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(Fall 2024)

2024 Supplement to Donald Earl Childress III, Michael D. Ramsey & Christopher A. Whytock, Transnational Law and Practice (2d ed. 2021)[*]

[*This is the Fall 2024 Supplement for* DONALD EARL CHILDRESS III, MICHAEL D. RAMSEY & CHRISTOPHER A. WHYTOCK, TRANSNATIONAL LAW AND PRACTICE *(2d ed. 2021). Highlights include new U.S. Supreme Court decisions relating to the extraterritorial application of U.S. law, the Alien Tort Statute, treaty interpretation, personal jurisdiction, and foreign sovereign immunity; the Ukraine-Russia dispute at the International Court of Justice; International Court of Justice decisions related to the Israel-Gaza conflict; and important court of appeals decisions on forum non conveniens, anti-suit injunctions, forum selection clauses, and the act of state doctrine.*]

Chapter 1: National Law

Page 33, add at the end of note 13:

In *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013), the U.S. Supreme Court examined the extraterritorial reach of the Alien Tort Statute (ATS), 28 U.S.C. § 1350. Under the ATS, "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The *Kiobel* court concluded that "the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption." It therefore held that the "petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred." However, the Court hinted that in some cases the ATS might still apply extraterritorially: "[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." *Id.* at 124-25. *See* Chapter 2.C.1, pp. 270-280 of the text.

In *Nestlé USA, Inc. v. Doe*, 593 U.S. 628 (2021), the Court returned to the issue. In that case, the plaintiffs sued defendants for aiding and abetting forced labor overseas. They argued that even though their injuries occurred outside the United States, the federal courts had subject matter jurisdiction under the ATS because petitioners made all major operational decisions from within the United States. Rejecting that argument, the Court stated: "Pleading general corporate activity is no better [than pleading mere corporate presence]. Because making 'operational decisions' is an activity common to most corporations, generic allegations of this sort do not draw a sufficient connection between the cause of action respondents seek—aiding and abetting forced labor

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

overseas—and domestic conduct….To plead facts sufficient to support a domestic application of the ATS, plaintiffs must allege more domestic conduct than general corporate activity." *Id.* at 634.

For more on the ATS and the *Nestlé* case, see the update to Chapter 2.C.1 below.

Page 47, add at end of note 3:

In *Abitron Austria GmbH v. Hetronic International, Inc.*, 600 U.S. 412 (2023), the Supreme Court further clarified the two-step approach in an opinion written by Justice Alito (joined by Justices Thomas, Gorsuch, Kavanaugh, and Jackson). Hetronic alleged that Abitron sold Hetronic-branded products, mostly in Europe but also in the United States. Hetronic sued Abitron for violations of two sections of the U.S. Lanham Act, which prohibits certain unauthorized uses of trademarks that are likely to cause confusion among consumers. At step one, the Court held that the two sections did not contain a clear indication that they apply extraterritorially. Regarding step two, the Court clarified that "[s]tep two does not end with identifying statutory focus." *Id*. at 418). Beyond that, courts must determine whether the conduct relevant to that focus occurred in the United States. *Id.* If so, the statute's application is domestic and permissible. If not, it is extraterritorial and impermissible. The Court noted the different contentions regarding focus: Abitron argued the focus is on preventing infringing use of trademarks in commerce; Hetronic argued the focus was on protecting goodwill of mark owners and preventing consumer confusion; and the United States as *amicus curiae* argued that focus was only on consumer confusion. The Court held that "the conduct relevant to any focus the parties have proffered is infringing use in commerce." *Id*. at 422. Thus any application of these two section of the Lanham Act to infringing use occurring outside the United States would be impermissibly extraterritorial.

Does the majority's approach represent a new three-step framework? Yes, according to a concurring opinion written by Justice Sotomayor (joined by Chief Justice Roberts and Justices Kagan and Barrett). Justice Sotomayor argued that the majority had turned step two into "a myopic conduct-only test." *Id*. at 439 (Sotomayor, J., concurring in the judgment). "[I]nstead of discerning the statute's focus and assessing whether that focus is found domestically, as the Court's precedents command, the majority now requires a third step: an assessment of whether the 'conduct relevant to the focus' occurred domestically, even when the focus of the statute is not conduct." *Id*. Justice Sotomayor also argued that the majority's approach was in tension with *RJR Nabisco*, which held that an application of the RICO private action provision was domestic so long as there is domestic *injury*. *Id*. at 440. According to Justice Sotomayor, the Court's precedents indicate that while the focus of some statutes may be on particular conduct, the focus of others may be on parties or interests that Congress seeks to protect or regulate; and that precedents requiring domestic *conduct* were cases in which "the Court first concluded (or assumed without

deciding) that the focus of the provision at issue *was* conduct, and only then proceeded to consider whether the relevant conduct occurred domestically." *Id*.

On remand, the Tenth Circuit Court of Appeals "reevaluate[d] which of Abitron's allegedly infringing activities count as "uses in commerce" under the Supreme Court's new extraterritoriality framework for the Lanham Act's trademark-infringement provisions." *Hetronic Int'l, Inc. v. Hetronic Germany GmbH*, 99 F.4th 1150, 1159 (10th Cir. 2024). The Court of Appeals first concluded that "all of Abitron's direct U.S. sales are actionable under the Lanham Act because these sales used Hetronic trademarks in domestic commerce in a way that threatened confusion among U.S. consumers." *Id*. at 1166. It then concluded that "[b]ecause the Court now requires infringing conduct in domestic commerce to anchor any Lanham Act claim, none of Abitron's purely foreign conduct—that is, foreign sales to foreign customers—can premise liability for Hetronic's Lanham Act claims." *Id*. at 1167.

Page 48, add at end of note 5:

In *Yegiazaryan v. Smagin*, 599 U.S. 533 (2023), the Supreme Court clarified that "determining whether a plaintiff has alleged a domestic injury [for purposes of RICO] is a context-specific inquiry that turns largely on the particular facts alleged in a complaint. Specifically, courts should look to the circumstances surrounding the alleged injury to assess whether it arose in the United States." *Id*. (slip op., at 8). In stating this context-specific approach, the Court rejected a "bright-line rule" that would deem the plaintiff's injury to be located where the plaintiff resides. Smagin, who resided in Russia, received a multimillion dollar foreign arbitral award against Yegiazaryan, who resided in California. Smagin then filed an action in the Central District of California to recognize and enforce the award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Federal Arbitration Act (see Chapter 8). The District Court entered judgment against Yegiazaryan in the amount of the arbitral award plus interest. Smagin alleged that Yegiazaryan had meanwhile engaged in a pattern of criminal activity to prevent Smagin from satisfying the California judgment, in violation of RICO, by hiding his assets with the assistance of a bank, a U.S. law firm, and others. Did Smagin adequately allege a domestic injury so that the application of RICO in his suit would be domestic (and permissible) rather than impermissibly extraterritorial? In an opinion written by Justice Sotomayor (joined by Chief Justice Roberts and Justices Kagan, Kavanaugh, Barrett, and Jackson), the Court looked to "the nature of the alleged injury, the racketeering activity that directly caused it, and the injurious aims and effects of that activity"; found that "Smagin's interests in his California judgment against Yegiazaryan, a California resident, were directly injured by racketeering activity either taken in California or directed from California, with the aim and effect of subverting Smagin's rights to execute on that judgment in California"; and on that basis held that Smagin's allegations sufficed to state a domestic injury. *Id*. (slip op., at 8-11).

