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**2016-2019 Cumulative Supplement to Donald Earl Childress III,
Michael D. Ramsey & Christopher A. Whytock, Transnational Law
and Practice (2015)**

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(Fall 2019)

Cumulative Supplement to Donald Earl Childress III, Michael D. Ramsey & Christopher A. Whytock, Transnational Law and Practice (2015)*

[This is the Fall 2019 Cumulative Supplement for DONALD EARL CHILDRESS III, MICHAEL D. RAMSEY & CHRISTOPHER A. WHYTOCK, TRANSNATIONAL LAW AND PRACTICE (2015). Highlights include excerpts of the Supreme Court's decisions in RJR Nabisco Inc. v. European Community and WesternGeco LLC v. ION Geophysical Corporation, involving extraterritorial application of the RICO Act and the Patent Act; new developments regarding Alien Tort Statute litigation including the Supreme Court's decision in Jesner v. Arab Bank PLC, involving corporate liability for international human rights violations; new Supreme Court and appellate court decisions in the areas of personal jurisdiction, including Bristol-Meyers Squibb Company v. Superior Court of California; discussion of pending litigation at the International Court of Justice; references to new Restatements issued by the American Law Institute; discussion of new Supreme Court and lower court developments in the law of foreign sovereign immunity; and an update on the ongoing dispute involving claims against Chevron, Inc. by Ecuadorian plaintiffs.]

Introduction

Page xli, add at the end of the first (carryover) paragraph:

There continue to be developments in the Chevron-Ecuador case that illustrate the role of national legal systems (both U.S. and foreign), international legal systems, and arbitral tribunals in transnational practice.

On August 8, 2016, a unanimous panel of the U.S. Court of Appeals for the Second Circuit affirmed a 2014 district court decision that granted Chevron equitable relief under the federal RICO Act and New York common law against Ecuadorian plaintiffs and their lawyer for fraud relating to the \$9.5 billion dollar Ecuadorian judgment. *Chevron, Inc. v. Donziger*, 833 F.3d 74 (2d Cir. 2016). The Supreme Court denied certiorari in 2017.

The plaintiffs' efforts to enforce the Ecuadorian judgment against Chevron in Argentina, Brazil, and Canada have so far been unsuccessful. Courts in Argentina and Brazil have refused enforcement (although the Argentine court decision is on appeal). In July 2019, the Ecuadorian plaintiffs consented to the dismissal of their enforcement action against Chevron in Ontario, Canada.

* Instructors using the Childress, Ramsey & Whytock casebook are authorized to distribute this supplement to their students for classroom use.

In September 2018, the Ecuadorian plaintiffs’ lead lawyer filed a petition with the Inter-American Commission on Human Rights, alleging that the United States has violated his human rights in connection with the RICO case Chevron filed against him.

Ecuador filed an action in Dutch courts to annul interim awards in favor of Chevron in the BIT arbitration ordering Ecuador “to take all measures to suspend or cause to be suspended the enforcement and recognition” of the Ecuadorian judgment, pending the outcome of the arbitration. In April 2019, the Dutch Supreme Court affirmed a lower Dutch court’s decision refusing to annul the awards.

Chapter 1: National Law

Pages 34-42, replace Hourani v. Mirtchev and the Notes and Questions following it with the following:

The following is the Supreme Court’s most recent opinion on the presumption against extraterritoriality. As you read it, consider how it clarifies *Morrison*’s framework for analyzing the extraterritorial reach of federal statutes.

RJR Nabisco, Inc. v. European Community

136 S. Ct. 2090 (2016)

Justice ALITO delivered the opinion of the Court.

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968, created four new criminal offenses involving the activities of organized criminal groups in relation to an enterprise. §§ 1962(a)-(d). RICO also created a new civil cause of action for “[a]ny person injured in his business or property by reason of a violation” of those prohibitions. § 1964(c). We are asked to decide whether RICO applies extraterritorially—that is, to events occurring and injuries suffered outside the United States.

I

A

RICO is founded on the concept of racketeering activity. The statute defines “racketeering activity” to encompass dozens of state and federal offenses, known in RICO parlance as predicates. These predicates include any act “indictable” under specified federal statutes, §§ 1961(1)(B)-(C), (E)-(G), as well as certain crimes “chargeable” under state law, § 1961(1)(A), and any offense involving bankruptcy or securities fraud or drug-related activity that is “punishable” under federal law, § 1961(1)(D). A predicate offense implicates RICO when it is part of a “pattern of racketeering activity”—a series of related predicates that together demonstrate the existence or threat of continued criminal activity. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989); see § 1961(5) (specifying that a “pattern of racketeering activity” requires at least two predicates committed within 10 years of each other).

RICO's § 1962 sets forth four specific prohibitions aimed at different ways in which a pattern of racketeering activity may be used to infiltrate, control, or operate "a[n] enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." These prohibitions can be summarized as follows. Section 1962(a) makes it unlawful to invest income derived from a pattern of racketeering activity in an enterprise. Section 1962(b) makes it unlawful to acquire or maintain an interest in an enterprise through a pattern of racketeering activity. Section 1962(c) makes it unlawful for a person employed by or associated with an enterprise to conduct the enterprise's affairs through a pattern of racketeering activity. Finally, § 1962(d) makes it unlawful to conspire to violate any of the other three prohibitions.¹

Violations of § 1962 are subject to criminal penalties, § 1963(a), and civil proceedings to enforce those prohibitions may be brought by the Attorney General, §§ 1964(a)-(b). Separately, RICO creates a private civil cause of action that allows "[a]ny person injured in his business or property by reason of a violation of section 1962" to sue in federal district court and recover treble damages, costs, and attorney's fees. § 1964(c).²

B

This case arises from allegations that petitioners—RJR Nabisco and numerous related entities (collectively RJR)—participated in a global money-laundering scheme in association with various organized crime groups. Respondents [are] the European Community and 26 of its member states....

¹ In full, 18 U.S.C. § 1962 provides:

"(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

"(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

"(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

² In full, § 1964(c) provides:

"Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final."

Greatly simplified, the complaint alleges a scheme in which Colombian and Russian drug traffickers smuggled narcotics into Europe and sold the drugs for euros that—through a series of transactions involving black-market money brokers, cigarette importers, and wholesalers—were used to pay for large shipments of RJR cigarettes into Europe. In other variations of this scheme, RJR allegedly dealt directly with drug traffickers and money launderers in South America and sold cigarettes to Iraq in violation of international sanctions. RJR is also said to have acquired Brown & Williamson Tobacco Corporation for the purpose of expanding these illegal activities.

The complaint alleges that RJR engaged in a pattern of racketeering activity consisting of numerous acts of money laundering, material support to foreign terrorist organizations, mail fraud, wire fraud, and violations of the Travel Act. RJR, in concert with the other participants in the scheme, allegedly formed an association in fact that was engaged in interstate and foreign commerce, and therefore constituted a RICO enterprise that the complaint dubs the “RJR Money–Laundering Enterprise.”

Putting these pieces together, the complaint alleges that RJR violated each of RICO’s prohibitions. RJR allegedly used income derived from the pattern of racketeering to invest in, acquire an interest in, and operate the RJR Money–Laundering Enterprise in violation of § 1962(a); acquired and maintained control of the enterprise through the pattern of racketeering in violation of § 1962(b); operated the enterprise through the pattern of racketeering in violation of § 1962(c); and conspired with other participants in the scheme in violation of § 1962(d). These violations allegedly harmed respondents in various ways, including through competitive harm to their state-owned cigarette businesses, lost tax revenue from black-market cigarette sales, harm to European financial institutions, currency instability, and increased law enforcement costs.

RJR moved to dismiss the complaint, arguing that RICO does not apply to racketeering activity occurring outside U.S. territory or to foreign enterprises. The District Court agreed and dismissed the RICO claims as impermissibly extraterritorial.

The Second Circuit reinstated the RICO claims....

The lower courts have come to different conclusions regarding RICO’s extraterritorial application. Compare 764 F.3d 129 (case below) (holding that RICO may apply extraterritorially) with *United States v. Chao Fan Xu*, 706 F.3d 965, 974–975 (C.A.9 2013) (holding that RICO does not apply extraterritorially...). Because of this conflict and the importance of the issue, we granted certiorari.

II

The question of RICO’s extraterritorial application really involves two questions. First, do RICO’s substantive prohibitions, contained in § 1962, apply to conduct that occurs in foreign countries? Second, does RICO’s private right of action, contained in § 1964(c), apply to injuries that are suffered in foreign countries? We consider each of these questions in turn. To guide our inquiry, we begin by reviewing the law of extraterritoriality.

It is a basic premise of our legal system that, in general, “United States law governs

domestically but does not rule the world.” *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 454 (2007). This principle finds expression in a canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application. *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010). The question is not whether we think “Congress would have wanted” a statute to apply to foreign conduct “if it had thought of the situation before the court,” but whether Congress has affirmatively and unmistakably instructed that the statute will do so. *Id.*, at 261. “When a statute gives no clear indication of an extraterritorial application, it has none.” *Id.*, at 255.

There are several reasons for this presumption. Most notably, it serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries. See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1663–1664 (2013); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957). But it also reflects the more prosaic “commonsense notion that Congress generally legislates with domestic concerns in mind.” *Smith v. United States*, 507 U.S. 197, 204, n. 5 (1993). We therefore apply the presumption across the board, “regardless of whether there is a risk of conflict between the American statute and a foreign law.” *Morrison, supra*, at 255.

Twice in the past six years we have considered whether a federal statute applies extraterritorially. In *Morrison*, we addressed the question whether § 10(b) of the Securities Exchange Act of 1934 applies to misrepresentations made in connection with the purchase or sale of securities traded only on foreign exchanges. We first examined whether § 10(b) gives any clear indication of extraterritorial effect, and found that it does not. 561 U.S., at 262–265. We then engaged in a separate inquiry to determine whether the complaint before us involved a permissible *domestic* application of § 10(b) because it alleged that some of the relevant misrepresentations were made in the United States. At this second step, we considered the “‘focus’ of congressional concern,” asking whether § 10(b)’s focus is “the place where the deception originated” or rather “purchases and sale of securities in the United States.” *Id.*, at 266. We concluded that the statute’s focus is on domestic securities transactions, and we therefore held that the statute does not apply to frauds in connection with foreign securities transactions, even if those frauds involve domestic misrepresentations.

In *Kiobel*, we considered whether the Alien Tort Statute (ATS) confers federal-court jurisdiction over causes of action alleging international-law violations committed overseas. We acknowledged that the presumption against extraterritoriality is “typically” applied to statutes “regulating conduct,” but we concluded that the principles supporting the presumption should “similarly constrain courts considering causes of action that may be brought under the ATS.” 133 S.Ct., at 1664. We applied the presumption and held that the ATS lacks any clear indication that it extended to the foreign violations alleged in that case. Because “all the relevant conduct” regarding those violations “took place outside the United States,” we did not need to determine, as we did in *Morrison*, the statute’s “focus.”

Morrison and *Kiobel* reflect a two-step framework for analyzing extraterritoriality issues. At the first step, we ask whether the presumption against extraterritoriality has been rebutted—

that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. We must ask this question regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction. If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute’s “focus.” If the conduct relevant to the statute’s focus occurred in the United States, 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.

What if we find at step one that a statute clearly *does* have extraterritorial effect? Neither *Morrison* nor *Kiobel* involved such a finding. But we addressed this issue in *Morrison*, explaining that it was necessary to consider § 10(b)’s “focus” only because we found that the statute does not apply extraterritorially: “If § 10(b) did apply abroad, we would not need to determine which transnational frauds it applied to; it would apply to all of them (barring some other limitation).” 561 U.S., at 267, n. 9. The scope of an extraterritorial statute thus turns on the limits Congress has (or has not) imposed on the statute’s foreign application, and not on the statute’s “focus.”⁵

III

With these guiding principles in mind, we first consider whether RICO’s substantive prohibitions in § 1962 may apply to foreign conduct. Unlike in *Morrison* and *Kiobel*, we find that the presumption against extraterritoriality has been rebutted—but only with respect to certain applications of the statute.

A

The most obvious textual clue is that RICO defines racketeering activity to include a number of predicates that plainly apply to at least some foreign conduct. These predicates include the prohibition against engaging in monetary transactions in criminally derived property, which expressly applies, when “the defendant is a United States person,” to offenses that “tak[e] place outside the United States.” 18 U.S.C. § 1957(d)(2). Other examples include the prohibitions against the assassination of Government officials, § 351(i) (“There is extraterritorial jurisdiction over the conduct prohibited by this section”); § 1751(k) (same), and the prohibition against hostage taking, which applies to conduct that “occurred outside the United States” if either the hostage or the offender is a U.S. national, if the offender is found in the United States, or if the hostage taking is done to compel action by the U.S. Government, § 1203(b). At least one predicate—the prohibition against “kill[ing] a national of the United States, while such national is outside the United States”—applies *only* to conduct occurring outside the United States. § 2332(a).

We agree with the Second Circuit that Congress’s incorporation of these (and other) extraterritorial predicates into RICO gives a clear, affirmative indication that § 1962 applies to foreign racketeering activity—but only to the extent that the predicates alleged in a particular

⁵ Because a finding of extraterritoriality at step one will obviate step two’s “focus” inquiry, it will usually be preferable for courts to proceed in the sequence that we have set forth. But we do not mean to preclude courts from starting at step two in appropriate cases.

case themselves apply extraterritorially. Put another way, a pattern of racketeering activity may include or consist of offenses committed abroad in violation of a predicate statute for which the presumption against extraterritoriality has been overcome. To give a simple (albeit grim) example, a violation of § 1962 could be premised on a pattern of killings of Americans abroad in violation of § 2332(a)—a predicate that all agree applies extraterritorially—whether or not any domestic predicates are also alleged.

We emphasize the important limitation that foreign conduct must violate “a predicate statute that manifests an unmistakable congressional intent to apply extraterritorially.” 764 F.3d, at 136. Although a number of RICO predicates have extraterritorial effect, many do not. The inclusion of *some* extraterritorial predicates does not mean that *all* RICO predicates extend to foreign conduct....

RJR resists the conclusion that RICO’s incorporation of extraterritorial predicates gives RICO commensurate extraterritorial effect. It points out that “RICO itself” does not refer to extraterritorial application; only the underlying predicate statutes do. Brief for Petitioners 42. RJR thus argues that Congress could have intended to capture only *domestic* applications of extraterritorial predicates, and that any predicates that apply only abroad could have been “incorporated ... solely for when such offenses are part of a broader pattern whose overall locus is domestic.” *Id.*, at 43.

The presumption against extraterritoriality does not require us to adopt such a constricted interpretation. While the presumption can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential. “Assuredly context can be consulted as well.” *Morrison, supra*, at 265. Context is dispositive here. Congress has not expressly said that § 1962(c) applies to patterns of racketeering activity in foreign countries, but it has defined “racketeering activity”—and by extension a “pattern of racketeering activity”—to encompass violations of predicate statutes that *do* expressly apply extraterritorially. Short of an explicit declaration, it is hard to imagine how Congress could have more clearly indicated that it intended RICO to have (some) extraterritorial effect. This unique structure makes RICO the rare statute that clearly evidences extraterritorial effect despite lacking an express statement of extraterritoriality.

We therefore conclude that RICO applies to some foreign racketeering activity. A violation of § 1962 may be based on a pattern of racketeering that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself extraterritorial. This fact is determinative as to § 1962(b) and § 1962(c), both of which prohibit the employment of a pattern of racketeering. Although they differ as to the end for which the pattern is employed—to acquire or maintain control of an enterprise under subsection (b), or to conduct an enterprise’s affairs under subsection (c)—this difference is immaterial for extraterritoriality purposes. ...

B

RJR contends that, even if RICO may apply to foreign patterns of racketeering, the statute does not apply to foreign *enterprises*. Invoking *Morrison*’s discussion of the Exchange Act’s “focus,” RJR says that the “focus” of RICO is the enterprise being corrupted—not the

pattern of racketeering—and that RICO’s enterprise element gives no clear indication of extraterritorial effect. Accordingly, RJR reasons, RICO requires a domestic enterprise.

This argument misunderstands *Morrison*. As explained above, only at the second step of the inquiry do we consider a statute’s “focus.” Here, however, there is a clear indication at step one that RICO applies extraterritorially. We therefore do not proceed to the “focus” step. The *Morrison* Court’s discussion of the statutory “focus” made this clear, stating that “[i]f § 10(b) did apply abroad, we would not need to determine which transnational frauds it applied to; it would apply to all of them (barring some other limitation).” 561 U.S., at 267, n. 9. The same is true here. RICO—or at least §§ 1962(b) and (c)—applies abroad, and so we do not need to determine which transnational (or wholly foreign) patterns of racketeering it applies to; it applies to all of them, regardless of whether they are connected to a “foreign” or “domestic” enterprise. This rule is, of course, subject to the important limitation that RICO covers foreign predicate offenses only to the extent that the underlying predicate statutes are extraterritorial. But within those bounds, the location of the affected enterprise does not impose an independent constraint. ...

C

Applying these principles, we agree with the Second Circuit that the complaint does not allege impermissibly extraterritorial violations of §§ 1962(b) and (c).

The alleged pattern of racketeering activity consists of five basic predicates: (1) money laundering, (2) material support of foreign terrorist organizations, (3) mail fraud, (4) wire fraud, and (5) violations of the Travel Act. The Second Circuit observed that the relevant provisions of the money laundering and material support of terrorism statutes expressly provide for extraterritorial application in certain circumstances, and it concluded that those circumstances are alleged to be present here. 764 F.3d, at 139–140. The court found that the fraud statutes and the Travel Act do not contain the clear indication needed to overcome the presumption against extraterritoriality. But it held that the complaint alleges *domestic* violations of those statutes because it “allege[s] conduct in the United States that satisfies every essential element of the mail fraud, wire fraud, and Travel Act claims.” *Id.*, at 142.

RJR does not dispute these characterizations of the alleged predicates. We therefore assume without deciding that the alleged pattern of racketeering activity consists entirely of predicate offenses that were either committed in the United States or committed in a foreign country in violation of a predicate statute that applies extraterritorially.... On these premises, respondents’ allegations that RJR violated §§ 1962(b) and (c) do not involve an impermissibly extraterritorial application of RICO.

IV

We now turn to RICO’s private right of action, on which respondents’ lawsuit rests. Section 1964(c) allows “[a]ny person injured in his business or property by reason of a violation of section 1962” to sue for treble damages, costs, and attorney’s fees. Irrespective of any extraterritorial application of § 1962, we conclude that § 1964(c) does not overcome the presumption against extraterritoriality. A private RICO plaintiff therefore must allege and prove a *domestic* injury to its business or property.

A

The Second Circuit thought that the presumption against extraterritoriality did not apply to § 1964(c) independently of its application to § 1962, reasoning that the presumption “is primarily concerned with the question of what *conduct* falls within a statute’s purview.” 764 F.3d, at 151. We rejected that view in *Kiobel*, holding that the presumption “constrain[s] courts considering causes of action” under the ATS, a “ ‘strictly jurisdictional’ ” statute that “does not directly regulate conduct or afford relief.” 133 S.Ct., at 1664. We reached this conclusion even though the underlying substantive law consisted of well-established norms of international law, which by definition apply beyond this country’s borders. See *id.*, at 133 S.Ct., at 1664–1666.

The same logic requires that we separately apply the presumption against extraterritoriality to RICO’s cause of action despite our conclusion that the presumption has been overcome with respect to RICO’s substantive prohibitions. “The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion.” *Sosa v. Alvarez–Machain*, 542 U.S. 692, 727 (2004). Thus, as we have observed in other contexts, providing a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct. See, e.g., *Kiobel*, *supra*, at 133 S.Ct., at 1665 (“Each of th[e] decisions” involved in defining a cause of action based on “conduct within the territory of another sovereign” “carries with it significant foreign policy implications”).

Consider antitrust. In that context, we have observed that “[t]he application ... of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy” in other nations, even when those nations agree with U.S. substantive law on such things as banning price fixing. *F. Hoffmann–La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 167 (2004). Numerous foreign countries—including some respondents in this case—advised us in *Empagran* that “to apply [U.S.] remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody.” *Ibid.* ...

Allowing recovery for foreign injuries in a civil RICO action, including treble damages, presents the same danger of international friction. See Brief for United States as *Amicus Curiae* 31–34. ...

Respondents urge that concerns about international friction are inapplicable in this case because here the plaintiffs are not foreign citizens seeking to bypass their home countries’ less generous remedies but rather the foreign countries themselves. We reject the notion that we should forgo the presumption against extraterritoriality and instead permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the consent of the affected sovereign. See *Morrison*, *supra*, at 261 (“Rather than guess anew in each case, we apply the presumption in all cases”); cf. *Empagran*, 542 U.S., at 168. Respondents suggest that we should be reluctant to permit a foreign corporation to be sued in the courts of this country for events occurring abroad if the nation of incorporation objects, but that we should discard those reservations when a foreign state sues a U.S. entity in this country under U.S. law—instead of in its own courts and under its own laws—for conduct committed on its own soil. We refuse to adopt this double

standard. “After all, in the law, what is sauce for the goose is normally sauce for the gander.” *Heffernan v. City of Paterson*, 578 U.S. —, — (2016).

B

Nothing in § 1964(c) provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States. The statute provides a cause of action to “[a]ny person injured in his business or property” by a violation of § 1962. § 1964(c). The word “any” ordinarily connotes breadth, but it is insufficient to displace the presumption against extraterritoriality. See *Kiobel*, 133 S.Ct., at 1665–1666. The statute’s reference to injury to “business or property” also does not indicate extraterritorial application. If anything, by cabining RICO’s private cause of action to particular kinds of injury—excluding, for example, personal injuries—Congress signaled that the civil remedy is not coextensive with § 1962’s substantive prohibitions. The rest of § 1964(c) places a limit on RICO plaintiffs’ ability to rely on securities fraud to make out a claim. This too suggests that § 1964(c) is narrower in its application than § 1962, and in any event does not support extraterritoriality.

The Second Circuit did not identify anything in § 1964(c) that shows that the statute reaches foreign injuries. Instead, the court reasoned that § 1964(c)’s extraterritorial effect flows directly from that of § 1962. Citing our holding in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), that the “compensable injury” addressed by § 1964(c) “necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern,” *id.*, at 497 the Court of Appeals held that a RICO plaintiff may sue for foreign injury that was caused by the violation of a predicate statute that applies extraterritorially, just as a substantive RICO violation may be based on extraterritorial predicates. 764 F.3d, at 151. Justice GINSBURG advances the same theory. This reasoning has surface appeal, but it fails to appreciate that the presumption against extraterritoriality must be applied separately to both RICO’s substantive prohibitions and its private right of action. It is not enough to say that a private right of action must reach abroad because the underlying law governs conduct in foreign countries. Something more is needed, and here it is absent. ...

C

Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries. The application of this rule in any given case will not always be self-evident, as disputes may arise as to whether a particular alleged injury is “foreign” or “domestic.” But we need not concern ourselves with that question in this case. As this case was being briefed before this Court, respondents filed a stipulation in the District Court waiving their damages claims for domestic injuries. The District Court accepted this waiver and dismissed those claims with prejudice. Respondents’ remaining RICO damages claims therefore rest entirely on injury suffered abroad and must be dismissed.

The judgment of the United States Court of Appeals for the Second Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Justice SOTOMAYOR took no part in the consideration or decision of this case.

Justice GINSBURG, with whom Justice BREYER and Justice KAGAN join, concurring in Parts I, II, and III and dissenting from Part IV and from the judgment.

...

I

...

