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Focus on Creative Solutions

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20 • Navigating § 1782 Judicial Assistance for International Arbitration Post-*ZF Automotive*

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In an era when the United States will be looking inward and backward, the author suggests that the justices of the U.S. Supreme Court should be invited to see that, throughout human history, what has been imported into their nation from other parts of the world does not replace what they stand for, but is an integral part of it. The author provides reasoning for the argument that a textualist reading of the U.S. Constitution and its amendments includes rights for U.S. citizens as provided by the International Bill of Human Rights.

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U.S. bankruptcy courts increasingly find themselves navigating bankruptcies involving multinational corporations and individual debtors with far-reaching, intricate webs of contractual obligations, diverse legal systems, and conflicting creditor interests. While the Supreme Court has decided a handful of extraterritoriality cases over the last two decades, steadfast at the center of the discussion is the presumption against extraterritoriality and the framework that has been developed to ascertain whether a particular U.S. law may reach into foreign territory.

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Message From the Chair
International Law *Is* a Creative Solution


ANA M. BARTON

Reflecting on the theme of the Winter 2025 *International Law Quarterly* (*ILQ*), the thought struck me: what is international law if not a creative solution in and of itself? International law is the product of pioneering and inspired minds working to bridge gaps across national borders and governments, across transnational commercial disputes, and across the movement of people (and money) around the globe. International law is reflected in treaties, customs and trade agreements, private agreements, arbitral tribunals, principles of jurisdiction and comity in court proceedings, immigration laws, etc. These are all tools for resolving problems that arise in our interconnected world. Moreover, the beauty of international law is that it is not static; new tools or new ways to apply those tools are invented all the time.

The intrinsic creative nature of international law was on full display during the ILS Lunch & Learn on 16 October 2024, featuring ILS Past Chair Arnoldo (Arnie) Lacayo. Among other things, Arnie spoke about his career in international fraud and asset recovery, describing the coordinated and years-long effort it takes to make clients whole when they have been defrauded and the bad actors have disseminated the stolen funds around the world. He described how the path to successful recovery requires coordination at many levels and with many players—with local counsel in foreign jurisdictions, with investigators, with governments (including police power), with courts, with financial institutions and tax advisers, and sometimes even with art dealers. One of my takeaways from the rich discussion was that what may appear to be an obstacle at first blush is really just an opportunity to find a creative alternative approach to reach the desired result.

Another opportunity for learning how thought leaders are tackling current trends in international law and shaping new creative solutions for the next wave of legal issues is the ILS's annual and premier conference: iLaw. With lawyers from more than twenty foreign jurisdictions represented between conference speakers and attendees, iLaw is an ideal forum for engaging conversations and collaboration. Especially this year, on the heels of presidential elections here and abroad, international practitioners need to remain informed and ready to help clients anticipate the ripple effects that the agendas of new world leaders and their cabinets may cause at all levels. With panels ranging from cryptocurrency regulation to international trademark protection to the use of AI in dispute resolution and the future of international trade, I guarantee you will learn something new and will see creativity in action.

I trust you will enjoy reading this edition of the *ILQ*, and I look forward to seeing you at iLaw and other upcoming ILS events throughout the year. In case you are not already aware, the best way to stay informed about all ILS happenings—including in-person programing, networking events, CLE webinars, and other announcements—is to follow the ILS on LinkedIn, Instagram, or Facebook, and to sign up for the weekly ILS Gazette email blast.

Ana M. Barton
Chair, International Law Section of The Florida Bar
Reed Smith LLP

From the Editors …

JEFFREY S. HAGEN

JENNIFER MOSQUERA

International law covers many legal disciplines. When a client comes to an international legal practitioner with what the client perceives to be a narrow issue, even the most specialized attorney sought out for that very reason might find themselves becoming a generalist at any given moment. Additionally, we operate in an ever-changing global legal landscape, with laws and technology changing both at home and abroad affecting our practices. There is not always a bright line test, clear cut regulation, or past precedent to address the unique circumstances our clients face. In these situations, it is important to craft a creative approach to problem solving, going beyond the conventional research or standard operating procedure we might apply to a typical situation.

In this Winter 2025 edition of *International Law Quarterly*, our authors focus on "Creative Solutions" that must be cleverly devised to bring optimal results for clients. While the elements of a complex legal issue may require an unorthodox or novel approach to find success, our clients rely on us to steer the ship, even in uncharted waters.

First, ILS Chair **Ana Barton** provides well-timed insights into solutions to wire fraud, which is a growing problem, in the Quick Take: "What to Do When Wire Transfer Fraud Strikes You." Next, eight partners from ILS Hemispheric Sponsor **Harper Meyer LLP** collaborated on a feature length article "A Hypothetical: Creative Solutions for an Interesting Client," which provides insight into how the law firm would provide advice to a client with several legal issues at once. Next, **Neha Dagley's** article "Legal (Un)Certainty and Investment (In)Security: Navigating the Challenges of Space Resource Activities" shines a light on the legal labyrinth surrounding the world of private investment in space resources, current legal frameworks that exist in this area, and strategies for mitigating investment risk. After analyzing laws about outer space, this edition then turns to practical considerations behind machine learning, with **Luiz Alberto de Carvalho Barros Filho's** article "Creative Solutions in International Law: The Role of Artificial Intelligence."

Our next feature pertains to legal considerations for developing powerful immigration cases, with **Larry Rifkin's** article entitled "Discretionary Determinations Before USCIS and the Department of State: How to Present the Most Compelling Cases." Directly following this piece, **Juan J. Mendoza** and **Noah Rosenblum** contribute a timely piece with their article "Navigating § 1782 Judicial Assistance for International Arbitration Post-*ZF Automotive*."

Our final two feature authors both focus on interesting and complex topics. **Bret Shawn Clark** publishes a creative article focused on the implementation of international human rights laws within the U.S. Constitution in "The New Great Replacement Theory: Using Humanitarian Law to Revive Civil Liberties in an Era of Retrenchment." Following this article, **Maria Jose Cortesi** highlights the struggle in understanding the bankruptcy code in cross-border matters, in her article "Navigating the Extraterritorial Tightrope in the Bankruptcy Code."

As usual, we also present the ILS Section Scene, which in this edition features photos and summaries from robust ILS programming in the Fall: (i) ILS's trip to Mexico City for the International Bar Association and surrounding events; (ii) the End of Summer Mixer at American Social in Miami, Florida; (iii) Lunch & Learn With former ILS Chair Arnie Lacayo; (iv) Miami FIFA Welcome Event, sponsored by Weiss Sorota, in Miami, Florida, (v) visits to numerous law schools around the state of Florida; (vi) the Orlando Luncheon; and (vii) the ILS Holiday Party. Also always included is the World Roundup, providing summaries of important legal updates in different countries and regions. This World Roundup features legal updates from India, the Middle East, North America, and Western Europe. We are actively looking for new contributors to our World Roundup column. If you would like to become a regular columnist for our publication on a particular region, please contact our editors to discuss this opportunity.

Being an international law attorney is one of the more exciting fields of legal practice, but be aware that clearly defined answers are not always easy to find. Sometimes a "creative solution" is the only way to help your client escape a maze of legal roadblocks. We hope by reading this edition of *ILQ* that you will be better equipped to advise clients with these multifaceted issues. As the legal systems around the world continue to shift, so, too, will our advice.

Best regards,

Jeffrey S. Hagen
Co-Editor-in-Chief
Harper Meyer LLP

Jennifer Mosquera
Co-Editor-in-Chief
Sequor Law

QUICK TAKE

What to Do When Wire Transfer Fraud Strikes You

By Ana M. Barton, Miami

We live in a time where we expect—if not demand—instantaneous electronic banking with just a few clicks. Sending online wire transfers is an all but routine practice, one upon which businesses and individuals alike depend. But, with the convenience of online banking comes the heavy societal cost of wire transfer fraud. According to a report by the FBI's Internet Crime Complaint Center (IC3),[1] the FBI received a "record number" of more than 880,418 registered complaints in 2023, with potential losses exceeding $12.5 billion.[2] Compared to 2022, the FBI estimates that is a 10% increase in the number of complaints received, and a 22% increase in losses suffered. This rising trend is almost certain to continue.

One of the first questions victims of wire transfer fraud inevitably ask is whether they will be able to recover the stolen money. Spoiler alert: it is statistically not likely, but not impossible. This Quick Take provides a high-level overview of the applicable legal framework in the United States for navigating wire transfer fraud recovery efforts. Of course, as with any area of law, there are nuances, and every fraud event has its own set of discrete facts that should be analyzed carefully.

Two Kinds of Wire Transfer Fraud Victims

The sophistication of the cybercriminals' playbook for stealing money is ever evolving and adapting, but for purposes of this article, victims of wire transfer fraud generally fall into one of two categories.

In the first camp, the bad actors have accessed a victim's account unbeknownst to the victim and wired themselves the funds. This is usually the result of a targeted phishing scheme designed to obtain information that facilitates access to an online bank account and the ability to intercept correspondence of wire confirmation from a bank. The victim typically is unaware of the wire until discovering the unauthorized account activity while the bank believes it has followed its customer's wire instructions.

The second camp of wire transfer fraud victims are those who have been tricked into sending a wire to the wrong recipient. Commonly referred to as "business email compromise" scenarios, these typically involve the victim sending a wire

that names the correct intended beneficiary of the funds, but provides the account number of the fraudster who ultimately receives the money.

You're a victim of wire transfer fraud – Now what?

No matter which camp a victim falls in, the first and most important step upon discovery of wire transfer fraud is to act immediately. Time is of the essence for any hope of recovering the wired funds in question.

First, you should report the fraud to your bank and request that they do everything possible to recall the wire. If the fraudster has not yet withdrawn the funds, the bank on the receiving end of the wire transfer (the beneficiary bank) may be able to freeze the account and prevent further movement of the funds. Simultaneously, you should contact the

beneficiary bank to ensure they are aware of the fraud and working on the wire recall and account freezing.

Next, you should report the fraud to the police and FBI IC3. Indeed, banks may require their customer to provide a sworn declaration and copy of a police report when conducting their internal investigation of the fraud claim. During this time, it is also advisable to determine whether you have any cyber insurance coverage and should file a claim with your insurer.

Once these wheels are in motion, you should follow up with the banks regularly. Much to fraud victims' frustration, however, it can be a slow-moving process and it can take weeks before learning whether the funds were fully or partially recovered. One way to assert pressure for faster action is to seek an ex parte emergency temporary injunction to freeze the beneficiary account. The bank will then be compelled to comply with the freezing order.

Unfortunately, however, the reality is that fraudsters anticipate you will be taking all these steps, so they have likely drained the account before you have discovered the fraud. Once the money is gone, chances of recovery are minimal.

What about recovering from the banks that permitted the unauthorized wire to transpire?

When a wire recall does not successfully result in clawing back the stolen funds and the fraudster cannot be located, victims of wire transfer fraud, looking for other avenues of recovery, may turn to their own bank and attempt to blame it for allowing the unauthorized wire transfer in the first place

This is where Article 4A of the Uniform Commercial Code (UCC) comes in, which has been adopted by nearly every state.[4] Article 4A provides "precise and detailed rules to assign responsibility, define behavioral norms, allocate risks and establish limits on liability" when it comes to wires.[5] A "critical consideration" of Article 4A is that the various parties to a wire transfer "need to be able to predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfer services appropriately."[6] The drafters of Article 4A set out to balance the competing interests of banks and the general public interest when designing these rules—a theme echoed throughout the comments to the statute.[7]

Under Section 202 of Article 4A, a bank generally is not responsible for an unauthorized wire transfer if the bank can prove that (1) the bank and its customer agreed to a "commercially reasonable" security procedure for determining whether the wire was authorized or verified, and (2) the bank accepted and followed the wire instructions in good faith and in compliance with the security procedure.[8] Security procedures should be designed to ensure the authenticity of a message between a bank and its customer regarding a wire.[9] Whether a security procedure is commercially reasonable is a question of law to be determined by various factors outlined in the statute,[10] but whether it has been complied with is a question of fact.[11] Section 202 is intended to "encourage banks to institute reasonable safeguards against fraud but not to make them insurers against fraud."[12] Indeed, "[a] security procedure is not commercially unreasonable simply because another procedure might have been better or because the judge deciding the question would have opted for a more stringent procedure. The standard is not whether the security procedure is the best available. Rather it is whether the procedure is reasonable for the particular customer and the particular bank, which is a lower standard."[13] Another spoiler alert: your bank has such a procedure.

Applying this standard to the first camp of fraud victims described above—i.e., those who are unaware that a fraudster has sent wires from their account—the answer to whether the bank or the customer is liable for the loss hinges on whether the agreed-upon commercially reasonable security procedure was followed. If it is demonstrated that the fraud was not detected by the bank because the bank did not perform an act required by the security procedure in place, then the bank has not complied and is responsible.[14] However, if a customer has been phished and compromised the safeguarding of their account information, thereby facilitating a fraudster's access and ability to overcome the security procedure, then the bank is justified in acting on the wire instructions and the customer is the one responsible for the loss.[15] Typically, the bank has followed the instructions and you are responsible.

Turning to the business email compromise fraud scenario—where a victim is the actual sender of the wire, naming the correct intended beneficiary on the wire instructions but providing the account number for the fraudster—Section 207 of Article 4A of the UCC provides a simpler analysis. That provision clearly specifies that if the bank receiving the wired funds is unaware of the mismatch in the wire instructions, not only may it rely solely on the account number provided, but it has no obligation to check whether the name and number refer to the same person.[16] Recognizing that most wires are processed by automated means without a human reading of the payment instructions, and not wanting to disrupt the speed and efficiency of that system,[17] Article 4A places responsibility for the loss on the person who supplied the wrong account number—that is, the customer who was defrauded. To shift the responsibility to the bank, the customer would have to prove that the bank actually knew of the mismatch before it deposited the funds into the fraudster's

account. Third spoiler alert: the bank did not actually know of the issue.

What about other causes of action?

While creative lawyers may be tempted to attempt to plead around the UCC by bringing other common law causes of action against a bank, the prevailing law is clear that the UCC preempts those claims.[18] Thus, actions against a bank sounding in negligence, breach of contract, or breach of similar claims to recover unauthorized wires will not likely survive a motion to dismiss.

Arbitration Considerations

An additional and important consideration when analyzing whether to pursue a claim against a bank for a fraudulent wire transfer is to determine whether it is subject to a binding arbitration provision. Many (if not most) banks have broad arbitration provisions in their customer account agreements. A bank is likely to move to compel arbitration when facing wire litigation.

Conclusion

Wire transfer fraud is an all-too-common occurrence and can lead to the stuff of nightmares for victims. Incentivized to both protect consumers and shield themselves from liability under Article 4A of the UCC, banks are highly motivated to employ increasingly rigorous security measures to prevent online banking fraud losses. This puts the onus on account holders to be vigilant of phishing and business email compromise scams—and even to anticipate what the next wave of fraud may look like. That remains the first and best line of defense against cybercriminals.

Ana M. Barton *is counsel at Reed Smith LLP, based in its Miami office. She is the chair of the International Law Section of The Florida Bar and practices general commercial litigation in Florida state and federal courts.*

Endnotes

[1] https://www.ic3.gov/.

[2] https://www.ic3.gov/AnnualReport/Reports/2023_IC3Report.pdf.

[3] *Id*.

[4] In Florida, Article 4A of the UCC is codified in Chapter 670, Fla. Stat.

[5] Fla. Stat. § 670.102, cmt 1.

[6] *Id*.

[7] *Id*.

[8] Fla. Stat. § 670.202.

[9] Fla. Stat. § 670.201, cmt 1.

[10] Fla. Stat. § 670.202(3) ("The commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank; the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank; alternative security procedures offered to the customer; and security procedures in general use by customers and receiving banks similarly situated.").

[11] Fla. Stat. § 670.202, cmt 4.

[12] *Id*.

[13] *Id*.

[14] Fla. Stat. § 670.203, cmt 3.

[15] *Id*.

[16] Fla. Stat. § 670.207(2)(a).

[17] Fla. Stat. § 670.207, cmt 2.

[18] *See Peter E. Shapiro, P.A. v. Wells Fargo Bank N.A.*, 795 F. App'x 741, 750 (11th Cir. 2019) (finding that common law negligence claim that did not allege negligence beyond the scope of the erroneous funds transfer was preempted by Article 4A of the UCC); § 670.102, Fla. Stat., cmt 1 (explaining that Article 4A is "intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article," and "resort[ing] to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article").

A Hypothetical: Creative Solutions for an Interesting Client

By Harper Meyer LLP, Miami, Florida

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In the complex field of international law, rarely will a client come to you with one specific legal issue. While they might think they have just one problem requiring your services, if you ask your client the right questions, more and more issues always seem to appear. In situations where there is more than one issue affecting the client in various legal sectors, it is useful to identify all the issues at hand; next, analyze the issues with the client's priorities in mind; and finally, provide the client with tailored and complete advice. The following scenario would require proceeding in such a manner:

> Our client, a dual citizen of Brazil and Portugal, and resident of São Paulo, owns a successful business in Brazil, a series of family owned and operated income producing farms. He also owns portions of investment funds within Brazil and investment accounts in the United States. He is married to his second wife, with a blended family of two children each from their prior marriages as well as a common child between them, who is a minor. The client comes from generational wealth and has a taste for the finer things in life such as historical art, private jets, and large yachts. He owns a mansion on Fisher Island in Miami. He also is considering obtaining an EB-5 investor visa so that, in his words, he can travel between the United States and Brazil "whenever he wants on his Gulfstream V." The client tells us that he likes to keep some of his extensive collection of paintings at his Miami mansion, and sometimes takes them back and forth as he pleases on his Gulfstream. Due to rising insurance premiums on the waterfront property, the client has listed his Fisher Island mansion for sale and is hoping for a quick sale for cash if a willing buyer comes along.

Our client has expressed that some of his children are also considering moving to the United States, but he's not sure which visa they should obtain. He also is unsure what this means for the future management of his farming businesses in Brazil. A Brazilian advisor once told him that he should consider using a usufruct, while a friend once told him to think about establishing a trust for succession planning for his business. Considering the blended family relationship issues that exist between the children, he is feeling overwhelmed, to say the least.

We have discovered that the client lost a judgment in Brazil pertaining to a labor law dispute on one of his farms, and the plaintiff's attorney is seeking to domesticate the ruling in the United States and wants to enforce it by seizing the Fisher Island property and the artwork located within it. Our client, already overwhelmed, feels his blood pressure and heart rate rising. He seeks our counsel regarding this case and how it affects his other legal matters.

How do we advise? This article compiles important insights related to the hypothetical in the following legal sectors: (I) tax planning and business succession issues; (II) litigation issues; (III) immigration options; (IV) local law considerations in Brazil; (V) art and collectibles issues; (VI) real property issues; and (VII) estate and probate issues.

I. *Tax Planning and Business Succession Issues* by Jeffrey S. Hagen and Nicole A. Baudini

Determining whether the client wishes to become a U.S. tax resident (from both an income tax perspective and an estate tax perspective) is fundamental for tax, business, and succession planning of his assets and private wealth. From a U.S. tax perspective, it would be more advantageous for the client (and subsequently, for the client's family) if the client continued coming to Miami seasonally and did not become a U.S. taxpayer. However, as a wise tax attorney once said, the "tax tail doesn't always wag the dog." Becoming a U.S. taxpayer may be the client's preference even despite the financial repercussions. Without proper planning, it can subject an unsuspecting nonresident to a host of taxation, penalties, and other unpleasantries.

If the client obtains a green card or is present in the United States for enough days in a particular calendar year under the substantial presence test, the client will be considered a U.S. income tax resident.[1] With that classification comes taxation on worldwide income earned by that person. To illustrate this, income earned in Brazil by the client, even if the client only spends 150 days here every year, might still be taxable in the United States. That is because the substantial presence test is calculated as follows:

Days in U.S. in Current Year
+ One-Third of Days in U.S. in Preceding Year
+ One-Sixth of Days in U.S. in the Second Preceding Year
= Days in the U.S. for Current Year under the test

In the scenario presented, the client would be a U.S. income tax resident in the third year (150 + 50 + 25 = 225 days). However, if the client is considered a U.S. income tax resident under the substantial presence test, he may still possibly avoid being subject to U.S. tax and reporting obligations on his worldwide income for the third year if he timely files Form 8840 claiming a "closer connection" to Brazil.[2] Remaining as a nonresident alien for income and transfer tax purposes may also have advantages, such as allowing the client to provide certain gifts free from U.S. gift tax liability to any person, even if his children become U.S. tax residents on their own accord. Nevertheless, the client's U.S. resident children may have to duly report those gifts on Form 3520[3] if the gift meets a $100,000 reporting threshold in a particular year.[5] If the client did become a U.S. income tax resident, he would need to be advised of all the required reporting on his foreign assets, including Form 5471[5] (Ownership of Foreign Corporations), Form 8621[6] (Ownership of Passive Foreign Investment Companies), Form 114[7] (Foreign Bank Account Reports), and Form 8938[8] (Specified Foreign Financial Assets), and the strict penalties involved with not filing such forms annually should they apply. While the client may want to look to an income tax treaty for support, the United States and Brazil do not share one, leaving the client at the risk of double taxation, unless he can obtain a tax credit for foreign income tax paid.

Even if the client remains a nonresident for U.S. income tax purposes, assets located in the United States titled under the client's personal name (such as the Fisher Island property that has been put up for sale or his paintings located at the property) would be subject to U.S. estate tax upon his death. Whether the client is a U.S. gift and estate tax resident is based on *domicile*, a more subjective concept that measures the client's intent to remain in the United States. If the client lives predominantly in the United States and intends to remain here permanently, even while maintaining Brazilian assets, there is likely an argument he is domiciled here. At the time of soliciting our advice, the client is likely still deemed to be a nonresident for this purpose, as he is still weighing his options about whether to immigrate. Therefore, the amount of his U.S. situs assets that would be exempt from the application of

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Legal (Un)Certainty and Investment (In)Security: Navigating the Challenges of Space Resource Activities

By Neha S. Dagley, Miami

photo:iStock/3dSculptor

Introduction

As humanity ventures beyond Earth's atmosphere to explore, exploit, and utilize space resources, a realm of immense opportunity emerges, accompanied by complex challenges. Space resource activities, including the extraction of extraterrestrial minerals and water, promise to revolutionize space exploration and offer unprecedented economic potential. However, these ventures require substantial investments, often beyond the public sector's financial reach, making private-sector involvement indispensable. Private companies bring innovation, flexibility, and crucial financial backing but face significant challenges, including legal uncertainties and financial risks associated with untested markets and prolonged return periods. These issues are compounded by a lack of clear regulatory frameworks and the need for significant upfront capital.

To address these challenges, this article adopts a structured approach. It begins by defining the scope of space resources and related activities, drawing on examples from both public and private sectors. Next, it examines ambiguities within international treaties that impact space resources, analyzing these issues through the lens of investment risk. The article then explores broader legal strategies and principles that can help mitigate these risks. By offering clarity on these complexities and proposing actionable legal frameworks, it seeks to enhance the investment landscape for private stakeholders while contributing to humanity's broader endeavors in space.

Overview: Space Resources and Space Resource Activities

Before exploring the complexities of the legal and investment challenges associated with space resource activities, defining what constitutes a space resource is crucial. A clear understanding of the nature and types of resources available in outer space is foundational, influencing the legal frameworks, economic models, and technological approaches addressed here. Space resources encompass a variety of substances and materials that can significantly enhance

human capabilities in space exploration, exploitation, and utilization. This section provides an essential foundation by categorizing these resources and illustrating their potential applications, setting the stage for deeper discussions on their legal and economic implications.

What is a space resource?

