DIRECT EFFECT JURISDICTION UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT: SEARCHING FOR AN INTEGRATED APPROACH

JOHN C. BALZANO*

Recent decisions by the United States Supreme Court as to the international reach of American antitrust and securities statutes have engendered significant debate about the appropriate extraterritorial application of federal law. Such debates have also slowly come to include some mention of the right application of state law beyond U.S. boundaries through long-arm statutes. The arguments of different commentators and jurists universally support careful consideration of the implications of prescribing a rule of U.S. law to foreign conduct, absent an appropriate basis in international law and practice. The time is now right, therefore, to consider how these debates affect a statute that combines federal and state law and potentially prescribes both of those sources of law abroad in the same action: The Foreign Sovereign Immunities Act (FSIA).

This Article discusses the "direct effect" provision under FSIA's commercial activities exception. It argues that the jurisprudence interpreting the appropriate reach of that provision has become confusing and unworkable, and advocates a reinterpretation in light of the ongoing larger discussion about extraterritoriality in the federal and state law contexts.

TABLE OF CONTENTS

INTRODUCTION 2
I. RELEVANT ASPECTS OF FSIA 6
II. THE DEBATE OVER EXTRATERRITORIALITY 9
A. General Principles under International Law 9

Copyright © 2013 by John C. Balzano.

* Visiting Assistant Professor, Boston University School of Law (2012–June 2013). I would like to thank Alexandra Roberts, Orly Rachmilovitz, Jeffrey Cohen, Robert Sloane, Tamar Frankel, Lilian Faulhauber, Daniela Caruso, David Walker, James Fleming, William P. Marshall, Wendy Gordon, Anna Di Robilant, and David Seipp and others who expressed helpful views at the presentation of this paper at Boston University School of Law. The views expressed herein are my own and do not represent those of any of the organizations with which I am or was affiliated.

B. The Debate in the Supreme Court 11
C. Scholarly Debate on Determining the Prescriptive Reach of Statutes Generally 19
D. Scholarship on FSIA's Direct Effect Provision..... 21
III. PHASES OF FSIA-EFFECTS LITIGATION IN THE U.S. COURTS..... 23
IV. RECONCEPTUALIZATION OF FSIA'S PRESCRIPTIVE REACH AND A PROPOSAL FOR INTEGRATION 40
A. Prescription of Foreign Conduct by U.S. Federal Foreign Sovereign Immunity Standards 41
B. Prescription of Foreign Conduct by Federal or State Law 48
CONCLUSION..... 50

INTRODUCTION

The extraterritorial application of U.S. law and regulation to conduct in another nation is neither a new[1] nor a simple matter.[2] The regulatory state and its influence over sensitive matters, such as personal finance, food and drugs, and Internet communications, coupled with the continued transnationalization of business and human relations, mean that countries must always be concerned with what goes on abroad and how it will affect the state and society in the United States.[3] Where and according to what law we will hold accountable those across sovereign boundaries who poison our food,[4] crash and spy on our computers,[5] steal our hard-earned

---

1. *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 355–57 (1909) (setting forth the circumstances in which the law of one sovereign may reach beyond its own borders).

2. Zachary D. Clopton, *Extraterritorality and Extranationality: A Comparative Study*, 23 DUKE J. COMP. & INT'L L. 217 (similarly defining extraterritoriality and noting how the increase in transnational interactions makes it of greater importance).

3. *See, e.g.*, Penguin Grp. (USA) Inc. v. Am. Buddha, 640 F.3d 497 (2d Cir. 2011) (holding that the situs of injury of copyright infringement is satisfied where infringement occurred via the Internet and was available to anyone in New York state with an Internet connection, despite the lack of any evidence that the work in question was downloaded).

4. *See, e.g.*, INST. OF MEDICINE, REPORT BRIEF: ENSURING SAFE FOODS AND MEDICAL PRODUCTS THROUGH STRONGER REGULATORY SYSTEMS ABROAD (2012) (discussing emerging global standards and practices on food safety), *available at* http://www.iom.edu/~/media/Files/Report%20Files/2012/Ensuring-Safe-Foods-and-Medical-Products-Through-Stronger-Regulatory-Systems-Abroad/safefoodmeds_rb.pdf; *see also* Stephanie Glynn, Note, *Toxic Toys and Dangerous Drywall: Holding Foreign Manufacturers Liable for Defective Products – the Fund Concept*, 26 EMORY INT'L L. REV. 317, 318 (2012) ("[B]ecause the current legal system makes it virtually impossible for U.S. plaintiffs to sue Chinese manufacturers, legal redress is limited or nonexistent for the majority of these consumers. Three primary procedural hurdles—personal jurisdiction, service of process, and enforcement of the judgment—prevent suits against Chinese manufacturers.").

5. *See, e.g.*, MacDermid, Inc. v. Deiter, 702 F.3d 725, 729–31 (2d Cir. 2012) (exercising personal jurisdiction over a Canadian resident for accessing a server in Connecticut); CYBERsitter, LLC v. China, No. CV 10-38-JST (SHx), 2010 U.S. Dist. LEXIS 128345, at *2–3 (C.D. Cal. Nov. 18,

savings,[6] and even break our hearts[7] are by no means insignificant questions. Nor, for that matter, are they questions that our legal system is close to answering. For these reasons, debates over the extraterritorial application of statutes and extension of court jurisdiction[8] have been very significant over the last several years, particularly in the areas of federal employment law,[9] antitrust,[10] and securities statutes.[11]

These federal statutes are not the only ones to engender such controversy. The extraterritorial provision of the commercial activities exception of the Foreign Sovereign Immunities Act of 1976 (FSIA)[12] has also led to hundreds of judicial opinions over the last thirty-six years and a great deal of confusion and debate. Specifically, the provision (hereinafter the "direct effect provision"), which allows for jurisdiction and suit over a foreign sovereign or related entity when a commercial activity abroad

---

2010) ("Plaintiff CYBERsitter, LLC d/b/a Solid Oak Software ('Solid Oak') filed suit against the People's Republic of China ('PRC') et al. for misappropriation of trade secrets and copyright infringement for allegedly copying nearly 3,000 lines of code from Solid Oak's software program 'CYBERsitter' and disseminating it to tens of millions of end users in China. Defendant Sony Corporation, joined by Defendants Acer, Inc., BenQ Corporation, and ASUSTeK Computer, Inc. ('Taiwanese Defendants'), moves to dismiss the action on the grounds of forum non conveniens because California is an inconvenient forum and the dispute should be heard in China." (citation omitted)).

6. *See, e.g.*, Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 814 (6th Cir. 2002) (plaintiff was a victim of a scam run by individuals in Nigeria).

7. *See, e.g.*, *In re* Marriage of Kimura, 471 N.W.2d 869, 871 (Iowa 1991) (adjudication of the dissolution of a marriage with only one party domiciled in U.S. forum).

8. The lines between inquiring into prescriptive jurisdiction (whether a law-making body was within its authority to and did intend to prescribe conduct abroad), subject matter jurisdiction (whether a court has power over the substance of a particular suit), and personal and/or in rem jurisdiction (whether a court has power over the relevant persons and their property) are not well defined, particularly in terms of intrusion into the domain of another sovereign. The questions of whether, for example, a court applies U.S. law to conduct that occurred in France and/or whether it exercises jurisdiction over French citizens and juristic persons, applying either U.S. or French law in a U.S. judicial forum governed by U.S. procedural rules, may both result in an intrusion into the territorial jurisdiction of another sovereign. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2786–87 (2011) ("The Due Process Clause protects an individual's right to be deprived of life, liberty or property only by the exercise of lawful power . . . . This is no less true with respect to the power of a sovereign to resolve disputes through judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere.") This piece seeks to answer whether these extensions are justified in the FSIA context, and, in doing so, it also seeks to sharpen the lines between personal jurisdiction and prescriptive jurisdiction in the FSIA context.

9. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C. and 42 U.S.C.) (discussing the extraterritorial reach of the Civil Rights Act of 1964).

10. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

11. *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2879 (2010).

12. Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.).

causes "a direct effect in the United States," has led courts to struggle with related larger issues, such as those of extraterritoriality, under both international and U.S. law and the procedural due process concerns of reaching beyond sovereign borders without the defendant having a relevant and reasonable connection to the forum in which the litigation is brought.[13]

Federal Courts of Appeals have tried numerous methods to add meaning to the direct effect provision in FSIA, a provision which is textually rather bare-bones. The potential breadth with which the direct effect provision could be read, given its sparse language, appears to trouble the courts, leading them to consider the territorial limits on other types of statutes. Courts have tried to use analogs from jurisprudence interpreting state long-arm statutes, the minimum contacts due process analysis developed by the Supreme Court, the standards for extraterritorial effects jurisdiction under the Restatement (Third) of Foreign Relations (i.e., international law), and, more recently, a "legally significant act" test created for FSIA itself from the raw materials of the aforementioned doctrines.[14] A review of approximately 500 cases that were litigated to opinion in the federal district and appellate courts concerning the direct effect provision, conducted by the author, shows that nearly all of these attempts have degenerated into a morass of confusion. Some of the latest cases highlight just how difficult the legally significant act test is to apply.[15]

Courts have repeatedly acknowledged how confusing the language in FSIA is on a number of fronts,[16] but few have acknowledged just how complex a statute it is as well. Take the direct effect provision, for example. There, a court is seemingly asked to consider one question—whether a relevant act abroad has a direct effect in the United States such that it is appropriate for a court to hear the case—in a context in which a court might typically consider several other weighty questions, such as whether it has subject matter and personal jurisdiction over the defendant and whether federal or state law should apply to the foreign conduct at issue. Add to that another layer of complexity: the implications (foreign

---

13. *See infra* Part III.

14. *See infra* Part III (discussing analogies to those doctrines and the development of the legally significant act test).

15. *See infra* Part III.

16. *See, e.g.*, Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1105 (S.D.N.Y. 1982) (describing FSIA as "a six-year-old statutory labyrinth that, owing to the numerous interpretive questions engendered by its bizarre structure and its many deliberately vague provisions, has during its brief lifetime been a financial boon for the private bar but a constant bane of the federal judiciary").

policy or otherwise) of permitting such a suit against a foreign sovereign.[17] Refining that many serious questions into a superficial textual inquiry is not conducive to resolving that problem effectively.

FSIA is a statute riddled with contradictions and conflicts. On the surface it appears to rest on a simple premise and put a very simple task to the courts: treat a private-acting sovereign-connected entity just as any other private defendant entity. Within the web of its provisions, however, FSIA tinkers endlessly with the procedural framework of the run-of-mill lawsuit that would exist between private entities under state or federal substantive law. While the Statute strives to treat the foreign state on a plane of equality with private parties,[18] it ultimately makes such unity impossible and therefore requires frustrating compromises regarding typical conceptions of official accountability and social justice.[19]

The crux of the problem is as follows. The Supreme Court has made congressional intent, analyzed through the lens of a presumption against extraterritoriality, the foundation of the analysis of the extraterritorial reach of a statute, but it has also employed a grab bag of considerations under the heading of "comity concerns" to permit judicial restraint.[20] In the FSIA context, however, the Court's decision in *Republic of Argentina v. Weltover, Inc.* prevents the operation of any of the nuance of this approach by focusing heavily on FSIA's words in a brand of ardent textualism that has become more common in FSIA cases.[21] But a simple textualist rule cannot solve the complex debate that preceded that rule over whether courts should analyze the direct effect provision in terms of Congressional

---

17. *See, e.g.*, Blackfeet Nat'l Bank v. Nelson, 171 F.3d 1237, 1244 n.10 (11th Cir. 1999) (describing FSIA as addressing an issue, foreign sovereign immunity, of "paramount national concern"); *see also* Stephens v. Nat'l Distillers Chem. Corp., 69 F.3d 1226, 1232–33 (2d Cir. 1995) (noting same); Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1174–76 (2007) (discussing the cost-benefit analysis and separation of powers concerns that animate courts' decisions to use various international comity-related doctrines to defer or decline to defer to foreign interests in litigation under U.S. statutes, one of which is FSIA, with an extraterritorial element).

18. Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 613–15 (1992).

19. One of the worst compromises into which Congress has forced litigants against foreign states is created by the fact that FSIA's scope of immunity for suit and for execution and attachment are incongruent. FSIA may provide jurisdiction for suit without providing the ability for a plaintiff to collect on its judgment. *See* FG Hemisphere Assocs., LLC v. Dem. Rep. Congo, 637 F.3d 373, 377 (D.C. Cir. 2011) (noting that FSIA may provide a right without a remedy because "[t]he FSIA is a rather unusual statute that explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the foreign state holds certain kinds of property subject to execution.").

20. *See infra* Part II.