[T]he Court concludes, when the predicate crimes underlying invocation of § 1962 thrust extraterritorially, so too does § 1962. I agree with that conclusion.

I disagree, however, that the private right of action authorized by § 1964(c) requires a domestic injury to a person's business or property and does not allow recovery for foreign injuries. One cannot extract such a limitation from the text of § 1964(c), which affords a right of action to "[a]ny person injured in his business or property by reason of a violation of section 1962." Section 1962, at least subsections (b) and (c), all agree, encompasses foreign injuries. How can § 1964(c) exclude them when, by its express terms, § 1964(c) is triggered by "a violation of section 1962"? To the extent RICO reaches injury abroad when the Government is the suitor pursuant to § 1962 (specifying prohibited activities) and § 1963 (criminal penalties) or § 1964(b) (civil remedies), to that same extent, I would hold, RICO reaches extraterritorial injury when, pursuant to § 1964(c), the suitor is a private plaintiff.

II

A

I would not distinguish, as the Court does, between the extraterritorial compass of a private right of action and that of the underlying proscribed conduct. Instead, I would adhere to precedent addressing RICO, linking, not separating, prohibited activities and authorized remedies. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985) ("If the defendant engages in a pattern of racketeering activity in a manner forbidden by [§ 1962], and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c)."); *ibid.* (refusing to require a "distinct 'racketeering injury' " for private RICO actions under § 1964(c) where § 1962 imposes no such requirement).²

To reiterate, a § 1964(c) right of action may be maintained by "[a]ny person injured in his business or property by reason of a violation of *section 1962*" (emphasis added). "[I]ncorporating one statute ... into another," the Court has long understood, "serves to bring into the latter all that is fairly covered by the reference." *Panama R. Co. v. Johnson*, 264 U.S. 375, 392 (1924). RICO's private right of action, it cannot be gainsaid, expressly incorporates § 1962, whose extraterritoriality, the Court recognizes, is coextensive with the underlying predicate offenses charged. See *ante*, at 2101 – 2106. See also *ante*, at 2102 ("[I]t is hard to imagine how Congress

² Insisting that the presumption against extraterritoriality should "apply to § 1964(c) independently of its application to § 1962," *ante*, at 2105 – 2106, the Court cites *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013). That decision will not bear the weight the Court would place on it. As the Court comprehends, the statute there at issue, the Alien Tort Statute, 28 U.S.C. § 1350, is a spare jurisdictional grant that itself does not "regulate conduct or afford relief." *Kiobel*, 133 S.Ct., at 1664. With no grounding for extraterritorial application in the statute, *Kiobel* held, courts have no warrant to fashion, on their own initiative, claims for relief that operate extraterritorially. See *ibid.* ("[T]he question is not what Congress has done but instead what courts may do.").

could have more clearly indicated that it intended RICO to have (some) extraterritorial effect.”). The sole additional condition § 1964(c) imposes on access to relief is an injury to one’s “business or property.” Nothing in that condition should change the extraterritoriality assessment. In agreement with the Second Circuit, I would hold that “[i]f an injury abroad was proximately caused by the violation of a statute which Congress intended should apply to injurious conduct performed abroad, [there is] no reason to import a domestic injury requirement simply because the victim sought redress through the RICO statute.” 764 F.3d 149, 151 (2014).

...

This very case illustrates why pinning a domestic-injury requirement onto § 1964(c) makes little sense. All defendants are U.S. corporations, headquartered in the United States, charged with a pattern of racketeering activity directed and managed from the United States, involving conduct occurring in the United States. In particular, according to the complaint, defendants received in the United States funds known to them to have been generated by illegal narcotics trafficking and terrorist activity, conduct violative of § 1956(a)(2); traveled using the facilities of interstate commerce in furtherance of unlawful activity, in violation of § 1952; provided material support to foreign terrorist organizations “in the United States and elsewhere,” in violation of § 2339B; and used U.S. mails and wires in furtherance of a “scheme or artifice to defraud,” in violation of §§ 1341 and 1343. In short, this case has the United States written all over it.

B

The Court nevertheless deems a domestic-injury requirement for private RICO plaintiffs necessary to avoid international friction. When the United States considers whether to initiate a prosecution or civil suit, the Court observes, it will take foreign-policy considerations into account, but private parties will not. It is far from clear, however, that the Court’s blanket rule would ordinarily work to ward off international discord. Invoking the presumption against extraterritoriality as a bar to *any* private suit for injuries to business or property abroad, this case suggests, might spark, rather than quell, international strife. Making such litigation available to domestic but not foreign plaintiffs is hardly solicitous of international comity or respectful of foreign interests. Cf. *Pfizer*, 434 U.S., at 318–319 (“[A] foreign nation is generally entitled to prosecute any civil claim in the courts of the United States upon the same basis as a domestic corporation or individual might do. To deny him this privilege would manifest a want of comity and friendly feeling.” (internal quotation marks omitted)).

RICO’s definitional provisions exclude “[e]ntirely foreign activity.” 783 F.3d 123, 143 (Lynch, J., dissenting from denial of rehearing en banc). Thus no suit under RICO would lie for injuries resulting from “[a] pattern of murders of Italian citizens committed by members of an Italian organized crime group in Italy.” *Ibid.* That is so because “murder is a RICO predicate only when it is ‘chargeable under state law’ or indictable under specific federal statutes.” *Ibid.* (citing § 1961(1)(A), (G)).

To the extent extraterritorial application of RICO could give rise to comity concerns not present in this case, those concerns can be met through doctrines that serve to block litigation in U.S. courts of cases more appropriately brought elsewhere. Where an alternative, more appropriate forum is available, the doctrine of *forum non conveniens* enables U.S. courts to

refuse jurisdiction. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (dismissing wrongful-death action arising out of air crash in Scotland involving only Scottish victims); Restatement (Second) of Conflict of Laws § 84 (1969). Due process constraints on the exercise of general personal jurisdiction shelter foreign corporations from suit in the United States based on conduct abroad unless the corporation’s “affiliations with the [forum] in which suit is brought are so constant and pervasive ‘as to render it essentially at home [there].’” *Daimler AG v. Bauman*, 134 S.Ct. 746, 751 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011); alterations omitted). These controls provide a check against civil RICO litigation with little or no connection to the United States. . . .

The Court hems in RICO out of concern about establishing a “double standard.” But today’s decision does exactly that. U.S. defendants commercially engaged here and abroad would be answerable civilly to U.S. victims of their criminal activities, but foreign parties similarly injured would have no RICO remedy. “Sauce for the goose” should indeed serve the gander as well. I would resist reading into § 1964(c) a domestic-injury requirement Congress did not prescribe. Instead, I would affirm the Second Circuit’s sound judgment:

“To establish a compensable injury under § 1964(c), a private plaintiff must show that (1) the defendant ‘engage[d] in a pattern of racketeering activity in a manner forbidden by’ § 1962, and (2) that these ‘racketeering activities’ were the proximate cause of some injury to the plaintiff’s business or property.”

Because the Court overturns that judgment, I dissent.

Justice BREYER, concurring in part, dissenting in part, and dissenting from the judgment.

I join Parts I through III of the Court’s opinion. But I do not join Part IV. The Court there holds that the private right of action provision in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c), has no extraterritorial application. Like Justice GINSBURG, I believe that it does. ...

Unlike the Court, I cannot accept as controlling the Government’s argument as *amicus curiae* that “[a]llowing recovery for foreign injuries in a civil RICO action ... presents the ... danger of international friction.” The Government does not provide examples, nor apparently has it consulted with foreign governments on the matter. By way of contrast, the European Community and 26 of its member states tell us “that the complaint in this case, which alleges that American corporations engaged in a pattern of racketeering activity that caused injury to respondents’ businesses and property, comports with limitations on prescriptive jurisdiction under international law and respects the dignity of foreign sovereigns.” In these circumstances, and for the reasons given by Justice GINSBURG, I would not place controlling weight on the Government’s contrary view.

Consequently, I join Justice GINSBURG’s opinion.

NOTES AND QUESTIONS

- 1. Practice: What's at Stake?** What was at stake for the litigants in *RJR Nabisco*? Specifically, why do you think the plaintiffs wanted U.S. federal law to apply? Why do you think the defendants didn't want U.S. federal law to apply? What other law potentially could have applied?
- 2. Practice: Litigation Strategy.** Why do you think the plaintiffs sued the defendants in the United States? What other forums might have potentially been available? Why didn't the plaintiffs sue there instead?
- 3. Clarifying the Morrison Framework.** In what ways does the Court in *RJR Nabisco* clarify the *Morrison* framework for analyzing the extraterritorial reach of federal statutes? In particular, what is the relationship between the presumption against extraterritoriality and a statute's "focus"? Is the "focus" analysis always necessary? And what light does the Court's opinion in *RJR Nabisco* shed on what the *Morrison* court meant when, in confirming that the presumption against extraterritoriality is not a "clear statement rule," it stated that "[a]ssuredly context can be consulted as well"? Specifically, what "context" did the Court find important in *RJR Nabisco*?

In *WesternGeco LLC v. ION Geophysical Corporation*, 138 S.Ct. 2129 (2018), the Supreme Court decided an extraterritoriality issue without doing the first analytical step at all. That case involved the federal Patent Act. Under § 271(f)(2) of that Act, a company is liable for patent infringement if it ships components of a patented invention overseas to be assembled there. Under § 284, a patent owner who proves infringement is entitled to recover lost-profits damages. The trial court ruled in favor of WesternGeco, the patent owner, awarding it damages for profits it lost outside the United States. The issue was whether the award of damages for foreign lost profits was an impermissible extraterritorial application of § 284. *Id.* at 2134. The Court explained its approach as follows:

We resolve this case at step two. While "it will usually be preferable" to begin with step one, courts have the discretion to begin at step two "in appropriate cases." One reason to exercise that discretion is if addressing step one would require resolving "difficult questions" that do not change "the outcome of the case," but could have far-reaching effects in future cases. That is true here. WesternGeco argues that the presumption against extraterritoriality should never apply to statutes, such as § 284, that merely provide a general damages remedy for conduct that Congress has declared unlawful. Resolving that question could implicate many other statutes besides the Patent Act. We therefore exercise our discretion to forgo the first step of our extraterritoriality framework.

Id. at 2136-37. The Court proceeded to conclude that the focus of Section 284 was on the act of infringement. The Court accordingly held that “[t]he conduct in this case that is relevant to that focus clearly occurred in the United States, as it was ION’s domestic act of supplying the components that infringed WesternGeco’s patents. Thus, the lost-profits damages that were awarded to WesternGeco were a domestic application of § 284.” *Id.* at 2138.

4. **Applying *Morrison* to RICO.** Why did the majority in *RJR Nabisco* separately analyze the extraterritorial reach of RICO’s substantive provisions in § 1962 and its private right of action in § 1964(c)? Why did it reach different conclusions about the extraterritorial reach of these two sections?
5. **What Counts as “Domestic Injury”?** The Court in *RJR Nabisco* held that “Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries,” commenting that “[t]he application of this rule in any given case will not always be self-evident, as disputes may arise as to whether a particular alleged injury is ‘foreign’ or ‘domestic.’” But the plaintiffs in *RJR Nabisco* waived their damages claims for domestic injuries, so the Court did not need to decide whether given injuries were indeed domestic. How should courts decide what counts and doesn’t count as domestic injury? Compare *Tatung Company, Ltd. v. Shu Tze Hsu*, 217 F. Supp. 3d 1138 (C.D. Cal. 2016) (holding that foreign plaintiff’s inability to enforce a domestic judgment due to defendant’s alleged conspiracy to avoid enforcement was a “domestic injury”) with *Bascuñan v. Daniel Yarur Elsaca*, 2016 WL 5475998 (S.D.N.Y. 2016) (holding that an economic injury is suffered in the place where the plaintiff resides and sustains the economic impact of the loss; where defendants caused funds in New York to be fraudulently siphoned from plaintiff’s share of his parents’ estate, and plaintiff was a Chilean citizen and resident, the injury was suffered in Chile and thus was foreign injury).
6. **Extraterritoriality and International Relations.** Why does the majority believe that the extraterritorial application of RICO’s private right of action provision would present a “danger of international friction”? Why are Justices Ginsburg and Breyer skeptical about whether there is such a danger in this case? What do you think? More broadly, is it appropriate for concerns about international relations to influence a court’s legal analysis? Why or why not?
7. **Policy: The Desirability of the Presumption Against Extraterritoriality.** Do you think the presumption against extraterritoriality is the best principle to apply to determine whether a U.S. federal statute applies extraterritorially? Why or why not? If not, what alternatives would be more appropriate?

Page 44, add after the excerpts from the *Restatement (Third) of the Foreign Relations Law of the United States (1987)* and before the Notes and Questions:

In 2016, the membership of the American Law Institute (ALI) approved the *Restatement (Fourth) of the Foreign Relations Law of the United States—Jurisdiction*. It provides an updated understanding, from a primarily U.S. perspective, of the customary international law principles governing jurisdiction to prescribe. Consider the ways in which they are similar to and different from the provisions of the *Restatement (Third) of Foreign Relations Law* excerpted above.¹

Restatement (Fourth) of the Foreign Relations Law of the United States (2016)

§ 205. Interpretation Consistent with International Law

Where fairly possible, U.S. courts construe federal statutes to avoid conflict with international law governing jurisdiction to prescribe. Where a federal statute cannot be so construed, the federal statute is controlling as a matter of U.S. law.

§ 211. Customary International Law Governing Jurisdiction to Prescribe

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. Prescriptive jurisdiction usually rests on a specific connection between the state and the subject being regulated, such as territory, effects, active personality, passive personality, or protection. In the case of universal jurisdiction, all states may exercise prescriptive jurisdiction based on a general interest in suppressing certain violations of international law.

§ 212. Jurisdiction Based on Territory

International law recognizes a state's jurisdiction to prescribe law with respect to persons, property, and conduct within its territory.

§ 213. Jurisdiction Based on Effects

International law recognizes a state's jurisdiction to prescribe law with respect to conduct that has a substantial effect within its territory.

§ 214. Jurisdiction Based on Active Personality

¹ The ALI membership also approved sections of the *Restatement (Fourth) of the Foreign Relations Law of the United States* on Sovereign Immunity and on Treaties.

International law recognizes a state's jurisdiction to prescribe law with respect to the conduct, interests, status, and relations of its nationals outside its territory.

§ 215. Jurisdiction Based on Passive Personality

International law recognizes a state's jurisdiction to prescribe law with respect to certain conduct outside its territory that harms its nationals.

§ 216. Jurisdiction Based on the Protective Principle

International law recognizes a state's jurisdiction to prescribe law with respect to certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other fundamental state interests, including espionage, certain acts of terrorism, murder of government officials, counterfeiting of the state's seal or currency, falsification of official documents, perjury before consular officials, and conspiracy to violate immigration or customs laws.

§ 217. Universal Jurisdiction

International law recognizes a state's jurisdiction to prescribe law with respect to certain offenses of universal concern, such as genocide, crimes against humanity, war crimes, certain acts of terrorism, piracy, slave trade, and torture, even if no specific connection exists between the state and the persons or conduct being regulated.

Page 50, add at the end of note 1:

The *Restatement (Fourth) of the Foreign Relations Law of the United States* (2016) summarizes the Charming Betsy Canon as follows:

§ 205. Interpretation Consistent with International Law

Where fairly possible, U.S. courts construe federal statutes to avoid conflict with international law governing jurisdiction to prescribe. Where a federal statute cannot be so construed, the federal statute is controlling as a matter of U.S. law.

Page 120, add after note 4:

5. Information Provided by Foreign Governments About Foreign Law. Are U.S. courts bound to defer to foreign governments when determining the meaning of foreign law? In a

unanimous opinion in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, 138 S.Ct. 1865 (2018), the U.S. Supreme Court held that the answer is no.

The *Animal Science* case involved price-fixing claims against the respondents, who were Chinese producers of vitamin C. The respondents did not deny that their behavior violated U.S. antitrust law. Instead, they raised several defenses — including foreign sovereign compulsion and the doctrine of international comity — each of which depended on a conclusion that Chinese law required them to fix vitamin C export prices. In support of the respondents, the Ministry of Commerce of the People’s Republic of China filed an amicus brief asserting that Chinese law indeed required respondents to set prices and reduce quantities of vitamin C sold abroad.

The district court in *Animal Science* “respectfully decline[d] to defer” to the Ministry’s interpretation and rejected respondents’ defenses, concluding that Chinese law did not compel the respondents’ anticompetitive conduct. In reaching its conclusion, the district court considered not only the ministry’s brief, but also the testimony of the petitioner’s expert witness, the text of the relevant government directives, and other sources of information about Chinese law. The case went to trial, and judgment was entered in favor of petitioners.

The Second Circuit reversed, holding that “when a foreign government ... directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements.” The Supreme Court granted certiorari.

The Supreme Court vacated the Second Circuit’s decision, holding that “[a] federal court should accord respectful consideration to a foreign government’s submission, but is not bound to accord conclusive effect to the foreign government’s statements.” The Supreme Court reasoned that the Second Circuit’s “unyielding rule is inconsistent with Rule 44.1 [of the Federal Rules of Civil Procedure],” which provides that “[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence” and that “[t]he court’s determination must be treated as a ruling on a question of law.” It also pointed out that the Second Circuit’s rule was inconsistent with international practice, as reflected in two treaties dealing with the determination of foreign law.

What does it mean to give “respectful consideration” to foreign government statements? The Supreme Court stated that “no single formula or rule will fit all cases in which a foreign government describes its own law.” It did, however, identify a number of considerations that are relevant when determining how much weight to give to a foreign government’s interpretation, including “the statement’s clarity, thoroughness, and support; its context and

purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the government's past positions." Regarding context, the Court emphasized that when the foreign government offers the interpretation "in the context of litigation, there may be cause for caution in evaluating the foreign government's submission." On the other hand, under the Supreme Court's approach it would seem that a prior decision of a foreign country's independent court about the meaning of its own law would ordinarily deserve substantial weight.

Is the Supreme Court's approach a sensible one? Why do you think the Second Circuit insisted on a different approach? In practical terms, what does the *Animal Science* decision mean for how lawyers make arguments about the meaning of foreign law?

Chapter 2: International Law

Page 166, add at the end of note 8:

In June 2015, the Obama administration announced a Joint Comprehensive Plan of Action (JCPOA) among the United States, Russia, China, Great Britain, France, Germany and Iran regarding Iran's nuclear program. Among other things, Iran agreed to certain limits on its nuclear program designed to prevent its acquisition of a nuclear bomb, and the Obama administration agreed to lift U.S. economic sanctions against Iran. After some initial uncertainty, the U.S. State Department clarified that it understood the JCPOA (which was not signed by the parties nor approved by Congress or the Senate) as a nonbinding agreement. Why might a nonbinding agreement be preferred in this situation? Are there any practical differences between a binding and nonbinding agreement in this situation? President Obama had preexisting statutory authority to lift the Iran sanctions. Why does that matter?

Also in 2015, President Obama signed the Paris Agreement on climate change, a multilateral agreement whose goal is to reduce carbon emissions. He did not seek Senate advice and consent, principally on the argument that the material provisions of the Agreement are non-binding. President Obama then ratified the Agreement on behalf of the United States in 2016.

In 2017, newly elected President Donald Trump announced the withdrawal of the United States from the Paris Agreement. Subsequently, in 2018, President Trump also announced U.S. withdrawal from the JCPOA. Does the President have this power to withdraw in these circumstances? What are the relevant considerations? Was it a mistake for President Obama to approve the Paris Agreement and the JCPOA on his own authority rather than as treaties approved by the Senate?

Page 238, add at the end of note 2:

In a potentially important case for treaty interpretation, the U.S. Supreme Court agreed to decide how to determine the “habitual residence” of an infant under the Hague Convention on the Civil Aspects of International Child Abduction, which requires a child wrongfully removed from her country of “habitual residence” to be returned to that country. *Taglieri v. Monasky*, 907 F.3d 404 (6th Cir. 2018) (en banc), *cert. granted sub nom. Monasky v. Taglieri* (June 10, 2019).

Pages 268-273, delete Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010).

Page 273, add introductory note before Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013)

Beginning in the 1990s, plaintiffs filed numerous claims under the ATS against multinational corporations alleging complicity in international human rights abuses in a wide range of countries including (among many others) Nigeria, Myanmar, Indonesia, South Africa, Sudan, Papua New Guinea, and Colombia. Some of these were dismissed on various procedural and evidentiary grounds, and none resulted in a judgment against the defendants; many remained ongoing more than a decade later when the Supreme Court turned its attention to the area. In *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), the Second Circuit held that corporations could not be defendants in ATS suits. The Supreme Court granted certiorari but decided on a different ground.

Pages 281-284, delete Notes and Questions 1-10 and replace with the following:

NOTES AND QUESTIONS

1. Aiding and Abetting Liability under the ATS. Like *Kiobel*, many, although not all, corporate ATS cases involve some form of secondary liability based on primary violations by a government. What is the correct standard for aiding and abetting liability, and why is this question important to ATS litigation? Courts of appeal are divided on the question. In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), plaintiffs sued Talisman, an oil exploration company, for its involvement with the government of Sudan in the government’s atrocities during a civil war. The court of appeals upheld the dismissal of the claim on the ground that although Talisman may have known of the atrocities, it did not intend for them to occur. *See also Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011) (endorsing the *Talisman* ruling in an ATS claim brought by Iraqi Kurds against a U.S. company that had supplied a chemical used by Saddam Hussein’s regime to manufacture mustard gas used against the Kurds in the 1980s). In contrast, in *Doe v. ExxonMobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011), in which Indonesian citizens claimed

government security forces committed abuses while guarding an Exxon gas facility, the court allowed an ATS claim to proceed against the corporation upon proof that the corporation knew or should have known of the violations. Which is the best standard? What considerations would influence this decision? In adopting standards for aiding and abetting liability, should courts apply U.S. law, the law of the nation where the alleged violations occurred, or international law?

- 2. Extraterritorial Application of the ATS.** What remains of ATS litigation after the Supreme Court's decision in *Kiobel*? What types of claims are clearly not permitted? What types of claims are clearly permitted? What types of claims *might* be permitted? Do multinational corporations still need to worry about the ATS? Suppose Royal Dutch had been a U.S. corporation; how might *Kiobel*'s lawyers try to argue that the suit could proceed? In *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013), the court indicated that *Kiobel* bars ATS suits for foreign conduct even when the defendant is a U.S. corporation. Is that right? Based on the opinions in *Kiobel*, why might it not be right? Might there be a way to rephrase the complaint to claim the conduct occurred in the United States?

In *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516 (4th Cir. 2014), the court allowed an ATS claim seeking damages against a U.S. corporation for the torture and mistreatment of foreign nationals at the Abu Ghraib prison in Iraq. The court found that the claims "touch and concern" U.S. territory within the meaning of *Kiobel*:

Here, the plaintiffs' claims allege acts of torture committed by United States citizens who were employed by an American corporation, CACI, which has corporate headquarters located in Fairfax County, Virginia. The alleged torture occurred at a military facility operated by United States government personnel.

In addition, the employees who allegedly participated in the acts of torture were hired by CACI in the United States to fulfill the terms of a contract that CACI executed with the United States Department of the Interior. The contract between CACI and the Department of the Interior was issued by a government office in Arizona, and CACI was authorized to collect payments by mailing invoices to government accounting offices in Colorado. Under the terms of the contract, CACI interrogators were required to obtain security clearances from the United States Department of Defense.

Finally, the allegations are not confined to the assertion that CACI's employees participated directly in acts of torture committed at the Abu Ghraib prison. The plaintiffs also allege that CACI's managers located in the United States were aware of reports of misconduct abroad, attempted to "cover up" the misconduct, and "implicitly, if not expressly, encouraged" it.