Does *Smagin* provide a workable approach to determining whether an injury is domestic? The majority conceded that "[b]ecause of the contextual nature of the inquiry, no set of factors can capture the relevant considerations for all cases….Thus, depending on the allegations, what is relevant in one case to assessing where the injury arose may not be pertinent in another." *Id.* (slip. op., at 10). In a dissenting opinion (joined by Justices Thomas and Gorsuch), Justice Alito criticized the majority's multi-factor approach, arguing that it "offers virtually no guidance to lower courts, and it risks sowing confusion in our extraterritoriality precedents." Alito, J., dissenting (slip op., at 1).

Page 79, add at the end of the last full paragraph:

In 2018, the American Law Institute (ALI) began work on the Restatement (Third) of Conflict of Laws, portions of which the ALI has already approved.

Page 113, add a new note 8:

8. Restatement (Third) Conflict of Laws. The American Law Institute (ALI) has approved portions of the Restatement (Third) Conflict of Laws dealing with choice-of-law for torts and property issues. Below are some representative sections. How are they similar to and different from the Restatement (First), Restatement (Second), and other approaches to choice-of-law discussed above?

From Restatement (Third) of Conflict of Laws, Tentative Draft No. 4 (Am. L. Inst. 2023):

§ 6.03 Issues Relating to Conduct and Issues Relating to Persons (Conduct Regulation and Loss Allocation)

(a) Issues relating to conduct, in the tort context, are issues for which territorial connecting factors such as the location of the conduct or injury are of primary importance.

(b) Issues relating to persons, in the tort context, are issues for which personal connecting factors such as the parties' domicile are of primary importance.

§ 6.04 Issues Relating to Conduct

Issues relating to conduct include, but are not limited to, the following:

(a) whether conduct is tortious, including whether it is negligent, or whether an interest is entitled to legal protection;

(b) standards of conduct or safety;

(c) duty or privilege to act;
(d) whether a duty is owed to the plaintiff;
(e) prerequisites for liability;
(f) defenses that negate wrongfulness;
(g) strict liability;
(h) scope of liability; and
(i) availability of punitive damages.

§ 6.05 Issues Relating to Persons

Issues relating to persons (loss-allocation issues) include, but are not limited to, the following:
(a) charitable immunity;
(b) intrafamily immunities;
(c) vicarious liability;
(d) measure of damages, including limitations;
(e) joint and several liability;
(f) contribution and indemnity among tortfeasors;
(g) comparative and contributory negligence;
(h) survival of actions;
(i) guest statutes; and
(j) workers' compensation and other similar immunities.

§ 6.06 Issues Relating to Conduct: Conduct and Injury in Same State

When the injurious conduct and the resulting injury occur in the same state, the law of that state governs issues relating to conduct….

§ 6.07 Issues Relating to Persons: Shared Domicile

When the relevant parties are domiciled in a single state, that state's law governs an issue relating to persons (loss allocation)….

§ 6.08 Issues Relating to Persons: No Shared Domicile—Intrastate Torts

When the relevant parties are domiciled in states whose laws are in material conflict, and conduct and injury occur in a single state, that state's law governs an issue relating to persons (loss allocation).

§ 6.09 Cross-Border Torts

(a) When conduct in one state causes injury in another, the law of the state of conduct governs both issues related to conduct and issues related to persons, except as otherwise provided in § 6.07.

(b) However, if the injured party shows that the location of the injury was reasonably foreseeable, the law of the state of injury, rather than the state of conduct, governs all issues subject to this Section.

(c) Whether the defendant was under a duty to act is always determined with reference to the law of the state of conduct. Whether the existence of such a duty precludes liability is determined by the law selected under this Section.

Page 127, add new note 6:

6. **Restatement (Third) Conflict of Laws.** The American Law Institute (ALI) has approved the sections of the Restatement (Third) Conflict of Laws dealing with the determination of foreign law. To what extent to they clarify how courts and lawyers should deal with questions about foreign law?

   From Restatement (Third) of Conflict of Laws, Tentative Draft No. 2 (Am. Law Inst. 2021):

   § 5.06 Notice of Foreign Law

   (a) A party who intends to raise an issue about foreign law must give the court and the other parties reasonable written notice.
   (b) If no party has given notice under subsection (a) but the court intends to raise an issue about foreign law, the court should give the parties reasonable notice.

   § 5.07 Information About Foreign Law

   (a) In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not admissible under the applicable rules of evidence.
   (b) The parties are primarily responsible for submitting information about foreign law. The court may also obtain information about foreign law on its own.
   (c) If the court has insufficient information to determine foreign law, it should ask the parties for more information, seek more information on its own, or both. If the parties do not provide and the court does not obtain sufficient information to determine foreign law, the court should ordinarily apply forum law.

§ 5.08 Determination of Foreign Law

(a) The court is responsible for determining foreign law.
(b) Ordinarily, the court should determine foreign law in light of how it is authoritatively interpreted and applied in the foreign state.
(c) If the court must determine foreign law to decide a motion to dismiss for failure to state a claim upon which relief can be granted, the court may use information about foreign law even if the material containing that information is outside the pleadings.
(d) Disputes over foreign-law determinations are not disputes of fact that preclude the court from granting a motion for summary judgment.
(e) The court's determination of foreign law is reviewable as a question of law.

Page 146, add at end first bullet point of note 1:

In *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 596 U.S. 107 (2022), plaintiff filed a claim against a foreign state defendant in the U.S. District Court for the Central District of California, basing subject matter jurisdiction on the Foreign Sovereign Immunities Act (FSIA) (see Chapter 11). The issue was which choice-of-law rules the District Court should apply: federal choice-of-law rules or the forum state's choice-of-law rules? The Court noted that Section 1606 of the FSIA provides that a foreign state defendant "shall be liable in the same manner and to the same extent as a private individual under the circumstances." The Court reasoned: "If the private suit were filed in state court, California's choice-of-law rule would of course govern. And if the private suit were filed in federal court, under diversity of citizenship, the same would be true. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)." Therefore, the Court held, Section 1606 requires application of forum state (here, California) choice-of-law rules to determine the law governing the plaintiff's claim. On remand, the court of appeals determined that California choice-of-law rules would pick the law of Spain as the substantive law governing the dispute, which resulted in a judgment for the defendant. *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 89 F.4th 1226 (9th Cir. 2024).

Page 137, add at the end of note 3:

In the *Johnson* case, Johnson relied on Section 187 of the Second Restatement to argue (unsuccessfully) that the court should not enforce the choice-of-law clause because it was contrary to Michigan's fundamental policy in favor of successor liability. Compare *Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC*, 47 F.4th 225 (3d Cir. 2022), which also addressed public policy as a ground for non-enforcement of a choice-of-law clause. That case involved a maritime

insurance contract between Great Lakes and Raiders that contained the following choice-of-law clause:

> It is hereby agreed that any dispute arising hereunder shall be adjudicated according to well established, entrenched principles and precedents of substantive United States Federal Admiralty law and practice but where no such well established, entrenched precedent exists, this insuring agreement is subject to the substantive laws of the State of New York.