Space resources can be defined as substances and materials that hold value due to their potential utilization, existing in space or originating from outer space.[1] These resources include various resource types such as atmospheric, environmental, raw materials, non-metals, volatiles, and metals.[2] The focus is on resources that can be extracted from celestial bodies and used in space operations or transported back to Earth. Notable among these are water, Helium-3, and lunar regolith.[3] Water is particularly emphasized for its role in enabling in-situ resource utilization (ISRU), which supports sustainable extraterrestrial operations by providing essential life support systems and fuel production capabilities crucial for long-duration missions to Mars.[4]

It is further essential to consider the definition of "space resource" assigned by international frameworks aimed at space resource activities. According to the Hague Building Blocks,[5] a "space resource" is "an extractable and/or recoverable abiotic resource in situ in outer space."[6] Additionally, a "space resource activity" is described as "an activity conducted in outer space for the purpose of searching for space resources, the recovery of those resources, and the extraction of raw mineral or volatile materials therefrom, including the construction and operation of associated extraction, recovery, processing and transportation systems."[7]

Current Trends

Both public and private sectors drive the recent surge in interest and activity regarding space resources. The public sector, exemplified by agencies like the National Aeronautics and Space Administration (NASA),[8] plays a pivotal role by setting the rules of engagement and spearheading missions that expand the boundaries of human presence in space. Programs such as NASA's Artemis initiative aim to return humans to the Moon and utilize its resources, setting the stage for a sustained lunar presence and future Mars missions.[9] The Artemis initiative outlines a comprehensive strategy for harnessing lunar resources to create safer, more efficient operations, significantly reducing dependency on supplies delivered from Earth.[10] The Artemis mission is categorized in four phases as follows: (a) Artemis I was an uncrewed flight test of the Space Launch System (SLS) and the Orion spacecraft around the Moon; (b) Artemis II will be the first crewed flight test of the SLS and the Orion spacecraft around the Moon; (c) Artemis III will send the first humans to explore the region near the South Pole; and (d) Artemis IV will debut the first lunar space station, a larger, more powerful version of the SLS rocket and new mobile launcher.[11]

The private sector's involvement is indispensable in realizing the potential of space resources. Companies like ispace Inc. aim to explore and develop the Moon's water resources essential to a space-based economy. This illustrates the potential for the Earth and Moon to operate as a single system.[12] Innovative enterprises such as Interlune[13] and OffWorld[14] are introducing technologies and business models aimed at the sustainable and responsible extraction of space resources. These private entities drive technological advancements and the necessary capital investment, making them crucial players given the high costs and speculative nature of space resource ventures.

Legal Frameworks Governing Space Resources

The exploration, exploitation, and utilization of space resources necessitate a robust understanding of the legal frameworks governing these activities. While the private sector sees substantial returns from exploiting celestial bodies, these opportunities come with significant legal challenges, particularly the provisions of the Outer Space Treaty of 1967.[15] This treaty establishes fundamental principles but also imposes constraints that complicate private ventures. The treaty's ambiguity regarding private entities' extraction, ownership, and utilization of outer space resources creates a legal gray area, complicating risk assessment and the securing of financing and insurance. Several nations have developed national frameworks to partly address these uncertainties, such as the U.S. Commercial Space Launch Competitiveness Act and Luxembourg's Space Resources Act. While these efforts aim to foster a more favorable environment for space commerce, they also require careful evaluation due to potential fragmentation and conflicts with established international treaties, adding another risk for investors. This section examines these dynamics, focusing on their influence on private investment and the maintenance of international principles guiding space activities.

The Gray Within the Outer Space Treaty Provisions

Key articles of the Outer Space Treaty need careful consideration by private investors due to their implications on property rights, operational freedoms, and legal ambiguities that may affect investment security and commercial viability. Understanding these risks is vital for navigating the complex

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Creative Solutions in International Law: The Role of Artificial Intelligence

By Luiz Alberto de Carvalho Barros Filho, Maceió, Alagoas, Brazil

photo: iStock/Cemile Bingol

Artificial intelligence (AI) has emerged as a transformative tool in the legal field, particularly in international law, where communication between diverse jurisdictions and the management of complex information play a fundamental role.[1] The innovative solutions provided by AI have substantially changed how lawyers and legal professionals approach international issues, facilitating the interaction between different legal systems and promoting the automation of legal processes that, until recently, required considerable human effort. This article will explore the main applications of AI in the field of international law, with an emphasis on the opportunities and challenges these technologies offer.

Artificial Intelligence as a Facilitator of Legal Communication

In the field of international law, one of the primary difficulties professionals face is the linguistic and cultural barriers that arise when interacting with different jurisdictions. AI has proven to be an effective tool in mitigating these obstacles, especially through advanced natural language processing (NLP) and machine translation technologies. The application of such technologies allows lawyers to overcome linguistic difficulties, providing a more accurate and efficient understanding of legal documents drafted in various languages.

Tools such as DeepL and Google Translate have become established solutions for high-precision automatic translation, capable of translating technical and legal texts with considerable accuracy.[2] [3] The use of these tools, in conjunction with the advancement of AI models, allows for a smoother interpretation of texts written in different languages, expanding lawyers' access to a greater number of international legal sources and references. However, it is essential that these translations be accompanied by a critical and meticulous review by the lawyers to ensure that the translation respects the contextual and legal particularities of each jurisdiction.

Moreover, the use of advanced language models such as ChatGPT has become increasingly prevalent in understanding complex legal terminologies and in conducting comparative analyses between different legal systems.[4] AI, by providing detailed insights into the functioning of various legal orders, enhances the ability of lawyers to operate in an increasingly interconnected international environment. For instance, in an international arbitration context, such as a dispute between a European company and an Asian business partner, the application of AI to translate technical legal documents

in real-time can significantly accelerate the resolution process, reducing the risk of interpretative errors and misunderstandings between the parties involved.

However, it is important to emphasize that, despite the innovations brought by machine translation tools and AI models, human intervention remains necessary to ensure the precision and adequacy of the translation to the specific legal context. Therefore, AI should be understood as an auxiliary tool rather than a substitute for legal expertise, with its use always subject to rigorous supervision and review by qualified professionals.

Automation of Legal Processes and Access to New Markets

Another area where artificial intelligence has shown great potential for transformation in international law is the automation of complex legal processes, especially in the analysis of large volumes of data, such as in due diligence, contract analysis, and regulatory compliance verification. AI tools like Kira Systems and Centuro Global are capable of performing these tasks with much greater precision and speed than traditional methods, representing a significant advancement in risk management and the fulfillment of legal obligations across various jurisdictions.[5] [6]

In particular, in international business operations, where companies and investors must comply with the specific regulations of different jurisdictions, the automation of these legal processes provides a means to optimize time and reduce costs while simultaneously increasing accuracy in analyses. AI can, therefore, play a crucial role in improving the operational efficiency of companies seeking to expand their activities in global markets, allowing them to adapt quickly to local standards and ensure compliance with the laws in each country.

As a practical example, consider a U.S.-based pharmaceutical company aiming to expand its operations into Southeast Asia. The use of AI plays a decisive role in automating the assessment of each country's specific regulatory and legal requirements, enabling the company to make more informed and agile decisions. The automation of verification and regulatory analysis processes provides greater legal security by reducing the risks associated with entering foreign markets while ensuring all legal requirements are met effectively and within the prescribed timeframes.

Therefore, automation offers an innovative response to the demands of international law by enabling companies to adapt quickly to a global environment that is increasingly dynamic and complex, while maintaining compliance with the diverse regulations governing international trade. Moreover, by reducing the manual workload associated with document and contract analysis, AI frees up lawyers to focus on more strategic and complex issues, contributing to the more efficient performance of the legal team and, consequently, to success in international operations.

The Role of ChatGPT in International Law

ChatGPT, developed by OpenAI, has emerged as a transformative tool in the legal field, particularly in international law. With the advent of its advanced versions, such as GPT-4-turbo and its successors, this technology has demonstrated significant potential for enhancing legal practice by offering features that increase the efficiency and effectiveness of legal professionals in a globalized environment, where complex and cross-jurisdictional legal issues require agility and precision.[7]

Below, this article details the functionalities and applications of GPT-4-turbo in the context of international law, emphasizing the advanced capabilities of its paid versions, its practical usability, and the impact this tool has on legal practice.[8]

Advanced Capabilities of Paid Versions

The advanced versions of ChatGPT, particularly GPT-4-turbo and its more advanced versions, have been designed to provide a deeper and more contextual understanding of legal queries, resulting in more precise analyses. While the free version of the model is effective for simpler and more straightforward tasks, the paid versions were developed to handle more complex legal issues, including the interpretation of international contract clauses, the drafting of sophisticated legal documents, and the analysis of regulatory risks across various jurisdictions—essential features for professionals working in international law.

These enhanced versions of ChatGPT are capable of processing and generating lengthy texts with high accuracy, maintaining the coherence and precision required to ensure compliance with the legal standards necessary in complex legal environments. The ability to conduct in-depth analysis and process complex data enables lawyers to use the tool to draft legal texts more efficiently while maintaining high-quality standards.

Moreover, GPT-4-turbo offers advanced customization capabilities, allowing lawyers to configure the model to respond according to specific legal requirements and language styles tailored to their needs. This customization enables legal professionals, particularly those working in international law, to use ChatGPT-4-turbo as a strategic and indispensable tool

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Discretionary Determinations Before USCIS and the Department of State How to Present the Most Compelling Cases

By Larry S. Rifkin, Miami

photo: iStock/mediaphotos

United States immigration law grants a great deal of discretion to immigration examiners and consular officials regarding the adjudication of petitions and applications at U.S. Citizenship and Immigration Services (USCIS) and of visas at U.S. consulates. This article will serve as a guide for preparing a case for filing in a practical manner to maximize the chances of a successful adjudication at USCIS and for a favorable decision at an appointment at the consulate, taking into consideration the broad discretion given to government officials in the decision-making process.

Burden of Proof and Standard of Proof Before USCIS

In matters involving applications for immigration benefits before USCIS, the applicant or petitioner "always has the burden of proving that he or she is eligible to receive the immigration benefit sought."[1] The burden of proof never shifts to USCIS.[2] The standard of proof is "the amount of evidence needed to establish eligibility for the benefit sought. The standard of proof applied in most administrative immigration proceedings is the preponderance of the evidence standard."[3] In *Matter of E-M-*, 20 I&N Dec. 77 (BIA 1989), the commissioner stated: "When something is to be established by a preponderance of the evidence, it is sufficient that the proof only establish that it is probably true."[4] Therefore, if the applicant submits "relevant, probative, and credible evidence that leads an officer to believe that the claim is 'probably true' or 'more likely than not,' then the benefit requestor has satisfied the standard of proof."[5] So it is the applicant or petitioner who must make a prima facie case for eligibility. However, despite making this showing, in certain cases the immigration officer "is then required to determine whether approval or denial is appropriate, in his or her discretion."[6]

Discretionary Determinations in Adjustment of Status Cases

Adjustment of status is the process that persons can use to apply for Lawful Permanent Resident (LPR) status with USCIS when they are present in the United States without having to return to their home country to complete visa processing.

Most categories of eligibility for permanent residence require the applicants to have an approved immigrant petition prior to submitting the application for adjustment of status.[7] There are some categories, such as immediate relatives of U.S. citizens, who can file the immigrant petition and the adjustment of status application concurrently with USCIS.[8] Finally, there are some categories of eligibility for permanent residence that do not require an underlying immigrant petition at all, such as applicants who file under the Cuban Adjustment Act.[9]

Most adjustment of status applicants may only be granted LPR status in the discretion of USCIS.[10] This means that "even if the applicant meets all of the other statutory and regulatory requirements, USCIS only approves the application if the applicant demonstrates that he or she warrants a favorable exercise of discretion."[11] An applicant is not automatically entitled to adjustment of status. These discretionary determinations apply to the following categories of eligibility: family-based, employment-based, and diversity visa cases; asylee adjustment; Cuban Adjustment Act; and special immigrant-based adjustment, to name a few.[12]

Favorable Exercise of Discretion

If the USCIS officer determines that an applicant for adjustment of status otherwise meets the eligibility requirements, the officer then determines whether the application should be approved as a matter of discretion. "Given the significant privileges, rights, and responsibilities granted to LPRs, an officer must consider and weigh all relevant evidence in the record, taking into account the totality of the circumstances to determine whether or not an approval of an applicant's adjustment of status application is in the best interest of the United States."[13]

In conducting this discretionary determination, the USCIS officer must weigh the positive and negative factors in each individual case. If the officer "finds that the applicant's positive factors outweigh the negative factors such that the applicant's adjustment is warranted and in the interest of the United States, the officer generally may exercise favorable discretion and approve the application."[14] If the officer finds that the applicant's negative factors outweigh the positive factors, such that a favorable exercise of discretion is not warranted in the applicant's case, the officer must deny the application.[15]

The positive factors that the USCIS will consider to determine if favorable exercise of discretion is warranted are: family and community ties to the United States; hardship to the applicant or close relatives if the adjustment application is denied; length of applicant's residence in the United States; compliance with immigration laws; property, investment, or business ties in the United States; employment history; education and training obtained from educational institutions in the United States; lack of a criminal record; evidence of service to the community; compliance with tax laws; rehabilitated criminal conduct, where applicable; and other evidence of good moral character in the United States and abroad.[16]

The negative factors the USCIS will consider are: absence of close family, community, and residence ties; violations of immigration law; current or previous instances of fraud in dealings with USCIS or any government agency; history of unemployment; unauthorized employment in the United States; employment or income from illegal activity; criminal record; lack of rehabilitation; failure to meet tax obligations; failure to pay child support; public safety or national security concerns; and other indicators adversely reflecting on the applicant's character.[17]

Practice Pointers in the Adjustment of Status Context

The first step in preparing adjustment cases for filing with USCIS is to establish that the applicant meets the eligibility requirements. Practitioners will not reach the favorable discretion phase of the case if they do not first establish a prima facie case of the applicant's eligibility for the benefit requested. Practitioners should first ensure that any foreign civil documents, such as birth certificates, marriage certificates, etc., comply with the Department of State's Civil Documents webpage for each individual country.[18] Second, practitioners should include professional, complete English translations of any documents in a foreign language in the filings. Third, practitioners should submit documentation establishing the desired eligibility: evidence of bona fide marriage for marriage petition, evidence of familial relationship for parent/child relationships, letters of experience and evidence of financial ability to pay for employment-based petitions, etc.

Once the prima facie case has been established, practitioners should include evidence to establish favorable discretion, such as: evidence of family ties (birth and marriage certificates for the applicant's U.S. citizen or Lawful Permanent Resident family members); evidence of community ties, such as letters from a religious organization and affidavits from persons in the community concerning the applicant's good moral character; copies of tax returns; police clearances establishing the applicant's lack of a criminal record; and property and business ties (warranty deeds, Articles of Incorporation, Articles of Organization, commercial lease agreements). If the

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Navigating § 1782 Judicial Assistance for International Arbitration Post-*ZF Automotive*

By Juan J. Mendoza and Noah Rosenblum, Miami

photo: iStock/MicroStockHub

The U.S. Supreme Court decision in *ZF Automotive US, Inc. v. Luxshare, Ltd.*[1] significantly narrowed the scope of 28 U.S.C. § 1782, holding that "only a governmental or intergovernmental adjudicative body constitutes a 'foreign or international tribunal' under § 1782" and excluding private arbitral bodies.[2] Since this landmark ruling, U.S. courts have consistently denied § 1782 applications seeking discovery for use in international arbitrations. However, a recent ruling by the District of Arizona suggests that judicial assistance for foreign arbitration may not be entirely foreclosed, leaving space for nuanced interpretations and potential shifts in the legal landscape.

Background on § 1782

Section 1782 of title 28, U.S. Code, is a powerful discovery tool that allows foreign litigants to obtain evidence found in the United States for use in foreign or international proceedings. It authorizes a U.S. district court to order a person found within its district to provide testimony or give evidence for use in a foreign or international tribunal,[3] offering access to broad "U.S.-style discovery" in an international proceeding, which many jurisdictions and arbitral regimes do not permit.

To obtain relief under § 1782, an applicant must satisfy four statutory elements: (1) the request for discovery must be made by a foreign or international tribunal, or by an interested person; (2) the request must seek evidence, whether it be the testimony or statement of a person or the production of a document or other thing; (3) the evidence must be for use in a foreign or international tribunal; and (4) the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application.[4] If the applicant satisfies the statutory elements, the district court has the discretion to grant the application and order the relief requested.[5] To guide the exercise of its discretion, the district court must weigh four additional factors: (1) whether the respondents are parties in the foreign proceeding; (2) the nature of the foreign tribunal, the character of the proceedings abroad, and the receptivity of the foreign tribunal to assistance from a U.S. federal court; (3) whether the discovery application conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and (4) whether the request is intrusive or burdensome.[6]

ZF Automotive Narrows the Scope of § 1782

The *ZF Automotive* decision resolved two consolidated cases that addressed whether two arbitral bodies qualified as

"foreign or international tribunals" under § 1782. In the first case, the applicant sought assistance under § 1782 for use in a contemplated arbitration in accordance with the Arbitration Rules of the German Institution of Arbitration e.V. (DIS).[7] The applicant in the second case sought assistance to support an ad hoc arbitration pursuant to a treaty between Russia and Lithuania in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).[8] The Court held that "only a governmental or intergovernmental adjudicative body constitutes a 'foreign international tribunal' under § 1782," and because neither of these bodies qualified, applicants were not entitled to the assistance requested under § 1782.[9]

In reaching its holding, the Court first reasoned that although the term "tribunal" is broad enough to encompass non-governmental adjudicative bodies in isolation, "tribunal" is modified in the statute by the terms "international" and "foreign."[10] The Court reasoned that a natural reading of "foreign tribunal" indicates that the statute is referring to an adjudicative body "belonging to" a foreign country, and if a foreign tribunal belongs to a particular country, it must be imbued with its sovereign authority.[11] Similarly, the Court reasoned that "international tribunal" must be a tribunal imbued with governmental authority of multiple nations.[12] Thus, the Court held that a "foreign or international tribunal" is one that exercises governmental authority conferred by a nation or multiple nations.[13] The Court also noted that this holding was consistent with the purpose of the statute in promoting comity between nations, as private bodies could not provide reciprocal assistance, and was supported by the statute's history and a comparison to the Federal Arbitration Act (FAA).[14]

In analyzing whether the two adjudicative bodies before it constituted "foreign or international tribunals," at the outset the Court held that the DIS panel was not a "foreign or international tribunal" because DIS panels operate under their own rules like any other private arbitration organization, the panels are formed by the parties, and no government is involved in creating the DIS panel or prescribing its procedures.[15] With respect to the ad hoc arbitration panel in the second case, the Court's analysis focused on whether Russia and Lithuania intended to confer governmental authority on the panel.[16] The Court identified various factors that indicated that Russia and Lithuania did not intend to confer governmental authority on the ad hoc panel created pursuant to their treaty: (1) the treaty did not itself create the panel; (2) the panel "functions independently" of and is not affiliated with either Lithuania or Russia; (3) the panel consisted of individuals chosen by the parties that all lacked an "official affiliation with Lithuania, Russia, or any other governmental or intergovernmental entity"; (4) the panel received zero government funding; (5) the proceedings were confidential; (6) the award may only be made public with the consent of both parties; and (7) the ad hoc panel had the authority to resolve the dispute only because the parties consented to the arbitration.[17]

Though the Court identified factors in determining whether an arbitral panel is imbued with governmental authority, it did not specify how these factors should be weighed or if any one factor is decisive. This lack of guidance left room for interpretation for lower courts.

Subsequent Cases Reinforce the Constraints on Foreign Arbitration

Post-*ZF Automotive* decisions underscore the limitations for obtaining relief under § 1782 for use in foreign arbitrations. In *Webuild S.P.A. v. WSP USA Inc.*, the Second Circuit applied the *ZF Automotive* framework to an arbitral tribunal formed under the International Centre for the Settlement of Investment Disputes (ICSID). The court held that the ICSID panel at issue was not imbued with the requisite governmental authority to qualify as a "foreign or international tribunal" under § 1782.[18]

In this case, Webuild, an Italian investment company that specialized in infrastructure projects, initiated an ICSID arbitration against the Republic of Panama alleging breaches of a bilateral investment treaty (BIT) between Italy and Panama, international law, and Panamanian law, in connection with its work to expand the Panama Canal.[19] To support its ICSID arbitration, Webuild sought and obtained an order granting its ex parte order application for assistance under § 1782 from the U.S. District Court for the Southern District of New York, allowing discovery from a third party, WSP USA Inc., for use in the ICSID arbitration.[20] Shortly after entry of the order, the Supreme Court issued the *ZF Automotive* decision, which caused Panama and WSP to make a motion requesting the district court to vacate the order granting discovery.[21] The district court granted this motion, vacated its earlier order, and quashed the WSP subpoena.[22]

In its opinion, the district court relied on the factors considered in *ZF Automotive*, and analyzed the key factual considerations that distinguished a private tribunal from one imbued with governmental authority: (1) why the arbitral panel was formed; (2) whether the BIT created the panel; (3) whether the panel functioned independently from either of the relevant BIT nations; (4) whether the panel received any government funding; (5) whether the proceedings and findings of the panel were public; and (6) whether the panel derived its authority from the parties' consent to arbitrate.[23] The district

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The New Great Replacement Theory
Using Humanitarian Law to Revive Civil Liberties in an Era of Retrenchment

By Bret Shawn Clark, Englewood

Eleanor Roosevelt holding a poster of the Universal Declaration of Human Rights (in English), Lake Success, New York, circa November 1949. FDR Presidential Library & Museum 64-165. Wikimedia.org

Adolf Hitler was greatly influenced in the formulation of his beliefs in the existence of a master race by *The Passing of the Great Race*, a 1916 book by American lawyer and eugenist Madison Grant, who was an early proponent of the superiority of the "Nordic Race." (Hitler and his Nazi associates such as Alfred Rosenberg preferred the term "Aryan" in referring to this mythical racial denomination.)[1] Grant's ideas about the threat of racial impurity from unrestrained immigration (and miscegenation) also inspired the revitalization of the white supremacist movement in the early 21st century, with its renewed interest in the so-called "white genocide conspiracy theory."[2]

Xenophobia-inspired ethnocentrism in the United States found its full-throated voice when chants of "You will not replace us!" could be heard during the white supremacist "Unite the Right" rallies in Charlottesville, Virginia in 2017.[3] The chants were a reference to the "great replacement" conspiracy theory that gets its name from *Le Grand Remplacement*, a 2011 book by French author Renaud Camus that maintains a belief in a conscious effort by global and liberal elites to perpetrate "genocide by substitution" whereby white people are "replaced" by non-white people.[4]

But there is a very different type of replacement theory that may hold promise for those who wish to restore the belief in a system of humanitarian justice that will protect vulnerable populations, regardless of the nation in which they were born.

A Nation of Immigrants?

Except for those instances of complaints of being displaced that are lodged by First Nation peoples, the jarring dissonance between claims of wrongful replacement coming from descendants of European colonialists being made against more recent non-white arrivals to the North American continent is difficult to fathom.[5] From the very beginning, Huguenots, Puritans, and other pilgrims who first arrived in North America were themselves refugees who were strangers to a land that was not theirs to take. This fact was not lost on the architects of the United States Constitution.

George Washington was to write "I had always hoped that this land might become a safe & agreeable Asylum to the virtuous & persecuted part of mankind, to whatever nation they might belong," to which Thomas Jefferson added that the United States offers "a sanctuary for those whom the misrule

of Europe may compel to seek happiness in other climes" and, in speaking of the new nation, "when the evils of Egyptian oppression become heavier than those of the abandonment of country, another Canaan is open where their subjects will be received as brothers, and secured against like oppressions by a participation in the right of self-government."[6]

Aspirations that the United States would remain welcoming to newcomers proved to be an elusive promise to keep, as reflected in a thoughtful book by President John F. Kennedy published posthumously in 1964, entitled *A Nation of Immigrants*, and in Carl J. Bon Tempo and Hasia R. Diner's *Immigration: An American History.*[7] But while the United States "was founded as an asylum and a refuge: a sanctuary," that Thomas Paine called "an asylum for mankind," and the founders excoriated the king for obstructing immigration and naturalization,[8] the road to extending human rights to all humans coming to this new nation proved to be a difficult one.

Many years later, in abolitionist and freed slave Frederick Douglass's classic 1869 speech "Composite Nation," the question was asked (and answered in the affirmative) as to whether Asians should be allowed to immigrate to the United States:

> There are such things in the world as human rights. They rest upon no conventional foundation, but are external, universal, and indestructible. *** I know of no rights of race superior to the rights of humanity, and when there is a supposed conflict between human and national rights, it is safe to go to the side of humanity. And here I hold that a liberal and brotherly welcome to all who are likely to come to the United States, is the only wise policy which this nation can adopt.[9]

Douglass's allusion to a "supposed" conflict between what the national rights had to offer as compared to universal human rights is instructive in an era where the libertarian ideal put forth by the architects of both the United States Constitution and international humanitarian law came under assault in the 21st century.[10] A brief examination of the development of the former shows that Douglass was prescient when he questioned that there was any real distinction between the two.