Is this sufficient to distinguish *Kiobel*? Would this allow ATS suits against any U.S. corporations?

In *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185 (11th Cir. 2014), plaintiffs sued Chiquita for allegedly encouraging the Colombian government to commit torture and murder in Colombia. Over a strong dissent, the court of appeals directed a dismissal on the basis of *Kiobel*, distinguishing *Al Shimari*. The dissent argued that *Kiobel* should not apply to U.S. corporations, and in any event that Chiquita's conduct had occurred at its corporate headquarters in the United States.

Mastafa v. Chevron Corp., 770 F.3d 170 (2d Cir. 2014), illustrates the relationship between *Kiobel* and the aiding and abetting liability issue discussed in note 1 above. Plaintiffs, Iraqi citizens, sued Chevron, a U.S. oil company, for allegedly aiding and abetting the Saddam Hussein regime's human rights violations by paying surcharges on Iraqi oil in violation of U.N. sanctions in the early 2000s. The court of appeals found that some of the plaintiffs' allegations involved conduct in the United States – for example, some of the oil purchases occurred in the United States – and thus *Kiobel* did not wholly bar plaintiffs' claims. However the court went on to hold that plaintiffs had not alleged that Chevron, in paying the surcharges, intended to aid human rights violations, as required by the Second Circuit's prior opinion in *Talisman*, discussed in note 1.

The Second Circuit applied *Mastafa* in *Licci v. Lebanese Canadian Bank*, 834 F.3d 201 (2d Cir. 2016), involving claims by Israeli and Canadian victims of a Hezbollah terrorist attack in Israel. The plaintiffs sued the defendant, a Lebanese bank (LCB), for providing banking services to Hezbollah. The court found that the claim satisfied *Kiobel*'s "touch and concern" requirement. The court observed:

Plaintiffs here assert that LCB, a Lebanese Bank, used a correspondent banking account at a New York bank to facilitate wire transfers between Hezbollah's bank accounts in the months leading up to the rocket attacks. Plaintiffs specifically allege that LCB carried out the specific "banking services which harmed the plaintiffs and their decedents . . . *in and through the State of New York.*" (emphasis added). Plaintiffs here have alleged that LCB engaged in numerous New York-based payments and financing arrangements conducted exclusively through a New York bank account. As in *Mastafa*, we find these allegations to be both specific and domestic. Plaintiffs' allegations "touch and concern" the United States with sufficient force to displace the presumption [against extraterritoriality].

The court reached this conclusion although LCB itself had no branches, offices or employees in the United States. As the court explained:

To effectuate U.S.-dollar-denominated transactions, LCB maintained a correspondent bank account with defendant American Express Bank Ltd. ("AmEx") in New York. Plaintiffs allege that LCB used this account to conduct dozens of international wire transfers on behalf of the Shahid (Martyrs) Foundation, an entity that maintained

bank accounts with LCB and that Plaintiffs allege to be an “integral part” of Hezbollah and “part of [its] financial arm.”

The court then found that plaintiffs had adequately alleged that the wire transfers aided and abetted Hezbollah’s terrorist activities in which the injuries occurred. However, the court went on to hold that the bank could not be liable under the ATS because it was a corporate entity, a question taken up by the U.S. Supreme Court in *Jesner v. Arab Bank PLC*, a case factually similar to *Licci* (excerpted below).

3. **The *Kiobel* Concurrences and Future ATS Litigation.** Note that Justice Kennedy provided the necessary fifth vote for the majority’s opinion. What does his concurrence mean? What uncertainties does he have in mind when he says that uncertainties remain about the application of the presumption against extraterritoriality in ATS cases? What is the point of Justice Alito’s concurrence?
4. **Justice Breyer’s Approach in *Kiobel*.** Why does the logic of Justice Breyer’s opinion not lead him to favor the plaintiffs/petitioners? If torturers and other violators of core international human rights are “today’s pirates,” why should U.S. courts not provide remedies against them if they are “found” in the United States? In *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), the court of appeals allowed an ATS claim to proceed against a person (Radovan Karadžić, a leader of the Bosnian Serbs in the Yugoslavian civil war) who had never resided in the United States but came to the United States only briefly as a visitor. Would that be correct under Justice Breyer’s test? Why isn’t it sufficient for Breyer that the plaintiffs in *Kiobel* were U.S. residents? What if they had been U.S. citizens? What if the defendant is a U.S. resident?
5. **Aftermath.** What next for the *Kiobel* plaintiffs? Do they have other options and venues for suing the defendants in the United States or elsewhere? Why did they not pursue those options first? What obstacles might there be to such suits? See generally Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709 (2012); Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 BOSTON U. L. REV. 397 (2018).

In *Kashef v. BNP Paribas S.A.*, 316 F. Supp. 3d 770 (S.D.N.Y. 2018), foreign plaintiffs sued BNP, a French Bank with operations in New York, under New York state tort law for aiding and abetting genocide and related atrocities committed by Sudanese forces in Sudan by providing financial services to Sudan through its New York offices in violation of U.S. law. The district court dismissed the claims under the act of state doctrine, a rule discussed in Chapter 12 below, but the court of appeals reversed. 2019 WL 2195619 (2d Cir. 2019). The litigation remains ongoing. Could this be a model for the *Kiobel* plaintiffs?

Jesner v. Arab Bank PLC

138 S.Ct. 1386 (2018)

JUSTICE KENNEDY announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B–1, and II–C, and an opinion with respect to Parts II–A, II–B–2, II–B–3, and III, in which THE CHIEF JUSTICE and JUSTICE THOMAS join. ...

I

A

Petitioners are plaintiffs in five [Alien Tort Statute (ATS)] lawsuits filed against Arab Bank in the United States District Court for the Eastern District of New York. ...

A significant majority of the plaintiffs in these lawsuits—about 6,000 of them—are foreign nationals whose claims arise under the ATS. These foreign nationals are petitioners here. They allege that they or their family members were injured by terrorist attacks in the Middle East over a 10-year period. ...

Arab Bank is a major Jordanian financial institution with branches throughout the world, including in New York. According to the Kingdom of Jordan, Arab Bank accounts for between one-fifth and one-third of the total market capitalization of the Amman Stock Exchange. Petitioners allege that Arab Bank helped finance attacks by Hamas and other terrorist groups. Among other claims, petitioners allege that Arab Bank maintained bank accounts for terrorists and their front groups and allowed the accounts to be used to pay the families of suicide bombers.

Most of petitioners’ allegations involve conduct that occurred in the Middle East. Yet petitioners allege as well that Arab Bank used its New York branch to clear dollar denominated transactions through the Clearing House Interbank Payments System. That elaborate system is commonly referred to as CHIPS. It is alleged that some of these CHIPS transactions benefited terrorists. ...

During the pendency of this litigation, there was an unrelated case that also implicated the issue whether the ATS is applicable to suits in this country against foreign corporations. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F. 3d 111 (CA2 2010). ... In *Kiobel*, the Court of Appeals held that the ATS does not extend to suits against corporations. This Court granted certiorari in *Kiobel*.

After additional briefing and reargument in *Kiobel*, this Court held that, given all the circumstances, the suit could not be maintained under the ATS. ... Dismissal of the action was required based on the presumption against extraterritorial application of statutes.

So while this Court in *Kiobel* affirmed the ruling that the action there could not be maintained, it did not address the broader holding of the Court of Appeals that dismissal was required because corporations may not be sued under the ATS. Still, the courts of the Second

Circuit deemed that broader holding to be binding precedent. As a consequence, in the instant case the District Court dismissed petitioners' ATS claims based on the earlier *Kiobel* holding in the Court of Appeals; and on review of the dismissal order the Court of Appeals, also adhering to its earlier holding, affirmed. This Court granted certiorari

II

...[T]his Court now must decide whether common-law liability under the ATS extends to a foreign corporate defendant. ...

Before recognizing a common-law action under the ATS, federal courts must apply the test announced in *Sosa [v. Alvarez-Machain]*. An initial, threshold question is whether a plaintiff can demonstrate that the alleged violation is “of a norm that is specific, universal, and obligatory.” 542 U.S., at 732. And even assuming that, under international law, there is a specific norm that can be controlling, it must be determined further whether allowing this case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before corporate liability can be imposed. “[T]he potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.” *Id.*, at 727. ...

A

...

1

In modern times, there is no doubt, of course, that “the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights,” leading “the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest.” *Filartiga*, 630 F. 2d, at 890. That principle and commitment support the conclusion that human-rights norms must bind the individual men and women responsible for committing humanity's most terrible crimes, not just nation-states in their interactions with one another. “The singular achievement of international law since the Second World War has come in the area of human rights,” where international law now imposes duties on individuals as well as nation-states. *Kiobel*, 621 F. 3d, at 118.

It does not follow, however, that current principles of international law extend liability—civil or criminal—for human-rights violations to corporations or other artificial entities. This is confirmed by the fact that the charters of respective international criminal tribunals often exclude corporations from their jurisdictional reach.

The Charter for the Nuremberg Tribunal, created by the Allies after World War II, provided that the Tribunal had jurisdiction over natural persons only. Later, a United States Military Tribunal prosecuted 24 executives of the German corporation IG Farben. Among other crimes, Farben's employees had operated a slave-labor camp at Auschwitz and “knowingly and intentionally manufactured and provided” the poison gas used in the Nazi death chambers. Although the Military Tribunal “used the term ‘Farben’ as descriptive of the instrumentality of

cohesion in the name of which” the crimes were committed, the Tribunal noted that corporations act through individuals. Farben itself was not held liable.

The jurisdictional reach of more recent international tribunals also has been limited to “natural persons.” *See* Statute of the International Criminal Tribunal for the Former Yugoslavia, S. C. Res. 827 (May 25, 1993), adopting U. N. Secretary-General Rep. Pursuant to Paragraph 2 of Security Council Resolution 808, Art. 6, U.N. Doc. S/25704 (May 3, 1993); Statute of the International Tribunal for Rwanda, Art. 5, S.C. Res. 955, Art. 5 (Nov. 8, 1994). The Rome Statute of the International Criminal Court, for example, limits that tribunal’s jurisdiction to “natural persons.” The drafters of the Rome Statute considered, but rejected, a proposal to give the International Criminal Court jurisdiction over corporations.

The international community’s conscious decision to limit the authority of these international tribunals to natural persons counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law.

2

In light of the sources just discussed, the sources petitioners rely on to support their contention that liability for corporations is well established as a matter of international law lend weak support to their position.

Petitioners first point to the International Convention for the Suppression of the Financing of Terrorism. This Convention imposes an obligation on “Each State Party” “to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity,” violated the Convention. But by its terms the Convention imposes its obligations only on nation-states “to enable” corporations to be held liable in certain circumstances under domestic law. The United States and other nations, including Jordan, may fulfill their obligations under the Convention by adopting detailed regulatory regimes governing financial institutions. The Convention neither requires nor authorizes courts, without congressional authorization, to displace those detailed regulatory regimes by allowing common-law actions under the ATS. And nothing in the Convention’s text requires signatories to hold corporations liable in common-law tort actions raising claims under international law.

In addition, petitioners and their amici cite a few cases from other nations and the Special Tribunal for Lebanon that, according to petitioners, are examples of corporations being held liable for violations of international law. Yet even assuming that these cases are relevant examples, at most they demonstrate that corporate liability might be permissible under international law in some circumstances. That falls far short of establishing a specific, universal, and obligatory norm of corporate liability.

It must be remembered that international law is distinct from domestic law in its domain as well as its objectives. International human-rights norms prohibit acts repugnant to all civilized peoples—crimes like genocide, torture, and slavery, that make their perpetrators “enem[ies] of all mankind.” *Sosa*, 542 U.S., at 732. In the American legal system, of course, corporations are often subject to liability for the conduct of their human employees, and so it may seem necessary and natural that corporate entities are liable for violations of international law under the ATS. It

is true, furthermore, that the enormity of the offenses that can be committed against persons in violation of international human-rights protections can be cited to show that corporations should be subject to liability for the crimes of their human agents. But the international community has not yet taken that step, at least in the specific, universal, and obligatory manner required by *Sosa*. Indeed, there is precedent to the contrary in the statement during the Nuremberg proceedings that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” *The Nurnberg Trial*, 6 F. R. D. 69, 110 (1946). ...

There is at least sufficient doubt on the point to turn to *Sosa*’s second question—whether the Judiciary must defer to Congress, allowing it to determine in the first instance whether that universal norm has been recognized and, if so, whether it is prudent and necessary to direct its enforcement in suits under the ATS.

B 1

Sosa is consistent with this Court’s general reluctance to extend judicially created private rights of action. The Court’s recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law, where this Court has “recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.” 542 U.S., at 727; *Alexander v. Sandoval*, 532 U.S. 275, 286–287 (2001)). That is because “the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability.” *Ziglar v. Abbasi*, 582 U.S. ___, ___ (2017). Thus, “if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, ... courts must refrain from creating the remedy in order to respect the role of Congress.” *Id.*

This caution extends to the question whether the courts should exercise the judicial authority to mandate a rule that imposes liability upon artificial entities like corporations. ...

Neither the language of the ATS nor the precedents interpreting it support an exception to these general principles in this context. In fact, the separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS. The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns. That the ATS implicates foreign relations “is itself a reason for a high bar to new private causes of action for violating international law.” *Sosa, supra*, at 727.

In *Sosa*, the Court emphasized that federal courts must exercise “great caution” before recognizing new forms of liability under the ATS. In light of the foreign-policy and separation-of-powers concerns inherent in ATS litigation, there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS. But the Court need not resolve that question in this case. Either way, absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations.

2

Even in areas less fraught with foreign-policy consequences, the Court looks to analogous statutes for guidance on the appropriate boundaries of judge-made causes of action.

Doing so is even more important in the realm of international law, where “the general practice has been to look for legislative guidance before exercising innovative authority over substantive law.” *Sosa, supra*, at 726.

Here, the logical place to look for a statutory analogy to an ATS common-law action is the [Torture Victim Protection Act (TVPA)]* ... Congress took care to delineate the TVPA’s boundaries. In doing so, it could weigh the foreign-policy implications of its rule. Among other things, Congress specified who may be liable, created an exhaustion requirement, and established a limitations period. In *Kiobel*, the Court recognized that “[e]ach of these decisions carries with it significant foreign policy implications.” The TVPA reflects Congress’ considered judgment of the proper structure for a right of action under the ATS. Absent a compelling justification, courts should not deviate from that model.

The key feature of the TVPA for this case is that it limits liability to “individuals,” which, the Court has held, unambiguously limits liability to natural persons. *Mohamad v. Palestinian Authority*, 566 U.S. 449, 453–456 (2012). Congress’ decision to exclude liability for corporations in actions brought under the TVPA is all but dispositive of the present case. That decision illustrates that significant foreign-policy implications require the courts to draw a careful balance in defining the scope of actions under the ATS. It would be inconsistent with that balance to create a remedy broader than the one created by Congress. Indeed, it “would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.” *Sosa, supra*, at 726. ...

Petitioners contend that, instead of the TVPA, the most analogous statute here is the Anti-Terrorism Act. That Act does permit suits against corporate entities. *See* 18 U.S.C. §§ 2331(3), 2333(d)(2). In fact, in these suits some of the foreign plaintiffs joined their claims to those of United States nationals suing Arab Bank under the Anti-Terrorism Act. But the Anti-Terrorism Act provides a cause of action only to “national[s] of the United States,” and their “estate, survivors, or heirs.” §2333(a). In contrast, the ATS is available only for claims brought by “an alien.” 28 U.S.C. §1350. A statute that excludes foreign nationals (with the possible exception of foreign survivors or heirs) is an inapt analogy for a common-law cause of action that provides a remedy for foreign nationals only. ...

3

Other considerations relevant to the exercise of judicial discretion also counsel against allowing liability under the ATS for foreign corporations, absent instructions from Congress to do so. It has not been shown that corporate liability under the ATS is essential to serve the goals of the statute. As to the question of adequate remedies, the ATS will seldom be the only way for plaintiffs to hold the perpetrators liable. And plaintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS. ...

As explained above, in the context of criminal tribunals international law itself generally limits liability to natural persons. Although the Court need not decide whether the seeming absence of a specific, universal, and obligatory norm of corporate liability under international

* The TVPA, enacted by Congress in 1992, provides a cause of action for civil damages against foreign officials who commit acts of torture and extrajudicial killing, subject to certain limitations.

law by itself forecloses petitioners' claims against Arab Bank, or whether this is an issue governed by international law, the lack of a clear and well-established international-law rule is of critical relevance in determining whether courts should extend ATS liability to foreign corporations without specific congressional authorization to do so. That is especially so in light of the TVPA's limitation of liability to natural persons, which parallels the distinction between corporations and individuals in international law.

If, moreover, the Court were to hold that foreign corporations may be held liable under the ATS, that precedent-setting principle "would imply that other nations, also applying the law of nations, could hale our [corporations] into their courts for alleged violations of the law of nations." *Kiobel*, 569 U.S., at 124. This judicially mandated doctrine, in turn, could subject American corporations to an immediate, constant risk of claims seeking to impose massive liability for the alleged conduct of their employees and subsidiaries around the world, all as determined in foreign courts, thereby "hinder[ing] global investment in developing economies, where it is most needed." Brief for United States as Amicus Curiae in *American Isuzu Motors, Inc. v. Ntsebeza*, O.T. 2007, No. 07-919, p. 20. ...

It is also true, of course, that natural persons can and do use corporations for sinister purposes, including conduct that violates international law. That the corporate form can be an instrument for inflicting grave harm and suffering poses serious and complex questions both for the international community and for Congress. So there are strong arguments for permitting the victims to seek relief from corporations themselves. Yet the urgency and complexity of this problem make it all the more important that Congress determine whether victims of human-rights abuses may sue foreign corporations in federal courts in the United States. Congress, not the Judiciary, is the branch with "the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *Kiobel*, 569 U.S., at 116. ...

C

The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable. But here, and in similar cases, the opposite is occurring.

Petitioners are foreign nationals seeking hundreds of millions of dollars in damages from a major Jordanian financial institution for injuries suffered in attacks by foreign terrorists in the Middle East. The only alleged connections to the United States are the CHIPS transactions in Arab Bank's New York branch and a brief allegation regarding a charity in Texas. The Court of Appeals did not address, and the Court need not now decide, whether these allegations are sufficient to "touch and concern" the United States under *Kiobel*. See 569 U.S., at 124-125.

At a minimum, the relatively minor connection between the terrorist attacks at issue in this case and the alleged conduct in the United States well illustrates the perils of extending the scope of ATS liability to foreign multinational corporations like Arab Bank. For 13 years, this litigation has "caused significant diplomatic tensions" with Jordan, a critical ally in one of the world's most sensitive regions. Brief for United States as Amicus Curiae 30. "Jordan is a key counterterrorism partner, especially in the global campaign to defeat the Islamic State in Iraq and

Syria.” *Id.*, at 31. The United States explains that Arab Bank itself is “a constructive partner with the United States in working to prevent terrorist financing.” *Id.*, at 32. Jordan considers the instant litigation to be a “grave affront” to its sovereignty. *See* Brief for Hashemite Kingdom of Jordan as Amicus Curiae 3; *see ibid.* (“By exposing Arab Bank to massive liability, this suit thus threatens to destabilize Jordan’s economy and undermine its cooperation with the United States”).

This is not the first time, furthermore, that a foreign sovereign has appeared in this Court to note its objections to ATS litigation. *Sosa*, 542 U.S., at 733, n. 21 (noting objections by the European Commission and South Africa); Brief for the Federal Republic of Germany as Amicus Curiae in *Kiobel v. Royal Dutch Petroleum Co.*, O.T. 2012, No. 10–1491, p. 1; Brief for the Government of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in No. 10–1491, p. 3. These are the very foreign-relations tensions the First Congress sought to avoid.

Petitioners insist that whatever the faults of this litigation—for example, its tenuous connections to the United States and the prolonged diplomatic disruptions it has caused—the fact that Arab Bank is a foreign corporate entity, as distinct from a natural person, is not one of them. That misses the point. As demonstrated by this litigation, foreign corporate defendants create unique problems. And courts are not well suited to make the required policy judgments that are implicated by corporate liability in cases like this one.

... Accordingly, the Court holds that foreign corporations may not be defendants in suits brought under the ATS. ...

[Concurring opinion of Justice Thomas omitted]

JUSTICE ALITO, concurring in part and concurring in the judgment.

Creating causes of action under the Alien Tort Statute against foreign corporate defendants would precipitate exactly the sort of diplomatic strife that the law was enacted to prevent. As a result, I agree with the Court that we should not take that step, and I join Parts I, II–B–1, and II–C of the opinion of the Court. I write separately to elaborate on why that outcome is compelled not only by “judicial caution,” but also by the separation of powers. ...

The ATS is a jurisdictional statute. ... By its terms, the ATS does not create any causes of action.

In *Sosa*, however, this Court nevertheless held that federal courts, exercising their authority in limited circumstances to make federal common law, may create causes of action that aliens may assert under the ATS. ...

For the reasons articulated by Justice Scalia in *Sosa* and by JUSTICE GORSUCH today, I am not certain that *Sosa* was correctly decided. ... But even taking that decision on its own terms, this Court should not create causes of action under the ATS against foreign corporate defendants. [A] court should decline to create a cause of action as a matter of federal common law where the result would be to further, not avoid, diplomatic strife. Properly applied, that rule easily resolves the question presented by this case. ...

The ATS was meant to help the United States avoid diplomatic friction. The First Congress enacted the law to provide a forum for adjudicating that “narrow set of violations of the law of nations” that, if left unaddressed, “threaten[ed] serious consequences” for the United States. *Sosa*, 542 U.S., at 715; *see also* Brief for Professors of International Law et al. as Amici Curiae 7–12. Specifically, the First Congress was concerned about offenses like piracy, violation of safe conducts, and infringement of the rights of ambassadors, each of which “if not adequately redressed could rise to an issue of war.” *Sosa*, *supra*, at 715. That threat was existentially terrifying for the young Nation. To minimize the danger, the First Congress enacted the ATS, “ensur[ing] that the United States could provide a forum for adjudicating such incidents” and thus helping the Nation avoid further diplomatic imbroglios.

Putting that objective together with the rules governing federal common law generally, the following principle emerges: Federal courts should decline to create federal common law causes of action under *Sosa*’s second step whenever doing so would not materially advance the ATS’s objective of avoiding diplomatic strife. And applying that principle here, it is clear that federal courts should not create causes of action under the ATS against foreign corporate defendants. All parties agree that customary international law does not require corporate liability as a general matter. But if customary international law does not require corporate liability, then declining to create it under the ATS cannot give other nations just cause for complaint against the United States.

To the contrary, ATS suits against foreign corporations may provoke—and, indeed, frequently have provoked—exactly the sort of diplomatic strife inimical to the fundamental purpose of the ATS. Some foreign states appear to interpret international law as foreclosing civil corporate liability for violations of the law of nations. ... For example, Jordan considers this suit “a direct affront” to its sovereignty and one that “risks destabilizing Jordan’s economy and undercutting one of the most stable and productive alliances the United States has in the Middle East.” Brief for Hashemite Kingdom of Jordan as Amicus Curiae 4. Courting these sorts of problems—which seem endemic to ATS litigation—was the opposite of what the First Congress had in mind. ...

JUSTICE GORSUCH, concurring in part and concurring in the judgment.