21. *See* 504 U.S. at 611. *See also infra* Part III (discussing *Weltover* and the implications of its holding); *infra* note 215 (discussing this textualism).

intent or principles circumscribing their power to adjudicate a case.[22] This divergence from other extraterritoriality jurisprudence is particularly troubling because FSIA litigation raises the same fundamental issue that makes most types of "transnational litigation" unique: concern over the insults to sovereignty that may occur when litigation crosses national boundaries. FSIA is doubly problematic in this regard because it potentially regulates foreign conduct through both a federal immunity standard and a state law standard embodied in a civil cause of action. This Article argues that, in light of these complexities, a reinterpretation of FSIA by the Supreme Court is needed to classify its reach under the direct effect provision as a question of legislative or prescriptive jurisdiction,[23] to bring it into line with the other extraterritoriality cases, and to clarify the nature and quality of the "effect in the United States" required. Such a reinterpretation would include a turn away from unproductive textualism and move to a more informed exercise of statutory construction and consideration of implicit international comity concerns.

This Article proceeds in four parts. In the first part, it discusses the relevant mechanics of FSIA. In the second part, it briefly examines international practice, Supreme Court precedent, and the literature surrounding extraterritorial jurisdiction generally as well as the little literature that exists on FSIA's direct effect provision. This part begins to situate FSIA within the larger debate over how courts should analyze the extraterritorial reach of federal statutes. The third part examines the long history of how the direct effect provision has been interpreted and handled by courts. In this part, the Article argues that the legally significant act test, which the Second Circuit designed for the direct effect provision, is neither helpful nor supported by the language of FSIA and that, consequently, that test should be discarded in future cases. The fourth part draws on the conclusions reached by courts and scholars to argue for the approach summarily described in the preceding paragraph.

I. RELEVANT ASPECTS OF FSIA

It is not necessary to repeat a broad and in-depth discussion of the history, purposes, and structure of FSIA. For current purposes, only a few facts are necessary. First, FSIA begins with a broad general rule that foreign states are immune from the jurisdiction of the U.S. courts unless one of a number of exceptions applies.[24] I have previously argued that the

22. *See infra* Part III.

23. *See supra* note 8 (defining prescriptive jurisdiction).

24. 28 U.S.C. §§ 1604, 1605–07 (2012). There are nine exceptions under FSIA: waiver,

"jurisdiction" discussed in FSIA's opening section is civil jurisdiction and that FSIA does not grant immunity from the criminal jurisdiction of the courts.[25]

FSIA creates original and valid federal subject matter and in personam jurisdiction in the district courts to hear these civil claims,[26] and it provides for a right of removal for claims that are brought in state court.[27] FSIA's exceptions are meant to primarily encompass activities that are private and non-sovereign in nature, although a few of the activities that form the basis for the exceptions do not fit that description.[28] The provision on which this Article focuses is embedded within the "commercial activities" exception.[29] Although the term "commercial" itself is not defined within the statute, a feature that has frustrated many judges,[30] the term "commercial activity" is defined in FSIA as "a regular course of commercial conduct or a particular commercial transaction or act,"[31] and the Statute also provides some guidance by demanding that the commercial character of the activity at issue be decided based not on the activity's purpose but rather upon its nature.[32]

FSIA then offers three different exclusive scenarios in which the commercial activities of a foreign state might be adjudicated by U.S. courts.[33] In all cases the claim must be "based upon" the relevant activity abroad or in the United States.[34] But, each scenario requires a nexus to the United States. The first scenario involves the foreign state simply conducting commercial transactions in the United States.[35] The second scenario involves the foreign state committing an act, not necessarily

---

commercial activities, non-commercial torts in the United States, expropriation, arbitral award enforcement, counterclaims, terrorist activities, and rights in property gifts or other inherited property in the United States, and maritime lien enforcement.

25. John Balzano, *Crimes and the Foreign Sovereign Immunities Act: New Perspectives on an Old Debate*, 38 N.C. J. INT'L L. & COM. REG. 43 (2012).

26. 28 U.S.C. § 1330(a)–(b) (2012). *See also* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983) (affirming FSIA's constitutionality as a jurisdictional statute).

27. 28 U.S.C. § 1441(d) (2012).

28. *Id.* § 1605(a); John Balzano, *A Hidden Compromise: Qualified Immunity in Suits Against Foreign Governmental Officials*, 13 OR. REV. INT'L L. 71, 77 (2011) (noting that the terrorism exception and the expropriation exceptions to FSIA do not necessarily fit into the private activities paradigm).

29. 28 U.S.C. § 1605(a)(2).

30. *See infra* Part III (discussing that frustration in the context of the *Weltover* case).

31. 28 U.S.C. § 1603(d) (2012).

32. *Id.*

33. *Id.* § 1605(a)(2).

34. *Id.*

35. *Id.*

commercial in nature, in the United States "in connection with" a commercial activity that it is carrying on outside U.S. borders.[36] And finally, the provision with which this article is concerned allows for adjudication of acts abroad connected to commercial activity abroad if it has a "direct effect" in the United States.[37] Specifically, the direct effect provision states that immunity is lifted if "the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes *a direct effect in the United States.*"[38] Because these provisions require that the commercial activity or related acts be the basis for the action and not that the action must sound in commercial law, they can apply to both contract and tort actions.[39]

Although the FSIA rule on foreign sovereign immunity itself is a federal codification of international law,[40] the contract or tort cause of action against the foreign state may be a question of state substantive law. The court may thus be applying state substantive law to foreign commercial conduct. For this reason, courts struggling with the direct effect provision have analogized it to a long-arm statute.[41] This analogy, as the discussion below will illustrate, has created confusion between courts over the distinction between prescribing behavior and exercising jurisdiction over people and assets.

In addition, Congress included a statutory grant of personal jurisdiction in FSIA. Specifically, 28 U.S.C. § 1330(b) grants personal jurisdiction over the foreign state defendant as long as that defendant was served in accordance with FSIA's rules on service and one of the exceptions to immunity applies.[42] This statutory structure, however, does not answer the question of whether the exercise of jurisdiction must comply with due process standards, particularly given the unique character and variation of defendants under FSIA. Sometimes the defendant is the foreign state proper, and sometimes the defendant is an ordinary state-owned enterprise.[43] This structure has become relevant to the

---

36. *Id.*

37. *Id.*

38. *Id.* (emphasis added).

39. *See, e.g.*, Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (allegations of intentional torts under commercial activity exception); *see also* 28 U.S.C. § 1605(a)(5) (a non-commercial tort exception that covers any torts that are not covered in 28 U.S.C. § 1605(a)(2)'s commercial activities exception).

40. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 497–98 (1983).

41. *See infra* note 146.

42. 28 U.S.C. § 1330(b) (2012).

43. *See, e.g.*, Shapiro v. Republic of Bol., 930 F.2d 1013, 1018–20 (2d Cir. 1991) (concluding that the FSIA requires that due process be satisfied but that the standard is different from that for

interpretations of the direct effect provision.[44]

In interpreting FSIA, courts have used various tools, including the language of the statute, the legislative history, and the content of both international law and federal common law, both at the time of FSIA's enactment and beyond. They have also used analogies from cases concerning entirely domestic law issues. It will become apparent during the discussion of the history of cases interpreting the direct effect provision in FSIA that this collection of interpretive techniques has led courts down a highly confusing and dynamic path without producing any sort of comprehensive solution. This Article will show that it is perhaps this failure of courts to think about FSIA's direct effect provision within the larger conceptual context of extraterritoriality debates that has led jurisprudence interpreting this provision down such an unproductive road.

II. THE DEBATE OVER EXTRATERRITORIALITY

A. General Principles under International Law

As a principle of international law, the widely acknowledged "territoriality principle" provides that a state has plenary jurisdiction over activity that takes place within its national territory.[45] But there are circumstances, some more accepted internationally than others, in which a state exercises regulatory powers over events, people, or things that are outside its borders. One of the more accepted bases for such an extension is nationality, whether of natural persons or juridical (corporate) persons. There are important examples of this citizenship-based principle in certain provisions of the Foreign Corrupt Practices Act and the Civil Rights Act of 1991, which hold U.S. corporations accountable for their behavior in other countries.[46]

As a corollary to that principle, an action or transaction abroad that creates an "effect" within a jurisdiction is a basis for extraterritorial application, albeit at times still a controversial one.[47] Debates about effects

---

permitting subject matter jurisdiction: "[a]s noted, the 'substantial contact' standard for subject matter jurisdiction under the commercial activity exception of Section 1605(a)(2) requires a closer nexus than the 'minimum contacts' necessary for due process.").

44. *See infra* Part III.

45. *See* Pennoyer v. Neff, 95 U.S. 714, 720 (1878) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum . . . an illegitimate assumption of power . . . ."); *see also* THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS 35–36 (Dieter Lange & Gary Born eds., 1987).

46. 15 U.S.C. § 78dd-2 (2012); 42 U.S.C. § 2000e-1(a) (2012).

47. EXTRATERRITORIAL APPLICATION, *supra* note 45, at 36–37. Another, more controversial,

jurisdiction have been prominent in the antitrust context.[48] This basis is controversial because the effects-based jurisdiction threatens to drag entities into conflicts between standards for liability in different countries.[49] The direct effect provision incorporates into FSIA the controversial effects basis for extraterritorial jurisdiction under international law. Yet, despite being controversial, effects-based jurisdiction under U.S. law seems to be more and more common. It has been employed in antitrust, export control, import regulation, and securities regulation (until recently) contexts, and, perhaps most commonly, it has been employed through nearly all of the state long-arm statutes that, in conjunction with due process standards, can permit a state court to exercise jurisdiction and, if the conflicts analysis so indicates, to apply state law to out-of-state activity that causes an effect in the jurisdiction.[50]

One "helpful"[51] summary of the U.S. view of the nature and quality of the effect necessary to legitimize extraterritorial prescription has been developed in the Restatement (First) of Conflict of Laws[52] and subsequently in the Restatements of the Law on Foreign Relations. Some concepts of international balancing also find their way to a lesser extent into the Restatement (Second) on Conflict of Laws, which controls choice of law inquiries that can lead to the application of state law to foreign conduct.[53] The Restatement (Second) of Foreign Relations—in existence at

---

basis for extraterritorial jurisdiction is the passive personality principle, in which a state asserts jurisdiction over conduct abroad because the *victim* of that conduct is one of its nationals. *E.g.*, 28 U.S.C. § 1605A(a)(2)(ii) (2012). This basis has been invoked for victims of terrorist attacks. *Id.*

48. *See infra* Part II.B (discussing antitrust jurisprudence).

49. *See infra* Section II.B. (discussing how the Supreme Court has tried to avoid conflicts with the laws of other nations as part of its adjudication of effects jurisdiction in antitrust cases).

50. EXTRATERRITORIAL APPLICATION, *supra* note 45, at 38–39.

51. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1673 (2013) (Breyer, J., concurring). The restatements of law on foreign relations are not best described as *the* source of international law, although they are perhaps a good summary of U.S. views on the matter. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817–18 (Scalia, J., dissenting) (relying on the Restatement (Third) of Foreign Relations to resolve issues of extraterrioriality); *see also* Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 LAW & CONTEMP. PROBS. 11, 12–13 (Summer 1987) (describing the approach of the Restatement (Second) of Conflict of Laws to issues of extraterritorial application of laws). It is also notable, because of the changes in the law that this Article will discuss, that the American Law Institute has begun work on the Restatement (Fourth) of Foreign Relations, which will, *inter alia*, consider issues of foreign sovereign immunity and extraterritoriality. *Current Projects: Restatement Fourth, The Foreign Relations Law of the United States*, AM. LAW INST., http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=28 (last visited Sept. 4, 2013).

52. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 65 (1934). The restatement gave jurisdiction both to the state where the acts were committed and to the state where the consequences were felt. *Id.*

53. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969) (requiring courts to consider the needs of the international system when deciding which law to apply).

the time that Congress enacted FSIA—gives four conditions for extraterritorial prescription: (1) the conduct must be relevant to the cause of action, (2) the effect must be "substantial," (3) the effect must be a foreseeable consequence of such conduct, and (4) the cause of action must not be "inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems."[54] Under the Restatement (Third), the relevant basis for prescriptive jurisdiction is conduct that is "intended to have or has a substantial effect" inside a given state's territory,[55] but that exercise of jurisdiction must also be assessed as "reasonable" by evaluating a list of factors that includes the substantiality, directness, and foreseeability of the effect; other relevant connections with the forum; and other considerations that are tantamount to a balancing of different states' interests in regulating the conduct at issue.[56]

B. The Debate in the Supreme Court

In U.S. federal court jurisprudence, the primary debate over extraterritoriality has been about the reach of federal statutes.[57] Congress has the power to regulate some conduct occurring abroad as part of its prescriptive jurisdiction. Unlike the assertion of court jurisdiction over persons and things abroad,[58] Congress's prescriptive jurisdiction is seemingly not subject to any established constitutional limits,[59] although some commentators believe that it should be constrained by due process.[60]

---

54. RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 18 (1965).

55. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403 (1987).

56. *Id.* § 404. As one scholar notes about the Restatements of Foreign Relations: "[T]he Restatement of Foreign Relations Law seems to indicate that its dictates of international law are American in origin." Brilmayer, *supra* note 51, at 12. Part IV, *infra*, will argue that the breadth of accepted international norms should perhaps not be based so narrowly on the Restatement.