Migration of Jurisprudence Into the United States

In its formative years, the United States imported more than just people into their newly formed nation. Ideas about governance were imported as well, drawing particularly from ancient Greece and the Roman Empire.[11] Employing the value of history, the Founding Generation looked to the republican example of ancient Rome and the experience with democracy of ancient Athens, filtered through the lens of the Age of Enlightenment, to formulate a system of mixed government and separation of powers that was to form the basis of a new form of constitutional democracy.[12]

Limitations on the power of the government to infringe upon the rights of the individual, another concept borrowed from classical antiquity, was incorporated by the authors of the Constitution into the Bill of Rights that were appended to the founding document.[13] So, too, was the notion, advanced in Cicero's *De Re Publica*, that the rule of law as administered by an apolitical judiciary was the essential means by which the "natural law" could protect the people's property, rights, and liberty.[14]

Also imported from overseas and embedded into constitutional jurisprudence were political philosophies from the European Age of Enlightenment. For example, the Declaration of Independence, written by Thomas Jefferson, which declares that citizens are endowed with "unalienable rights" to life, liberty, and the pursuit of happiness, and other guarantees of individual liberty in the founding documents derive from ideas advanced by European thought leaders such as John Locke ("no one ought to harm another in his life, health, liberty, or possessions'), Blackstone, and others.[15]

Replacement parts for the original void of U.S. constitutional jurisprudence were imported as well from England in the form of the Magna Carta. Writing for the Court, Chief Justice Earl Warren discerned fundamental rights applicable to the states through the Fourteenth Amendment's guarantee of substantive due process as existing by virtue of provisions of the Magna Carta. *Klopfer v. North Carolina*, 386 U.S. 213, 223-24 (1967).

Klopfer was just one of a string of landmark rulings during the Warren court era that was to reinvigorate the role of the judiciary in securing fundamental rights. Civil liberties were consequently expanded in dramatic fashion during those years. This was accomplished by a combination of two theories of constitutional interpretation. The first was the doctrine of incorporation, whereby the Bill of Rights was gradually found to be applicable not just to the national government, but to all governments via the due process clause of the Fourteenth Amendment to the Constitution that had been ratified after the Civil War, in 1868.[16] The second was to interpret clauses of the Fourteenth and Fifth Amendments to mean that the people enjoy fundamental rights "implicit in the concept of ordered liberty" that cannot be infringed upon by the government.[17]

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Navigating the Extraterritorial Tightrope in the Bankruptcy Code

By Maria Jose Cortesi, Miami

During the 2022 term, the Supreme Court of the United States revisited the concept of extraterritoriality in the case *Abitron Austria GmbH v. Hetronic International*, 600 U.S. 412 (2023). Extraterritoriality refers to the application of a country's laws and jurisdiction beyond its borders. Since at least 2010, U.S. law has held there is a presumption *against* the extraterritorial application of its laws. In other words, the presumption holds that U.S. laws are generally meant to apply only within the domestic boundaries of the United States unless a contrary legislative intent appears.[1] The presumption is rooted in respect for the sovereignty of other nations, notions of international comity, and the avoidance of conflicts of laws. While the Supreme Court has decided a handful of extraterritoriality cases over the last two decades, steadfast at the center of the discussion is the presumption against extraterritoriality and the framework that has been developed to ascertain whether a particular U.S. law may reach into foreign territory.

In 2010, the Supreme Court, in the landmark *Morrison* case, introduced a two-step analytical approach aimed at clarifying the extraterritorial application of U.S. statutes. This decision was a response to years of inconsistent and varying judicial approaches that created a lack of clarity and predictability in determining the reach of U.S. laws beyond U.S. borders.

In particular, the *Morrison* Court sought to cease the use of the "conducts and effects" tests used by some courts, and to provide much-needed guidance on the extraterritoriality question to put an end to the era of what had been described as "judicial-speculation-made-law."[2] In the *Morrison* approach, the initial step involves examining whether there is an "affirmative indication" from Congress that the statute is intended to apply extraterritorially, thereby overcoming the strong presumption against such application.[3] If this initial analysis does not produce a clear outcome, the second step comes into play, requiring courts to ascertain the "focus" of the statute. This involves determining the location where the conduct central to the statute's focus occurred.[4]

In *Abitron*, the Supreme Court once again sought to reign in the extraterritoriality jurisprudence that had developed over the years since *Morrison*. The Court looked to the "focus" of congressional concern to determine whether the claim sought a "(permissible) domestic or (impermissible) foreign application of the provision."[5] However, identifying the focus of congressional concern does not end the inquiry.[6] With regard to the second step of the presumption analysis, the Abitron Court clarified that the "focus" prong was "designed to apply the presumption against extraterritoriality to claims that involve both domestic and foreign activity, separating the

activity that matters from the activity that does not."[7]

The *Abitron* Court found that the two provisions of the Lanham Act that prohibit trademark infringement were not extraterritorial and could only extend to claims where the claimed infringing use in commerce was domestic.[8] In reaching this conclusion, the Court expressly rejected an argument that while the provisions themselves did not, on their own, signal extraterritorial application, the link could be made through the Lanham Act's definition of "commerce," which applies to both provisions at issue.[9] The argument proposed that "commerce" overcame the presumption, on the basis that Congress could regulate foreign conduct under the Foreign Commerce Clause, and further, because the Lanham Act's definition of "commerce" differed from "boilerplate" definitions of commerce in other statutes.[10] The Court cited to its decisions in *Morrison, RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325 (2016), and *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), in saying that "it is well established that generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality."[11]

Abitron marks a shift of the presumption framework back to its pre-*Morrison* days, where conduct itself was relevant to the presumption analysis.[12]

In bankruptcy law, the analysis of extraterritoriality of U.S. bankruptcy proceedings has become pronounced as the bankruptcy courts increasingly find themselves navigating bankruptcies involving multinational corporations and individual debtors with far-reaching, intricate webs of contractual obligations, diverse legal systems, and conflicting creditor interests. This reality prompts a careful consideration of cross-border implications and raises questions about the scope of certain powers and remedies available in the Bankruptcy Code. One aspect that is likely to be even more a point of contention is whether the avoidance provisions of the Bankruptcy Code apply extraterritorially.

Certain provisions of the Bankruptcy Code, such as section 541(a), are widely recognized as having extraterritorial reach.[13] This acceptance is grounded in the text of section 541(a), which includes in the bankruptcy estate all property of the debtor, "wherever located and by whomever held."[14]

Thus, while it appears clear that some provisions of the Bankruptcy Code—i.e., section 362, section 541(a), and Chapter 15—were intended to have extraterritorial reach, bankruptcy courts have yet to categorically agree on whether Congress intended sections 548 and 550 (the "Avoidance Provisions") to have similar extraterritorial effect. Bankruptcy courts and district courts—sometimes within the same circuit—have taken opposing views on Congress's intent for the Avoidance Provisions to apply extraterritorially. Some courts have overcome the lack of direct extraterritorial signaling in the Avoidance Provisions and found congressional intent by virtue of section 541(a)'s creation of a bankruptcy estate comprising "all… property, wherever located and by whomever held."[15] Conversely, some courts have refused to read sections 548 and 550 in tandem with section 541(a) for purposes of overcoming the presumption, finding the lack of explicit reference to extraterritorial application in the Avoidance Provisions indicative of Congress's intent to restrict their application to domestic transfers.[16]

Interestingly, two circuits, the Second and Ninth Circuits, seem to have an internal split on the issue, with each circuit having at least one district court come out on either side of the debate.[17]

Under the *Abitron* holding, the extraterritorial application of the Avoidance Provisions would be in peril just as the Lanham Act's provisions reviewed in *Abitron*. Based on the Court's explicit rejection of the "commerce" argument in *Abitron* and the parsing of specific sections of the Lanham Act for separate analysis under the framework, a similar argument that section 541(a)'s definition of property of the estate signals the extraterritorial application of sections 548 and 550, may not find success with the Court. An *Abitron*-informed Court could easily agree with the *CIL Ltd.* Court that "when it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute,"[18] and therefore, the lack of affirmative intent in the Avoidance Provisions settles the issue.

With the Avoidance Provisions in jeopardy of failing the first step of the framework, the analysis would proceed to step two—the congressional focus of the statute and conduct relevant to that focus—an analysis that could also yield a similar outcome as that in *Abitron*. The Supreme Court admonished the *Abitron* parties for centering the dispute on the "focus" of the statute "without regard to the 'conduct relevant to that focus.'"[19] According to the new, but in some way old, standard promulgated in *Abitron*, the applicability of a statute hinges on the location of the conduct relevant to its focus.

At least one court has held that the focus of the Avoidance Provisions is the "transfers sought to be avoided or the nature of the transaction in which property is transferred" rather than physical presence in the United States or the parties' relationship.[20] It is in the "conduct relevant to" the congressional focus that the Avoidance Provisions find themselves in a bind. For the Avoidance Provisions, this would involve examining where the fraudulent transfers or relevant transactions occurred. In *In re FAH Liquidating Corporation*, the bankruptcy court applied a "center of gravity" test to

… continued on page 70

WORLD ROUNDUP

INDIA

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Bombay High Court grants interim relief to Burger King Corp. in trademark dispute.

In a significant trademark dispute, the Bombay High Court has granted interim relief to Burger King Corporation by staying a Pune court's dismissal of its infringement suit against a local eatery operating under the same name. The Pune-based establishment, owned by Anahita and Shapoor Irani, has been using the "Burger King" name since 1992, predating the U.S. company's entry into the Indian market in 2014. The Pune court had previously ruled in favor of the local restaurant, recognizing its prior and honest use of the name. However, upon appeal, the Bombay High Court emphasized the necessity of thoroughly examining all evidence, noting its role as the "last fact-finding court" in this matter. Consequently, the High Court issued an interim order restraining the Pune eatery from using the "Burger King" name until the appeal is resolved. Additionally, both parties have been directed to preserve their business records for the past ten years. This case highlights the complexities of trademark law, especially when local businesses adopt names later claimed by global entities, underscoring the importance of diligent trademark registration and enforcement strategies.

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MIDDLE EAST

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UAE-led gas consortium brings claim over Iraqi gas project.

Pearl Petroleum, a unit of UAE natural gas company Dana Gas, has started arbitration proceedings against Enerflex, the EPC contractor of the Khor Mor 250 project in the Kurdistan region of Iraq.

On 19 August 2024, Pearl Petroleum issued a notice of termination to Enerflex, citing numerous "performance issues" that had arisen during the execution of the contract works. In an August disclosure, Dana Gas said the impact of these issues materially affected Enerflex's ability to meet its contractual obligations, which lead "to delays and hindering the progress and timely completion of the Khor Mor gas expansion project."

On 9 September 2024, following the termination of the contract, Pearl Petroleum initiated an arbitration "in accordance with the contract to recover costs and damages arising from Enerflex's defective performance," according to a September 9 disclosure from Dana Gas.

DIFC Court upholds $1.6 billion ICC award and rejects claims of unlawful evidence.

The Dubai International Financial Centre (DIFC) Court upheld a $1.6 billion International Chamber of Commerce (ICC) arbitration award in favor of Iraq Telecom, a joint venture between Kuwait's Agility and France's Orange, against Sirwan Barzani and Korek Telecom, dismissing their attempts to overturn it.

In the underlying arbitration, the award creditors claimed that the award debtors had bribed officials in an Iraqi state entity, leading to a decision that caused the award creditors significant losses. In response, the award debtors argued that the arbitral tribunal lacked jurisdiction to hear the corruption claims because this would violate the foreign act of state doctrine, which prevents any tribunal from adjudicating the lawfulness or validity of sovereign acts by a foreign state, or from hearing claims of unlawful actions by a foreign state. The tribunal dismissed this argument, finding that that Barzani and Korek conspired to bribe Iraqi officials to revoke a previous telecoms deal. The award debtors applied to set aside the award, arguing that, under the act of state doctrine,

national courts must not adjudicate the validity of official acts by a foreign state within its own territory unless that validity violated public policy. They contended that the tribunal exceeded its jurisdiction and violated the UAE's public policy in dismissing their jurisdictional objections. The DIFC Court dismissed the grounds for the annulment application and found no breach of UAE public policy, affirming both the award and a worldwide freezing order.

ICSID tribunal rules in favor Lebanon.

A tribunal of the International Centre for the Settlement of Investment Disputes (ICSID) dismissed AVAX SA's claim against the Republic of Lebanon on the basis of the Greece-Lebanon Bilateral Investment Agreement, regarding the contract between the two parties for the construction of the Deir Aamar (Phase II) thermal power station near the city of Tripolis in Lebanon.

AVAX filed its claim in 2016, citing among other things, the fact that the Republic of Lebanon did not make any payments regarding the project. The arbitral tribunal ruled that Lebanon did not violate its obligations under the Bilateral Investment Agreement. It also ordered AVAX to pay Lebanon the amount of €1.3 million for costs incurred during the arbitration proceedings.

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NORTH AMERICA

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Mexico will elect judges at all levels by popular vote.

On 15 September 2024, outgoing Mexican President López Obrador completed one of his last acts—and arguably one of his most controversial—as president. He approved the 2024 Mexican judicial reform (the Judicial Reform), making Mexico one of the few countries that elects its judiciary at all levels, including the country's Supreme Court, by popular vote. With the stated goal of reducing corruption in the judiciary, the Judicial Reform, which is a series of constitutional amendments restructuring Mexico's judicial system, reduces the number of Supreme Court justices from eleven to nine and replaces judges appointed by the Mexican Congress with elected judges.

The Judicial Reform sparked significant domestic and international opposition on the grounds that it threatened judicial independence. On 10 September 2024, the scheduled day of the bill's vote, protestors stormed the Mexican Senate chambers to halt the vote. The Senate was briefly evacuated, and the vote was delayed until 11 September.

The International Bar Association (IBA) expressed concern over the speed of Mexico's Judicial Reform as well as the likely effect on the independence of Mexico's judicial branch, stating that the "timing of the 'Judicial Reform' is worrisome, considering the doubts it generates about any potential benefits. Such far-reaching and concerning proposals require an even more careful study of their potential impact on an independent, professional and fair judicial branch. There is too much at stake for Mexico and Latin America." The IBA president concluded, "[t]here is no rush."

Canadian media companies file suit against OpenAI.

In November 2024, five news media companies in Canada (Torstar, Postmedia, The Globe and Mail, The Canadian Press, and CBC/Radio-Canada) filed suit against OpenAI, the creator of ChatGPT, accusing OpenAI of illegally using their content in a process known as "scraping" to train their AI chatbot. These Canadian news media companies brought what is likely the first such case in Canada in the Ontario Superior Court of Justice. A similar suit was brought in the United States against OpenAI by *The New York Times* in 2023.

Unlike the U.S. action, which focuses on copyright infringement, the eighty-four-page Canadian complaint focuses on OpenAI's training model for its chatbot. Elon Musk has also sued OpenAI, which he cofounded in 2015 but left in 2018, over disagreements with the other cofounders. The five Canadian plaintiffs are collectively seeking what could amount to billions of dollars in damages for the use of their copyrighted materials.

As a presidential candidate and as president-elect, Donald Trump has promised sweeping action on international issues.

When Donald Trump assumes the U.S. presidency on 20 January 2025, he will have the power to radically reshape the United States' international policy in accordance with what he has described as an "American First" plan. During the 2024 campaign season, Donald Trump foreshadowed numerous proposed changes, both domestically and internationally, that will likely be legally controversial. For example, he has pledged to carry out the largest deportation effort in American history, potentially using the U.S. military and relying on the 1798 Alien

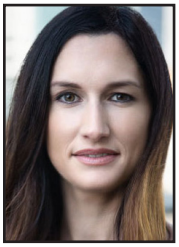
Enemies Act to facilitate these actions. Both proposals would most likely face legal challenge in the U.S. courts.

As president, Trump has proposed tariff increases and a more-protectionist international trade policy. He is also likely to resume the controversial travel bans for individuals, including refugees, from certain countries that were challenged during his first term in office. He will also likely consider the United States' continued participation in the North Atlantic Treaty Organization (NATO) in light of other members' reductions in defense spending as well as in the Paris Climate Agreement, the UN's Framework Convention on Climate Change (UNFCCC), and the UN's Educational, Scientific and Cultural Organization (UNESCO).

Laura M. Reich *is a commercial litigator and an arbitrator practicing at Harper Meyer LLP. In addition to representing U.S. and foreign clients in U.S. courts and in arbitration, she is also an arbitrator with the American Arbitration Association and the Court of Arbitration for Art in The Hague. A frequent author and speaker on art, arbitration, and legal practice, Ms. Reich is an adjunct professor at Florida International University Law School and Florida Atlantic University and vice treasurer of the International Law Section of The Florida Bar.*

Clarissa A. Rodriguez *is a board certified expert in international law. She is a member of the Harper Meyer LLP dispute resolution practice and specializes in art, fashion, and entertainment law, as well as international law. With nearly two decades of experience, Ms. Rodriguez leads and serves on cross-disciplinary teams concerning disputes resolution and the arts industry. She has found a way to dovetail her passion for the arts into her legal career by representing the players in the art, fashion, and entertainment industries in their commercial endeavors and disputes.*

WESTERN EUROPE



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Germany's Act to Modernize Nationality Law enters into force.

The Act to Modernize Nationality Law (StARModG) entered into force on 27 June 2024 and allows individuals to acquire German citizenship without having to relinquish their existing citizenship, even in cases where this was previously not possible. German nationals now can also obtain any foreign nationality without losing their German citizenship. Prior to this change, German nationals lost their German citizenship automatically by law if they did not obtain a prior permission to retain their German nationality (Beibehaltungsgenehmigung) before accepting another citizenship, such as from the United States. This was a time-consuming process, and only a few individuals qualified to retain their German nationality.

Individuals who acquire multiple nationalities by birth in Germany are no longer required to choose between German citizenship and another nationality, as the obligation to opt for one has been removed. Additionally, the naturalization period has been reduced from eight years to five years for those residing in Germany. The new provisions are not retroactive.

Can American lawyers settle in Paris?

Paris is a major legal hub that attracts foreign law firms. However, this presence also raises concerns locally, and such firms face strict French regulations governing the practice of law in France. When listing the American law firms established in Paris, it seems as if the list is not very dynamic. Is this true? If so, why?

This portion of the Roundup aims to review the history behind these questions, examine the present situation, and explore potential developments.

The past: Established American law firms in Paris. In France, there were originally two legal professions: "*avocats*" (lawyers) who could both litigate and provide legal advice ; and "legal advisors" who could only provide advice without litigating. Only lawyers were admitted to a Bar.

A law passed on 31 December 1990 (Law No. 90-1258) merged the professions of lawyers and legal advisors. As a result, legal advisors became lawyers. Prior to this, Paris had already hosted foreign legal firms, including American ones, acting as "legal advisors." When the merger happened, these American firms were allowed to stay in France by registering as lawyers under the provisions of Articles I-I and 50 XIII of the law of 31 December 1971, which regulated legal professions at the time. Firms like Cleary, Gottlieb, Steen & Hamilton LLP, Curtis, Mallet-Prevost, Colt & Mosle LLP, Debevoise & Plimpton LLP, and others were among those that remained.

In the 1990's, no new American firms were allowed to register with a French Bar.

The present: A ban on direct establishment of American law firms in Paris. Currently, the rule is clear: no American lawyer or American law firm can directly establish itself in Paris. This strict rule stems from the legislation. Since the transposition of Directive 98/5/EC by a law on 11 February 2004, only European lawyers and European law firms can establish

themselves in France as lawyers from EU member states or Switzerland.

The applicable laws, including the law of 31 December 1971 and its various amendments, limit the possibility of establishing a legal profession in France to European lawyers, either as individuals or as branches of law firms. There is an exception for non-EU law firms, but it does not apply to American firms. France recognizes a special legal status: the *foreign legal consultant* (CJE), which was created by an ordinance on 27 April 2018 and incorporated into the law of 31 December 1971. This allows non-European lawyers, whose countries have a free trade agreement with the EU, to register with a French Bar as foreign legal consultants. However, the United States does not have such an agreement with France.

In conclusion, American lawyers, whether individuals or firms, are not allowed to establish themselves directly in France.

Possible ways for American law firms to establish themselves in Paris. Despite the restrictions, directories and websites of Parisian lawyers show that other American firms, besides the ones grandfathered in as legal advisors, have set up offices in Paris. For instance, Latham & Watkins (since 2001), Winston & Strawn (since 2003), Baker & Mckenzie (since 2004), and recently Littler, among others.

How was this possible given the prohibition? These firms are not technically "established" in France. Most have entered into international cooperation agreements with French lawyers, such as:

- International lawyer networks (under Article P. 16.0.1 of the Paris Bar Internal Regulations (RIPB));
- International correspondence agreements (Articles P. 48.7 and P. 49.3), which can be concluded with non-EU lawyers and allow joint results;
- Transnational partnership agreements (Article 16-1 of the National Internal Regulations of the Legal Profession (RIN)); and
- Economic Interest Groups (GIEs) since a ruling on 12 August 2024.

The Paris Bar is careful about these agreements, ensuring they preserve the independence of French lawyers and do not create the appearance of indirect establishment in Paris.

Additionally, joint firm names between French and American firms are not allowed. The regulation concerning the naming of French law firms is restrictive. The RIN prohibits names that could create confusion or give the appearance of a nonexistent legal structure.

American firms have also explored using name licensing contracts, which was initially refused by the Paris Bar but later admitted in some cases. The Bar evaluates these agreements on a case-by-case basis to ensure compliance with principles such as independence, public transparency, and avoidance of the appearance of a joint structure.

In conclusion, although Paris is highly attractive, establishing a presence there is challenging. American firms looking to enter the Paris market should seek guidance from French firms experienced in this area.

Susanne Leone *is one of the founders of Leone Zhgun, based in Miami, Florida. She concentrates her practice on national and international business start-ups, enterprises, and individuals engaged in cross-border international business transactions or investments in various sectors. Ms. Leone is licensed to practice law in Germany and in Florida.*

Amaury Sonet *was elected member of the Paris Bar Council for a three-year term, heading the Commission on Professional Practice, which handles foreign law firm applications in Paris. He is a partner at BFPL Avocats where he heads the corporate practice. Mr. Sonet assists his clients in all areas of company law, mergers and acquisitions, and business litigation. He is specialized with the Paris Bar in corporate law and holds a Ph.D. in private law. He also teaches corporate law at the Paris University Panthéon-Assas. He is a former secretary of the Conférence des Avocats à la Cour and a former secretary of the Conférence des Avocats au Conseil d'Etat et à la Cour de cassation.*

ILS Events at the IBA Conference 15-20 September 2024 • Mexico City

ILS members attended the International Bar Association Annual Conference in Mexico City, 15-20 September 2024. ILS events during the conference included the Battle Royale on 14 September and the signing of the ILS and Barra Mexicana, Colegio de Abogados A.C. Cooperation Agreement on 19 September, followed by a celebratory cocktail party hosted by the signatories at Museo de Arte Moderno.

International Arbitration Battle Royale • 14 September 2024 • Miami

On 14 September 2024, the ILS co-sponsored the International Arbitration Battle Royale moot presentation in Mexico City. This moot-style presentation (a redux from the inaugural event in Miami two years ago) showcased the differences in advocacy styles of civil law and common law practitioners. It was organized together with the Bar Council of England & Wales, the Bar of Northern Ireland, The Bar of Ireland, ANADE, Barra Mexicana de Abogados, and the Ilustre y Nacional Colegio de Abogados de Mexico. Attorneys Francisco Rodriguez (Reed Smith, Miami) and Francisco Gonzalez de Cossio (González de Cossío Abogados, Mexico City) gave compelling presentations to a three-panel tribunal (Ann Ryan Robertson (Locke Lord, Houston), Kate Brown de Vejar (DLA Piper, Mexico City), Samuel Townend KC (Keating Chambers, London) and a packed audience.

International Law Section – Barra Mexicana, Colegio de Abogados A.C. Cooperation Agreement 19 September 2024 • Mexico City

BMA Presidente Víctor Oléa Peláez and ILS Chair Ana Barton

Jocelyn Macelloni, Davide Macelloni, Ana Barton, and Cristina Vicens pose at the signing with Barra Mexicana.