I am pleased to join the Court’s judgment and Parts I, II–B–1, and II–C of its opinion. Respectfully, though, I believe there are two more fundamental reasons why this lawsuit must be dismissed. A group of foreign plaintiffs wants a federal court to invent a new cause of action so they can sue another foreigner for allegedly breaching international norms. In any other context, a federal judge faced with a request like that would know exactly what to do with it: dismiss it out of hand. Not because the defendant happens to be a corporation instead of a human being. But because the job of creating new causes of action and navigating foreign policy disputes belongs to the political branches. For reasons passing understanding, federal courts have sometimes treated the Alien Tort Statute as a license to overlook these foundational principles. I would end ATS exceptionalism. We should refuse invitations to create new forms of legal liability. ...

... In this case, the plaintiffs ... want the federal courts to recognize a new cause of action, one that did not exist at the time of the statute's adoption, one that Congress has never authorized. While their request might appear inconsistent with *Sosa*'s explanation of the ATS's modest origin, the plaintiffs say that a caveat later in the opinion saves them. They point to a passage where the Court went on to suggest that the ATS may also afford federal judges "discretion [to] consid[er] [creating] new cause[s] of action" if they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the [three] 18th-century" torts the Court already described. 542 U.S., at 725.

I harbor serious doubts about *Sosa*'s suggestion. In our democracy the people's elected representatives make the laws that govern them. Judges do not. The Constitution's provisions insulating judges from political accountability may promote our ability to render impartial judgments in disputes between the people, but they do nothing to recommend us as policymakers for a large nation. Recognizing just this, our cases have held that when confronted with a request to fashion a new cause of action, "separation-of-powers principles are or should be central to the analysis." *Ziglar v. Abbasi*, 582 U.S. ___, ___ (2017). The first and most important question in that analysis "is 'who should decide' ..., Congress or the courts?" and the right answer "most often will be Congress." *Ibid.* ...

Nor can I see any reason to make a special exception for the ATS. As *Sosa* initially acknowledged, the ATS was designed as "a jurisdictional statute creating no new causes of action." 542 U.S., at 724. And I would have thought that the end of the matter. A statute that creates no new causes of action ... creates no new causes of action. To the extent *Sosa* continued on to claim for federal judges the discretionary power to create new forms of liability on their own, it invaded terrain that belongs to the people's representatives and should be promptly returned to them. 542 U.S., at 747 (Scalia, J., concurring in part and concurring in the judgment).

...

II

Another independent problem lurks here. This is a suit by foreigners against a foreigner over the meaning of international norms. Respectfully, I do not think the original understanding of the ATS or our precedent permits federal courts to hear cases like this. At a minimum, both those considerations and simple common sense about the limits of the judicial function should lead federal courts to require a domestic defendant before agreeing to exercise any *Sosa*-generated discretion to entertain an ATS suit.

... Like today's recodified version, 28 U.S.C §1350, the original text of the ATS did not expressly call for a U.S. defendant. But I think it likely would have been understood to contain such a requirement when adopted.

That is because the First Congress passed the Judiciary Act in the shadow of the Constitution. The Act created the federal courts and vested them with statutory authority to entertain claims consistent with the newly ratified terms of Article III. Meanwhile, under Article III, Congress could not have extended to federal courts the power to hear just any suit between two aliens (unless, for example, one was a diplomat). Diversity of citizenship was required. So, because Article III's diversity-of-citizenship clause calls for a U.S. party, and because the ATS

clause requires an alien plaintiff, it follows that an American defendant was needed for an ATS suit to proceed.

Precedent confirms this conclusion. In *Mossman v. Higginson*, 4 Dall. 12, 14 (1800), this Court addressed the meaning of a neighboring provision of the Judiciary Act. Section 11 gave the circuit courts power to hear, among other things, civil cases where “an alien is a party.” 1 Stat. 78. As with §9, you might think §11’s language could be read to permit a suit between aliens. Yet this Court held §11 must instead be construed to refer only to cases “where, indeed, an alien is one party, but a citizen is the other.” *Mossman*, 4 Dall., at 14. That was necessary, *Mossman* explained, to give the statute a “constructio[n] consistent” with the diversity jurisdiction clause of Article III. *Ibid.* And as a matter of precedent, I cannot think of a good reason why we would now read §9 differently than *Mossman* read §11. ...

... There are at least serious historical arguments suggesting the ATS was not meant to apply to suits like this one. And to the extent *Sosa* affords courts discretion to proceed, these arguments should inform any decision whether to exercise that discretion. ... It is one thing for courts to assume the task of creating new causes of action to ensure our citizens abide by the law of nations and avoid reprisals against this country. It is altogether another thing for courts to punish foreign parties for conduct that could not be attributed to the United States and thereby risk reprisals against this country. If a foreign state or citizen violates an “international norm” in a way that offends another foreign state or citizen, the Constitution arms the President and Congress with ample means to address it. Or, if they think best, the political branches may choose to look the other way. But in all events, the decision to impose sanctions in disputes between foreigners over norms is not ours to make. It is a decision that belongs to those answerable to the people and assigned by the Constitution to defend this nation. If they wish our help, they are free to enlist it, but we should not ever be in the business of elbowing our way in.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE KAGAN join, dissenting.

The Court today holds that the Alien Tort Statute (ATS), 28 U.S.C. §1350, categorically forecloses foreign corporate liability. In so doing, it absolves corporations from responsibility under the ATS for conscience-shocking behavior. I disagree both with the Court’s conclusion and its analytic approach. The text, history, and purpose of the ATS, as well as the long and consistent history of corporate liability in tort, confirm that tort claims for law-of-nations violations may be brought against corporations under the ATS. Nothing about the corporate form in itself raises foreign-policy concerns that require the Court, as a matter of common-law discretion, to immunize all foreign corporations from liability under the ATS, regardless of the specific law-of-nations violations alleged. I respectfully dissent.

I

The plurality assumes without deciding that whether corporations can be permissible defendants under the ATS turns on the first step of the two-part inquiry set out in [*Sosa*]. But by asking whether there is “a specific, universal, and obligatory norm of liability for corporations” in international law, the plurality fundamentally misconceives how international law works and so misapplies the first step of *Sosa*.

A

In *Sosa*, the Court ... articulated a two-step framework to guide [its] inquiry. First, a court must determine whether the particular international-law norm alleged to have been violated is “accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms,” i.e., “violation of safe conducts, infringement of the rights of ambassadors, and piracy.” *Id.*, at 724–725. ... Second, if that threshold hurdle is satisfied, a court should consider whether allowing a particular case to proceed is an appropriate exercise of judicial discretion.

Sosa’s norm-specific first step is inapposite to the categorical question whether corporations may be sued under the ATS as a general matter. International law imposes certain obligations that are intended to govern the behavior of states and private actors. *See* ... 1 Restatement (Third) of Foreign Relations Law of the United States, pt. II, Introductory Note, pp. 70–71 (1987) (Restatement). Among those obligations are substantive prohibitions on certain conduct thought to violate human rights, such as genocide, slavery, extrajudicial killing, and torture.. Substantive prohibitions like these are the norms at which *Sosa*’s step-one inquiry is aimed and for which *Sosa* requires that there be sufficient international consensus.

Sosa does not, however, demand that there be sufficient international consensus with regard to the mechanisms of enforcing these norms, for enforcement is not a question with which customary international law is concerned. Although international law determines what substantive conduct violates the law of nations, it leaves the specific rules of how to enforce international-law norms and remedy their violation to states, which may act to impose liability collectively through treaties or independently via their domestic legal systems. ...

B

... The plurality ... assumes the correctness of its approach because of its view that there exists a distinction in international law between corporations and natural persons. The plurality attempts to substantiate this proposition by pointing to the charters of certain international criminal tribunals and noting that none was given jurisdiction over corporate defendants. That argument, however, confuses the substance of international law with how it has been enforced in particular contexts.

Again, the question of who must undertake the prohibited conduct for there to be a violation of an international law norm is one of international law, but how a particular actor is held liable for a given law-of-nations violation generally is a question of enforcement left up to individual states. Sometimes, states act collectively and establish international tribunals to punish certain international-law violations. Each such tribunal is individually negotiated, and the limitations placed on its jurisdiction are typically driven by strategic considerations and resource constraints.

For example, the Allies elected not to prosecute corporations at Nuremberg because of pragmatic factors. Those factors included scarce judicial resources, a preference of the occupation governments to swiftly dismantle the most culpable German companies without destroying Germany’s postwar economy, and a desire to focus on establishing the principle of nonstate criminal responsibility for human-rights violations.

More recently, the delegations that negotiated the Rome Statute of the International Criminal Court in the 1990's elected not to extend that tribunal's jurisdiction to corporations in part because states had varying domestic practices as to whether and how to impose criminal liability on corporations. ...

Ultimately, the evidence on which the plurality relies does not prove that international law distinguishes between corporations and natural persons as a categorical matter. To the contrary, it proves only that states' collective efforts to enforce various international-law norms have, to date, often focused on natural rather than corporate defendants.

In fact, careful review of states' collective and individual enforcement efforts makes clear that corporations are subject to certain obligations under international law. For instance, the United States Military Tribunal that prosecuted several corporate executives of IG Farben declared that corporations could violate international law. See 8 Trials of War Criminals Before the Nuernberg Military Tribunals Under Council Control Law No. 10, p. 1132 (1952) ("Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action . . . is in violation of international law"). Similarly, the International Criminal Tribunal for Rwanda found that three nonnatural entities—a private radio station, newspaper, and political party— were responsible for genocide. See *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment and Sentence ¶953 (Dec. 3, 2003). Most recently, the appeals panel of the Special Tribunal for Lebanon held that corporations may be prosecuted for contempt. See *Prosecutor v. New TV S. A. L.*, Case No. STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings ¶74 (Oct. 2, 2014). ...

Finally, a number of states, acting individually, have imposed criminal and civil liability on corporations for law-of-nations violations through their domestic legal systems. ...

C

Instead of asking whether there exists a specific, universal, and obligatory norm of corporate liability under international law, the relevant inquiry in response to the question presented here is whether there is any reason—under either international law or our domestic law—to distinguish between a corporation and a natural person who is alleged to have violated the law of nations under the ATS. As explained above, international law provides no such reason. Nor does domestic law. The text, history, and purpose of the ATS plainly support the conclusion that corporations may be held liable.

Beginning with the language of the statute itself, two aspects of the text of the ATS make clear that the statute allows corporate liability. First, the text confers jurisdiction on federal district courts to hear "civil action[s]" for "tort[s]." 28 U.S.C. §1350. ...

Corporations have long been held liable in tort under the federal common law. See *Philadelphia, W., & B. R. Co. v. Quigley*, 21 How. 202, 210 (1859) ... This Court "has assumed that, when Congress creates a tort action, it legislates against a legal background of ordinary tort-related . . . rules and consequently intends its legislation to incorporate those rules." *Meyer v. Holley*, 537 U.S. 280, 285 (2003). The presumption, then, is that, in providing for "tort" liability, the ATS provides for corporate liability.

Second, whereas the ATS expressly limits the class of permissible plaintiffs to “alien[s],” §1350, it does not distinguish among classes of defendants. ...

Nothing about the historical background against which the ATS was enacted rebuts the presumption that the statute incorporated the accepted principle of corporate liability for tortious conduct. ...

Finally, the conclusion that corporations may be held liable under the ATS for violations of the law of nations is not of recent vintage. More than a century ago, the Attorney General acknowledged that corporations could be held liable under the ATS. *See* 26 Op. Atty. Gen. 250, 252 (1907) (stating that citizens of Mexico could bring a claim under the ATS against a corporation, the American Rio Grande Land and Irrigation Company, for violating provisions of a treaty between the United States and Mexico). ...

II

At its second step, *Sosa* cautions that courts should consider whether permitting a case to proceed is an appropriate exercise of judicial discretion in light of potential foreign-policy implications. The plurality only assumes without deciding that international law does not impose liability on corporations, so it necessarily proceeds to *Sosa*’s second step. Here, too, its analysis is flawed.

A

Nothing about the corporate form in itself justifies categorically foreclosing corporate liability in all ATS actions. Each source of diplomatic friction that respondent Arab Bank and the plurality identify can be addressed with a tool more tailored to the source of the problem than a blanket ban on corporate liability.

Arab Bank contends that foreign citizens should not be able to sue a Jordanian corporation in New York for events taking place in the Middle East. The heart of that qualm was already addressed in *Kiobel*, which held that the presumption against extraterritoriality applies to the ATS. Only where the claims “touch and concern the territory of the United States . . . with sufficient force” can the presumption be displaced. “[M]ere corporate presence” does not suffice. ...

Arab Bank also bemoans the unfairness of being sued when others—namely, the individuals and organizations that carried out the terrorist attacks—were “the direct cause” of the harm petitioners here suffered. That complaint, though, is a critique of the imposition of liability for financing terrorism, not an argument that ATS suits against corporations generally necessarily cause diplomatic tensions.

Arab Bank further expresses concern that ATS suits are being filed against corporations in an effort to recover for the bad acts of foreign governments or officials. But the Bank’s explanation of this problem reveals that the true source of its grievance is the availability of aiding and abetting liability. ... Yet not all law-of-nations violations asserted against corporations are premised on aiding and abetting liability...

Notably, even the Hashemite Kingdom of Jordan does not argue that there are foreign-policy tensions inherent in suing a corporation generally. Instead, Jordan contends that this particular suit is an affront to its sovereignty because of its extraterritorial character and because of the role that Arab Bank specifically plays in the Jordanian economy.

The majority also cites to instances in which other foreign sovereigns have “appeared in this Court to note [their] objections to ATS litigation,” but none of those objections was about the availability of corporate liability as a general matter. ...

As the United States urged at oral argument, when international friction arises, a court should respond with the doctrine that speaks directly to the friction’s source. ... In addition to the presumption against extraterritoriality, federal courts have at their disposal a number of tools to address any foreign-relations concerns that an ATS case may raise. This Court has held that a federal court may exercise personal jurisdiction over a foreign corporate defendant only if the corporation is incorporated in the United States, has its principal place of business or is otherwise at home here, or if the activities giving rise to the lawsuit occurred or had their impact here. *See Daimler AG v. Bauman*, 571 U.S. 117 (2014). Courts also can dismiss ATS suits for a plaintiff’s failure to exhaust the remedies available in her domestic forum, on forum non conveniens grounds, for reasons of international comity, or when asked to do so by the State Department.

... Foreclosing foreign corporate liability in all ATS actions, irrespective of circumstance or norm, is simply too broad a response to case-specific concerns that can be addressed via other means.

B

1

The Court urges that “[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.” I agree that the political branches are well poised to assess the foreign-policy concerns attending ATS litigation, which is why I give significant weight to the fact that the Executive Branch, in briefs signed by the Solicitor General and State Department Legal Advisor, has twice urged the Court to reach exactly the opposite conclusion of the one embraced by the majority. ... Notably, the Government’s position that categorically barring corporate liability under the ATS is wrong has been consistent across two administrations led by Presidents of different political parties.

Likewise, when Members of Congress have weighed in on the question whether corporations can be proper defendants in an ATS suit, it has been to advise the Court against the rule it now adopts...

2

The plurality instead purports to defer to Congress by relying heavily on the [TVPA] to support its categorical bar. ... But there is no reason to think that because Congress saw fit to permit suits only against natural persons for two specific law-of-nations violations, Congress meant to foreclose corporate liability for all law-of-nations violations. The plurality’s contrary conclusion ignores the critical textual differences between the ATS and TVPA, as well as the TVPA’s legislative history, which emphasizes Congress’ intent to leave the ATS undisturbed.

37

On its face, the TVPA is different from the ATS in several significant ways: It is focused on only two law-of-nations violations, torture and extrajudicial killing; it makes a cause of action available to all individuals, not just foreign citizens; and it uses the word “individual” to delineate who may be liable. The ATS, by contrast, is concerned with all law-of-nations violations generally, makes a cause of action available only to foreign citizens, and is silent as to who may be liable. ...

Furthermore, Congress repeatedly emphasized in the House and Senate Reports on the TVPA that the statute was meant to supplement the ATS, not replace or cabin it. ...

... To infer from the TVPA that no corporation may ever be held liable under the ATS for any violation of any international-law norm, moreover, ignores that Congress has elsewhere imposed liability on corporations for conduct prohibited by customary international law. For instance, the Antiterrorism Act of 1990 (ATA) created a civil cause of action for U.S. nationals injured by an act of international terrorism and expressly provides for corporate liability. ...

C

... [H]olding corporations accountable for violating the human rights of foreign citizens when those violations touch and concern the United States may well be necessary to avoid the international tension with which the First Congress was concerned. ... If a corporation owned a fleet of vessels and directed them to seize other ships in U.S. waters, there no doubt would be calls to hold the corporation to account. Finally, take, for example, a corporation posing as a job-placement agency that actually traffics in persons, forcibly transporting foreign nationals to the United States for exploitation and profiting from their abuse. Not only are the individual employees of that business less likely to be able fully to compensate successful ATS plaintiffs, but holding only individual employees liable does not impose accountability for the institution-wide disregard for human rights. Absent a corporate sanction, that harm will persist unremedied. Immunizing the corporation from suit under the ATS merely because it is a corporation, even though the violations stemmed directly from corporate policy and practice, might cause serious diplomatic friction.

Second, the plurality expresses concern that if foreign corporations are subject to liability under the ATS, other nations could hale American corporations into court, ... a prospect that will deter American corporations from investing in developing economies. The plurality offers no empirical evidence to support these alarmist conjectures, which is especially telling given that plaintiffs have been filing ATS suits against foreign corporations in United States courts for years. ... Driven by hypothetical worry about besieged American corporations, today’s decision needlessly goes much further, encompassing all ATS suits against all foreign corporations, not just those cases with extraterritorial dimensions premised on an aiding and abetting theory.

* * *

In sum, international law establishes what conduct violates the law of nations, and specifies whether, to constitute a law-of-nations violation, the alleged conduct must be undertaken by a particular type of actor. But it is federal common law that determines whether corporations may, as a general matter, be held liable in tort for law-of-nations violations. Applying that framework here, I would hold that the ATS does not categorically foreclose

corporate liability. Tort actions against corporations have long been available under federal common law. Whatever the majority might think of the value of modern-day ATS litigation, it has identified nothing to support its conclusion that “foreign corporate defendants create unique problems” that necessitate a categorical rule barring all foreign corporate liability.

... I would reverse the decision of the Court of Appeals for the Second Circuit and remand for further proceedings, including whether the allegations here sufficiently touch and concern the United States, *see Kiobel*, 569 U.S., at 124–125, and whether the international law norms alleged to have been violated by Arab Bank—the prohibitions on genocide, crimes against humanity, and financing of terrorism—are of sufficiently definite content and universal acceptance to give rise to a cause of action under the ATS.

NOTES AND QUESTIONS

- 1. Rejection of Foreign Corporation Liability.** What seems to be the central motivating factor of Justice Kennedy’s opinion? How does the Court’s previous opinion in *Sosa* make his approach possible?

Justices Alito and Gorsuch join only a small part of the substance of Justice Kennedy’s opinion. What part do they join, and why? What parts do they not join, and why? How do their central concerns differ from Kennedy’s and how are they similar? How are Alito and Gorsuch similar or different from each other? What is the consequence of Kennedy obtaining only three votes for parts of his opinion?

Why does the dissent not share the concerns of Kennedy, Alito and Gorsuch?

- 2. Jurisdiction and Cause of Action.** All Justices acknowledge that the ATS provides jurisdiction but does not (in itself) provide a cause of action. What is the difference between jurisdiction and cause of action? Under what circumstances can there be one but not the other? Why does the cause of action issue become important for some Justices but not others?
- 3. International Law and Corporate Liability.** The plurality and the dissent debate whether international law recognizes corporate liability and whether this matters. Should it matter? Suppose it is clear (as the plurality contends) that international criminal tribunals have not held corporations liable for human rights violations. What does that say about the content of international law? What are the implications for ATS law? How do the plurality and dissent differ in answering these questions?
- 4. The Torture Victim Protection Act.** As discussed in the opinions, in 1992 Congress passed a somewhat related statute, the Torture Victim Protection Act (TVPA). The TVPA allows suits by both aliens and U.S. citizens against individuals for torture and extrajudicial killing committed under the authority of a foreign nation. In *Mohamad v. Palestinian Authority*, 566

U.S. 449 (2012), the Supreme Court – relying on the plain language of the statute – held that the TVPA does not authorize suits against entities (presumably including corporations). Why might this be important to the ATS? Why might it not be?

Some claims are now being brought under the TVPA against individual corporate officers and directors. See, e.g., *Penaloza v. Drummond Company, Inc.*, 2019 WL 2206440 (N.D. Ala. 2019) (allowing claims under TVPA against corporate officers for complicity in human rights violations of Colombian paramilitary group in Colombia); *In re Chiquita Brands International, Inc. Alien Tort Statute and Shareholder Derivative Litigation*, 190 F. Supp. 3d 1100 (S.D. Fla. 2016) (same); *see also Doe v. Drummond Corp.*, 782 F.3d 576 (11th Cir. 2015) (generally allowing such claims but dismissing for lack of proof in the particular case). Does this represent an end-run of the *Mohamad* decision or admirable creative lawyering? Might this be a solution for the plaintiffs in *Jesner*? What practical difficulties is this approach likely to encounter?

5. **Exhaustion of Remedies.** Should foreign plaintiffs be required to exhaust remedies in their other courts (that is, sue first in their own courts, or in the defendant's courts, if the defendant is not a U.S. national) before bringing suit in the United States? Note that this is a requirement under the TVPA. The Seventh Circuit required claimants suing Hungarian state banks and railways for complicity in the Nazi genocide to first seek remedies in Hungary. *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 679-692 (7th Cir. 2012). Does exhaustion solve some of the problems with allowing such cases to go forward in U.S. courts?
6. **Views of the Executive Branch.** In a footnote in *Sosa*, the Court suggested that lower courts might take into account the views of the U.S. executive branch in considering whether to allow suits to go forward. Is such an approach appropriate? To the extent there is deference to the Executive, how far should courts go in adopting the Executive's position? Why might courts want to defer to the executive branch in such matters? Note that the Court in *Jesner* did not adopt the executive branch's view.
7. **Corporate Liability after *Jesner*.** The defendant in *Jesner* was a foreign corporation. Does the limit the Court found in *Jesner* bar ATS suits against all foreign corporations? Does it bar ATS suits against U.S. corporations? In *Al Shimari*, an ATS suit against a U.S. corporate defendant discussed above, the district court concluded that *Jesner* only barred suits against foreign corporations. *Al Shimari v. CACI Premier Technology, Inc.*, 320 F. Supp. 3d 781 (E.D. Va. 2018); *accord Estate of Alvarez v. Johns Hopkins University*, 373 F. Supp. 3d 639 (D. Md. 2019) (same, allowing ATS claim against U.S. entity for allegedly tortious medical experimentation). Why should U.S. corporations be treated differently? What arguments could be made that they should not be treated differently? *Compare Doe v. ExxonMobil Corporation*, 2019 WL 2343014 (D.D.C. 2019), rejecting ATS liability of U.S. corporations and concluding:

The Supreme Court’s prior precedents counsel against creating a private right of action in this case. International law has not extended the scope of liability to corporations. Accordingly, there is not a specific, universal, and obligatory norm of corporate liability under currently prevailing international law as required by *Sosa* for ATS cases. Also, separation of powers and foreign relations concerns lead the Court to decline to recognize domestic corporate liability under the ATS in circumstances where, as here, the claims have caused significant diplomatic strife.

Is this view compelled by *Jesner*? Is it allowed by *Jesner*?