In the U.S. District Court for the Eastern District of Pennsylvania, Raiders asserted three counterclaims against Great Lakes under Pennsylvania law. Great Lakes argued that the Pennsylvania-law counterclaims should be dismissed because they contravened the choice-of-law clause, which designated New York law as the governing law in the absence of applicable federal maritime law. Raiders argued that the choice-of-law clause should not be enforced because New York law violated a strong Pennsylvania public policy of punishing insurers who deny coverage in bad faith. The District Court rejected Raiders' argument, holding that in the maritime context, only violation of federal public policy (not state public policy) is a ground for non-enforcement of a choice-of-law clause. The Court of Appeals vacated and remanded, holding that a "'strong public policy of the forum [state] in which suit is brought' could…render unenforceable the choice of state law in a marine insurance contract." Accordingly, "the District Court needed to consider whether Pennsylvania has a strong public policy that would be thwarted by applying New York law." 47 F.4th at 233.

The U.S. Supreme Court granted certiorari and reversed the Court of Appeals. *Great Lakes Ins. SE v. Raiders Retreat Realty Co*., LLC, 601 U.S. 65 (2024). It held that "[l]ongstanding precedent establishes a federal maritime rule: Choice-of-law provisions in maritime contracts are presumptively enforceable," *id*. at 70, subject only to narrow exceptions. *Id*. at 76. For example, courts can "disregard choice-of-law clauses in otherwise valid maritime contracts when the chosen law would contravene a controlling federal statute" or "conflict with an established federal maritime policy," "when parties can furnish no reasonable basis for the chosen jurisdiction." *Id*. But the Court held that state public policy was not an exception, reasoning that "[a] federal presumption of enforceability would not be much of a presumption if it could be routinely swept aside based on 50 States' public policy determinations." *Id*. at 77.

Chapter 2: International Law

Page 235, add new note 4:

4. **What Relationship is Required between a Treaty and an Implementing Statute?** In *United States v. Rife*, 33 F.4th 838 (6th Cir. 2022), the defendant, a U.S. citizen living in Cambodia, was convicted of violating a federal statute criminalizing sexual misconduct abroad. On

appeal, a divided panel of the Sixth Circuit held that the statute, as applied to the defendant's conduct, was beyond Congress' constitutional power under the foreign commerce clause because the conduct was not commercial. However, the court, applying *Missouri v. Holland*, went on to hold that the statute was constitutional as an implementation of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (an international treaty to which the United States is a party, discussed in note 3, p. 235 of the text). Although the defendant's conduct was not directly implicated by the treaty (which addresses only commercial sexual misconduct), the court concluded: "we cannot say that [the federal statute] as applied to noncommercial sex offenses against children is so unrelated to the treaty's provisions as to put this case beyond the Court's holding in *Holland*." Is that the right standard? *Compare* Michael D. Ramsey, *Congress's Limited Power to Enforce Treaties*, 90 NOTRE DAME L. REV. 1539 (2015) (arguing for a higher standard).

Page 244, add at the end of note 2:

In contrast, a more recent case on the Hague Child Abduction Treaty adopted a strongly textualist approach. In *Golan v. Saada*, 596 U.S. 666 (2022), the Second Circuit had held that a district court must consider "ameliorative measures" in deciding whether to order a child returned to the country from which the child had been wrongfully removed. In a unanimous opinion by Justice Sotomayor, the Supreme Court reversed. In the Court's view, the Convention's text gives courts discretion whether to order return if the court finds that return would pose a "grave risk" of physical or psychological harm to the child. The Court continued:

> Nothing in the Convention's text either forbids or requires consideration of ameliorative measures in exercising this discretion. The Convention itself nowhere mentions ameliorative measures. Nor does [the implementing statute], which, as relevant, instructs courts to "decide the case in accordance with the Convention" and accordingly leaves undisturbed the discretion recognized in the Convention. 22 U.S.C. § 9003(d). The longstanding interpretation of the Department of State offers further support for the view that the Convention vests a court with discretion to determine whether to order return if an exception to the return mandate applies. *Id*. at 676-77.

The Court did not examine the treaty's drafting and negotiating history, the conclusions of foreign courts, or other nontextual sources. Is that a better approach than in *Monasky* (discussed in note 2 of the text)? Is it a problem that the Court may appear to shift between interpretive approaches from case to case, or might that be explained by circumstances particular to each case?

Page 296, add new note 8 at the end of subsection 2.C.1:

8. ***Nestlé USA, Inc. v. Doe***. In *Nestlé USA, Inc. v. Doe*, 593 U.S. 628 (2021), the plaintiffs brought an ATS suit against defendant chocolate producers for violating international law by allegedly aiding and abetting forced labor on cocoa plantations in West Africa. Reversing the court of appeals in a brief opinion for an almost-unanimous Supreme Court, Justice Thomas wrote:

> Nearly all the conduct that [respondents] say aided and abetted forced labor—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast. The Ninth Circuit nonetheless let this suit proceed because respondents pleaded as a general matter that "every major operational decision by both companies is made in or approved in the U.S." But allegations of general corporate activity—like decisionmaking—cannot alone establish domestic application of the ATS.
>
> As we made clear in *Kiobel*, a plaintiff does not plead facts sufficient to support domestic application of the ATS simply by alleging "mere corporate presence" of a defendant. Pleading general corporate activity is no better. Because making "operational decisions" is an activity common to most corporations, generic allegations of this sort do not draw a sufficient connection between the cause of action respondents seek—aiding and abetting forced labor overseas—and domestic conduct. "[T]he 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." *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010). To plead facts sufficient to support a domestic application of the ATS, plaintiffs must allege more domestic conduct than general corporate activity. The Ninth Circuit erred when it held otherwise. *Id*. at 634.

In a separate section of the opinion joined only by Justices Gorsuch and Kavanaugh, Justice Thomas argued that the Court should not recognize any further causes of action under the ATS without direction from Congress. Justice Sotomayor, joined by Justices Breyer and Kagan, concurred separately, specifically arguing against this position.

The Court granted the writ of certiorari in *Nestlé* on the question whether corporations are subjects of international law, an issue raised but not resolved in prior decisions such as *Kiobel* and *Jesner* (see, e.g., pp. 282-283 of the text). Justice Thomas' opinion for the Court did not address the issue. Justice Gorsuch, joined by Justice Alito, argued that U.S. corporations should be liable under the ATS to the same extent as U.S. individuals. Justice Sotomayor, joined by Justices Breyer and Kagan, similarly concluded that international law applied to corporations.

Although the parties briefed the question whether the ATS allows aiding-and-abetting liability (see note 7 on pp. 295-296 of the text), none of the Justices addressed that issue.

What do you conclude from this case about the future of ATS litigation?