57. I do not claim, of course, that this debate begins and ends with the cases below. They do, however, represent, a good cross-section of the Court's jurisprudence and the concerns that have played into its analysis of the reach of such a statute.

58. *See, e.g.*, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 413 (1984) (holding that due process standards for personal jurisdiction apply to parties in foreign nations).

59. *See* Lauritzen v. Larsen, 345 U.S. 571, 579 n.7 (1953) (noting that construing a statute as applying domestically is different from recognizing a limit on Congress's power to legislate that far and treating the question of application of a statute as one of intent and not as one of limits). Of course, in enacting statutes, Congress must act pursuant to an enumerated power. In that respect, the direct effect provision of FSIA's commercial activity exception stands in good stead because it is, as is FSIA itself in part, a clear exercise of Congressional power to regulate commerce with foreign nations. *See* U.S. CONST., art. I, § 8, cl. 3 (authorizing Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"; *see also* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (implying that Congress could punish conduct occurring solely abroad between foreign parties in violation of the law of nations provided that it is clear in this desire).

60. *See* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1223 (1992) ("It is our thesis that the Fifth Amendment Due Process

In the absence of specific limits, whether Congress acts in an unruly fashion when prescribing foreign conduct or whether it generally exercises its powers in congruence with the principles of international law is debatable.[61] The Supreme Court, however, has been willing to give Congress wide latitude in this respect.[62]

In interpreting a statute to reach conduct abroad, the Supreme Court has used different interpretive tools separately or in combination, including a presumption against extraterritoriality, standard tools of statutory interpretation (text, history, and purposes), recognized principles of international law relating to extraterritorial jurisdiction, conflicts with foreign regulation, multiple regulation concerns, and additional comity concerns. But apart from direct, irreconcilable conflicts, the Court has treated these inquiries more as methods of statutory interpretation than as conclusive rules or presumptions with precedential effect. This may be, in part, because of the dynamic nature and trajectory of global transactions and commerce. It may also be because circumstances have differed in such a way that the perceived dangers of foreign relations problems and the desire to preserve the international order[63] have led the court to opt for a more flexible approach.[64]

Clause limits federal actions in much the same manner that the Fourteenth Amendment Due Process Clause limits state actions. Although no Supreme Court case explicitly discusses and adopts this proposition, little or no authority exists to the contrary. When the Supreme Court finally *does* address this question, we believe the proper answer is clear: Fifth Amendment limits extraterritorial application of federal substantive law."); *see also* United States v. Davis, 905 F.2d 245, 248 (9th Cir. 1990) ("Only two restrictions exist on giving extraterritorial effect to Congress' directives. We require Congress make clear its intent to give extraterritorial effect to its statutes. And secondly, as a matter of constitutional law, we require that application of the statute to the acts in question not to violate the due process clause of the [F]ifth [A]mendment" (citations omitted)).

61. *See* A.V. LOWE, EXTRATERRITORIAL JURISDICTION: AN ANNOTATED COLLECTION OF LEGAL MATERIALS xv (1983) ("The United States of America is much the most prominent of the claimants to extraterritorial jurisdiction, although it is by no means the only one.").

62. *See, e.g.*, Steele v. Bulova Watch Co., 344 U.S. 280, 283 (1952) (permitting a U.S. court to enjoin actions that took place in Mexico over objections by the dissent that such an action would intrude on Mexico's sovereignty).

63. Justin Desautels-Stein, *Extraterritoriality, Antitrust and the Pragmatist Style*, 22 EMORY INT'L L. REV. 499, 537 (2008).

64. The Fourth Circuit has so observed in the antitrust context. *See* Dee-K Enterprs., Inc. v. Heveafil Sdn. Bhd, 299 F.3d 281, 294 (4th Cir. 2002) ("[T]he Supreme Court's jurisdictional analysis has emphasized above all else the effects, i.e., the intended location, actual location, and magnitude of those effects. Quite simply, the Supreme Court has moved away from its earlier doctrine focused solely on the location of acts. . . . Instead of the parties' bright-line rules, we believe a court should properly engage in a more flexible and subtle inquiry. In determining which jurisdictional test . . . applies, a court should consider whether the participants, acts, targets, and effects involved in an asserted antitrust violation are primarily foreign or primarily domestic. This inquiry will best accommodate the cases with mixed fact patterns, defying ready categorization as 'foreign' or 'domestic' conduct, which our increasingly global economy will undoubtedly produce. We cannot begin to foresee the scope or

Four major cases warrant consideration to illustrate this approach. In the first case, *Hartford Fire Insurance Co. v. California*, the defendants were U.S. and foreign insurers in London that allegedly conspired to pressure certain primary insurers to change the terms of their commercial general liability insurance policies to be favorable to the defendants.[65] The Foreign Trade Antitrust Improvement Act (FTAIA) demonstrates Congress's intent with respect to the Sherman Act's extraterritorial reach by permitting its application to conduct having a "substantial" effect on U.S. commerce.[66] The extraterritoriality question that the Supreme Court of the United States faced, however, was whether the Sherman Act applied to the London insurers' foreign conduct on the basis of comity concerns.[67] The Court rephrased the question more narrowly as whether it should refuse to apply the Sherman Act to conduct that produced a substantial effect in the United States out of concern that it might interfere with the sovereign prerogatives of the British government to regulate or encourage anti-competitive conduct that is illegal in the United States.[68]

Taking an approach to the comity analysis that commentators have criticized,[69] the Court declined to balance any interests involved in permitting or forbidding the application of U.S. antitrust law abroad and instead opined only on whether the exercise or conferral of jurisdiction would create a "true conflict between domestic and foreign law."[70] The

---

complexity of future transactions. To adopt the simplistic rules the parties favor might well yield unintended and unfortunate results." (citation omitted)); *see also* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 543–44 (1987) (adopting a case-by-case approach to questions of conflicting discovery practices).

65. 509 U.S. 764, 775–76 (1993).

66. *Id.* at 796 n.23 ("Under § 402 of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), the Sherman Act does not apply to conduct involving foreign trade or commerce, other than import trade or import commerce, unless 'such conduct has a direct, substantial, and reasonably foreseeable effect' on domestic or import commerce. The FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy, and it is unclear how it might apply to the conduct alleged here. Also unclear is whether the Act's 'direct, substantial, and reasonably foreseeable effect' standard amends existing law or merely codifies it. We need not address these questions here. Assuming that the FTAIA's standard affects this litigation, and assuming further that that standard differs from the prior law, the conduct alleged plainly meets its requirements." (citations omitted)).

67. *Id.* at 779 n.9 ("The question presented in No. 91-1128 is: 'Did the court of appeals properly assess the extraterritorial reach of the U.S. antitrust laws in light of this Court's teachings and contemporary understanding of international law when it held that a U.S. district court may apply U.S. law to the conduct of a foreign insurance market regulated abroad?'").

68. *Id.* at 798–99.

69. *E.g.*, HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS 79–83 (2008) (also noting the breadth of the *Hartford Fire* standard)..

70. *Hartford Fire*, 509 U.S. at 798 (quoting Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 543–44 (1987) (Blackmun, J., concurring in part and

majority and the dissent disagreed about whether this was a question subject matter or prescriptive jurisdiction.[71] Provided that a person in each state could comply with the regulations of both countries, there was no true conflict "even where the foreign state has a strong policy to permit or encourage such conduct."[72]

In dissent from this conclusion, Justice Scalia acknowledged Congress's "broad power" to "make laws applicable to persons beyond our territorial boundaries where United States interests are affected."[73] Rather than analyzing whether there was a true conflict, however, Scalia saw the question as one of the exercise of prescriptive jurisdiction and congressional intent: whether Congress had in fact meant to assert regulatory power over the challenged conduct.[74] In making this determination, he employed an analysis that was much more flexible than one might expect for the purportedly rigid exercise of statutory interpretation. First, he utilized two "canons of statutory construction": the presumption that unless otherwise stated Congress intends legislation to apply only within U.S. territory (the presumption against extraterritoriality) and the presumption that statutes should not be interpreted to regulate foreign conduct if such an interpretation would violate international law (also known as the *Charming Betsy* canon).[75] Scalia concluded that the presumption against extraterritoriality was overcome with regard to antitrust statutes but that principles of prescriptive comity—the respect that legislatures are presumed to have for other sovereigns in limiting the reach of statutes—constrained the reach of the Sherman Act under the *Charming Betsy* canon.[76] Deriving the standard for extraterritorial prescriptive jurisdiction under international law from the Restatement (Third) of Foreign Relations, Scalia found the question to be one of "reasonableness."[77] Analyzing a number of factors under the Restatement's framework,[78] Scalia concluded that regulating the conduct of

---

dissenting in part)).

71. *Id.*

72. *Id.* at 799.

73. *Id.* at 813–14 (Scalia, J., dissenting).

74. *Id.*

75. *Id.* at 814–16.

76. *Id*. Comity, i.e., respect for the laws and legal system of another co-equal sovereign, is a loosely defined, discretionary judicial canon that allows a court to exercise restraint where its prescriptive or jurisdictional intrusion into the affairs of another nation would be too extensive. Donald Earl Childress, III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 13–14 (2010).

77. *Id.* at 817–19.

78. *Id.* at 818–19 ("The 'reasonableness' inquiry turns on a number of factors including, but not

the London insurers would be unreasonable.[79] The defendants were British, and the alleged wrongdoing occurred in the United Kingdom, which had set forth a comprehensive regulatory scheme governing the conduct in this area.[80] Therefore, the United Kingdom's interest in regulating the conduct was paramount.[81]

In *F. Hoffman-La Roche Ltd. v. Empagran S.A.* (*Empagran*),[82] the Court injected some of the considerations in Justice Scalia's *Hartford Fire* dissent into the analysis of the reach of the Sherman Act. *Empagran* once again involved an interpretation of the FTAIA, which requires (1) a "direct, substantial and reasonably foreseeable effect" on domestic commerce in the United States that (2) gives rise to a Sherman Act claim.[83] The case involved one of the largest global antitrust conspiracies ever litigated: a price-fixing conspiracy by foreign and domestic manufacturers and distributors of vitamins.[84] The defendants sought dismissal of the claims of foreign purchasers of vitamins, which were based on foreign purchase transactions allegedly "entirely outside of U.S. commerce."[85]

Beginning its analysis by stating the presumption against extraterritoriality, the Court then framed its analysis with the idea of "prescriptive comity."[86] It reasoned that in cases involving a foreign injury separable from a domestic injury, U.S. law should not "supplant" the laws of other nations, such as the United Kingdom, Japan, or Canada, that concern the best way to deal with anticompetitive conduct within their jurisdiction.[87] Careful to carve out the reach of laws governing the conduct of American companies abroad, e.g., Title VII and the Foreign Corrupt Practices Act,[88] the Court found no acceptable reason under international

---

limited to: 'the extent to which the activity takes place within the territory [of the regulating state],' 'the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated,' 'the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted,' 'the extent to which another state may have an interest in regulating the activity,' and 'the likelihood of conflict with regulation by another state,'." (citations omitted)).

79. *Id.* at 819.

80. *Id.*

81. *See id.* (holding that it would be "unimaginable" for the United States to assert prescriptive jurisdiction in that case absent a statutory indication of Congress's intent to do so).

82. 542 U.S. 155 (2004).

83. *Id.* at 159 (quoting 15 U.S.C. §§ 6a(1)(A), (2) (2012)).

84. *Id.* at 159–60.

85. *Id.* at 160.

86. *Id.* at 164.

87. *Id.* at 165.

88. *Id.* ("We recognize that principles of comity provide Congress greater leeway when it seeks to

law that made it reasonable to assume that Congress meant for the Sherman Act to reach foreign conduct that causes a foreign injury on the basis of which foreign plaintiffs have brought a claim.[89] Indeed, the Court found nothing in or underlying the FTAIA that provided a basis for applying the Sherman Act to conduct so foreign in nature.[90] Such an application was not in line with that statute's "basic intent."[91]

Congressional intent through the lens of the presumption against extraterritoriality and comity concerns was also the order of the day in *Morrison v. National Australia Bank Ltd*.[92] There, the Supreme Court, through Justice Scalia, interpreted a provision of the Securities Exchange Act of 1934, which, unlike the FTAIA, is silent on the question of extraterritorial reach.[93] Foreign plaintiffs had brought an action against a company that was not listed on a U.S. stock exchange but whose illegal conduct could be said to be part of larger transactions that had an effect on American markets.[94] In analyzing a question that it framed as one of "prescriptive jurisdiction," the Court rejected the Second Circuit's traditional standard that subject matter jurisdiction would exist under the Exchange Act if the foreign conduct had "some effect on American securities markets or investors" or if some conduct occurred in the United States.[95]

The prescriptive jurisdiction question was not whether a court had the power to hear the case – or even whether Congress had the power to prescribe such conduct – but rather whether Congress did in fact intend the questioned provision in the Exchange Act to apply abroad.[96] The Court could not divine any such clear intent absent some "clear" or "affirmative indication."[97] The Court noted that there was "no one who thought the [Exchange] Act was intended to 'regulat[e]' *foreign* securities exchanges – or indeed who even believed that under established principles of international law Congress had the power to do so."[98] Although it did not

---

control through legislation the actions of American companies . . . .").