Representatives of Barra Mexicana with Davide Macelloni, Jocelyn Macelloni, Richard Montes de Oca, Ana Barton, Cristina Vicens, Jeff Hagen, and Fred Rocafort

International Cooperation Cocktail at Museo de Arte Moderno • 19 September 2024 • Mexico City

Jeff Hagen, Cristina Vicens Beard, and Gary Birnberg pose in front of The Two Fridas (Las dos Fridas), an oil painting by Mexican artist Frida Kahlo.

The galleries at Museo de Arte Moderno provide a beautiful setting for the celebratory cocktail.

Perhaps the *ILQ* is a work of art in its own right!

ILS End of Summer Social
26 September 2024 • Miami

Members of the International Law Section gathered at American Social in Miami to celebrate the end of summer on 26 September 2024.

Laura Reich, Davide Macelloni, and Matt Akiba

Patricia Cuba-Sichler (Paris Bar Association) and Ana Barton

Omar Ibrahem, Alain Acanda, Patricia Cuba-Sichler, Ana Barton, Rodolfo Blanco, and Evelyn Barroso

Jennifer Mosquera, Tamires Frasson, a colleague, and Juan Andrade

Kateri Davis, Edward Davis, Cristina Vicens, and Davide Macelloni

Giovanni Angles enjoys reading the *International Law Quarterly.*

ILS Lunch & Learn With Arnie Lacayo
19 October 2024 • Coral Gables

Fiduciary Trust International hosted the ILS Lunch & Learn on 19 October 2024 at their office in Coral Gables, Florida. Arnoldo B. (Arnie) Lacayo, shareholder at Sequor Law and a past chair of the ILS, shared his experiences in his international litigation practice, which focuses on financial fraud, asset recovery, and cross-border insolvency. Thank you to Fiduciary Trust International for hosting this event and to Jackie Villalba for moderating the discussion.

Lunch & Learn attendees

Arnie Lacayo

Michael Cabanas from Fiduciary Trust International welcomes attendees.

The traditional rooftop photo op after the Lunch & Learn

ILS & EASL Miami FIFA Welcome Reception 24 October 2024 • Coral Gables

The International Law Section and the Entertainment, Arts, and Sport Law Section hosted a reception on 24 October 2024 to welcome FIFA's Legal and Compliance Division to its new home in Miami. The division recently relocated to South Florida in advance of the FIFA World Cup, to be held in the United States in 2026. Thank you to Weiss Serota Helfman Cole + Bierman for hosting the event.

The ILS leadership team with the FIFA legal team

The FIFA legal team

All of the participants gather at the office of Weiss Serota Helfman Cole + Bierman.

Fabio Giallanza delivers a speech during the celebratory event.

Pedro Fragoso Pires, Bob Becerra, Jeff Hagen, and Susanne Leone

ILS Law School Presentations • Fall 2024 Tallahassee, Miami, Gainesville

International Law Section members took several days this fall to reach out to students at the law schools of Florida State University, Florida International University, Nova Southeastern University, and the University of Florida to share information about the practice of international law. Their presentations were warmly received, and the future of the profession looks bright as many law students expressed their interest in pursing international law.

Ana Barton and Fred Rocafort at FSU on 22 October 2024 (top left)

Laura Reich at FIU on 23 October 2024 (bottom)

Davide Macelloni and Laura Reich at NSU on 30 October 2024 (middle right)

Laura Reich, Jeff Hagen, and Nouvelle Gonzalo at UF on 13 November (top right)

ILS Annual Orlando Luncheon
14 November 2024 • Citrus Club, Orlando

The International Law Section's Orlando Luncheon is a popular annual event where ILS members and international law practitioners in Central and North Florida have the chance to get together in their own area of the state—and we even have lawyers based in South Florida take the train or make the drive to join in on the fun! This year, ILS Past Chair Brock McClane welcomed attendees to the event, and ILS Vice Chair Cristina Vicens spoke about the section's accomplishments and plans for the new year.

Deborah Kallas, Laura Reich, Cindy Duque Bonilla, Clarissa Rodriguez, Cristina Vicens, and Penelope Perez-Kelly

The attendees enjoy their lunch and a beautiful view from the 18th floor.

Cristina Vicens addresses the group.

Brock McClane welcomes attendees.

Donna L. Draves speaks about her international practice.

It's always great to get together at the ILS Annual Orlando Luncheon!

ILS Holiday Party
12 December 2024 • Miami

ILS members enjoyed a beautiful evening at Sip Sip, the Calypso Rum Bar, on the rooftop of the Mayfair House Hotel & Garden, as they came together to celebrate the season. In addition to lively conversations and holiday cheer, the event is always a time to give back to the community. This year the ILS held a toy drive in support of Americans for Immigrant Justice.

Davide Macelloni, Cristina Vicens, Ana Barton, Laura Reich, and Jeff Hagen, the acting Executive Board of ILS, on the roof of the hotel

Jeff Hagen and Carolina Obarrio

Nouvelle Gonzalo, Katrina Suarez, and Macarena Bazan

Angel Valverde and Omar Ibrahem

Laura Reich, Sherman Humphrey, and Ana Barton

The rooftop of the Mayfair House Hotel & Garden provides the perfect setting for ILS members to celebrate the holidays.

A Hypothetical: Creative Solutions for an Interesting Client, continued from page 12

photo: Designed by Freepik

the U.S. estate tax upon his death would only be $60,000,[9] the paltry nonresident exclusion amount, causing generally a 40% estate tax on the excess value over that threshold. If the client's property was owned by a foreign corporation the client controlled, for example, rather than in his own name, his foreign corporate shares would not be subject to estate tax upon his death.[10]

If the client was considered domiciled in the United States, meaning he had no intention of leaving the United States upon his death, then his estate tax exclusion amount would be the same as it is for U.S. citizens: $13,990,000 in 2025.[11] Of course, this takes U.S. assets *and* non-U.S. assets into account, so to the extent his worldwide estate is valued a significantly higher level than simply his U.S. assets, this would not be a better result. Therefore, the client should further consult with U.S. tax counsel to carefully structure his U.S. assets in a manner that will minimize the applicability of the U.S. estate tax if he intends to remain a nonresident. If he is coming to the United States to live, pre-immigration tax planning (to optimize both U.S. income tax and future U.S. estate tax, if his estate exceeds $13.99 million in value) is important to prioritize.

As mentioned above, the client has a blended family, including a second wife, children from each of their marriages, as well as a shared minor child. This may present challenges for the client as to succession planning for his businesses and assets upon his passing or permanent incapacity. The client may want to leave certain assets to some of his children but not to others. He may also want some of his children to run his companies, but not others. In addition, the client may want to ensure that his children's spouses or significant others do not hold an interest in the family companies or their underlying assets.

While one popular planning tool for Brazilian families is the usufruct, as described more fully in Section IV, it may lack the specificity (and tax and reporting treatment) needed for the blended family described in this hypothetical. Especially if the family were considering becoming U.S. taxpayers, establishing an irrevocable trust to hold the family's assets could be a savvy maneuver if timed and structured with proper advice. Trusts permit specificity as complex as the drafter is capable of providing. For example, a trust can feature mechanisms for the distribution of particular property the client wants to leave to only one child or, if he wants to identify a specific wine collection to be granted to another upon a particular date, he can do so. He could also decide to establish certain rules as to how and when his heirs, who are probably beneficiaries of the trust, may receive distributions. The client could establish distribution rules that would direct distribution to a child upon marriage or upon attaining a degree. In addition, the client could establish rules with the aim of protecting the client's children and the client's family's assets, such as requiring a prenuptial agreement for the purpose of qualifying as a beneficiary of the trust to be eligible to receive distributions. The client's wishes as to his personal family dynamics, where he wants to reside, and the time he wishes to spend in the United States will surely drive what type of tax, business, and succession planning may be most suitable to the client's situation.

II. *Litigation Issues* by Laura M. Reich

Our client has a Brazilian labor law judgment against him, and we can assume that the Brazilian plaintiff's attorney has or soon will hire counsel in Florida to domesticate the judgment in Florida. Domestication of a foreign law judgment will be addressed under principles of comity and also under Florida's Uniform Out-of-Country Foreign Money-Judgment Recognition Act, Fla. Stat. § 55.601-55.607 (UFMJRA).

Both Florida law and U.S comity principles require that the Florida court consider whether the foreign judgment is final and enforceable in the originating jurisdiction and is free from fraud, as well as whether the foreign judgment was rendered by a court with proper jurisdiction in accordance with due process principles. Moreover, the UFMJRA specifies the process by which a foreign monetary judgment may be recognized and enforced in Florida, assuming the judgment is final, conclusive, and enforceable in the country where it was issued. The process begins when the judgment creditor files an authenticated

copy of the foreign judgment with a Florida court and provides notice to the judgment debtor. However, the recognition of the judgment is not automatic. A Florida court may decline to enforce the judgment if it finds any of the statutory grounds for nonrecognition. Additionally, enforcement may be denied if the judgment conflicts with Florida's public policy or if the judgment is for taxes, a fine, or another penalty. Once recognized, the foreign judgment is treated as a Florida judgment, allowing the creditor to pursue collection remedies such as liens or garnishments. The debtor, however, retains the right to challenge the enforcement by asserting applicable defenses.

Applying Florida's UFMJRA to the client's situation involves analyzing whether the Brazilian labor judgment meets the requirements for recognition and enforcement in Florida. The plaintiff seeks to domesticate a Brazilian judgment in Florida to seize the client's assets, specifically his Fisher Island mansion, which is not exempt from collections as homestead property, and his artwork. Under the UFMJRA, the plaintiff must demonstrate that the judgment is final, conclusive, and enforceable in Brazil. The plaintiff would need to file an authenticated copy of the judgment with a Florida court and provide notice to the client.

Our client may be able to raise several arguments in defense. For example, he may argue that the Florida court lacks jurisdiction over the subject matter or that the judgment pertains to foreign labor laws not recognized as enforceable in the United States or that the damages are not allowed under the public policy of Florida. The client could argue that the Brazilian court lacked proper jurisdiction over him or his assets. For example, if the dispute pertains to the operations of a specific farm, the client could assert that he was not personally liable for the debt. We will also likely scrutinize the original proceedings in Brazil for procedural irregularities, fraud, or possible violations of the client's due process rights.

It will be important to advise the client that his Fisher Island property and Miami artwork are vulnerable. If the Brazilian judgment is recognized, it becomes enforceable as if it were a Florida judgment. This would expose the Fisher Island mansion to potential liens or forced sale and allow the seizure of artwork located in Florida. The client should talk to asset protection attorneys to make plans to mitigate these risks. It may be possible to restructure ownership of Florida-based assets to shield them from direct claims. Additionally, we may be able to explore settlement options, in conjunction with our client's Brazilian counsel, to avoid further litigation and preserve high-value assets located in Florida.

III. *Immigration Options* by Jacqueline Villalba

While the client mentioned his interest in obtaining an EB-5 visa, there are other visa options available as well. As described in detail in Section 1, immigrant status in the United States as a permanent resident compared with nonimmigrant status on a work visa has tremendous ramifications. Depending on the investment that the client wants to make within the United States and his short- and long-term goals, there are several immigrant and nonimmigrant visas available to him, some of which are detailed below:

(a) E-2 visa: A nonimmigrant visa, the E-2 visa is available to citizens of countries with which the United States maintains a qualifying treaty or the equivalent.[12] The client could use his Portuguese citizenship for this purpose. To be eligible for E-2 visa classification, there are several key requirements that must be satisfied:[13] (i) the E-2 visa is available if the requisite treaty exists between the United States and the country of applicant's nationality;[14] (ii) a treaty national must invest or actively be investing a substantial amount of capital into a U.S. business to be sufficient to establish the business as a viable enterprise; (iii) a majority of the shares or membership interest of the U.S. entity must be ultimately owned and controlled by treaty nationals; and (iv) the investment must be a real and operating commercial enterprise; passive investments, such as the purchase of real estate, will not qualify for E-2 visa classification. As the applicant must have the intent to depart the United States at the conclusion of their stay in E-2 classification, the client will need to determine if this option meets his long-term goals.

Advantages of the E-2 visa classification include flexibility to travel in and out of the United States during the visa validity period, the ability to continually remain in the United States for up to two years, authorization to develop and direct the operations of the investment, the ability to renew the visa indefinitely as long as the investment continues to qualify, no fixed minimum amount of investment, the ability to include spouses and children under the age of 21 as dependents (which may be of interest to the client), and automatic work authorization for E-2 dependent spouses. Although the E-2 visa does not directly lead to permanent residence (green card), in some cases, clients can obtain a green card by growing and converting their original E-2 investment to meet the requirements of the EB-5 Immigrant Investor Visa Program. Additionally, if the U.S. company in which the client invested their funds has a qualifying corporate

relationship with a foreign company, they may also be able to obtain a green card as a multinational executive under the EB-1-C immigrant visa category.

(b) L-1A visa: Another nonimmigrant visa, the L-1A visa is used to temporarily transfer an executive or manager from a foreign company to one of its offices in the United States.[15] To qualify for L-1A visa classification, there are three main elements that must be satisfied: (i) there must be a qualifying corporate relationship between the United States and the foreign entity; (ii) the individual who will be temporarily transferred to the United States must have been functioning in an executive or managerial capacity at the foreign company for at least one year preceding the filing of the petition to classify the individual as an L-1A intracompany transferee; and (iii) the individual must be transferred to fill an executive or managerial position in the United States.[16] Advantages of the L-1A visa classification include flexibility to travel in and out of the United States during the visa validity period, the ability to remain in the United States for up to seven years, the ability to include spouses and children under the age of 21 as dependents, automatic work authorization for L-1A dependent spouses, and the ability to obtain a green card as a multinational executive or manager under the EB-1-C immigrant visa category. The client would need to review his business operations with U.S. immigration counsel to determine whether option (a) or (b) would be better for him to apply for, from a nonimmigrant visa perspective.

(c) EB-5 immigrant investor visa: If the client does determine, perhaps with the pre-immigration planning advice of tax counsel, that he wishes to come permanently to the United States, then the EB-5 investor visa may be a promising option. Through the EB-5 program, foreign investors can apply for a conditional green card (and in the future, a permanent green card) if they invest $1,050,000 (in some cases $800,000) in a new commercial enterprise (NCE) that creates full-time positions for at least ten qualifying employees.[17] NCEs include a variety of business relationships including but not limited to sole proprietorship, partnerships, holding companies, joint ventures, corporations, and privately owned entities if they are "for-profit" businesses. For an NCE that is not within a regional center, the investment must be in the job-creating entity and that entity must employ ten qualified U.S. workers per investor. For an NCE that is within a regional center, the jobs can be created directly or indirectly by the NCE. An investor must invest or be actively involved in the process of investing the required funds, and it must be established that the investor is the legal owner of the capital. Source of funds is extremely important and must be meticulously documented. Several advantages of the EB-5 program include not needing a U.S. company to sponsor the investor's green card application, the ability to concurrently file the investor petition and green card application, which allows the investor to remain in the United States while the petition is pending, and the ability to include spouses and children under the age of 21 as dependents.

IV. *Local Law Considerations in Brazil* by Otavio B. Carneiro

The hypothetical of this Brazilian resident, who owns art and businesses in Brazil and is considering moving to the United States, causes several cross-border issues. Knowing whether the client's move to the United States will be temporary or permanent will be an essential factor in advising him correctly in all areas. Understanding his spouse's plans, residency, citizenship, and family situation is equally important.

The client mentioned he was considering taking art back and forth between Brazil and the United States on his private jet. He must comply with applicable Brazilian rules and regulations that apply to the export of goods and assets abroad;[18] otherwise, when the client decides to take the paintings back to Brazil, he could be subject to taxes and duties on the paintings. With respect to the art itself, as discussed in more detail in Section V, Articles 215 and 216 of the Federal Constitution of Brazil, promulgated on 5 October 1988, set forth the basis for the protection and preservation of Brazilian cultural heritage. In Brazil, the Instituto do Patrimônio Histórico e Artístico Nacional – IPHAN (*i.e.*, National Institute of Historic and Artistic Heritage) is the arm of the federal government created for this purpose.[19]

If the client intends to reside permanently in the United States, he may wish to evaluate whether a formal "exit" from Brazil as a taxpayer is in his best interest, which would be heavily reliant on his remaining assets and businesses there. For instance, certain discounts and exemptions available to Brazilian taxpayers in the calculation of capital gain taxes are not available to nonresident taxpayers (which would be his status in Brazil if he obtained an EB-5 visa in the United States and exited Brazil). As another example of negative treatment to a nonresident taxpayer of Brazil, remittances of funds as a gift from a Brazilian resident

donor to a nonresident taxpayer are subject to a 15% withholding income tax by the Brazilian bank responsible for the remittance of the funds.[20]

With respect to the income producing farms the client owns, the client currently benefits from certain lower tax rates in Brazil due to being a Brazilian tax resident, which may have a negative effect on him if he relinquishes this status. Yet another issue that needs to be addressed concerns the restrictions on foreign ownership of rural land in Brazil.[21] Depending on the location and size of the land, the majority ownership of rural land may not be owned or possessed by foreigners without the prior approval of the Brazilian government.[22] If the farm is owned by the client individually, when the client dies owning the farm as a U.S. tax resident, the beneficiaries of such farmland will receive a step-up in basis for U.S. tax purposes, so if the client is considering coming to the United States, it might be better not to restructure it if he determines it is a long-term asset.

Finally, the client told us he received conflicting information about whether he should create a usufruct to hold his interest in Brazilian assets, or whether he should create a trust for that same purpose. The usufruct is a common estate planning tool in Brazil, where during the lifetime of the beneficiary of the usufruct interest, the recipient of the gift keeps the "bare ownership" or "naked title" to the property received with usufruct interest, while the usufructuary, the person who makes the gift, continues to enjoy the "fruits" of the usufruct, to benefit from it during the term of the usufruct, usually the duration of his or her life. Upon the death of the usufructuary, the beneficiary receives the completed portion of the gift of the usufruct. From a U.S. tax standpoint, usufructs generally are not helpful, as the client would still have tax reporting and payment obligations with respect to the property. However, a trust may not be much better, as there are restrictions on ownership of certain Brazilian assets through a trust structure. A trust is a common law structure that is not accepted or embraced by the Brazilian legal system. As such, strategies must be implemented to place Brazilian assets in a trust in a way not disallowed by Brazilian bureaucracy. One of those strategies includes the creation of one or more Brazilian holding companies to hold certain categories of assets and to later contribute the shares of those entities to a foreign legal entity. Then, the shares or membership interests of the foreign legal entity can be contributed to the trust.

Ultimately, like in a game of expert chess, this client needs to move strategically to avoid exposing his kingdom to checkmate.

V. *Art and Collectibles Issues* by Clarissa A. Rodriguez

Is the artwork at risk? Yes, in both Brazil and Miami.

When buying art in and from Brazil, buyers are expected to exercise due diligence, which includes reviewing the artwork's ownership paperwork, evidence of provenance, and making sure the artwork is not subject to Brazil's patrimony laws. Even if the client purchases art in good faith, a purchaser of cultural property does not retain ownership in a valid title claim made by a lawful owner who can demonstrate that the sale of the cultural property resulted, directly or indirectly, from illegal export or other illicit conduct under the 1970 UNESCO Convention, the 1995 UNIDROIT Convention, or applicable Brazil laws.

Brazil's protection of archeological, cultural, and artistic artwork dates back to 1937. The works entitled to protection can be generally classified into two classes: cultural property belonging to the government and cultural property belonging to individuals or the private sector.[23] The National Historic and Artistic Institute (IPHAN), a federal public administration body linked to Brazil's Ministry of Culture, is responsible for the recognition and distinction of artwork between these groups. Additionally, Brazil approved the 1970 UNESCO Convention in 1972 and further gave the IPHAN the authority of maintaining and updating the national inventory of cultural goods under protection. In 1995, Brazil ratified the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.

Export permission is granted after a formal application requesting authorization is issued by the IPHAN after an examination of the cultural property or artwork the owner wishes to export. Failure to seek and obtain authorization can lead to fines of upwards of 10% of the value of the artwork and up to 50% of the value of the artwork if it is deemed subject to Brazil's patrimony laws. If the IPHAN determines the artwork was illegally taken out of Brazil and the artwork is of cultural significance, it will be forfeited to the government of Brazil.

Assuming the client is not in possession of art or cultural property that cannot be removed from Brazil, then if the client wants to bring his artwork on his private jet to his house on Fisher Island, he (or likely his attorney) must complete an application for authorization for the exit of goods and file it with the IPHAN. This application is technical and requires complete descriptions of the artwork (i.e., type, title (if any), date, authorship, materials, dimensions, and production techniques); photographs from at least two angles; a copy of personal identification;

and, if acting through an attorney-in-fact, of the power-of-attorney. In cases of cultural property or artwork protected under Brazilian law but not subject to non-removal, the client must file an application of *temporary* export of protected cultural goods with the IPHAN at least ninety days prior to the intended exit date. Similarly, these applications require as much description as possible but not limited to authorship, materials, dimensions, production techniques, marks, inscriptions, status of conservation with at least three photos, and a copy of personal identification and, if acting through an attorney-in-fact, of the power-of-attorney. Importantly, the application must state a detailed route of transportation of the goods and the expected date of return to Brazil, include an evaluation of the goods for insurance purposes, and indicate the parties responsible for packaging, for loading and unloading, for transportation, and for delivery of a copy of the insurance policy.

Here, prior to the artwork leaving Brazil, the client should ensure he has records of his purchase and can demonstrate ownership (individually, through an entity, or trust) and all the other essential information necessary for an application and authorization to take the artwork out of Brazil. The client may want to avoid the hassle of the application process because of his ability to transport the art on a private jet; however, failure to undertake this task upfront could lead to significant civil fines, forfeiture, and obviously higher attorney fees and costs.

The artwork, depending on how it is owned, is the client's asset subject to enforcement and collections procedures in Miami, Florida. Tax and estate planning attorneys should discuss and review the structures that may provide the client, an art collector, and his family with the benefits of creditor protection, centralized management, and ownership of the collection (or any artwork) that would serve to ensure the artwork does not become enjoined or executed upon for purposes of satisfying a judgment. These attorneys should consult art experts and appraisers during the acquisition and ownership process as well. A proper system for acquiring, enjoying, and owning art (anywhere in the world) can benefit from the opportunities for efficient income, tax savings, and less health-related anxiety.

VI. *Real Property Issues* by Manuel (Manny) A. Perez

When considering *ownership* of real property, the client keeping ownership of the Fisher Island mansion in his own personal name would not be our recommendation. When possible, it is best to own real property through the appropriate corporate vehicle or vehicles to avoid incurring tax or to minimize risk of loss, such as estate tax and personal injury liability, respectively.

As described in Section I, when a person dies owning U.S. real property, the value of that property at the time of their death is subject to U.S. estate tax (currently up to 40%). While U.S. citizens and U.S. permanent residents receive a generous estate tax exemption ($13.99 million in 2025), the exemption for foreign persons is only a paltry $60,000. Our client's ownership of the Fisher Island property in his own name causes exposure to estate tax that may necessitate a sale of the property if he dies owning it in this manner.

Moreover, because accidents and injuries can occur, owning real property in one's individual name potentially exposes an individual to personal liability for injuries or damages that may be suffered by guests, contractors, or other invitees to the real property. Although a good insurance policy is always the first recommendation to protect against these types of losses, should insurance be insufficient or should it fail to cover the full extent of the loss while title to the real property is in an individual's name, then all of that individual's personal assets may be needlessly exposed and recoverable by an injured party.

The client also mentioned he wanted to sell the property. When preparing for the sale of real property, our client should keep the following in mind:

(a) Listing agreement/NAR settlement: A seller of real property typically engages the services of a real estate agent to assist with the marketing of the real property. For many years, this consisted of a seller entering into a listing agreement with a real estate agent that included the payment of a commission, and in turn, the buyer's real estate agent would share in that same commission. As a result of the recent actions by the National Association of Realtors (NAR) due to its settlement of a number of antitrust claims, commencing as of 17 August 2024, the typical arrangement for contracting a real estate agent and the payment of commissions has changed. Each party will now be responsible for the payment of their own real estate agent's commission (although a seller may still provide a credit to the buyer to compensate the buyer for the payment of the buyer's agent's commission). To address this new arrangement, the NAR has recently issued and promoted revised standardized forms. As these changes and their corresponding documentation are quite new, many in the real estate industry still do not fully understand the implications of the new forms and how they all work together. We therefore recommend all sellers and buyers to consult with their attorney

prior to entering into any such arrangement with their real estate agent.