In *Doe v. Nestlé S.A.*, 906 F.3d 1120 (9th Cir. 2018), as amended, 2018 WL 8731558 (9th Cir., July 5, 2019), the court allowed ATS claims against U.S. corporations for aiding and abetting child slavery on cocoa plantations in the Ivory Coast to go forward despite *Jesner* and *Kiobel*. Eight judges dissented from the denial of a petition to rehear the case en banc.

Page 284, add the following after the notes:

Consider the following application of *Kiobel*. How would you argue for ATS jurisdiction in an appeal to the First Circuit Court of Appeals?

Sexual Minorities Uganda v. Lively

254 F.Supp.3d 262 (D. Mass. 2017)

PONSOR, U.S.D.J.

Plaintiff Sexual Minorities Uganda, which uses the acronym “SMUG,” is headquartered in Kampala, Uganda. It comprises member organizations seeking fair and equal treatment of lesbian, gay, bisexual, transgender, and intersex (LGBTI) people in that east African country. Defendant Scott Lively is an American citizen who has aided and abetted a vicious and frightening campaign of repression against LGBTI persons in Uganda. ...

The record in this case demonstrates that Defendant has worked with elements in Uganda who share some of his views to try to repress freedom of expression by LGBTI people in Uganda, deprive them of the protection of the law, and render their very existence illegal. He has, for example, proposed twenty-year prison sentences for gay couples in Uganda who simply lead open, law-abiding lives.

Plaintiff has filed this lawsuit under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, seeking monetary damages and injunctive relief based on Defendant’s crimes against humanity. Defendant now seeks summary judgment in his favor arguing that, on the facts of record, the ATS provides no jurisdiction over a claim for injuries—however grievous—occurring entirely in

a foreign country such as Uganda. Because the court has concluded that Defendant's jurisdictional argument is correct, the motion will be allowed. ...

To summarize now that discovery has closed, the evidence that the actions of the Defendant have “touched and concerned” the territory of the United States is that Defendant is a citizen of the United States living in Massachusetts, that he traveled from the United States to Uganda twice in 2002 and once in 2009, that he sent copies of his writings and other material to Uganda on a few occasions, and that over twelve years he transmitted emails, probably from the United States, to various people in Uganda. Of these perhaps a score, at most, included encouragement, advice, and guidance regarding the campaign to intimidate and repress the Ugandan LGBTI community. ...

As in the case now before this court, the question in *Kiobel* [*v. Royal Dutch Petroleum Co.*, 133 S.Ct. 139 (2013)], was not whether petitioners stated a substantive cause of action under the ATS. A claim for aiding and abetting a crime against humanity, both in this case and in *Kiobel*, could potentially state a proper substantive cause of action under the ATS. The question—again, here as well as in *Kiobel*—was whether the ATS provided a court with jurisdiction over such a claim when the offensive conduct and the injury occurred in the territory of a foreign sovereign.

[*Kiobel*] held that the ATS did not provide such jurisdiction. [The majority’s] analysis began with the recognition of “a canon of statutory interpretation known as the presumption against extraterritorial application.” Under this canon, unless a particular law contains a “clear indication of an extraterritorial application, it has none.” The Chief Justice found that there was “no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.” Where neither respondent was an American citizen and where neither was alleged to have taken any action in the United States directed at Nigeria, the mere fact that the respondents had a corporate presence in this country was insufficient to provide a jurisdictional foundation under the ATS.

It must be recognized that *Kiobel* presents, in some ways, a weaker case for extraterritorial application of the ATS than the case now before this court. Neither respondent corporation in *Kiobel* was a citizen of the United States, whereas Defendant here is. Moreover, beyond “mere corporate presence,” neither corporation had any connection to the United States, and neither committed acts in this country related to the outrages in Nigeria. In contrast, Defendant in this case resides in Springfield, Massachusetts, and at least some of the emails he sent to Uganda to aid and abet the campaign of repression against LGBTI people in that country originated in the United States.

It is important to note, however, that even where a plaintiff's claims “touch and concern the territory of the United States,” *Kiobel* holds that jurisdiction under the ATS will not lie unless this contact has “sufficient force to displace the presumption against extraterritorial application.” As the Court noted in *Morrison* [*v. National Australia Bank*], “the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case.” The question before the court now is whether the sporadic emails sent by Defendant from the United States offering encouragement,

guidance, and advice to a cohort of Ugandans prosecuting a campaign of repression against the LGBTI community in their country constitutes the sort of forceful contact with the United States that would overcome the presumption against extraterritoriality.

The clear import of *Kiobel* is that the level of contact presented in this case is not enough. Justice Alito offered a concurrence for himself and Justice Thomas suggesting a stricter view of the ATS than the majority opinion describes. Justice Alito would permit an action to escape the presumption against extraterritorial application “only if the event or relationship that was the ‘focus’ of congressional concern under the relevant statute takes place within the United States.” While it is difficult to discern exactly how this “focus” test might be applied, it is equally hard to see how the scenario revealed here, no matter how disturbing, could pass muster.

Justice Breyer's separate concurrence on behalf of himself and three other justices is also very unhelpful to Plaintiff here. He agreed that jurisdiction under the ATS did not lie in *Kiobel*.

The plaintiffs are not United States nationals but nationals of other nations. The conduct at issue took place abroad. And the plaintiffs allege, not that the defendants directly engaged in acts of torture, genocide, or the equivalent, but that they helped others (who are not American nationals) to do so.

All three of the factors identified by Justice Breyer's concurrence as deterrents to the exercise of ATS jurisdiction are present in this case. Thus, at least six of the nine justices in *Kiobel* seem to line up against Plaintiff.

Circuit court opinions subsequent to *Kiobel*, while not precisely on point, support the conclusion that no ATS jurisdiction adheres in this case. The most instructive are *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516 (4th Cir. 2014); *Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014); and *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184 (5th Cir. 2017).

Al Shimari involved a corporate defendant that trained and supervised the non-military, contract employees who committed acts of torture at the Abu Ghraib detention facility during the Iraq war. Extensive relevant conduct within the United States included that the defendant (an American corporation based in the United States) actually hired the employees who directly perpetrated the acts of torture, received substantial payments based on contracts issued by the U.S. government in the United States, was aware of its employees' misconduct, encouraged the misconduct, and attempted to cover it up when it was discovered. Based on this, the Fourth Circuit found that the plaintiffs' claims touched and concerned the territory of the United States with sufficient force to rebut the presumption against extraterritorial application of the ATS. Defendants' conduct in *Al Shimari* went far beyond simply aiding and abetting; they had direct responsibility through actions taken in the United States for the crimes against humanity committed by their employees. Nothing approaching this level of conduct based in the United States can be found in the record of the case now before this court.

In *Mastafa*, the plaintiffs were victims of human rights abuses committed by the regime of Saddam Hussein. They brought suit against American corporations who aided Hussein in obtaining illegal payments in violation of the United Nations Oil-for-Food program. Chevron's conduct included “multiple domestic purchases and financing transactions” in the United States

that facilitated kickbacks and surcharge payments to the Hussein regime. This conduct, the Second Circuit found, touched and concerned the United States with sufficient force to displace the presumption against extraterritorial application of the ATS. Again, no domestic conduct by Defendant here approaches the level found on the part of the defendants in *Mastafa*.

In *Adhikari*, the plaintiffs accused the defendant, a U.S. military contractor, of aiding and abetting in unlawful human trafficking to obtain cheap labor to work at the Al Asad Air Base, a U.S. military installation near Ramadi, Iraq. The plaintiffs were family members of Nepali workers who were dragooned and forced against their will to work in Iraq. Tragically, most were eventually murdered by Iraqi insurgents. The record reflected payments by the defendant from the United States to middlemen who arranged the illegal trafficking, as well as knowledge on the part of the defendant of the trafficking. Nevertheless, the Fifth Circuit upheld the ban against the exercise of extraterritorial jurisdiction, finding that “all the conduct comprising the alleged international law violations occurred in a foreign country.” The financial transactions, the court held, were insufficient to displace the presumption against extraterritoriality, and the actual knowledge of trafficking was limited to the defendant's overseas employees.

In this case, now that discovery is complete, the record reveals that Defendant supplied no financial backing to the detestable campaign in Uganda, he directed no physical violence, he hired no employees, and he provided no supplies or other material support. His most significant efforts on behalf of the campaign occurred within Uganda itself, when he appeared at conferences, meetings, and media events. The emails sent from the United States providing advice, guidance, and rhetorical support for the campaign on the part of others in Uganda simply do not rise to the level of “force” sufficient to displace the presumption against extraterritorial application.

The world is now wrapped in a vast network of internet communications. If emails—or at least emails of the number and type disclosed on the record here—were enough to supply the “force” sufficient to justify the exercise by American courts of jurisdiction over wrongs committed in foreign countries, the presumption against extraterritoriality described in *Kiobel* would be a fiction.

Moreover, the record reveals that in this case serious potential “foreign policy concerns” exist—a problem explicitly identified in *Kiobel*. Plaintiff's complaint accuses highly placed members of the Ugandan legislative and executive branches of complicity with Defendant. Moreover, the Ugandan judicial system has weighed in vigorously on the local issues that Plaintiff wishes to have this court adjudicate here in the United States. More than in *Al Shimari*, *Mastafa*, *Adhikari*—and even, perhaps in *Kiobel*—this case presents the potential for conflict with the sovereignty of a foreign nation. This counsels a “need for judicial caution.” *Kiobel*, 133 S.Ct. at 1664.*

* Plaintiffs also sued Lively under Massachusetts state law. After rejecting the ATS claim, the district court dismissed the state claims without prejudice. Plaintiffs chose not to appeal to the First Circuit; instead they pursued the state law claims in state court. The First Circuit rejected an appeal by Lively to keep the state law claims in federal court. *Sexual Minorities Uganda v. Lively*, 899 F.3d 24 (1st Cir. 2018).

Chapter 4: National Courts

Page 422, add to the end of note 9:

In 2017, the Supreme Court issued an important decision on specific jurisdiction. In reading the below case, note that the issue that the Court considers—whether the *contacts* with the forum state *are related enough to the underlying claim* to support specific jurisdiction—is a different question than the Court addressed in the specific jurisdiction decisions discussed earlier in the casebook—whether the defendant had the requisite *purposeful contacts with the forum state* to support jurisdiction. With this distinction in mind, consider what impact the Court’s analysis may have on transnational cases and the specific jurisdiction analysis generally going forward.

Bristol-Meyers Squibb Company v. Superior Court of California

137 S. Ct. 1773 (2017)

Justice ALITO delivered the opinion of the Court.

More than 600 plaintiffs, most of whom are not California residents, filed this civil action in a California state court against Bristol–Myers Squibb Company (BMS), asserting a variety of state-law claims based on injuries allegedly caused by a BMS drug called Plavix. The California Supreme Court held that the California courts have specific jurisdiction to entertain the nonresidents’ claims. We now reverse.

I

A

BMS, a large pharmaceutical company, is incorporated in Delaware and headquartered in New York, and it maintains substantial operations in both New York and New Jersey. Over 50 percent of BMS’s work force in the United States is employed in those two States.

BMS also engages in business activities in other jurisdictions, including California. Five of the company’s research and laboratory facilities, which employ a total of around 160 employees, are located there. BMS also employs about 250 sales representatives in California and maintains a small state-government advocacy office in Sacramento.

One of the pharmaceuticals that BMS manufactures and sells is Plavix, a prescription drug that thins the blood and inhibits blood clotting. BMS did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California. BMS instead engaged in all of these activities in either New York or New Jersey. But BMS does sell Plavix in California. Between 2006 and 2012, it sold almost 187 million Plavix pills in the State and took in more than \$900 million from those sales. This amounts to a little over one percent of the company’s nationwide sales revenue.

B

A group of plaintiffs—consisting of 86 California residents and 592 residents from 33 other States—filed eight separate complaints in California Superior Court, alleging that Plavix had damaged their health. All the complaints asserted 13 claims under California law, including products liability, negligent misrepresentation, and misleading advertising claims. The nonresident plaintiffs did not allege that they obtained Plavix through California physicians or from any other California source; nor did they claim that they were injured by Plavix or were treated for their injuries in California.

Asserting lack of personal jurisdiction, BMS moved to quash service of summons on the nonresidents' claims, but the California Superior Court denied this motion, finding that the California courts had general jurisdiction over BMS "[b]ecause [it] engages in extensive activities in California." BMS unsuccessfully petitioned the State Court of Appeal for a writ of mandate, but after our decision on general jurisdiction in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), the California Supreme Court instructed the Court of Appeal "to vacate its order denying mandate and to issue an order to show cause why relief sought in the petition should not be granted."

The Court of Appeal then changed its decision on the question of general jurisdiction. Under *Daimler*, it held, general jurisdiction was clearly lacking, but it went on to find that the California courts had specific jurisdiction over the nonresidents' claims against BMS.

The California Supreme Court affirmed. The court unanimously agreed with the Court of Appeal on the issue of general jurisdiction, but the court was divided on the question of specific jurisdiction. The majority applied a "sliding scale approach to specific jurisdiction." Under this approach, "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." Applying this test, the majority concluded that "BMS's extensive contacts with California" permitted the exercise of specific jurisdiction "based on a less direct connection between BMS's forum activities and plaintiffs' claims than might otherwise be required." This attenuated requirement was met, the majority found, because the claims of the nonresidents were similar in several ways to the claims of the California residents (as to which specific jurisdiction was uncontested). The court noted that "[b]oth the resident and nonresident plaintiffs' claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product." And while acknowledging that "there is no claim that Plavix itself was designed and developed in [BMS's California research facilities]," the court thought it significant that other research was done in the State.

Three justices dissented. "The claims of ... nonresidents injured by their use of Plavix they purchased and used in other states," they wrote, "in no sense arise from BMS's marketing and sales of Plavix in California," and they found that the "mere similarity" of the residents' and nonresidents' claims was not enough. The dissent accused the majority of "expand[ing] specific jurisdiction to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction."

We granted certiorari to decide whether the California courts' exercise of jurisdiction in this case violates the Due Process Clause of the Fourteenth Amendment.

II

A

It has long been established that the Fourteenth Amendment limits the personal jurisdiction of state courts. See, e.g., *Daimler*, 134 S. Ct. at 753–757; *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310, 316–317 (1945); *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878). Because “[a] state court’s assertion of jurisdiction exposes defendants to the State’s coercive power,” it is “subject to review for compatibility with the Fourteenth Amendment’s Due Process Clause,” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918 (2011), which “limits the power of a state court to render a valid personal judgment against a nonresident defendant,” *World–Wide Volkswagen*, 100 S. Ct. 559. The primary focus of our personal jurisdiction inquiry is the defendant’s relationship to the forum State. See *Walden v. Fiore*, 134 S. Ct. 1115, 1121–1123; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 806–807 (1985).

Since our seminal decision in *International Shoe*, our decisions have recognized two types of personal jurisdiction: “general” (sometimes called “all-purpose”) jurisdiction and “specific” (sometimes called “case-linked”) jurisdiction. *Goodyear*, 564 U.S., at 919. “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.” *Id.*, at 924. A court with general jurisdiction may hear *any* claim against that defendant, even if all the incidents underlying the claim occurred in a different State. *Id.*, at 919. But “only a limited set of affiliations with a forum will render a defendant amenable to” general jurisdiction in that State. *Daimler*, 134 S. Ct., at 760.

Specific jurisdiction is very different. In order for a state court to exercise specific jurisdiction, “the *suit*” must “aris[e] out of or relat[e] to the defendant’s contacts with the *forum*.” *Id.*, at 754 (internal quotation marks omitted; emphasis added); see *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–473 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). In other words, there must be “an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.” *Goodyear*, 564 U.S., at 919. For this reason, “specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.” *Ibid.*

B

In determining whether personal jurisdiction is present, a court must consider a variety of interests. These include “the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff’s forum of choice.” *Kulko v. Superior Court of Cal., City and County of San Francisco*, 436 U.S. 84, 92 (1978); see *Daimler*, 134 S. Ct., at 762, n. 20; *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 113 (1987); *World–Wide Volkswagen*, 444 U.S., at 292. But the “primary concern” is “the burden on the defendant.” *Id.*, at 292. Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question. As we have put it, restrictions on personal jurisdiction “are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power

of the respective States.” *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). “[T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State ... implie[s] a limitation on the sovereignty of all its sister States.” *World–Wide Volkswagen*, 444 U.S., at 293. And at times, this federalism interest may be decisive. As we explained in *World–Wide Volkswagen*, “[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.” *Id.*, at 294.

III A

Our settled principles regarding specific jurisdiction control this case. In order for a court to exercise specific jurisdiction over a claim, there must be an “affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.” *Goodyear*, 564 U.S., at 919. When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant’s unconnected activities in the State. See *id.*, at 931, n. 6 (“[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales”).

For this reason, the California Supreme Court’s “sliding scale approach” is difficult to square with our precedents. Under the California approach, the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction. For specific jurisdiction, a defendant’s general connections with the forum are not enough. As we have said, “[a] corporation’s ‘continuous activity of some sorts within a state ... is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.’” *Id.*, at 927 (quoting *International Shoe*, 326 U.S., at 318).

The present case illustrates the danger of the California approach. The State Supreme Court found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents’ claims. As noted, the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents’ claims. As we have explained, “a defendant’s relationship with a ... third party, standing alone, is an insufficient basis for jurisdiction.” *Walden*, 134 S. Ct., at 1123. This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents. Nor is it sufficient—or even relevant—that BMS conducted research in California on matters unrelated to Plavix. What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.

Our decision in *Walden*, *supra*, illustrates this requirement. In that case, Nevada plaintiffs sued an out-of-state defendant for conducting an allegedly unlawful search of the plaintiffs while they were in Georgia preparing to board a plane bound for Nevada. We held that the Nevada courts lacked specific jurisdiction even though the plaintiffs were Nevada residents and “suffered foreseeable harm in Nevada.” *Id.*, at 1124. Because the “*relevant* conduct occurred entirely in Georgi[a] ... the mere fact that [this] conduct affected plaintiffs with connections to the forum State d[id] not suffice to authorize jurisdiction.” *Id.*, at 1126 (emphasis added).

In today’s case, the connection between the nonresidents’ claims and the forum is even weaker. The relevant plaintiffs are not California residents and do not claim to have suffered harm in that State. In addition, as in *Walden*, all the conduct giving rise to the nonresidents’ claims occurred elsewhere. It follows that the California courts cannot claim specific jurisdiction. See *World–Wide Volkswagen*, 100 S. Ct. 559 (finding no personal jurisdiction in Oklahoma because the defendant “carr[ied] on no activity whatsoever in Oklahoma” and dismissing “the fortuitous circumstance that a single Audi automobile, sold [by defendants] in New York to New York residents, happened to suffer an accident while passing through Oklahoma” as an “isolated occurrence”).

B

The nonresidents maintain that two of our cases support the decision below, but they misinterpret those precedents.

In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), a New York resident sued Hustler in New Hampshire, claiming that she had been libeled in five issues of the magazine, which was distributed throughout the country, including in New Hampshire, where it sold 10,000 to 15,000 copies per month. Concluding that specific jurisdiction was present, we relied principally on the connection between the circulation of the magazine in New Hampshire and damage allegedly caused within the State. We noted that “[f]alse statements of fact harm both the subject of the falsehood and the readers of the statement.” *Id.*, at 776. This factor amply distinguishes *Keeton* from the present case, for here the nonresidents’ claims involve no harm in California and no harm to California residents.

The nonresident plaintiffs in this case point to our holding in *Keeton* that there was jurisdiction in New Hampshire to entertain the plaintiff’s request for damages suffered outside the State, *id.*, at 774, but that holding concerned jurisdiction to determine *the scope of a claim* involving in-state injury and injury to residents of the State, not, as in this case, jurisdiction to entertain claims involving no in-state injury and no injury to residents of the forum State. *Keeton* held that there was jurisdiction in New Hampshire to consider the full measure of the plaintiff’s claim, but whether she could actually recover out-of-state damages was a merits question governed by New Hampshire libel law. *Id.*, at 778, n. 9.

The Court’s decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), which involved a class action filed in Kansas, is even less relevant. The Kansas court exercised personal jurisdiction over the claims of nonresident class members, and the defendant, Phillips Petroleum, argued that this violated the due process rights of these class members because they lacked minimum contacts with the State. According to the defendant, the out-of-state class

members should not have been kept in the case unless they affirmatively opted in, instead of merely failing to opt out after receiving notice. *Id.*, at 812.

Holding that there had been no due process violation, the Court explained that the authority of a State to entertain the claims of nonresident class members is entirely different from its authority to exercise jurisdiction over an out-of-state defendant. *Id.*, at 808–812. Since *Shutts* concerned the due process rights of *plaintiffs*, it has no bearing on the question presented here.

Respondents nevertheless contend that *Shutts* supports their position because, in their words, it would be “absurd to believe that [this Court] would have reached the exact opposite result if the petitioner [Phillips] had only invoked its own due-process rights, rather than those of the non-resident plaintiffs.” But the fact remains that Phillips did not assert that Kansas improperly exercised personal jurisdiction over it, and the Court did not address that issue. Indeed, the Court stated specifically that its “discussion of personal jurisdiction [did not] address class actions where the jurisdiction is asserted against a *defendant* class.” *Shutts, supra*, at 812, n.3.

C

In a last ditch contention, respondents contend that BMS’s “decision to contract with a California company [McKesson] to distribute [Plavix] nationally” provides a sufficient basis for personal jurisdiction. But as we have explained, “[t]he requirements of *International Shoe* ... must be met as to each defendant over whom a state court exercises jurisdiction.” *Rush v. Savchuk*, 444 U.S. 320, 332 (1980); see *Walden*, 134 S. Ct., at 1123 (“[A] defendant’s relationship with a ... third party, standing alone, is an insufficient basis for jurisdiction”). In this case, it is not alleged that BMS engaged in relevant acts together with McKesson in California. Nor is it alleged that BMS is derivatively liable for McKesson’s conduct in California. And the nonresidents “have adduced no evidence to show how or by whom the Plavix they took was distributed to the pharmacies that dispensed it to them.” 1 Cal.5th, at 815 (Werdegar, J., dissenting). See Tr. of Oral Arg. 33 (“It is impossible to trace a particular pill to a particular person.... It’s not possible for us to track particularly to McKesson”). The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State.

IV

Our straightforward application in this case of settled principles of personal jurisdiction will not result in the parade of horrors that respondents conjure up. Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. BMS concedes that such suits could be brought in either New York or Delaware. Alternatively, the plaintiffs who are residents of a particular State—for example, the 92 plaintiffs from Texas and the 71 from Ohio—could probably sue together in their home States. In addition, since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court. See *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102, n. 5 (1987).

The judgment of the California Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice SOTOMAYOR, dissenting.

Three years ago, the Court imposed substantial curbs on the exercise of general jurisdiction in its decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). Today, the Court takes its first step toward a similar contraction of specific jurisdiction by holding that a corporation that engages in a nationwide course of conduct cannot be held accountable in a state court by a group of injured people unless all of those people were injured in the forum State.

I fear the consequences of the Court’s decision today will be substantial. The majority’s rule will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone. It will make it impossible to bring a nationwide mass action in state court against defendants who are “at home” in different States. And it will result in piecemeal litigation and the bifurcation of claims. None of this is necessary. A core concern in this Court’s personal jurisdiction cases is fairness. And there is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike. ...

B

[T]he California courts appropriately exercised specific jurisdiction over respondents’ claims.

First, there is no dispute that Bristol–Myers “purposefully avail[ed] itself,” *Nicastro*, 564 U.S., at 877 of California and its substantial pharmaceutical market. Bristol–Myers employs over 400 people in California and maintains half a dozen facilities in the State engaged in research, development, and policymaking. It contracts with a California-based distributor, McKesson, whose sales account for a significant portion of its revenue. And it markets and sells its drugs, including Plavix, in California, resulting in total Plavix sales in that State of nearly \$1 billion during the period relevant to this suit.

