INTERNATIONAL LAW QUARTERLY

www.internationallawsection.org

Focus on Extraterritoriality

fall 2024 • volume XL, no. 3

In this issue:

Cover image by iStock/Lusky

This publication is prepared and published by The Florida Bar.

Contacts: Jeffrey S. Hagen at *jhagen@harpermeyer.com*
Jennifer Mosquera at *jmosquera@sequorlaw.com*

Features

10 • The TikTok Ban: Geopolitics, Global Speech, and the Right to Equal Laws

In this article, the author summarizes the issues surrounding the TikTok ban and the lawsuit filed by TikTok and parent company ByteDance to block the forced sale or division of TikTok from its parent company. He posits that a carceral and disciplinary mentality drives recent federal involvement with social media and online video and frames the TikTok challenge as a new front in a contest between the American people and people around the world with human rights to free expression on the one hand, and on the other, a partisan, militaristic censor class insisting on platform docility, utility, and complicity.

13 • The Extraterritorial Reach of Corruption, Money Laundering, Fraud and Tax Crimes: Offenses Without Borders?

The United States is fairly unique in the extraterritorial reach of some of its criminal laws for violations occurring outside its national boundaries. Federal laws are presumed to apply only within the United States, unless Congress clearly provides otherwise. Beside a clear expression of congressional intent subject to constitutional limitations, extraterritorial application must comport with international law. This article will explore the often conflicting law of extraterritorial application of federal criminal statutes involving corruption, money laundering, and fraud offenses, the standards applicable in ascertaining extraterritoriality, and the relative scarcity of case law addressing these issues.

15 • In *re Al Zawawi* – Rethinking Eligibility Requirements in Chapter 15 Cases

In *Al Zawawi v. Diss*, the Eleventh Circuit confronted the tension between Chapter 15 of the Bankruptcy Code, which incorporates the UNCITRAL Model Law on Cross Border Insolvency (the Model Law), and an eligibility provision that, whether intended or not, could have limited its scope. Guided by precedent and legislative history, the Court held that though a plain reading of the statute suggested the restrictions should apply, the purpose of the statute required that the eligibility requirements are not a prerequisite for recognition of a foreign proceeding.

18 • U.S. Immigration Laws and Their Extraterritorial Application to Border Control, Foreign Adoptions, and Derivative Citizenship

With regard to extraterritoriality, there are several instances where the United States' immigration laws apply to conduct and processes that occur outside of the nation's borders. Various U.S. agencies are responsible for these international processes, including U.S. Customs and Border Protection and U.S. Citizenship and Immigration Services, as part of the Department of Homeland Security, and the Department of State. This article summarizes the processes related to border control, foreign adoptions, and derivative citizenship. The author concludes that international law practitioners should seek the advice of U.S. immigration counsel with regard to intercountry adoptions and applications for derivative citizenship due to their complexity.

21 • Cognitive Sovereignty and International Norms: Human Rights Implications and Extraterritorial Obligations in Neurotechnology

The growing influence of neurotechnology raises concerns about privacy, autonomy, and mental integrity, posing new challenges to existing human rights frameworks. The rapid advancement of neurotechnology, such as brain-computer interfaces and neural implants, raises the potential for misappropriation and ethical concerns, which are becoming more pronounced, specifically in the context of human rights, such as consent, cognitive liberty, and mental privacy. This article aims to evaluate how the potential of neurotechnology can be harnessed without compromising fundamental human rights and freedoms by examining the intersection of technology, human rights, and international law.

THE FLORIDA BAR
INTERNATIONAL LAW SECTION

SECTION GLOBAL SPONSORS

HMI
HARPER | MEYER

SECTION HEMISPHERIC SPONSORS

JAMS
Local Solutions. Global Reach.

ReedSmith
Driving progress through partnership

SEQUOR LAW

SECTION REGIONAL SPONSORS

AbitOs
Accountants + Advisors

BARAKAT + BOSSA

BCLP

Buchanan

EISNERAMPER

GT GreenbergTraurig

Hogan Lovells

MM&H
MARK MIGDAL & HAYDEN

SECTION STRATEGIC SPONSORS

BECERRA LAW, P.A.

CROSSROADS INVESTIGATIONS

OKI LAW

OSORIO INTERNACIONAL
ATTORNEYS • ABOGADOS • ADVOGADOS

RIFKIN AND FOX-ISICOFF, P.A.
The Immigration Law Firm

SQUIRES INTERNATIONAL LAW

VERITEXT LEGAL SOLUTIONS

Message From the Chair
The Extraterritorial Reach of the ILS


ANA M. BARTON

It is a great privilege to be addressing the readership of the *International Law Quarterly* (*ILQ*) and an even greater privilege to be serving as the 2024-2025 chair of The Florida Bar International Law Section (ILS). As a former co-editor of this periodical, I am immensely proud of the high-caliber publication that the *ILQ* team works so hard to produce. I want to echo what many already know: the *ILQ* is a resource that every international law practitioner would be wise to read to stay current on the most topical legal issues around the world.

This edition of the *ILQ* is focused on the theme of *Extraterritoriality*. One of the defining and, to me, most impressive attributes of the ILS is that it is an organization that unites a diverse cross-section of lawyers. International law touches on issues spanning from cross-border litigation and arbitration disputes, to transnational corporate transactions, to tax and treaties, to family and estate planning, to immigration and human rights, to customs and trade, and the list goes on and on. But no matter your area of specialization, international legal practitioners must be aware of and sensitive to the implications that actions in any one jurisdiction may have in another jurisdiction. As we navigate the intricate web of international law, the extraterritorial reach of the law should not be underestimated. That reach seemingly has no bounds, especially as governments take increasingly aggressive positions on the scope of their laws and the conduct they can regulate notwithstanding traditional national borders. It's not every day that TikTok, nefarious criminal enterprises, U.S. border control, and neurotechnology are grouped together—but each of these is feeling the effects of extraterritoriality in their own way, as the articles in this *ILQ* describe. I hope you enjoy these thought-provoking pieces.

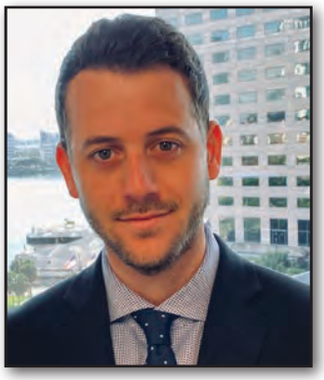
So, what's in store for the ILS this year, aside from stellar *ILQs* of course? In August, we kicked off with our third annual ILS Fantasy Football League, which has grown to international proportions with teams participating all the way from Mexico, England, and Romania. In September, we traveled to the International Bar Association Annual Conference in Mexico City, where we formalized a cooperation agreement with the Barra Mexicana, Colegio de Abogados, A.C. (BMA). While in Mexico, we also joined forces with the Bar Council of England & Wales, the Bar of Northern Ireland, The Bar of Ireland, ANADE, BMA, and the Ilustre y Nacional Colegio de Abogados de Mexico to organize a moot-style presentation playfully entitled *Battle Royale: Civil versus Common Law*, highlighting different advocacy approaches found in international arbitration. Dates have been set and announced in the weekly *ILS Gazette* for our annual "End of Summer" happy hour, four-part Lunch & Learn series, Orlando luncheon in November, December holiday party, iLaw2025, Richard DeWitt Memorial Vis Pre-Moot Competition, and the Section's annual meeting in June. We look forward to engaging with our members across these different events.

As if that schedule is not enough, there is more! Following in the sound tradition of prior section leadership, I do want to take this opportunity to highlight one of my goals for this year: to implement a robust CLE webinar series. With the help of the ILS board and the Section's program administrator, I would like to tap into the rich expertise of our members to increase the number of on-demand CLEs offered by the Section. The ILS is consistently strong when it comes to in-person programing—and that certainly will not change. However, requests for webinars are ever increasing, and we are, thankfully, positioned to answer that call to action. Not only is this important for raising the Section's profile, but it is commonly requested by the many foreign bar associations with which we collaborate. There is also a real need to increase the number of on-demand CLEs available for Florida Bar Board Certification in both International Law and International Litigation & Arbitration. If you have a CLE topic you want to present, please do not hesitate to contact me so we can facilitate it. I have no doubt this initiative will take off, and I'm excited to get it going.

Cheers to what's promising to be a very active 2024-2025 ILS season, and I look forward to meeting and working with more of you this year.

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

From the Editors …



JEFFREY S. HAGEN

JENNIFER MOSQUERA

Extraterritoriality—at times confusing to pronounce and even more difficult to spell—often makes an appearance within the practice of international law. The concept of extraterritoriality speaks to the ability of countries to apply laws beyond their borders. Many factors are considered when determining whether a law or regulation has an extraterritorial application, including the need to regulate outside of a jurisdiction's domestic borders, respecting the sovereignty and governance of other nations, and limiting or outright avoiding conflicts of law. The importance of grasping extraterritoriality as international law practitioners is obvious—understanding when and where laws apply prepares attorneys to better serve their clients.

The Fall 2024 edition of the *International Law Quarterly* contains articles penned by authors who have taken it upon themselves to explore these boundaries and give us food for thought on where the law ends and begins. Our first article, "The TikTok Ban: Geopolitics, Global Speech, and the Right to Equal Laws" by **Professor Hannibal Travis** delves into the issues raised in the lawsuit regarding the forced sale or division of TikTok from its parent company, ByteDance. Next, **Robert Becerra's** "The Extraterritorial Reach of Corruption, Money Laundering, and Fraud Crimes: Offenses Without Borders?" explores the nuanced and at times conflicting application of multiple federal criminal statutes outside of the national boundaries of the United States.

The next three articles discuss extraterritoriality in three very different arenas—bankruptcy, immigration, and human rights. **Juan Mendoza's** *"In re Al Zawawi* – Rethinking Eligibility Requirements in Chapter 15 Cases" discusses the Eleventh Circuit's decision that recognition of a foreign proceeding under Chapter 15 of the Bankruptcy Code is not restricted by the definition of "debtor" under 11 U.S.C. § 109. **Larry Rifkin's** "U.S. Immigration Laws and Their Extraterritorial Application to Border Control, Foreign Adoptions, and Derivative Citizenship" discusses conducts and processes that occur outside of the United States that affect the immigration process. **Theshaya Naidoo's** "Cognitive Sovereignty and International Norms: Human Rights Implications and Extraterritorial Obligations in Neurotechnology" highlights the surge in brain-computer interfaces and neural implants and deliberates on the ways this can trigger extraterritorial human rights obligations.

Additionally, in this edition of the *International Law Quarterly's* "Quick Take" column, **Li Massie** discusses a recent and momentous United States Supreme Court decision in her article "The End of the *Chevron* Deference Doctrine."

As usual, we present the ILS Section Scene, which in this edition features several events held during the month of May in Miami, including the TTN 2024 Americas Tax Conference, the ILS Marlins Game Night, the ILS Lunch & Learn With Raquel (Rocky) Rodriguez, and the ILS Networking Happy Hour, as well as ILS events held in conjunction with the Annual Florida Bar Convention held in June in Orlando. We also showcase the World Roundup, which features important legal updates and current events from all over the world. This edition, we feature updates from China, India, the Middle East, North America, South America, and Western Europe.

We hope that after reading this edition of the *ILQ* you will be better positioned to understand the ways in which conduct abroad can have legal ramifications in an entirely different jurisdiction. We look forward to continuing to publish novel and substantive international law perspectives in the next one.

Best regards,

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

Jennifer Mosquera
Co-Editor-in-Chief
Sequor Law

QUICK TAKE

The End of the *Chevron* Deference Doctrine

By Li Massie, Tallahassee

The Supreme Court of the United States issued a groundbreaking decision on 28 June 2024 that has the potential to affect all who practice federal administrative law in the United States. In *Loper Bright Enterprises v. Raimondo*,[1] the Supreme Court overruled the *Chevron*[2] deference doctrine, which required courts to defer to reasonable federal agency constructions of ambiguous statutes the agency administers. This decision marks a significant shift in administrative law. Under *Loper Bright*, instead of the federal agency interpreting the statute's meaning, as was the case for forty years under *Chevron*, the duty to interpret the statute is returning back to the courts.

Background: The *Chevron* Deference Doctrine

Under the longstanding *Chevron* deference doctrine, when courts reviewed a federal agency's actions under the statutes passed by the U.S. Congress that gave the agency the general authority to make rules, the courts first asked whether the statute was ambiguous and second, if the statute was silent or ambiguous as to the specific issue, whether the agency's answer was based on a permissive construction of the statute. This two-part test meant that if the statute was ambiguous as to the specific issue at hand, the courts were required to defer to the federal agency's reasonable construction of the statute. *Chevron* has been cited more than 18,000 times by the U.S. Supreme Court and lower federal courts.[3] In applying *Chevron* deference, one study estimated that the agencies have prevailed 77.4% of the time in the federal courts of appeals.[4]

Overruling the *Chevron* Deference Doctrine

In *Loper Bright*,[5] the Supreme Court held that the U.S. Administrative Procedure Act (APA) requires the U.S. courts, not the agency itself, to decide all relevant questions of law and to interpret statutory provisions. The Court further held that because the courts were to decide all questions of law and statutory interpretation, the *Chevron* deference doctrine contradicted the APA. The Court also went as far as to state that the *Chevron* deference doctrine "has proved to be fundamentally misguided,"[6] "is unworkable,"[7] and has failed to safeguard reliance interests, "leaving those attempting to plan around agency action in an eternal fog of uncertainty."[8]

In overturning the *Chevron* deference doctrine, the Supreme Court partly clarified the effect of its decision in *Loper Bright*, but the decision left many questions unanswered. First, the Court clarified that its ruling did not apply retrospectively, meaning that prior cases that were decided under the *Chevron* deference doctrine remain good law. Second, the Court clarified that its decision to end *Chevron* deference does not mean an end to the longstanding practice that a court can *consider* a federal agency's interpretation as persuasive authority under the *Skidmore*[9] doctrine. The only difference now is that a court is not *bound* to defer to the federal agency's interpretation.

Implications

Despite these clarifications, it is early days, and the total impact to practitioners is still uncertain. The overall impact will vary depending on the specific agencies and the specific industries. On the one hand, some practitioners may find it easier to challenge federal agency action as overreaching and incorrect. Federal agencies will find it more difficult to defend challenges to their regulations. This could result in an increase in litigation against federal agency decisions since there is now potentially a greater chance of winning against an agency. It may also be more difficult for federal agencies to justify reinterpretations of the statutes that lead to changes in the agencies' policies, thereby promoting greater predictability. On the other hand, eliminating the *Chevron* deference doctrine may disrupt the benefits of the agency's accumulated knowledge, especially in complex and nuanced industries where courts may have less experience in the area. It may also place a higher burden on the expertise of the courts to decipher these complex areas of law that traditionally implicate technical and scientific expertise. Further, because regulated entities are still expected to follow agency interpretations, the knowledge that courts are no longer required to defer to the agency's interpretations may raise some concerns as to the ultimate reliability of an agency's guidance.

Practitioners have already begun arguing cases under this change. For example, in the international trade space, practitioners are already arguing before the U.S. Court of International Trade that the Court need not defer to the U.S. Department of Commerce's interpretation of a statute that defines affiliations between parties relating to antidumping cases.[10] In another case, one company urged the U.S. Federal Circuit to review the U.S. International Trade Commission's decision to bar the import of certain products for alleged infringement of patents because the Commission based its ruling on a 2015 decision that, in turn, was decided using the *Chevron* deference doctrine.[11] International businesses and their counsel may face increased uncertainty but also increased opportunities in navigating this new regulatory landscape, especially as it concerns areas like trade, sanctions, and environmental protections. Only time will show the full impact of the U.S. Supreme Court's decision in overturning the *Chevron* deference doctrine.

Li Massie *is an attorney at Akerman LLP where she focuses her practice on international trade and regulatory compliance. She advises clients on matters before the U.S. Customs and Border Protection, the U.S. Department of Commerce, and the U.S. Court of International Trade. Ms. Massie also counsels producers of dietary supplements, medical devices, drugs, and cosmetics in labeling compliance and other regulations, helping clients to expand into the United States and abroad. Before joining Akerman, she clerked at the Florida First District Court of Appeal. She obtained her bachelor's degree in international studies from the University of Florida, her master's degree in contemporary Chinese studies from the University of Nottingham, and graduated cum laude from the Florida State University College of Law with her juris doctor.*

Endnotes

[1] *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

[2] *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[3] *Chevron Deference in the Courts of Appeals*, Congressional Research Service, LSB10976 (7 June 2023), available at https://crsreports.congress.gov/product/pdf/LSB/LSB10976.

[4] *Id*. at 3.

[5] *Loper Bright Enterprises*, 144 S. Ct. at 2273.

[6] *Id*. at 2270.

[7] *Id*.

[8] *Id*. at 2272.

[9] *Skidmore v. Swift*, 323 U.S. 134 (1944).

[10] Notice of Subsequent Authority, *Ventura Coastal v. U.S.*, No. 23-00009 (Ct. Intl. Trade 3 July 2024).

[11] Sonos, Inc.'s Response to Petition for Rehearing En Banc, *Sonos Inc. v. ITC*, No. 22-1421, (Fed. Cir. 8 Aug. 2024).

The TikTok Ban: Geopolitics, Global Speech, and the Right to Equal Laws

By Professor Hannibal Travis, Miami

Photo: QubixStudio/Shutterstock.com

TikTok and its parent company, ByteDance, have sued the Biden administration to block the forced sale or division of TikTok from its parent company.[1] Many consider the forced sale as acting in effect as a ban of TikTok. Press reports see a TikTok ban as being potentially catastrophic for short-form video creators and small businesses that sell products online,[2] but also serving as a "major victory" in a "war" against "Chinese technology."[3] People who have studied the lobbying actions and false claims that led to the ban criticize it as "authoritarian," a "security state" power grab, an assertion of control over political "dissent,"[4] and a full-scale attack on "information that contradicted official narratives."[5]

ByteDance Ltd., the owner of speech-sharing apps TikTok, Douyin, and Jinri Toutiao, may be the most valuable non-public Internet company in the world.[6] At the convergence of machine learning and the mobile social Web, the firm's networked curation of news, art, photography, video, and advertising seemingly represents the future of business.[7] Such creative economies, however, are tightly regulated, and the laws governing them are imperfectly harmonized across national borders. In the United States and Europe, TikTok confronted many of the same legal hurdles that have bedeviled Google, Facebook, and their defunct counterparts such as Napster, Veoh, and Yahoo! Music. Recently, an additional hurdle not faced by the U.S.-based tech giants has taken center stage: a relationship to a Chinese parent company.