89. *Id.* at 166.

90. *Id.* at 174–75.

91. *Id.* at 174.

92. 130 S. Ct. 2869, 2877–78 (2010).

93. *Id.* at 2875–76.

94. *Id.*

95. *Id.* at 2879.

96. *See id.* at 2877–78 (describing the presumption against extraterritoriality and the rationale behind it).

97. *Id.* at 2883 ("In short, there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not.").

98. *Id.* at 2884. The Supreme Court ultimately created a transactional test that required that the

advocate courts straying too far from the text of a given statute, the Court did state that "context" might be consulted in determining the prescriptive reach of a given law,[99] including whether the "probability" of conflicts with foreign laws was so high that one would undoubtedly expect Congress to address such conflicts in the statute.[100] Here again, it is apparent that a number of considerations as to extraterritorial reach weighed on the Court's judgment (even if only in the background), including traditional tools of statutory interpretation, potential for conflict with foreign laws, comity concerns,[101] and international law.[102]

In redefining the reach of the Statute, Justice Scalia wrote that the "focus" of the Exchange Act is on domestic transactions – purchases and sales of securities in the United States. Lea Brilmayer argues that this new test, which has rattled commentators and attorneys alike, is an exercise in "judicial creativity" that "makes no pretense at all of reflecting what Congress wanted."[103] In fact, these doctrines are a pragmatic[104] way of preserving a means of judicial restraint in circumstances wherein judges fear that broad interpretations approach an imagined tipping point of encroachment on other states' sovereignty.[105]

In *Kiobel v. Royal Dutch Petroleum Co.*, the Court reinforced the *Morrison* approach in the context of prescriptive jurisdiction questions relating to the Alien Tort Statute (ATS).[106] *Kiobel* involved claims of former Nigerian citizens against British and Dutch corporations and a

---

there be a transaction within the United States or of shares traded on domestic securities exchanges for the Exchange Act to apply. *Id.* at 2888.

99. *Id.* at 2883.

100. *Id.* at 2885 ("Like the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction. And the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters.").

101. The Court noted the views of various amici, including foreign governments, who complained of potential interference with their laws. *Id.* at 2885–86.

102. *See id.* at 2887 (considering the argument that the significant and material conduct test may be in accord with "prevailing notions of international comity" and thus with customary international law).

103. Lea Brilmayer, *The New Extraterritoriality:* Morrison v. National Australia Bank*, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SOUTHWESTERN L. REV. 655, 656–57 (2011).

104. Desautels-Stein, *supra* note 63, at 535–37 (concentrating on the pragmatic style of the *Empagran* decision).

105. *See infra* Part IV.

106. 28 U.S.C. § 1350 (2012) ("The 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."); 133 S. Ct. 1659, 1663–64 (2013).

Nigerian subsidiary for human rights atrocities committed in conjunction with the Nigerian government.[107] The Court had no problem applying the *Morrison* approach to the ATS, a jurisdictional statute that concerns causes of action drawn from common law.[108] As in *Morrison*, the Court concluded that the presumption against extraterritoriality coupled with the text, history, and purposes of the ATS proved that the statute was not intended to apply to foreign parties engaged in conduct occurring entirely abroad.[109] In this way, the Court indirectly took into account international norms, noting that applying the ATS to these facts would make the U.S. "uniquely hospitable" to the enforcement of international norms in its courts and would have significant foreign policy implications.[110] In addition, as in *Morrison*, the Court noted that such an extraterritorial extension of the statute is objectionable to other nations, which have lodged objections to its use for foreign conduct.[111] The Court's concerns with international comity, or rather the fear that over-intrusion into the jurisdiction of other sovereigns would provoke a similar and unwanted intrusion into U.S jurisdiction over its territory and citizens, are also evident.[112]

Kiobel solidified *Morrison*'s and *Empagran*'s congressional intent approach to prescriptive jurisdiction, but the majority and the concurrence were divided on which canon of statutory interpretation to apply to the ATS. The majority favored the presumption against extraterritoriality,[113] while the concurrence favored interpreting the ATS in line with international jurisdictional principles.[114] Future cases are likely to see similar debates, but the approach of both sides in *Kiobel* notably adheres to the framework that Justice Scalia began in his dissent in *Hartford Fire* and that has captured every member of the court in the decisions described in this Section.

---

107. *Kiobel*, 133 S. Ct. at 1662–63.

108. *Id.* at 1664–65. FSIA similarly reaches out to other state and federal law for the causes of action. *See, e.g.*, 28 U.S.C. § 1606 (2012) (looking to state law for liability of a foreign state).

109. *Id.* at 1665–69.

110. *Id.* In a concurrence, Justice Breyer stated that he would base the reach of the statute on international norms of jurisdiction, an inquiry for which the Restatement (Third) of Foreign Relations would be "helpful." *Id.* at 1673 (Breyer, J., concurring in the judgment).

111. *Id.* at 1668–69.

112. *Id.*

113. *Id.* at 1664–65.

114. *Id.* at 1673.

C. Scholarly Debate on Determining the Prescriptive Reach of Statutes Generally

Scholarly debate concerning the degree of appropriate extraterritorial intrusion into the jurisdiction of other states did not begin with the decisions above.[115] Those decisions, however, especially *Morrison*, have generated many new proposals to reinvent the presumption (or canon) against extraterritoriality. Most commentators agree that some sort of limit must be placed on extraterritorial jurisdiction. And scholars have reached a nebulous agreement that the international law of jurisdiction, to the extent ascertainable, should in some way factor into the determination of whether and the extent to which a statute is applied extraterritorially.

For example, Professor John Knox argues that courts facing an issue of prescriptive jurisdiction should ask two questions: (1) whether *"under international law"* the United States has "primary" jurisdiction, meaning that there is a well-accepted, nearly undeniable basis for U.S. court jurisdiction under international law, and (2) whether there is any basis under international law for jurisdiction.[116] If there is primary jurisdiction, the court would almost assuredly apply the statute, but if there is only some basis under international law, then the court would apply it only if there was some evidence of congressional intent to do so.[117] If, in the more extreme case, absolutely no basis for jurisdiction exists, the U.S court would only apply the statute if it contained an "inescapably clear statement of congressional intent."[118]

Anthony Colangelo argues that the extent of extraterritorial application may depend on the source of the lawmaking power: whether a statute implements international law or is rather a unilateral exercise of Congress's constitutional powers.[119] Statutes that implement international law, such as the Alien Tort Statute, may extend further than those that do not.[120]

Finally, Jeffrey A. Meyer attempts to bridge the gap between "territorialists" (those who only favor extraterritorial application when there is an unmistakably clear statement on the part of Congress),

---

115. For an excellent position on the interesting balancing approach in the Restatement, see Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 582–88 (1983).

116. John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 360–61 (2010).

117. *Id.*

118. *Id.*

119. Anthony J. Coangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1030–32 (2011).

120. *Id.*

"universalists" (who, at their most extreme, favor application of U.S. law whenever there is any effect or interference in the United States), and "interest balancers" (who favor a balance of each state's interests in regulating the conduct, depending on the extent of the state's connection with a particular jurisdiction).[121] Meyer argues that courts should only apply "geoambiguous" law extraterritorially when the conduct would be illegal in both national jurisdictions.[122]

A resolution of this debate and a determination of which of these proposals is optimal is beyond the scope of this Article. They are noted here only because they show that the concerns of scholars very much reflect the concerns of the courts. And it is those common concerns that need to be brought to bear in determining the extent of FSIA's extraterritorial reach. To summarize those concerns, they are: (1) deference to the norms of international law; (2) extra-legal diplomatic or foreign relations concerns; (3) comity or respect for sovereign prerogatives of internal regulation; and (4) separation of powers or adherence to congressional intent and non-interference in executive prerogatives.[123]

In the midst of the debate about the implications of the *Morrison* decision, however, Katherine Florey points out the importance of uniformity in approaches to extraterritoriality under federal and state law.[124] Professor Florey builds on Lea Brilmayer's article comparing federal extraterritoriality considerations to state conflicts of laws

---

121. Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 114–18 (2011).

122. *Id.* at 118–21.

123. These concerns have been stated in different ways by different courts and scholars. The Ninth Circuit, in articulating a "rule of reason" interest balancing for extraterritorial application of U.S. antitrust law—similar to a balancing of interests that occurs under conflicts of law principles—noted:

> The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. A court evaluating these factors should identify the potential degree of conflict if American authority is asserted. A difference in law or policy is one likely sore spot, though one which may not always be present. Nationality is another; though foreign governments may have some concern for the treatment of American citizens and business residing there, they primarily care about their own nationals. Having assessed the conflict, the court should then determine whether in the face of it the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction.

Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 614–15 (9th Cir. 1976) (footnotes omitted).

124. Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of* Morrison v. National Australia Bank, 92 B.U. L. REV. 535, 535–38 (2012).

principles.[125] Specifically, Florey examines long-arm jurisdiction under state law across national borders, its difference from the federal approach, and the implications or dangers of turning to state law claims to reach foreign conduct post-*Morrison*.[126] Florey discusses how states tend to view the application of their law, which may be common law rather than statutory law, as a question of "choice of law" rather than prescriptive jurisdiction.[127] In other words, Florey observes that, because state choice of law analysis remains "rooted in the interstate context," state courts generally do not frame such analysis any differently depending on whether the law is another state's law or a foreign nation's law.[128] None of the approaches embodied in the Restatements on Conflict of Laws—i.e., the more territorial vested rights approach and the more flexible most significant relationship approach—are as sensitive to foreign relations concerns as the federal approach.[129]

Professor Florey also observes that the constitutional constraints on the "extraterritorial" application of state law are typically satisfied if minimum jurisdictional contacts are present, which is actually a lower standard than the "interest" needed for forum law to apply.[130] Although she ultimately concludes that the state law puzzle should point toward a "less exacting application of the presumption against extraterritoriality in federal law," she does tend toward the adoption of a more integrated approach between the two.[131] She argues that, while the presumption against extraterritoriality may be inapplicable in the state law context because courts are applying common law, states should incorporate comity concerns and some form of a "within-jurisdiction effects" test into their analyses.[132] As implied above, Florey's analysis has a great deal of relevance to the interpretation of FSIA's direct effect provision, which is often treated as the awkward federal cousin of state long-arm statues.[133]

D. Scholarship on FSIA's Direct Effect Provision

Scholarship on the direct effect provision of FSIA's commercial activities exception is not ample. Those commentators that have ventured

---

125. Brilmayer, *supra* note 51, at 13–15.
126. Florey, *supra* note 124, at 536.
127. *Id.* at 537–38.
128. *Id.* at 551.
129. *Id.* at 557–58.
130. *Id.*
131. *Id.* at 564.
132. *Id.* at 573–75.
133. *See infra* Part IV.

into this area, however, tend to argue for the adoption of a test that is more in line with accepted bases for jurisdiction under international law—i.e., one that would analyze whether the character of the effect is substantial and foreseeable.[134] Joseph Dellapenna argues in his preeminent treatise on suing foreign governments and their corporations that FSIA's effects provision should be interpreted in accordance with the Restatement (Third) of Foreign Relations.[135] More specifically, he advocates for the application of the interest balancing described in the Restatement (Third) between considerations of "the burden on an American court . . . fairness to the parties, and the possibility of affront to a foreign government with a resultant embarrassment to the foreign relations of the United States."[136]

Other scholarship argues that international and domestic tests of fairness may not be materially different. Karen Halverson examines the jurisdictional nexus generally required under all three clauses of the commercial activities exception—as well as other exceptions—and compares them to the nexus necessary to meet the due process adjudicatory jurisdiction standard.[137] She cites precedent, like that described above, which finds the two requirements to be nearly the same.[138] But she argues that it is perhaps not necessary to determine whether a foreign state is a person under the Fifth Amendment and, therefore, whether constitutional due process under FSIA is necessary because customary international law, as embodied in the Restatement (Third), is an equally adequate guide to fairness.[139] She argues this, even though, as she acknowledges, FSIA may exceed international bounds in some provisions, such as Section 1605A, which provides for jurisdiction over claims arising from state-sponsored terrorist activities that injure U.S. citizens whether abroad or in the United States.[140] Halverson's approach, while avoiding the difficult question of

---

134. *See, e.g.,* Hadwin A. Card III, Note*, Interpreting the Direct Effects Clause of the FSIA's Commercial Activity Exception*, 59 FORDHAM L. REV. 91, 91–93 (1990) (arguing for an adoption of the Restatement's approach); Heidi L. Frostestad, Voest-Alpine Trading v. Bank of China*: Can a Uniform Interpretation of a "Direct Effect" Be Attained Under the Foreign Sovereign Immunities Act (FSIA) of 1976*, 34 VAL. U. L. REV. 515, 550–51 (2000) (proposing a new statute incorporating the legally significant act test and adopting the substantial and foreseeable test from the Restatement as a secondary concern).