Second, respondents’ claims “relate to” Bristol–Myers’ in-state conduct. A claim “relates to” a defendant’s forum conduct if it has a “connect[ion] with” that conduct. *International Shoe*, 326 U.S., at 319. So respondents could not, for instance, hale Bristol–Myers into court in California for negligently maintaining the sidewalk outside its New York headquarters—a claim that has no connection to acts Bristol–Myers took in California. But respondents’ claims against Bristol–Myers look nothing like such a claim. Respondents’ claims against Bristol–Myers concern conduct materially identical to acts the company took in California: its marketing and distribution of Plavix, which it undertook on a nationwide basis in all 50 States. That respondents were allegedly injured by this nationwide course of conduct in Indiana, Oklahoma, and Texas, and not California, does not mean that their claims do not “relate to” the advertising and distribution efforts that Bristol–Myers undertook in that State. All of the plaintiffs—residents and nonresidents alike—allege that they were injured by the same essential acts. Our cases require no connection more direct than that.

Finally, and importantly, there is no serious doubt that the exercise of jurisdiction over the nonresidents' claims is reasonable. Because Bristol–Myers already faces claims that are identical to the nonresidents' claims in this suit, it will not be harmed by having to defend against respondents' claims: Indeed, the alternative approach—litigating those claims in separate suits in as many as 34 different States—would prove far more burdensome. By contrast, the plaintiffs' "interest in obtaining convenient and effective relief," *Burger King*, 471 U.S., at 477, is obviously furthered by participating in a consolidated proceeding in one State under shared counsel, which allows them to minimize costs, share discovery, and maximize recoveries on claims that may be too small to bring on their own. California, too, has an interest in providing a forum for mass actions like this one: Permitting the nonresidents to bring suit in California alongside the residents facilitates the efficient adjudication of the residents' claims and allows it to regulate more effectively the conduct of both nonresident corporations like Bristol–Myers and resident ones like McKesson.

Nothing in the Due Process Clause prohibits a California court from hearing respondents' claims—at least not in a case where they are joined to identical claims brought by California residents.

III

Bristol–Myers does not dispute that it has purposefully availed itself of California's markets, nor—remarkably—did it argue below that it would be "unreasonable" for a California court to hear respondents' claims. See 1 Cal.5th 783, 799, n. 2 (2016). Instead, Bristol–Myers contends that respondents' claims do not "arise out of or relate to" its California conduct. The majority agrees, explaining that no "adequate link" exists "between the State and the nonresidents' claims,"—a result that it says follows from "settled principles [of] specific jurisdiction." But our precedents do not require this result, and common sense says that it cannot be correct.

A

. . . The majority's animating concern, in the end, appears to be federalism: "[T]erritorial limitations on the power of the respective States," we are informed, may—and today do—trump even concerns about fairness to the parties. Indeed, the majority appears to concede that this is not, at bottom, a case about fairness but instead a case about power: one in which "the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; ... the forum State has a strong interest in applying its law to the controversy; [and] the forum State is the most convenient location for litigation" but personal jurisdiction still will not lie. But I see little reason to apply such a principle in a case brought against a large corporate defendant arising out of its nationwide conduct. What interest could any single State have in adjudicating respondents' claims that the other States do not share? I would measure jurisdiction first and foremost by the yardstick set out in *International Shoe*—"fair play and substantial justice," 326 U.S., at 316. The majority's opinion casts that settled principle aside.

B

I fear the consequences of the majority's decision today will be substantial. Even absent a rigid requirement that a defendant's in-state conduct must actually cause a plaintiff's claim, the upshot of today's opinion is that plaintiffs cannot join their claims together and sue a defendant

in a State in which only some of them have been injured. That rule is likely to have consequences far beyond this case.

First, and most prominently, the Court's opinion in this case will make it profoundly difficult for plaintiffs who are injured in different States by a defendant's nationwide course of conduct to sue that defendant in a single, consolidated action. The holding of today's opinion is that such an action cannot be brought in a State in which only some plaintiffs were injured. Not to worry, says the majority: The plaintiffs here could have sued Bristol–Myers in New York or Delaware; could “probably” have subdivided their separate claims into 34 lawsuits in the States in which they were injured; and might have been able to bring a single suit in federal court (an “open ... question”). Even setting aside the majority's caveats, what is the purpose of such limitations? What interests are served by preventing the consolidation of claims and limiting the forums in which they can be consolidated? The effect of the Court's opinion today is to eliminate nationwide mass actions in any State other than those in which a defendant is “essentially at home.”⁴ See *Daimler*, 134 S. Ct., at 754. Such a rule hands one more tool to corporate defendants determined to prevent the aggregation of individual claims, and forces injured plaintiffs to bear the burden of bringing suit in what will often be far flung jurisdictions.

Second, the Court's opinion today may make it impossible to bring certain mass actions at all. After this case, it is difficult to imagine where it might be possible to bring a nationwide mass action against two or more defendants headquartered and incorporated in different States. There will be no State where both defendants are “at home,” and so no State in which the suit can proceed. What about a nationwide mass action brought against a defendant not headquartered or incorporated in the United States? Such a defendant is not “at home” in any State. Especially in a world in which defendants are subject to general jurisdiction in only a handful of States, the effect of today's opinion will be to curtail—and in some cases eliminate—plaintiffs' ability to hold corporations fully accountable for their nationwide conduct.

The majority chides respondents for conjuring a “parade of horrors,” but says nothing about how suits like those described here will survive its opinion in this case. The answer is simple: They will not.

* * *

It “does not offend ‘traditional notions of fair play and substantial justice,’” *International Shoe*, 326 U.S., at 316 to permit plaintiffs to aggregate claims arising out of a single nationwide course of conduct in a single suit in a single State where some, but not all, were injured. But that is exactly what the Court holds today is barred by the Due Process Clause.

This is not a rule the Constitution has required before. I respectfully dissent.

⁴ The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there. Cf. *Devlin v. Scardelletti*, 536 U.S. 1, 9–10 (2005) (“Nonnamed class members ... may be parties for some purposes and not for others”); see also Wood, Adjudicatory Jurisdiction and Class Actions, 62 Ind. L.J. 597, 616–617 (1987).

NOTES AND QUESTIONS

- 1. Practice: What's at Stake?** What was at stake for the litigants in the *Bristol-Meyers Squibb* case? Specifically, why do you think the plaintiffs wanted to sue in California for harms that took place in other states? Why do you think the defendants argued that the plaintiffs should have to sue in the other states? Wouldn't a mass action centralized in one state be much more efficient than many smaller actions in multiple states?
- 2. Practice: Litigation Strategy.** What other forums might have potentially been available? Would the place where the drug was manufactured be an appropriate forum? Why didn't the plaintiffs sue there instead?
- 3. Practice: Foreign Defendants.** Another practical effect relates to the case of the foreign defendant who is not "at home" in any state. Recall that in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), *see* casebook at p. 411, a plaintiff injured by a foreign manufacturer's product could not sue in the forum where the injury occurred because New Jersey courts lacked jurisdiction for lack of purposeful conduct—and it was far from clear that the plaintiff's claim could be said to "arise out of its activity in Ohio," where the foreign manufacturer's distributor was located. *See* casebook, p. 422 (note 5). Thus, there may have been no place in the United States for the plaintiff to sue the foreign manufacturer. Does a suit against a foreign country defendant present a more compelling case for broadening the arising from/related to standard for specific jurisdiction?
- 4. Policy:** In light of this decision, can you state the tests for general and specific jurisdiction? Are those tests different in a case involving a foreign defendant?

Page 447, add to the end of note 5:

After the Supreme Court's *Daimler* decision, the Ninth Circuit dealt again with agency and affiliate jurisdiction in *Ranza v. Nike, Inc.*, 793 F.3d 1059 (9th Cir. 2015). In this case, plaintiff Ranza, a U.S. citizen who resided in the Netherlands during the events that gave rise to the cause of action, filed suit against her former employer, Nike European Operations Netherlands, B.V. (NEON), and NEON's parent company, Nike, Inc., in the District of Oregon for violations of federal civil rights laws. Ranza alleged that NEON subjected her to sex and age discrimination. Nike has its headquarters in Oregon and Neon is a wholly owned subsidiary of Nike, organized as a private limited liability corporation under Netherlands law. The federal district court held that it lacked personal jurisdiction over NEON and Ranza appealed.

On appeal, Ranza raised two arguments. First, she argued that NEON was subject to general jurisdiction in Oregon. Second, she argued in the alternative that Nike's contacts could be

attributed to NEON to establish general jurisdiction. The Ninth Circuit rejected both arguments and explained the current state of agency and affiliate law as follows.

Before the Supreme Court's *Daimler* decision, this circuit permitted a plaintiff to pierce the corporate veil for jurisdictional purposes and attribute a local entity's contacts to its out-of-state affiliate under one of two separate tests: the "agency" test and the "alter ego" test. The agency test required a plaintiff to show the subsidiary "perform[ed] services that [were] sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services." The Supreme Court invalidated this test. It held that focusing on whether the subsidiary performs "important" work the parent would have to do itself if the subsidiary did not exist "stacks the deck, for it will always yield a pro-jurisdiction answer." Such a theory, the Court concluded, sweeps too broadly to comport with the requirements of due process. The agency test is therefore no longer available to Ranza to establish jurisdiction over NEON.

In contrast to the agency test, the Court left intact this circuit's alter ego test for "imputed" general jurisdiction. The alter ego test is designed to determine whether the parent and subsidiary are "not really separate entities," such that one entity's contacts with the forum state can be fairly attributed to the other. The "alter ego ... relationship is typified by parental control of the subsidiary's internal affairs or daily operations." We examine Nike's relationship with NEON under this alter ego test.

1. Applying the Alter Ego Theory to a Foreign Subsidiary

As an initial matter, NEON argues Ranza is asking us to apply the alter ego test in an unprecedented fashion. Rather than seeking to impute a subsidiary's local contacts to a foreign parent, which is the traditional application of the alter ego test, Ranza seeks to impute a local parent's contacts to a foreign subsidiary. Yet, like the typical application of the alter ego test, Ranza supports her imputation theory based on the parent Nike's allegedly extensive control over its subsidiary NEON. Thus, whereas the alter ego test has traditionally been used to bring a controlling parent into a controlled subsidiary's home forum, Ranza attempts to use the test to bring a controlled subsidiary into the controlling parent's home forum.

Ranza offers no binding authority applying the alter ego test in reverse. She does, however, highlight persuasive reasoning from a district court opinion addressing this issue in the context of a multidistrict antitrust dispute in which the plaintiffs sought to establish general jurisdiction over foreign subsidiaries of domestic candy manufacturers

This is sound reasoning. . . . In fact, exercising general jurisdiction over both entities in the parent's forum is just as defensible (if not more so) under due process principles as haling

the parent into the subsidiary's forum. If the two entities are to be treated as a single enterprise, the stronger candidate for the "home" of that enterprise is likely where the controlling parent most closely affiliates. And the enterprise as a whole should reasonably foresee being subject to suit for all of its activities—even those unrelated to the forum—where it most closely affiliates.

We hold the alter ego test may be used to extend personal jurisdiction to a foreign parent or subsidiary when, in actuality, the foreign entity is not really separate from its domestic affiliate. We therefore turn to the alter ego inquiry.

2. Alter Ego Application

To satisfy the alter ego test, a plaintiff "must make out a prima facie case '(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice.'" *Unocal*, 248 F.3d at 926. The "unity of interest and ownership" prong of this test requires "a showing that the parent controls the subsidiary to such a degree as to render the latter the mere instrumentality of the former." *Id.* This test envisions pervasive control over the subsidiary, such as when a parent corporation "dictates every facet of the subsidiary's business—from broad policy decisions to routine matters of day-to-day operation." *Id.* (internal quotation marks omitted). Total ownership and shared management personnel are alone insufficient to establish the requisite level of control. ...

Ranza has presented no evidence Nike and NEON fail to observe their respective corporate formalities. Each entity leases its own facilities, maintains its own accounting books and records, enters into contracts on its own and pays its own taxes. Each has separate boards of directors, and Ranza has been able to identify only one director who served on both company's boards simultaneously. Some employees and management personnel move between the entities, but that does not undermine the entities' formal separation. Ranza has presented no evidence that NEON is undercapitalized, that the two entities fail to keep adequate records or that Nike freely transfers NEON's assets, all of which would be signs of a sham corporate veil.

As in *Unocal*, Ranza has not shown Nike "dictates every facet of [NEON's] business," including "routine matters of day-to-day operation." To be sure, Nike is heavily involved in NEON's operations. Nike exercises control over NEON's overall budget and has approval authority for large purchases; establishes general human resource policies for both entities and is involved in some hiring decisions; operates information tracking systems all of its subsidiaries utilize; ensures the Nike brand is marketed consistently throughout the world; and requires some NEON employees to report to Nike supervisors on a "dotted-line" basis.

NEON, however, sets its own prices for its licensed Nike products, takes and fulfills orders for its licensed products using its own inventory, negotiates its own contracts and licenses, makes routine purchasing decisions without Nike's consultation and has its own human resources division that handles day-to-day employment issues, including hiring and firing decisions. ...

In sum, Nike's involvement in NEON, though substantial, is insufficient to negate the formal separation between the two entities such that they are functionally one single enterprise. Ranza therefore may not attribute Nike's Oregon contacts to NEON for the purpose of personal jurisdiction. And NEON's contacts with Oregon, standing alone, are insufficient to make it amenable to general jurisdiction in that state. We therefore hold the district court properly declined to exercise personal jurisdiction over NEON.

In light of the Ninth Circuit's reasoning, under what circumstances may plaintiffs use agency or affiliate jurisdiction to establish personal jurisdiction? In your view, does the Ninth Circuit adopt the right approach? How would you change the test, or would you discard it altogether?

Page 460, "Is there subject matter jurisdiction?", example 2, should read as follows: 2. P(VA) v. D(CA) & D(UK)

Chapter 5: International Courts

Page 488, note 8:

The reference to the ICJ Statute should be to Article 65.

Page 489, add to the end of note 10:

As of 2019, the ICJ reported hearing a total of 176 cases since its inception, with 17 cases pending. Illustrative cases currently pending at the ICJ include (i) a challenge by Qatar to aspects of a blockade imposed against it by the United Arab Emirates, under the International Convention on the Elimination of All Forms of Racial Discrimination; (ii) a challenge by Equatorial Guinea to France's prosecution of Equatorial Guinea's Vice President for corruption, under the diplomatic immunity provisions of the Vienna Convention on Diplomatic Relations; and (iii) a claim by Bolivia against Chile for access to a seaport on the Pacific Ocean.

In 2018, the ICJ ruled that it had authority to order compensatory damages for environmental damage caused by Nicaragua during wrongful occupation of Costa Rican territory. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Feb. 2, 2018. However, it awarded damages of only about \$300,000, compared to over \$6 million claimed by Costa Rica. Nicaragua, a small, poor country, nonetheless paid the money as directed.

Page 511, add to the end of note 4:

In 2016, Iran filed a case against the United States at the ICJ based on the United States' failure to protect Iran's assets from seizure to pay judgments obtained in U.S. courts by terrorism victims. See ICJ Press Release, *Iran institutes proceedings against the United States with regard to a dispute concerning alleged violations of the 1955 Treaty of Amity*, June 15, 2016, available at <http://www.icj-cij.org/docket/files/164/19032.pdf>. As discussed in Chapter 11, international law generally recognizes the immunity of governments and their assets in foreign jurisdictions, subject to exceptions, and the United States implements that principle by statute. However, one of the U.S. statutory exceptions, which is arguably not recognized by international law, is for "state sponsors of terrorism." The U.S. executive branch has designated Iran as a state sponsor of terrorism, thus denying Iran immunity. In particular, a U.S. statute directs that certain assets of Iran's central bank, Bank Markazi, be used to satisfy judgments in favor of terrorism victims. The U.S. Supreme Court upheld the statute in *Bank Markazi v. Peterson*, 136 S.Ct. 1310 (2016), after which Iran filed its case with the ICJ. Iran alleges ICJ jurisdiction under the 1955 Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States of America, in which the parties consented to ICJ jurisdiction to resolve disputes under the treaty. In 2017, the United States filed preliminary objections to admissibility and jurisdiction and requested that the ICJ dismiss the case in whole or in part. The ICJ heard arguments in October 2018 on the preliminary objections. In February 2019, the ICJ issued a judgment on the preliminary objections in which it found that it had jurisdiction to rule on the Application filed by Iran—except with respect to Iran's claims relating to sovereign immunity and subject to the question of its jurisdiction to entertain Iran's claims of purported violations of the Treaty of Amity predicated on the treatment accorded to Bank Markazi, questions upon which the Court will rule on the merits—and that the Application is admissible. The Counter-Memorial of the United States is to be filed in September 2019.

Is the United States likely to comply with an adverse decision, if there is one? If not, why would Iran file the claim?

In 2018, Iran filed a second case against the United States requesting the indication of provisional measures, alleging that actions taken by the Trump administration in imposing economic sanctions violated the U.S-Iran Treaty of Amity. See *Iran files suit in international court against U.S. over sanctions*, REUTERS, July 17, 2018. The ICJ heard arguments in August

2018 on Iran's request. In October 2018, the ICJ unanimously indicated the following provisional measures: (1) The United States "shall remove, by means of its choosing, any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of the Islamic Republic of Iran of" medicines and medical devices, foodstuffs and agricultural commodities, and spare parts, equipment and associated services necessary for the safety of civil aviation; (2) The United States "shall ensure that licenses and necessary authorizations are granted and that payments and other transfers of funds are not subject to any restriction in so far as they relate to the goods and services referred to in point (1)"; and (3) both parties "shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve." The litigation remains ongoing.

Also in October 2018, immediately after the ICJ's order on provisional measures, the United States announced its withdrawal from the Treaty of Amity. See Edward Wong & David Sanger, *U.S. Withdraws from 1955 Treaty Normalizing Relations with Iran*, N.Y. TIMES, Oct. 3, 2018.

Page 520, add at the end of note 4:

In an escalating dispute, the United States has blocked new appointments to fill vacancies on the WTO appellate panel. The panel has seven seats but currently only four positions are filled, with another vacancy expected soon. The United States, which objects to various aspects of the panel's procedures and results, began blocking appointments in 2016 and the policy has been expanded under President Donald Trump. Members of the appellate body are appointed by consensus of all WTO members, so the United States is able to block appointments on its own. Some experts believe the functioning of the dispute resolution system is being, or shortly will be, greatly impaired by this development. Why might the United States pursue such a policy? What does it suggest about the structure of the WTO dispute resolution system? What alternative structures, if any, might be feasible?

In April 2019, Russia won a dispute about "national security" at the WTO. The WTO panel ruling, the first on the right to a national security exemption from the global trade rules, awarded Russia a victory because it successfully invoked national security. The WTO panel in so ruling confirmed that it could review national security claims.

Page 529, add at the end of note 3:

The standoff between the U.K. and the ECHR persisted for twelve years, as the U.K. refused to implement the decision. In November 2017, the U.K. government proposed extending the franchise to a very small number of prisoners (principally, those on temporary release). The

Council of Europe, the diplomatic organization that oversees implementation of the European Convention on Human Rights, indicated that this would be an acceptable implementation of *Hirst*, and the U.K. government plans to go forward with that limited reform. See House of Commons Library, *Prisoners' voting rights: developments since May 2015*, <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7461>.

Britain's pending efforts to withdraw from the European Union (discussed below) do not affect its status under the European Convention on Human Rights, which is a distinct undertaking. There have also been calls for Britain to withdraw from the Convention, including in reaction to the *Hirst* decision.

Page 533, add at the end of note 4:

Several African countries, most prominently South Africa, have threatened or actually announced plans to withdrawal from the ICC. In 2017, South Africa's withdrawal was blocked by a South African court on the ground that withdrawal required approval of South Africa's parliament, and it is unclear whether the South African government will continue to press for withdrawal. Also in 2017, the African Union, an association of African nations, adopted a nonbinding resolution calling upon members to withdraw from the ICC, in part on the ground that the court focuses too much on situations in Africa. Burundi withdrew in 2017, shortly after the prosecutor opened an investigation into events in Burundi. In 2018, with the prosecutor considering an investigation into events in the Philippines, the President of the Philippines announced that his country would begin the process of withdrawal.

In 2016 the ICC opened an investigation into alleged war crimes committed during the 2008 conflict between Russia and Georgia. See <https://www.icc-cpi.int/georgia>. This is the ICC's first full-scale investigation of a situation outside of Africa. Note that although Russia is not a party to the ICC statute, Georgia is; the alleged war crimes occurred in Georgia. Consider what obstacles this investigation is likely to encounter.

Also in 2016, the Court reached several additional verdicts, including a guilty verdict against Ahmad al Faqi al Mahdi, who was convicted of the war crime of destroying historic and religious buildings in Timbuktu, Mali, as part of an al Qaeda-affiliated group. As of 2019, the court had indicted 42 defendants, some of whom remain at large (the ICC does not try defendants *in absentia*). Five persons have been convicted, and approximately 20 proceedings are ongoing.

Page 534, add at the end of the first paragraph under section 4:

In a 2016 referendum in the U.K., voters chose to leave the European Union. If Britain's withdrawal from the European Union (called "Brexit") is completed, Britain would not be subject to the CJEU unless it agreed to remain under the Court's jurisdiction. British dissatisfaction with the CJEU played a role in the Brexit vote, although it is not clear how large a factor it may have been.

Chapter 6: Alternative Dispute Resolution

Page 556, add immediately before the excerpt from the Convention on the Recognition and Enforcement of Foreign Arbitral Awards:

In 2019, the American Law Institute approved the Restatement of the Law, The U.S. Law of International Commercial and Investor-State Arbitration. Chapter 2 of this new Restatement focuses on enforcement of arbitration agreements, and clarifies the relationship between the applicable rules of national law and international law that govern arbitration agreements.

Page 597, add new note 3:

In 2016, the Permanent Court of Arbitration issued an award resolving a dispute under UNCLOS instituted by the Republic of Philippines against the People's Republic of China regarding whether China was permitted to build on various islands in the South China Sea. China claims almost the entire South China Sea, through which more than \$5 trillion in trade moves annually. Brunei, Malaysia, the Philippines, Taiwan, and Vietnam also have claims in the sea, which is thought to be rich in energy deposits. The Tribunal found in favor of the Philippines. For a press release issued by the PCA as well as the complete award, see <https://pca-cpa.org/en/news/pca-press-release-the-south-china-sea-arbitration-the-republic-of-the-philippines-v-the-peoples-republic-of-china/> In the wake of the Tribunal's decision, China has rejected the ruling. Many countries, including the United States, Japan, Australia, and New Zealand, have called the award legally binding and have urged both parties, especially China, to comply with the award. Other countries, like Russia, have expressed concern about the award.

What might account for these diverging views on the legitimacy and enforceability of this State-State arbitration award?

Page 594, add immediately before the Notes and Questions:

In 2019, the American Law Institute approved the Restatement of the Law, The U.S. Law of International Commercial and Investor-State Arbitration. Chapter 5 of that new Restatement covers the role of U.S. courts in the investor-state arbitration process.

Chapter 7: Court Judgments

Page 611, insert at the end of note 2:

In 2017, the American Law Institute approved the Restatement of the Law Fourth, The Foreign Relations Law of the United States, which contains a list of mandatory and discretionary grounds for refusing recognition and enforcement that are similar to those found in the 2005 Act. The new Restatement also adds a discretionary ground for refusal based on reciprocity if “the courts of the state of origin would not recognize a comparable U.S. judgment.” See Restatement of the Law Fourth, The Foreign Relations Law of the United States §§ 483-484.