TikTok and ByteDance have long been rebels in their respective domains. In China, ByteDance filed an unfair competition lawsuit against WeChat/Tencent, which Facebook and Google never did to their competitors, perhaps because they did not need to do so.[8] While Facebook and Google confronted

the threat of a social media monopoly held by Yahoo! in the early 2000's, the weakness of Yahoo!'s and other incumbents' patents left the rising U.S. giants relatively free to operate. Microsoft's and Verizon's ability to leverage national or local monopolies were blunted during the critical 2001-2004 period by settlements and commitments relating to fair treatment of "edge" providers like search engines, social media sites, or other lawful content or applications on the Internet, under antitrust or net neutrality. TikTok boasts in its brief against the ban that its innovative and proprietary algorithm and its global mindset and far-flung userbase have driven its monthly user count to among the largest of any platform.[9]

TikTok claims that separating the companies would be technically and economically difficult, discriminatory, and harmful to its users. Technically speaking, the company says that a ByteDance engineering team has to use ByteDance code and machines to maintain the algorithm and database, and that a new team would need years to reinvent these systems.[10] Economically, the law envisions an unlikely deal being done to buy the independent TikTok code and content without the ByteDance infrastructure.[11] It provides about half to one-third the amount of time for TikTok to close the deal that even a much more modest technology transaction would require in terms of due diligence, paperwork, and the like. It is true that Facebook closed its acquisition of Instagram in only five months and that Elon Musk closed the Twitter deal in six months, but Instagram had no revenue at the time and Musk did not have to impose some kind of geographic partition among Twitter's facility or replace critical technology subject to Chinese technology export regulations.[12] A more comparable divestiture would be those done by Verizon and other conglomerates to get mergers approved, which would take two to three times longer than the amount of time TikTok has to offer, sell, close, and execute. If a competitor to TikTok with a large amount of revenue in video, social media, or digital advertising were to attempt an acquisition, competition law review around the world could take nearly two years or even longer versus a hard deadline for the TikTok divestiture to close in twelve months and a deadline of nine months without a presidential waiver.[13]

The United States seems to be well aware of the possibility that the evidence will not bear out its main defense that the law is a forced sale for national-security purposes rather than a ban targeting disfavored political and ethnic groups. Congress crafted, and the president signed, a unique procedure to provide TikTok and ByteDance with a modicum of due process, a concept recognized in the Constitution and trade agreements. They confined judicial review to an appeals court, even though the U.S. Supreme Court has often noted the importance of factual development in the federal trial courts hearing constitutional challenges to statutes, most recently in *Moody v. NetChoice, LLC*.[14]

Algorithmic competition is an issue that distinguishes TikTok's rise, and therefore the legislation targeting TikTok presents an early test case of the theory of algorithmic or AI "safety." According to safety advocates like President Joe Biden or Senate Majority Leader Charles Schumer, AI and social media have to be "safe."[15] TikTok's algorithm stood out, especially in the period since YouTube began downranking the average person in favor of "authoritative" corporate sources, for allowing new videos to break out and go viral.[16]

Although the ban on China-based ByteDance Ltd. owning a U.S. app was justified in Congress as being necessary to protect user privacy, social cohesion, and national security, a look at similar cases indicates that TikTok has a good chance of prevailing in its bid to survive.[17] These cases have involved executive orders against the app (and a similar one called WeChat), state laws attempting to regulate TikTok, and private tort suits. There are other theories of unconstitutionality involving the Bill of Attainder Clause and other constitutional provisions that I will not mention here due to limitations of space.

Prelude to TikTok II: The First Amendment and Equal Protection

The First Amendment prevents poorly drafted, disproportionate, and irrationally conceived laws from being enforced.[18] The danger of selective enforcement is simply too great.[19]

In California, the County of Los Angeles once tried to ban comic books depicting crime or delinquency as corrupting young people, but exempted illustrated religious texts.[20] The ban was ruled unconstitutional as not guaranteeing to all publishers the protection of equal laws, a principle that goes back to the discriminatory enforcement of laundry permits in San Francisco against Chinese-owned laundry businesses.[21] The Court explained that improper discrimination is unconstitutional, as are arbitrary legal privileges.[22]

While the comic book case arose in the 1950's, the principle remains valid today. In 2011, the U.S. Supreme Court struck down a California law that treated violent video games differently from films, books, and other media content.[23] The Court rejected California's argument that video games are too risky for kids because they are "interactive," and observed that a compelling novel or film about crime or revolution can draw in the reader and create an imaginative space for role-playing.[24]

... continued on page 37

The Extraterritorial Reach of Corruption, Money Laundering, and Fraud Crimes: Offenses Without Borders?

By Robert J. Becerra, Coral Gables

The United States is fairly unique in the extraterritorial reach of some of its criminal laws for violations occurring outside its national boundaries. Extraterritorial application of these laws is one hinging on congressional intent and authority; federal laws are presumed to apply only within the United States, unless Congress clearly provides otherwise. Beside a clear expression of congressional intent subject to constitutional limitations, extraterritorial application must comport with international law.[1] This article will explore the often conflicting law of extraterritorial application of federal criminal statutes involving corruption, money laundering, and fraud offenses, the standards applicable in ascertaining extraterritoriality, and the relative scarcity of case law addressing these issues.

When does a law have extraterritorial application?

The Supreme Court of the United States, first in *Morrison*[2] and then *RJR Nabisco*[3] stated, in the civil context, that it is presumed in all cases that a statute does not apply extraterritorially unless the text of the statute clearly shows that Congress expressly intended such a result.[4] If the statute has no clear, affirmative indication that it applies extraterritorially, a court then examines the statute's "focus" to determine whether the application of the statute involves a domestic application of the statute in question. The Supreme Court stated that applying the presumption against exterritoriality serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries, and reflects a common-sense notion that Congress legislates with domestic concerns in mind.[5]

If it is necessary to examine a statute's "focus" due to there being no express congressional intent of extraterritoriality, then it must be determined if the conduct relevant to the statute's focus occurred in the United States. If so, then the case involves a permissible domestic application, even if other conduct occurred abroad, but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.[6]

Both *Morrison* and *RJR Nabisco* were decided in the context of a civil action. There is a tension between those cases and its progeny and the case of *United States v. Bowman*, a 1922 criminal case where the Supreme Court stated that in certain classes of criminal cases, extraterritorial effect may be "inferred from the nature of the offense."[7] *Bowman* has not been expressly overruled and continues to be followed despite its tension with *Morrison* and *RJR Nabisco*.

In Bowman, the defendants entered into a scheme to defraud a government-owned company in Brazil. In that case, while the Supreme Court acknowledged the presumption against extraterritoriality, it stated that it normally applied to "crimes against private individuals … their property … assaults, murder, burglary, larceny … embezzlement, and frauds of all kinds." The Court reasoned, however, that the presumption should not apply to criminal laws, which as a class are not dependent on their locality for jurisdiction but were enacted so that the government can "defend itself against obstruction, or fraud wherever perpetrated" and therefore, extraterritoriality could be "inferred" from the nature of the offense.[8] Lower courts, in trying to reconcile *Morrison* or *RJR Nabisco* with *Bowman*, have both applied the presumption against extraterritoriality in criminal cases while acknowledging the tension between *Morrison*, *RJR Nabisco*, and *Bowman*, or stated that *Bowman's* exception to the presumption needs to be narrowly applied given the Supreme Court's subsequent decision in *Morrison*.[9] Some lower courts have interpreted statutes that have both civil and criminal application consistently, applying the presumption against extraterritoriality to a statute whether it is being applied civilly or criminally.[10]

The Eleventh Circuit Court of Appeals, however, with jurisdiction over federal courts in Florida, Georgia, and Alabama, has expressly held that the Supreme Court has not overruled *Bowman*, and found absent the Supreme Court overruling it, *Bowman* remains binding law. The Eleventh Circuit has long acknowledged that Congress has the power to regulate extraterritorial acts of U.S. citizens, or conduct outside the United States of noncitizens where congressional intent is clear, and whether it has done so in a particular instance is an issue of statutory interpretation.[11] As in *Bowman*, the Eleventh Circuit has found that Congress's intention to apply a statute extraterritorially, when not express or clear, may be inferred from the nature of the harm the statute is designed to prevent, the focus of the statute, and from the fact that limiting the scope of its prohibitions would undermine the statute's effectiveness.[12] As stated by the Eleventh Circuit, "Crimes fall under the *Bowman* exception when limiting their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens in foreign countries as at home." Where the nature of the activities warranted a broad sweep of power, the Eleventh Circuit has upheld extraterritorial application.[13] An example of the Eleventh Circuit's application of *Bowman* to find a statute has extraterritorial reach is *United States v. Plummer*.[14] In *Plummer*, the Eleventh Circuit held the statute that penalizes smuggling cigars into the United States, 18 U.S.C. § 545, applies extraterritorially. In so holding, the Court found "smuggling is quintessentially an international crime" and that "Congress unquestionably has the authority to enforce its laws beyond the territorial boundaries of the United States" basing its conclusions on *Bowman*. In *Plummer*, the Eleventh Circuit rejected the defendant's argument that *Bowman* had been overruled by subsequent Supreme Court cases, stating that "[w]e are not aware of any court to this day that has relied on . . ." other Supreme Court cases, "to hold *Bowman* inapplicable to a criminal statute . . . ." As such, the *Plummer* court found that the smuggling statute's extraterritorial effect could be inferred from the nature of the offense and the problem to which the statute was directed, because smuggling by its nature involves activities outside U.S. territory.[15]

The extraterritorial reach of a criminal statute is a question of statutory interpretation. Courts consider two questions: (1) whether Congress intended the statute to apply extraterritorially, and (2) whether such application complies with principles of international law.[16] Federal criminal statutes may only be applied extraterritorially if consistent with due process requirements, which necessitate a sufficient nexus between the defendant and the United States to ensure the application is not arbitrary or fundamentally unfair.[17]

For noncitizens acting entirely abroad, a jurisdictional nexus exists if the aim of the charged activity is to cause harm inside the United States or to U.S. citizens or interests.[18] Due process, however, does not require the defendant to be on notice that they would be subject to criminal prosecution in the United States, as long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere.[19]

According to the American Law Institute's Fourth Restatement of Foreign Relations Law of the United States,[20] customary international law permits exercises of prescriptive jurisdiction if there is a genuine connection between the subject of the regulation and the state seeking to regulate it. This genuine connection usually rests on a specific connection between the state and the subject being regulated, such as territory, effects, personality,

... continued on page 42

In re Al Zawawi – Rethinking Eligibility Requirements in Chapter 15 Cases

By Juan J. Mendoza, Miami

In *Al Zawawi v. Diss (In re Al Zawawi)*,[1] the Eleventh Circuit confronted the tension between Chapter 15 of the Bankruptcy Code,[2] which incorporates the UNCITRAL[3] Model Law on Cross Border Insolvency[4] (the Model Law), and an eligibility provision that, whether intended or not, could have limited its scope. Guided by precedent and legislative history, the Court held that though a plain reading of the statute suggested the restrictions should apply, the purpose of the statute required that the eligibility requirements are not a prerequisite for recognition of a foreign proceeding.[5]

In re Al Zawawi

In *In re Al Zawawi*, Al Zawawi was placed into bankruptcy in England after failing to make payments due under a divorce judgment.[6] The joint trustees sought recognition of the English bankruptcy under Chapter 15 of the Bankruptcy Code.[7] To obtain recognition of the English bankruptcy, the joint trustees had to demonstrate that the English bankruptcy is a foreign proceeding that satisfies the requirements of sections 1515 and 1517 of the Bankruptcy Code.[8] A foreign proceeding is defined by the Bankruptcy Code as a "collective or administrative proceeding in a foreign country … under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court."[9]

Al Zawawi opposed recognition on various grounds, including that he was an eligible debtor under section 109(a), which provides that "only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title."[10] He argued that because section 109 applied to the Chapter 15[11] and he did not have a domicile, place of business, or property in the United States, he did not qualify as an eligible debtor and recognition could not be granted.[12] The joint trustees countered that section 109 and its eligibility requirements do not apply in Chapter 15 cases.[13]

The Eleventh Circuit faced an important question: whether section 109(a) and its eligibility requirements apply to Chapter 15 cases. The Court acknowledged that "[a] plain reading of the Bankruptcy Code … indicates that § 109(a) does apply in Chapter 15 cases" and noted that

the Second Circuit had reached a similar conclusion, finding that the plain reading controls.[14] However, the Eleventh Circuit recognized that it is bound by its precedent in *In re Goerg*, where it addressed a similar question under the former section 304, the predecessor statute of Chapter 15.[15] Guided by its precedent, the Court examined the purpose of Chapter 15 to resolve this tension and ultimately interpreted the statute in a manner consistent with the purpose of Chapter 15 and the Model Law.[16]

The Model Law and Chapter 15

In 2005, Congress enacted Chapter 15, codifying the Model Law promulgated by UNCITRAL.[17] The objectives of the Model Law are reflected in the legislative history and at the outset of Chapter 15 itself: to encourage cooperation between the United States and foreign countries in cross-border insolvency cases, to provide legal certainty for trade and investment, to promote the fair and efficient administration of cross-border insolvency cases to protect the interests of creditors and interested persons, the protection and maximization of the value of the debtor's assets, and the facilitation of the rescue of a financially troubled businesses.[18]

Chapter 15 incorporates the Model Law almost in its entirety, with few express exclusions to align the Model Law with U.S. law, all with the goal of achieving uniformity in cross-border insolvency proceedings.[19] The goal of uniformity is reinforced by section 1508, which directs the courts interpreting Chapter 15 to "consider its international origin, and the need to promote an application of this chapter with the application of similar statutes adopted by foreign jurisdictions."[20] This principle is also echoed in the House Report, which recommends reviewing the UNCITRAL Guide to Enactment of the Model Law and the related reports.[21]

To achieve its goals, Chapter 15 offers ancillary assistance to foreign proceedings that satisfy its requirements for recognition. A proceeding shall be recognized under Chapter 15 if it is either a foreign main or nonmain proceeding, if the foreign representative who applies for recognition is a person or body, and if the petition meets the procedural requirements of section 1515.[22] Upon recognition, a foreign representative gains access to the U.S. bankruptcy system and the range of relief available

... continued on page 45

Upcoming Events

2024

October 18 – Deadline to submit statement of interest for articles to be published in the *ILQ* Winter 2025 edition.

October 24 – ILS Webinar on U.S. Immigration Laws and Their Extra Territorial Application to Border Control, Foreign Adoption, and Derivative Citizenship (online)

October 31 – Deadline to submit application for Board Certification in International Litigation and Arbitration

November 5 – ILS Webinar on International Sports Law and Arbitration – The FIFA Regulations on the Status and Transfer of Players (RSTP) and the Court of Arbitration for Sport (online)

November 14 – Orlando Holiday Luncheon (Orlando)

November 22 – Deadline to submit article drafts for the *ILQ* Winter 2025 edition

December – ILS Holiday Reception, date TBD (Miami)

2025

January 22 – Lunch & Learn hosted by Fiduciary Trust International (Coral Gables)

February 6 – ILS Mid-Year Meeting (Miami)

February 7 – iLaw 2025 Conference (Miami)

February 8 – Richard DeWitt Memorial Vis Pre-Moot Competition (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 27 – ILS Annual Meeting (Boca Raton)

U.S. Immigration Laws and Their Extraterritorial Application to Border Control, Foreign Adoptions, and Derivative Citizenship

By Larry S. Rifkin, Miami

Photo: lev radin/Shutterstock.com

Extraterritoriality refers to the application of a state's law beyond the state's borders.[1] In the immigration context, there are several instances where U.S. immigration laws govern conduct that occurs outside of its borders. Various U.S. agencies are responsible for these international processes, including U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS), as part of the Department of Homeland Security (DHS), and the Department of State (DOS). In the area of border control efficiency, CBP agents are stationed at various locations abroad to screen and inspect U.S. passengers. In the area of intercountry adoptions, both USCIS and DOS are involved in the adjudication of the petitions and immigrant visas. In the area of derivative U.S. citizenship for persons born abroad, both USCIS and DOS are responsible for managing these processes.

Border Control and Preclearance

U.S. Customs and Border Protection is tasked with the enforcement of our immigration laws to protect the U.S. border, airports, and seaports from illegal entry, illicit activity, and other threats. According to CBP officials, on average more than a quarter million international air travelers arrive daily at U.S. airports and the number is expected to grow.[2] Beginning in Toronto in 1952, preclearance is the agency's practice of operating prescreening border control facilities by stationing CBP personnel at designated foreign airports and other ports of entry located outside of the United States to inspect travelers prior to boarding U.S.-bound flights.[3] A preclearance inspection is essentially the same inspection an individual would undergo at a U.S. port of entry.[4] After undergoing preclearance abroad, "travelers then bypass CBP and Transportation Security Administration (TSA) inspections upon arrival in the United States and proceed directly to their connecting flight or destination."[5] Today, CBP has more than "600 officers and agriculture specialists stationed at 15 Preclearance locations in 6 countries: Dublin and Shannon in Ireland; Aruba; Bermuda; Abu Dhabi in the United Arab Emirates; Nassau in the Bahamas; and Calgary, Toronto, Edmonton, Halifax, Montreal, Ottawa, Vancouver, Victoria, and Winnipeg in Canada."[6]

Benefits and Disadvantages of Preclearance

For international passengers, the benefits of preclearance are that they skip CBP and TSA inspection lines upon arrival in the United States and are therefore less likely to miss a domestic connection.[7] For the airlines, preclearance allows them to expand the number of flights and routes to desirable U.S. destinations and reduce international airport congestion, as well as gain access to less expensive U.S. domestic gates.[8] In addition, when CBP at a U.S. airport denies a traveler entry into the country, the airline is responsible for the costs to return the passenger to the country of origin.[9] When CBP preclearance prevents a passenger from boarding, the airline immediately has saved the cost it otherwise would incur had the passenger flown to the United States, since the passenger is already outside of the United States.[10]

For the airports, the popularity of preclearance boosts the number of passengers, flights, and routes to the United States, giving preclearance airports a competitive edge.[11] For the U.S. government, preclearance is the best tool CBP has to disrupt and deter terrorist threats through the strategic stationing of CBP law enforcement personnel overseas, preclearing travelers before they board U.S.-bound flights.[12] Preclearance also bolsters the safety and security of all travelers while facilitating efficient trade and travel. It also increases the collaboration and coordination between the United States and host governments through daily interaction with local law enforcement partners and other government authorities.[13]

The drawbacks to preclearance inspection are for international travelers unfamiliar with the process. The consequence of not realizing that travelers need to go through border control at the departure airport could result in travelers missing their flight if the lines are long at the CBP preclearance facility, particularly during peak periods when many flights are departing to the United States within a short period of time.[14] Another drawback is that airports are responsible for roughly 85% of preclearance costs, so there is a financial burden to foreign governments participating in preclearance.[15] Finally, once precleared, passengers are considered to have already entered the United States, which can cause administrative issues regarding their departure from the United States, if their flights are subsequently canceled or rerouted.

Intercountry Adoptions

Intercountry adoption refers to the adoption of a child born in one country by an adoptive parent living in another country. Two separate processes apply to children adopted by U.S. citizens: (1) the Hague Process, which applies to children residing in a country that is a party to the Hague Intercountry Adoption Convention; and (2) the Orphan Process, if the country where the child resides is not a party to the Convention.[16]

Hague Process

The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, or Hague Intercountry Adoption Convention, is an international agreement to safeguard intercountry adoptions. Concluded on 29 May 1993 in The Hague, the Netherlands, the Convention establishes international standards of practices for intercountry adoptions.[17] The United States signed the Convention in 1994, and the Convention entered into force for the United States on 1 April 2008.[18] The United States recognizes more than 100 countries as Hague countries.[19]

A U.S. citizen petitioner (Prospective Adoptive Parent – PAP) who resides in the United States and seeks to adopt a child who is a resident in a Hague Intercountry Adoption Convention country must follow these steps to adopt the child:

a. The PAP chooses a U.S. accredited or approved Adoptions Service Provider (ASP).

b. The PAP must obtain a home study from someone authorized to complete the intercountry adoption home study.

c. The PAP files Form I-800A with USCIS to be found suitable and eligible to adopt before adopting a child or accepting a placement.

d. Upon approval of Form I-800A, the ASP transmits Form I-800A approval and home study to the Hague country's Central Authority in order to match the child with the PAP.

e. Before adopting the child, the PAP must file Form I-800 petition with USCIS to have the child found provisionally eligible to immigrate to the United States based on the proposed adoption.

f. After USCIS provisionally approves Form I-800, it transfers the case to the Department of State for review of the visa application. After review, DOS transmits a letter of notification to the Hague country's Central Authority for the U.S. citizen petitioner to adopt the child or to obtain legal custody of the child in the foreign country for the purpose of emigration and adoption in the United States.