(b) Interests of Foreign Countries Law: As of 1 July 2023, certain restrictions have been placed on the ownership of Florida land near a "critical infrastructure facility" by certain "foreign principals" from specified "foreign countries of concern" (*i.e.*, Venezuela, Cuba, China, Syria, Russia, Iran, and North Korea) (Fla. Stat. § 692.201, et seq.). Due to Fisher Island's location near the Port of Miami and Miami International Airport, each of which are "critical infrastructure facilities" under Florida law, our client is restricted as to whom he can sell his real property. As Florida law prohibits the sale of real property to certain "foreign principals" unless they meet one of the limited exemptions set forth in the law, our client will need to conduct some due diligence on each prospective buyer prior to entering into an agreement to sell his real property to make certain that the prospective purchaser is not a prohibited party.

(c) Foreign Interest in Real Property Tax Act of 1980 (FIRPTA): As our client is not a U.S. citizen or U.S. permanent resident yet, the buyer is required by law to withhold and remit to the Internal Revenue Service at the time of the closing a sum equal to 15% of the total sales price of the real property as a prepayment for any taxes that our client, as the seller, may have incurred as the result of any gains realized from the sale of the real property. As the amount remitted may be in excess of the amount actually due if there is not a substantial taxable gain on the sale of the property, our client may seek reimbursement of the balance of any overpayment of tax by filing a reduced withholding certificate with the IRS ahead of the due date of the client's tax return.

(d) Considerations at closing regarding possible judgment: At the time of the sale of the real property, all liens, mortgages, and judgments that encumber title to the real property will be required to be paid and their corresponding releases obtained to convey free and clear title to the buyer of the real property. As discussed in the litigation section of this article, if the Brazilian claimant were to have domesticated its judgment against our client in a Florida court prior to the closing of the sale of the real property and filed the same appropriately on the title record of our client's real property, subject to certain limited exceptions, such judgment would need to be satisfied from the proceeds of the sale of the property.

VII. *Estate and Probate Issues* by Rose M. Parish-Ramon

If our client, who has been feeling overwhelmed and unwell, were to experience a premature demise, the issues described below could result in an expensive and prolonged estate administration for the client's family. For the purposes of this analysis, we will assume that the client had not implemented his plan to become a U.S. permanent resident before his unfortunate passing.

In fact, prior to his death, the client had been so busy operating his farms and other businesses that he had not had time to implement the detailed plan that his tax and succession planning attorneys had devised to safeguard his assets from U.S. estate taxes and probate proceedings. He had not even signed his last will and testament. What will happen to his assets?

At the time of his death, if the Fisher Island mansion, its contents (including the historical art), the private jet, and the U.S. investment accounts are still in the sole name of the client, his premature death can result in some expensive consequences for his family.

Under Florida law, to manage the assets upon the client's death, it will be necessary to commence an estate administration proceeding with the probate court and request the appointment of a personal representative (PR) to oversee and administer the client's assets. The PR must retain a Florida attorney and an accountant to represent him or her as PR of the estate. The duties and responsibilities of the PR are extensive. The PR has a duty to maintain and protect the assets, address the payment of the client's debts owed to U.S. creditors (and possibly others), gather information necessary to file applicable U.S. tax returns, and pay U.S. estate taxes (which are due nine months after the date of death). The PR may need to sell some of the assets (if permitted by the probate court and the IRS) to pay the taxes, creditors, fees of the attorney and accountants, and the continuing expenses of the estate administration, including ongoing expenses related to the maintenance of the Fisher Island mansion and the private jet. The probate court proceeding will typically take a minimum of two to three years to conclude. In the interim, a lien is automatically imposed on those assets that are part of the client's U.S. estate and which are required to be reported on the client's U.S. estate tax return. The assets are deemed to be security for the payment of the estate taxes. In essence, the assets are frozen until the IRS releases them from the lien.

After the taxes, creditors, fees, and expenses of the administration of the estate have been paid, and the IRS

has released the lien on the assets, the remaining assets of the estate can be distributed to the foreign personal representative of the client's domiciliary estate (who may be the same person as the PR), or to the beneficiaries of the estate, as directed by the probate court. Who are the beneficiaries of the estate? Under Florida law, since the client did not have a last will and testament, the assets will pass to his heirs. The laws of the United States and Brazil may be applicable in determining the heirs and their share of the assets.

Since the client's youngest child is a minor, the court could require that the share of the estate that is allocated to the minor child be transferred to a court-appointed guardian for the child. In this case, the client's wife may be appointed guardian. Typically, a court guardianship is established in the country in which the minor child is living.

If the client had implemented a proper estate plan prior to his untimely passing, then the foregoing court and tax proceedings and their related expenses could have been avoided.

The Creative Solution

After digesting the information contained here, the client might reorganize his priorities and conclude that he wants to delay U.S. permanent residency and not exit Brazil, settle his labor law claim, not travel with art on his Gulfstream, restructure his U.S. real property, and set up a trust for his U.S. assets that would otherwise be subject to probate. Or, maybe, the itch to come to Miami permanently might be too great, and there might not be time for any of that. It is up to us, as international attorneys, to find the best creative solutions for our clients that are carefully tailored to their individual needs, familial preferences, and business goals, helping them avoid the many pitfalls discussed above, regardless of the clients' perception of their immediate priorities.

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Endnotes

[1] IRC § 7701(a)(30).

[2] Treas. Reg. § 301.7701(b)-2.

[3] IRC § 6048.

[4] IRC § 643(i)(2)(B).

[5] IRC § 6038.

[6] IRC § 1298.

7 31 U.S.C. 5314.

[8] IRC § 6038D.

[9] IRC § 6018(a)(2).

[10] IRC § 2104(a).

[11] Rev. Proc. 2024-41.

[12] 9 FAM 402.9-2.

[13] 9 FAM 402.9-6.

[14] https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fees/treaty.html.

[15] https://www.uscis.gov/working-in-the-united-states/temporary-workers/l-1a-intracompany-transferee-executive-or-manager.

[16] *Id*.

[17] https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/about-the-eb-5-visa-classifcation.

[18] Please see, among others, Normative Ruling of the Brazilian Tax Authorities # 1984, dated 27 Oct. 2020, as amended, Normative Ruling of the Brazilian Tax Authorities # 611, dated 18 Jan. 2006, as amended, and Normative Ruling of the Brazilian Tax Authorities # 1702, dated 23 Mar. 2017,as amended.

[19] IPHAN was created by Federal Law # 8,113, dated 12 Dec. 1990 and is regulated by Federal Decree # 99,492, dated 3 Sept. 1990, based upon Federal Law 8,029, dated 12 Apr. 1990 and is subordinated to the Ministry of Culture in Brazil.

[20] http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?idAto=97808&visao=anotadoSolução de Consulta COSIT # 309/18.

[21] Federal Law # 5,709, dated 7 Oct. 1971 and Article 190 of the Brazilian Federal Constitution.

[22] Opinion CGU/AGU 01/2008, issued by Federal General Consultant Dr. Ronaldo Vieira Junior, approved on 19 Aug. 2010 by the Federal Attorney General, Dr. Luis Inacio Lucena Adams – (Opinion # LA – 01) - https://www.planalto.gov.br/ccivil_03/AGU/PRC-LA01-2010.htm.

[23] National Historic and Artistic Heritage Institute Law (Instituto do Patrimônio Histórico e Artístico Nacional) (IPHAN) Articles 11 and 13.

Navigating the Challenges of Space Resource Activities, continued from page 14

photo: iStock/satori13

legal landscape of space resource exploration and exploitation, ensuring that investments align with international law while safeguarding economic interests.

(a) *Lack of Explicit Authorization of Space Resource Activities*: A critical ambiguity within the Outer Space Treaty is its silence on the explicit authorization or prohibition of the extraction of space resources. This omission creates a gray area for private sector stakeholders, opening the door to various interpretations subject to shifting geopolitical dynamics. Such uncertainty can be particularly problematic for investors who require stable legal environments to secure and justify extensive financial commitments.

(b) *No Binding International Framework for Space Resource Activities*: The absence of a dedicated, binding international regulatory framework specifically governing the exploitation of celestial bodies significantly amplifies operational risks for space resource activities. This legal void means that no internationally agreed-upon standards or procedures govern how mining and extraction activities should be conducted, nor are there safety or operational protocols to ensure coordinated efforts.

(c) *The "Free Access" Principle of OST Article I*: The legal landscape for space resource activities is further complicated by potential conflicts with other foundational principles established in the Outer Space Treaty (OST). Article I of the OST advocates for "free access to all areas of celestial bodies,"[16] a stipulation that could conflict with the objectives of exclusive commercial operations that aim to control and profit from specific sites.

(d) *The Non-Appropriation Principle of OST Article II*: Article II's non-appropriation principle[17] presents substantial challenges for private entities seeking to assert property rights over resources extracted from celestial bodies and security interests in physical equipment related to such extraction. The ambiguity of this principle regarding the ownership of space resources significantly undermines investor confidence.[18] Investors need assurance that definitive legal rights of title underpin the value of their property, robustly protecting and enhancing the asset's value over time. Moreover, without explicit legal protections, investments in space resources become fraught with risks.

(e) *The Broad Mandates of OST Article IX*: Article IX of the Outer Space Treaty provides a broad mandate that space activities must be conducted with due regard to the corresponding interests of other states and requires international consultations in cases of potentially harmful interference.[19] However, this provision alone is insufficient as it does not offer detailed guidelines or notification requirements for mining operations. As a result, spacefaring entities may operate without a clear consensus on standards for environmental protection, operational safety, or interference prevention, potentially leading to conflicts or hazardous incidents.

(f) *The "Open Access" Principle of OST Article XII*: Article XII of the Outer Space Treaty presents complexities for private enterprises by stipulating that "all stations, installations, equipment, and space vehicles on the Moon and other celestial bodies shall be open to representatives of other State Parties" on a reciprocity basis.[20] While this promotes transparency and cooperation, it poses challenges for protecting trade secrets and proprietary information. The provision for advance notice of visits[21] offers some security, but its effectiveness in the volatile and logistically complex environment of space is uncertain. This mandated openness can jeopardize intellectual property protection, undermine competitive advantages, and deter investors. Effective strategies are needed to maintain operational security and confidentiality, ensuring the integrity and competitiveness of private enterprises in space.

(g) *Liability Provisions of OST Article VII and the Liability Convention*: Article VII of the Outer Space Treaty[22] and the Convention on International Liability for Damage Caused by Space Objects[23] present significant considerations for private investors. These treaties outline that liability for

damages caused by space objects lies with the launching state, not private entities, and establishing fault can be complex. For investors, the lack of direct legal recourse and the inherent challenge in proving fault creates a legally precarious environment.

The above ambiguities and operational challenges underscore the necessity for additional legal measures to support private investment in space resource activities. Subsequent sections of this article will explore how emerging principles and national legislation can enable frameworks to mitigate these challenges, creating a more supportive environment for private-sector investment in space resources.

Development of International Principles and Investment-Enabling Frameworks

As commercial opportunities in outer space expand, the clarity and stability of legal frameworks governing space resources become crucial for private investment. The Outer Space Treaty, foundational yet ambiguous, has led some nations to adopt specific legal measures for space resource activities. Concurrently, international efforts like the Artemis Accords and initiatives by the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS) aim to refine these frameworks. Though non-binding, these initiatives represent strides toward a coherent legal environment. This section examines how some of these efforts address the gaps in the Outer Space Treaty, fostering a legal landscape conducive to private investments and enhancing legal certainty in the burgeoning space sector.

National Legislation Supporting Private Enterprise

Recognizing the need to foster private investment and innovation in space resource extraction, four countries—the United States of America, Luxembourg, the United Arab Emirates, and Japan—have enacted national legislation addressing the legality of space resource activities and related issues. These legislative efforts are designed to create a more predictable and secure legal environment for companies in this emerging field.

(a) *United States of America*: The United States Commercial Space Launch Competitiveness Act,[24] expressly provides that "[A] United States citizen engaged in commercial recovery of an asteroid resource or a space resource under this chapter shall be entitled to any asteroid resource or space resource obtained, including to possess, own, transport, use, and sell the asteroid resource or space resource obtained …"[25] This act is intended to stimulate commercial exploration and utilization of resources from asteroids and other celestial bodies.

(b) *Luxembourg*: Subsequently, Luxembourg passed a law entitled "Law of 2017 on the Exploration and Use of Space Resources,"[26] providing that space resources "are capable of being owned,"[27] thus offering legal clarity and certainty to private investors.

(c) *United Arab Emirates*: In 2019, the UAE passed its National Space Law to stimulate investment and encourage private sector participation in space sector activities.[28] In part, the law allows for the exploitation and utilization of space resources.[29]

(d) *Japan*: In 2021, Japan enacted a law allowing for the commercial extraction and use of space resources, supporting its growing participation in space exploration and its commercial space sector.[30]

These nations' legislative efforts reflect the growing recognition of the potential economic benefits that space resources might bring and highlight the varying approaches countries are taking to integrate these activities within the bounds of international law.

The Artemis Accords and the Hague Building Blocks

The Artemis Accords and the Hague Building Blocks, discussed below, represent pivotal efforts to create a more structured and predictable legal environment for space resource activities.

(a) *The Artemis Accords*:[31] The Artemis Accords, an initiative led by the United States,[32] establish structured guidelines around transparency, safety, resource utilization, and conflict prevention, offering a clearer path for private companies engaged in space activities, particularly resource extraction. These principles help mitigate legal and operational risks by promoting a more regulated and predictable environment for space activities. For example, the Artemis Accords clarify that "the extraction of space resources does not inherently constitute national appropriation under Article II."[33] This reduces legal ambiguity surrounding the ownership and use of extracted resources, reassuring investors and promoting investment confidence and stability. Another significant provision is the commitment of the signatories to use safety zones tailored to specific activities,[34] preventing or reducing operational conflicts and interference among various space activities. This ensures a safer and more predictable environment for conducting space operations, further enhancing the attractiveness of these ventures to private investors by mitigating operational risks.

(b) *The Hague Building Blocks*: The Hague Building Blocks, crafted by a group of international space policy experts,

provide guidelines and recommended practices for space resource activities aimed at creating an "enabling environment" for such ventures.[35] By addressing critical issues such as jurisdiction and control over space-made products, priority and resource rights, and safety zones, these guidelines help establish a regulatory framework conducive to attracting private investment. For example, the Hague Building Blocks specify priority rights "to an operator to search for and/or recover space resources for a maximum period of time and a maximum area," allowing for international recognition of such rights.[36] This provision can significantly alleviate concerns about conflicts and rights subordination among competitors exploiting resources in the same regions of a celestial body. Further, the Hague Building Blocks explicitly state that resource rights over extracted material and products derived from them can be lawfully acquired through domestic legislation and bilateral or multilateral agreements.[37] This clarity reassures private investors, ensuring their rights to utilize and profit from space resources are recognized and safeguarded under established legal frameworks.

The Artemis Accords represent a critical step in the right direction that could smooth the path for private investment in the complex and costly arena of space resource activities. Further, the Hague Building Blocks offer well-thought-out and comprehensive recommendations for transparency, safety, and the lawful utilization of space resources. In sum, the Artemis Accords and the Hague Building Blocks, although differently situated within a wider international framework, pave the way for a more predictable and secure investment environment in outer space.

A Contractual Path Toward Securing Private Investment

As commercial interests in space continue to grow, navigating the complex interplay between international law and private investment becomes increasingly critical. Developing detailed contractual mechanisms and thorough due diligence is crucial for private investment in space resource activities. Clearly defined extraction rights, compliance with international guidelines, operational protocols, and technological reliability clauses reduce legal ambiguities and exploration risks, building investor trust. Until international legal frameworks fully adapt, non-binding principles and well-crafted contractual mechanisms offer the best strategy to protect intellectual property, ensure legal compliance, and foster a commercially viable and robust space industry.

Conclusion

The exploration, exploitation, and utilization of space resources introduce complex legal concepts where traditional frameworks, such as the Outer Space Treaty, provide essential but inadequate guidance for modern commercial pursuits. While emerging national laws and international initiatives, like the Artemis Accords, begin to bridge these legal uncertainties, substantial gaps still exist that could deter investor confidence. Understanding the uncertainties, implementing proposed enhancements to contractual mechanisms, and conducting thorough due diligence aim to mitigate these investment risks. The continued refinement of these frameworks is critical for transforming space resource exploitation into a viable and attractive investment opportunity. By advocating for ongoing stakeholder dialogue and adaptive legal strategies, this analysis underscores the pathway toward supporting current investments and catalyzing future economic growth in the space sector.

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[5] The Hague International Space Resources Governance Working Group. (2019). *Building Blocks for the Development of an International Framework on Space Resource Activities* [hereinafter, the Hague Building Blocks]. The Hague Building Blocks were drafted by The Hague International Space Resources Governance Working Group, which was "created to promote international cooperation and multi-stakeholder dialogue." Further, the working group designed the Hague Building Blocks "to lay the groundwork for international discussions on the potential development of an international framework, encouraging States, international organizations, and non-governmental entities to consider and use the Building Blocks."

[6] Hague Building Blocks, § 2.1.

[7] Hague Building Blocks, § 2.3.

[8] National Aeronautics and Space Administration.

[9] NASA's Lunar Exploration Program Overview, at 28.

[10] *See id.*

[11] https://www.nasa.gov/humans-in-space/artemis/ (last accessed 24 Nov. 2024).

[12] https://ispace-inc.com/aboutus (last accessed 24 Nov. 2024) ("At ispace, we've turned our attention to the Moon. By taking advantage of lunar water resources, we can develop the space infrastructure needed to enrich our daily lives on earth, as well as expand our living sphere into space. Also, by making the Earth and Moon one system, a new economy with space infrastructure at its core will support human life, making sustainability a reality. This result is our ultimate goal, and our search for water on the Moon is the first step to achieving that goal.").

[13] https://www.interlune.space/about (last accessed 24 Nov. 2024).

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[15] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (1967), 610 U.N.T.S. 205 [hereinafter Outer Space Treaty or OST].

[16] Outer Space Treaty, art. I.

[17] Outer Space Treaty, art. II.

[18] In the realm of space resource activities, the distinction between movable and immovable property rights is foundational to understanding the legal environment that governs private investment. Immovable property rights, which pertain to the national appropriation of outer space and celestial bodies through claims of sovereignty, use, occupation, or other means, are explicitly prohibited under Article II of the Outer Space Treaty. Conversely, movable property rights involving the ownership and utilization of resources extracted from celestial bodies, such as minerals and water, are not explicitly addressed in international space law.

[19] Outer Space Treaty, art. IX.

[20] Outer Space Treaty, art. XII.

[21] *Id*.

[22] Outer Space Treaty, art. VII.

[23] Convention on International Liability for Damage Caused by Space Objects (1972), 961 U.N.T.S. 2389 [hereinafter the Liability Convention].

[24] U.S. Commercial Space Launch Competitiveness Act, Pub. L. No. 114–190, 129 Stat. 704 (2015).

[25] Space Resource Exploration and Utilization Act of 2015 § 402 (codified as amended at 51 U.S.C. § 51303) (emphasis added).

[26] Loi du 20 juillet 2017 sur l'exploration et l'utilisation des ressources de l'espace [Law of 20 July 2017 on the Exploration and Use of Space Resources], Lux. Space Agency.

[27] *Id*., art. 1.

[28] Federal Law No. 12 on the Regulation of the Space Sector (19 Dec. 2019) (U.A.E.).

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[30] Sayuri Umeda, *Japan: Space Resources Act Enacted*, (2021). Retrieved from the Library of Congress, https://www.loc.gov/item/global-legal-monitor/2021-09-15/japan-space-resources-act-enacted.

[31] *See* The Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes, 13 Oct. 2020 [hereinafter the Artemis Accords].

[32] The founding member nations of the Artemis Accords are Australia, Canada, Italy, Japan, Luxembourg, the United Arab Emirates, the United Kingdom, and the United States of America. As of November 2024, 48 countries have signed the Artemis Accords. *See* https://www.state.gov/artemis-accords (last accessed 24 Nov. 2024).

[33] Artemis Accords, § 10.2.

[34] Artemis Accords, § 11.

[35] Hague Building Blocks, § 1.1.

[36] Hague Building Blocks, § 7.

[37] Hague Building Blocks, § 8.

The Role of Artificial Intelligence, continued from page 17

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for managing information and producing legal documents. Thus, the tool contributes to performing tasks that require a high degree of specialization and precision, which, in turn, raises the standard of quality of the services provided.

Usability in International Law

ChatGPT has established itself as a multifaceted tool in the practice of international law, with a variety of applications that make the work of lawyers more efficient and accurate. Below are some of the main ways in which ChatGPT is utilized in this field:

Drafting Legal Documents: ChatGPT can be used to draft international contracts, legal memoranda, petitions, and other documents quickly and accurately. The tool allows adjustments in tone and terminology as needed, adapting to the specific requirements of each jurisdiction, which is particularly relevant in international law, where documents must comply with different legal systems. AI can thus optimize the production of complex documents, ensuring clarity and linguistic precision.

Legal Research: With access to vast legal databases and the ability to synthesize information efficiently, ChatGPT is a valuable resource for legal research in international law. It can provide summaries of relevant case law, conduct comparative analyses between different legal systems, and identify relevant precedents for a particular case—all with much greater speed than traditional manual methods. This enhances a lawyer's ability to access and interpret a larger volume of data and information, which is essential for developing effective legal strategies.

Consultancy and Strategic Planning: ChatGPT also proves to be a useful tool for consulting with international clients. AI can be used to provide detailed analyses of local regulations, compliance risks, and possible risk mitigation strategies. In international law, where norms can vary considerably between jurisdictions, ChatGPT aids in strategic planning by offering insights into how best to position the client in the face of legal challenges in different countries.

Translation and Adaptation of Documents: One of ChatGPT's key functions in international law is its ability to translate and adapt legal documents for different jurisdictions. By utilizing natural language processing (NLP), the model can translate with precision, ensuring that legal nuances are maintained and adapting the content to make it legally robust across multiple legal contexts. This is particularly important in international law, where compliance with local laws and clarity in document drafting are of paramount importance.

Contract Analysis: ChatGPT can be configured to review international contracts, identifying potentially problematic clauses, suggesting modifications, and ensuring the contracts comply with the laws applicable in various jurisdictions. This function is essential in international law, where contracts often involve multiple parties from different countries with varying legal systems. AI can, therefore, significantly contribute to ensuring that agreements are balanced and legally sound, minimizing legal risks.

Impact on Legal Practice

The introduction of ChatGPT into legal practice, particularly in international law, is redefining how lawyers operate. By allowing legal professionals to delegate repetitive and administrative tasks to AI, ChatGPT frees up time and resources for lawyers to focus on more strategic and high-value activities.[9] This efficient use of technology not only increases productivity but also improves the quality of the service provided, enabling a more personalized approach focused on the specific needs of each international client.

Moreover, ChatGPT is making international law more accessible, especially for small and medium-sized enterprises that previously may have had difficulty affording specialized legal advice. AI, by reducing costs and increasing efficiency, enables these businesses to access high-quality legal consultation without the hefty fees typically associated with large law firms. This democratizes access to justice, allowing companies of different sizes and geographic origins to engage in international negotiations and transactions with greater legal certainty.

With these applications, ChatGPT enhances operational efficiency and strengthens international legal practice, contributing to greater equity and accessibility in the field of international law. This profound impact on the role of lawyers and the way legal services are provided reflects the growing integration of AI into legal professions, signaling a paradigm shift in the management of knowledge and the practice of international law.

Addressing Criticisms and Counterarguments

While AI, particularly through tools such as ChatGPT, has established itself as a transformative instrument in legal practice, offering a considerable range of benefits, it is undeniable that its implementation in the legal field is not free from substantial criticisms. Several critics argue that AI, when applied to legal processes, could, in some cases, overly simplify legal reasoning, potentially resulting in the loss of essential nuances necessary to resolve complex legal issues. There are also concerns that AI, by attempting to offer objective and standardized responses, might reduce human autonomy and judgment, especially in situations where the interpretation of facts and contextual analysis are crucial for decision-making.[10]

One of the main arguments against the use of AI in international law lies in the possibility of a "one-size-fits-all" approach, where the solutions provided by the machine do not adequately consider the cultural, social, or historical factors involved in specific cases. This becomes particularly relevant in an international context, where legal issues often present a diversity of cultural and legal aspects that can differ substantially between jurisdictions. For example, in disputes involving jurisdictions with significantly different legal systems, AI could offer uniform responses, but fail to consider the richness of the local specifics, which could lead to inadequate or unjust solutions for the parties involved.