*Page 629, replace last paragraph of note 5 with the following:**

The Fifth Circuit Court of Appeals reversed the District Court’s decision in *DeJoria*, reasoning as follows:

Based on the evidence in the record, we cannot agree that the Moroccan judicial system lacks sufficient independence such that fair litigation in Morocco is impossible.⁹

Even under *DeJoria*'s characterization, the Moroccan judicial system would still contrast sharply with the judicial systems of foreign countries that have failed to meet due process standards. For example, in *Bank Melli Iran v. Pahlavi*, the Ninth Circuit refused to enforce an Iranian judgment and concluded that the Iranian judicial system did not comport with due process standards. 58 F.3d 1406, 1411–13 (9th Cir. 1995). The court relied on official reports advising Americans against traveling to Iran during the relevant time period and identifying Iran as an official state sponsor of terror. *Id.* at 1411. Further, the court noted that Iranian trials were private, politicized proceedings, and recognized that the Iranian government itself did not “believe in the independence of the judiciary.” *Id.* at 1412. Judges were subject to continuing scrutiny and potential sanction and could not be expected to be impartial to American citizens. *Id.* Further, “revolutionary courts” had the power to usurp and overrule decisions of the Iranian civil courts. *Id.* Attorneys were also warned against “representing politically undesirable interests.” *Id.* Based on

* The Texas act is based on the 1962 Act, not (as mistakenly indicated in Note 5, the 2005 Act).

⁹ Although our inquiry focuses on Morocco's judicial system, we also observe that the record does not establish that the King actually exerted any improper influence on the Moroccan court in this case. For example, the Moroccan court (1) appointed experts, (2) took seven years to reach a decision, (3) awarded a lesser judgment than the expert recommended, and (4) absolved five defendants—including *DeJoria*'s company Skidmore—of liability.

this evidence, the court concluded that the Iranian judicial system simply could not produce fair proceedings. *Id.* at 1412–13.

Similarly, in *Bridgeway Corp. v. Citibank*, the Second Circuit declined to recognize a Liberian judgment rendered during the Liberian Civil War. 201 F.3d 134, 144 (2d Cir. 2000). There, the court observed that, during the relevant time period, “Liberia's judicial system was in a state of disarray and the provisions of the Constitution concerning the judiciary were no longer followed.” *Id.* at 138. Further, official State Department Country Reports noted that the Liberian judicial system—already marred by “corruption and incompetent handling of cases”—completely “collapsed” following the outbreak of fighting. *Id.* Because the court concluded that there was “sufficiently powerful and uncontradicted documentary evidence describing the chaos within the Liberian judicial system during the period of interest,” it refused to enforce the Liberian judgment. *Id.* at 141–42.

Pahlavi and *Bridgeway* thus exemplify how a foreign judicial system can be so fundamentally flawed as to offend basic notions of fairness. Unlike the Iranian system in Pahlavi, there is simply no indication that it would be impossible for an American to receive due process or impartial tribunals in Morocco. In further contrast with Pahlavi, there is no record evidence of a demonstrable anti-American sentiment in Morocco; in fact, American law firms do business in Morocco. While the judgment debtor in Pahlavi could not have retained representation in Iran, Skidmore—a co-defendant in the Moroccan case—did briefly retain Moroccan attorney Azzedine Kettani until a conflict of interest forced his withdrawal. One expert opined that it is “not at all uncommon” for Moroccan attorneys to represent unpopular figures in Moroccan courts. *Bridgeway* presents an even more stark contrast. Morocco's judicial system is not in a state of complete collapse, and there is no evidence that Moroccan courts or the Moroccan government routinely disregard constitutional provisions or the rule of law. Because Morocco's judicial system is not in such a dire situation, it does not present the unusual case of a foreign judicial system that “offend[s] against basic fairness.” *Turner*, 303 F.3d at 330 (internal quotations omitted).

The Texas Recognition Act's due process standard requires only that the foreign proceedings be fundamentally fair and inoffensive to “basic fairness.” This standard sets a high bar for non-recognition. The Moroccan judicial system does not present an exceptional case of “serious injustice” that renders the entire system fundamentally unfair and incompatible with due process. The district court thus erred in concluding that non-recognition was justified under ... the Texas Recognition Act.

DeJoria v. Maghreb Petroleum Exploration, S.A., 804 F.3d 373, 382-384 (5th Cir. 2015).

Is the trial court’s decision or appellate court’s decision more consistent with *Ashenden*? Was the evidence that systemic due process was lacking as strong in *DeJoria* as it was in *Bridgeway*? If you were the judge, and the Texas Recognition Act had a case-specific due process exception like the one found in the 2005 Act, would you have preferred to decide the case based on that exception or the systemic due process exception? If the Court of Appeals in *DeJoria* had affirmed the lower court’s refusal to recognize and enforce the Moroccan judgment in this case, then what options—if any—would have been available for the Moroccan plaintiffs to effectively pursue their claims against the U.S. defendants? In 2017, Texas adopted legislation based on the 2005 Act, and in 2018, the District Court held that under the case-specific due process exception it would not enforce the Moroccan judgment. *DeJoria v. Maghreb Petroleum Exploration, S.A.*, *DeJoria v. Maghreb Petroleum Exploration, S.A.*, 2018 WL 1830789 (W.D. Texas 2018).

Page 630, insert the following paragraph between the first partial paragraph and the last paragraph of note 9:

Later, in a related action, the District Court issued an injunction prohibiting action to enforce the judgment against Chevron in the United States only. This time, the U.S. Court of Appeals affirmed. It reasoned that “the geographic scope of the *Naranjo* injunction and scope of the injunction granted in the District Court Judgment [in the present action] are different. The *Naranjo* injunction was essentially global, prohibiting actions toward enforcement of the Judgment anywhere outside of Ecuador. The geographic scope of the present District Court Judgment anti-enforcement injunction...is limited to the United States: [it enjoins] taking actions toward enforcement in courts of the United States; but “nothing []in [the District Court Judgment] enjoins, restrains or otherwise prohibits...filing or prosecuting any action for recognition or enforcement of the Judgment ... in courts outside the United States....” *Chevron Corporation v. Donziger*, 833 F.3d 74, 144 (2d Cir. 2016). What is the legal significance of this difference in geographic scope? Why did this difference lead the Court of Appeals to reach different outcomes? Do you agree with the distinction? Why or why not?

Chapter 8: Arbitral Awards

Page 648, insert as the last sentence of the first full paragraph under “Legal Framework”:

In 2019, the American Law Institute approved the Restatement of the Law, The U.S. Law of International Commercial and Investor-State Arbitration. Chapter 4 of that new Restatement covers the role of U.S. courts in providing post-award relief in international commercial arbitration, including confirmation, vacatur, recognition, and enforcement.

Page 686, add at the end of note 5:

The Second Circuit Court of Appeals affirmed the *PEMEX* decision. In its opinion, the Court of Appeals recalled that the Mexican court annulling the arbitral award reached its decision to annul by applying a statute that did not exist when the parties entered their contract and that prohibited arbitration of the subject matter of the contract (this is described in the court's discussion of the *PEMEX* case in the *Thai-Lao Lignite* case above). The Court of Appeals affirmed the U.S. District Court partly because of the Mexican court's "repugnan[t]" retroactive application of the statute to annul the award violated public policy, thus allowing the District Court to refuse recognition of the Mexican court's annulment decision. The Court of Appeals reasoned as follows:

[The] discretion of a district court to enforce an arbitral award annulled in the awarding jurisdiction...is constrained by the prudential concern of international comity, which remains vital notwithstanding that it is not expressly codified in the Panama Convention.

Accordingly, "a final judgment obtained through sound procedures in a foreign country is generally conclusive ... unless ... enforcement of the judgment would offend the public policy of the state in which enforcement is sought."....

Precedent is sparse; but the few cases that are factually analogous have endorsed this approach. See *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194, 197 n.3 (2d Cir. 1999) ("Recognition of the Nigerian [annulment of the arbitral award] in this case does not conflict with United States public policy."); see also *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 938 (D.C. Cir. 2007) ("Baker Marine is consistent with the view that when a competent foreign court has nullified a foreign arbitration award, United States courts should not go behind that decision absent extraordinary circumstances not present in this case...).

Consequently, although [the court has] discretion in enforcing a foreign arbitral award that has been annulled in the awarding jurisdiction,...the exercise of that discretion here is appropriate only to vindicate "fundamental notions of what is decent and just" in the United States.

Applying this standard, we conclude that the Southern District did not abuse its discretion in confirming the arbitral award notwithstanding invalidation of the award in the Mexican courts. The high hurdle of the public policy exception is surmounted here by four powerful considerations[, including] the repugnancy of retroactive legislation....

Any court should act with trepidation and reluctance in enforcing an arbitral award that has been declared a nullity by the courts having jurisdiction over the forum in which the award was rendered. However, we do not think that the Southern District second-guessed the Eleventh Collegiate Court, which appears only to have been implementing the law of Mexico. Rather, the Southern District exercised discretion, as allowed by treaty, to assess whether the nullification of the award offends basic standards of justice in the United States. We hold that in the rare circumstances of this case, the Southern District did not abuse its discretion by confirming the arbitral award at issue because to do otherwise would undermine public confidence in laws and diminish rights of personal liberty and property. Taken together, these circumstances validate the exercise of discretion and justify affirmance.

Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción, 832 F.3d 92, 105-110 (2d Cir. 2016). What is the relationship between the rules governing the enforcement of foreign country court judgments (discussed in Chapter 7) and the enforcement of foreign arbitral awards that have been annulled in the arbitral seat?

Page 689, add at the end of note 2:

In actions to enforce ICSID awards against foreign sovereigns in U.S. courts, must award creditors establish personal jurisdiction over the foreign sovereign? See *Mobil Cerro Negro, Limited v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 112 (2d Cir. 2017) (“The [Foreign Sovereign Immunities Act (FSIA)] controls actions to enforce ICSID awards. We conclude that the FSIA provides the sole source of jurisdiction—subject matter and personal—for federal courts over actions brought to enforce ICSID awards against foreign sovereigns; [and] that the FSIA’s service and venue requirements must be satisfied before federal district courts may enter judgment on such awards....Although the FSIA provides subject matter jurisdiction over this proceeding, the FSIA’s service and venue requirements have not been satisfied here. Accordingly, the District Court lacked personal jurisdiction over Venezuela” and the award creditor’s ex parte enforcement action must be dismissed.).

In 2019, the American Law Institute approved the Restatement of the Law, The U.S. Law of International Commercial and Investor-State Arbitration. Chapter 5 of that new Restatement covers the role of U.S. courts in the investor-state arbitration process, including the role of U.S. courts in providing post-award relief in investor-state arbitration.

Chapter 9: Transnational Service of Process

Page 715, replace note 3 with the following:

In 2017, the Supreme Court resolved a circuit split regarding whether service by mail constitutes effective service on a party abroad. In *Water Splash, Inc. v. Menon*, 137 S.Ct. 1504 (2017), the Court, in a unanimous decision authored by Justice Alito, held that Article 10(a) of the Hague Service Convention does not prohibit service of process by mail. But according to the Court, “just because traditional tools of treaty interpretation unmistakably demonstrate” that service by mail is permitted, “this does not mean that the Convention affirmatively authorizes service by mail. Article 10(a) simply provides that, as long as the receiving state does not object, the Convention does not ‘interfere with ... the freedom’ to serve documents through postal channels. In other words, in cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law.” *Id.* at 1513.

Chapter 10: Alternative Forums

Page 740, add to the end of note 3:

In *Shi v. New Mighty U.S. Trust*, 918 F.3d 944 (D.C. Cir. 2019), the district court granted defendants’ motion for a *forum non conveniens* dismissal where a Taiwanese citizen sued defendant entities located in the District of Columbia, alleging that the defendants participated in a scheme to deny her inheritance of her husband’s estate. The court of appeals reversed, finding that the district court had misapplied the public and private factors. The court of appeals emphasized that defendants seeking such dismissal bear a “heavy burden” and that the motion should be granted only in “exceptional circumstances.” Among other things, the court found that the presumption for the plaintiff’s choice of forum should generally exist even for a non-U.S. plaintiff, and that difficulties of travel and translation were overstated by the district court in light of modern technology. A key consideration appeared to be that the defendants were located in the chosen forum.

Page 748, add to the end of note 12:

In *Mujica v. AirScan, Inc.*, 771 F.3d 580 (9th Cir. 2014), the court considered a claim by Colombian citizens that two U.S. companies were complicit in the Colombian air force’s bombing of a Colombian village in 1998. After first rejecting plaintiffs’ federal claims under the Alien Tort Statute (ATS) and the Torture Victim Protection Act (TVPA) (see Chapter 2), the court considered claims under California state law and rejected them on basis of international comity. It first held that international comity was a doctrine of federal common law that could overcome state law claims, and then applied the following test:

a court “evaluate[s] several factors, including [1] the strength of the United States' interest in using a foreign forum, [2] the strength of the foreign governments' interests, and [3] the adequacy of the alternative forum.” [quoting *Ungaro–Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004)].

As to U.S. interests, the court observed:

The (nonexclusive) factors we should consider when assessing U.S. interests include (1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) the foreign policy interests of the United States, and (5) any public policy interests. When some or all of a plaintiff's claims arise under state law, the state's interests, if any, should be considered as well.

Applying these factors, the court found the analysis to favor dismissal on grounds of comity. As to the U.S. interest, the court found it “mixed” due to the presence of California-based corporations as defendants, but the court was influenced by a U.S. State Department Statement of Interest (SOI) filed with the district court, saying that U.S. diplomatic interests favored resolution of the case in Colombia. As to Colombian interests, the court found them strong based on the location of the incident and a statement of the Colombian government that it preferred resolution in Colombia. The court then found the Colombian forum adequate and available, as the Colombian government supported the litigation and had allowed civil claims against the government and criminal charges against the individuals involved. It therefore directed dismissal of the claims.

How is this approach different (if at all) from *forum non conveniens*? Does it leave too much room for dismissal of claims that ought to be heard in the United States?

Page 772, add at the end of note 1:

Parallel proceedings typically arise (as in *China Trade*) where a defendant in a case in one jurisdiction files a parallel suit as the plaintiff in another jurisdiction. In *1st Source Bank v. Neto*, 861 F.3d 607 (7th Cir. 2017), the plaintiff bank initially filed suit in Indiana (its home jurisdiction) and then filed a parallel suit in Brazil, the home jurisdiction of the defendant. The claim was to enforce a guaranty of a debt owed to the bank. The U.S. court upheld the district court's refusal to issue an antisuit injunction against the Brazilian suit after finding that it was not “vexatious or oppressive.” Is that the right standard? Under that standard, is that the right result? Why might the bank choose to file as plaintiff in both Indiana and Brazil?

Page 781, add new note 4:

- 4. Comparative Perspective.** As always, one should not assume that U.S. law is typical. Although forum selection clauses in international business contracts are commonly enforced worldwide, other jurisdictions may not share the U.S. inclination to enforce them in consumer contracts. For example, in *Douez v. Facebook, Inc.*, 2017 S.C.C. 33, the Canadian Supreme Court refused to enforce a forum selection clause in a contract between the plaintiff and Facebook in suit arising from the plaintiff's Facebook account. The three-Justice plurality reasoned:

Forum selection clauses serve a valuable purpose and are commonly used and regularly enforced. However, forum selection clauses divert public adjudication of matters out of the provinces, and court adjudication in each province is a public good. Because forum selection clauses encroach on the public sphere of adjudication, Canadian courts do not simply enforce them like any other clause. Where no legislation overrides the forum selection clause, [a two-step approach] ... applies to determine whether to enforce a forum selection clause and stay an action brought contrary to it. At the first step, the party seeking a stay must establish that the clause is valid, clear and enforceable and that it applies to the cause of action before the court. If this party succeeds, the onus shifts to the plaintiff who must show strong cause why the court should not enforce the forum selection clause and stay the action. At this second step of the test, a court must consider all the circumstances, including the convenience of the parties, fairness between the parties and the interests of justice. Public policy may also be a relevant factor at this step. The strong cause factors have been interpreted and applied restrictively in the commercial context, but commercial and consumer relationships are very different. Irrespective of the formal validity of the contract, the consumer context may provide strong reasons not to enforce forum selection clauses. ... When considering whether it is reasonable and just to enforce an otherwise binding forum selection clause in a consumer contract, courts should take account of all the circumstances of the particular case, including public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake.

With respect to the first step ..., the forum selection clause contained in Facebook's terms of use is enforceable. At the second step of the test, however, [plaintiff] has met her burden of establishing that there is strong cause not to enforce the forum selection clause. A number of different factors, when considered cumulatively, support a finding of strong cause. Most importantly, the claim involves a consumer contract of adhesion between an individual consumer and a large corporation and a statutory cause of action implicating the quasi-constitutional privacy rights of British Columbians. It is clear from the evidence that there was gross inequality of bargaining power between the parties. Individual consumers in this context are faced with little choice but to accept Facebook's terms of use. Additionally, Canadian courts have a greater interest in adjudicating cases impinging

on constitutional and quasi-constitutional rights because these rights play an essential role in a free and democratic society and embody key Canadian values. This matter requires an interpretation of a statutory privacy tort and only a local court's interpretation of privacy rights under the *Privacy Act* will provide clarity and certainty about the scope of the rights to others in the province. Overall, these public policy concerns weigh heavily in favour of strong cause.

Two other secondary factors also suggest that the forum selection clause should not be enforced. First, even assuming that a California court could or would apply the *Privacy Act*, the interests of justice support having the action adjudicated by the British Columbia Supreme Court. The lack of evidence concerning whether a California court would hear [plaintiff's] claim is not determinative. The British Columbia Supreme Court, as compared to a California one, is better placed to assess the purpose and intent of the legislation and to decide whether public policy or legislative intent prevents parties from opting out of rights created by the *Privacy Act* through a choice of law clause in favour of a foreign jurisdiction. Second, the expense and inconvenience of requiring British Columbian individuals to litigate in California, compared to the comparative expense and inconvenience to Facebook, further supports a finding of strong cause. The chambers judge found it would be more convenient to have Facebook's books and records made available for inspection in British Columbia than requiring [plaintiff] to travel to California to advance her claim. There is no reason to disturb this finding.

One Justice concurred in the judgment on the grounds that the clause was unconscionable and hence unenforceable at the first step. Three dissenting Justices would have enforced the clause.

Does this decision suggest that forum selection clauses in consumer contracts are generally unenforceable in Canada, as some alarmed commentators contended after it was announced? Contrast *Douez* with a recent U.S. decision, *Feggstad v. Kerzner International Bahamas Limited*, 843 F.3d 915 (11th Cir. 2016), which upheld a forum selection clause choosing courts of the Bahamas in a tort dispute between a hotel in the Bahamas and a U.S.-resident hotel guest who was injured on the hotel property. The court noted that the clause had not been negotiated and had only been communicated to the plaintiff in terms and conditions contained in a hyperlink in an email confirmation of the plaintiff's reservation, which the plaintiff had not read. The court nonetheless found no unfairness because the plaintiff had an opportunity to read the terms in the hyperlink. What relevant differences might there be between the situation in *Douez* and the situation in *Feggstad*? How would you argue that a *Feggstad*-type clause should be enforced in Canada after *Douez*?

Chapter 11: Foreign Sovereign Immunity

Page 816, add at the end of note 2:

In *Barapind v. Government of the Republic of India*, 844 F.3d 824 (9th Cir. 2016), the court rejected a claim of implied waiver where the Indian government, in an exchange of diplomatic notes, promised the United States that Barapind would not be tortured if extradited from the United States to India. Barapind alleged that he was tortured after extradition, but the court found no implied waiver because nothing suggested India “contemplated the involvement of the courts of the United States” or “intended ... to avail itself of the privileges or protections of the courts of the United States,” expressly distinguishing *Joseph and Siderman*.

Page 822, add at the end of note 2:

In *Frank v. Commonwealth of Antigua and Barbuda*, 842 F.3d 362 (5th Cir. 2015), plaintiff was an investor in a Ponzi scheme operated by Allen Stanford; Antigua allegedly facilitated the Ponzi scheme. When the Ponzi scheme collapsed, plaintiff, a U.S. citizen, suffered financial losses and sued Antigua. The court found no direct effect in the United States: “Defining ‘direct effect’ to permit jurisdiction when a foreign state's actions precipitate reactions by third parties, which reactions then have an impact on a plaintiff, would foster uncertainty in both foreign states and private counter-parties.... While Antigua may have helped facilitate Stanford's sale of the fraudulent [certificates of deposit], Stanford's criminal activity served as an intervening act interrupting the causal chain between Antigua's actions and any effect on investors.”

Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC, 813 F.3d 98 (2d Cir. 2016), found a direct effect in the United States where plaintiffs invested in debt instruments issued by an instrumentality of the Kazakhstan government; after the investment lost value, plaintiffs sued the sovereign instrumentality for fraud. The alleged fraud (misrepresentation in the sale) occurred outside the United States, but the plaintiffs were U.S. residents. The court concluded:

Based on *Weltover's* holding, courts have consistently held that, in contract cases, a breach of a contractual duty causes a direct effect in the United States sufficient to confer FSIA jurisdiction so long as the United States is the place of performance for the breached duty.

Here, of course, Plaintiffs are asserting tort claims, not contract claims. In tort, we have reasoned, the analog to contract law's place of performance is the locus of the tort. A tort's locus—also known as the *locus delicti*, or “place of wrong”—is the place where the last event necessary to make an actor liable for an alleged tort takes place. And, since a tort action traditionally has not been viewed as complete until the plaintiff suffers injury

or loss, the cause of action has generally been considered to arise at the place where this damage was sustained. [citing, inter alia, Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 724–25 (2009)]. Thus, a determination that a tort's locus is the United States is, in effect, often a determination that the plaintiff has been injured in this country by the defendant's tortious actions—meaning that those actions caused a “direct effect” (the plaintiff's injury) in this country. As a result, such a determination will ordinarily be sufficient, if not invariably necessary, to confer FSIA jurisdiction under our precedents.

... [I]t follows that in a securities fraud case, an FSIA direct effect may be felt where the plaintiff suffers such loss.

Are these cases consistent with each other? Does *Atlantica* mean that essentially any financial loss by a U.S. resident would provide an exception to immunity? The *Atlantica* court added:

To be sure, locating an economic injury within the United States, without more, will not suffice to bring a foreign sovereign within the “commercial activities” exception. ... But here, as the district court correctly determined, Plaintiffs have adequately shown that SK Fund “contemplated investment by United States persons” and that SK Fund's alleged misrepresentations caused a direct effect in the United States when at least some investors in the Subordinated Notes ... suffered an economic loss in this country as a result of those misrepresentations.

Is that a sufficient limitation? Could the plaintiff in the *Sachs* case (note 3 in the casebook) claim a direct effect in the United States based on her U.S. residency?

EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro, S.A., 894 F.3d 339 (D.C. Cir. 2018), involved an investment by a U.S. fund in the Brazilian energy sector which was allegedly lost due to fraud and misrepresentations of Petroleo Brasileiro (Petrobras), the Brazilian state oil company. The court, citing *Atlantica*, found a direct effect in the United States for purposes of the commercial activity exception because Petrobras specifically targeted U.S. investors and Petrobras' fraud caused economic loss to those investors. Why should it matter that Petrobras targeted U.S. investors? Wouldn't the effect in the United States (the economic loss) be the same if Petrobras had not known the identity of the investors? Should it matter (as the D.C. Circuit found) that some of Petrobras' misrepresentations occurred during discussions with EIG in the United States? What if all the discussions had been in Brazil?