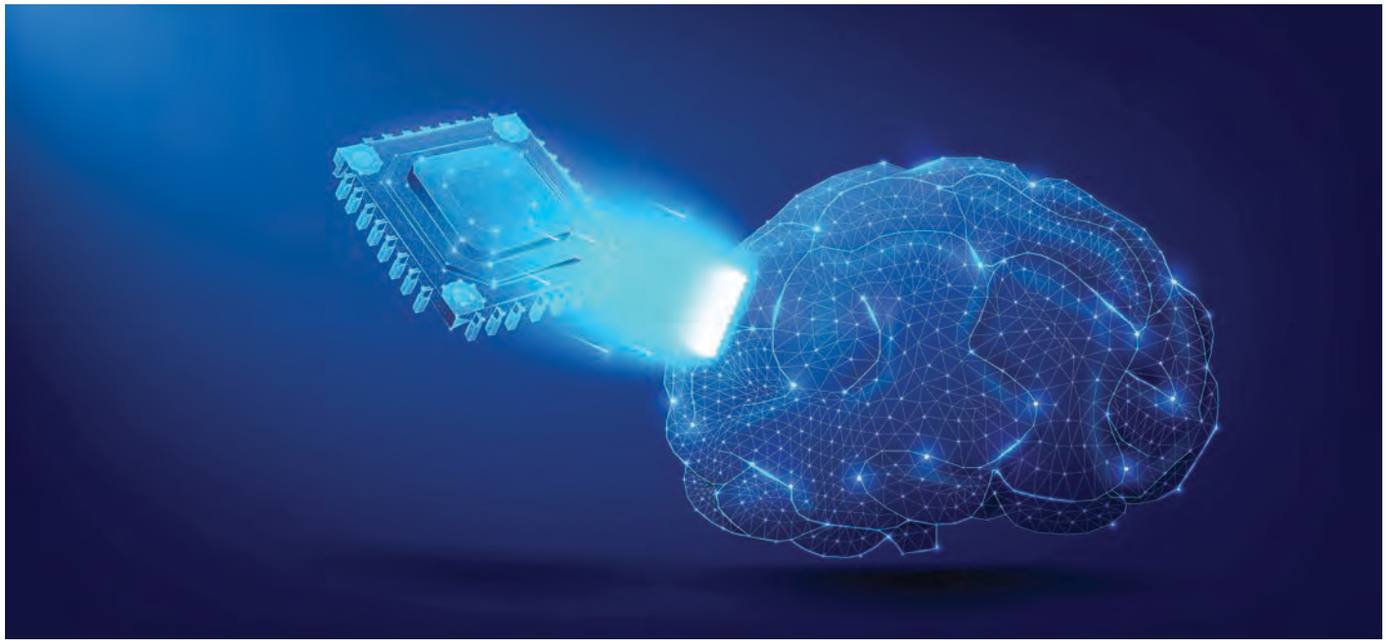
g. If the PAP resides in the United States, he/she must obtain an immigrant visa for the child.

h. The PAP travels with the child to the United States for admission with an immigrant visa.[20]

... continued on page 47

Cognitive Sovereignty and International Norms: Human Rights Implications and Extraterritorial Obligations in Neurotechnology

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



The human mind is typically considered the last frontier of technological exploration. However, these technologies are becoming increasingly accessible to the broader public due to recent advances in neurotechnology,[1] which is progressively gaining the ability to read, interpret, and manipulate brain activity.[2] This has the potential to revolutionize fields like medicine, communication, and even entertainment. These advances also introduce significant ethical dilemmas and human rights challenges[3] that should be acknowledged and addressed. The growing influence of neurotechnology raises concerns about privacy, autonomy, and mental integrity,[4] posing new challenges to existing human rights frameworks. The rapid advancement of neurotechnology, such as brain-computer interfaces (BCIs) and neural implants, raises the potential for misappropriation and ethical concerns,[5] which are becoming more pronounced, specifically in the context of human rights, such as consent, cognitive liberty, and mental privacy.

This article aims to evaluate how the potential of neurotechnology can be harnessed without compromising fundamental human rights and freedoms by examining the intersection of technology, human rights, and international law. Exploration of the human rights consequences of these technologies and an examination of the extraterritorial obligations of states and corporations in protecting these rights is timely, necessary, and relevant. This article will further explore, discuss, and advocate for the necessity of international legal frameworks that can effectively address these challenges and protect individuals' rights in the context of emerging technologies.

Defining Neurotechnology

At its core, neurotechnology is an intersection of neuroscience, engineering, and digital innovation.[6] It integrates a broad range of tools and systems, each with unique capabilities and applications, designed to interface with the human nervous system and facilitate the reading, modulation, and even enhancement of neural activity.[7] It can be formally defined as the application of engineering and technology to the human nervous system,[8] specifically in the context of the brain, with the aim of monitoring, influencing, and enhancing its functioning. For example, BCIs facilitate direct communication between the brain and external devices, which enables individuals to control devices using their thoughts.[9] Similarly, neural modulation techniques such as transcranial magnetic stimulation (TMS) and deep brain stimulation (DBS) involve the stimulation of specific brain regions to alter neural activity, which are used as mechanisms to treat various conditions

including depression, Parkinson's disease, and chronic pain.[10] Functional magnetic resonance imaging (fMRI) and electroencephalography (EEG) are methods used to visualize brain activity, which provide insights into brain functions and are used to diagnose and monitor neurological conditions.[11]

From a practical perspective, neurotechnology has vast applications in multiple sectors. In a medical context, BCIs are used as a rehabilitation tool for patients with severe motor impairments to regain control over their environment[12] while neuroimaging aids the diagnosis and understanding of complex brain disorders, such as schizophrenia and Alzheimer's disease.[13] Within the military, advancements in neuro-enhancements could lead to improved decision-making, stress resistance, and physical endurance, potentially transforming modern warfare.[14] Within this context, caution should be exercised, specifically concerning consent and the potential creation of a "super-soldier" paradigm. Neurotechnology is also having a significant impact on education, allowing learning experiences to be personalized based on individual cognitive processes[15] by leveraging insights from neuroimaging and BCIs to optimize educational outcomes, which can revolutionize the efficiency and effectiveness of learning approaches. Neurotechnology can also enhance immersive experiences by allowing users to control and interact with digital environments using their thoughts,[16] opening new possibilities for gaming, virtual tourism, and social interaction.

Ethical and Human Rights Concerns

The above demonstrates that neurotechnology encompasses both exciting and complex developments since advances in neural decoding and machine learning may lead to devices that not only read neural activity but also predict and influence behavior,[17] offering unprecedented control over our cognitive and emotional states. Consequently, significant ethical and human rights concerns should be addressed. As BCIs are becoming more integrated into daily devices, privacy is at the forefront of ethical concerns due to the potential for misappropriation of neural data. As the most private and personal organ in the body, the brain has the potential to access and interpret neural information, which may risk an individual's privacy and autonomy, thus raising questions regarding the ownership and protection of neural data. Similarly, consent is a concern, specifically in situations where the user may have minimal comprehension and control of the technology being used. This is a particular concern for vulnerable populations, such as those with cognitive impairments, since there is a risk of coercion or manipulation.

... continued on page 50

WORLD ROUNDUP

CHINA

Frederic Rocafort, Seattle
fred@harrisbricken.com

China's top court offers guidelines for applying foreign law.

China's top court recently published five "typical cases" (*dianxing anli*) that it considers to be representative of the cases with a foreign nexus that come before Chinese courts. Their publication follows the 2023 judicial interpretation by the Supreme People's Court (SPC) on the application of foreign law to civil disputes, part of an effort by the judiciary to align with Xi Jinping's focus on strengthening China's foreign-related legal system. Last year, the SPC also issued a judicial interpretation, again followed by the release of typical cases, on the application of international treaties and international practices.

The publication of typical cases is an established practice that seeks to offer guidance to lower courts and promote consistency in rulings. One of the recently published cases involves the application of Delaware law by the Shanghai No. 1 Intermediate People's Court, which was called upon to determine if a party to an investment dispute had become a shareholder or director in a Delaware company. Other cases involved the application of English, Mexican, Tajikistani, or Hong Kong law.

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

INDIA

Neha S. Dagley, Miami
nehadagley@gmail.com

India enters new era of space exploration.

India is poised to make a significant leap in human space exploration with its participation in the Axiom-4 Mission to the International Space Station (ISS). The Axiom-4 Mission is the fourth private astronaut mission organized by Axiom Space, a company at the forefront of commercial spaceflight. What sets this mission apart is its focus on international partnerships, particularly the involvement of the Indian Space Research Organisation (ISRO), alongside contributions from Poland and Hungary.

India's involvement in the Axiom-4 Mission has been formalized through a Spaceflight Agreement (SFA) between ISRO and Axiom Space. This agreement establishes the foundation for India's participation and signifies a key step in joint human spaceflight efforts with NASA. According to a joint fact sheet released by the White House on 17 June 2024, this collaboration aims to enhance international partnerships and propel India's Human Space Program into a new era of exploration and discovery. The mission will feature a diverse crew including mission pilot Shubhanshu Shukla and backup astronaut group captain Prashanth Nair, both accomplished pilots in the Indian Air Force, highlighting India's commitment to excellence in space exploration. The mission commander is Peggy Whitson, who will be joined by Sławosz Uznański of ESA/Poland and Tibor Kapu of Hungary, both as mission specialists.

The success of the Axiom-4 Mission relies on a meticulously coordinated legal and operational framework. As the Private Astronaut Mission (PAM) provider, Axiom Space has established detailed contracts with NASA for ISS access and with SpaceX for launch and return services. These contracts cover a range of critical aspects, including mission planning, crew training, safety protocols, and liability management.

Securing a seat on the Axiom-4 Mission is a significant achievement for India, marking a new chapter in the country's space exploration efforts. By participating in this mission, India is not only enhancing its technical and operational capabilities but also strengthening its position as a key player in the global space community. The mission's emphasis on scientific research, international collaboration, and technology

development reflects the strategic importance of space for India's future. India's involvement in the Axiom-4 Mission is more than just a milestone; it is a testament to the country's growing influence in the domain of space exploration.

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

MIDDLE EAST

Omar K. Ibrahem, Miami
omar@okilaw.com

United Kingdom court sets aside £47 million Kuwaiti arbitration award.

In a bizarre case, a United Kingdom court set aside a Kuwaiti arbitration award. The Kuwaiti arbitration award dated 28 November 2022 (the Award) was purportedly awarded by the Kuwait Chamber of Commerce and Industry Commercial Arbitration Centre (KCAC). It was further represented to the Court that the defendant had appealed the award to the Commercial Court of Appeal in Kuwait and the Kuwaiti court had endorsed the Award (the Kuwaiti Judgment). There was, in fact, no such arbitration. Among other things, there was no record of the proceedings. The KCAC confirmed that no cases had been brought in that forum against any of the defendants. The Kuwait Ministry of Justice confirmed there was no record of any proceedings between the parties during the relevant time. In addition, most of the Award was cut and pasted from a UK court judgment in *Manoukian v Société Générale de Banque au Liban SAL* [2022] EWHC 669 (QB). Finally, the purported Kuwaiti Judgment was not in Arabic, an odd development considering Kuwaiti judgments are supposed to be in Arabic. For these reasons and more, the UK court set aside the £47 million award.

Federal court DIAC ruling set for oral argument.

Last year, a Louisiana district court refused to compel arbitration of a dispute between the parties where the contract provided for arbitration under DIFC-LCIA Rules, seated in the DIFC in Dubai. The Court found that since decree No. 34 of 2021 had abolished the DIFC-LCIA Arbitration Center, arbitration could not be compelled. The decree abolished the administering body of the DIFC-LCIA Arbitration Centre, with immediate effect, while assigning all their obligations, rights, and resources to the DIAC. The federal court's decision was the first non-UAE decision regarding the implications of this decree. For many in the region, it has sent shockwaves as to the status of agreements providing for DIFC-LCIA arbitration. The federal court's decision is now on appeal before the United States Court of Appeal for the Fifth Circuit. An oral hearing was held on 7 August 2024.

Iran and South Korea to arbitrate dispute over frozen assets.

A dispute between Iran and South Korea over US$7 billion in frozen assets is set for arbitration. The dispute is between the Central Bank of Iran and the government of South Korea. Iran has accused South Korea of freezing US$7 billion in foreign exchange reserves belonging to Iran under pressure from the United States. The funds were frozen after the U.S. administration of Donald Trump withdrew unilaterally from the 2015 Iran nuclear deal in May 2018 and reinstated unprecedented sanctions on the country. In the period between 2015 and 2018, South Korea was one of the three largest importers of oil and condensates from Iran. After the sanctions were reimposed, Seoul could not settle its debt. After mediation did not resolve the dispute, the parties agreed to submit the dispute to arbitration.

Omar K. Ibrahem *is a practicing attorney in Miami, Florida. He can be reached at omar@okilaw.com.*

NORTH AMERICA

Laura M. Reich and Clarissa A. Rodriguez, Miami
lreich@harpermeyer.com; crodriguez@harpermeyer.com

Mexico elects Claudia Sheinbaum to be its first woman president.

On 2 June 2024, Mexican voters went to the polls to elect Claudia Sheinbaum Pardo president-elect of Mexico, the first woman to be elected to the position in its over 200-year history. Sheinbaum, the handpicked successor of outgoing President Andrés Manuel López Obrador, assumed office on 1 October 2024.

Sheinbaum is a member of the left-wing National Regeneration Movement (Morena) and has served as secretary of the environment as well as mayor of Mexico City. Her campaign included statements that the government must address economic inequality and promises to promote a sturdy social safety net. In July 2024, Sheinbaum announced that she plans to focus on increasing minimum wage rates and passing an amendment that would classify delivery app

workers as employees. Sheinbaum is also a climate scientist and holds a Ph.D in energy engineering from the National Autonomous University of Mexico.

U.S. Court of Appeals for the Ninth Circuit affirms dismissal of case challenging U.S. military aid to Israel.

On 15 July 2024, the Ninth Circuit upheld a lower court's decision to dismiss a case alleging the United States' military support and financial aid to Israel following the 7 October 2023 attacks in that country violated international law and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The case is *Defense for Children International-Palestine v. Biden*, 4:23-cv-05829-JSW (9th Cir. July 15, 2024).

Finding that the case fell under the "political questions doctrine," the Ninth Circuit held that the case was not justiciable and was shielded from judicial review. Relying on its precedent in *Corrie v. Caterpillar*, 503 F.3d 974 (9th Cir. 2007), in which the Court held that a lawsuit against Caterpillar for providing bulldozers used by the IDF to destroy homes in Palestinian presented non-justiciable political questions, the Court held that allowing this action to go forward would intrude upon the executive branch's discretion in foreign affairs and military matters.

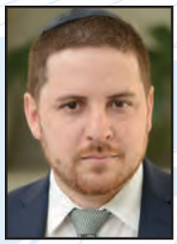
Canada's Federal Court issues permanent injunction against internet pirates unlawfully live-streaming sporting events.

In *Rogers Media Inc. v. John Doe 1*, 2024 FC 1082 (9 July 2024), the Federal Court issued a permanent injunction against anonymous internet actors engaged in pirating and unlawfully streaming live sporting events against the interests of copyright holders. The Court recognized the applicants' entitlement under the Canadian Copyright Act to a permanent injunction, and referenced the pirates' infringement on the applicants' exclusive rights to broadcast live NHL, NBA, and Premier League games in Canada.

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.*

SOUTH AMERICA



Rafael Szmid, New York, and Pedro Simões, São Paulo
rszmid@reedsmith.com; pedro.simoes@veirano.com.br

Brazil amends betting and gambling regulation.

On 30 December 2023, the Brazilian president enacted Law No. 14,790, amending Law No. 13,756/2018 to regulate fixed-odds betting in Brazil. This legislation permits companies to offer fixed-odds betting on sports events and online games, provided they are authorized by the Ministry of Finance and comply with applicable regulations and/or provided they are authorized by a local Brazilian state, hence limited to offering bets in the state where the license was granted.

Among the main legal requirements to operate in this market, at least 20% of the operator's share capital must be held by a Brazilian party, and operators must implement adequate policies on customer service, anti-money laundering, responsible gambling, and betting integrity. The Brazilian party may be a company incorporated in Brazil, under Brazilian law, but held entirely by international investors, according to a recently published Q&A provided by the Gaming Authority of the Ministry of Finance.

Additionally, Brazil is considering the legalization of casinos, bingos, and overall gambling games. The proposed bill outlines the establishment of three types of casinos:

1. **Integrated Casinos:** Part of tourist complexes
2. **Smaller Tourist Casinos:** Standalone entities
3. **Bingos:** Located in cities with more than 150,000 inhabitants

If Bill 2.234/22 is approved, Brazil could become the third-largest gambling market in the world. In anticipation of this, numerous international gambling companies have already visited Brazil to evaluate potential sites for future operations, with many more expected to follow if the bill is enacted.

These developments are part of Brazil's strategy to attract local and international investments, increase tax revenue, and

foster economic development. On the other hand, betting and gambling can be significant channels for money laundering. This is particularly concerning in jurisdictions with a high risk of corruption. Therefore, law enforcement agencies tend to closely monitor the development of these new markets in Brazil. Additionally, international investors and regulators will expect companies operating in this market to have a robust compliance structure.

Brazil's Superior Court of Justice revises stance on retroactivity of administrative norms.

In June 2024, following a 2022 decision from Brazil's Supreme Court that found the rule establishing the retroactivity of the more favorable criminal law is based on the peculiarities of this branch of law, the Superior Court of Justice (STJ) of Brazil revised its previous stance. The Court had previously held that in cases of sanctioning administrative law, the more favorable law or norm should be retroactively applied.

This type of retroactivity is provided for in Article 5, Clause XL, of Brazil's Constitution. Although this clause specifically refers to criminal law, the STJ had been interpreting it as a general principle applicable to all sanctioning situations.

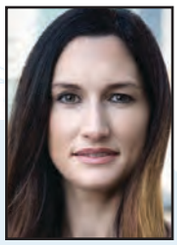
The current governing precedent, however, is that administrative penalties should be based on the norm that was in force when the infraction occurred. Consequently, it is not possible to apply a subsequent sanctioning norm retroactively to benefit the offender.

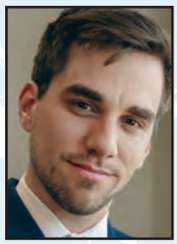
Although this decision highlights the lack of legal certainty provided by Brazil's judiciary—by overturning its own precedent, which was more favorable to individuals—it reduces the possibility of future administrative regulations being created under the guise of benefiting parties previously sanctioned for violating existing regulations.