135. JOSEPH DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS 239–41 (2d ed. 2003).

136. *Id.* at 240–41.

137. Karen Halverson, *Is a Foreign State A "Person"? Does It Matter?: Personal Jurisdiction, Due Process, and the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT'L L. & POL. 115, 157–58 (2001).

138. *Id.*

139. *Id.* at 185–87.

140. *Id.* at 167–72.

due process application, is complicated by the layers of analysis introduced subsequent to its publication in the *Empagran* and *Morrison* decisions.[141] Those layers include the proper contours of an inquiry into congressional intent, the distinction between prescriptive and adjudicatory jurisdiction, and the function of a presumption against extraterritoriality.[142] In addition, as will be argued below, an inquiry into international standards need not be based solely on the Restatement (Third), which may provide less insight in terms of other legal systems involved.[143]

These approaches may be helpful for courts looking to simplify their inquiry into the extent of FSIA's reach by combining the international law analysis with the due process prong of personal jurisdiction, but as the remainder of this Article will address, that approach is not necessarily equivalent to the more delicate balance of congressional intent and comity concerns that the Supreme Court has applied in other extraterritoriality cases.

Before proceeding to that analysis, however, the next section examines the various tests that courts have used to cope with the meaning of "direct effect" under FSIA and analyzes the utility of those approaches.

III. PHASES OF FSIA-EFFECTS LITIGATION IN THE U.S. COURTS

Courts have gone through several phases in the litigation of the direct effect provision. The earliest of cases interpreted the provision in line with a typical long-arm and minimum contacts personal jurisdiction analysis that would occur under the Washington, D.C., long-arm statute. Courts based this conclusion on a specific reference to the statute within FSIA's legislative history.[144] This analysis appears to have gone hand in hand with a discomfort with FSIA's apparent authorization of personal jurisdiction if service of process is properly executed within the statute's requirements and if one of the immunity exceptions applies.[145] As noted above, this

---

141. *See supra* Section II.B.

142. *See supra* Section II.B.

143. *See, e.g.*, Peter Charles Choharis, *U.S. Courts and the International Law of Expropriation: Toward a New Model for Breach of Contract*, 80 S. CAL. L. REV. 1, 5 (2006) ("[T]he Restatement (Third) of Foreign Relations Law of the United States ("Restatement (Third)")—a leading resource for U.S. courts deciding issues of international law—often does not reflect current U.S. law and, in a number of places, is analytically incomplete or otherwise unsound.").

144. *E.g.,* Upton v. Empire of Iran, 459 F. Supp. 264, 266 (D.D.C. 1978); *see also* E. Eur. Domestic Int'l Sales Corp. v. Terra, 467 F. Supp. 383, 387 (S.D.N.Y. 1979) (stating that FSIA "is intended to be a long arm statute modeled after the District of Columbia long arm statute"); Nat'l Amer. Corp. v. Fed. Republic of Nigeria, 448 F. Supp. 622, 638–39 (S.D.N.Y. 1978) (comparing FSIA direct effect provision to long-arm statute).

145. *See* 28 U.S.C. § 1330(b) (2012) ("[P]ersonal jurisdiction over a foreign state shall exist as to

arrangement left courts wondering whether due process comes into play. Although, as will be discussed below, the Supreme Court has questioned the legal necessity of conducting a due process analysis for a suit involving a foreign state, one can hardly blame courts that conducted, and still conduct, the minimum contacts analysis to reduce the chances of reversal in light of the confusion in the law. As one court succinctly stated:

> The "direct effect" requirement . . . is apparently intended, in part, to ensure that there is "some connection between the lawsuit and the United States" thereby assuring that the exercise of the court's personal jurisdiction over the foreign state under section 1330(b) comports with the minimum contacts standard set forth in *International Shoe Co. v. Washington* and *McGee v. International Life Insurance Co*. Therefore, the "direct effect" exception . . . requires not only that there be an immediate causal effect within the United States but also that there be sufficient minimum contacts between the matter in controversy and the United States to support the court's exercise of in personam jurisdiction.[146]

The assumption seems to be that a direct effect can be roughly or exactly equivalent to the connection necessary to establish the minimum contacts for due process.[147] The precedent is not necessarily limited to the direct effect provision under the commercial activities exception. Indeed, as Karen Halverson asserted, the territorial nexus required under any clause of that exception might be analogized to minimum contacts.[148]

---

every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title."). In some cases, courts have assumed that they needed to conduct a due process analysis without just relying on the literal operation of the statute. *See, e.g.*, Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 454 (6th Cir. 1988) (reading due process into § 1330(b) by means of the legislative history).

146. Decor by Nikkei Int'l, Inc. v. Fed. Republic of Nigeria, 497 F. Supp. 893, 903–04 (S.D.N.Y. 1980) (citations omitted).

147. *See, e.g.*, Velidor v. L/P/G Benghazi, 653 F.2d 812, 819–20 (3d Cir. 1981) (equating direct effect with the contacts necessary for personal jurisdiction); Thomas P. Gonzalez Corp. v. Consejo Nacional de Producción de Costa Rica, 614 F.2d 1247, 1255 (9th Cir. 1980) ("The words 'direct effect' in the clause cited by Gonzalez have been interpreted as embodying the minimum contacts standard of *International Shoe Co.* and the requirement of *Hanson* that the defendant purposely avail itself of the privilege of conducting business within the forum." (citations omitted)); Carey v. Nat'l Oil Corp., 592 F.2d 673, 676 (2d Cir. 1979) ("The legislative history of this section makes clear that it embodies the standard set out in *International Shoe Co. v. Washington* . . . ." (citations omitted)); Maizus v. Weldor Trust Reg., 820 F. Supp. 101, 105 (S.D.N.Y. 1993) (minimum contacts); Exch. Nat'l Bank of Chi. v. Empresa Minera del Centro del Perú S.A., 595 F. Supp. 502, 504–05 (S.D.N.Y. 1984) (minimum contacts); Gibbons v. Údarás na Gaeltachta, 549 F. Supp. 1094, 1117 (S.D.N.Y. 1982) (minimum contacts); Osen v. Republic of Fr., No. 79 Civ. 0972, 1981 U.S. Dist. LEXIS 12646, at *14–15 (S.D.N.Y. Apr. 10, 1981) (minimum contacts).

148. *See supra* Section II.D.

While not necessarily equating the personal jurisdiction analysis to the territorial nexus required for the commercial activities exception, the United States Court of Appeals for the Second Circuit has argued that the two are undeniably related. In *Rein v. Socialist People's Libyan Arab Jamahiriya*, the Second Circuit had before it an interlocutory appeal from the district court's dismissal of various challenges to its jurisdiction under the exception in FSIA permitting suit for state-sponsored terrorist activities against U.S. citizens.[149] Because of the procedural posture of the case, the Second Circuit had to decide whether to review the defendant's objections to both personal and subject matter jurisdiction.[150] The court noted that personal and subject matter jurisdiction are certainly statutorily inter-related in FSIA: subject matter jurisdiction is conferred under 28 U.S.C. § 1330(a) by virtue of the application of an exception to immunity under 28 U.S.C. §§ 1605–07,[151] and the satisfaction of subject matter jurisdiction and proper service of process are the statutory prerequisites for personal jurisdiction under 28 U.S.C. § 1330(b).[152] But that says nothing of the due process analysis that might be necessary and also related or in certain cases even identical to the jurisdictional nexus required under some of the exceptions to immunity, including the direct effect provision.[153] The court concluded it is also "possible that a foreign sovereign could be subject to subject matter jurisdiction under the commercial activities exception without being within the personal jurisdiction of an American court."[154] Ultimately, the review of these two issues could proceed separately.[155] Although the court did not make this point, this Article will later argue that the major point of caution regarding the relevance of these tests is that merging them conflates domestic and international analogies and leads to distortion of separate policy concerns.[156]

The *Rein* case appeared after the Supreme Court had given significant guidance on the commercial activity exception. But the much earlier comparisons between the direct effect provision and the concept of

149. 162 F.3d 748, 753–54 (2d Cir. 1998).

150. *Id.*

151. *Id.*

152. *Id.* at 759.

153. *See id.* at 759–61 & n.8 (noting that in another case the nexus to the United States under the commercial activity exception could be equivalent to the minimum contacts necessary for due process but that this equivalence is not necessarily the case). Moreover, by the time of this case, the Supreme Court had questioned the applicability of the due process clause of the Fifth Amendment to foreign sovereigns. *See infra* notes 192–206 and accompanying text.

154. *Rein*, 162 F.3d at 760 n.8.

155. *Id.* at 759.

156. *See infra* Section IV.A.

minimum contacts were at first blush quite logical, given that certain state long-arm statutes authorize jurisdiction to the limits of the due process clause.[157] Other courts noted, however, that direct effect could mean something more than "only the degree of effect necessary to satisfy due process requirements."[158] This interpretation might also have some force because conflict of law analysis could demand something different than minimum contacts.[159] For these courts, satisfaction of the direct effect requirement meant that the lesser minimum contacts requirement was established.[160]

It is also conceivable that Congress, under the direct effect test, exercised its broad prescriptive powers to cover conduct with a territorial connection that is less than one necessary to comport with the minimum contacts requirement, given the unique nature of foreign sovereign defendants. The language of the statute only requires that there be an unqualified effect, no matter how large or small, and that it be direct, meaning not too attenuated in the chain of causal events. Comparatively, in the antitrust context, the effect must be substantial and foreseeable. If it had been concerned, Congress would arguably have specified the degree of effect necessary in FSIA's text. Still, because courts, including the Supreme Court, have been unwilling to stray too far from the territoriality principle regardless of whether a case involves international or domestic jurisdiction, it is easy to imagine why courts in FSIA cases have continually sought something more than simply any U.S.-based effect with an un-attenuated causal linkage.[161]

In contrast to courts that, because of the reference to the D.C. long-arm statute in FSIA's legislative history, viewed the direct effect inquiry as an analysis of jurisdiction to adjudicate, other courts focused on the reference in the legislative history to the Restatement (Second) of Foreign Relations and its section on prescriptive jurisdiction. Those courts

---

157. *See* GARY BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN THE UNITED STATES COURTS 82–83 (5th ed. 2011) (discussing various types of state long-arm statutes). The personal jurisdiction inquiry should be informative but never determinative of the meaning of the direct effect provision. *See infra* Section IV.A.

158. Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1065 (E.D.N.Y. 1979).

159. *See* Florey, *supra* note 124, at 557.

160. *See, e.g.*, Shapiro v. Republic of Bol., 930 F.2d 1013, 1018–20 (2d Cir. 1991) (holding that the commercial activity exception requires a closer nexus than that necessary for minimum contacts).

161. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2789–90 (2011) (emphasizing purposeful availment of the forum rather than a more liberal stream of commerce theory of personal jurisdiction and creating a high standard that there must be evidence of an intent to submit to the laws governing the territory of a particular sovereign or rather evidence that the defendant was "targeting" the forum).

interpreted the reference to the Restatement to mean that the effect in the United States had to be "substantial, and a foreseeable consequence of the actions performed elsewhere."[162] This prescriptive jurisdiction analysis, however, did not always obviate the need for the minimum contacts analysis, which some of these courts viewed as distinct.[163] At worst, this analysis is truncated and superficial. Some of the more significantly reasoned decisions, however, remained sensitive to foreign relations by balancing the interests of the nations involved in conjunction with the test under the Restatement (Second).[164]

For example, in *Callejo v. Bancomer, S.A.*, U.S. citizens living in Texas brought suit against a Mexican bank.[165] In the wake of dramatic changes in foreign exchange control regulations and nationalization of banks, this bank had paid out on the plaintiffs' U.S. dollar-denominated deposits in pesos, thereby substantially reducing their value.[166] In determining whether the defendant bank's activities had the requisite direct effect in the United States, the United States Court of Appeals for the Fifth Circuit eschewed a narrow interpretation of precedent that would have required payment to be called for in the United States before a direct effect could be established.[167] Rather, the court held that the direct effect existed

---

162. *E.g.*, Ohntrup v. Firearms Ctr., Inc., 516 F. Supp. 1281, 1286–87 (E.D. Pa. 1981); *see also* Am. W. Airlines, Inc. v. GPA Group, Ltd., 877 F.2d 793, 798–800 (9th Cir. 1989) ("In short, this Circuit is in agreement with most courts analyzing the 'direct effect' clause of section 1605(a)(2). A foreign sovereign's activities must cause an effect in the United States that is substantial and foreseeable in order to abrogate sovereign immunity."); Zernicek v. Brown & Root, Inc., 826 F.2d 415, 418–19 (5th Cir. 1987) ("The direct-effects clause in the FSIA differs from 'direct-effect' clauses found in many state long-arm statutes, because the FSIA clause is explicitly intended to encompass effects resulting from commercial as well as tortious activities. The 'substantial' and 'direct and foreseeable' standards set forth in § 18 of the Restatement are likewise intended to apply in commercial contexts."); Transamerican S.S. Corp. v. Som. Democratic Republic, 767 F.2d 998, 1004 (D.C. Cir. 1985) ("[C]ourts construing the 'direct effect' language may look for guidance to section 18 of the Restatement (Second) of Foreign Relations Law of the United States (1965) concerning the extent to which a state may enact laws proscribing conduct outside its territory to prevent effects of that conduct within the state. Thus, we stressed in *Maritime* that the effects in the United States should be both 'substantial' and 'direct and foreseeable' in order to satisfy the requirements of clause 3 of the section 1605(a)(2) exception."); Ohntrup v. Firearms, Ctr., Inc., No. 84-1468, 1985 U.S. App. LEXIS 22059, at *3–4 (3d Cir. Mar. 26, 1985) ("We also agree with the district court that the injury in the United States of a purchaser of a pistol was both a substantial and foreseeable consequence of Makina's actions and came within the exception for commercial acts which cause a 'direct effect' in the United States."); Wilk v. Creditanstalt Bankverein Int'l, No. 92 Civ. 1748 (JFK), 1993 U.S. Dist. LEXIS 3964, at *10–11 (S.D.N.Y. Mar. 31, 1993) (relying on the Restatement (2d)).