However, these criticisms can be mitigated if AI is understood and used as a complement rather than a replacement for human expertise. AI undeniably has potential in handling repetitive and massive tasks, such as analyzing large datasets and documents, allowing lawyers to focus their attention on issues that demand judgment, strategic interpretation, and client interaction. Therefore, AI should be integrated into legal practice in a way that complements human work, preserving the judgment and discretion that are irreplaceable in resolving complex legal matters.

By adopting a human-supervised approach, AI can be effective in automating operational tasks, while critical analysis and decision-making responsibility remain with the legal professional. This integration of technology with the specialized knowledge of lawyers could enable a significant advancement in the efficiency of legal practice, while still preserving the fundamental principles of impartiality, justice, and fairness. In other words, AI should serve as an auxiliary tool, empowering professionals to solve complex issues more efficiently without relinquishing the ethical and professional responsibility they bear.

Furthermore, it is essential that AI systems are developed and implemented transparently, ensuring that the algorithms used are auditable and that the data employed in the processes are representative, unbiased, and adequately protected. The explainability of the results generated by AI should be a guiding principle so that the decisions made based on these technologies can be understood and justified in a clear manner, especially in legal contexts, where transparency and logic behind decisions are vital for the acceptance and legitimacy of the proposed solutions.

Collaboration between legal professionals, AI experts, and policymakers is essential for establishing clear ethical guidelines that will govern the use of AI in the legal field. These guidelines must be grounded in solid ethical principles, ensuring that emerging technologies contribute to improving the legal system without compromising its foundational pillars, such as equity, justice, and the protection of human rights. The creation of a clear regulatory framework in which the use of AI is accompanied by accountability is crucial to mitigate criticisms regarding its potential opacity and the introduction of biases in decision-making processes.

In summary, while AI offers powerful and innovative tools to enhance the practice of international law, its implementation within the legal system must be carefully balanced, ensuring that the use of technology is always integrated with human supervision and judgment, in order to preserve legal expertise, cultural sensitivity, and guarantees of justice and fairness. Technology should be viewed as an aid to the legal professional, not a substitute, with the goal of making legal practice more effective without compromising the fundamental rights of the parties involved.

Future Trends and Evolution of AI in International Law

The impact of the use of AI in international law continues to grow, driven by rapid technological advancements and the increasing integration of AI into legal processes. The role of AI in international law is constantly evolving, reflecting the legal system's quick adaptation to technological innovations and the need for more efficient solutions to complex and transnational legal issues. It is expected that, in the near future, new AI-powered dispute resolution platforms will emerge, where artificial intelligence will not only facilitate the process but

will also play an active role in mediations and resolutions of international conflicts.

The growing incorporation of AI into global trade also suggests that new international legal standards will emerge to regulate the role of AI in cross-border transactions and disputes. AI, when integrated into the international legal context, could substantially transform how disputes are resolved, making the process more efficient and accessible, while also enabling closer monitoring of contractual obligations in international settings.

The integration of AI with blockchain technology, for example, offers significant potential to revolutionize areas such as contract enforcement and intellectual property protection, providing unprecedented levels of security, transparency, and efficiency. The use of smart contracts, which combine the automation capabilities of AI with the immutability of blockchain, could significantly speed up the execution of international contracts and substantially reduce the incidence of litigation. Additionally, AI could be used to analyze large volumes of data related to international disputes, identifying patterns and trends that might assist in forecasting and preventing conflicts, thereby improving the ability to resolve disputes proactively.

However, the adoption of these technologies also presents significant challenges. The need to ensure the impartiality of algorithms, protect sensitive data, and adapt existing legal systems are issues that require careful attention. Implementing technological solutions in international law requires deep reflection on how to adapt traditional laws and regulations to ensure that technological advancements are used responsibly and justly.

The collaboration between legal professionals, technology experts, and policymakers will be crucial in developing appropriate legal frameworks that effectively integrate AI and blockchain into the international legal system. These emerging technologies must be governed by clear, ethical standards to ensure that their implementation contributes to justice, equity, and transparency in legal processes.

In conclusion, the evolution of artificial intelligence in international law promises to significantly transform legal practice, offering new tools and methodologies for dispute resolution and the protection of rights. However, this transformation must be accompanied by critical analysis and adaptation of existing legal frameworks to ensure that the technological advantages are leveraged without compromising the fundamental principles of justice, equity, and human rights.

Critical Analysis

AI has established itself as a highly promising tool in the field of international law and is widely recognized for its potential to transform legal practice by offering innovative solutions to complex and multifaceted issues. However, it is imperative that its adoption is accompanied by in-depth critical analysis, considering not only the benefits it provides but also its limitations, ethical implications, and the potential impacts on economic and legal development. This section aims to explore the positive and negative aspects of AI applications in international legal contexts, as well as the ethical issues associated with its widespread use, providing a comprehensive reflection on the viability and risks of its implementation.

Effectiveness of AI in International Law

The effectiveness of artificial intelligence in international law has been widely recognized, particularly with regard to its ability to increase efficiency and accuracy in resolving highly complex legal issues. AI facilitates communication between different jurisdictions, automates complex legal processes, and offers new possibilities for predictive analysis of cases and risks, which can be extremely useful in international contexts where issues involve multiple legal systems and distinct legal cultures. These advancements have contributed to reducing costs and timelines, while also expanding access to the international legal system, allowing businesses—especially small and medium-sized enterprises (SMEs)—to obtain legal solutions more affordably and with fewer barriers than traditionally encountered when seeking specialized advice.

However, despite the undeniable benefits provided by AI, its effectiveness in international law largely depends on the quality of the data upon which it is trained and the models of learning used. In the international context, where data is often fragmented, scarce, or culturally biased, AI application may lead to inconsistent or inaccurate interpretations, undermining the quality of decisions made.[11] The use of data originating from jurisdictions with legal systems or cultural contexts that are profoundly different can lead to results that do not reflect the essential nuances of a given legal issue, resulting in responses that lack the precision necessary for fair and just decisions.

Furthermore, excessive use and dependency on AI may foster a dangerous technological reliance in which lawyers and legal professionals neglect critical judgment and human interpretation—elements that are indispensable when dealing with legal issues that involve significant cultural and contextual nuances. The analysis of complex legal problems, particularly in international law, requires an appreciation of local specifics and social norms that cannot be fully understood or

appropriately addressed by algorithms without the supervision of qualified professionals who are capable of integrating these factors.

Limitations and Ethical Challenges

The implementation of AI in international law also faces several limitations, particularly with regard to ethical and privacy challenges. First, data security and privacy emerge as crucial issues, especially when dealing with the collection and processing of large volumes of sensitive data, which are common in international disputes. The risk of confidential information being leaked or misused is a legitimate concern, especially in a global scenario where jurisdictions may have different regulations on data protection, creating additional challenges in legal compliance.

Moreover, AI may be susceptible to the introduction of unintended biases derived from the limitations of the data used in its training. If an AI system is trained predominantly on data from a single jurisdiction or culture, it may fail to provide fair or equitable solutions in broader international contexts, where multiple legal and cultural realities are at play. Such limitations could result in decisions that reinforce existing inequalities and undermine trust in AI-based systems, especially in legal contexts where impartiality and justice are key to ensuring the legitimacy of decision-making processes.

Another significant ethical challenge is the transparency and explainability of the decision-making processes carried out by AI. Often, AI algorithms are treated as a "black box," meaning the criteria by which a decision was made are not fully understood or accessible to the public. This lack of transparency is problematic in a legal context, where parties involved in legal processes require a clear and logical justification for decisions to ensure they are acceptable and in line with the rule of law. The absence of a comprehensible explanation for AI-driven decisions can compromise public acceptance and trust in the legal system, particularly in such a critical field as international law, where legitimacy is essential to ensure equity and justice in resolutions.

Impact on Economic and Legal Development

The impact of artificial intelligence on economic and legal development is a central topic of debate, as the implications of this technology extend beyond legal practice and directly affect international trade and global economic relations. On the one hand, AI has the potential to democratize access to international law, enabling smaller businesses and developing countries to participate more actively in global trade and international legal relations. Advanced AI tools can help these entities navigate complex legal systems and overcome traditional barriers posed by the lack of resources to hire high-quality legal counsel, promoting greater inclusion and access to justice.

On the other hand, widespread adoption of AI in international law may exacerbate existing inequalities by providing disproportionate advantages to companies and jurisdictions that have better access to advanced technologies and resources for their implementation. In this context, countries and businesses that cannot afford to adopt these technologies may be further marginalized, widening the gap between developed and developing countries. This raises serious concerns about equity in access and application of AI-driven solutions, especially when it comes to global justice and international trade.

Additionally, the rapid evolution of AI may challenge traditional legal systems, which are often unprepared to address the new legal issues arising from the use of this technology. The adoption of AI in international law demands the updating and development of new regulations, compliance standards, and legal norms that align with emerging technological needs and challenges. These legal frameworks must ensure that AI is used ethically, respecting human rights and international norms, while fostering a legal environment that balances technological innovation with the foundational principles of international law.

The adoption of AI in international law requires careful reflection on how it impacts both legal practice and economic relations at the global level. The integration of AI into the global legal system must be accompanied by rigorous regulations to ensure fair, transparent, and accountable use.

Conclusion

International law, with its inherent complexity and global scope, has been consistently challenged to develop solutions that overcome the cultural, legal, and economic barriers that define the global landscape. The introduction of artificial intelligence as an innovative tool in the field of international law represents a significant evolutionary milestone, altering the way legal professionals face the challenges of this area, marked by diverse legal systems, a multiplicity of regulations, and the need for more efficient international cooperation.

AI, by offering advanced technological solutions, has proven its capacity to facilitate legal communication between different jurisdictions, promoting the integration of distinct legal systems and translating norms in a faster and more accurate manner. Furthermore, the automation of complex legal processes and the generation of predictive insights based on large volumes of data have proven to be extremely valuable resources in international legal practice. These innovations

not only enhance operational efficiency but also present a significant potential to democratize access to international law, allowing actors from emerging economies, who previously faced barriers of cost and complexity, to engage more actively and equitably in the global legal system.

However, as detailed in the critical analysis above, the effectiveness of AI in international law is not without substantial limitations that require careful scrutiny. The quality of the data used, the transparency of decision-making processes, and the ethical implications associated with the widespread use of this technology are undeniable challenges that cannot be minimized. Excessive dependence on technologies still in development may, for example, lead to the perpetuation of biases and inequalities within legal systems, particularly in a field such as international law, where fairness and justice are fundamental values. AI, if used without proper oversight and with a lack of clear ethical guidelines, could potentially exacerbate historical disparities and challenges, undermining the trust of citizens and businesses in legal processes.

Moreover, the integration of AI into economic development and the international legal system demands a dynamic and continuous adaptation of regulatory frameworks that govern these fields. The evolution of AI in international law cannot be separated from the need for updated legal standards to ensure that regulations and compliance norms are adequate for responsible and just use of the technology. The laws and legal practices must be revisited to ensure that AI is used in a manner that respects the foundational principles of international law and human rights, which are the bedrock of a balanced global justice system.

In conclusion, the use of artificial intelligence in international law emerges as one of the most promising solutions of the current era, with vast potential to transform how global legal issues are addressed. However, for its benefits to be fully realized and its risks minimized, it is essential that its implementation is carefully managed, with constant supervision by lawyers, legal experts, and technology specialists. These professionals play a crucial role in ensuring that the technology is not only used efficiently but also aligns with the principles of justice, equity, and transparency in the global legal arena.

As we move toward an increasingly digital future, the harmonious integration of AI into international law could not only facilitate dispute resolution and cooperation between states but also open new frontiers for legal and economic innovation. The emerging solutions from this integration have the potential to reshape the future of international law, offering innovative responses to traditional challenges and transforming those challenges into opportunities for all actors involved in the global arena. In this sense, the evolution of AI, when properly directed, could serve as a catalyst for significant change, promoting greater inclusion and global justice in a broader and more accessible manner.

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Discretionary Determinations Before USCIS and DOS, continued from page 19

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applicant has a criminal record that does not legally disqualify him/her from the benefit requested, practitioners should also submit evidence of rehabilitation, such as volunteer service, mentoring young members in the community, feeding the homeless, etc. If the criminal offense involves alcohol, such as driving under the influence convictions, practitioners should submit evidence of the applicant's participation in Alcoholics Anonymous (AA) and evidence that the applicant has attended alcohol addiction counseling to convince the U.S. immigration official that the DUI conviction was a one-time mistake that will not occur again. Multiple DUI convictions will be more difficult to overcome due to the seriousness of the crime, the applicant's apparent danger to the community, and the lack of rehabilitation.

Exercise of USCIS's Discretion in Waiver Cases

There are certain grounds of inadmissibility that may disqualify an applicant for eligibility for permanent residence, such as certain criminal convictions that involve moral turpitude, past instances of fraud or misrepresentation, etc. When an applicant is inadmissible to the United States, in certain instances, he/she may be eligible to seek a waiver of certain grounds of inadmissibility. The most common grounds of inadmissibility that may be waived are prior acts of fraud or misrepresentation, convictions for crimes involving moral turpitude, and unlawful presence in the United States. In these instances, the waiver application requires that the applicant have certain existing U.S. citizen or Lawful Permanent Resident qualifying relatives. Once the required familial relationships are established, the applicant must prove to the satisfaction of the U.S. attorney general that the applicant's removal from the United States would result in "extreme hardship" to the qualifying relative.

The "extreme hardship" analysis is discretionary, and the USCIS officer must make the determination based on the factors, arguments, and evidence presented.[19] The USCIS officer may consider the applicant's documentary evidence, as well as U.S. Department of State articulated country conditions in the applicant's home country.[20] The USCIS officer must base his/her decision on the "totality of the evidence and circumstances presented."[21] The officer must consider all factors and consequences in their "totality and cumulatively when assessing whether a qualifying relative will experience extreme hardship either in the United States or abroad."[22]

The Board of Immigration Appeals has held that the common results of a person's removal from the United States, such as separation from family, financial difficulties, difficulties of readjusting life in the new country, quality and availability of educational opportunities abroad, and inferior quality of medical services and facilities abroad, do not rise, in and of themselves, to the level of extreme hardship.[23]

USCIS will consider the following factors in a particular case to determine if the applicant has established "extreme hardship":

1. Qualifying relative's ties to family members living in the United States, including age, status, and length of residence, and ties to the country of applicant's relocation
2. Qualifying relative's community ties to the United States and country of relocation, including his/her ability to communicate in the language of the foreign country; ability to integrate to the country of relocation; availability and quality of educational opportunities abroad; and availability of quality of job training abroad for the qualifying relative
3. Economic impact on the qualifying relative if he/she has to relocate to the foreign country; decline in the standard of living; costs of extraordinary needs; and cost of care for family members
4. Applicant's health condition; psychological impact on qualifying relative due to either separation from the

applicant or departure from the United States; and prior trauma suffered by qualifying relative

5. Country conditions in the country of relocation[24]

USCIS considers the following to be particularly significant factors, which will weigh heavily in support of finding of extreme hardship:

1. Qualifying relative previously granted Iraqi or Afghan special immigrant status, T nonimmigrant status, or asylum or refugee status
2. Qualifying relative or related family member's disability
3. Qualifying relative's military service
4. Department of State (DOS) travel warnings
5. Substantial displacement of care of applicant's children[25]

Practice Pointers for Preparing Inadmissibility Waiver Applications

After preparing the necessary immigration forms related to each particular waiver, practitioners should prepare hardship affidavits from both the applicant and the qualifying relative. These affidavits are crucial as their purpose is to assist the immigration officer reviewing the waiver packet to understand why the applicant regrets the actions that form the basis of inadmissibility, to address his/her rehabilitation, as well as to stress the specific hardship that the qualifying relative will experience if the waiver is not granted. It is important for practitioners to remember that the extreme hardship must be established in two instances: (1) If the qualifying relative remains in the United States separated from the applicant; and (2) If the qualifying relative relocates with the applicant back to his/her home country.[26] Practitioners should dedicate time and effort to these affidavits to present the strongest and most compelling humanitarian case for the USCIS officer to exercise favorable discretion on the applicant's behalf.

The preparation of the hardship affidavits is just the beginning of the case. One of the most important steps in preparing a successful waiver case is the collection of the supporting evidence. Practitioners should document as many of the hardship factors discussed in the hardship letters as possible. The "mere assertion of extreme hardship *does not* establish a credible claim. Individuals applying for a waiver of inadmissibility should provide sufficient evidence to support and substantiate assertions of extreme hardship to the qualifying relative(s)."[27]

If the applicant or the qualifying relative suffers from medical conditions, doctor's letters should be submitted that identify the relevant medical condition, the stage of the condition and its seriousness, the prognosis, and the applicant's or qualifying relative's need to have family support present in his/her life in order to combat the medical condition. The doctor's letters should be written in layman's terms so it is easier to understand for non-medical personnel. If the extreme hardship argument identifies psychological hardship that the qualifying relative will suffer, then a letter from a licensed psychologist or therapist who has evaluated the qualifying relative is paramount to the case. Expert opinions from other professionals, such as university professors who can attest to the poor conditions in the applicant's home country, should be provided, where possible.

If practitioners can establish the presence of any of the particularly significant factors previously listed, then the possibility of success increases substantially. If the extreme hardship waiver alleges that the applicant or qualifying relative is disabled, then the formal disability determination from a government agency should be presented in the waiver packet. Practitioners should also present evidence to show that "services available to the disabled individual in the country of relocation are unavailable or significantly inferior to those available to him or her in the United States."[28] Practitioners should also present evidence of the applicant's role in caring for the qualifying relative who is disabled.

In addition to the detailed hardship affidavits and supporting evidence, practitioners should also include a legal brief that cites to the relevant Board of Immigration (BIA) and federal case law, the USCIS Policy Manual, Department of State publications, the regulations and statute, the supporting evidence being submitted in the waiver packet, and any other persuasive authority relevant to each particular client's case. The brief should argue that any expert opinions submitted with the waiver packet should be given the appropriate deference and significant evidentiary weight.

Discretionary Determinations From the Department of State

Process

The Department of State is responsible for administration of the immigration laws abroad. The Bureau of Consular Affairs within the Department of State is responsible for "issuing visas to qualified visitors, workers, and immigrants.[29] With few exceptions, each alien who desires to visit or to immigrate to the United States must obtain a visa from a United States consular officer stationed at an appropriate Foreign Service post abroad. Consular officers adjudicate immigrant and nonimmigrant visas, facilitate adoptions, help evacuate Americans, combat fraud, and fight human trafficking.[30] Under the Immigration and Nationality Act (INA), consular officers have the sole authority and discretion to issue visas.[31]

Consular officers may approve a visa if the applicant qualifies for the visa classification sought and is not otherwise inadmissible or ineligible for a visa.[32] Visa applications can be denied based on the officer's discretion under three main INA provisions: insufficient information under INA § 221(g); the grounds of inadmissibility under INA § 212(a); and, for nonimmigrant applicants, the presumption of seeking permanent residence under INA § 214(b). Inadmissibility grounds under INA § 212(a) include, inter alia, criminal grounds ((a)(2)), security and terrorism grounds ((a)(3)), public charge risk ((a)(4)), and previous illegal entry to the United States or violation of U.S. immigration laws ((a)(7)).

Consular officers interview all immigrant and most nonimmigrant visa applicants at a U.S. consulate or embassy, unless specifically waived.[33] The purpose of the interview is to request additional information or clarification as needed as to the applicant's intentions or qualifications for a nonimmigrant visa (NIV) before the issuance of a visa. [34] Consular officers always have the option to require an interview of any applicant if they doubt the applicant's credibility or the veracity of the information in the visa application.[35]

Little recourse is available to applicants whose visa applications have been denied. While legal errors may be corrected through an inquiry to the State Department's LegalNet service, visa refusals based on a consular officer's finding of fact are not reviewable, and are not subject to reconsideration, except on the presentation of additional evidence tending to overcome the ground of ineligibility on which the refusal was based.[36] For immigrant visas, the Foreign Affairs Manual requires supervisory review of most refusals, depending on the grounds, within thirty days of the refusal.[37] In the event the supervisor disagrees with the refusal, the supervisor is expected to discuss the case with the refusing officer before taking further action.[38] For nonimmigrant visas, the Foreign Affairs Manual requires supervisory review of as many nonimmigrant refusals as time allows, but no fewer than 10%.[39]

In a recent decision from the United States Supreme Court, the Court upheld the doctrine of consular nonreviewability, which states that an executive officer's decision "to admit or to exclude an alien is final and conclusive" and not subject to judicial review in federal court.[40]

Practice Pointers for Presenting Immigrant and Nonimmigrant Visa Applications Before a U.S. Consulate Abroad

Given the harsh consequences and finality of a consular officer's decision, practitioners should prepare their clients thoroughly prior to the interview with regard to the INA 221(g), 214(b), and 212(a) grounds of inadmissibility. With regard to INA 221(g), the basis for this denial is that the consular officer did not have all the information or documentation required to conclude that an applicant was eligible to receive the visa. It is important that practitioners follow the specific instructions submitted with the interview notice and available online in order to submit all of the necessary documents. For E-2 nonimmigrant visas, each consular post has a list of required documents to be submitted in support of the visa application with specific page limits and table of contents for the documents. Similarly, each consular post has a list of specific documents required for L-1 visa applications on its website. For immigrant visa interviews, each consular post has a list of documents and requirements (appointment registration, medical exams, biometrics, etc.) on its website that the applicant must comply with and present at the interview. It is important that practitioners be aware of these requirements in order to avoid presenting an incomplete case.

With regard to the 214(b) visa denials, the role of the attorney is also vital. Under Section 214(b) of the Immigration and Nationality Act (INA), applicants are presumed to be intending immigrants unless they credibly demonstrate, to the consular officer's satisfaction, that their economic, family, and social ties outside the United States are strong enough that they will depart at the end of their authorized stay and that their intended activities in the United States will be consistent with the visa status.[41] The term "to the consular officer's satisfaction" is not defined. Practitioners must be aware of this immigrant presumption against their clients applying for nonimmigrant visas and prepare them accordingly for responding to questions and presenting evidence at the consular interview. It is important that the applicants understand that they are applying for a nonimmigrant visa to remain in the United States for a *temporary* period of time and they must answer any questions regarding their intentions in the United States accordingly. For example, for applicants applying for student visas, it will be important to stress to the consular officer that the applicant intends to depart the United States after the conclusion of his/her education to develop the skills obtained in the acquisition of their degree in his/her home country. Practitioners should submit as much supporting evidence as possible of the applicant's nonimmigrant intent in order to avoid the consular officer issuing a discretionary 214(b) finding.

With regard to the 212(a) grounds of inadmissibility, practitioners should be fully aware of each client's immigration history (prior visa applications and refusals), any periods of unlawful presence in the United States, criminal history, misuse of visas, unauthorized employment in the United

States, past unlawful affiliations, prior allegations of fraud, etc. Only then can practitioners properly advise clients as to the applicability of the INA 212(a) grounds of inadmissibility.

Conclusion

USCIS and consular officers are allowed wide latitude and discretion in their decision-making process. Practitioners must submit documentation that first establishes prima facie eligibility for the benefit requested, and second, present compelling evidence to convince the adjudicator to exercise favorable discretion on behalf of their clients. It is imperative that practitioners are aware of both the requirements and the types of documents that USCIS and the Department of State will consider in each individual case.

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Endnotes

[1] 7 USCIS PM-PT.A, CH.10, § A.

[2] 1 USCIS PM-PT.E, CH.4, § A.

[3] *Id*. at § B.

[4] *Id*. at 80.

[5] 1 USCIS PM-PT.E, CH.4, § B, citing to *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50% probability of something occurring).

[6] *Id*.

[7] USCIS, *Adjustment of Status*, https://www.uscis.gov/green-card/green-card-processes-and-procedures/adjustment-of-status.