Rafael Szmid, *counsel at the global law firm Reed Smith, is a licensed attorney in Brazil and the United States (New York). He holds master's and doctorate degrees from the University of São Paulo and an LL.M. from Stanford Law School. He was a visiting student at the University of Barcelona, Spain, is a former advisor to the chair of the Brazilian Competition Authority, and served as a secondee in the global compliance team of a Fortune 100 company. He is a member of the International Association of Independent Corporate Monitors and is the author of the book Anti-Corruption Corporate Monitors in Brazil: A Guide for Their Use in Administrative and Judicial Processes and of academic articles on anticorruption, antitrust, and compliance.*

Pedro Simões *is a partner at Veirano Advogados (São Paulo, Brazil) and a licensed attorney in Brazil. He holds master's and doctorate degrees from the University of São Paulo. He is a professor of AML compliance and corporate criminal liability at Insper and IDP and a member of the Brazilian Institute of Criminal Sciences (IBCCrim). He specializes in the new betting and gambling regulation in Brazil.*

WESTERN EUROPE





Susanne Leone and Nico Berger, Miami
sleone@leonezhgun.com;
nberger@leonezhgun.com

EU adopts corporate sustainability due diligence directive.

The EU's new directive aims to ensure that businesses operating within its jurisdiction adhere to high standards of corporate sustainability by setting a framework for companies to identify and mitigate risks to human rights, enhance corporate accountability, and promote sustainable development.

The directive applies to large companies operating in the EU that meet certain revenue and employee number thresholds. Companies are required to conduct due diligence across their entire value chain and must consider the concerns and insights of their stakeholders. The implementation costs and complexities of adopting new due diligence practices are to be borne by the companies.

EU adopts landmark Artificial Intelligence Act.

On 21 May 2024, the Council of the EU formally adopted the Artificial Intelligence (AI) Act. This new legislation aims to ensure the safe and ethical use of AI technologies within the EU, promoting innovation while protecting fundamental rights. The regulation categorizes AI systems into three risk levels: unacceptable risk (AI systems that pose a threat to safety, livelihoods, or rights are prohibited), high risk (AI systems in critical areas such as health care, law enforcement, and infrastructure must meet strict requirements), and limited risk (AI systems requiring specific transparency obligations, such as chatbots needing to disclose they are not human).

Compliance with this directive requires AI systems to undergo conformity assessments, post-market monitoring, and cooperation with relevant authorities. The European Artificial Intelligence Board, a new body established to facilitate implementation, along with the national supervisory authorities from each member state, will have supervisory authority to enforce the AI Act.

Switzerland introduces Act on the Transparency of Legal Entities.

Similar to the Corporate Transparency Act in the United States, Switzerland is introducing a Federal Act on the Transparency of Legal Entities. The Act seeks to increase transparency in ownership structures to combat money laundering and terrorist financing. The electronic register shall be kept by the Federal Department of Justice and shall not be accessible to the public. Under this new Act, adopted on 22 May 2024 by the Federal Council, legal entities are required to identify and disclose their beneficial owners. Beneficial owners are defined as individuals with a minimum 25% stake in capital or voting rights, or those who otherwise control the entity. Entities must verify and maintain accurate records of this information.

Exemptions are made for entities fully or partially listed on the stock exchange and their subsidiaries more than 75% owned by listed companies. Failure to comply can result in fines up to CHF 500,000. Additionally, legal and accounting advisors involved in transactions such as real estate or company formation will also be subject to these transparency requirements.

EU adopts new anti-money laundering directive.

On 30 May 2024, the European Parliament adopted new anti-money laundering rules. These comprehensive regulations aim to close loopholes in the financial system, targeting cash and crypto transactions, as well as high-value sectors like football clubs. The legislation establishes a new EU Anti-Money Laundering Agency to oversee compliance and enforce the new standards. These measures are designed to enhance transparency and prevent the financing of illicit activities, ensuring a more secure and robust financial framework within the EU.

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.*

Nico Berger *is an attorney at Leone Zhgun, with experience in international business and business development. Before becoming an attorney, Mr. Berger worked across Europe in Switzerland, the United Kingdom, and Ireland. Mr. Berger focuses his practice on international business and taxation.*

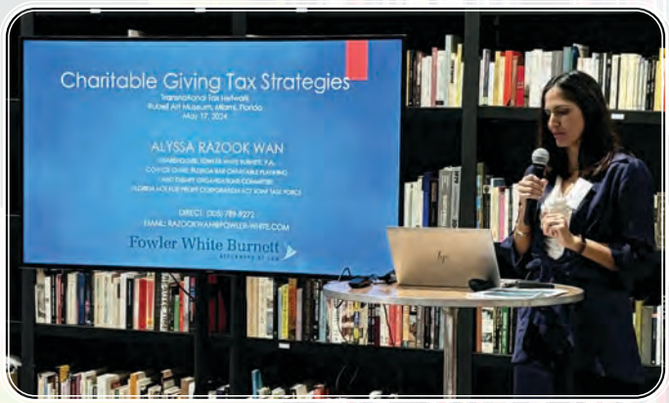
TTN 2024 Americas Tax Conference
17 May 2024 • Rubell Museum, Miami

ILS members Jeff Hagen and Clarissa Rodriguez joined a panel of international taxation experts who presented sessions at Transnational Taxation Network's 2024 Americas Tax Conference on 17 May 2024. The Rubell Museum in Miami, Florida, offered the perfect backdrop for the conference in view of its topic "Taxing the Canvas: Understanding the Art of International Tax." The Rubell Museum features contemporary art collected over the course of the last three decades. The renowned museum, located next to Miami's famous Wynwood Arts District, features paintings, sculptures, photography, video, and other installations..

Arturo Brook welcomes attendees to the 2024 Americas Tax Conference.

Colleen Boyle, managing director of The Fine Art Group, Philadelphia, presents "Luxury Assets: An Integral Part of Wealth.".

Mauricio Cano, founding partner of Brook & Cano, Mexico, presents "Mexico and the US: Transfer and Taxation of Art."

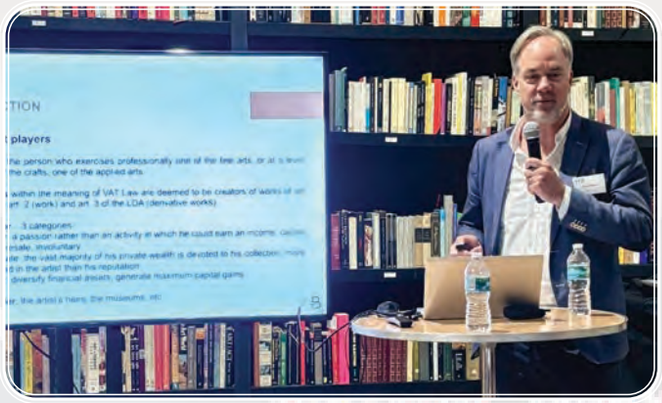


Alyssa Razook Wan, a tax, trusts, and estates attorney with Fowler White Burnett, Miami, presents "Charitable Giving Tax Strategies."

Clarissa Rodriguez, partner, and Jeff Hagen, partner, of Harper Meyer, Miami, present "Art Litigation and Restitution of Nazi Looted Art."

TTN 2024, continued

Walter Keiniger, partner with the tax department of Marval O'Farrell Mairal, Buenos Aires, Argentina, presents "Argentina: Update on International Tax Topics Under Milei."



Thierry Boitelle, owner of Boitelle Tax, Geneva, Switzerland, presents "The Art of Taxing the Arts: A Swiss Perspective."

Derren Joseph of HTJ Tax, Singapore, presents "Singapore Family Offices."

Ana Barton, Susanne Leone, Clarissa Rodriguez, Matt Akiba, Richard Montes de Oca, Jim Meyer, Jeff Hagen, Hyewon Son, and George Vina

Clarissa Rodriguez and Laura Reich

Jeff Hagen and Thierry Boitelle

Laura Reich and Richard Montes de Oca

Jeff Hagen poses with one of the thought-provoking works of art at the Rubell Museum.

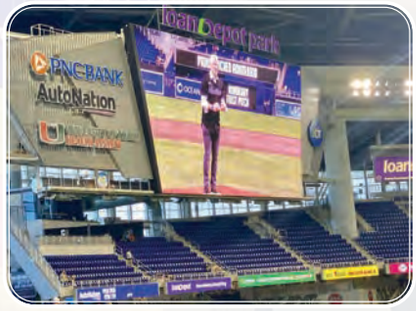
Otavio Carneiro, Nicole Baudini, and Colleen Boyle

ILS Marlins Game Night
22 May 2024 • Miami

On 22 May 2024, the International Law Section and the Miami Finance Forum co-hosted an evening event of networking with colleagues while enjoying America's greatest pastime (baseball, of course) at the Miami Marlins-Milwaukee Brewers game at loanDepot park in Miami. Defense won the night in this single score game, but Marlins fans were happy to take the 1-0 win. Thank you to event sponsors Buchanan Ingersoll Rooney, Gonzalo Law, Phoenix Pro Connect, and Vinali Group, and kudos to ILS Chair Richard Montes de Oca, who threw out the first pitch!

Jorge De La Hoz, Sammy Epelbaum, Daniela Pretus, and Richard Montes de Oca

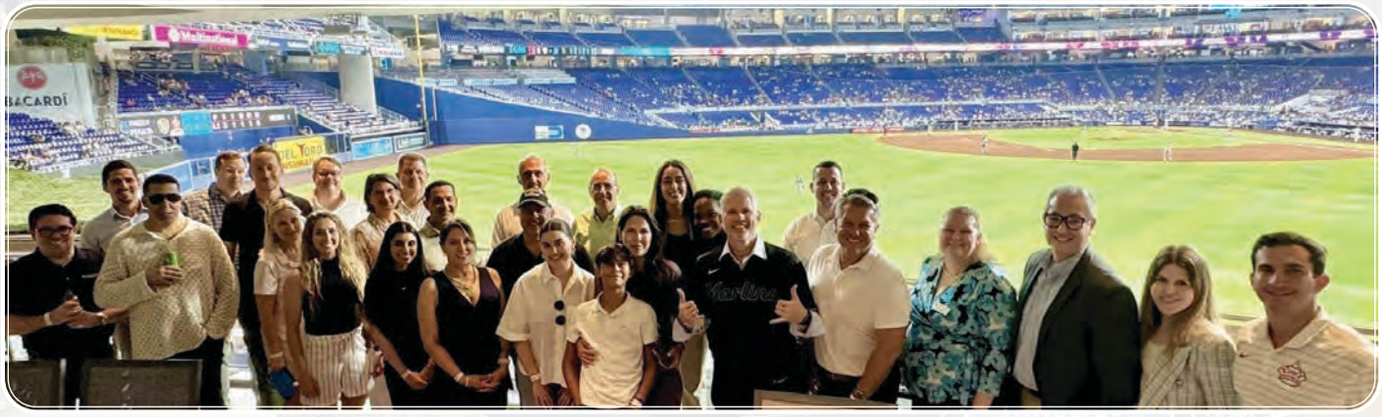
Ciara Eckardt, Dayne Shenk, Nouvelle Gonzalo, and Aashna Arora



All eyes are on Richard Montes de Oca as he throws out the first pitch.

Richard Montes de Oca, Cynthia Rodriguez, and Cynthia's son.

Ricard Montes de Oca, Jim Meyer, Nouvelle Gonzalo, Jeff Hagen, and Laura Reich



And a great time was had by all!

ILS Lunch & Learn With Raquel (Rocky) Rodriguez 28 May 2024 • Miami

Buchanan Ingersoll & Rooney PC hosted the ILS Lunch & Learn on 28 May 2024 at their offices in Miami. Raquel (Rocky) Rodriguez, chair of Buchanan's Florida Offices, shared her experiences in the legal profession, which include serving as general counsel to Florida Governor Jeb Bush and three decades of state and federal litigation experience in banking, commercial, international, real estate, constitutional, administrative, and election law.

ILS Chair Richard Montes de Oca introduces Rocky Rodriguez.

Jim Meyer and Rocky Rodriguez enjoy their lunch.

ILS Lunch & Learn participants

Rocky Rodriguez shares her insights with the group.

ILS Networking Happy Hour
30 May 2024 • Miami

The International Law Section joined with friends and colleagues from the Miami-Dade Bar International Law Committee, Intellectual Property Committee, and the Young Lawyers Section for an evening of networking and camaraderie at the Biscayne Bay Brewing Company in Miami. Thanks to everyone who helped make it a night to remember!

Colleagues engage in enjoyable and productive conversations.

Isabelle Wong, Alan Barson, Jim Meyer, and Matt Akiba

Alan K. Fertel, Gabrielle Barcellos, Averie Bischoff, and Tyler Litwak

Isabelle Wong and David Rogero

ILS Chair's Reception at Florida Bar Annual Convention 20 June 2024 • Orlando

ILS members came together in Orlando for the Annual Florida Bar Convention, 19-22 June 2024, to celebrate the Section's accomplishments, to network with fellow lawyers, to discuss ongoing initiatives, and to set goals for the upcoming year. The ILS Chair's Reception held on Thursday evening was a great time to relax and connect before a busy executive committee meeting and annual meeting on Friday of the convention.

ILS Chair Richard Montes de Oca welcomes everyone to the reception.

Sir Harry's Lounge at the Waldorf Astoria provides a warm and inviting venue for an evening of socializing and networking.

Davide Macelloni, Matt Akiba, and Isabelle Wong

Maria Breen, Nouvelle Gonzalo, and Maria Thanh-Tram Thi Tran

Chance Lyman and Richard Montes de Oca

Cristina Vicens, Ana Barton, Richard Montes de Oca, and Davide Macelloni

Laura Reich, Ed Davis, Bob Becerra, and Arnie Lacayo

Jeff Hagen, Cristina Vicens, Davide Macelloni, and Laura Reich

ILS Executive Council Annual Meeting
21 June 2024 • Orlando, Florida

Members of the International Law Section Executive Council gathered at the Hilton Bonnet Creek in Orlando, Florida, for their annual meeting to review the accomplishments of the previous year, to recognize and thank ILS members and leaders for their contributions, and to make plans for the coming year. The group began early, with breakfast and meetings of the ILS committees, followed by the annual meeting of the Executive Council and a networking lunch. Members who could not attend in-person joined the meetings via Zoom (with breakfast and lunch on their own!).

Bob Becerra looks over the latest edition of the *International Law Quarterly* during the committees meeting.

Jeff Hagen reports on the *International Law Quarterly* and the International Tax Law Committee.

ILS members gather at the ILS Executive Council Meeting.

2023-24 ILS officers conduct their final meeting. Pictured are Richard Montes de Oca, chair; Ana Barton, chair-elect; Cristina Vicens, secretary; Laura Reich, treasurer; and Davide Macelloni, vice treasurer.

2023-24 ILS officers Laura Reich, Ana Barton, Richard Montes de Oca, Cristina Vicens, and Davide Macelloni.
Richard was thanked for his work as chair during the 2023-24 year by his executive board and the ILS.

ILS Executive Council Annual Meeting, continued

Richard Montes de Oca presents an award to Davide Macelloni for his service as vice chair during the 2023-24 year.

Richard Montes de Oca presents the "110% Executive Council Member" Award to Jennifer Mosquera, who consistently goes above and beyond for the ILS!

Richard Montes de Oca presents an award to Matt Akiba for his service as editor of the *ILS Gazette*.

Richard Montes de Oca presents an award of appreciation to Katherine Doble, president of Ingage, the section's social media and marketing firm that hosts and runs the ILS website.

Richard Montes de Oca presents an award to Laura Reich for her service as treasurer during the 2023-24 year.

Richard Montes de Oca presents an award to Jeff Hagen for his service as editor-in-chief of the *International Law Quarterly.*

The TikTok Ban, continued from page 11

Photo: Ascannio/Shutterstock.com

The Executive Order and Montana Decisions

Most recently, bans on WeChat and TikTok have been struck down as selective. In a case involving an executive order dealing with alleged data breaches on the China-based social media app WeChat, a court in California emphasized that the order singled out an app with connections to Chinese-Americans.[25] The Court in California found that policies to promote data security in general would be more effective than barring all U.S. users from one app out of many, even though privacy and national security are valid concerns.[26] In TikTok's case (*TikTok I*), the federal government is continuing an investigation of the app that could lead to privacy-related changes by consent decree or prosecution, similar to the government's other actions relating to Facebook.[27]

Two cases have found that applying national-security statutes to TikTok on a case-specific basis would present less hardship to its owners and less overreach by the federal government than virtually outlawing the app.[28] In any event, the Court in *TikTok I* held that the president lacks the statutory authority to issue an executive order addressing the alleged threat.[29] In 2023, a federal judge in Montana held that even if there is an important state interest arising out of TikTok's risks for children, a law banning it is too broad and blocks more lawful user speech than is necessary.[30] With respect to sending data to China, the Court in Montana held that the law was under-inclusive and could fail, in view of other social-media platforms and apps that have servers in China, as well as data brokers.[31]

The government will likely argue that the TikTok ban is a valid regulation of a series of economic transactions and courses of conduct, including regularly exporting the sensitive personal data of Americans to a foreign "adversary," organizing a U.S. social media app into a cog in a multinational machine operated out of Beijing, and cooperating with Chinese security agencies on messaging and state media objectives.[32] The government will likely also argue that any impact on the First Amendment interests of TikTok in California, U.S. persons who work for TikTok or ByteDance, and TikTok users is incidental and "downstream" of an export regulation.[33]

The First Amendment Rights of TikTok Recognized in Private Class Actions

Private suits against ByteDance have foundered for somewhat different but related reasons. One case involved three types of allegations: first, that TikTok and other social media platforms notified users of platform contests, awards, or trophies in a defective manner; second, that the platforms violated a tort duty to protect their users from malicious third parties, such as those propositioning minors; and third, that the platforms were defective products in that they should have included age-verification or parental-notification requirements, voluntary user screen-time warnings or controls, or easier account deletion or suspension tools, and should not have included appearance filters that can create touched-up pictures or videos and allegedly lead to personal insecurity and low self-esteem—or at least labeled such content as having been manipulated.[34] One court found that platforms like TikTok are protected by the First Amendment to the extent that they publish messages to users, including such mundane messages as trophies for length or type of use.[35] While the Court did not delve that deeply into the trophy systems, it mentioned Snapchat trophies, which were historically available for such activities as sharing hundreds of snaps, sending hundreds of videos, and sharing hundreds of stories from searches.[36] The Court dismissed other claims against the platforms for malicious third parties' actions, observing that TikTok does not encourage criminal activity, that its terms of use prohibit such conduct, and that omissions or failures to act on preventing malicious activity from taking place on a website or app do not violate a tort duty.[37] Only the addictive and injurious app or website design claims survived, under products liability theories.

The TikTok/Meta/Snapchat/YouTube litigation illustrates selectivity in yet another way. Like the comic book decision from Los Angeles, the addictive or dangerous app decision generated a laundry list of dangerous functionalities and potentially harmful videos that do not lead to tort liability under state law or the First Amendment. For example, the platforms pointed to Netflix, which escaped responsibility for a young teen's suicide despite the fact that it allegedly foisted a show on the victim prominently featuring suicide by means of a "sophisticated, targeted recommendation system."[38] Similarly, they mentioned websites that have escaped civil liability in the wake of mass shootings or attempted mass

shootings despite displaying violent content to high school students or young people.[39] There are other examples, summarized by the Court with the rule "that ideas, content, and free expression have consistently been held not to support a products liability claim," in a paraphrase of the *Restatement (Second) of Torts*.[40]

The Geopolitical Environment and the Rise of Docile Platforms

It is possible that courts will find that ByteDance lacks First Amendment rights as a foreign corporation. The principal cases cited for that proposition, however, may be distinguishable as involving companies or persons who conceded they had no U.S. presence.[41] In any event, TikTok is a California corporation based in part in Culver City, California, and employs thousands of Americans.[42] ByteDance also is majority-owned by global institutional investors and staff, likely including many Americans.[43]

House Majority Leader Steve Scalise has defended the TikTok law as outlawing an app that can "spy on Americans and steal their personal information, while also manipulating the content American users see, endangering our national security."[44] The content that American Internet users are allowed to see had originally been as "diverse as human thought," as a Supreme Court opinion put it, but has since become heavily curated, filtered, and some might say rigged.[45] Unlike other Big Tech companies apparently seen as toeing various party lines, TikTok was deemed not to be "a force for good in the tech industry."[46] Some press reports point to Hamas and Osama bin Laden statements being available on the app, but this is nothing new for social media or even for cable television or a newspaper for that matter.