163. *E.g., Ohntrup*, 516 F. Supp. at 1286–87.

164. Callejo v. Bancomer, S.A., 764 F.2d 1101, 1110–12 (5th Cir. 1985).

165. *Id.* at 1105.

166. *Id.* at 1106.

167. *See id.* at 1112 (holding the place of payment not decisive).

because the plaintiffs were physically located in the United States and the effects of the conversion "were inevitably felt by them [in Texas]."[168] In supporting this nexus, which the court said was foreseeable in light of the defendants' on-going course of business conduct with the plaintiffs over several years, the court also turned to the purposes behind FSIA and the balance that the nexus requirement in the commercial activities exception maintains.[169] In other words, the connection to the United States through the direct effect provision preserves the independence of different sovereigns at different times. Where the U.S. nexus is weak and the foreign state's interest is likely stronger, then immunity from suit in the United States will be granted.[170] Where the nexus with the United States is strong and the foreign state's interest is arguably weaker, then no immunity will be given.[171] Therefore, because the defendants had engaged in a long-standing commercial transaction with U.S. citizens in the United States, the nexus was strong, as was the U.S. interest in providing a forum to its residents, who suffered serious financial harm because of the cross-border transactions.[172] Mexico's interest was "not so great," said the court, because the transaction was commercial and non-sovereign.[173] This type of interest balancing applies more flexible foreign relations concerns to an analysis of FSIA's text.[174]

Before beginning a discussion of the more substantial and influential circuit court and Supreme Court precedent in this area, one additional phenomenon is worthy of note because it illustrates the failure of the legal inquiries above to provide a meaningful framework for analysis. Many courts, regardless of the test, if any, that they have adopted, have relied heavily on comparisons with the factual scenarios in prior cases. The courts have reached results based almost solely on whether the facts were sufficiently similar to those in other cases wherein a circuit had found a

---

168. *Id.* at 1111–12.

169. *Id.* at 1112.

170. *Id.*

171. *Id.*.

172. *Id.*

173. *Id.*

174. The court noted that sovereign immunity and the act of state doctrine, which is a defense on the merits that prohibits a court from adjudicating the validity of an act of a foreign state, are based in principles of international comity. *Id.* at 1125. The comity balance under the act of state doctrine in that case weighed in favor of the defendant, whereas the sovereign immunity balance weighed in favor of the plaintiff. *Id.* at 1125–26. Similarly disparate results might be said to occur with regard to the personal jurisdiction due process analysis, which incorporates some principles of international comity into its reasonableness test, and the comity analysis under prescriptive jurisdiction. *See infra* Section IV.

direct effect.[175] Nearly all courts have acknowledged that the determination of what constitutes a "direct effect" is a complex and ambiguous enterprise fraught with artifice,[176] so the temptation to rely on factual comparisons is understandable. For example, the Supreme Court agrees that where payment is made to a designated institution in the United States, the loss is felt there and therefore constitutes a direct effect.[177] The effect is sufficient regardless of whether the plaintiff is American or foreign.[178] When an American citizen is injured abroad, however, the consequences to the citizen's health and well-being of that intentional or negligent tort do not constitute a direct effect.[179] Rather, the direct effect is the injury itself, whereas the consequences flowing from that injury are one step removed and, therefore, not sufficiently direct to comply with FSIA.[180] The following cases show how confusion has deepened and, despite a number of opportunities to consider these issues, no truly useful approach has emerged.

In *Texas Trading Co. v. Federal Republic of Nigeria*, the Second Circuit devised a five-part inquiry to resolve not only direct effects cases but also all FSIA-related commercial activity cases.[181] The defendant, the

---

175. *E.g.*, Erickson v. Alitalie Linee Aeree Italiane, No. 90-3895 (CSF), 1991 U.S. Dist. LEXIS 8256, at *15–18 (D.N.J. June 5, 1991) (no direct effect of negligent act abroad); Crimson Semiconductor, Inc. v. Electronum, 629 F. Supp. 903, 907 (S.D.N.Y. 1986) ("The loss to plaintiff—the benefit of its bargain—is the same as the loss to the sellers in *Texas Trading* and *Schmidt*. This effect provides an adequate nexus between the cause of action and the United States. The FSIA confers subject-matter jurisdiction upon this court."); Tucker v. Whitaker Travel, Ltd., 620 F. Supp. 578, 586 (E.D. Pa. 1985) (injury abroad not a direct effect in the United States); Zernicek v. Petróleos Mexicanos (Pemex), 614 F. Supp. 407, 413 (S.D. Tex. 1985) ("In short, courts have uniformly held that a personal injury suffered outside the United States does not form a basis for jurisdiction under the third clause [of the FSIA], even if the injury lingers after the plaintiff returns to the United States."); Keller v. Transportes Aéreos Militares Ecuadorianos, 601 F. Supp. 787, 790 (D.D.C. 1985) (facts of this case are "indistinguishable" from those of other cases); Tigchon v. Island of Jam., 591 F. Supp. 765, 767–68 (W.D. Mich. 1984) ("[T]he connections between defendant, plaintiff's injury, and the United States, are even more remote than those in *Harris* and *In re Air Disaster*."); Reale Int'l, Inc. v. Fed. Republic of Nigeria, 562 F. Supp. 54, 57 (S.D.N.Y. 1982) ("The facts in the case at bar fall squarely within *Texas Trading*, and I hold that plaintiff's cause of action falls within the FSIA."); *In re* Disaster at Riyadh Airport, on Aug. 19, 1980, 1981 U.S. Dist. LEXIS 15608, at *6–7 (D.D.C. July 17, 1981) (causing personal injury to American citizens abroad not a direct effect); Dorrian v. Canadian Pac. Hotels, Ltd., No. 80-1740, 1980 U.S. Dist. LEXIS 16523, at *9-11 (E.D. Pa. Dec. 2, 1980) (comparing injuries outside of the United States to the factual scenario in Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1060 (E.D.N.Y. 1979)).

176. *See, e.g,* Tex. Trading Co. v. Fed. Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981) (discussing a court's role in deciphering the complexities of FSIA).

177. *E.g.*, Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 619 (1992).

178. *Id.*

179. *See, e.g.*, *Zernicek*, 614 F. Supp. at 413.

180. *See id.*

181. 647 F.2d at 308.

government of Nigeria, had entered into numerous contracts with foreign entities for the sale of cement to fund its rapid economic growth and development.[182] The financial arrangements in the contracts contemplated payment on letters of credit, issued by Nigeria, at banks that were primarily located in New York.[183] When the cement was no longer needed, Nigeria ordered its financial agents not to make good on the arrangements.[184] After attempts to settle had failed, several suits were brought in federal court in New York.[185]

The Second Circuit first determined whether the commercial activity bore some relation to the cause of action and to the United States, which are requirements common to each of the three clauses in Section 1605 (a)(2).[186] This question was one of congressional intent.[187] Next the court determined whether it had federal question or diversity jurisdiction under Article III and whether the facts met the requirements of 28 U.S.C. § 1330 (a).[188] Finally, the court engaged in an analysis to ensure that personal jurisdiction comported with due process.[189]

The Second Circuit's analysis offers much on a conceptual level because it makes the jurisdictional inquiry more detailed and rigorous. In other words, it examines the questions of adjudicative jurisdiction more discretely than the text of FSIA expressly requires. The Second Circuit's now-defunct test provided the most comprehensive method to ensure that a case involving a foreign sovereign is properly before a court. For that reason, it gained popularity until it was, as the cases below illustrate, called into question in different ways by decisions of the Supreme Court.

It is also notable that, in analyzing whether Nigeria's nonpayment and breach had a direct effect in the United States, the Second Circuit rejected the analytical framework derived from the Restatement (Second) and therefore did not analyze whether that effect needed to be substantial or foreseeable.[190] The court determined that Congress did not intend for the words "direct effect" to be limited in such a way and that the Restatement's

182. *Id.* at 303.

183. *Id.*

184. *Id.* at 305.

185. *Id.* at 306.

186. *Id.* at 308.

187. *Id.* at 308–09.

188. *Id.* at 308. That section is the subject matter jurisdiction section of FSIA, permitting jurisdiction only if the action falls within an exception in sections 1605 and 1607. 28 U.S.C. § 1330(a) (2012).

189. *Id.* at 308.

190. *Id.* at 311.

test was meant for prescriptive rather than adjudicative jurisdiction.[191] The court did not consider that, under its direct effect provision, FSIA is prescribing a federal immunity standard to conduct that may be otherwise immune abroad.

Instead, the court concluded that the effect of Nigeria's conduct was sufficiently direct and sufficiently within the United States because Nigeria breached contracts with companies that were "American corporation[s]" and because the contracts called for the plaintiffs to present documents and collect money in banks in the United States.[192] While this analysis did not define a test or approach for determining the circumstances or conduct that constitute a direct effect, it did lay the groundwork for the Second Circuit's legally significant act test in a later case.

That case, *Weltover, Inc. v. Republic of Argentina*,[193] gave both the Second Circuit and the Supreme Court the chance to redefine the direct effect inquiry under FSIA. *Weltover* involved Argentina's failure to pay the principal and interest due on bonds that it had issued to bolster its foreign exchange reserves.[194] The relevant principal and interest payments were due to be paid in New York to the defendants, who were private investors.[195] The district court had rejected Argentina's motion to dismiss, in which Argentina had argued that its issuance of bonds under the circumstances did not constitute commercial activities under FSIA, and the Second Circuit affirmed.[196] Concluding that the bond transactions were commercial activity, the Second Circuit broke them down into their legally significant parts or acts. It held that the legally significant act, "the defendants' failure to abide by the contractual terms, i.e., to make payments *in New York*," caused the effect that "the Plaintiffs' accounts were not

---

191. The court opined:

> The reference [to the Restatement Second § 18] is a bit of a *non sequitur*, since § 18 concerns the extent to which substantive American law may be applied to conduct overseas, not the proper extraterritorial jurisdictional reach of American courts *n'importe quelle* substantive law. Nor is the House Report's vague reference to the District of Columbia's long-arm statute especially helpful; that provision looks to personal jurisdiction, not subject matter jurisdiction, and in any event is concerned in its "effects" provision only with torts. We are left with the words, "direct effect in the United States," and with Congress's broad mandate in passing the FSIA: "Under section 1605(a)(2), no act of a foreign state, tortious or not, which is connected with the commercial activities of a foreign state would give rise to immunity if the act takes place in the United States or has a direct effect within the United States."

Id. (citations omitted).

192. *Id.* at 312.

193. 941 F.2d 145 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992).

194. *Id.* at 147–48.

195. *Id.* at 148.

196. *Id.*

credited with the outstanding amount in U.S. dollars."[197]

The Supreme Court granted certiorari and made several conclusions with significant implications for the remainder of this analysis.[198] First, the Court affirmed the broad approach to determining what constitutes a commercial activity. In other words, the issuance of bonds, while meant to help regulate the Argentinean economy, could be viewed as a private commercial activity if analyzed according to its nature and not its purpose.[199] This conclusion allows courts to extend jurisdiction to an expansive range of foreign sovereign activities and to aggressively protect the rights of private investors in government-sponsored commercial ventures.