Page 823, add to the end of note 3:

The U.S. Supreme Court unanimously reversed the en banc Ninth Circuit in *OBB Personenverkehr AG v. Sachs*, 136 S.Ct. 390 (2015). The Court held that Sachs' claim was

“based on” an act outside the United States, namely the operation of the train that injured her. It rejected the Ninth Circuit’s conclusion that Sachs’ purchase of her ticket in the United States constituted an act on which the claim was “based.”

Page 833, add new note 5a:

Takings of Property of a Government’s Own Citizens. In *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016), the court allowed some claims to proceed against the Hungarian state railway company for seizures of property of Jews during the Holocaust. Although the property itself was not present in the United States, the defendant railway was alleged to own some of the property (or property exchanged for that property), and it engaged in commercial activity in the United States. The court found this sufficient to defeat immunity (at least at a preliminary stage) against the Hungarian railway, but not against the Hungarian government itself. Is that consistent with the statute’s text?

The international law of takings generally applies only to the taking of foreigners’ property, not to the government’s taking of its own citizens’ property. In *Simon*, the plaintiffs (who were Hungarian citizens or heirs of Hungarian citizens) successfully argued that the taking had been in the context of genocide, and therefore there had been a violation of international law even though the government took the property of its own citizens.

Helmerich & Payne Int’l Drilling Co. v. Venezuela, 784 F.3d 804 (D.C. Cir. 2015), similarly involved the Venezuelan government’s taking of the property of a Venezuelan corporation, which Venezuela argued could not violate international law. However, the Venezuelan company was a subsidiary of a U.S. company; the plaintiffs contended that the government had seized the property because it was ultimately owned by U.S. citizens, and that this discriminatory action violated international law. The D.C. Circuit found this “nonfrivolous” argument for FSIA jurisdiction sufficient to defeat Venezuela’s motion to dismiss.

The U.S. Supreme Court reversed, holding that the plaintiffs must actually prove, as a threshold jurisdictional matter, that the Venezuelan action violated international law, not merely make a “nonfrivolous” argument that it did. *Bolivarian Republic of Venezuela v. Helmerich & Payne Intern. Drilling Co.*, 137 S.Ct. 1312 (2017). But presumably the plaintiff would in any event eventually have to prove that Venezuela’s conduct violated international law to recover on the merits. Why does the seemingly technical issue of the pleading standard matter to the litigants, so much that they would pursue the issue to the U.S. Supreme Court? What policy of the FSIA supports the Supreme Court decision?

On remand, the D.C. Circuit held that the taking of the subsidiary’s property did not violate international law. However, it went on to hold that Venezuela, by interfering with the parent’s control of the subsidiary, had also taken the parent’s property, and that this taking violated

international law. *Bolivarian Republic of Venezuela v. Helmerich & Payne Intern. Drilling Co.*, 743 Fed. Appx. 442 (D.C. Cir. 2018). Is that enough to defeat immunity? What else will the plaintiffs need to show?

Page 834, add at the end of note 6:

In *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018), the court expressly disagreed with the decision in *Abelesz*, finding no exhaustion requirement for claimants to an art collection suing a German government-owned museum. The court principally relied on the fact that the FSIA conveys jurisdiction without providing for an exhaustion requirement. Should that be conclusive?

Page 834, add new note 7:

Commercial Activity by Affiliates. In *Arch Trading Co. v. Republic of Ecuador*, 839 F.3d 193 (2d Cir. 2016), plaintiffs, non-U.S. entities, alleged that Ecuador had seized their property in Ecuador in violation of international law and that the property was held by instrumentalities of Ecuador with commercial ties to the United States. The court concluded:

Plaintiffs do not contend that either CFN or the Trust [the entities holding the allegedly expropriated property] is *itself* engaged in commercial activity in the United States. Rather, they argue primarily that we should impute to each the United States activities of several other entities ... But CFN and the Trust are entities distinct from the subsidiaries and other Ecuadorean entities to which plaintiffs point. The presumption of legal separateness established by the Supreme Court in *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (“*Bancec*”), and respect for international comity compel us to treat these legally separate entities as just that, unless plaintiffs can demonstrate that CFN and the Trust exercise significant and repeated control over the [entities'] day-to-day operations. Plaintiffs have failed to clear this substantial bar and therefore have not satisfied the requirements of Section 1605(a)(3).

Page 845, add at the end of note 5:

As discussed above (Chapter 5), in 2016 Iran filed a claim against the United States at the International Court of Justice contending that U.S. failure to accord sovereign immunity protection to Iran’s assets in the United States violated international law.

In September 2016, the U.S. Congress passed the Justice Against Sponsors of Terrorism Act (JASTA), which amended the FSIA to add section 1605B, creating an exception to immunity for

any foreign sovereign that played a role in terrorist attacks on U.S. territory. (President Obama vetoed the bill, but Congress overrode the veto.) As a result, claims against Saudi Arabia for allegedly facilitating the September 11 attacks, which had been dismissed on sovereign immunity grounds, were partially reinstated. *In re Terrorist Attacks on September 11, 2001*, 298 F.Supp.3d 631 (S.D.N.Y. 2018). Compare Section 1605B to Section 1605A and Section 1605(a)(5) (the non-commercial tort exception). Why is Section 1605B a significant change? Why did President Obama likely oppose it?

Sections 1605A and 1605B appear to allow the imposition of punitive damages on foreign sovereigns because they are not subject to the limits of Section 1606 (which excludes punitive damages). In *Opati v. Republic of Sudan*, cert. granted June 28, 2019, the Supreme Court agreed to decide whether Section 1605A has retroactive application to allow punitive damages for injuries prior to the enactment of Section 1605A (in that case, for Sudan's complicity in the 1998 embassy bombings in Kenya and Tanzania).

Page 856, add at the end of note 6:

In *Lewis v. Mutond*, 918 F.3d 142 (D.C. Cir 2019), the court considered a TVPA suit by a U.S. citizen allegedly detained and tortured by police in the Democratic Republic of the Congo (DRC); the defendants were individual police officers and other DRC officials. After the U.S. State Department declined to issue a statement of interest in support of immunity, the majority applied the common law of foreign official immunity, reflected (it said) in Section 66 of the Restatement (Second) of Foreign Relations of the United States. It found no immunity principally because (it said) the effect of exercising jurisdiction would not be to enforce a rule against the foreign state. In particular, the majority found that the plaintiff did not “seek[] to draw on the DRC’s treasury or force the state to take specific action.” Concurring, Judge Randolph sharply disputed that the Restatement reflected common law or that it was applicable; in his view, the TVPA categorically displaced common law conduct-based immunity. How are these approaches consistent with or different from the Fourth Circuit in *Samantar*?

Page 856, add new note 8:

Statutory and Treaty-Based Immunities. In addition to the FSIA, some immunities are conveyed on foreign persons and entities by treaties or statutes. Diplomatic and consular property and personnel, for example, have treaty based immunities, as do some international organizations such as the UN. Other international organizations have statutory immunity under the International Organizations Immunities Act (IOIA), 22 U.S.C. § 288a(b). Enacted in 1945, the IOIA provides that specified international organizations shall have “the same immunity” as foreign sovereigns. In *Jam v. International Finance Corporation*, 139 S.Ct. 759 (2019), the Supreme Court concluded that this language meant that international organizations have the

same immunity that a foreign sovereign would have under the FSIA at the time the suit is commenced, not the same immunity that a foreign sovereign would have had at the time the IOIA was enacted. Can you see why this distinction matters? Recall the history of foreign sovereign immunity since 1945.

Page 862, add at the end of note 4:

As discussed above (Chapter 8), in *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 112 (2d Cir. 2017), the court held that enforcement of arbitration awards under the ICSID Convention must proceed in accordance with the FSIA, meaning that service of process pursuant to the FSIA was required (see Chapter 11, Part E) and therefore – presumably – enforcement is subject to the FSIA limitations.

Page 863, add at the end of note 7:

After a new government was elected in Argentina, Argentina settled the dispute with NML.

Page 865, add at the end of note 4:

In *Republic of Sudan v. Harrison*, 139 S.Ct. 1048 (2019), a case arising from the attack on the navy ship U.S.S. Cole in Yemen, plaintiffs purported to serve process on the Republic of Sudan by delivering process to the Sudanese Embassy in Washington D.C., addressed to the Minister of Foreign Affairs. After plaintiffs obtained a default judgment and attempted to enforce it against Sudanese assets in New York banks, Sudan entered a limited appearance contesting the validity of the service. The court of appeals held that plaintiffs had satisfied the statutory requirement that service be made on the Minister of Foreign Affairs but the U.S. Supreme Court reversed. Justice Alito wrote for an eight-Justice majority, concluding:

The most natural reading of [the FSIA] is that service must be mailed directly to the foreign ministers office in the foreign state.

A key term in § 1608(a)(3) is the past participle “addressed.” A letter or package is “addressed” to an intended recipient when his or her name and “address” is placed on the outside of the item to be sent. And the noun “address,” in the sense relevant here, means “the designation of a place (as a residence or place of business) where a person or organization may be found or communicated with.” Webster’s Third New International Dictionary 25 (1971) (Webster’s Third); see also Webster’s Second New International Dictionary 30 (1957)

“the name or description of a place of residence, business, etc., where a person may be found or communicated with”); Random House Dictionary of the English Language 17 (1966) (“the place or the name of the place where a person, organization, or the like is located or may be reached”); American Heritage Dictionary 15 (1969) (“[t]he location at which a particular organization or person may be found or reached”); Oxford English Dictionary 106 (1933) (OED) (“the name of the place to which any one’s letters are directed”). Since a foreign nation’s embassy in the United States is neither the residence nor the usual place of business of that nation’s foreign minister and is not a place where the minister can customarily be found, the most common understanding of the minister’s “address” is inconsistent with the interpretation of § 1608(a)(3) adopted by the court below and advanced by respondents.

The Court also observed:

Finally, respondents contend that it would be “the height of unfairness to throw out [their] judgment” based on the highly technical argument belatedly raised by petitioner. We understand respondents’ exasperation and recognize that enforcing compliance with § 1608(a)(3) may seem like an empty formality in this particular case, which involves highly publicized litigation of which the Government of Sudan may have been aware prior to entry of default judgment. But there are circumstances in which the rule of law demands adherence to strict requirements even when the equities of a particular case may seem to point in the opposite direction. ...

Moreover, as respondents’ counsel acknowledged at oral argument, holding that Sudan was not properly served under § 1608(a)(3) is not the end of the road. Respondents may attempt service once again under § 1608(a)(3), and if that attempt fails, they may turn to § 1608(a)(4). ...

Justice Thomas dissented, arguing that “the FSIA neither specifies nor precludes the use of any particular address. Instead, the statute requires only that the packet be sent to a particular person – ‘the head of the ministry of foreign affairs.’”

Chapter 12: Foreign Affairs Limits on Transnational Cases

Page 886, add at the end of note 8:

For a recent application of the act of state doctrine, see *Sea Breeze Salt, Inc. v. Mitsubishi Corporation*, 899 F.3d 1064 (9th Cir. 2018) (barring antitrust claim by U.S. sea salt buyer contending that Mitsubishi conspired with the Mexican state salt-producing corporation to monopolize sea salt production and sales in Mexico).

Page 886, add new note 9:

The Act of State Doctrine in Human Rights Litigation. In *Kashef v. BNP Paribas S.A.*, 2019 WL 2195619 (2d Cir. 2019), plaintiffs sued BNP, a French Bank with operations in New York, under New York state tort law for aiding and abetting genocide and related atrocities committed by Sudanese forces in Sudan by providing financial services to Sudan through its New York offices in violation of U.S. law. On appeal, the court reversed the district court's application of the act of state doctrine to bar the suit. According to the court of appeal, (1) under *Kirkpatrick*, the doctrine did not apply because the suit did not require the court to determine the validity of an act of Sudan; (2) under *Dunhill*, there was no evidence that the alleged wrongful acts were the official policy of Sudan (indeed, they were illegal under Sudanese law); and (3) in any event, the alleged wrongful acts violated *jus cogens* norms of international law and therefore could not be shielded by the act of state doctrine. Are these correct applications of *Kirkpatrick* and *Dunhill*, respectively? How would you argue otherwise? Why should the act of state doctrine not apply to *jus cogens* norms?

Page 892, add to the end of note 5:

In *Belhaj v. Straw*, [2017] UKSC 3, the U.K. Supreme Court reached a similar conclusion in a somewhat different way. The case involved suits against U.K. officials for assisting wrongful acts by various foreign governments including the United States in the course of the war on terrorism. Rejecting an act of state defense, the court concluded that a public policy exception should apply "at least [to] the allegations of complicity in torture, unlawful detention, enforced rendition and disappearance."

Page 908, add to the end of note 3:

Simon v. Republic of Hungary, discussed above (Chapter 11), involved property claims by Holocaust victims against Hungary and the Hungarian state railroad. The D.C. Circuit applied *Zivotofsky* to reject a political question defense by Hungary, holding that the matter was not textually committed to another branch and that there were adequate standards for judicial resolution. *Wu v. United States*, 777 F.3d 175 (4th Cir. 2015), involved the U.S. Navy's capture of a Taiwanese fishing boat that had been seized by Somali pirates. During the capture, the boat's captain, who was being held prisoner by the pirates, was accidentally killed by U.S. naval gunfire, and after the seizure the U.S. navy sank the boat rather than tow it to shore. In a subsequent suit by the captain's widow, the court applied the political question doctrine to bar her tort and property claims against the U.S. navy. Are these decisions consistent applications of *Zivotofsky*?

Jaber v. United States, 861 F.3d 241 (D.C. Cir. 2017), found a political question in plaintiff's suit challenging the legality of a U.S. drone strike in Yemen. The court reasoned:

In *Zivotofsky*, the Court considered a statute directing the Secretary of State, upon request, to issue a registration of birth or passport to a U.S. citizen born in Jerusalem that identified the individual's place of birth as "Jerusalem, Israel." ... [T]he U.S. Embassy later refused *Zivotofsky's* request to list his place of birth as Jerusalem, Israel and issued a passport and registration of birth listing only "Jerusalem." The Supreme Court noted "the parties [did] not dispute the interpretation" of the statute, and the question before the Court concerned whether the statute was constitutional. Accordingly, the Court held the question justiciable, reasoning *Zivotofsky* did not "ask the courts to determine whether Jerusalem is the capital of Israel" but sought only to vindicate his statutory right to have Israel designated as his place of birth on his passport.

Zivotofsky confirms no *per se* rule renders a claim nonjusticiable solely because it implicates foreign relations. Rather, it recognizes that, in foreign policy cases, courts must first ascertain if "[t]he federal courts are ... being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination" or, instead, merely tasked with, for instance, the "familiar judicial exercise" of determining how a statute should be interpreted or whether it is constitutional. In the latter case, the claim is justiciable. Therefore, if the court is called upon to serve as a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security, then the political question doctrine is implicated, and the court cannot proceed.

Zivotofsky sought only to enforce a statute alleged to directly regulate the Executive, and the reviewing court needed to determine only "if *Zivotofsky's* interpretation of the statute [was] correct, and whether the statute [was] constitutional." *Zivotofsky*, 566 U.S. at 196. The Court was not called upon to impose its own foreign policy judgment on the political branches, only to say whether the congressional statute encroached on the Executive's constitutional authority. This is the wheelhouse of the Judiciary, and accordingly, it does not constitute a nonjusticiable political question. Here, however, Plaintiffs assert claims under the [Torture Victim Protection Act and the Alien Tort Statute] that would require the Court to second-guess the wisdom of the Executive's decision to employ lethal force against a national security target—to determine, among other things, whether an urgent military purpose or other emergency justified a particular drone strike. Indeed, Plaintiffs' request is more analogous to an action challenging the Secretary of State's independent refusal to recognize Israel as the rightful sovereign of the city of Jerusalem, a decision clearly committed to executive discretion.

Page 932, add to the end of note 4:

Gingery v. City of Glendale, 831 F.3d 1222 (9th Cir. 2017), rejected a *Zschernig*-based challenge to a statue, which Glendale placed in a public park, commemorating Korean “comfort women” kidnapped and abused by Japanese forces in World War II. According to the plaintiff, the statue interfered with foreign affairs. As the court explained:

For several decades, Japan and South Korea have engaged in a heated and politically sensitive debate concerning historical responsibility for the Comfort Women. South Korea has urged Japan to redress grievances relating to the Comfort Women. Japan denies responsibility for the recruitment of the Comfort Women and asserts that, in any event, all World War II-related claims, including those related to the Comfort Women, were resolved pursuant to postwar treaties between Japan and the allied nations. According to Plaintiffs' complaint, the United States has generally “avoid[ed] taking sides” and encouraged Japan and South Korea to resolve the dispute through “further government-to-government negotiations.” ...

Plaintiffs ... claim that the monument interferes with the federal government's foreign affairs power and violates the Supremacy Clause. Plaintiffs' complaint further alleges that by installing the monument, Glendale “has taken a position in the contentious and politically-sensitive international debate concerning the proper historical treatment of the former comfort women.” In Plaintiffs' view, Glendale's monument disrupts the federal government's foreign policy of nonintervention and encouragement of peaceful resolution of the Comfort Women dispute.

The court rejected this claim:

Applying the doctrine of field preemption, we have found that a state or local government is more likely to exceed the limits of its power when it creates remedial schemes or regulations to address matters of foreign affairs. In *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2010), for example, we held that a California statute, which extended the statute of limitations for civil actions to recover looted Holocaust-era artwork, was preempted because the statute would often require courts to review the reparation decisions of foreign nations, and thus intruded on the federal government's power “to make and resolve war.” *Id.* at 965–68. More recently, in *Movsesian*, our Court, sitting en banc, concluded that a California statute, which vested California courts with jurisdiction over certain insurance claims brought by “Armenian genocide victim[s]” and extended the statute of limitations for those claims, intruded on the field of foreign affairs. 670 F.3d at 1076–77. We explained that the California statute not only “expresses a distinct political point of view on a specific matter of foreign policy,” but also “subject[s] foreign insurance companies to lawsuits in California” and would require

courts applying the statute to engage in “a highly politicized inquiry into the conduct of a foreign nation.” *Id.* at 1076.

What we have *not* considered, however, is the extent to which a state or local government may address foreign affairs through expressive displays or events, rather than through remedies or regulations. ... Under the circumstances of this case, we conclude that it does not.

First, Glendale's establishment of a public monument to advocate against “violations of human rights” is well within the traditional responsibilities of state and local governments. ... [C]ities, counties, and states have a long tradition of issuing pronouncements, proclamations, and statements of principle on a wide range of matters of public interest, including other matters subject to preemption, such as foreign policy and immigration. For example, local governments have established memorials for victims of the Holocaust and the Armenian genocide, and leaders of local governments have publicly taken positions on matters of foreign affairs, from South African apartheid in the 1980s to the recent actions of Boko Haram. Here, by dedicating a local monument to the plight of the Comfort Women in World War II, Glendale has joined a long list of other American cities that have likewise used public monuments to express their views on events that occurred beyond our borders. ...

Second, even if Glendale were acting outside an area of traditional state responsibility, Plaintiffs have not plausibly alleged that Glendale's actions intrude[] on the federal government's foreign affairs power. To intrude on the federal government's foreign affairs power, a state's action must have more than some incidental or indirect effect on foreign affairs. While Plaintiffs broadly assert that the monument threatens to negatively affect U.S. foreign relations with Japan, Plaintiffs do not support this assertion with specific allegations that Glendale's actions have had, or are likely to have, any appreciable effect on foreign affairs. At most, Plaintiffs allege that various Japanese officials have expressed disapproval of the monument. However, Plaintiffs have not further alleged that this disapproval has in any way affected relations between the United States and Japan. In addition, Plaintiffs do not allege that the federal government has expressed any view on the monument—much less complained of interference with its diplomatic agenda. Thus, Plaintiffs have failed to plausibly allege that Glendale's installation of the monument has had more than some incidental or indirect effect on foreign affairs.

Moreover, in contrast to state actions we have found preempted, Glendale has taken no action that would affect the legal rights and responsibilities of any individuals or foreign governments. ... Rather, by erecting a symbolic display commemorating what it views as a historical tragedy, Glendale has appropriately exercised the expressive powers of a

local government and stopped short of interfering with the federal government's foreign affairs power.

Chapter 13: Transnational Discovery

Page 968, add a new note 6:

For a recent discussion of the issues that arise when there is a conflict between the Federal Rules of Civil Procedure and a foreign “blocking statute,” consider *In re: Xarelto (Rivaroxaban) Products Liability Litigation*, 2016 WL 3923873 (E.D. La. 2016). There, a group of plaintiffs claimed injury from the manufacture, sale, distribution and use of the medication Xarelto, an anti-coagulant used for a variety of blood-thinning medical purposes. During discovery, one party, Bayer, objected to the production of personnel files on the grounds that production of such data would constitute a violation of the German Data Protection Act.

The district court explained the state of the law as follows:

In the wake of *Société Nationale*, courts have devised numerous mechanisms for performing the Court’s unarticulated ‘comity analysis.’ Some courts use a three-factor test. For example, the District of Connecticut examines whether: “(1) the examination of the particular facts of the case, particularly with regard to the nature of the discovery requested; (2) the sovereign interests in issue; and (3) the likelihood that the [foreign discovery] procedures will prove effective.” Others, such as the Second Circuit, have used a four-factor test, examining “(i) the competing interests of the nations whose laws are in conflict; (ii) the hardship that compliance would impose on the party or witness from whom discovery is sought; (iii) the importance to the litigation of the information and documents requested; and (iv) the good faith of the party resisting discovery.” *But see Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199 (E.D.N.Y. 2007) (applying the five factors of the Restatement (Third) of the Law of Foreign Relations as well as two additional factors).

The majority of lower courts, however, perform the five-factor test used in the Restatement (Third) of the Law of Foreign Relations § 442 (Am. Law Inst. 1987) (the “Third Restatement”), citing the Court’s favorable reference to the Third Restatement in a footnote in *Société Nationale*. Under the Third Restatement, a court in deciding whether to order the production of information protected by a blocking statute should consider:

the importance to the ... litigation of the documents or other information

requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

Restatement (Third) of Foreign Relations Law § 442 (Am. Law Inst. 1987). These five factors expand to seven in the Ninth Circuit. Relying on *Société Nationale*'s holding that the Third Restatement's factors are not exhaustive, the Ninth Circuit also considers "[1] the extent and the nature of the hardship that inconsistent enforcement would impose upon the person, and [2] the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state." *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992).

One year after the Supreme Court's holding in *Société Nationale*, the Fifth Circuit adopted a three-factor comity analysis. "The district court is only directed to determine whether [foreign discovery procedures] are appropriate after 'scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to these procedures would prove effective.'" *In re Anshuetz & Co., GmbH*, 838 F.2d 1362, 1364 (5th Cir. 1988). The Fifth Circuit's formulation of the comity analysis emphasizes the sovereignty interests of foreign states. In particular, the circuit court found that district courts should "consider, with due caution, that many foreign countries, particularly civil law countries, do not subscribe to our open-ended views regarding pretrial discovery, and in some cases may even be offended by our pretrial procedures." *Id.* The *Anshuetz* opinion does not cite the Third Restatement.

Despite the *Anshuetz* court's adoption of a three-factor comity analysis, district courts in the Fifth Circuit routinely use the five-factor test of the Third Restatement."

As explained in notes 2 through 5 of the casebook, practitioners must play close attention to the legal test that is being used in order to marshal facts to the benefit of their client's position.