipate the CTA may undergo certain modifications in the application of its key provisions, and on the serious civil and criminal penalties.

For the time being, and until further guidance from FinCEN and the courts, I think a brief pause from onboarding new clients who have yet to file the BOI report is prudent and sensible, especially when it comes to those clients with more complex corporate structures, like foreign nationals. Newly formed entities, however, should continue to follow the time-sensitive deadlines for compliance with the BOI report.

The CTA has a laudable goal of fighting financial corruption, even as it places new responsibilities and administrative burdens on U.S. businesses, domestic and international clients, and legal practitioners. Whether the CTA is a friend or foe for U.S. businesses is too premature to conclude at this juncture and will remain a question mark in the foreseeable future.

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Endnotes

1 Title LXIV of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Public Law 116–283, 1 Jan. 2021) is commonly referred to as the Corporate Transparency Act (CTA), available at https://www.congress.gov/bill/116th-congress/house-bill/6395.

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5 This Guide satisfies FinCEN's requirements under Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1966, amended by Section 8302 of the Fair Minimum Wage Act of 2007. *See* Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, § 212, 110 Stat. 857, 858 (1996), available at www.govinfo.gov/content/pkg/PLAW-104publ121/pdf/PLAW-104publ121.pdf. *See* Fair Minimum Wage Act of 2007, Pub. L. No. 110-28, § 8302, 121 Stat. 112, 204 (2007), available at www.govinfo.gov/content/pkg/PLAW-110publ28/pdf/PLAW-110publ28.pdf.

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10 31 CFR § 1010.380(b)(1)(i)(A)-(F) – available at eCFR :: 31 CFR 1010.380 -- Reports of beneficial ownership information.

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12 31 CFR § 1010.380(a)(1)(iii) – available at eCFR :: 31 CFR 1010.380 -- Reports of beneficial ownership information.

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15 *National Small Business United v. Yellen*, No. 5:22-CV-1448-LCB (N.D. Ala. 2024), available at USCOURTS-alnd-5_22-cv-01448-0.pdf (govinfo.gov).

16 31 U.S.C. 5336(a)(11)(B)(xxiii) – available at USCODE-2022-title31-subtitleIV-chap53-subchapII-sec5336.pdf (govinfo.gov).

17 31 CFR § 1010.380(c)(2)(xxiii) – available at https://www.ecfr.gov/current/title-31/part-1010/section-1010.380#p-1010.380(c)(2)(xxiii).

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Prior to the adoption of the above approach, it is necessary for the concept of "ethical AI" to be accurately defined due to the diverse considerations of AI ethical practices, such as fairness, transparency, accountability, privacy, and bias mitigation. Thus, the potential application of these principles to vary based on specific contexts and nuances of legal practice necessitates consistent dialogue, collaboration, and adaptation to ensure AI technologies reflect legal principles and uphold the values of justice and equity. This consistent dialogue and adaptation surrounding the application of AI technologies within practice is demanded due to the potential variance of the application of ethical principles based on specific contexts and nuances of legal practice. For example, what constitutes fair decision-making in one legal scenario within a specific jurisdiction may differ from another, thus necessitating consistent adaptation. Further, the consistent advancement and increasing integration of AI in legal processes will inevitably introduce ethical dilemmas with emerging challenges that necessitate further refinement of ethical standards and practices.

This ethical focus on AI regulation within the legal profession necessitates striking a balance between the prioritization of innovation and ethics. In other words, the potential implications of nuanced AI technologies must be carefully considered, specifically within the context of privacy, fairness, and accountability. This balance is necessary to ensure the benefits of AI innovation can be harnessed while upholding ethical standards, with the primary purpose of ensuring that AI legal tools holistically serve the interests of justice and society.