Post-*Nestlé*, the Ninth Circuit allowed ATS claims to proceed against Cisco Systems (a U.S. corporation) for allegedly aiding and abetting human rights violations by the Chinese government against followers of the Falun Gong religion. Doe v. Cisco Systems, Inc., 73 F. 4th 700 (9th Cir. 2023). As to extraterritoriality, the court held:

> [C]onduct within the United States that constitutes aiding and abetting a violation of international law, "even if other conduct [i.e., the principal's acts] occurred abroad," is a violation of the law of nations that falls within the "focus" of the ATS. See Nestle II, 141 S. Ct. at 1936 (majority op.) (quotation omitted). …
>
> … Cisco is alleged to have supplied significant software, hardware, and ongoing support to the Party and Chinese authorities, thereby providing assistance with substantial effect on the commission of international law violations. Specifically, the complaint alleges that the Golden Shield apparatus was "designed and developed by Defendants in San Jose [California]," and that "[a]ll of the high level designs provided by Cisco to its Chinese customers were developed by engineers with corporate management in San Jose, the sole location where Cisco cutting edge integrated systems and components were researched and developed."
>
> The complaint also alleges corporate decision-making and oversight in San Jose of actions taken in China to build and integrate Golden Shield technology provided by Cisco. But the complaint further notes that "[i]n addition [to general decision-making], the Defendants, from their San Jose headquarters, handled all aspects of the high-level design phases including those enabling the douzheng of Falun Gong." During the request for proposal and design phases, for example, "the Defendants in San Jose described sophisticated technical specification linked to the . . . functions of the Golden Shield, including . . . who can access information, how the information is transmitted, transmission speeds, [and] data storage location and capacity."
>
> The complaint additionally alleges "[f]or technologically advanced important overseas projects like the Golden Shield, [Cisco] operating out of San Jose routinely assigns its own engineering resources to design and implement the project in its entirety and in particular through its Advanced Services Team[,] . . . a specialized service offered by San Jose Defendants that employs experts and engineers in network technology for large-scale overseas projects or important clients." For the Golden Shield technology,

> specifically, the "operation and optimization phases" were "orchestrated" from San Jose, and system practices were "carefully analyzed and made more efficient as well as increased in scope by Cisco engineers in San Jose." Additionally, the "post-product maintenance, testing and verification, [and] training and support" that "Cisco provided to Public Security" "required intensive and ongoing involvement by Cisco employees in San Jose."
>
> Finally, "San Jose manufactured key components of the Golden Shield in the United States, such as Integrated circuit chips that function in the same manner as the Central Processing Unit of a computer." Additionally, Plaintiffs have plausibly alleged that Cisco's domestic activities satisfied the mens rea for aiding and abetting liability. For example, the "anti-Falun Gong objectives communicated to Cisco were . . . outlined in Cisco internal reports and files . . . kept in San Jose." Cisco materials using the term douzheng to describe the purpose of the Golden Shield, and referring to "Strike Hard" campaigns against "evil cults," "were identified as emanating from Cisco San Jose." And, as discussed above, U.S. government entities and news media widely reported on the torture and detention of Falun Gong adherents in China. In sum, Plaintiffs allege that Cisco designed, developed, and optimized important aspects of the Golden Shield surveillance system in California; that Cisco manufactured hardware for the Golden Shield in California; that Cisco employees in California provided ongoing maintenance and support; and that Cisco in California acted with knowledge of the likelihood of the alleged violations of international law and with the purpose of facilitating them.

Id. at 736-739. Is that consistent with *Nestlé*? Does it suggest a viable future direction for ATS litigation? How would you advise future clients?

What, if anything, does international law add in these cases? Consider a long-running case against Chiquita Brands International, Inc., a U.S. corporation accused of financing paramilitary death squads in Colombia. Plaintiffs initially filed their claims under the ATS (among other sources of law), but the ATS claims were dismissed as extraterritorial after *Kiobel*. Plaintiffs then pursued their claims under Colombian law, resulting in a jury verdict in their favor in the Southern District of Florida in 2024. *See* Ingrid Brunk, *Chiquita Liable for Financing Colombian Paramilitary Death Squads*, TRANSNATIONAL LITIGATION BLOG (June 19, 2024).

Chapter 4: National Courts

Page 440, add at the end of note 1:

In 2021, the Supreme Court issued an important decision on the framework for specific jurisdiction. In *Ford Motor Co. v. Montana Eighth Judicial District*, 592 U.S. 351 (2021), the Court considered two consolidated products liability cases both involving car accidents. The question before the Court was whether a state court has specific jurisdiction over a company when that company does substantial business in a state, but where the car involved in the crash was not first sold in the forum state, nor was it designed or manufactured there. The Court held that "[w]hen a company like Ford serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit." *Id*. at 355. In so holding, the Court clarified that while there must be a connection between a plaintiff's suit and a defendant's activities, it need not be a strict causal relationship. Of particular interest, Justice Gorsuch, joined by Justice Thomas, concurred in the judgment and noted that perhaps the approach taken since *International Shoe* is worth reconsideration. Specifically, he stated: "Hopefully, future litigants and lower courts will help us face these tangles and sort out a responsible way to address the challenges posed by our changing economy in light the Constitution's text and the lessons of history." *Id*. at 384. How would you structure an approach to personal jurisdiction along these lines?

Page 433, add immediately after the first paragraph:

In *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. 122 (2023), the Supreme Court held that a Pennsylvania law requiring out-of-state corporations to consent to general jurisdiction in that state as a condition of doing business there was consistent with due process. The Court's opinion was fractured and the only portions of the opinion joined by a majority was narrow, concluding that Pennsylvania's consent-by-registration statute did not violate due process under the Court's prior holding in *Pennsylvania Fire Insurance Co. v. Gold Issue Mining and Milling Co.*, 243 U.S. 93 (1917), that a similar statute did not violate due process. Norfolk Southern argued that Pennsylvania Fire had been implicitly overruled by Supreme Court cases following *International Shoe*. A majority of the court made clear that *Pennsylvania Fire* had not been implicitly overruled. Justice Alito concurred, providing the fifth vote to vacate the lower court's decision and remand for further consideration. In his concurrence, he opined that while such statutes do not violate due process they might violate other constitutional provisions, including the dormant commerce clause. Justice Barrett, joined by Chief Justice Roberts and Justices Kagan and Kavanaugh, dissented. She opined that the statute in issue was inconsistent with due process and principles of interstate federalism. For transnational litigation, the practical implication of the Court's decision is that states are free as a matter of due process to require consent-to-jurisdiction as a condition of doing

business. This means that states have a way to avoid the limits on general jurisdiction imposed by the Court's cases. Whether states will take this approach remains to be seen. And, should they take such an approach, it might mean future challenges based on the dormant commerce clause. The Court's decision may impact ongoing litigation regarding "deemed consent," whereby Congress has enacted statutes facilitating personal jurisdiction in Anti-Terrorism Act (ATA) cases when foreign entities engage in specific activities. Congress, in the Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA), provided that certain conduct by the Palestinian Liberation Organization (PLO) and the Palestinian Authority (PA) would constitute consent to personal jurisdiction in civil ATA actions. Specifically, the PSJVTA provides that if the PLO and PA make certain payments to people who injure or kill American nationals (or their families), or if they engage in certain activities in the United States, these organizations will be deemed to have consented to personal jurisdiction. A federal district court held that Congress has no power to enact such a law as the requirements for specific and general jurisdiction have not been met. *Fuld v. Palestinian Liberation Organization*, 578 F.Supp.3d 577 (S.D.N.Y. 2022). The Second Circuit affirmed, 82 F.4th 74 (2023), and a petition for certiorari was docketed on July 9, 2024. While *Mallory* considers whether the Fourteenth Amendment's due process clause permits jurisdiction by registration, the Court's decision could impact how lower courts view the Fifth Amendment's due process requirement for personal jurisdiction in ATA cases.