[8] *Id*.

[9] *Id*.

[10] 7 USCIS PM-PT.A, CH.10, § B.

[11] *Id*.

[12] *Id*.

[13] *Id*. at § B(1) citing to *Matter of Buscemi*, 19 I&N Dec. 628, 633 (BIA 1988) and *Matter of Edwards*, 20 I&N Dec. 191, 195 (BIA 1990).

[14] *Id*.

[15] *Id*.

[16] *Id*. at § B(2).

[17] *Id*.

[18] https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country.html.

[19] 9 USCIS PM-PT.B, CH.5, ¶A.

[20] *Id*.

[21] *Id*.

[22] *Id*. at ¶C.

[23] *Id*. at ¶B; *Matter of Ngai*, 19 I&N Dec. 254 (BIA 1984).

[24] *Id*. at ¶D.

[25] *Id*. at ¶E.

[26] *Id*. at Ch. 4, ¶B.

[27] 9 USCIS PM-PT.B, CH.6, ¶B (emphasis added).

[28] 9 USCIS PM-PT.B, CH.5, ¶E(2).

[29] https://www.state.gov/bureaus-offices/under-secretary-for-management/bureau-of-consular-affairs/#:~:text=Our%20Mission,are%20here%20to%20serve%20you.

[30] https://careers.state.gov/career-paths/foreign-service/officer/fso-career-tracks/consular/.

[31] 8 U.S.C. § 1201.

[32] 9 FAM 301.1-2.

[33] 9 FAM 504.7, 9 FAM 403.5.

[34] *Id*.

[35] 9 FAM 402.3-4(E).

[36] 22 C.F.R. § 42.81; 9 FAM 504.11-4(A).

[37] 9 FAM 504.11-3(A)(2).

[38] *Id*. at (A)(3).

[39] 9 FAM 403.12-3(A).

[40] *Department of State v. Munoz*, 602 U.S. ___ (2024).

[41] https://uk.usembassy.gov/visas/visa-refusals-belfast/visa-refusals-under-section-214b-of-the-immigration-and-nationality-act/.

Navigating § 1782 Judicial Assistance Post-ZF Automotive, continued from page 21

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court held that the analysis of these factors indicated that the ICSID panel did not have the requisite governmental authority. First, the court noted the panel was not a preexisting body and was only formed upon Webuild's request.[24] Second, the court mentioned that the BIT did not create the panel itself, but it merely prescribed the rules to be used, which were the ICSID rules in this case.[25] Third, the court observed that the panel functioned independently and was not affiliated with either of the BIT nations, and that none of the arbitrators on the panel were government officials or nationals of Panama or Italy.[26] Fourth, the court noted that the panel received zero government funding, but rather that the parties themselves jointly funded the panel.[27] Fifth, the court reasoned that the tribunal maintained confidentiality and that the award may be made public only with the consent of both parties.[28] Lastly, the court found that the tribunal derived its authority only from the parties' consent to arbitrate—that the BIT provided the ICSID panel as one of several available options and that the parties could opt to use an established court of "competent jurisdiction" demonstrated there was no intent to imbue the proceeding with governmental authority.[29] The district court therefore concluded that the ICSID panel in this case is not materially distinguishable from the UNCITRAL panel from *ZF Automotive*, and therefore, vacated its order and quashed the subpoena.[30]

On appeal at the Second Circuit, Webuild argued that the ICSID panel was conferred with governmental authority because it is a permanent institution that receives funding from member states, it has mechanisms for enforcement, and it can appoint arbitrators to the panel when the parties fail to.[31] The court was unpersuaded because the arbitral tribunal was funded by the parties themselves and ICSID did not appoint any arbitrators in this matter, and the enforcement procedures did not evince an intent to imbue the panel with governmental authority.[32] The court therefore affirmed the district court's order finding "no principled basis for distinguishing this case from *ZF Automotive*."[33]

Notably, although the Second Circuit focused its analysis on the particular ICSID panel at issue, it is unclear whether every ICSID panel would be barred from § 1782 discovery. After all, it is possible that an ICSID panel can consist of arbitrators from the ICSID-maintained panel of arbitrators designated by the member states, and that the underlying treaty does not contemplate the alternative option of established courts, rendering ICSID arbitration as the only venue for recourse. The Second Circuit appears to have left open the possibility that under certain circumstances, an ICSID panel can be deemed to exercise governmental authority conferred by one or multiple nations to qualify as a "foreign or international tribunal."

The *Alpene* Decisions – Weighing of Factors

Opinions rendered in the *In re Alpene* case underscore that courts prioritize certain factors over others when determining whether an arbitral body qualifies as a "foreign or international tribunal." The *Alpene* decisions involved a § 1782 request for discovery to support an ICSID arbitration initiated under a bilateral investment treaty between China and Malta.[34]

In the magistrate court's opinion (*Alpene I*), the court considered factors outlined in *ZP Automotive* emphasizing that the treaty provided a menu of options to resolve a dispute such as suing in a court of the member state and arbitration under ICSID.[35] The court reasoned that the applicant's choice of arbitration, despite the availability of a domestic court, undercut the contention that the arbitration panel had governmental authority.[36] The court added that though the ICSID body is an intergovernmental organization, the panel was chosen by the parties and lacked official affiliation with the nations.[37] The magistrate judge also reasoned that comity would not be promoted as the ICSID panel cannot offer reciprocal assistance for U.S. proceedings and that a mismatch would be created if arbitration under ICSID was afforded broad discovery under § 1782 while U.S. arbitration proceedings had only limited discovery.[38] Based on these factors, the magistrate court held that the ICSID panel did not qualify as a "foreign or international tribunal."[39]

By contrast, the district court decision (*Alpene II*) focused on the sixth Webuild factor: the source of the panel's authority.[40] The court held that, although the ICSID panel was created under a treaty, its authority derived powers from the consent of the parties, not government mandate.[41] It added that the parties' ability to choose a "competent court" instead of arbitration under ICSID "evinces the member states' intention to provide for 'the choice of bringing disputes before a pre-existing governmental body,' not to imbue the ICSID panel with governmental authority."[42] Based on this determination, the district court held that neither China nor Malta intended to imbue the ICSID panel with governmental authority to qualify as a "foreign or international tribunal."[43]

The *Alpene* and *Webuild* decisions demonstrate that courts afford different weight to the factors set forth in *ZF Automotive*, as some courts focus on the source of the tribunal's authority, while others adopt a more holistic approach weighing multiple factors.

Authorizing § 1782 Assistance in Support of Private Arbitration

A recent decision from the District of Arizona[44] demonstrates that judicial assistance under § 1782 for use in foreign arbitration is still possible in certain circumstances. In *In re ICBC*, the court granted assistance under § 1782 to support an arbitration conducted before the International Commercial Arbitration Centre (BCICAC), marking the first instance post-*ZF Automotive* of a court granting § 1782 relief in support of an arbitration.

In this case, Insurance Company of British Columbia (ICBC) sought § 1782 assistance to support its arbitration before the BCICAC relating to a claim by a Canadian citizen who had been injured in a car accident in Arizona.[45] Under British Columbia law, disputes regarding underinsured motorist protection (UMP) coverage must be resolved by either private arbitration by consent or, in the absence of consent, by private arbitration under the Arbitration Act of British Columbia, administered through the BCICAC.[46] As the parties did not consent to private arbitration, they were forced to arbitrate through the BCICAC.[47]

The court reasoned that the "arbitration at issue here is not a private arbitration by consent" and that "arbitration under the Arbitration Act through BCICAC is more akin to a governmental authority than a purely private, commercial body."[48] Thus, the court held that the BCICAC panel qualified as a "foreign or international tribunal" under § 1782 because its authority derived from Canadian law, not consent of the parties.[49]

This case, along with the *Alpene II* decision, show the significant weight some courts place on the source of the arbitral panel's authority. In this case, the BCICAC's authority being clearly derived from Canadian law was a decisive fact in the court's determination that the panel was found to be sufficiently imbued with governmental authority. In contrast, *Alpene II* found that the ICSID panel at issue there was empowered by the consent of the parties and thus held that it was not imbued with the requisite governmental authority. Both decisions suggest that the source of the panel's authority may, at least in certain cases, be determinative on whether the panel qualifies as a foreign or international tribunal.

As courts continue to interpret the Supreme Court's decision in *ZF Automotive*, practitioners should be mindful that application of § 1782 to foreign arbitration remains a developing area of the law. While the ruling significantly narrowed the scope of § 1782 by excluding private arbitral bodies, decisions like *Webuild, Alpene*, and *In re ICBC* demonstrate that the analysis is nuanced and case-specific, particularly when the arbitral panel's authority is derived from enabling legislation or treaty and not the parties' consent to arbitrate. After all, the only case to have granted § 1782 relief to assist a foreign arbitral proceeding post *ZF Automotive* solely relied on the fact that the enabling law mandated arbitration as the means to resolve the parties' disputes. Accordingly, practitioners must evaluate the unique features of each arbitral panel when considering whether to seek relief under § 1782.

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Endnotes

[1] *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 596 U.S. 619, 633, 142 S. Ct. 2078, 2089, 213 L. Ed. 2d 163 (2022).

[2] *Id*.

[3] *See* 28 U.S.C. § 1782 ("The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.").

[4] *See In re Clerici*, 481 F.3d 1324, 1331-32 (11th Cir. 2007) (quoting 28 U.S.C. § 1782).

[5] *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264 (2004)

[6] *See Intel Corp.*, 542 U.S. at 264-65 ("[A] court presented with a § 1782(a) request may consider the nature of the foreign tribunal, the character of proceedings underway abroad, and the receptivity of the foreign government, court, or agency to federal-court judicial assistance. . . . [A] district court could [also] consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering limits or other policies of a foreign country or the United States. Also, unduly intrusive or burdensome requests may be rejected or trimmed."); *see also Glock v. Glock*, 797 F.3d 1002, 1008 (11th Cir. 2015).

[7] *ZF Auto.*, 596 U.S. at 624.

[8] *Id*. at 626.

[9] *Id*. at 638.

[10] *Id*. at 628.

[11] *Id*. at 630–31.

[12] *Id*. at 633.

[13] *Id*.

[14] Indeed, the Court reasoned that if § 1782 included private bodies, it would be in tension with the Federal Arbitration Act (FAA) because § 1782 permits broader discovery than the FAA allows, and it would not make sense for private domestic arbitrations to have less U.S. discovery power than foreign arbitrations. Lastly, the Court pointed out that the main objective of § 1782, promoting cooperation between nations, is not served by extending the statutes reach to private bodies as they have no reciprocal power.

[15] *Id*. at 633–34.

[16] *Id*. 634

[17] *Id*. at 635.

[18] 108 F.4th 138, 141 (2d Cir. 2024).

[19] *Id*. at *4–5.

[20] *Id*. at *5–6.

[21] *Id*. at *7.

[22] *Id*.

[23] *In re Webuild S.P.A.*, No. 22-MC-140 (LAK), 2022 U.S. Dist. LEXIS 228147, at *3-5 (S.D.N.Y. Dec. 19, 2022), *aff'd sub nom. Webuild S.P.A. v. WSP USA Inc.*, 108 F.4th 138 (2d Cir. 2024).

[24] *Id*. at *3.

[25] *Id*.

[26] *Id*. at *4.

[27] *Id*.

[28] *Id*. at *4–5.

[29] *Id*. at *5–6.

[30] *Id*. at *6.

[31] *Webuild*, 108 F.4th at 143.

[32] *Id*.

[33] *Webuild*, 108 F.4th 138, 141 (2d Cir. 2024).

[34] *In re Alpene, Ltd.*, No. 21MC2547MKBRML, 2022 U.S. Dist. LEXIS 196061, *3 (E.D.N.Y. 2022),

[35] *Id*. at *5.

[36] *Id*. at *7.

[37] *Id*.

[38] *Id*. at *10 (citing *ZF Automotive*, 596 U.S. at 631–32).

[39] Id. at *11.

[40] *Compare In re Alpene, Ltd.*, No. 21MC2547MKBRML, 2022 WL 15497008, at *3 (E.D.N.Y. 2022), *with In re Alpene, Ltd.*, No. 21MC2547MKBRML, 2023 WL 5237336, at *5 (E.D.N.Y. 2023).

[41] *In re Alpene*, 2022 U.S. Dist. LEXIS 228147, at *15.

[42] *Id*.

[43] *Id*.

[44] *In Re: Ex Parte Application Pursuant To Section 204 Of The Federal Arbitration Act and A.R.S. § 12-1507 For An Order To Provide Documents And/Or Appear Remotely And Testify In A Foreign Arbitration Hearing*, No. MC-24-00015-PHX-DLR (D. Ariz. May 9, 2024) ("*In re ICBC*").

[45] *Id*. at 2.

[46] *Id*. at 3.

[47] *Id*.

[48] *Id*.

[49] *Id*.

The New Great Replacement Theory, continued from page 23

While the expansion of civil liberties in the courts of the United States progressed through the 20th century, a parallel course proceeded abroad.

The Evolution of International Human Rights Law

Although they share a common root structure, the legal regime undergirding the protection of civil liberties in the United States branched out into a separate jurisprudence, taking a different trajectory from that comprising international human rights law. The idea that there is such a thing as a body of law recognizing "human rights" throughout the world, as with it's not-too-distant North American cousin, originates from antiquity.[18] All of the major religions of the world have teachings that factor into the development of this body of law, as do the views of philosophers such as Hsün-tzu, the ancient Greeks, Cicero, and later thinkers such as John Locke, Jean-Jacque Rousseau, Olympe de Gouge, and Thomas Paine.[19]

Two years prior to the adoption of the U.S. Bill of Rights, France promulgated the *Déclaration des droits de l'Homme et du citoyen de 1789*, which had a significant impact on the development of concepts concerning individual liberty, democracy, and universal human rights, inspired by the doctrine of natural right during the Age of Enlightenment that spread throughout Europe and the rest of the world.[20] In the 19th century, distinct but related doctrines of international humanitarian law, notably the first of the Geneva Conventions, evolved to augment the developing human rights jurisprudence, as did multilateral agreements and other measures to suppress and eventually end slavery.[21]

Further evolution in human rights law continued in the 20th century, beginning with the Charter of the League of Nations mandating many of the rights that were later to be included in the Universal Declaration of Human Rights, a seminal document adopted by the United Nations General Assembly in 1948 in the wake of the abject barbarism of World War II that established, for the first time in history, fundamental human rights that were to be universally protected worldwide.[22]

The Universal Declaration together with the International Covenant on Civil and Political Rights (with its two optional protocols) (ICCPR, 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) are referred to as the International Bill of Human Rights and form the legal basis for customary international law that establishes enumerated rights to be respected and enforced by all nations.[23]

All 193 United Nation member states have signed the UDHR. Nine other treaties (together with nine associated protocols) make up the core normative framework for the international human rights regime that is central to the work of the UN High Commissioner for Human Rights (HCHR) at national, regional, and international levels.[24]

Beginning in 1977 and throughout his presidency, Jimmy Carter not only highlighted the importance of robust enforcement of international human rights law, but he also incorporated it as a vital part of U.S. foreign policy, stating in his inaugural address:

> *Because we are free, we can never be indifferent to the fate of freedom elsewhere. Our moral sense dictates a clear-cut preference for those societies which share with us an abiding respect for individual human rights.*[25]

As a counterpoint to the support of human rights enforcement during the Carter administration, the United States has been recalcitrant in ratifying core treaties that provide enhanced rights and greater protection to vulnerable communities throughout the world and is the only "developed" country and member of the UN that refuses to ratify the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the U.N. Convention on the Rights of the Child (UNCRC).[26] For a nation aspiring to be the "leader of the free world," the United States has one of the worst records of any country in ratifying treaties that safeguard human rights (as well as protecting the environment), owing mainly to overstated concerns of infringement on its national sovereignty, ethnocentrism

that seeks to put its interests above those of other peoples, or the fear that protecting human rights would somehow compromise its national security.[27]

This leaves people in the United States with fewer and fewer options in a federal judiciary that has become increasingly parsimonious in granting them their civil liberties.

The De-Evolution of U.S. Constitutional Law

Much to the chagrin of jurists such as Hugo Black, the U.S. Supreme Court in the later half of the 20th century continued to stretch the Bill of Rights well past the limits of the plain words used to define them, and perhaps their meaning as well. Rejecting an approach to a natural law interpretation of civil liberties based on a judge's subjective idea of fundamental fairness or on principles that are "implicit in the concept of ordered liberty," Black insisted on a literal interpretation of the plain words of the Bill of Rights, given the context of the intent of its authors at the time it was ratified.[28]

In like fashion, other justices adopted a similar "textualist" or "originalist" approach to constitutional interpretation, even when, on a superficial level, their political ideology did not seem to agree with that of their colleagues following the same approach.[29] On the one hand (or so the argument goes), there is a need to be true to the actual text of the Constitution as and when written. On the other, there is a need for constitutional rights that live and breathe, evolving with the progression of time.[30]

In the first two decades of the 21st century, the U.S. Supreme Court has made a decisive (and some would argue reactionary) shift toward an extreme form of originalism that constricts the meaning of civil liberties tightly to what they would have been understood to mean at the time of the ratification of the underlying right being asserted. Reversing two precedents, the Court (relying in part on the views of infamous witch-hunter Matthew Hale[31] for part of its reasoning) found that the right to elect to have an abortion is not "deeply rooted in history and tradition" enough to be regarded as "implicit in the concept of liberty."[32] In an ominous concurring opinion, Justice Thomas urges the Court to reconsider all of its substantive due process precedents because "any substantive due process decision is demonstrably erroneous."[33]

The stage has now been set for a method of interpreting the Bill of Rights in the United States using a textualist-originalist approach favored by Justice Antonin Scalia. As a former law clerk to Scalia who now occupies the seat on the Court once held by liberal jurist Ruth Bader Ginsberg, Amy Coney Barrett is in a uniquely qualified position to clarify how this two-part system of interpreting how the Constitution works:

> Originalism rests on two basic claims. First, the meaning of constitutional text is fixed at the time of its ratification. Second, the original meaning of the text controls because "it and it alone is law." Non-originalists consider the text's historical meaning to be a relevant factor in interpreting the Constitution, but other factors, like value-based judgments, might overcome it. Originalists, by contrast, treat the original meaning as a relatively hard constraint.[34]

According to the Scalia formula, civil liberties in the United States are, in essence, now limited by the specific words used to describe them (textualism) and the meaning of those words at the times they were written (originalism), which is the year 1791 for the ten Amendments comprising the enumerated Bill of Rights and the year 1868 for the Due Process and Equal Protection clauses of the Fourteenth Amendment.

Given the current makeup of justices on the Supreme Court, this constraining interpretation of the reach of individual rights is likely to prevail well into the 21st century. But while they share a common ancestry, international human rights have two important distinguishing characteristics that make them more availing to advocates for greater freedom in the world than their more muted counterparts in the United States.

One is that true textualists are obliged to acknowledge a greater degree of specificity as to the contours of what human rights entail under international law. The other is that the words used to describe human rights are of more recent vintage (circa 1948) and are less susceptible to interpretation based on an outdated historical record that includes such things as the trial and execution of witches centuries ago.[35]

Do Humans Have Rights in the United States?

Unlike the U.S. Bill of Rights, the International Bill of Rights specifically affords all human beings a right of "privacy."[36] The right is established by treaty law as well as being a well-established part of customary international law.[37] The right of privacy includes the right of dominion over a human being's body, specifically in the case of a human being who elects to have an abortion.[38] The evolution of the human right to privacy (as well as other associated rights) concerning the specific need to protect greater access to safe abortions recognizes that reproductive rights are human rights:

> International human rights bodies have repeatedly found that ensuring access to abortion and reproductive healthcare, and promoting reproductive autonomy are critical to fulfilling fundamental human rights obligations and ensuring women's rights to non-discrimination and equal participation.[39]

Assuming a person has a right to reproductive freedom under international law, the question remains (and to date remains unanswered) as to whether she would be entitled to assert that right in the courts of the United States. The same question could be asked of other rights grounded under the rubric of "privacy" formerly thought to exist under the U.S. Bill of Rights but that have now been placed at risk, including the right to marry, the right to procreate, the right of custody of one's own children, the right to keep one's family together, the right to control the upbringing of one's children, the right to purchase and use contraceptives, the right to engage in private consensual same-sex sexual activity, and the right of a competent individual to refuse medical treatment.[40]

Other rights previously thought to exist under the Bill of Rights are now on the chopping block due to the textualist-originalist interpretation of the Constitution.[41] The same cannot be said for the explicitly stated freedoms secured under the International Bill of Human Rights. The conservative justices of the Supreme Court would be unable to ignore direct, textual statements of the existence of rights that are not explicitly mentioned in the U.S. Constitution. They would also be hard pressed to rationalize away these rights as being unintentionally created by their original authors.

There are two avenues of relief whereby basic human rights being lost through constitutional interpretation in the United States can be replaced with rights secured under international law. Both are found in the Supremacy Clause, which reads as follows:

> This Constitution, *and the Laws of the United States* which shall be made in Pursuance thereof; *and all Treaties made*, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding (emphasis supplied).[42]

Even the most ardent conservative jurist must confess that this text of the Constitution requires adherence to international human rights law, either as a feature of federal law or by way of a treaty "made" under the authority of the United States.[43] With respect to the former, an argument can (and has) been made that human rights jurisprudence under customary international law is a feature of federal law. As for the latter, a number of treaties "made" by the United States would seem to create an obligation upon the United States to enforce human rights within its borders.

Human Rights Law as Federal Law. In the landmark case of *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), the court ruled that U.S. courts had jurisdiction to hear and decide cases to compensate victims of tortious conduct that was perpetrated in violation of public international law (or any treaties to which the United States was a party). Writing for the court, Judge Kaufman held that, not only did the tortious conduct at issue there (torture) violate international law, but that the law forbidding it was the law of the United States. 630 F.2d 885–887 citing, inter alia, Dickenson, *The Law of Nations as Part of the National Law of the United States*, 101 U.Pa.L.Rev. 26, 27 (1952).

Filártiga v. Peña-Irala led to progress on the legislative front to make the enforcement of human rights more feasible when Congress passed the Torture Victims Protection Act of 1991 (TVPA), (28 U.S.C § 1350), which codified the result, at least, reached by Kaufman, by providing that victims of torture may bring tort cases against their abusers, provides a statute of limitations, and lays down other procedural issues. On the judicial front, the basic holding that customary international law (including human rights law) is binding as federal law, remains intact, although there are questions concerning the commitment among members of the judiciary to uphold that principle.[44]

Human Rights Law as Treaty Law. Attempting to enforce international human rights in the U.S. courts as a feature of treaty law can be problematic, despite the holding that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination," *See, The Paquete Habana*, 175 U.S. 677, 700 (1900) and precedent holding that, where the United States has ratified a treaty, it is bound to follow its terms. *Flores v. Southern Peru Copper Corp*., 414 F.3d 233, 256 (2d Cir. 2003) (citing *Haver v. Yaker*, 76 U.S. (9 Wall.) 32, 35(1869)).

Nations that have ratified a treaty are consequently "legally obligated to uphold the principles embodied in that treaty." *Id*. And even where the United States has signed but not ratified a treaty, it has an affirmative obligation to refrain from taking actions that "defeat the object and purpose of the treaty."[45] In interpreting the meaning of the Supremacy Clause, a true textualist should therefore conclude that human rights treaties "made" by the United States are binding law, to include those that are signed, but no doubt those that have been ratified by the U.S. Senate.

While nominally voicing support for a textualist view of the Constitution, the courts have interpreted away rights secured by treaties through the Supremacy Clause by characterizing them as being not "self-executing." This served as a way out of a problem for jurists who were challenged in their belief that the United States had "the best constitution of them all"

by cases such as *Sei Fujii v. California*, 217 P.2d 481 (Cal. Ct. App. 1950), which held that while the Constitution did not afford protection against racial discrimination, the Universal Declaration of Human Rights did.

Fujii v. State, 242 P.2d 617, 620 (CA 1952), avoided this uncomfortable reality by holding that the UN Declaration was not "self-executing"—an interpretation at odds with the plain language of the Supremacy Clause and contrary to precedent.[46]

In other cases, when presented with a cognitive dissonance created when human rights provided by international law were superior to rights under the U.S. Constitution, the judiciary is corralled into a decision-making process where it must either (a) find that the right does exist after all under U.S. law; (b) find that the international treaty is not self-executing; or (c) just ignore international human rights law altogether.[47]

The textualist-originalist point of view would seem to indicate that the human rights treaties are not disqualified as the supreme law of the land under a concocted reasoning (found nowhere in the text) that they are not "self-executing." For this reason alone, an argument can and should be made before the courts that human rights treaties, as well as human rights customary law, are valid and enforceable in the United States.