Furthermore, the enforcement of an ethical AI approach involves the establishment of guidelines that regulate the development, deployment, and application of AI systems in legal practice. The absence of these guidelines perpetuates a risk that AI systems could be developed and implemented without due consideration for their ethical implications, thus increasing the potential for biased decisions, privacy violations, or other adverse consequences. Due to the significant variation of the implementation of AI systems in legal practice, based on jurisdictions, organizations, or even individual practitioners, these guidelines become necessary to ensure consistency, thus mitigating the potential for disparities in the application and regulation of AI that could undermine trust in the technology, potentially resulting in legal challenges, which means that these standards would ensure that developers or users of AI systems (may) be held accountable for any harms rooted in their actions or decisions.

It has been widely proposed that the application Responsible Innovation (RI) has promising potential to address ethical concerns surrounding AI applications, being able to address pertinent issues such as data biases and the necessity for a balanced AI-human workforce dynamic.[8] Both these factors are specifically relevant in the context of AI application in legal practice. Hence, it is proposed that the starting point of regulating AI in legal practice should be the education of legal professionals on AI technologies, their capabilities, limitations, and potential ethical implications to ensure lawyers using these technologies are trained to comprehend their complexities, thus empowering them to make informed decisions when faced with AI-related legal issues. Further, the complementary roles of AI and human lawyers must be acknowledged because while AI has the potential to enhance efficiency and accuracy in select legal tasks, human oversight

and judgment remain indispensable, particularly in complex legal matters requiring empathy, creativity, and critical thinking. In other words, legal frameworks should encourage the integration of AI technologies into legal workflows with the primary aim of preserving the essential role of human lawyers.

Similarly, the integration of data cards, which provide transparent documentation of datasets used to train AI models,[9] can be significantly beneficial if integrated into the regulatory strategy of AI in legal practice. The comprehension of the origin, composition, and evolution of these datasets will provide lawyers with the knowledge to evaluate potential biases that might skew the outcomes generated by AI tools, thus fostering the responsible use of AI in legal research, document analysis, and even decision-making support. The use of data cards would further facilitate the assessment of the fairness and accuracy of AI-derived insights, thus fostering transparency and accuracy within the legal process.

AI Regulation Around the World

The global nature of AI development and deployment is perpetuating regulatory challenges due to the inability to implement regulations uniformly across jurisdictions. Global AI regulatory frameworks are diverse, from national plans and laws to ethical codes and international agreements, with countries either adopting a horizontal approach (regulations that are broad and overarching, applying uniformly across various industries and sectors) or a lateral approach (regulations that are tailored or specific to industries or applications of AI) when regulating AI, thus assuming uniformity of all AI systems and attempting to pinpoint shared sources of harm, requiring consistent human interventions across different AI applications or contexts.

In contrast, countries such as the United States have opted for a context-specific or modular approach, meaning regulations are tailored to the circumstances or applications in which AI systems are utilized, thus recognizing the diverse range of AI technologies and their unique contexts of use.[10] For example, the EU AI Act adopts a risk-based approach, with applications deemed high-risk being subject to strict rules regarding accuracy, data handling, and human oversight. This approach prioritizes safety in areas of most significant concern while fostering innovation in lower-risk areas, with this Act serving as a template for international AI governance.[11]

Balancing Regulation and Innovation

The legal profession is undergoing significant transformation due to the emergence of AI. To maximize the benefits of these technologies and to mitigate potential risks, a well-defined and structured regulatory framework becomes necessary (or does it?). The regulation of AI in legal practice introduces significant advantages, with regulatory frameworks offering structured approaches to the resolution of critical issues such as ownership rights, privacy concerns, economic monopolies, and responsibility for harm resulting from the application of AI technologies.[12] This means that the establishment of an accurate legal framework ensures the rights and responsibilities of stakeholders within the AI ecosystems are clear and prescribed, encouraging transparency and accountability. Further, regulation plays a paramount role in the protection of human rights, with the development of a code of ethics for AI and the enactment of legislation preventing misuse and mitigating potential harm.[13] This proactive approach does not solely cultivate trust and fairness in legal practices driven by AI technologies but also promotes the responsible use and innovation of AI within the legal industry.

