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2016-2017 Cumulative Supplement to Donald Earl Childress III, Michael D. Ramsey & Christopher A. Whytock, *Transnational Law and Practice* (2015)

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(Fall 2016)

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

*[This is the Fall 2016 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 decision in RJR Nabisco Inc. v. European Community involving extraterritorial application of the RICO statute; discussion of new Supreme Court and appellate court decisions on foreign sovereign immunity; new developments regarding Alien Tort Statute litigation; 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:*

On August 8, 2016, a unanimous panel for the United States Court of Appeals for the Second Circuit affirmed a 2014 district court decision that granted Chevron equitable relief under the federal RICO statute 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*, 2016 WL 4173988 (2d Cir. 2016).

**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.

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

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.<sup>1</sup>

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<sup>1</sup> 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.

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).<sup>2</sup>

## 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....

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.

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“(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.”

<sup>2</sup> 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.”

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.”<sup>5</sup>

### 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

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<sup>5</sup> 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.

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 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).<sup>2</sup>

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 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

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<sup>2</sup> 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.”).

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*'s 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*?
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. **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?
6. **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?

## 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?

*Page 281, add to the end of note 1:*

After the Supreme Court’s decision in *Kiobel*, the Second Circuit re-affirmed its conclusion that corporations cannot be liable under the ATS. It acknowledged, however, the Supreme Court’s *Kiobel* decision “suggests that the ATS may allow for corporate liability” and that “there is a growing consensus among our sister circuits to that effect.” *In Re Arab Bank PLC Alien Tort Statute Litigation*, 808 F.3d 144, 151 (2d Cir. 2015).

*Page 282, add to the end of note 3:*

Some claims are now being brought under the TVPA against individual corporate officers and directors. *See, e.g., 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); *In re Chiquita Brands International, Inc. Alien Tort Statute and Shareholder Derivative Litigation*, \_\_ F.Supp.2d \_\_ (S.D. Fla. June 1, 2016) (finding plaintiffs stated claim under TVPA against corporate officers and directors). Does this represent an end-run of the *Mohamad* decision or admirable creative lawyering? What practical difficulties is this approach likely to encounter?

*Page 284, add at the end of note 7:*

The Second Circuit applied *Mastafa* in *Licci v. Lebanese Canadian Bank*, \_\_ F.3d \_\_ (2d Cir. Aug. 24, 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:

Like the *Mastafa* plaintiffs’ allegations against the French bank, 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.” *See Mastafa*, 770 F.3d at 191. As in *Mastafa*, we find these allegations



to be both specific and domestic. See *id.* 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.

#### **Chapter 4: National Courts**

*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 511, add to the end of note 4:*

In 2016, Iran filed a claim 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.

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

*Page 533, add at the end of note 4:*

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.

## **Chapter 6: Alternative Dispute Resolution**

*Page 597, add new note 2:*

On July 12, 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?

## Chapter 7: Court Judgments

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.<sup>9</sup>

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 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

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

<sup>9</sup> 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.

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?

*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*, 2016 WL 4173988, \*58 (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 686, add the following at the end of note 5:*

The courts in the *Chromalloy* and *PEMEX* cases, also discussed in the *Thai-Lao* opinion, did enforce arbitral awards that had been vacated by a court in the arbitral seat. Can these decisions be reconciled with *Thai-Lao*, *Baker Marine*, and *TermoRio*? Why or why not? As one commentator notes, the *Chromalloy* decision has not been very influential in the United States. MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 215-16 (2008). The more influential view in the United States today is that U.S. courts generally will use their discretion under Article V of the New York Convention to refuse enforcement of a foreign arbitral award that has been vacated in the arbitral seat.

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, 2016 WL 4087215, \*8-13 (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?

## Chapter 10: Alternative Forums

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?

## **Chapter 11: Foreign Sovereign Immunity**

*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?

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 U.S. company as plaintiff successfully argued that the government had seized the property because it was ultimately owned by U.S. citizens, and that this discriminatory action violated international law. (Consider, however, what barriers Helmerich may face on remand.) In June 2016, the U.S. Supreme Court granted a writ of certiorari to review the D.C. Circuit's decision, limited to the question of the pleading standard

required to be met by the plaintiff in bringing FSIA takings claims. *Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 136 S.Ct. 2539 (2016).

*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. House of Representatives passed a bill that would amend the FSIA to allow suits against any nation that played a role in terrorist attacks on U.S. territory. One purpose of the bill is to allow suits against Saudi Arabia for possible connections to the 9/11 attacks. The Senate previously passed the bill, but President Obama has indicated that he may veto it. See Jennifer Steinhauer, *House Passes Bill Allowing 9/11 Lawsuits Against Saudi Arabia; White House Hints at Veto*, N.Y. TIMES, Sept. 9, 2016, <http://www.nytimes.com/2016/09/10/us/politics/house-911-victims-saudi-arabia.html>

*Page 863, add at the end of note 7:*

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

## **Chapter 12: Foreign Affairs Limits on Transnational Cases**

*Add to note 3 on p. 908:*

*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*?