Second, the Court could find nothing in FSIA or its context that required a determination that the effect was substantial and foreseeable, as described in the Restatement.[200] Indeed, it cautioned courts not to stray too far from the congressional intent embodied in FSIA's text.[201] In the wake of that conclusion, the Court articulated no alternative test for what is a sufficiently direct effect in the United States. Instead the Court stated that the effect of Argentina's breach was clearly directly felt in the United States.[202] But, the Court also continued to create uncertainty in the law by noting its doubt that the citizenship of the plaintiff, i.e., American or foreign, is relevant to the determination of whether the effect is sufficiently "in the United States."[203] Furthermore, it expressed doubt as to whether a foreign sovereign is a "person" for purposes of the due process clause of the Fifth Amendment, creating significant uncertainty as to the applicability of the *International Shoe* minimum contacts and *Hansen v. Denckla* purposeful availment analyses. These analyses had provided the rubric for courts to discern whether a case had the requisite nexus with the United States for the various purposes detailed above.[204] The Court dropped a convenient reference to a prior case that held that U.S. states are not persons for purposes of the due process clause and simply noted that, in any event, minimum contacts would have been satisfied on the facts of the case.[205]

---

197. *Id.* at 153 (emphasis added).
198. Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 609–10 (1992).
199. *Id.* at 612.
200. *Id.* at 617–18.
201. *Id.* at 618.
202. *Id.* at 618–19.
203. *Id.* at 619.
204. *Id.* at 619–20.
205. *Id.* (citing South Carolina v. Katzenbach, 383 U.S. 301, 323–24 (1966)).

Finally, the Court's decision is also significant for what it did not include: any comment on the appropriateness of the Second Circuit's legally significant act analysis. Post-*Weltover*, that test continues to be the law of the Second Circuit as well as other circuits that have adopted the formulation.[206] Its continued validity notwithstanding, the test has incurred meaningful criticism and has been rejected by other circuits.[207]

In *Voest-Alpine Trading USA Corp. v. Bank of China*,[208] the United States Court of Appeals for the Fifth Circuit declined to adopt the legally significant act test. *Voest-Alpine* involved the Bank of China's failure to make good on a letter of credit as payment for a shipment by the plaintiff, Voest-Alpine Trading Corporation, of an order of 1000 metric tons of styrene monomer to the Jiangyin Foreign Trade Corporation, located in Jiangyin City, Jiangsu Province, China.[209] The Fifth Circuit looked to whether the act on which the suit for payment was based caused an "effect in the United States" that was an "immediate consequence" of the defendant's activity.[210] Affirming the district court's conclusion that the suit was proper according to FSIA's direct effect provision, it held that the defendant's failure to pay on the letter of credit caused, as an immediate and direct consequence, an American corporation to suffer a nontrivial financial loss.[211] The court, therefore, relied on precedent holding that financial loss in the United States by an American plaintiff was sufficient under the direct effect provision, which it further noted was entirely consistent with the Supreme Court's holding in *Weltover*.[212]

The court could find nothing in the text to support the Second Circuit's legally significant act test. Thus, the court concluded that the use of the test would add a requirement without a textual basis to FSIA.[213] Perhaps much more significant, however, was the Fifth Circuit's concern that the legally significant act test merges the second clause of the

---

206. *See infra* note 218.

207. *See, e.g.*, Westfield v. Fed. Republic of Ger., 633 F.3d 409, 414–15 (6th Cir. 2010) (concluding that there are no objective standards to guide the interpretation of the direct effect provision, only factual comparisons).

208. 142 F.3d 887, 895 (5th Cir. 1998).

209. *Id.* at 890–91.

210. *Id.* at 892–93.

211. *Id.* at 892–93, 897.

212. *Id.* at 893 (citing Callejo v. Bancomer, S.A., 764 F.2d 1101, 1111–12 (5th Cir. 1985)).

213. *Id.* at 894. The court noted that the Supreme Court in *Weltover* had already reprimanded lower courts for adding requirements without textual bases to FSIA when it rejected their reading into the statute a requirement that the effect be substantial and foreseeable. *Id.* (quoting Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 618 (1992)).

commercial activity exception in FSIA with the direct effect provision.[214] The second clause requires that an act occurring in the United States serve as a basis for the action.[215] Therefore, the legally significant act sought by the Second Circuit under the third clause could quite arguably be the same as that found under the second, "except . . . that the third clause would also require proof of an act outside the United States upon which the action is also based" and that had caused a direct effect in the United States.[216] Whether this is precisely accurate in every case, it does come dangerously close to rendering the third clause rather "meaningless."[217]

For the Fifth Circuit, the failure of payment was a financial loss, but for the Second Circuit it was an omission of performance. One formulation treats the transaction as property that is lost, and the other treats the transaction as a series of legally significant events, the final one of which occurs in the United States. It is debatable whether it would be more faithful to the word "effect" to consider such failure as a loss (for clearly a loss was suffered in both cases) or as a failure of performance, which also occurred in both cases.

Several years after *Voest-Alpine*, and despite endorsements of the legally significant act test from the Ninth and Tenth Circuits,[218] the Sixth Circuit also rejected the test in the case of *Keller v. Central Bank of Nigeria*.[219] Like the Fifth Circuit, the Sixth Circuit concluded that adding requirements to the statute would be improper, given the Supreme Court's admonishment in *Weltover*.[220]

These condemnations notwithstanding, the legally significant act test has persisted and was reaffirmed and re-explained in the recent Second Circuit case of *Guirlando v. T.C. Bankasi A.S.*[221] *Guirlando* has a set of sympathetic facts, which, like many of the overseas tort cases, creates the desire to extend the extraterritorial reach of the direct effect provision. Unfortunately the court failed to see the logic of doing so.

In *Guirlando*, the plaintiff, Ms. Guirlando, met and married a man

---

214. *Id.* at 895.

215. *Id.* (citing 28 U.S.C. § 1605(a)(2) (1994)).

216. *Id.* at 895–97.

217. *Id.* at 895.

218. Adler v. Fed. Republic of Nigeria, 107 F.3d 720, 727 (9th Cir. 1997); United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n, 33 F.3d 1232, 1239 (10th Cir. 1994).

219. 277 F.3d 811, 818 (6th Cir. 2002).

220. *Id.* (citing Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887, 895 (5th Cir. 1998)).

221. 602 F.3d 69, 73–74 (2d Cir. 2010).

(Cicek) of Turkish descent in New York.[222] Shortly following their marriage, Cicek disappeared without notice but telephoned Guirlando from abroad to say that the U.S. government had deported him to Turkey.[223] Guirlando sold her house and car and, at Cicek's invitation, flew to Turkey to join him.[224] Once in Turkey, she deposited the funds from the sale of her property, drawn from a check from Citibank's New York branch, into an account with the defendant bank, Ziraat, which the parties conceded qualified as an instrumentality of the Turkish government under FSIA.[225] Guirlando alleged that Ziraat's employees failed to inform her of her option to open an account in her own name or, in the alternative, a joint account that only permitted withdrawals with the consent of both parties.[226] Instead, she opened a joint account with Cicek that permitted withdrawals by either party without the other's consent.[227] Cicek removed and robbed her of the bulk of the money of the account, leaving her with approximately 20 percent of her life savings.[228] After discovering the fraud, Guirlando returned to the United States and lived in drastically reduced circumstances.[229] She alleged in her complaint that Ziraat's employees knew that Cicek was already married when he married Guirlando and that he had been cheating on her, and she further averred that Ziraat's employees had engaged in negligence, negligent misrepresentation, breaches of a contractual duty of good faith and fair dealing, and a breach of fiduciary duty.[230]

Presumably unable to prove that Ziraat had been conspiring with Cicek since her marriage in New York, Guirlando sought jurisdiction over Ziraat under FSIA's direct effect provision.[231] She made two principal arguments: first, that the defendant's actions had caused an effect "in the United States" by causing money to be transferred from a bank in New York to a bank in Turkey; and second, that the defendant's actions had caused a loss to her in the United States because her standard of living had declined significantly.[232]

---

222. *Id.* at 72.
223. *Id.*
224. *Id.*
225. *Id.* at 73.
226. *Id.* at 72.
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.* at 72–73.
231. *Id.*
232. *Id.* at 73.

The Second Circuit affirmed the importance of the legally significant act test, with some clarification as to its application.[233] The court noted that the legally significant act test does not conflate the second and third clauses, as the Fifth Circuit had suggested, because the test does not require the *performance* of an *act* in the United States.[234] The court explained that the requirement of an act that is legally significant includes the effect or result itself, which may be an omission.[235] Therefore, for example, when payment is required to be made to a U.S. corporation at a U.S. bank, the legally significant act is the omission or the failure of payment there, and the act abroad that is legally significant is the defendant's decision not to pay.

With this re-formulation in mind, the court dismissed Guirlando's arguments.[236] It rejected her loss argument on the grounds that the loss occurred in Turkey, where the swindle took place, and any financial loss that Guirlando felt was not a direct effect of that behavior.[237] There was, therefore, no legally significant act *in* the United States and thus no loss *in* the United States. The second argument similarly failed because the wrongdoing that Guirlando alleged—Ziraat's statements regarding potential bank accounts and its notification to Guirlando's husband of the transfer from New York—had not caused her to transfer her money from a U.S. bank to a Turkish bank.[238] The court concluded that Guirlando had intended to open an account with the defendant when she walked into the defendant's branch and that the defendant's subsequent actions had had no bearing on that.[239]

The *Guirlando* decision is problematic on several levels. First, it rendered the legally significant act test even less user-friendly than it had been previously. The court now requires that the lower courts not look literally to an act *performed* in the United States but rather to an act in the sense of a result, including, but not limited to, an omission or a failure of payment or performance. Under the classic paradigm in which a contract calls for payment in the United States, this formulation would surely be workable, but how applicable is it to other, more complex circumstances that might arise? In addition, in its analysis of the plaintiff's claims, the court used the phrase "legal significance" in a confusing way. It seemed to

233. *Id.* at 75–76.
234. *Id.* at 76.
235. *Id.*
236. *Id.* at 79–82.
237. *Id.* at 79–80.
238. *Id.* at 80.
239. *Id.* at 81.

conflate the legal significance of the effect in the United States with the requirement from the Supreme Court's decision in *Saudi Arabia v. Nelson*, decided under the first clause of the commercial activities exception, that the commercial activity within the United States form the constituent elements of a plaintiff's claim.[240] This misses the mark of what FSIA textually requires.

There is no requirement that the claim under the commercial activities exception arise out of the direct effect. Rather, the claim must be based on a foreign act in connection with a foreign commercial activity. This language differs markedly from the FTAIA, which provides that the "effect" on U.S. commerce must "give[] rise" to the plaintiff's claim under the Sherman Act.[241] In *Guirlando*, Guirlando and Ziraat entered into a transaction. Ziraat was to deliver an account under certain terms of use and service, and Guirlando was to deliver funds into that account.[242] The elements of Guirlando's claims of negligent misrepresentation and breach of fiduciary duty come from the events involved in this transaction and are thus based upon it. Had Ziraat not, as Guirlando alleged, misrepresented certain material terms[243]—a merits, rather than jurisdictional, question—then the transaction would have happened quite differently or perhaps not at all. The effect *in the United States* was therefore that funds were removed from the country, or rather were drawn on a New York bank, as part of the plaintiff's performance, which occurred under a false apprehension of the terms of the deal. For the Second Circuit to decide otherwise is to be unfaithful to its analysis in *Weltover*, in which it divided up the components of a transaction (negotiations, contract, performance) and then analyzed whether any of the events associated with these components caused some non-*de minimis* result in the United States.

The Fifth Circuit's test, focusing merely on directness and some effect in the United States, would have functioned in the same way, if not better, in *Guirlando*, essentially demonstrating the superfluity of the legally significant act test. This test would have allowed the Second Circuit to reject Guirlando's argument that Ziraat's actions caused her to return to the United States, having lost most of her life savings.[244] The immediate consequence of Ziraat's actions, at best, was the loss of Guirlando's savings in Turkey.[245] The fact that Guirlando then returned to the United

240. 507 U.S. 349, 357 (1993).
241. 15 U.S.C. § 6a(2) (2012).
242. *Guirlando*, 602 F.3d at 72.
243. *Id.*
244. *Id.*
245. *Id.*

States is too attenuated an event, both in terms of time and causation, to have been directly felt in the United States.[246] Guirlando's volitional act of returning to the United States disrupts the chain of causation needed to qualify Ziraat's act as a direct cause of that final circumstance.[247]

More importantly, the Fifth Circuit's test would have also permitted the correct result on Guirlando's argument that a direct effect of Ziraat's actions was felt in the United States when her life savings was drawn from a U.S. bank. In that respect, the withdrawal of the money from a New York account was a direct and immediate consequence of the commercial activity, or the deal to open an account, between Guirlando and Ziraat. Consider the steps in the transaction: (1) a deal was reached, (2) Guirlando performed by allowing Ziraat to draw funds from her account in the United States, and (3) Ziraat's withdrawal caused a transfer of property from the United States. This was not merely one leg of a complex transaction, in which money went through several banks, but was rather the primary act of performance on Guirlando's part in her deal with Ziraat.