Page 448, insert at the end of note 3:

In *United States v. Aquatherm GmbH*, 609 F.Supp.3d 1163 (D. Or. 2022), a federal district court permitted the United States, as plaintiff, to use Rule 4(k)(2) to obtain personal jurisdiction over a foreign defendant on facts quite similar to *Nicastro*. While there were not sufficient contacts with the forum state, the court held that the foreign defendant had sufficient minimum contacts with the United States as a whole to support jurisdiction. Are there sound reasons to treat private parties suing under state law differently than private or governmental parties suing under federal law for purposes of personal jurisdiction?

Chapter 5: International Courts

Page 507, add immediately after the first paragraph:

In February 2022, in response to Russian military activities in Ukraine, Ukraine instituted proceedings against the Russian Federation and requested that the International Court of Justice (ICJ) indicate provisional measures. The ICJ held a public sitting in March 2022, in which Russia declined to participate. By an order of March 16, 2022, the ICJ indicated the following provisional

measures: (1) that "[t]he Russian Federation shall immediately suspend military operations . . . in the territory of Ukraine;" (2) that "[t]he Russian Federation shall ensure that any military or irregular armed united which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to in point (1) above;" and (3) that "[b]oth Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve." By a separate order, the ICJ issued a schedule for written submissions extending into 2023. Hearings on the merits concluded in June 2023. On February 2, 2024, the Court issued a decision on Russia's preliminary objections. It upheld Russia's objection that Russia's uses of force based on allegations of genocide fell outside the scope of the Genocide Convention and thus outside the Court's jurisdiction. The Court, however, did not dismiss the case. It decided that it will decide whether there is any "credibly evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine." To date, the Russian Federation has not complied with the ICJ's order. Consider what options there are to enforce such an order. Given the lack of enforcement to date, does the Russian Federation's disregard of the ICJ's order challenge the system for international dispute resolution established under the UN Charter? Additional information is available on the ICJ website at https://www.icj-cij.org/case/166.

On December 29, 2023, South Africa, in response to Israeli military action in the Gaza Strip, instituted proceedings before the ICJ alleging that Israel had violated its obligations under the Genocide Convention and requested that the Court indicate provisional measures. On January 26, 2024, the Court indicated provisional measures that enjoins Israel from violating the Genocide Convention and requires Israel to facilitate provision of humanitarian aid to Palestinians in the Gaza Strip. On February 12, South Africa requested additional provisional measures. The ICJ indicated concern but declined to issue the additional measures. On March 6, South Africa filed another request for modified provisional measures. On March 28, the ICJ indicated additional measures and required Israel to "take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip." Additional information is available on the ICJ website at https://www.icj-cij.org/index.php/case/192.

Chapter 6: Alternative Dispute Resolution

Page 543, add immediately after the paragraph on Mediation:

The United Nations Convention on International Settlement Agreements Resulting from Mediation (also known as the Singapore Convention) was adopted in December 2018 and opened for signature in August 2019. As of July 2024, it counts 57 states as signatories, and 14 states have ratified the Convention. Much like the New York Convention, the Singapore Convention hopes

to facilitate international trade and commerce by enabling parties to enforce and invoke settlement agreements reached through mediation across borders. The Singapore Convention has entered into force, but the United States has not yet ratified it. For commentary on the Singapore Convention, see http://arbitrationblog.kluwerarbitration.com/category/singapore-convention-on-mediation/.

Chapter 7: Court Judgments

Page 608, update the number of parties to the Hague Convention on Choice of Court Agreements in note 12:

The Convention entered into force in 2015 and, as of July 2024, had 35 parties.

Page 608, update the status of the Hague Judgments Convention in note 13:

The Convention entered into force in 2023 and, as of July 2024, had 30 parties. The United States has signed but not ratified the Convention.

Page 643, insert after the fourth sentence in note 4:

For a recent opinion emphasizing the narrow scope of the public policy exception, see *De Fontbrune v. Wofsy*, 39 F.4th 1214, 1223 (9th Cir. 2022) (interpreting California law):

> California courts have set a high bar for repugnancy under the Uniform Act…. The issue is not simply whether the "foreign judgment or cause of action is contrary to our public policy." Rather, the question is whether either is "so offensive to our public policy as to be prejudicial to recognized standards of morality and to the general interests of the citizens." Under this standard, a "difference in law, even a marked one, is not sufficient to raise a public policy issue. Nor is it relevant that the foreign law allows a recovery that the forum state would not allow." Instead, public policy is violated "only if recognition or enforcement of the foreign-country judgment would tend clearly to injure public health, the public morals, or the public confidence in the administration of law, or would undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel."…. The standard is not lower where the asserted repugnancy arises from inconsistency with constitutional principles rather than with statutes or common law. In such cases, "only judgments presenting a direct and

definite conflict with fundamental American constitutional principles will be denied recognition because repugnant."

Page 635, add new last paragraph to note 6:

A recent empirical study confirms that U.S. courts have rarely applied the systemic due process exception to refuse recognition and enforcement of a foreign judgment. Samuel P. Baumgartner & Christopher A. Whytock, *Enforcement of Foreign Judgments, Systemic Calibration, and the Global Law Market*, 23 THEORETICAL INQUIRIES IN LAW 119 (2022). Why do you think this is the case? Is the systemic due process exception necessary given that the 2005 Act includes case-specific exceptions that allow courts to refuse recognition and enforcement if "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment" or if "the specific proceedings in the foreign court leading to the judgment was not compatible with the requirements of due process of law"?

Chapter 8: Arbitral Awards

Page 693, add at the end of note 5:

For a recent decision considering this issue, see *Esso Exploration and Production Nigeria Limited v. Nigerian National Petroleum Corporation*, 40 F.4th 56 (2d Cir. 2022). In this case, the Second Circuit determined that the district court did not abuse its discretion in affording comity to Nigerian judgments setting aside arbitral awards. Following *Pemex*, the court concluded that "Esso has fallen short of its burden of showing that this is one of those rare cases presenting 'extraordinary circumstances' that are repugnant to notions of justice in the United States." *Id*. at 74. While the court noted that questions "may reasonably be raised" about the Nigerian court's legal conclusions, "our role in secondary jurisdiction is not to second-guess the Nigerian court's substantive determinations made under Nigerian law. We assess that court's rulings only so far as required to ascertain whether they are plainly incompatible with U.S. notions of justice." *Id*. After reading the case, consider the following question: Does the Second Circuit set the standard too high, or, in light of the New York Convention, is this the correct approach to the recognition and enforcement of awards annulled at the arbitral seat?