Human Rights Law Enforceable Under § 1983. Whether they exist as part of customary international law, or under treaty law, international human rights are part of U.S. law. This makes them enforceable under the Klu Klux Klan Act of 1871. Codified at 42 U.S.C. § 1983, the law provides in relevant part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This statute by its plain terms applies to the vindication of federal laws, including federal treaty law.[48] Logic dictates that basic human rights as a feature of customary international law are also enforceable as federal law under Section 1983. Typically used to vindicate civil rights secured by the U.S. Constitution, there is no reason to think that this law cannot also be used to enforce basic human rights laws.[49]

Replacing Constitutional Rights With Human Rights

Desperate times call for desperate measures or, in the alternative, creative solutions. In the early part of the 21st century, the people of the United States have been confronted by a national government that asks them to turn inward and, in effect, against themselves, forgetting that everyone within its borders are from elsewhere.

This is but a temporary setback. The extent to which individuals in the United States have any rights at all, whether called civil or human, can shift and change with the shifts and changes of judges responsible for interpreting them. At the moment, those judges have extended fundamental civil liberties begrudgingly, restricting them to words that describe them that were written in a distant past. They interpret those words in the context of when they were written so many years ago.

Whether right or wrong, this is the hand that civil libertarians have been dealt. They can circumvent the restrictive way judges interpret rights under the Constitution by replacing them with rights under international law, where the text is more clearly articulated and the historical context is more current. Even if the textualist-originalist way of doing things can somehow be grafted onto international humanitarian law, the result will be more availing to those who aspire to greater freedoms as human beings.

If asked, judges may conclude that human beings in other parts of the world enjoy greater freedoms than those afforded to people living in the United States. But that does not seem likely. By making the argument that international law applies, judges will be confronted with a cognitive dissonance that may impel them to reconsider their position and find that the Bill of Rights, having come from the same stock, are the same as those granted in the International Bill of Human Rights.

For the moment, the United States seems to have forgotten to embrace new people or new ideas from all parts of the world, incorporating them into a nation that has a constitution and laws that honor and protect fundamental rights of individual human beings, wherever they are found. These new people and new ideas do not replace the ones that are already here. They become part of one nation.

Lest they forget what it means to invite the "other" to become part of that nation, those who fear they will be replaced by someone or something new should first consult the inscription found at the base of the *Statue of Liberty Enlightening the World*—a sonnet written in 1883 by Emma Lazarus, who had been involved with aiding refugees from vicious pogroms taking place in eastern Europe:

The New Colossus

Not like the brazen giant of Greek fame,
With conquering limbs astride from land to land;
Here at our sea-washed, sunset gates shall stand
A mighty woman with a torch, whose flame
Is the imprisoned lightning, and her name
Mother of Exiles. From her beacon-hand
Glows world-wide welcome; her mild eyes command
The air-bridged harbor that twin cities frame.
"Keep, ancient lands, your storied pomp!" cries she
With silent lips. "Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!

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Endnotes

[1] Noted evolutionary biologist and historian of science Stephen Jay Gould regarded Grant's book as "the most influential tract of American scientific racism." Gould, Stephen, *Bully for Brontosaurus: Reflections in Natural History* (New York, New York: W. W. Norton, 1991), p. 162.

[2] Berlet, Chip; Vysotsky, Stanislav (2006). "Overview of U.S. White Supremacist Groups." Journal of Political and Military Sociology. *34* (1): 14. "White genocide" (belief that Jewish people are plotting to overthrow the white race) is among a trifecta of racist conspiracy theories that includes the plot for a "great replacement" (belief that Muslims are "replacing" white French people) and the "Eurabia" machinations (belief in a European-Arab cabal conspiring to establish an Islamic caliphate in Europe). Davis, M. (2024) 'Violence as method: the "white replacement", "white genocide", and "Eurabia" conspiracy theories and the biopolitics of networked violence,' *Ethnic and Racial Studies*, pp. 1–21. doi: 10.1080/01419870.2024.2304640.

[3] Participants in the Unite the Right rallies included representatives from the alt-right, neo-Confederates, neo-fascists, white nationalists, neo-Nazis, Klansmen, and far-right militias. Lind, Dara (updated 14 Aug. 2017). "Unite the Right, the violent white supremacist rally in Charlottesville, explained." Vox. The rise of white supremacy groups and their embrace by politicians advocating for mass deportations is the subject of a number of documentaries and reports by news agencies: Frontline (PBS) & ProPublica: *Documenting Hate: New American Nazis* (2018) (Frontline/PBS); *American Insurrection* (2021 & 2022) (Frontline/PBS; *The blueprint of Trump's deportation plan: A questionable approach by Eisenhower* (27 Oct. 2024)(CBS News - 60 Minutes).

[4] "Great Replacement" seizes on demographic change caused by immigration to promote political xenophobia that is said by some to pose a threat to democratic institutions, societies, and immigrants alike. Ekman, M. (2022). The great replacement: Strategic mainstreaming of far-right conspiracy claims. *Convergence*, 28(4), 1127–1143.

[5] Given what in today's world would be considered illegal border crossings by such notables as George Washington and Ethan Allen, some scholars suggest a less hypocritical view toward the interpretation of constitutional rights as applied to immigrants in the United States called "integrative egalitarianism"—applying the law in a way that overcomes "arbitrary inequalities stemming from accidents of birth." Victor C. Romero, *Our Illegal Founders*, 16 Harv. Latino L. Rev. 147, p. 166–7 (2013), citing as examples of this principle *Zadvydas v. Davis*, 533 U.S. 678 (2001)(indefinite detention of alien ruled unconstitutional); *Clark v. Martinez*, 543 U.S. 371 (2005)(same); *Padilla v. Kentucky*, 559 U.S. 356 (2010)(defense attorneys must advise noncitizens of the possible immigration consequences of a guilty plea).

[6] 28 May 1788 letter from George Washington to Francis Adrian Van der Kemp; letter of 12 Sept. 1817 from Thomas Jefferson to George Flower.

[7] Then-Senator Kennedy began writing the book in 1958, as part of a series sponsored by the Anti-Defamation League, in response to rising xenophobia and anti-immigrant rhetoric in the 1950's. The 2018 edition was endorsed by former Secretary of State Madeleine K. Albright and U.S. Senator Marco Rubio. Kennedy's 1963 address to the ADL can be accessed here: https://www.youtube.com/watch?v=ewk_9wQVVz4. Drawn from stories spanning the colonial period to the present, Immigration: An American History (31 May 2022) is described as a sweeping account of immigration scholarship, including the contexts and motivations for migration, settlement patterns, work, family, racism, and nativism, against the background of immigration law and policy.

[8] Lepore, Jill. *This America: The Case for the Nation* (28 May 2019).

[9] Douglass, Frederick (1869). Composite Nation; Despite the efforts of Douglass, the hatred toward Chinese and fear of the "yellow peril" led to passage of the Chinese Exclusion Act of 1882, described by anti-imperialist Senator George Frisbie Hoar as "nothing less than the legalization of racial discrimination." Daniels, Roger (2002). *Coming to America: A History of Immigration and Ethnicity in American Life.* Harper Perennial. p. 271. ISBN 978-0-06-050577-6.

[10] 2024 had been described as a "make-or-break" year for democracies, the world having been said to be in the midst of an era of "defensive nationalism," defined as a form of national-populism focused on protecting the various nations of the world against "globalizing forces" (such as immigration) that generates a sense of unease and apprehension, allowing populist politicians to attack internationalism and lead their nation to an inward populist turn, pushing many people toward radical domestic politics and their nation toward violence. Rabinowitz, B.S. (18 Mar. 2024). *Our Era Is One of Defensive Nationalism. It's Happened Before* (TIME magazine/Made by History).

[11] Author Thomas E. Ricks details the influence of antiquity on the founders by examining the educations of George Washington, John Adams, Thomas Jefferson, and James Madison in *First Principles: What America's Founders Learned from the Greeks and Romans and How That Shaped Our Country* (10 Nov. 2020), HarperCollins.

[12] Brice, Shamir. *A Classy Constitution: Classical Influences on the United States Constitution from Ancient Greek and Roman History and Political Thought* (2015). John Carroll University Senior Honors Projects. 85 p.8, citing David J. Bederman, The Classical Foundations of the American Constitution: Prevailing Wisdom. (Cambridge, MA: Cambridge UP, 2008), p. 49–50.

[13] The paper written by Shamir Brice (at page 26) noted above describes how, in a September 1763 letter to the *Boston Gazette* John Adams in particular cited Plato's works as support for the importance of the protection of individual rights and liberties (such as freedom of speech, press, and liberty of conscious), arguing that the preservation of the human self and property is an indisputable right of nature that the social compact protected. Plato's The Laws is available at the Internet Encyclopedia of Philosophy. Adams' letter can be accessed through the National Archives' *Founders Online under The Adams Papers, VIII*. "U" to the Boston Gazette, 5 Sept. 1763, *Founders Online*, National Archives.

[14] Brice at 9, citing De Burgh, *Legacy of the Ancient World*, Macdonald & Evans/The Macmillan company) (1 Jan. 1924) p. 247–249; M.N.S. Sellers, American Republicanism: Roman Ideology in the United States Constitution. (New York: New York UP, 1994), 94–95

[15] Locke, John (1690). *Two Treatises of Government* (10th ed.). Project Gutenberg. Sir William Blackstone, Commentaries on the Laws of England (1765-1769) Wollaston, William, *The Religion of Nature Delineated* (1722). See also, Bailyn, Bernard. *The Ideological Origins of the American Revolution* (1967); Colbourn, H. Trevor (1974). *The lamp of experience: Whig history and the intellectual origins of the American Revolution.* New York: Norton; Adams, Willi Paul (2001); *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era.* Rowman & Littlefield. pp. 128–29.

[16] Gary Bugh (2023). *Incorporation of the Bill of Rights: An Accounting of the Supreme Court's Extension of Federal Civil Liberties to the States.*

[17] See, Williams, Ryan, *The One and Only Substantive Due Process Clause* (6 Mar. 2010). Yale Law Journal, Vol. 120, 2010, for a comparison of the origins of substantive due process (and their legitimacy) under both the Fifth and Fourteenth Amendments.

[18] One of the first references to the term "human rights" is found in a letter written circa 217 AD by Tertulian (regarded as the founder of Western theology) to Scapula, Proconsul of Carthage: "it is a fundamental human right, a privilege of nature, that every man should worship according to his own convictions: one man's religion neither harms nor helps another man. It is assuredly no part of religion to compel religion—to which free-will and not force should lead us—the sacrificial victims even being required of a willing mind."

[19] Shelton, Dinah L., "An Introduction to the History of International Human Rights Law" (2007). George Washington Law Faculty Publications & Other Works. p.3–4.

[20] Translated literally as a "Declaration of the Rights of Man and of the Citizen," the initial draft of the document was written by Marquis de Lafayette with an assist from his good friend Thomas Jefferson. Most of the final version came from Abbé Sieyès, chief political theorist of the French Revolution. Susan Dunn, *Sister Revolutions: French Lightning, American Light* (1999) pp. 143–145.

[21] At the Congress of Vienna (1814-1815), language in a declaration stating that the international slave trade was "repugnant to the principles of humanity and universal morality" led to a treaty between Britain, Russia, Austria, Prussia, and France calling for the "abolition of a Commerce so odious and so strongly condemned by the laws of religion and nature" and a treaty between the United States and Britain declaring traffic in slaves to be "irreconcilable with the principles of humanity and justice." The 1890 General Act for the Repression of the African Slave Trade called for suppression of the slave trade at sea and along inland caravan routes, prosecution and punishment of slave traders, and the liberation of captured slaves, reflecting the principle of shared international responsibility to respond to gross human rights violations and marking the first general agreement on a common standard of behavior for all nations. Shelton at 6–7.

[22] The Universal Declaration of Human Rights was framed by members of the Human Rights Commission, chaired by Eleanor Roosevelt, who advocated for an "International Bill of Rights." The Commission eventually proceeded to frame the UDHR and accompanying treaties. Glendon, Mary Ann (July 2004). "The Rule of Law in The Universal Declaration of Human Rights." Northwestern University Journal of International Human Rights.

[23] Unlike many branches of international law, human rights law did not first develop as "customary international law" per se. In the mid-20th century, treaties and declarations were adopted by the United Nations and other international bodies that eventually became customary law in the 1960's. Schabas, William A., *The Customary International Law of Human Rights* (Oxford, 2021; online edn 19 Aug. 2021).

[24] The nine core human rights treaties: International Convention on the Elimination of Racial Discrimination (1965), International Covenant on Civil and Political Rights (1966), International Covenant on Economic, Social and Cultural Rights (1966), Convention on the Elimination of Discrimination Against Women (1979), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Convention on the Rights of the Child (1989), Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), Convention for the Protection of All Persons from Enforced Disappearance (2006), Convention on the Rights of Persons with Disabilities (2006). United Nations New York and Geneva (2014) The Core International Human Rights Treaties.

[25] Carter's post-Cold War foreign policy marked a change in the fundamental nature of American relations with the Third World while still protecting essential American interests. His quest for a more humane foreign policy prompted many commentators to criticize his approach as overly simplistic if not sanguine. Schmitz, David F., Walker, Vanessa (2004). Jimmy Carter and the Foreign Policy of Human Rights: *The Development of a Post-Cold War Foreign Policy*, Diplomatic History, Volume 28, Issue 1, January 2004, Pages 113–143, (quoting 20 Jan. 1977 Inaugural Address).

[26] The reticence of the United States to ratify or, in some cases, even sign human rights treaties undermines its standing, trustworthiness, and influence in the global community, raising doubts among allies and adversaries regarding its commitment to human rights and international cooperation, while also compromising global partnerships, and its ability to shape future global regulations. This is in addition to depriving the people of the nation of the benefits of living in a fully free society would bring. Winton, Kenzie R. (2024). *Policy Implications and Recommendations Concerning the United States' Non-ratification of International Human Rights Treaties*, Pepperdine Policy Review: Vol. 16, Article 9.

[27] Wahal, Anya (7 Jan. 2022). Council on Foreign Relations, *On International Treaties, the United States Refuses to Play Ball.* In lists of state parties to globally significant treaties, the United States is often notably absent. Ratification hesitancy is a chronic impairment to international U.S. credibility and influence.

[28] Black complained that many times First Amendment freedoms "suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used." As for the word "privacy" found nowhere in the Constitution, he famously said "I get nowhere in this case by talk about a constitutional "right of privacy" as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. *Griswold v. Connecticut*, 381 U. S. 479, 510 (1965)(Black, J. dissenting).

[29] Gerhardt, Michael J., *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia* (1994). College of William & Mary Law School Faculty Publications. 990.

[30] Schor, Miguel, Foreword: Contextualizing the Debate between Originalism and the Living Constitution (21 Oct. 2012). Drake Law Review, Vol. 59, pp. 961–72, 2011, Drake University Law School Research Paper No. 12–29. See also, John Marshall, C.J.: the Constitution is "intended to endure for ages to come," and must adapt itself to a future "seen dimly." *M'Culloch v. State of Maryland*, 4 L Ed 579: 17 US 316 (1819).

[31] Hale presided over the Bury St Edmunds witch trials, regarded as "one of the most notorious of the seventeenth century English witchcraft trials," where he sentenced two women (Amy Duny and Rose Cullender) to death for witchcraft. Geis, G. (1978). "Lord Hale, Witches, and Rape." British Journal of Law and Society. 5 (1). Wiley-Blackwell: 26–44. He is also credited with establishing the legal right of a husband to rape his wife. Ryan, Rebecca M. (1995). The Sex Right: A Legal History of the Marital Rape Exemption. Law & Social Inquiry. 20 (4). Blackwell Publishing: 941–1001 p. 947.

[32] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

[33] Mohapatra, Seema, *An Era of Rights Retractions: Dobbs as a case in point*, American Bar Association, 26 July 2023.

[34] Amy C. Barrett, *Originalism and Stare Decisis*, 92 Notre Dame L. Rev. 1921, 1924 (2017). Justice Barrett during her Senate confirmation hearings distinguished between conservative originalism such as that espoused by her mentor, and a kinder and gentler form of it when she explained that "There is a school of originalism that's more of a progressive originalism and is very committed to keeping the Constitution's meaning, just interpreting texts the way all originalists do, to say that it has the meaning that it had at the time that it was ratified, but they tend to read it at a higher level of generality." She may have been referring to Justice Ginsberg, who described herself as having an originalist view that was quite different than her good friend (and fellow opera enthusiast) Antonin Scalia. Bravin, Jesse, *Analysis: How Justice Ruth Bader Ginsburg Viewed Herself as an Originalist*, Wall Street Journal, 13 Oct. 2020.

[35] In addition to relying on Mathew Hale, the *Dobbs* decision also liberally cites to the De Legibus et Consuetudinibus Angliae, a treatise attributed to Henry of Bratton, (circa 1210–1268) that delves into monsters, duels, bastardy, concubines, sturgeon "and other royal fish," the "pillory and the ducking-stool," regards women as inferior to men, and offers tortured logic about the mistreatment of those convicted of witchcraft: those condemned to be burned alive ought not to be injured by floggings, whippings, or tortures, since many perish while under torture." Milbank, Dana. Washington Post. That 13th-century law treatise Alito uses? Here's what else it says (9 May 2022).

[36] Article 12 of the Universal Declaration of Human Rights (10 Dec. 1948) provides that "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence." Article 17 of the International Covenant on Civil and Political Rights states that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence."

[37] *See*, n.23 *supra*; Diggelmann O. and Cleis M. N., "How the Right to Privacy Became a Human Right" (2014). 14 Human Rights Law Review 441.

[38] Brief of Amici Curiae Human Rights Watch, Global Justice Center, and Amnesty International in Support of at Respondents at 28–31, *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

[39] Brief of International and Comparative Legal Scholars as Amici Curiae in Support of Respondents at 27–28, *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

[40] Erwin Chemerinsky, Worse Than Nothing: The Dangerous Fallacy of Originalism, Yale University Press (2022) at 119–20.

[41] Niehoff, Leonard. *Unprecedented Precedent and Original Originalism: How the Supreme Court's Decision in Dobbs Threatens Privacy and Free Speech Rights.* Communications Lawyer 38, no. 3 (2023): 24–33.

[42] Article VI, Paragraph 2, United States Constitution.

[43] Ostensibly the head of an apolitical branch of government, the Supreme Court is increasingly seen as basing its decisions on the political viewpoints of the justices, losing public confidence in its integrity in the process. Senator Sheldon Whitehouse, *Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts*, Harvard Law & Policy Review (23 Apr. 2015).

[44] "One has to temper one's optimism about the future of international human rights law in the courts of the United States until judges and political leaders accept the notion that, in the international legal order, the United States is subject to the laws and cannot make, repeal, or ignore elements of that body of law on its own initiative or for its own domestic or political reasons." Steven M. Schneebaum, Human Rights in the United States Courts: The Role of Lawyers, 55 Wash. & Lee L. Rev. 737, 756 (1998).

[45] Vienna Convention on the Law of Treaties art. 18(a), May 23, 1969, 1155 U.N.T.S. 331 (although the United States is not a party to the Vienna Convention, the treaty's provisions are considered customary international law. *Avero Belgium Ins. v. American Airlines*, Inc., 423 F.3d 73, 79 n.8 (2d Cir. 2005).

[46] David Sloss, *The Death of Treaty Supremacy: An Invisible Constitutional Change* (2016) at 10.

[47] *Id*. at 9.

[48] Matthew J. Jowanna, 42 U.S.C. § 1983: *A Legal Vehicle with No International Human Rights Treaty Passengers*, 9 U.N.H. L. Rev. 31 (2010) at 58 citing, inter alia, *Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007).

[49] Attorney Jowanna advocates for legislative action to address attempts to delimit the reach of international treaties ratified by the United States through the use of unilateral "reservations, understandings, and declarations" that have been severely criticized by other nations and are of questionable validity. Certainly, obtaining a sense of Congress that human rights treaties should be made clearly enforceable and "self-executing" would be helpful, but these problems of treaty law interpretation should not prevent human rights law from being enforced as a part of customary international law.

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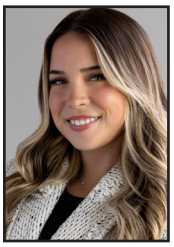
determine whether the conduct regulated by the statute took place beyond the U.S. border. 572 B.R. at 124. If these activities are primarily domestic, then applying the Avoidance Provisions would be consistent with their intended scope. Conversely, if the activities occurred primarily outside the United States, applying these sections might constitute an impermissible extraterritorial application under the Abitron precedent.



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Endnotes

[1] *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010).

[2] *Id*. at 261.

[3] *See id.* at 265.

[4] *See id.* at 266–70.

[5] *Abitron*, 600 U.S. at 418.

[6] *Id*.

[7] *Id*. at 419.

[8] *Id*. at 412.

[9] *Id*. at 420.

[10] *Id*. at 420.

[11] *Id*. at 421.

[12] *See* William S. Dodge, *The New (Old) Presumption Against Extraterritoriality*, TRANSNAT'L LITIG. BLOG (6 Sep. 2023), https://tlblog.org/the-new-old-presumption-against-extraterritoriality/.

[13] *See* In re Ampal-American Israel Corp., 562 B.R. 601, 612 (Bankr. S.D.N.Y. 2017); In re Lyondell Chem. Co., 543 B.R. 127, 151 (Bankr. S.D.N.Y. 2016); In re Simon, 153 F.3d 991, 996 (9th Cir. 1998).

[14] *See also* 28 U.S.C. § 1334(e).

[15] *See In re FAH Liquidating Corp*., 572 B.R. 117 (Bankr. D. Del. 2017); *In re French*, 440 F.3d 145 (4th Cir. 2006).

[16] *See In re Sherwood Invs. Overseas Ltd., Inc.*, No. 6:10–00158, 2016 WL 4486470 (Bankr. M.D. Fla. July 22, 2015), aff'd, No. 6:15–1469, 2016 WL 5719450 (M.D. Fla. Sep. 30, 2016), appeal dismissed, No. 16–16824, 2017 WL 5185307 (11th Cir. Apr. 24, 2017); *see also In re Midland Euro Exch. Inc.*, 347 B.R. 708 (Bankr. C.D. Cal. 2006).

[17] *Compare In re Lyondell Chem. Co*., 543 B.R. 127 (Bankr. S.D.N.Y. 2016) (finding congressional intent), and *SEC v. Bernard L. Madoff Inv. Sec. LLC*, 480 B.R. 501 (Bankr. S.D.N.Y. 2012), with *SEC v. Bernard L. Madoff Inv. Sec. LLC*, 513 B.R. 222 (S.D.N.Y. 2014) (finding no congressional intent), and *In re CIL Ltd.*, 582 B.R. 46 (Bankr. S.D.N.Y. 2018).

[18] *In re CIL Ltd.*, 582 B.R. at 92.

[19] *Abitron Austria GmbH v. Hetronic Int'l, 600 U.S. 412*, 143 S. Ct. 2522 (2023) at 2524 (quoting *WesternGeco LLC v. Ion Geophysical Corp.*, 138 S. Ct. 2129, 201 L. Ed. 2d 584 (2018)).

[20] Hadas Livnat, *Extraterritorial Application of Bankruptcy Code's Fraudulent Transfer Provisions* (11 U.S.C.A. §§ 548, 550), 39 A.L.R. Fed. 3d Art. 5 (2019) (citing *In re Sherwood Invs. Overseas*, 2016 WL 4486470).

2025 Upcoming Events

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February 8 – Richard DeWitt Memorial Vis Pre-Moot Competition (Miami)

March 1 – Pre-Moot Madrid Competition for law students (Miami)

March 13 – Board Certification in International Law Exam

March 19 – Lunch & Learn hosted by Fiduciary Trust International (Coral Gables)

May 16 – Board Certification in International Litigation and Arbitration exam

May 21 – Lunch & Learn hosted by Fiduciary Trust International (Coral Gables)

June – End of Year Chair's Reception (Boca Raton)

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