Oversharing of personal information with advertisers and governments is another problem that is hardly unique for TikTok. Facebook parent company Meta has repeatedly been fined for violating users' expectations that certain posts would be shared with their friends only.[47] The ordinary procedure is for the Federal Trade Commission or federal or state courts to ensure due process in privacy law.

Similarly, *The Washington Post* and *The Guardian* published an internal presentation from within the National Security Agency stating that the servers of Facebook and other Big Tech companies have been copied to U.S. government files, enabling the content of private communications including direct messages to be analyzed and read under the Section 702 program.[48] Virtually no one proposed separating Facebook or Instagram from Mark Zuckerberg's control after the Section 702 scandal, despite a potentially far more severe impact on Americans' constitutional rights than alleged Chinese spying.[49] The remedy typically sought in Section 702 litigation is an injunction against federal fishing expeditions into social media and online video communications. In congressional proceedings, the reform that tends to be sought is a statutory limitation on mass surveillance on social media, not the breakup or forced sale of all platforms that may have been aware of it or even complicit in it. One might argue that there can be no such limit imposed under U.S. law by statute or court order for the activities of the Chinese state, but the same is true of the U.S. intelligence community. This is due to the combined effect of Article III standing doctrine, official secrecy, and the state secrets doctrine, not to mention sovereign immunity, presidential immunity from prosecutions, and the decline of the *Bivens* cause of action for damages due to unreasonable searches and seizures of papers or effects.[50]

The TikTok law also does nothing about the much more frightening rise of data brokers.[51] A law passed in the same package of bills prohibits data brokers' sale of the sensitive personal data of Americans to foreign adversaries, but does not address the arguably more harmful exploitation and misuse of that data by domestic brokers or U.S.-based multinationals with the power to negatively affect users globally.[52]

Biased "content moderation" policies that threaten national security are not unique to TikTok, either. Despite banning a wide variety of Americans from Facebook or Instagram for vague offenses against online safety, community standards, and accuracy of information, Meta won a 2023 Supreme Court case arising out of its recommendation of the posts of the Islamic State of Iraq and Syria to Facebook users, allegedly advancing the recruitment and fundraising drives of this terrorist organization.[53] Meta celebrated the ruling, with a spokesperson for its advocacy group NetChoice praising the Supreme Court for leaving untouched their contested civil liability safe harbor in cases involving large-scale violence, which absolves Meta among other things of "aiding and abetting ISIS, leading to [civilian] deaths."[54]

This summer's decisions in *Moody v. NetChoice, LLC* and *Murthy v. Missouri* do not necessarily bode well for TikTok. While the former recognizes the curation of platform feeds of user posts as speech covered by the First Amendment, the gist of both decisions is to tighten government control over the Internet in a manner analogous to the TikTok ban, as the dissents in those cases explain more fully.[55]

Conclusion

As I argue in my recent book, *Platform Neutrality Rights: AI Censors and the Future of Freedom* (Routledge, 2024), a carceral and disciplinary mentality drives recent federal involvement with social media and online video. Governments demand speedy removal of dissent and unwelcomed news,

and insist on special privileges to quickly flag and cleanse such speech as malicious, disinformation, foreign, or some combination of these talismanic terms. The TikTok challenge is a new front in a contest between the American people and people around the world with human rights to free expression on the one hand, and on the other, a partisan, militaristic censor class insisting on platform docility, utility, and complicity.

Professor Hannibal Travis *teaches Internet law at Florida International University, which he joined after several years practicing law at O'Melveny & Myers in San Francisco and at Debevoise & Plimpton in New York. He is the author, most recently, of Platform Neutrality Rights: AI Censors and the Future of Freedom (Routledge, forthcoming 2024).*

Endnotes

[1] *TikTok Inc. v. Garland*, Nos. 24-1130 & 24-1113 (D.C. Cir. petition filed 7 May 2024), https://fingfx.thomsonreuters.com/gfx/legaldocs/myvmkdggbvr/TikTok-ByteDance-petition-review-20240507.pdf.

[2] *See* Bobby Allyn, The Social Media Creator Economy Reckons with a Possible TikTok Ban, NPR (6 May 2024), https://www.npr.org/2024/05/06/1249047583/possible-tiktok-ban-could-be-an-extinction-level-event-for-the-creator-economy; Leah Willingham, TikTok ban: Creators Warn of Economic Impact If Ban Succeeds, Associated Press (16 Mar. 2024), https://apnews.com/article/tiktok-ban-reaction-influencers-4ae88afbc344630b2c1091a4a1784078.

[3] Rishi Ivengar, *The Tech Hawks Took Down TikTok. Now What?*, Foreign Policy (3 May 2024), www.foreignpolicy.com.

[4] Glenn Greenwald, A Vital Question on This New, Bipartisan TikTok Ban, YouTube (15 May 2024), https://www.youtube.com/watch?v=kSA0jEl0kLc.

[5] Julianne Tveten, TikTok Law Is an Attempt to Censor, Not a Warning to Big Tech, Fairness and Accuracy in Reporting (8 May 2024), https://fair.org/home/tiktok-law-is-an-attempt-to-censor-not-a-warning-to-big-tech/.

[6] The company's 2023-2024 revenue of US$120 billion rivals Meta's US$143 billion, and while it falls far short of Microsoft's nearly US$300 billion and Apple's US$400 billion, TikTok's revenue has been growing more rapidly and Bytedance is a much younger company. *See generally* Yahoo! Finance, http://finance.yahoo.com.

[7] *Cf*. Brief of Petitioners, at 6, *TikTok v. Garland.*

[8] The suit alleged that Chinese social-media, messaging, and e-commerce giant WeChat blocked links to or support for Douyin content. *See ATF, China's TikTok Sues Tencent for Monopolistic Practices*, Asia Financial (4 Feb. 2021), https://www.asiafinancial.com/chinas-tiktok-sues-tencent-for-monopolistic-practices. There were 500 lawsuits filed by the ByteDance or Tencent/WeChat companies against one another by 2018. *See id. Cf.* Yuan Yang, *Bytedance and Tencent Legal Battle Escalates*, Financial Times (6 Jan. 2018), https://www.ft.com/content/13f5ceb2-5f18-11e8-9334-2218e7146b04. The 2019 suit was dropped in March 2021, after being accepted for filing by a Beijing court. *See* Anniek Bao & Heather Mowbray, ByteDance Drops Unfair Competition Complaint Against Tencent, Caixin Global (30 Mar. 2021), https://www.caixinglobal.com/2021-03-30/bytedance-drops-antitrust-lawsuit-against-tencent-after-venue-change-101682658.html; *Chinese Court Accepts Douyin's Case Tencent Over Alleged Monopoly*, China Daily (8 Feb. 2021), http://global.chinadaily.com.cn. Later in 2021, ByteDance estimated that 49 million shares of Douyin content in WeChat or QQ messages were being blocked daily, and that one billion links to Douyin or other ByteDance apps had been blocked by Tencent since 2018. *See* ByteDance Rages against Tencent over Link Blocking. Here's Why., Technode, (8 June 2021), https://technode.com/2021/06/08/bytedance-rages-against-tencent-over-link-blocking-heres-why.

[9] *See* Brief of Petitioners, at 6, *TikTok v. Garland*, Nos. 24-1130 & 24-1113, 2024 WL 3101639 (D.C. Cir. brief filed 20 June 2024).

[10] *See* Petition, at ¶ 25–30, *TikTok v. Garland*.

[11] *See* Brief of Petitioners, at 22–24, *TikTok v. Garland*.

[12] TikTok alleges that ending operational collaboration among ByteDance and its various subsidiaries would make content on the U.S. splinter TikTok a shadow of the global public sphere that the platform is today. *See* Petition, at ¶ 27, *TikTok v. Garland*.

[13] *See* Microsoft Completes $69bn Takeover of Call of Duty maker, BBC News (13 Oct. 2023), https://www.bbc.co.uk/news/business-67080391. The Facebook deal to acquire the wearable, fitness, and virtual reality company Within took nearly 16 months, after a Federal Trade Commission antitrust challenge. *See* Scott Stein, Meta Completes Acquisition of VR Fitness Company Within, CNET (8 Feb. 2023), https://www.engadget.com/meta-completes-within-acquisition-2232552.html.

[14] H.R. 815, div. H, §§ 3(a) & 3(b), 118th Cong., 2d Sess., Pub. L. No. 118-50 (24 Apr. 2024); *see Moody v. NetChoice, LLC*, 144 S. Ct. 2283 (2024).

[15] *See* Ashley Capoot, Biden State of Union to Target Social Media and Kids' Mental Health in SOTU Speech, CNBC (7 Feb. 2023), https://www.cnbc.com/2023/02/07/biden-state-of-union-to-target-social-media-and-kids-mental-health.html (previewing Biden's State of the Union speech in which he called for presumably legal accountability for social media's unknown effects on kids); Rebecca Klar, Schumer, LGBTQ+ Advocates Back Updated Kids Online Safety Bill, The Hill (15 Feb. 2024), https://thehill.com/policy/technology/4469721-schumer-backs-updated-kids-online-safety-bill (Senate Majority Leader Schumer co-sponsored a bill which its sponsor stated would "require social media companies to design their products with the safety of kids and teens in mind"); Senate Democrats, Majority Leader Schumer Delivers Remarks to Launch Safe Innovation Framework for Artificial Intelligence at CSIS [sic] (2023), https://www.democrats.senate.gov/news/press-releases/majority-leader-schumer-delivers-remarks-to-launch-safe-innovation-framework-for-artificial-intelligence-at-csis; The Bletchley Declaration by Countries Attending the AI Safety Summit, 1-2 Nov. 2023, https://web.archive.org/web/20231101123904/https://www.gov.uk/government/publications/ai-safety-summit-2023-the-bletchley-declaration/the-bletchley-declaration-by-countries-attending-the-ai-safety-summit-1-2-november-2023 (United States signed onto multilateral statement during President Biden's term in office stating: "We resolve to work together in an inclusive manner to ensure human-centric, trustworthy and responsible AI that is safe, and supports the good of all . . . . This could include making, where appropriate, classifications and categorisations of risk based on national circumstances and applicable legal frameworks.").

[16] *See* Katie Notopoulos, *What Happens If TikTok Is Sold Without the Algorithm That Drives the "For You" Page? It Might Not Be So Bad*, Business Insider (2024), https://www.businessinsider.com/tiktok-ban-bill-algorithm-byetdance-2024-4; Chris Stokel-Walker, *How TikTok Beat Instagram*, Business Insider (2 Feb. 2023), https://www.businessinsider.com/why-instagram-cant-compete-tiktok-videos-algorithm-influencers-engagement-2023-2.

[17] *See* Brief of Petitioners, at 48–60, *TikTok v. Garland*.

[18] *See, e.g., NAACP v. Button*, 371 U.S. 415 (1963).

[19] *See id*. at 435–44.

[20] *See Katzev v. County of Los Angeles*, 52 Cal. 2d 360, 362–64, 368–371, 341 P.2d 310 (Cal. 1959). *See also id*. at 369 ("An exemption must be reasonable in order to meet the standard prescribed by *Yick*

Wo v. Hopkins, 118 U.S. 356 [1886], where it is stated at page 369 . . . that 'the equal protection of the laws is a pledge of the protection of equal laws.'"); *id*. (ordinance irrationally and invidiously discriminated against comic books that were not religious or newspaper comic strips, in the latter case solely because of the type of paper, and irrationally failed to exempt humorous or harmless crimes by Bugs Bunny, dogs, and sharks).

[21] *See id.* at 367 ("In *In re Lyons*, 27 Cal.App.2d 293, 296 [81 P.2d 190 (Cal. Ct. App. 1938)], it was accurately stated: 'The courts have always been zealous to protect the rights of persons to acquire, own and enjoy property. They have been more zealous, if possible, to protect the personal right of free speech, ...'"); *id*. ("The record fails to show that there is a clear and present danger that the circulation of crime comic books in general will injure the character of persons under the age of 18 years and inculcate in them a preference for crime.").

[22] *See id*. at 369.

[23] Specifically, the law at issue prohibited the sale of violent video games to minors, but not violent books, plays, or magazines, or the broadcast or cable transmission of violent television shows or music. *See Brown v. Ent. Merchants Ass'n*, 564 U.S. 786 (2011) (citing Cal. Civ. Code Ann. §§ 1746-1746.5).

[24] *Id*. at 790. The Court added that ideas and messages are off-limits for government regulation. *See id*. at 790–91.

[25] *See US WeChat Users Alliance v. Trump*, 488 F. Supp. 3d 912, 926 (N.D. Cal. 2020).

[26] *See id*. at 927.

[27] *See Meta Platforms, Inc. v. Federal Trade Commission*, No. 23-cv-03562, 2024 U.S. Dist. LEXIS 45452, 2024 WL 1121424 (D.D.C. 14 Mar. 2024), *injunction pending appeal denied*, No. 24-5054, slip op. (D.C. Cir. 29 Mar. 2024); FTC, Statement of the Commission Regarding TikTok Complaint Referral to the Department of Justice (18 June 2024), https://www.ftc.gov/news/press-releases/2024/06.

[28] *See TikTok Inc. v. Trump*, 507 F. Supp. 3d 92, 112 n.6 (D.D.C. 2020); *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73, 83 n.3 (D.D.C. 2020); Petition, at ¶ 21, *TikTok v. Garland*.

[29] *See TikTok v. Trump*, 490 F. Supp. 3d at 83; *TikTok Inc. v. Trump*, 507 F. Supp. 3d at 112; Petition, at ¶ 21, *TikTok v. Garland*.

[30] *Alario v. Knudsen*, No. CV 23-56-M-DWM, 2023 WL 8270811 (D. Mont. 30 Nov. 2023) (Dkt. No. 113). As *The New York Times* reported, "Montana's effort to ban TikTok sought to fine the company and app stores if residents downloaded or used TikTok." Sapna Maheshwari and Amanda Holpuch, *Why the U.S. Is Forcing TikTok to Be Sold or Banned*, The New York Times, 3 Mar. 2023, https://plus.lexis.com.

[31] *See Alario*, slip op. at § I.A.2.b.

[32] *See Brief for Appellants*, at 7–12, *TikTok, Inc. v. Trump*, No. 20-5302, 2020 WL 6118761, *46-47 (D.C. Cir. brief filed Oct. 2020).

[33] *See id*. at 20–21 (citing *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986)); *cf. Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

[34] In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litig., Nos. 4:22-md-03047-YGR, MDL No. 3047, slip op. at §§ II-IV (N.D. Cal. 14 Nov. 2023).

[35] *See id. Cf. NetChoice, LLC v. Yost*, No. 2:24-cv-0047, 2024 WL 555904 (N.D. Ohio 12 Feb. 2024) (holding that platforms like those owned by Meta, X, and YouTube were singled out in a way subject to First Amendment strict scrutiny when they were subjected to higher age-verification duties than media outlets or product review websites, and enjoining the law as being potentially overbroad and under-inclusive in how it sought to protect minors from oppressive contracts with platforms like TikTok, while leaving media outlets like *The New York Times* unregulated).

[36] *See* Aisling Moloney, Snapchat Trophies: The Full 2017 List and How to Unlock Them All, Metro (U.K.) (26 Oct. 2017), https://metro.co.uk/2017/10/26/snapchat-trophies-the-full-2017-list-and-how-to-unlock-them-all-7027037/. TikTok reportedly offered trophies in 2020, including diamonds and gifts worth real money. *See* Brief for Appellants, at 46–47, *TikTok v. Trump* (citing TikTok, Virtual Items Policy (last updated Dec. 2019), https://www.tiktok.com/legal/virtual-items?lang=en; Rinab Decl. at 2, *Marland v. Trump*, No. 20-cv-4597 (E.D. Pa. 19 Sept. 2020), Doc. 7-3).

[37] *See* In re: Social Media Adolescent Addition/Personal Injury Litig., *supra* note 33, at § IV.B. *See also Twitter, Inc. v. Taamneh*, 598 U.S. 471, 501 (2023) ("Plaintiffs have not presented any case holding such a company liable for merely failing to block [user or subscriber] criminals despite knowing that they used the company's services.").

[38] *Id*. at § V.C.i.d. (quoting a docket entry).

[39] *See id*. § V.B.ii.

[40] *Id*. Supporting cases are collected in footnotes 6 through 8 of *Winter v. GP Putnam's Sons, Inc.*, 938 F.3d 1033, 1036–37 (9th Cir 1991). *See also James v. Meow Media, Inc.*, 90 F. Supp. 2d 798 (W.D. Ky. 2001), aff'd, 300 F.3d 683 (6th Cir. 2002); *Ziencik v. Snap, Inc.*, No. 21-7292 DMG, 2023 WL 2638314 (C.D. Cal. 3 Feb. 2023); *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 397–400 (S.D.N.Y. 2018); *Gorran v. Atkins Nutritionals*, Inc., 464 F. Supp. 2d. 315, 324–25 (S.D.N.Y. 2006).

[41] *See Moody v. NetChoice, LLC*, 144 S. Ct. 2283, 2410 (U.S. 1 July 2024) (Barrett, J., concurring) ("Corporations, which are composed of human beings with First Amendment rights, possess First Amendment rights themselves . . . . But foreign persons and corporations located abroad do not.") (quoting *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, 591 U.S. 430, 433–436 (2020)); *id*. ("What if the platform's corporate leadership abroad makes the policy decisions about the viewpoints and content the platform will disseminate? Would it matter that the corporation employs Americans to develop and implement content-moderation algorithms if they do so at the direction of foreign executives? Courts may need to confront such questions when applying the First Amendment to certain platforms."). Bytedance, and certainly TikTok, may have persons or facilities located in the United States. Another case applied the U.S. Constitution to foreign nationals present in Guantanamo Bay naval station, in Cuba but not wholly outside U.S. control. *See Boumediene v. Bush*, 553 U.S. 723, 765–71 (2008).

[42] *See* Petition, ¶ 14, *TikTok Inc. v. Garland*.

[43] *See* Brief of Petitioners, at 7, *TikTok v Garland*.

[44] Sapna Maheshwari, David McCabe and Cecilia Kang, *Thunder Run: Behind Lawmakers' Secretive Push to Pass the TikTok Bill*, The New York Times, 24 Apr. 2024, https://www.nytimes.com/2024/04/24/technology/tiktok-ban-congress.html.