Page 694, add at the end of note 1:

What if an award debtor attempts to hide assets to thwart an award creditor's efforts to enforce an arbitral award? In *Yegiazaryan v. Smagin*, 599 U.S. 533 (2023), Smagin, who resided in Russia, received a multimillion dollar foreign arbitral award against Yegiazaryan, who resided in California. Smagin then filed an action in the Central District of California to recognize and enforce the award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Federal Arbitration Act. The District Court entered judgment against Yegiazaryan in the amount of the arbitral award plus interest. Smagin alleged that Yegiazaryan had meanwhile engaged in a pattern of criminal activity to prevent Smagin from satisfying the California judgment, in violation of the federal Racketeer Influenced and Corrupt Organizations Act (RICO) and sought actual damages as well as attorney's fees and treble damages as authorized under RICO. The District Court dismissed Smagin's RICO claim, holding that because he resided in Russia, his injury occurred in Russia, and that the application of RICO in his case was therefore impermissibly extraterritorial. The Ninth Circuit reversed and the Supreme Court affirmed, holding that a context-specific analysis showed that Smagin's injury was instead suffered in California, where his efforts to satisfy the California judgment were being intentionally hindered by Yegiazaryan's racketeering activity. See Chapter 1. How might the *Smagin* case affect the advice and assistance you might consider giving an award debtor who is resisting enforcement of a foreign arbitral award in a domestic enforcement action?

Chapter 9: Transnational Service of Process

Page 723, add at the end of note 3:

Email service under the Convention continues to divide district courts. *See Smart Study Co. v. Acuteye-US*, 620 F.Supp.3d 1382 (S.D.N.Y. 2022) (Convention does not allow service by email in China) (appeal dismissed as interlocutory, 2023 WL 3220461 (2nd Cir., May 3, 2023)): *Kadmon Corp. v. Limited Liability Company Oncon*, 2023 WL 2346340 (S.D.N.Y. 2023) (Convention does not allow service by email in Russia); *Teetex LLC v. Zeetex LLC*, 2022 WL 4096881 (N.D. Cal 2022) (Convention allows service by email in China); *Seasons 4 Inc. v. Special Happy, Ltd*., 2024 WL 3191796 (C.D. Cal. 2024) (same).

In 2024, a Special Commission of the Hague Conference concluded that service by email constitutes service by "postal channels" under Article 10(a) of the Hague Service Convention. If adopted by U.S. courts, what would be the implications of this conclusion? *See* Ted Folkman, *A Big Step Forward for Service by Email under the Hague Service Convention*, TRANSNATIONAL

LITIGATION BLOG, July 18, 2024, https://tlblog.org/a-big-step-forward-for-service-by-email-under-the-hague-service-convention/

Chapter 10: Alternative Forums

Page 746, add at the end of note 3:

Arguably in some tension with *Shi*, two courts of appeal upheld *forum non conveniens* dismissals in suits by a foreign plaintiff against U.S. corporations in their home jurisdictions. *Instituto Mexicano del Seguro Social v. Stryker Corp.*, 28 F.4th 732 (6th Cir. 2022) (applying doctrine in case involving alleged bribery in Mexico); *Instituto Mexicano del Seguro Social v. Zimmer Biomet Holdings, Inc.*, 29 F.4th 351 (7th Cir. 2022) (same). Both courts declined to apply a presumption in favor of the plaintiff's choice of forum. Is that the right approach? Should it have mattered in these cases that the plaintiff was a Mexican government entity?

In both *Stryker* and *Zimmer*, the plaintiff argued among other things that a treaty, the United Nations Convention against Corruption, requires U.S. courts to provide jurisdiction in bribery cases, overriding the *forum non conveniens* doctrine. Both courts found the treaty inapplicable on the basis of a Senate declaration that the treaty is non-self-executing (see Ch. 2.B.2.a of the text); the Sixth Circuit further held that the treaty in any event does not impose this requirement.

Page 753, add at the end of note 13:

A recent study found that 17 states apply different rules to *forum non conveniens* dismissals than do federal courts, including 6 that preclude the doctrine to some extent. *See* William S. Dodge, Maggie Gardner & Christopher A. Whytock, *The Many State Doctrines of Forum Non Conveniens*, 72 DUKE L.J. 1163 (2023). For an example of state court application of the *forum non conveniens* doctrine, see *Espinoza v. Evergreen Helicopters, Inc.*, 359 Or. 63 (2016) (suit against Oregon-based company based on helicopter crash in Peru).

Page 777, add at the end of note 3:

A divided panel of the Fifth Circuit followed the *Kaepa* approach in *Ganpat v. Eastern Pacific Shipping PTE, Ltd.*, 66 F.4th 578 (5th Cir. 2023), affirming a district court injunction against suit in India. As Judge Ho's majority opinion described the facts:

Kholkar Vishveshwar Ganpat, a citizen of India, worked as a crew member on the Stargate, a merchant ship managed by the Singapore based shipping company Eastern Pacific. When the Stargate stopped at Savannah, Georgia, in spring 2017, Eastern Pacific allegedly failed to stock up on anti-malarial medicine, despite warnings that the supply was low. Ganpat then contracted malaria in Gabon, the Stargate's next stop—and a predictably high-risk area for malaria. When the Stargate arrived at Rio de Janeiro, the stop after Gabon, Ganpat went to the hospital, where his gangrenous toes—a complication of malaria—were amputated.

In December 2018, Ganpat brought suit against Eastern Pacific in the Eastern District of Louisiana, alleging tort claims under the Jones Act and general maritime law, as well as contract claims arising from a collective bargaining agreement.

…

In March 2020—after Ganpat brought his complaint and Eastern Pacific consented to federal court jurisdiction, but before Ganpat perfected service—Eastern Pacific sued Ganpat in Goa, India. In the Indian suit, Eastern Pacific sought an anti-suit injunction to prevent Ganpat from litigating in American court.

The Indian court enjoined Ganpat from continuing his lawsuit in the United States. The court then issued an arrest warrant against Ganpat when he failed to comply. Police officers, accompanied by the court bailiff and an Eastern Pacific attorney, subsequently arrested Ganpat and brought him before the court.

As Ganpat's uncontradicted testimony shows, the post-arrest hearing was procedurally stacked against him. Eastern Pacific had multiple lawyers. He had none. What's worse, the judge instructed one of the Eastern Pacific attorneys to advise Ganpat. In response, the Eastern Pacific lawyer took Ganpat aside and pressured him to settle. The lawyer then lied to the judge, absurdly claiming that Ganpat opposed his own release on bail. Ganpat was then placed in a prison for violent criminals, where he was strip searched and held in a cramped cell.

In August 2021, back in the Eastern District of Louisiana, Ganpat sought an anti-suit injunction to prohibit Eastern Pacific from prosecuting its Indian suit against him. Finding the Indian litigation vexatious and oppressive, and determining that it need not show comity to the Indian court that had attempted to enjoin the American suit, the district court granted the injunction in favor of Ganpat.

Judge Jones' dissent began:

> This circuit, to be sure, takes a more permissive approach to foreign antisuit injunctions than many of our sister circuits. See Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 626–27 (5th Cir. 1996). Nonetheless, a foreign antisuit injunction is "an extraordinary remedy" fraught with "unique" concerns regarding international comity. Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 363, 364 (5th Cir. 2003). Yet the district court wheeled out this extraordinary remedy so that a sailor from India can sue a Singaporean ship management company under the Jones Act, claiming that he got malaria in Africa after his Liberian-flagged vessel docked briefly in Savannah, Georgia and received insufficient anti-malaria pills.