These regulatory measures further contribute to the maintenance of integrity within the rule of law by addressing ethical concerns and ensuring unbiased adjudication, procedural fairness, and equitable access to justice. Consequently, when considered in a vacuum, it is evident that the regulation of AI in legal practice offers a comprehensive solution to the enhancement of transparency, accountability, and compliance with legal and ethical standards, thereby promoting justice, equality, and human rights in a rapidly evolving technological landscape.

As established above, regulating AI in legal practice offers significant advantages, such as fostering transparency, accountability, and compliance with legal and ethical standards. It also presents a range of potential disadvantages and challenges. From a broad perspective, threats to constitutional rights must be considered as a potential likelihood since regulatory measures may unconsciously silence discourse, undermine the rule of law, and jeopardize fundamental constitutional rights, thus disrupting the traditional balance of the legal system. Challenges persist in accurately defining artificial intelligence within legal frameworks.[14] In a similar vein, there is a potential that traditional roles and processes within the legal system may be disrupted, particularly within the adversarial system, where the differing capabilities of AI

compared to human lawyers could adversely impact legal proceedings and client representation.[15] The risk of stifling innovation is also a significant concern, as regulatory burdens might deter investment in high-risk AI products, hindering progress in the field.

Recommendations for Policymakers, Industry Stakeholders, and Researchers

To navigate the regulation of AI in legal practice based on the synthesis of research findings and insights from scholars and industry experts requires a multifaceted approach involving policymakers, industry stakeholders, and researchers. Consequently, the most appropriate form of regulatory measures that would most efficiently regulate AI in legal practice are tailored ethical frameworks and standards to guide the development and deployment of AI technologies and to prioritize fairness, accountability, and transparency in legal proceedings. Specifically, from a legal perspective, it is necessary to establish definitions for AI based on context to distinguish legal issues from ethical, philosophical, and technological concerns and to facilitate more effective regulation. Industry stakeholders should commit to responsible AI development practices that reflect established ethical frameworks and legal standards, with the primary purpose of ensuring AI systems are transparent, explainable, and do not perpetuate bias or inequality. From a broader perspective, the establishment of procedural safeguards and oversight mechanisms is necessary to monitor AI systems' adherence to legal requirements and ethical standards. Globally, an evaluation of the socioeconomic implications of AI in legal practice is pertinent to ensure content-appropriate regulation, including its potential to disrupt job markets, influence legal outcomes, and affect access to justice, which is necessary to inform policies that mitigate adverse effects while enhancing the beneficence of AI in law.

Essentially, through the collective and proactive addressing of these recommendations via interdisciplinary collaboration, ongoing dialogue, and adaptive policy formulation, it becomes possible to navigate the complexities of regulating AI in legal practice effectively. However, it must be acknowledged that progression in this field necessitates a commitment to ethical principles, legal integrity, and the pursuit of justice, ensuring AI serves as a tool for enhancing rather than diminishing the legal profession's core values.

Conclusion

It is necessary to reflect on the delicate balance that must be struck between the benefits and detriments of AI regulation within legal practice. While it is acknowledged that regulations offer the promise of transparency, accountability, and adherence to legal and ethical standards, there is an association of stifling innovation, disrupting traditional legal processes, and potentially encroaching on constitutional rights.

Progression in AI regulation in legal practice necessitates all stakeholders—policymakers, industry leaders, and researchers alike—to be accountable and to take responsibility for responsible and ethical AI development and regulation. Through the establishment of tailored ethical frameworks and standards, the gradual integration of AI into legal practice can reflect fairness, accountability, and transparency.

There must be a collective commitment to adherence to responsible AI development practices while simultaneously implementing robust oversight mechanisms to monitor compliance with legal requirements and ethical standards. Thus, it is evident that the progression of AI regulation holds profound implications for society. While AI has the potential to broadly improve not solely legal practice but also the legal landscape, its deployment must aim to enhance rather than diminish the core values of the legal profession. This requires an environment where technology augments human capabilities, promotes fairness, and facilitates equitable access to justice. We can forge a path toward a future where AI regulation aligns with the principles of ethical integrity and societal well-being.