[45] *Reno v. American Civil Liberties Union*, 521 US 844, 870 (1997). On the rigging of discourse to prevent third-party candidates, peace plans, chronic diseases, the national debt, and other pressing issues from being discussed fully and fairly, which used to be primarily a function of newspaper or television discourse but now affects primarily online events like the CNN presidential debate of 2024 from which third-party candidates were excluded, see, for example, Frank Giustra, *Censored and Silenced: Why the Mainstream Media's Selective Coverage of the U.S. Election Is Wrong*, Toronto Star, 9 July 2024, https://www.thestar.com/business/opinion/censored-and-silenced-why-the-mainstream-medias-selective-coverage-of-the-u-s-election-is/article_4331e9be-3d46-11ef-9669-fbf1289f72a2.html. After selectively banning conspiracy theories, YouTube CEO Susan Wojcicki penned an op-ed in *The Wall Street Journal* that called such limits on social media use part of a general policy of "corporate responsibility." *Free Speech and Corporate Responsibility Can Coexist Online*, Wall St. J., 1 Aug. 2021, https://www.notofman.com/wp-content/uploads/2022/08/Free-Speech-and-Corporate-Responsibility-Can-Coexist-Online-WSJ.pdf. Right before the divestiture law was passed, TikTok announced a Meta/Microsoft/YouTube style ban on "conspiracy theories." Reclaim The Net, TikTok Announces Crackdown on "Conspiracy Theories" (23 Apr. 2024), https://altnewsag.org/blog/2024/04/24/tiktok-announces-crackdown-on-conspiracy-theories-didi-rankovic-4-23-24/. After banning criticism of elections

procedures and vaccines in 2018-2019, Facebook followed it up by banning criticism of social distancing, the "go home and call 911 if you can't breathe" advice to COVID-19 sufferers in 2020 and 2021, and the civet cat or pangolin theory of COVID-19's origin. *See Murthy v. Missouri*, 603 U.S. ___, 144 S. Ct. ___, 219 L. Ed. 2d 604, 612 (2024). Facebook and YouTube banned not only the account of former President Donald Trump, but many people who simply covered him or mentioned his policies as citizens, journalists, or commentators, even though people were allowed to mention or cover al Qaeda, the Taliban, Hamas, historical serial killers, Hitler, Stalin, etc. *See*, e.g., Cindy Harper, YouTube Responds to CPAC Censorship with More Censorship, Reclaim the Net (25 Mar. 2022), https://reclaimthenet.org/youtube-responds-to-cpac-censorship-complaints-with-more-censorship; Mary Ellen Klas, *Legislators Seek to Punish Social Media Giants for "Selective Censorship" of Trump*, Miami Herald, 12 Jan. 2021, https://www.miamiherald.com/news/article248452195.html.

[46] Nancy Quan, *How TikTok's Arrogance Sealed Its Fate in America*, South China Morning Post, 7 May 2024, http://www.scmp.com.

[47] *See Meta Platforms, supra* note 26; Knudsen, slip op. at § 1.A.2.b.

[48] *Cf. Schuchardt v. President of the United States*, 839 F. 3d 336, 340–41 (3d Cir. 2016); Spencer Ackerman, *US Tech Giants Knew of NSA Data Collection, Agency's Top Lawyer Insists*, The Guardian (U.K.), 19 Mar. 2014, https://www.theguardian.com.

[49] *Cf*. Ackerman, *supra* note 47.

[50] *See, e.g., Clapper v. Amnesty International USA*, 568 U.S. 398, 133 S. Ct. 1138, 1144, 1149 n.4 (2013); Schuchardt, 839 F.3d at 354; *ACLU v. National Security Agency*, 493 F.3d 644 (6th Cir. 2007).

[51] *See Knudsen*, slip op. at § I.A.2.b.

[52] *See* H.R. 815, 118th Cong., 2d Sess. (May 2024), containing the Protecting Americans' Data from Foreign Adversaries Act of 2024.

[54] *See Twitter, Inc. v. Taamneh*, 598 U.S. 471, 478, 481, 499 (2023); Brief of Former National Security Officials as Amici Curiae in Supp. of Respondents, at 2, *Twitter, Inc. v. Taamneh*, No. 21-1496 (U.S. brief filed 18 Jan. 2023) (arguing that "ISIS pioneered [sic] the use of social media platforms like Twitter, Facebook, and Google . . . to spread its messages to unprecedent[ed]ly large audiences around the world. ISIS used these platforms to recruit a legion of terrorists from its sympathizers in the Middle East and from countries across the globe."); *cf*. Brief of U.S. Senator Ted Cruz, Congressman Mike Johnson, and Fifteen Other Members of Congress as Amici Curiae in Supp. of Neither Party, at 21, *Gonzalez v. Google, LLC*, No. 21-1333 (U.S. brief filed 7 Dec. 2022) (citing Michael Rubin, Why Does Big Tech Censor Conservatives and Not Terrorists, American Enterprise Institute (3 Mar. 2021), https://tinyurl.com/wx9wm968).

[55] Zach Schonfeld & Rebecca Klar, *Supreme Court Hands Twitter, Google Wins in Internet Liability Cases*, The Hill (18 May 2023), https://thehill.com/regulation/court-battles/4010347-supreme-court-punts-ruling-on-breadth-of-tech-companies-liability-shields/.

[56] *See, e.g., Murthy v. Missouri*, 603 U.S. ___, 144 S. Ct. ___, 219 L. Ed. 2d 604, 628-649 (2024) (Alito, J., joined by Thomas, J., and Gorsuch, J., dissenting); *NetChoice, LLC v. Paxton*, 49 F.4th 439, 445 (5th Cir. 2022) (framing issue as whether state legislatures can resist in any way the sweeping assertion that "corporations have a freewheeling First Amendment right to censor what people say"), *rev'd*, 603 U.S. ___, 144 S. Ct. 2283 (2024). While *Moody* in theory condemns government control of the Internet, the asserted control was designed to promote access to dominant platforms and achieve, in the Court's words, a "speech nirvana," rather than to suppress speech as in *Murthy*, which involved among other things the "Disinformation Dozen" and like persons who lost accounts or followers.

The Extraterritorial Reach of Corruption, continued from page 14

or protection. In addition, universal jurisdiction can be supported by a specific connection to a universally condemned offense that constitutes an offense against all nations. The territorial connection not only covers conduct within a nation's borders, but also conduct on territorial waters, its vessels on the high seas, and conduct elsewhere that has an impact within a nation's territory. The protection connection is usually confined to crimes outside a nation's territory that is against its security, territorial integrity, or political independence. This would, for example, cover terrorism, overseas murders of political figures, threats to national security, or overseas bribery in connection with the award of U.S. government contracts. The personality connection is concerned with the citizenship of the accused, or the nationality of a victim.[21]

Given these general principles regarding extraterritorial application of federal criminal statutes, how do they play out in the real world? Decisions regarding extraterritorial application exist regarding federal statutes concerning foreign corruption, money laundering, and fraud.

Foreign Corruption Offenses

In *United States v. Hoskins*,[22] the Second Circuit affirmed the dismissal of a Foreign Corrupt Practices Act (FCPA) indictment against a non-U.S. citizen employed by a non-U.S. subsidiary of a French company on extraterritoriality grounds. The defendants, according to the prosecution, were part of a scheme to bribe Indonesian officials in order to secure a contract. According to the indictment, the defendant had repeatedly emailed and called conspirators located in the United States, although the defendant never traveled to the United States during the bribery scheme. The lower court dismissed the indictment because the FCPA statute only has liability for "narrowly-circumscribed groups of people." The Second Circuit affirmed, finding that the FCPA, "does not impose liability on a foreign national who is not an agent, employee, officer . . . of an American issue or domestic concern … unless that person commits a crime … within the United States."[23] The Court further stated that the text of the FCPA's anti-bribery provisions did not extend to a "foreign national who never set foot in the United States or worked for an American company during the alleged scheme" and stated that "when a statute includes some extraterritorial application, that application is limited to the statute's terms."[24]

The new Foreign Extortion Prevention Act (FEPA) addresses the apparent hole in the FCPA, namely the "demand side" of foreign bribery, while the FCPA addresses the "supply side" of foreign bribery. 18 U.S.C. Sec. 1352 was enacted to criminalize a foreign official, or anyone acting on behalf of a foreign official, *demanding* or *receiving* a bribe in return for influencing the official in connection with obtaining or retaining business. The FCPA, on the other hand, addresses U.S. concerns of *offering* or *providing* a bribe to foreign officials to influence them in connection with obtaining or retaining business. This new law, 18 U.S.C. § 1352 (b)(3), expressly provides that the offense "shall be subject to extraterritorial Federal jurisdiction." Given the clear, express statement of extraterritoriality in the statute, under the relevant case law discussed previously, a court would find that the presumption against extraterritoriality was rebutted in this statute. This result would make sense, since the statute is directed to the conduct of foreign officials receiving bribes, a class of persons who would be found in foreign countries.

Money Laundering

The U.S. Money Laundering Control Act, 18 U.S.C. § 1956(f), expressly provides for extraterritorial jurisdiction over money laundering offenses if the conduct is by a U.S. citizen or occurs partly in the United States, and the transaction involves funds exceeding US$10,000.[25] This statute has been held to have an express grant of extraterritoriality by Congress and therefore rebuts any presumption against extraterritoriality.[26] The extraterritorial reach of the statute was illustrated in *United States v. Ojedokun*.[27] In that case, the defendant was convicted of money laundering conspiracy. During all relevant time periods, he resided in Nigeria, and was not a U.S. citizen. None of his misconduct occurred in the United States. However, since the misconduct of the defendant's co-conspirators occurred in the United States, the Court found that the money laundering statute applied extraterritorially to the defendant, and it was not necessary to conduct the Supreme Court's two-step analysis of extraterritoriality because of the clear, unambiguous statement of extraterritoriality under the statute.[28]

Fraud

The mail and wire fraud statutes, 18 U.S.C. § 1341 and 1343, prohibit mail or wire transmissions in interstate or foreign commerce for the purpose of executing a scheme to defraud. The courts, however, have disagreed whether the wire and mail fraud statutes have extraterritorial effect, with the majority answering in the negative. In *Pasquantino v. United States*,[29] the Supreme Court held that a wire fraud scheme to evade Canadian taxes by smuggling liquor into Canada was not an impermissible extraterritorial application of the wire fraud statute, as the offense was complete the moment the scheme was executed within the United States. The Supreme Court found in that case the focus of the statute to be the use of the wires, which occurred in the United States, and not the scheme to defraud itself, much of which occurred in Canada.[30] Courts in the various circuits, however, have disagreed whether these statutes apply extraterritorially and where the focus of the wire and mail fraud statutes lies. For example, in *United States v. Georgiou*,[31] the Third Circuit held that the wire fraud statute applies extraterritorially, as it punishes frauds executed in "interstate and foreign commerce." The First Circuit came to the same conclusion.[32] The Second Circuit, on the other hand, in *European Community v. RJR Nabisco, Inc.*,[33] rejected that view, finding that *Morrison*, decided after *Pasquantino*, held that a general reference in a statute to foreign commerce does not defeat the presumption against extraterritoriality. Courts in that circuit have found, differently than for instance, the Eleventh Circuit, that the focus of the wire fraud statute is the scheme to defraud itself, and not just the use of the wires in the United States to demonstrate a domestic focus or application.[34] A case from the Eastern District of New York, in the Second Circuit, *United States v. Gasparini*, found distinguishable from *Pasquantino* a scheme devised and otherwise executed abroad that involves only some use of the U.S. wires.[35] There, however, it found that the charged wire fraud counts only required domestic application of the statute, as the scheme itself was supported in large part by domestic conduct.[36] As such, the Court denied a motion to dismiss the case based on the presumption against extraterritoriality even though the defendant resided in Rome and executed a large part of the scheme overseas. It found that the scheme's use of a leased computer server in New Jersey to execute wires to more than 800 computers in the United States required only a domestic, not extraterritorial application of the wire fraud statute, as the domestic conduct was "substantial" and "integral" to the commission of the scheme.[37]

Likewise, a court in the Northern District of California found that wire fraud and domestic bribery statutes do not apply extraterritorially. In *United States v. Sidorenko*, the defendants were foreign nationals residing outside the United States. The defendants were alleged to have given money to an employee of the International Civil Aviation Organization in exchange for favorable treatment. The only nexus to the United States was that the organization was partially funded by the United States. The Court stated that while the United States had some interest in "eradicating bribery, mismanagement and petty thuggery the world over" it believed that extraterritorial application of the statutes would create limitless authority over "foreign individuals, in foreign government or in foreign organizations" as long as they received U.S. federal funding.[38]

The Eleventh Circuit has also found the mail and wire fraud statutes to have no extraterritorial application.[39] Despite this finding, the Eleventh Circuit found that the defendant's case in *Skillern* involved a domestic application of the statute, as the Court found the focus of the statute to be "the acts of "depositing" and "transmitting" for the purpose of executing a scheme to defraud. Since the defendant was alleged to have made mailings to Orlando and transmitted funds within Florida, the violative conduct occurred in the United States although the offense also involved conduct that occurred abroad.[40]

The First and Third Circuits, as discussed above, found, contrary to the Second and Eleventh Circuits, that the wire fraud statute applies extraterritorially because it contains, as stated in *Georgiou*, "explicit statutory language" … it punishes frauds executed in "interstate and foreign commerce" and "is surely not a statute in which Congress had only domestic concerns in mind." In *Georgiou*, the defendant had opened numerous brokerage accounts in Canada, the Bahamas, and Turks and Caicos to execute a scheme to defraud and to manipulate stocks, which included transactions in the United States.[41] The Second and Eleventh Circuits, as stated above, have found the "foreign commerce" language in the wire fraud statute insufficient to show Congress's express intent to confer extraterritoriality.

Given the split in the circuits on the extraterritorial application of the wire and mail fraud statutes, will the Supreme Court step in and decide the issue to resolve the split? The federal fraud statutes are commonly used in federal prosecutions of both domestic and foreign defendants, and it would seem that uniform application of extraterritoriality in those statutes, either for or against, would be an important consideration for certainty in the rule of law. The Supreme Court has not shown interest in entering this fray to resolve the issue, since as recently as October 2023, the Supreme Court denied certiorari in a case that specifically asked the Court to resolve the circuit split.[42] As such, extraterritorial application of the fraud

statutes will continue to be in flux and depend on in which circuit one is prosecuted.

Conclusion

The Supreme Court in *Morrison* and *RJR Nabisco*, two civil cases, prescribed a two-step test to determine whether a statute has extraterritorial application, applying a presumption against extraterritoriality absent a clear and express intent of Congress for extraterritorial application. However, this test is in tension with *Bowman*, a Supreme Court case preceding *Morrison* and *RJR Nabisco*, providing that in certain criminal cases, congressional intent need not be express, but may instead be inferred under certain circumstances to rebut the presumption against extraterritoriality. Since *Bowman* has not been expressly overruled, there will continue to be disparate analysis of extraterritoriality depending on whether a case is civil or criminal, and in what circuit one finds themselves. To provide certainty in the extraterritorial reach of federal statutes and to harmonize the analysis between civil and criminal cases, the Supreme Court should accept certiorari in the appropriate case and settle the issue once and for all.

Robert J. Becerra *is a board certified expert in international law. He concentrates his practice in the areas of civil litigation, white collar criminal defense, grand jury investigations, cargo loss, federal agency investigations, disputes between exporters and importers, trade-based money laundering, export enforcement, FDA detentions and investigations, customs seizures and civil forfeitures, and other proceedings related to international trade.*

Endnotes

[1] *Extraterritorial Application of American Criminal Law: An Abbreviated Sketch.* Congressional Research Service, 21 Mar. 2023.

[2] *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 , (2010).

[3] *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325 (2016).

[4] *Id*.

[5] *Id*. at 579 U.S. **334.

[6] *Id*. at 579 U.S. **336.

[7] *United States v. Bowman*, 260 U.S. 94 (1922).

[8] *Id*.; *Garcia v. United States*, 2016 U.S. Dist. LEXIS 139811 *2 (S.D. Fla. 2016).

[9] *See*, e.g., *United States v. Vasquez*, 899 F.3d 363, 373 n.6 (5th Cir. 2018); *United States v. Ubaldo*, 859 F.3d 690, 700–01 (9th Cir. 2017); *United States v. Abu Khatallah*, 151 F. Supp. 3d 116, 124–26 (D.D.C. 2015) (explaining that *Bowman* "sits uneasily with *Aramco, Morrison*, and *Kiobel*").

[10] *See*, e.g., *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004) ("[W]e must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context."); *FCC v. Am. Broadcast Co.*, 347 U.S. 284, 296 (1954) ("There cannot be one construction for the Federal Communications Commission and another for the Department of Justice."); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 727 (6th Cir. 2013) ("A single statute with civil and criminal applications receives a single interpretation.").

[11] *United States v. Rolle*, 65 F.4th 1273 (11th Cir. 2023).

[12] *United States v. Frank*, 599 F.3d 1221, 1230 (11th Cir. 2010).

[13] *Id*; *United States v. Belfast*, 611 F.3d 783, 813 (11th Cir. 2010).

[14] *United States v. Plummer*, 221 F.3d 1298 (11th Cir. 2000).

[15] *Id*., at 1303.

[16] *United States v. McVicker*, 979 F. Supp. 2d 1154 (D. Ore. 2013); *United States v. Carvajal*, 924 F. Supp. 2d 219 (D.D.C. 2103); *United States v. Bin Laden*, 92 F. Supp. 2d 189 (S.D.N.Y. 2000).

[17] *United States v. Gasperini*, 2017 U.S. Dist. LEXIS 84116 (E.D.N.Y. 2017), *United States v. Didani*, 2024 U.S. Dist. LEXIS 70181 *16–17 (E.D. Mich. 17 Apr. 2024), *United States v. Skinner*, 536 F. Supp. 3d 23 (E.D. Va. 2021).

[18] *Gasparini*, *supra*; *United States v. Cardona-Cardona*, 500 F. Supp. 3d 123 (S.D.N.Y. 2020).

[19] *United States v. Al Kassar*, 660 F.3d 108, 118–119 (2d Cir. 2011).

[20] Fourth Restatement, *Foreign Relations Law of the United States; Extraterritorial Application of American Criminal Law: An Abbreviated Sketch*, Congressional Research Service, 21 Mar. 2023; *United States v. Rolle*, 65 F.4th 1273, 1279 (11th Cir. 2023).

[21] *Id*.

[22] *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).

[23] *Id*. at 96.

[24] *Id*., at 95–96.

[25] § 17A.01 Money Laundering, § 29A-2 *Extraterritoriality; United States v. Bodmer*, 342 F. Supp. 2d 176, 191 (S.D.N.Y. 2004).

[26] *See Skillern v. United States*, supra, at *22.

[27] *United States v. Ojedokun*, 517 F.Supp. 3d 444 (D. Md. 2021).

[28] *Id*. at 457 (collecting cases).

[29] *Pasquantino v. United States,* 544 U.S. 349 (2005).

[30] *Id*. at 358, 371.

[31] *United States v. Georgiou*, 777 F.3d 125 (3d Cir. 2015).

[32] *United States v. Lyons*, 740 F.3d 702, 719 (1st Cir. 2014).

[33] *European Community v. RJR Nabisco*, 764 F.3d 129, 141–142 (2d Cir. 2014) *rev'd and remanded*, 579 U.S. 325(2016).

[34] *Gasparini, supra* at *16.

[35] *Id*.

[36] *Gasparini* also involved violations of the Computer Intrusion Statutes, 18 U.S.C. Sec. 1030. The Eleventh Circuit, contrary to its conclusion regarding the wire fraud statute, found that 18 U.S.C. Sec. 1030 includes an indicia of congressional intent to be applied extraterritorially by examining its legislative intent. 2017 U.S. Dist. LEXIS 84116, *19, fn. 9.

[37] *Gasparini*, *supra* at *16, 19.

[38] *United States v. Sidorenko*, 102 F. Supp. 3d 1124 (N.D. Cal. 2015).

[39] *Skillern v. United States*, 2021 U.S. App. LEXIS 11056 *22 (11th Cir. 2021).

[40] *Id*.

[41] *Georgiou, supra*, at 136–137.

[42] *United States v. Elbaz*, 52 F.4th 593, (4th Cir. 2022) *cert. denied Elbaz v. United States*, 2023 U.S. LEXIS 3961, 144 S.Ct. 278 (10 Oct. 2023).