As grounds for reversing the injunction, she principally relied on comity:

> [I]nternational comity concerns here decidedly outweigh the need to "prevent vexatious or oppressive litigation" and "to protect the court's jurisdiction." To begin, India, Singapore, and Liberia are all signatories of the 2006 Maritime Labour Convention (MLC). … In accordance with its duties under the treaty, India promulgated a complex regulatory regime that governs the relationship among EPS, EPS India, and Ganpat…. Consequently, any decision regarding Ganpat's claims will … necessarily implicate an international treaty and foreign states' rules promulgated thereunder.
>
> Comity concerns, however, do not only arise where public international relations are at stake. Such a holding would place this court's precedent well outside the norm. Indeed, even circuits friendly to this court's approach to antisuit injunctions acknowledge there are "international-comity concerns inherent in enjoining a party from pursuing claims in a foreign court." 1st Source Bank v. Neto, 861 F.3d 607, 613 (7th Cir. 2017). Those inherent concerns are on full display here. In March 2020, seventeen months before service was perfected in the district court, the Indian court determined that it had jurisdiction over the dispute and the parties, was a convenient forum, and should temporarily enjoin Ganpat from his U.S. litigation. In April 2022, two years after the Indian court's order, the district court issued its foreign antisuit injunction in the face of Ganpat's ongoing disregard of the Indian court's order. Had Ganpat instead litigated on the merits in the Indian court, this case might have been concluded already, albeit on terms he might not have found attractive. But as noted above, the district court's injunction forced EPS and EPS India to dismiss the Indian action. In short, the district court's actions not only clashed "with the general principle that a sovereign country has the competence to determine its own jurisdiction and grant the kinds of relief it deems appropriate," but also "effectively attempt[ed] to arrest the judicial proceedings of another foreign sovereign." Karaha Bodas,

335 F.3d at 371, 372–73. The fact that the Eastern District of Louisiana maintains absolutely zero factual connection to the dispute only exacerbates the violation of comity.

For an overview of anti-suit injunctions, see RESTATEMENT OF THE LAW FOURTH, THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 425.

Page 792, add at the end of note 3:

In *Rostami v. Hypernet Inc*., 2023 WL 2717262 (N.D. Cal. 2023), plaintiff, a resident of Puerto Rico and the purchaser of cryptocurrency tokens, sued the seller, a Cook Islands corporation with its principal place of business in Northern California. The sales contract contained a forum selection clause selecting the courts of the Cook Islands, a small nation encompassing a group of remote islands in the South Pacific Ocean. The court upheld the clause and dismissed the action. Is that consistent with the *Liles* factors listed in note 3 of the text? What would you emphasize as counsel for the plaintiff? What would you emphasize as counsel for the defendant? What additional facts might you want to know? How would you have advised the plaintiff if you had been consulted prior to signing the contract? How would you have advised the defendant in that situation?

Page 792, add new note 3a:

3a. Exclusive versus Nonexclusive Forum Selection Clauses. Parties must assure that forum selection clauses are clearly stated to be exclusive if that is what is intended. In *Rivera v. Kress Stores of Puerto Rico*, Inc., 30 F.4th 98 (1st Cir. 2022), the parties' contract stated that "the parties agree to voluntarily submit to the jurisdiction of the Court of First Instance, Superior Court of San Juan." When the plaintiff sued in U.S. federal court instead, the district court dismissed on the basis of the forum selection clause, but the court of appeals reversed. In its view, the clause was not clearly exclusive and therefore should be treated as nonexclusive (meaning that the parties could, but were not required to, litigate in the San Juan Superior Court). Is that a sensible way to read the clause? How would you redraft the clause to assure exclusivity?

Page 797, add at the end of note 4:

Forum selection clauses may also be invoked against non-signatory defendants. In *General Electric International, Inc. v. Thorco Shipping America, Inc.*, 2022 WL 1748410 (S.D.N.Y. 2022), plaintiff General Electric sued Thorco (a U.S. entity) and its Danish parent. The U.S. company had signed a forum selection clause choosing U.S. courts but the Danish entity had not. The court

nonetheless held the Danish entity might be bound by the forum selection clause (and thus to have waived objections to lack of personal jurisdiction) because it was "closely related" to the signatory defendant. How is that situation different from the situation in *Raintree*? Is the result more or less problematic than the result in *Raintree*?

Page 798, add at the end of note 4c:

For a recent reaffirmation of the "closely related" doctrine, see *Franlink Inc. v. BACE Services, Inc.*, 50 F.4th 432 (5th Cir. 2022) (noting that the doctrine has been adopted by all circuits to consider the issue, although the application varies somewhat among circuits). However, a subsequent decision of the Sixth Circuit substantially challenged this consensus. The court first concluded that in a diversity action the application of a forum selection clause depended on the law governing the contract, which in turn depended on the choice-of-law rules of the forum state (there, Ohio). The court then concluded that Ohio choice-of-law rules would pick English law as the substantive law of the contract, and that English law did not recognize the "closely related" doctrine. As a result, the court refused to enforce the clause against a non-signatory. *Firexo, Inc. v. Firexo Group Limited*, 99 F.4th 304 (6th Cir. 2024). Does this seem like the correct analysis? Does it make application of forum selection clauses to third parties too complex and uncertain?

Chapter 11: Foreign Sovereign Immunity

Page 809, add at the end of note 8:

Does the FSIA apply to criminal prosecutions? The United States brought a criminal action against Turkiye Halk Bankasi, a Turkish state-owned bank, for money laundering. The Bank, citing *Amerada Hess*, argued that the prosecution could proceed only if there were an applicable FSIA exception to immunity. But 18 U.S.C § 3231 gives federal district courts "original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." Does that override the FSIA? In *Turkiye Halk Bankasi AS v. United States*, 598 U.S. 264 (2023), the Supreme Court ruled against the Bank, holding that the FSIA only applies to civil cases. Is that right? How would you argue otherwise? Might international law be relevant? Might international law be relevant even though the FSIA only applies to civil cases? What will the Bank argue on remand?

Page 828, add at the end of note 4:

Blenheim Capital Holdings Ltd. v. Lockheed Martin Corp., 53 F.4th 286 (4th Cir. 2022), held that the purchase of F-35 fighter planes by the South Korean military was not a commercial activity under the FSIA. In the court's view, the purchase was an "inherently sovereign activity" because – due to the nature of the products being purchased – the "transaction in this case was not the type of activity in which a private party could have participated." Is that consistent with *Weltover*? Despite an apparent conflict among the circuits, the Supreme Court denied certiorari in *Blenheim*. 2024 WL 3014478 (2024).

Page 837, add at the end of the second paragraph of note 6:

In *Federal Republic of Germany v. Philipp*, 592 U.S. 169 (2021), the Court held that the FSIA takings exception applies only to the taking of property of noncitizens, rejecting the conclusions of the D.C. Circuit in *Simon* and related cases.