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This or That: AI Regulation, continued

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consignor.[13] The difference in the result of this litigation cannot be overstated.

If the consignor can successfully satisfy this exception to the filing requirement, and therefore be able to take back its property by proving the consignee is engaged in the sale of others' property, it is a total win for the consignor. On the other hand, if the consignor cannot satisfy its burden, it will be relegated to only having an unsecured claim. It is like the difference between the relaxing, fun Miami nights and the intense, blazing hot Miami summer days.

Of course, it is always beneficial for practitioners to consider alternatives on how to address this relatively fact-intensive and complex problem. For example, in the insolvency context, the objective of the fiduciary that is put in charge of the filing party, whether it be the bankruptcy trustee or the ABC assignee, is to marshal assets and have them sold for the highest price. While this dispute is taking place, the disputed goods are taking up valuable and costly warehouse space and cannot be sold until the matter is resolved. So, this is the time to be creative.

If there is still a sufficient margin baked into the price of the goods that were on consignment, the consignor should consider if there is any way to buy back its own goods from the fiduciary, which is really only cutting into the consignor's own margins. If that is possible, then the consignor will be able to take back the goods and resell them, and the consignor will also be able to control to whom the goods are sold. Yes, this is much less profitable than the original scenario; however, it reduces the risk, cost, and uncertainty of litigation, which oftentimes international parties are not comfortable to bear.

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This or That: Consignor's Blues, continued

Endnotes

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2 *See Furr v. Corvette Experience, Inc. (In re Corvette Collection of Boston, Inc.)*, 294 B.R. 409, 413-14 (Bankr. S.D.Fla. 2003).

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13 *See* Fla. Stat. § 727·110(1)(b)·

This or That: FEPA: Combating Demand, continued from page 25

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One practical implication of FEPA's enactment is that bad actors may not be able to avoid enforcement and the negative publicity that comes with it, even by attenuation. For instance, a company that frequently appears in the annual report may face commercial backlash, as private and public companies may hesitate to risk relations with such a company, particularly given the definition of covered actors identified in FEPA's text. It is possible that companies may face increased pressure to correct their faulty practices, simply because the cost of facing enforcement on *both* sides of a bribery scheme may be too high for many companies to risk. For instance, Honeywell International, Inc., recently faced steep fines imposed by the SEC and the Brazilian government due to corrupt practices committed by its subsidiaries in Belgium.[6] To the extent that some companies regard bribery as simply the cost of doing business in certain regions, Congress may hope that the anticorruption framework created by the FCPA and FEPA together may operate as a sufficient deterrent.

It is not out of the realm of possibility that some informal network emerges from the distinct laws. The UK Bribery Act and the Sapin II Act, like FEPA, involve public dissemination of violators of their respective statutes. It makes sense that companies and NGOs, ones with presences in multiple countries, would communicate and note which entities and jurisdictions present potential issues of liability, especially given the broad scope of who can be found liable under FEPA. Companies should revisit their monitoring protocols and ensure they are equipped to handle any increased scrutiny that FEPA could bring upon their organizations.

However, a nongovernmental anticorruption network may fall victim to the very behaviors it seeks to eradicate, as evidenced by the recent decision in France whereby a Paris Administrative Court stripped authority from Anticor—the French NGO formerly permitted to act as a party in civil cases concerning corruption and bribery.[7] Ironically, Anticor was found to have failed to abide by its own bylaws, internal rules, and regulations, which resulted in a problematic lack of transparency into its *own* financial operations. FEPA's requirement that the DOJ justify its enforcement actions from the previous year may reflect the U.S. government's attempt to resolve/preempt the "who watches the watcher" problem highlighted in France with the Anticor fiasco. To that end, the DOJ may simply choose to work with foreign counterparts to root out corruption and bribery schemes in violation of FEPA, as the SEC often does with respect to FCPA enforcement. Just last year, the SEC prosecuted an FCPA violation out of Guinea, with help from the Australian Federal Police and the United Kingdom Serious Fraud Office.[8]

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