In re Al Zawawi – Rethinking Eligibility Requirements in Chapter 15 Cases, *continued from page 16*

to a trustee.[23] This includes the ability to seek discovery regarding the assets of the debtor, the ability to marshal, administer, and liquidate those assets in the United States, to enforce the automatic stay to prevent actions against the debtor and its property in the United States, and to obtain any additional relief that may be available to a U.S. trustee with certain exceptions.[24]

The Analysis in *In re Goerg*

In *In re Goerg*, the Eleventh Circuit considered whether to commence a section 304 ancillary case of a West German bankruptcy of a decedent's estate.[25] At the time, the definition of a *foreign proceeding* was "a proceeding . . . in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding."[26] And the definition of *debtor* was a "person or municipality concerning which a case under this title has been commenced."[27] In turn, the definition of a *person* included "individuals, partnership, and corporation," and the Eleventh Circuit concluded that decedents' estates did not meet such definition.[28] The Court acknowledged an anomaly—that the inclusion of the term debtor in the foreign proceeding suggests that the subject of the foreign proceeding qualify as a debtor under the Bankruptcy Code, yet a foreign proceeding need not be a bankruptcy proceeding and can include an estate, which does not qualify as a debtor.[29]

The Court then considered that this anomaly can be resolved by holding that either (i) the Bankruptcy Code's definition of debtor controls, which would limit the commencement of ancillary proceedings to only those foreign proceedings of which the subject qualified as a debtor; or (ii) the term debtor as used in the section 304 context incorporates the definition of a debtor used by the home court where the foreign proceeding is pending.[30] Though the Court described the former view as "the more attractive of the two" as it followed the statutory construction principle that a definition, like debtor, be applied each time it appears in the statutory scheme, it reasoned that the two differing interpretations required that it examine the statutory purpose of section 304.[31] In so doing, the Court considered that section 304 "was intended to deal with the complex and increasingly important problems involving the legal effect the United States courts will give to foreign bankruptcy proceedings," that cases commenced under section 304 were ancillary to give effect to order in the foreign proceedings, and that the statute was enacted "to help further the efficiency of foreign insolvency proceedings involving worldwide assets."[32] Based on the foregoing, the Court stated that it "made eminent sense for Congress to define expansively the class of foreign insolvency pleadings for which ancillary assistance is available," and concluded that a debtor subject of a foreign proceeding need not qualify as a debtor under the Bankruptcy Code for the commencement of an ancillary proceeding under section 304.[33]

Following the Guidance From *Goerg*

Faced with a similar "anomaly" in *Al Zawawi* as in *In re Goerg*—this time in the context of Chapter 15 rather than the former section 304—and given that the definitions of debtor and foreign proceeding remained largely unchanged, the Eleventh Circuit reasoned that *Goerg* guided them to consider the purpose of Chapter 15 in resolving the anomaly.[34] The Court concluded that one of the main aims of Chapter 15, like the former section 304, is "to provide effective mechanisms for cross-border insolvency."[35] Following the logic of *Goerg*, the Court held that the eligibility requirements for a debtor under section 109(a) did not apply to Chapter 15 cases.[36]

Implications of the *Al Zawawi* Decision

The *Al Zawawi* decision clarifies a crucial issue in cross-border insolvency: a debtor involved in a foreign proceeding does not need to meet the eligibility requirements set forth in section 109(a) of the Bankruptcy Code. This decision firmly establishes that, at least in the Eleventh Circuit, foreign insolvency proceedings involving trusts and estates—which are "entities" but not "debtors" under the Bankruptcy Code—can be recognized under Chapter 15. Moreover, it allows foreign fiduciaries to commence Chapter 15 cases to investigate the whereabouts of a debtor's potentially dissipated or transferred property, with the aim of identifying, localizing, and recovering such property for the benefit of the creditor body.[37]

Juan J. Mendoza *is counsel at Sequor Law with a focus on asset recovery, bankruptcy, creditors' rights and remedies, and cross-border insolvency. He regularly represents both foreign and domestic trustees, financial institutions, and other creditors in fraud-based disputes and investigations. Mr. Mendoza has extensive experience litigating in federal and state courts, including cases under Chapter 15 of the U.S. Bankruptcy Code, and pursuing actions to collect evidence for use in foreign proceedings under 28 U.S.C. § 1782.*

Endnotes

[1] 97 F.4th 1244 (11th Cir. 2024).

[2] "Bankruptcy Code" refers to title 11 of the United States Code, 11 U.S.C. § 101 et seq.

[3] "UNCITRAL" refers to the United Nations Commission on International Trade Law.

[4] United Nations Commission on International Trade Law, Uncitral Model Law on Cross-Border Insolvency (1997), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf.

[5] *Al Zawawi*, 97 F.4th 1244.

[6] *Id*. at 1248.

[7] *Id*.

[8] *See* 11 U.S.C. § 1517, which provides, in relevant part:

(a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if—

(1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;

(2) the foreign representative applying for recognition is a person or body; and

(3) the petition meets the requirements of section 1515.

(b) Such foreign proceeding shall be recognized—

(1) as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests; or

(2) as a foreign nonmain proceeding if the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending.

[9] 11 U.S.C. § 101(23).

[10] *Id*. at 1249 (citing 11 U.S.C. § 109(a)).

[11] *Id*. (citing to 11 U.S.C. § 103).

[12] *Id*.

[13] *Id*.

[14] *Al Zawawi*, 97 F.4th at 1252 (citing to *In re Goerg*, 844 F.2d 1562 (11th Cir. 1988)).

[15] *Id*. (citing *In re Goerg*, 844 F.2d 1562 (11th Cir. 1988)).

[16] *Id*.

[17] *The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, Title VII, Pub. L. No. 109-8, § 109-8, § 801 (2005).

[18] *See* H.R. Rep. No. 109-31, pt. 1, 109–10.

[19] *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 43-44 (Bankr. S.D.N.Y. 2008) ("The language of chapter 15 tracks the Model Law, with some modifications that are designed to conform the Model Law with existing United States law.").

[20] 11 U.S.C. § 1508.

[21] H.R. Rep. No. 109-31, pt. 1, 109–10.

[22] 11 U.S.C. § 1517.

[23] *See, e.g.*, 11 U.S.C. §§ 1507, 1520, 1521.

[24] 11 U.S.C. § 1520(a)(1)-(3); § 1521(a)(1)-(7).

[25] 844 F.2d at 1563.

[26] *Id*. at 1565 (quoting 11 U.S.C. § 101(22), 1986).

[27] 11 U.S.C. § 101(12) (1982).

[28] 11 U.S.C. s 101(35) (1986).

[29] *In re Goerg*, 844 F.2d at 1566–67.

[30] *Id*. at 1567.

[31] *Id*.

[32] *Id*. at 1568.

[33] *Id*.

[34] *In re Al Zawawi*, 97 F.4th at 1253-54. The Court signaled its skepticism of following this approach, stating that "it is impossible to confidently determine the degree to which *Goerg's* understanding of the purpose of the former § 304 can be grafted onto Chapter 15." *Id*. at 1254.

[35] *Id*.

[36] *Id*. at 1255. Notably, though raised in the special concurrence of Judge Tjoflat, the majority opinion did not address § 1508's directive to consider Chapter 15's international origin to achieve a uniform interpretation of Chapter 15.

[37] In fact, Judge Tjoflat noted that the *Al Zawawi* decision "illustrate[d] the problem with adopting" the position that eligibility be a prerequisite to recognition: "it would reward fraudulent transfers of a foreign debtor's assets in the United States because once the debtor sells his American property, the foreign proceeding cannot be recognized." *Id*. at 1274. He concluded that "[c]ommon sense tells us this result almost certainly cannot be correct." *Id*. at 1277.

U.S. Immigration Laws and Their Extraterritorial Application, continued from page 19

Photo: 1000 Words/Shutterstock.com

Orphan Process

If the Hague Intercountry Adoption Convention does not apply and the child is an orphan, the adoption process is different. Under U.S. immigration law, an orphan is a foreign-born child who does not have any "legal parents because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents; or has a sole or surviving parent who is unable to care for the child, consistent with the local standards of the foreign-sending country, and who has, in writing, irrevocably released the child for emigration and adoption."[21] The U.S. citizen petitioner must file an orphan petition before the child's 16th birthday.[22] The steps in the Orphan Process for the PAP are as follows:

a. The U.S. citizen petitioner (PAP) must obtain a home study completed by someone authorized to complete an adoption home study in his/her home state in order to establish the petitioner's ability to provide proper parental care.

b. File Form I-600A with the home study and evidence that the child is an orphan with USCIS.

c. Upon approval of Form I-600A, the ASP transmits the approval and home study to the child's country of origin.

d. The PAP identifies or matches with a child.

e. The PAP completes the adoption/grant of custody process in the child's country of origin.

f. The PAP files Form I-600 for a specific child, which USCIS or DOS adjudicates.

g. DOS issues the child an immigrant visa.[23]

Please note that during this process, USCIS and/or DOS will "conduct an investigation overseas to confirm that the child is an orphan; verify that the U.S. citizen prospective parent had obtained a valid adoption or grant of custody; confirm that the child does not have an illness or disability that is not described in the orphan petition; determine whether the child has any special needs that were not fully addressed in the home study; and determine whether there are any facts showing that the child does not qualify for immigration as an adopted child."[24]

Both of these adoption processes are convoluted, so it is recommended that prospective adoptive parents retain immigration counsel to assist them with presenting the most compelling case.

Derivative U.S. Citizenship for Persons Born Abroad

In general, a person born outside of the United States may acquire U.S. citizenship at birth if all of the following requirements are met at the time of the person's birth:

- The person is a child of a U.S. citizen parent(s);
- The U.S. citizen parent meets certain residence or physical presence requirements in the United States or an outlying possession before the person's birth in accordance with the applicable provision; and
- The person meets all other applicable requirements under either INA § 301 or INA § 309.[25]

For purposes of citizenship, a "child" is defined as:

- The genetic child of a U.S. citizen mother;
- The adopted (including an orphan or Hague Convention adoptee) child of a U.S. citizen mother or father;
- The genetic, legitimated child of a U.S. citizen father;
- The child of a non-genetic gestational U.S. citizen mother (person who carried and gave birth to the child) who is recognized as the child's legal parent; or
- The child of a U.S. citizen mother or father who is married to the child's genetic or gestational parent at the time of the child's birth (even if no genetic or gestational

relationship exists with the U.S. citizen mother) if both parents are recognized as the child's legal parents.[26]

USCIS considers a child to be born in wedlock when the legal parents are married to one another at the time of the child's birth and at least one of the legal parents has a genetic or gestational relationship to the child.[27]

In-Wedlock Births Abroad to U.S. Citizen Parent and Noncitizen Parent

If the child was born abroad to a U.S. citizen parent and a noncitizen parent on or after 14 November 1986, the U.S. citizen parent must demonstrate that he/she was physically present in the United States for five years prior to the child's birth, two of which were after age fourteen in order to transmit U.S. citizenship to the child.[28]

In-Wedlock Birth Abroad to Two U.S. Citizen Parents

Since 13 January 1941, the only requirement for a parent to transmit U.S. citizenship to a child born abroad when the child is born in wedlock to two U.S. citizen parents is to establish that at least one parent resided in the United States or outlying possession prior to the child's birth.[29]

Out-of-Wedlock Birth Abroad to U.S. Citizen Father and Noncitizen Mother

In order for a U.S. citizen father to transmit citizenship to a child born abroad on or after 14 November 1986, he must establish four requirements: (1) He was physically present in the United States or outlying possession for at least five years, two of which were after the father reached the age of fourteen, before the child's birth; (2) The child was legitimated or acknowledged before age eighteen (legitimated under the laws of the child's residence or domicile; or paternity acknowledged in writing under oath; or paternity established by court order); (3) A blood relationship between the child and the U.S. citizen father was established; and (4) The U.S. citizen father, unless deceased, has agreed in writing to financially support the child until the age of eighteen.[30]

Out-of-Wedlock Birth Abroad to U.S. Citizen Mother

For children born abroad on or after 24 December 1952 and before 12 June 2017, the U.S. citizen mother can transmit U.S. citizenship to the child if she was physically present in the United States or outlying possession continuously for twelve months prior to the child's birth.[31] In light of the U.S. Supreme Court's decision in *Sessions v. Morales-Santan*, 137 S. Ct. 1678 (2017), for children born on or after 12 June 2017, the U.S. citizen mother must establish that she was physically present in the United States or outlying possession for at least five years, two of which were after the mother reached the age of fourteen.[32]

Evidence Required to Establish Physical Residence

The acceptable proofs the U.S. citizen parent may submit to USCIS to establish the required residence or physical presence in the United States may include, but are not limited to the following:

- School, employment, or military records;
- Deeds, mortgages, or leases showing residence;
- Attestations by churches, unions, or other organizations;
- U.S. Social Security quarterly reports; and
- Affidavits of third parties having knowledge of the residence and physical presence.[33]

Evidence of Citizenship

If a person acquired U.S. citizenship at birth and is present in the United States, he/she may file an Application for Certificate of Citizenship (Form N-600) with USCIS. A person who is at least eighteen years of age may submit the Application for Certificate of Citizenship on their own behalf. A parent or a legal guardian may submit the application for a child who has not reached eighteen years of age.[34] USCIS issues proof of U.S. citizenship in the form of a Certificate of Citizenship if the Form N-600 is approved.[35]

Alternatively, the person may apply for a U.S. passport with the U.S. Department of State directly to serve as evidence of U.S. citizenship. If the child is under eighteen, the parent or legal guardian of a U.S. citizen may choose to apply to the local U.S. embassy or consulate for a Consular Report of Birth Abroad (CRBA).[36] Please note that U.S. passports expire and must be renewed periodically, while neither a CRBA nor a Certificate of Citizenship expire.

Conclusion

With regard to extraterritoriality, there are several instances where our nation's immigration laws apply to conduct and processes that occur outside of the nation's borders. International law practitioners should seek the advice of U.S. immigration counsel with regard to intercountry adoptions and applications for derivative citizenship.

Larry S. Rifkin *is the managing partner of Rifkin & Fox-Isicoff PA. The firm's specialty is immigration law with its principal office in Miami, Florida. He is also chair of the Immigration Law Committee for the International Law Section of The Florida Bar.*

Endnotes

[1] William S. Dodge, "A Primer on Extraterritoriality", (25 Mar. 2022), at: https://tlblog.org/extraterritoriality/#:~:text=Extraterritoriality%20

refers%20to%20the%20application,%2C%20nationality%2C%20and%20universal%20jurisdiction.

[2] U.S. CUSTOMS AND BORDER PROTECTION, *Frontline Preclearance* (last modified 4 Jan. 2024), at: https://www.cbp.gov/frontline/frontline-preclearance.

[3] U.S. CUSTOMS AND BORDER PROTECTION, *CBP Customer Service* (1 Mar. 2024), at: https://www.help.cbp.gov/s/article/Article-1333?language=en_US.

[4] *Id*.

[5] *Id*.

[6] *Id*.

[7] U.S. CUSTOMS AND BORDER PROTECTION, *Preclearance*, at: https://www.cbp.gov/travel/preclearance.

[8] *Id*.

[9] *Frontline Preclearance*, supra n. 2

[10] *Id*.

[11] *Id*.

[12] *Id*.

[13] *Preclearance*, supra n. 7.

[14] Nat'l Academies of Sciences, Engineering & Medicine, *Guidelines for Improving Airport Services for International Customers* (2016) The National Academies Press.

[15] *Frontline Preclearance*, supra n. 2.

[16] USCIS, *Immigration through Adoption* (11 Apr. 2023), at: https://www.uscis.gov/adoption/immigration-through-adoption.

[17] U.S. DEP'T OF STATE, *Understanding the Hague Convention*, at: https://travel.state.gov/content/travel/en/Intercountry-Adoption/Adoption-Process/understanding-the-hague-convention.html.

[18] *Id*.

[19] *Id*.

[20] USCIS, *Hague Process* (14 June 2024), https://www.uscis.gov/adoption/immigration-through-adoption/hague-process.

[21] USCIS PM, Vol. 5, Part C, Chapter 4.

[22] *Id*.

[23] USCIS, Hague and Orphan Intercountry Adoption Processes (22 June 2023), at: https://www.uscis.gov/sites/default/files/document/charts/Hague-and-Orphan-Intercountry-Adoption-Processes-Flow-Chart-of-Key-Steps.pdf.

[24] USCIS, *Orphan Process* (24 July 2023), at: https://www.uscis.gov/adoption/immigration-through-adoption/orphan-process.

[25] USCIS, *Chapter 3 - U.S. Citizens at Birth* (INA 301 & 309) (18 July 2024), at: https://www.uscis.gov/policy-manual/volume-12-part-h-chapter-3.

[26] USCIS, *Chapter 2 - Definition of Child and Residence for Citizenship and Naturalization* (18 July 2024), at: https://www.uscis.gov/policy-manual/volume-12-part-h-chapter-2.

[27] *Id*.

[28] *Chapter 3 - U.S. Citizens at Birth (INA 301 and 309)*, supra n. 25.

[29] *Id*.

[30] *Id*.

[31] *Id*.

[32] *Id*.

[33] USCIS, *Form N-600, Instructions for Application for Certificate of Citizenship (15 Mar. 2024)*, at: https://www.uscis.gov/sites/default/files/document/forms/n-600instr.pdf.

[34] *Chapter 3 - U.S. Citizens at Birth (INA 301 and 309)*, USCIS (18 July 2024), supra n. 28.

[35] *Id*.

[36] *Id*.

Cognitive Sovereignty and International Norms, continued from page 22

The mental integrity of individuals using these technologies may also be threatened since the alteration of thoughts, emotions, and behaviors by neurotechnology can infringe on an individual's cognitive liberty, which raises ethical questions regarding the extent to which technology should be allowed to intervene in human thought processes and the potential for misuse in surveillance or coercion. Similarly, as a valuable commodity, data security is a growing concern since hacking or unauthorized access to this neural information may lead to misappropriation or manipulation, with broad consequences for personal and societal security. Therefore, it is evident that the protection of neural data extends beyond a mere technical challenge to having moral imperatives that necessitate robust legal frameworks and technological protections. From a societal perspective, there is also potential for discrimination and social inequality since neurotechnology accessibility may be hindered by socioeconomic status, thus perpetuating disparities in who can benefit from these advancements, which raises questions about fairness and justice.

We can conclude that while neurotechnology has significant advantages and has the potential to enhance human capabilities and improve the quality of life, it also poses significant ethical and human rights challenges, which necessitates the development of comprehensive legal and ethical frameworks aimed at the protection of individual rights, to ensure the equitable and responsible application of neurotechnology.

Neurotechnology and International Human Rights

The advancement of neurotechnology presents unprecedented challenges to existing international human rights frameworks. Consequently, it is necessary to examine the relationship between neurotechnology and international human rights laws, primarily focusing on an analysis of existing legal frameworks and exploring the need for adaptations to protect individual rights in this rapidly evolving landscape.

Several international human rights frameworks provide a foundation for addressing the ethical and legal challenges posed by these technologies, such as the Universal Declaration of Human Rights (UDHR),[18] the International Covenant on Civil and Political Rights (ICCPR),[19] and the Convention on the Rights of Persons with Disabilities (CRPD).[20] The UDHR was adopted in 1948 and prescribes fundamental human rights principles applicable to all individuals. Specifically, Article 3 focuses on the right to life, liberty, and security, which can be interpreted to include the right to mental integrity and autonomy. Similarly, Article 12 protects against arbitrary interference with privacy, family, home, or correspondence, a provision that is important in the context of the privacy implications of neurotechnology. Freedom of opinion and expression is protected by Article 19, which becomes relevant when considering cognitive liberty and the right to maintain one's thoughts and opinions without undue influence from external technologies.