On remand in *Simon*, the D.C. Circuit found that some of the plaintiffs plausibly alleged non-Hungarian citizenship, so their claims could go forward. *Simon v. Republic of Hungary*, 77 F. 4th 1077 (D.C. Cir. 2023). The court further held that the plaintiffs had plausibly alleged that "proceeds" of the takings were present in the United States (as required for an exception to the government's immunity under the FSIA) because the government of Hungary had commingled the proceeds with other government funds. According to the court:

> Requiring plaintiffs whose property was liquidated to allege and prove that they have traced funds in the foreign state's or instrumentality's possession to proceeds of the sale of their property would render the FSIA's expropriation exception a nullity for virtually all claims involving liquidation. Given the fungibility of money, once a foreign sovereign sells stolen property and mixes the proceeds with other funds in its possession, those proceeds ordinarily become untraceable to any specific future property or transaction. The Hungarian defendants' proposed rule could thus thwart most claims under the expropriation exception: A foreign sovereign would need only commingle the proceeds from illegally taken property with general accounts to insulate itself from suit under the expropriation exception. We decline to ascribe to Congress an intent to create a safe harbor for foreign sovereigns who choose to commingle rather than segregate or separately account for the proceeds from unlawful takings.

Id. at 1118. Rather, the court held, Hungary had the burden of proving that funds currently held by it in the United States did *not* trace back to the expropriated property. In 2024, the U.S. Supreme Court granted Hungary's petition for writ of certiorari to review this holding, with a decision

expected in 2025. 2024 WL 3089537 (2024). Do you see why this is a critical issue for litigation under the FSIA takings exceptions?

Page 839, add at the end of note 7:

However, as noted above, the Court decided the *Philipp* case on other grounds and did not reach the exhaustion issue. The D.C. Circuit subsequently reaffirmed its no-exhaustion rule, continuing the split with the Seventh Circuit. *De Csepel v. Republic of Hungary*, 27 F.4th 736 (D.C. Cir. 2022).

Page 850, add immediately before Subsection C:

Note: Consequences of Finding an FSIA Exception to Immunity:

FSIA Section 1606 provides:

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages…

In *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 596 U.S. 107 (2022), a continuation of the litigation excerpted on pp. 830-836 of the text, the court of appeals held that in litigation against an instrumentality of a foreign sovereign, choice-of-law rules would be supplied by federal common law rather than state law. Applying Section 1606, the Supreme Court unanimously reversed, finding that Section 1606 disallowed any special rules for litigation involving non-immune foreign sovereigns (apart from its express bar on punitive damages). Because a suit against a private art foundation would be governed by state choice-of-law rules, the Court held that Cassirer's suit against a state-owned art foundation must be governed by the same rules. As noted above, on remand the court of appeals applied California choice-of-law rules to conclude that the law of Spain governed the claim, resulting in a judgment for the defendant.

Note, however, that litigants suing non-immune foreign sovereigns must still overcome other procedural barriers that would apply in private litigation. For example, *Aenergy, S.A. v. Republic of Angola*, 31 F.4th 119 (2d Cir. 2022), involved a dispute over plaintiffs' investment projects in Angola. Although the foreign sovereign defendants were allegedly not immune under the FSIA's commercial activity exception, the court nonetheless upheld dismissal of the claims under the

doctrine of *forum non conveniens* (discussed in Ch. 10.A of the text), which also applies to private suits involving transnational injuries.

Page 860, add at the end of note 8:

On remand, the court of appeals applied the FSIA's commercial activity exception and found immunity for the International Finance Corporation because the plaintiffs' claims for tort injuries abroad were not "based on" the defendants' activities in the United States. *Jam v. International Finance Corporation*, 3 F.4th 405 (D.C. Cir. 2021). The Supreme Court denied a petition for writ of certiorari. 142 S. Ct. 2668 (2022).

Chapter 12: Foreign Affairs Limits on Transnational Litigation

Page 891, add at the end of note 7:

Applying *Kirkpatrick*, the Second Circuit rejected an act of state argument in *Celestin v. Caribbean Air Mail, Inc.*, 30 F.4th 133 (2d Cir. 2022). Plaintiffs alleged that the defendants had conspired with the President of Haiti and other government officials to fix prices for the delivery of mail and remittances from the United States to Haiti in violation of U.S. federal and state antitrust laws. The alleged conspiracy had been implemented though presidential decrees and other government action in Haiti. Defendants argued that the Haitian government rules and decrees were shielded by the act of state doctrine, but the court of appeals held otherwise, distinguishing between finding foreign government actions invalid and finding them illegal under U.S. law. According to the court,

> Under the act of state doctrine, U.S. courts may not declare the official acts of a foreign sovereign to be invalid. But the doctrine does not bar our adjudication of whether those same acts are wrongful under a cause of action properly brought before us. [citing *Kirkpatrick.*]

Is that what *Kirkpatrick* held? Is that approach required by *Kirkpatrick*? Is it consistent with *Kirkpatrick*? Is it consistent with *Sabbatino*?

Other courts have applied the act of state doctrine in antitrust cases on somewhat similar facts. *Compare Sea Breeze Salt, Inc. v. Mitsubishi Corporation*, 899 F.3d 1064 (9th Cir. 2018) (discussed on p. 892 of the text) (holding that the act of state doctrine barred claims against defendants for conspiring with Mexican officials to monopolize salt production).

Page 892, add at the end of note 9:

As noted above, in an antitrust case somewhat similar to *Sea Breeze*, the court found that the elements of the act of state doctrine were not satisfied. *Celestin v. Caribbean Air Mail, Inc.*, 30 F.4th 133 (2d Cir. 2022). Which is the better view?

Chapter 13: Transnational Discovery

Page 968, add new note 5a:

5a. Discovery and Data Protection Laws

Concern over protecting the privacy of personal data has prompted a number of jurisdictions to enact statutes prohibiting disclosure of personal information, which may increase potential conflicts with U.S. discovery orders. Examples include China's Personal Information Protection Law (PIPL) (enacted in 2021) and the European Union's General Data Protection Regulation (GDPR) (effective in 2018). Should U.S. courts be more hesitant to enforce discovery orders conflicting with these laws, as compared to the "blocking statutes" specifically targeting U.S. discovery? In *Owen v. Elastos Foundation*, 343 F.R.D. 268 (S.D.N.Y. 2023), purchasers of cryptocurrency tokens sued the seller, a Singaporean entity doing business in Shanghai, in U.S. court and sought discovery; the defendants resisted on the basis of China's PIPL. The U.S. court read the Chinese statute narrowly not to bar the discovery (disagreeing with the defendants' Chinese law expert) but in an alternate holding concluded that it would order discovery even if there were a conflict. The court in particular relied on its conclusions that China's interest in the data protection law was weak and that China had done little to enforce it.

Page 976, add at the end of note 3:

In *ZF Automotive US, Inc. v. Luxshare, Ltd*., 596 U.S. 619 (2022), the Supreme Court unanimously resolved the circuit split described in the text by holding that the phrase "foreign or international tribunal" in Section 1782 refers only to "an adjudicative body that exercises governmental authority" and not to a private arbitral panel or an arbitral panel established under a bilateral investment treaty.