These rights are extended in the ICCPR, with Article 17 reinforcing the right to privacy by offering protection against

arbitrary or unlawful interference with an individual's privacy, family, home, or correspondence, which is specifically relevant since unauthorized access to neural data could infringe upon personal privacy. Similarly, Article 18 addresses freedom of thought, conscience, and religion, emphasizing the importance of protecting mental integrity and cognitive liberty against invasive technologies that could manipulate or alter an individual's thoughts and beliefs. From a societal perspective, the CRPD is important, focusing primarily on ensuring that persons with disabilities have the same rights and freedoms as other individuals. Article 22 protects the right to privacy, ensuring that personal data, including health-related information, is protected. Article 25 further emphasizes the right to health by advocating for the provision of health services, including informed consent and respect for individuals' autonomy and dignity. Any application of neurotechnology needs to adhere to these principles to ensure that individuals with disabilities are not exploited or subjected to coercive treatments without their informed consent.

It should be acknowledged that while providing a solid foundation, the above framework is constrained by limitations. These frameworks are built around broad, general, and aspirational language to provide flexibility and adaptability across diverse legal systems and cultural contexts. However, this broadness can be a double-edged sword, especially when dealing with a novel technology like neurotechnology, which often requires interpretation to be applied to specific contexts.

For example, terms like *privacy, autonomy,* and *integrity* are foundational to human rights law, but their application to neurotechnology requires nuanced understanding and adaptation. In the context of privacy, neurotechnology introduces the principle of neural privacy, which involves the protection of an individual's thoughts, emotions, and cognitive processes, which may not be appropriately addressed within existing human rights frameworks. While Article 12 of the UDHR and Article 17 of the ICCPR protect against arbitrary interference with privacy, there is an absence of specificity regarding the application of this provision to neural data, which can be considered more intimate and personal than typical data sets such as emails or financial records. When interpreting this provision, there may be a broad variance regarding what constitutes an invasion of neural privacy due to an absence of clear precedents and guidelines. Therefore, a reevaluation is necessary regarding what constitutes appropriate protection measures, such as the inclusion of stricter regulations on data collection, storage, and usage specifically tailored to neural data.

At the same time, informed consent is enshrined in human rights frameworks. The enforcement of these frameworks in the context of neurotechnology is complicated since users may not be able to fully comprehend how the neural data is used or the potential consequences of BCIs or neural modulation. This raises questions regarding whether the requirement to protect the autonomy of individuals, as prescribed by Articles 3 and 18 of the ICCPR, can be fulfilled since consent cannot truly be informed.

Technologies like deep brain stimulation (DBS) and neural modulation have the potential to directly manipulate thoughts, emotions, and behaviors,[21] raising concerns regarding the cognitive liberty of individuals. There is also a risk of misappropriation if used for coercive purposes. These technologies can be misused, thus challenging the concept of mental integrity.

These frameworks also fail to appropriately address the ethical and legal consequences of direct brain manipulation. The right to mental integrity can be inferred from existing human rights principles. However, explicit recognition and protection are absent against the potential harm of these technologies, which creates ambiguity regarding the application of existing rights within a neurotechnology context. There are also concerns regarding the cognitive autonomy of individuals due to the ability of neurotechnology to influence or manipulate thoughts and emotions. Existing frameworks do not adequately address these new forms of manipulation, thus leaving gaps in legal protections for individuals' mental sovereignty. For example, if a technology can subtly influence decision-making processes, does it not infringe on the right to autonomy?

Adapting Human Rights Law

While the human rights framework provides a strong foundation for the regulation of neurotechnology, significant gaps remain since these technologies did not exist and were not anticipated when these legal instruments were being formulated. Consequently, it is necessary to evaluate whether the development of new legal instruments or the adaptation of existing ones will be the most appropriate way to address the challenges posed by neurotechnology. It is suggested that new treaties or protocols specifically tailored to addressing the harm posed by neurotechnology should be developed, which provide detailed guidelines on privacy, consent, data protection, and cognitive autonomy. These instruments will provide clarification regarding the application of existing human rights principles to neural data and brain manipulation, providing comprehensive protection. Legal instruments focused on neurotechnology may facilitate the harmonization of global standards and practices, thus ensuring consistent protection of human rights across various jurisdictions, which would be particularly important in the context of an increasingly interconnected world where the development and deployment of neurotechnology transcend borders. These

instruments need to establish best practices for the ethical application of neurotechnology to ensure that researchers, developers, and users adhere to principles of transparency, accountability, and respect for individual rights.

An alternative approach would be the amendment of existing treaties, such as the ICCPR, to explicitly address neurotechnology through the expansion of the definitions of privacy, autonomy, and mental integrity to include neural data and cognitive processes. These updates could integrate new rights that specifically address neurotechnology, such as the right to cognitive liberty or mental integrity, to ensure the protection of individuals from unauthorized manipulation or control over their cognitive functions. In tandem, the development or amendment of these legal instruments will necessitate international collaboration and input from various stakeholders, such as legal experts, neuroscientists, ethicists, and technologists. These frameworks should also be informed by public discussions and engagement regarding neurotechnology and its consequences to ensure that legal frameworks reflect societal values and concerns. The adoption of this interdisciplinary approach would be aimed at ensuring that the latest scientific understanding and ethical considerations inform the new legal frameworks.

Based on the above contentions, the author proposes that the profound and unprecedented challenges posed by neurotechnology necessitate the development of new legal instruments tailored explicitly to these fields, which arguably would be the most effective approach. While the amendment of existing treaties would integrate new rights and update definitions, these modifications might still be inadequate to address the specific complexities of neurotechnology. Thus, the development of new legal frameworks informed by interdisciplinary collaboration and public engagement would offer a more collaborative solution to the evolution of challenges posed by neurotechnology by facilitating the development of robust and relevant protections of human rights in this rapidly developing field.

Extraterritorial Human Rights Obligations of States

Building on the necessity for new legal frameworks to address the unique challenges posed by neurotechnology, it is imperative to evaluate the extraterritorial human rights obligations of different nation-states. Since neurotechnology often extends beyond national borders, it is necessary to understand the extent to which the responsibilities of states extend beyond their territories when ensuring effective regulation and protection of human rights.

Extraterritorial human rights obligations refer to the duty that states should uphold and protect human rights beyond their national borders.[22] This concept recognizes that the occurrence of human rights violations is not confined to the territory of the state but also involves actions and policies that impact individuals in other jurisdictions. This principle is becoming increasingly relevant in the context of globalization, where the impact of the actions of a state can extend far beyond its geographical limits.

Extraterritorial obligations are founded upon the ideology of the universality of human rights,[23] with states having a responsibility to ensure that their activities, including those conducted through multinational corporations, international agreements, or technological advancements, do not infringe upon the rights of individuals outside their borders. There are two types of obligations. Positive obligations oblige states to take proactive steps to prevent human rights violations by third parties, including multinational corporations operating abroad, often involving the formulation and implementation of regulations to ensure that entities do not engage in practices that violate human rights in other countries. On the other hand, states also have negative obligations, meaning they should refrain from actions that cause or contribute to human rights abuses in other jurisdictions by ensuring that their policies, technology exports, or corporate activities do not perpetuate the violation of rights in other territories.[24]

Exterritorial Responsibilities of the State

This concept is particularly relevant in the context of the development and deployment of neurotechnology, which often encompasses cross-border interactions and impacts, thus requiring states to consider the effects of their actions, policies, and regulations regarding the impact of neurotechnology on individuals outside their jurisdiction. Multinational corporations are at the forefront of neurotechnology, and states should ensure that these entities are fully compliant with human rights standards, even when the operations are based in foreign countries. This may include the enforcement of regulations that mitigate the misappropriation of neurotechnology and ensure that these companies respect fundamental human rights such as privacy, consent, and mental integrity. Specifically, human rights assessments should be periodically conducted, and practices related to neurotechnology and their potential impacts on human rights should be disclosed.

Similarly, as previously discussed, the rapid evolution of neurotechnology necessitates international collaboration during the development of consistent standards and regulations that regulate the ethical application of neurotechnology, ensuring that protections extend beyond national borders. Collaboration is necessary to help address gaps in existing legal frameworks and to ensure that human rights are universally protected.

When exporting neurotechnology, states should conduct assessments regarding the potential human rights impact of their technology exports, with the primary aim of implementing safeguards to mitigate the misappropriation of neurotechnology in other jurisdictions. For example, they should ensure that neurotechnology exported to other countries is not used for surveillance or coercive purposes. Where enforcement is concerned, states should be willing to address violations through legal and diplomatic channels when human rights abuses facilitated by neurotechnology occur in one country but are committed by actors or technology from another jurisdiction by providing remedies and by supporting international efforts to investigate and facilitate resolutions of issues arising from the misappropriation of neurotechnology.

States should establish comprehensive regulatory frameworks that specifically address the potential risks of neurotechnology and the issues related to data protection, informed consent, and ethical use. These standards should integrate guidelines for the development, testing, and deployment of neurotechnology to ensure they do not infringe upon individual rights. For example, regulations should mandate rigorous privacy safeguards to protect neural data from unauthorized access or misuse. These robust regulatory measures should be implemented with monitoring mechanisms to oversee the activities of neurotechnology developers and users, including conducting regular audits, inspections, and assessments of neurotechnology applications with the aim of ensuring compliance with human rights standards. Enforcement actions should be taken against entities that contravene regulations, including penalties or sanctions to deter potential abuses. States should also prioritize public awareness and education, as individuals need to be informed about their rights and the consequences of neurotechnology, which will allow them to make informed decisions and advocate for their rights. Public awareness campaigns and educational initiatives can help individuals understand how to protect their neural privacy and cognitive autonomy.

Another critical component of state responsibility is accountability, as both domestic and international entities need to be held accountable if they are found to be contravening human rights frameworks associated with neurotechnology. Legal accountability can be facilitated through the incorporation of specific provisions into national laws that are aimed at addressing neurotechnology-related human rights abuses, such as the formulation of legal mechanisms to hold entities accountable for violations such as unauthorized data collection, cognitive manipulation, or discriminatory practices. These frameworks should also prescribe avenues for victims to seek redress and obtain compensation for harms suffered. Given the global role of neurotechnology, collaboration with other countries and international organizations is necessary to investigate and address transnational human rights abuses related to neurotechnology, with states supporting the establishment of international bodies or mechanisms that can adjudicate cases involving cross-border neurotechnology issues.

Transparency is essential for maintaining trust and ensuring that neurotechnology development and application reflect human rights standards. The state should mandate neurotechnology developers and users to disclose relevant information about their technologies, such as their functionalities, data collection practices, and potential risks. This disclosure would help individuals understand the nuances of the operation of neurotechnology and the use of their data, thus facilitating informed consent and protection against potential harms and abuses. The regulatory processes overseen by neurotechnology should also be transparent, with clearly prescribed guidelines and criteria for approval, monitoring, and enforcement, with states ensuring that regulatory decisions are publicly available and that stakeholders have opportunities to participate in and comment on regulatory processes, with the primary aim of building public trust and ensuring the effectiveness of regulation and accountability. Therefore, it is proposed that mechanisms be established for individuals to report their concerns about the use of neurotechnology, including alleged violations of their rights, and to ensure these reports are investigated and addressed. Such public reporting would facilitate the identification and mitigation of issues early, thus promoting a culture of accountability and responsiveness.

Challenges and Opportunities

As established above, states have a responsibility to protect human rights that may be impacted by neurotechnology. However, exercising this responsibility may be hindered by a range of challenges that may impede their ability to fulfill their extraterritorial obligations effectively. While these challenges are often intertwined with the complexities of neurotechnology, these challenges present opportunities for enhanced international collaboration and the harmonization of legal standards, which can facilitate more effective protection of human rights.

One of the most predominant challenges that states may face is determining jurisdiction when neurotechnology crosses national borders. It can be difficult to determine which state has jurisdiction over specific human rights violations, which can lead to disputes regarding legal authority and responsibilities, complicating efforts to address abuses and to enforce regulations. These

challenges may extend to the effective implementation and monitoring of regulations. Enforcement challenges are compounded by the rapid development of technological innovation, which can outpace the development of legal frameworks and regulatory mechanisms. Further, the global nature of this technology limits the control that states have over practices and standards in other countries, thus adversely impacting their ability to ensure accountability and compliance. These challenges further illustrate the necessity of international cooperation since the absence of a uniform global approach can perpetuate inconsistencies in the protection of rights and make it difficult to address cross-border violations.

Despite these challenges, there are significant opportunities for states to enhance international collaboration. By working together, states can share best practices, collectively develop joint standards, and formulate coordinated responses to human rights issues, specifically in the context of neurotechnology. For example, international organizations such as the United Nations and their associated agencies can play a core role in the facilitation of discourse and cooperation among states, which can facilitate the development of international treaties or protocols that prescribe common standards for addressing jurisdictional and enforcement issues of neurotechnology. States can collaborate on the formulation of consistent regulations and guidelines that address common challenges and risks associated with neurotechnology, thus mitigating jurisdictional contradictions and ensuring that human rights are consistently protected, regardless of where the technology is developed or applied. The establishment of global standards for data protection, informed consent, and cognitive autonomy can provide more transparent and comprehensive protections for individuals. States can also leverage technological advancements to improve monitoring, enforcement, and transparency in neurotechnology. For example, blockchain technology can be applied to create secure and transparent records of neurotechnology applications and data usage, and artificial intelligence (AI) can facilitate the detection and addressing of potential biases.

It is evident that while states face substantial challenges in fulfilling their extraterritorial obligations related to neurotechnology, there are also significant opportunities for improvement. By addressing the impediments noted above, states will be better positioned to protect human rights, with the harmonizing of legal standards and leveraging of technological solutions, further contributing to the creation of a more effective and cohesive approach to the protection of human rights on a global scale. Consequently, these efforts will allow states to effectively navigate the complexities of neurotechnology and ensure that human rights are upheld in an increasingly interconnected world.

Conclusion

This article emphasizes the necessity of addressing the human rights consequences of neurotechnology. While existing international human rights frameworks offer foundational protections, they do not appropriately address the unique challenges posed by neurotechnology, such as direct brain manipulation and data privacy concerns. Therefore, the author advocates for the development of new legal instruments that are tailored to address these gaps and to facilitate the robust protection of rights such as cognitive liberty and mental integrity.

The intersection of neurotechnology, human rights, and international law is significant and thus necessitates legal and ethical frameworks to protect individual rights. Challenges related to jurisdiction, enforcement, and international cooperation should be addressed through strengthened global standards and collaborative efforts. By fostering a uniform approach, we can navigate the nuances of neurotechnology and contribute to a future where technological progress and human rights coexist harmoniously, thus enhancing both the human experience and our collective ethical standards.

Theshaya Naidoo *is a pending LL.D. candidate. She completed a Bachelor of Social Science, specializing in law and criminology and forensic sciences, followed by an LL.B. (cum laude) and an LL.M. in medical law, all at the esteemed University of KwaZulu Natal. Throughout her academic journey, Ms. Naidoo's commitment to excellence has been consistently recognized through numerous academic awards. Her research interests span various facets of law, with a particular focus on gender and technology. Her dedication to scholarly inquiry was further demonstrated when she was selected to present her research internationally twice, both in Rwanda and at the University of Oxford.*

Endnotes

[1] A. A. Ahmed, and R. A. Muhammed, *Accessibility, Use and Effectiveness of Neurotechnology Devices for Improved Productivity in Workplace*, 11 IJSRP 15, 22 (2021).

[2] C. Cinel, D. Valeriani, and R. Poli, *Neurotechnologies for human cognitive augmentation: current state of the art and future prospects*, 13 FRONTIERS IN HUMAN NEUROSCIENCE 13 (2019).

[3] R. Yuste, J. Genser, and S. Herrmann, *It's time for neuro-rights* 18 HORIZONS 154, 164 (2021)

[4] M. Ienca, and R. Andorno, *Towards new human rights in the age of neuroscience and neurotechnology*, 13 LSSP 1, 27 (2017).

[5] M. Ienca, and P. Haselager, *Hacking the brain: brain-computer interfacing technology and the ethics of neurosecurity*, 18 ETHICS AND INFO. TECH. 117, 129 (2016).

[6] H. Garden, D. E. Winickoff, N. M. Frahm, and S. Pfotenhauer, *Responsible innovation in neurotechnology enterprises (2019)*.

[7] S. M. Won, E. Song, J. Zhao, J. Li, J. Rivnay, and J. A. Rogers, *Recent advances in materials, devices, and systems for neural interfaces* 30(3) Advanced Materials 1800534 (2018).

[8] E. S. Ereifej et al, *Neural engineering: the process, applications, and its role in the future of medicine* 16(6) J. Neural Eng 063002.

[9] U. Chaudhary, N. Birbaumer, and A. Ramos-Murguialday, *Brain-computer interfaces for communication and rehabilitation* 12(9) Nature Reviews Neurology 513, 525 (2016).

[10] Valentina D'Onofrio et al, *Combining Transcranial Magnetic Stimulation and Deep Brain Stimulation: Current Knowledge, Relevance and Future Perspectives* 13(2) Brain Sci. 349 (2023).

[11] C. Yen, L. Chia-Lia, and C. Ming-Chiang, *Exploring the frontiers of neuroimaging: a review of recent advances in understanding brain functioning and disorders* 13(7) Life 1472 (2023).

[12] J. Chen et al, *fNIRS-EEG BCIs for Motor Rehabilitation: A Review* 10(12) Bioengineering (Basel) 1393 (2023).

[13] G. S. Malhi, and J. Lagopoulos, *Making sense of neuroimaging in psychiatry* 117(2) Acta Psychiatrica Scandinavica 100, 117 (2008).

[14] D. C. Billing, G. R. Fordy, G.R, K. E. Friedl, and H. Hasselstrøm, *The implications of emerging technology on military human performance research priorities* 24(10) J. Sci. Med. in Sport 947, 953 (2021).

[15] B. Williamson, *Brain data: Scanning, scraping and sculpting the plastic learning brain through neurotechnology* 1 Postdigital Science and Education 65, 86 (2019).

[16] D. D. Georgiev, I. Georgieva, Z. Gong, V. Nanjappan, and G. V. Georgiev, *Virtual reality for neurorehabilitation and cognitive enhancement* 11(2) Brain Sciences 221 (2021).

[17] J. A. Olson et al, *Emulating future neurotechnology using magic*, 107 Consciousness and Cognition 103450 (2023).

[18] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., Supp. No. 10, at 71 (1948).

[19] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52 (1966), entered into force 23 Mar. 1976.

[20] Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. GAOR, 61st Sess., Supp. No. 52 (2006), entered into force 3 May 2008.

[21] A. M. Lozano et al, *Deep brain stimulation: current challenges and future directions* 15(3) Nature Reviews Neurology 148,160 (2019).

[22] R. McCorquodale and P. Simons, *Responsibility beyond borders: state responsibility for extraterritorial violations by corporations of international human rights law* 70(4), Mod. L. Rev. 598, 625 (2007).

[23] I. Kanalan, *Extraterritorial state obligations beyond the concept of jurisdiction* 19(1) GLJ 43, 64 (2018).

[24] B. Dickson, *Positive obligations and the European Court of Human Rights* 61 N. Ir. Legal Q.

The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

FIRST CLASS
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43