The Fifth Circuit's test has the distinct advantage of focusing on only the words in the statute: "direct effect in the United States."[248] In stark contrast, the Second Circuit's approach, post-*Guirlando*, requires a court to examine the differences between the words "effect," "act," and "omission"; apply the conclusion of this examination to the facts; and then ascribe some sort of legal significance to the result of that analysis. This test is, in short, a metaphysical mess. A serious problem with the Second Circuit's approach is, therefore, that it is difficult to apply and likely to produce disparate results that draw the reach of FSIA litigation rather narrowly. Additionally, neither the words "act" and "omission" nor the legal significance inquiry that follows find any basis in the text of the statute! The Supreme Court's recent decision in *Morrison* made an "affirmative indication" of congressional intent the core of the extraterritoriality equation.[249] This framework, along with *Weltover's* holding, makes the Second Circuit's legally significant act test highly questionable.[250]

It is also notable that, in *Frontera Resources Azerbaijan Corp. v. State*

---

246. *Id.*

247. *Id.*

248. Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887, 893 (5th Cir. 1998).

249. 130 S. Ct. at 2883.

250. The legally significant act test represents the same approach to interpretation that the Second Circuit used prior to *Morrison* for statutes that are silent on extraterritoriality. For example, the Circuit read into the Securities Exchange Act an intent to reach transactions that affect U.S. markets. Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 171 (2d Cir. 2008). At the same time, the test arguably adds territorial limits where Congress may not have meant to apply them.

Oil Co. of the Azerbaijan Republic, the Second Circuit ultimately agreed with the doubt that the Supreme Court cast in *Weltover*[251] on the personhood of a foreign state under the due process clause.[252] In *Frontera*, the Second Circuit overruled its holding in *Texas Trading* that foreign states were entitled to due process.[253] The plaintiffs had obtained an arbitral award against a state-owned enterprise of Azerbaijan.[254] Seeking to enforce the award, the district court had inquired into whether it had quasi in rem or personal jurisdiction and had concluded that the defendant had pointed to no property that would support the former and had insufficient minimum contacts for the court to exercise the latter.[255] Not quibbling with the quasi in rem holding, the Second Circuit followed fairly recent precedent of the United States Court of Appeals for the District of Columbia Circuit, holding that, if the states, which are part of the union that is the United States, could not "avail" themselves of the protections of the due process clause as "persons" within its reach, then there was no reason to conclude that foreign sovereigns, which are wholly outside the Union, could do so.[256] That holding, however, only applies to foreign states and not necessarily to their instrumentalities.[257] It was immaterial that FSIA actually defines state-owned enterprises as a foreign state—i.e., as part of a whole —because that should not influence the Constitution's conception of the constituent parts of the foreign state. The court also held that if an instrumentality is essentially the alter ego (or closely controlled agent) of the foreign state or its separateness is a fiction utilized to perpetrate a fraud, the instrumentality could stand in the shoes of the foreign state and lose due process protection.[258] The court did not ultimately resolve the status of a juridically distinct foreign instrumentality under the due process clause because it was as yet unclear if the defendant

---

251. In a recent case, the Supreme Court described personal jurisdiction under the statutory provisions of FSIA as "automatic," thus continuing the doubt as to whether due process should apply. Samantar v. Yousuf, 130 S. Ct. 2278, 2292 n.20 (2010).

252. 582 F.3d 393, 398–401 (2d Cir. 2009).

253. *Id.* at 400.

254. *Id.* at 395.

255. *Id.*

256. *Id.* at 399 (quoting Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 97 (D.C. Cir. 2002).

257. *Id.* at 400.

258. *Id.* The Second Circuit thus joined the debate amongst the circuits post-*Weltover* as to whether and under what circumstances a foreign state is entitled to due process protections. *See, e.g.*, BP Chemicals Ltd. v. Jiangsu SOPO Corp., 420 F.3d 810, 818 (8th Cir. 2005) (concluding that the nexus required for commercial activity is sufficient for minimum contacts such that a foreign sovereign would be expected to be haled into court in the United States).

entity was the alter ego of the foreign state.[259] The court held that it would be premature to analyze due process's applicability to juridically distinct instrumentalities without first resolving that factual question.[260]

IV. RECONCEPTUALIZATION OF FSIA'S PRESCRIPTIVE REACH AND A PROPOSAL FOR INTEGRATION

On the basis of the discussion above, three propositions should be evident: first, the glosses on the minimum contacts standard, such as the "legally significant act test," are unworkable and confusing. Second, because FSIA is a federal statute with many state law characteristics, the dilemma in the FSIA direct effect provision context is similar, although not identical, to that faced in the extraterritorial state law context that Professor Florey describes: how to insert some measure of comity concerns into the analysis in order to avoid overreaching applications of U.S. law in foreign nations and disturbance of harmony in the international order, i.e., relations and cooperation between nations. Third, FSIA is a statute that strikes at the heart of the foreign relations concerns that now color the Supreme Court's extraterritoriality analysis because it implicates sovereignty on a higher level than a normal dispute with a private player would. In light of these three propositions, courts should endeavor to integrate the concerns raised in other cases that relate to extraterritorial application of U.S. law into the FSIA context. Why integrate? Because it will create an intellectually honest, multi-factored analysis that leads to more consistent and fairer results and because it will help to separate the analysis from other heavily unsettled areas of the law.

In the direct effect provision, Congress has tied subject matter jurisdiction, immunity, and related issues of personal jurisdiction and choice of law together. Therefore, in discussing this proposal, it is perhaps best to break the following discussion into separate questions that courts should ask. First, did Congress intend to prescribe, and what are the implications of prescribing, federal immunity standards to *X* conduct detached to *Y* degree from the United States? And, second, what are the implications of applying substantive state or federal law to the merits and thereby regulating the conduct to an even further degree? Both questions implicate U.S. regulation of conduct that foreign sovereigns might otherwise not regulate or regulate differently. This section will further argue that personal jurisdiction and its constituent due process prong should be a separate question from the prescriptive jurisdiction

259. Frontera Res. Azer. Corp., 582 F.3d at 400.

260. *Id.*

determination.

A. Prescription of Foreign Conduct by U.S. Federal Foreign Sovereign Immunity Standards

Regardless of the specific formulation that a court utilizes, this inquiry should involve statutory interpretation via questions of textual and contextual statutory analysis and non-precedential canons, consideration of discernible international law, and analysis of international comity concerns. Courts should acknowledge this task for the diverse and mixed inquiry that it is to avoid the substantial confusion that is evident in the decisions described above.

The inquiry into congressional intent should examine FSIA's text, structure, legislative history, *and* purposes.[261] As noted above, the text is susceptible to both broad and narrow readings. The legislative history gives some clue that international principles and the limits of adjudicative jurisdiction under the due process clause may be guides as to FSIA's appropriate reach.[262] Furthermore, the focus of the direct effect provision under *Morrison* is almost entirely on acts abroad.[263]

In analyzing the text within FSIA's overall structure, a court may also consider the expansiveness of the extraterritorial application of other exceptions to foreign sovereign immunity. For example, the arbitration exception requires virtually no connection with the United States to engage federal court process,[264] and the terrorism exception requires that the plaintiff had been an American citizen at the time that state-sponsored terrorism injured him or her, employing the passive personality basis for jurisdiction under international law.[265] The latter exception shows that FSIA was meant to apply more broadly than international standards, and so perhaps the direct effect provision should be similarly applied, considering

---

261. *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2290–93 (2010) (explicitly and implicitly approving all of these methods).

262. At least one scholar has warned of the dangers of ardent textualism in interpreting a statute as complex and poorly drafted as FSIA. Joseph Dellapenna, *Interpreting the Foreign Sovereign Immunities Act: Reading or Construing the Text*, 15 LEWIS & CLARK L. REV. 555, 557–70 (2011). FSIA has a rich legislative history containing a number of stated purposes and policies served by its enactment and a section-by-section analysis of the original text, including the direct effect provision, in the House Report. *Id.* at 559–70.

263. *See* 28 U.S.C. § 1605(a)(2) (2012).

264. *See* 28 U.S.C. § 1605(a)(6) (only requiring that the agreement to arbitrate or the claim be essentially compatible with the laws and treaties of the United States, regardless of whether it has a U.S. territorial nexus).

265. 28 U.S.C. § 1605A(a)(2)(A)(ii)(I) (2012).

its unqualified language.[266] Furthermore, the other clauses in the commercial activities exception are more defined. FSIA's definition section states that the phrase "commercial activity carried on in the United States" refers to conduct that has "substantial contact" with the United States.[267] Should the direct effect provision be read in line with this "substantial contact" command, considering the sheer logic of such an approach? Or is the direct effect provision's exclusion from the more circumscribed definition a deliberate and, therefore, material act by Congress? FSIA's text bends the reader in various directions, often demanding the consideration of other contexts to break the tie.

Given the aforementioned Supreme Court precedent in this area, canons of interpretation should play a significant role, when applicable. First, despite the fact that the strength accorded to the presumption against extraterritoriality is not quite yet determined,[268] such a canon may prove useful as a tie-breaker in ambiguous cases because it means that a court should pull back when it is unsure and because it reminds the court that the touchstone of prescriptive jurisdiction is still, albeit more loosely, territory. Similarly, although not controlling over the inquiry into congressional intent, courts should determine whether the action is consistent with jurisdictional bases under international law. Again, when ambiguous, Congress should be presumed to have legislated within the bounds of international law.[269] FSIA was meant to codify international law and should not be interpreted, if possible, in a way that directly contravenes it.[270]

---

266. Keith E. Sealing, *State Sponsors of Terrorism are Entitled to Due Process Too: The Amended Sovereign Immunities Act is Unconstitutional*, 15 AM. U. INT'L L. REV. 395, 454–55 (2000) (discussing seemingly constitutional and international law problems with the terrorism exception).

267. 28 U.S.C. § 1603(e) (2012) (defining the relevant phrase); 28 U.S.C. § 1605(a)(2) (containing the defined phrase).

268. Unlike in *Morrison*, it is clear that the FSIA was meant to apply extraterritorially.

269. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

270. *See* Permanent Mission of India to the UN v. City of New York, 551 U.S. 193, 199 (2007) ("Our reading of the text is supported by two well-recognized and related purposes of the FSIA: adoption of the restrictive view of sovereign immunity and codification of international law at the time of the FSIA's enactment."). Indeed, international, as opposed to domestic, standards are applied under FSIA for purposes of determining the judicial distinctness of entities of foreign states and agency issues. *See* Sachs v. Republic of Austria, 695 F.3d 1021, 1024–25 (9th Cir. 2012), *reh'g en banc granted*, 705 F.3d 1112 (2013) (citing First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983)) (adopting a standard that was previously articulated based on general international principles to determine whether a U.S. ticket agent could be held to be the agent of an Austrian rail company to provide for jurisdiction under the FSIA's commercial activities exception for commercial activity carried on in the United States); *see also* Transamerica Leasing, Inc. v. La República de Venez., 200 F.3d 843, 847–48 (D.C. Cir. 2000); Arriba Ltd. v. Petróleos Mexicanos, 962 F.2d 528, 533–36 (5th Cir. 1992).

There is ample other authority that may be useful in discerning the bounds of international law, including the practice of other common law nations, such as the United Kingdom, Singapore, Canada, and Australia, which have their own state immunity acts.[271] Even where a comparison with another common law jurisdiction that has a comprehensive foreign sovereign immunity statute is not possible, most jurisdictions have embraced a restrictive theory of sovereign immunity (like FSIA) and so would have helpful cases to examine.[272] Moreover, comparisons to the practices of other national jurisdictions are not uncommonly found in Supreme Court opinions.[273] Commentators have argued that citation to foreign precedent has been a pillar of the development of U.S. law.[274] Thus, examining state practice in addition to, or in the context of, the Restatement's formulations will lend a useful dimension to this debate.

Courts will need to analyze the forum's interest in, or rather connections to, the suit as part of the Supreme Court's comity or reasonableness test.[275] In so doing, courts should analyze prescriptive and personal jurisdiction separately. This has the advantage of avoiding procedural difficulties such as those that occurred in the *Rein* case, in which personal and subject matter jurisdiction were conflated and complicated interlocutory review. The Court has, moreover, concluded that prescriptive jurisdiction should be considered separately from adjudicative jurisdiction. Echoing his dissent in *Hartford Fire*, Justice

---

271. *Foreign State Immunities Act 1985* (Cth) pt 1, s 3 (Austl.); State Immunity Act, R.S.C. 1985, c. S-18 (Can.); State Immunity Act, pt. II, § 19(2) (rev. ed. 1985) (Sing.). The issue of the precise role and ascertainment of international law relates to larger debates that no FSIA case can solve. For example, as Professor Coangelo asks, should the relevance of international law be different depending on whether the cause of action is meant to implement international law? And what is the proper place of customary international law vis-à-vis federal common law in this equation? Coangelo, *supra* note 119, at 1032. The resolution of these debates is beyond the scope here; suffice it to say that international law, if substantial authority is available, should be at least one strong factor in the court's analysis of congressional intent and any additional discretionary considerations.

272. *See* Letter from Jack B. Tate, Acting Legal Advisor, U.S. Dep't of State, to Philip B. Perlman, Acting Attorney Gen. (May 19, 1952), *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 DEP'T ST. BULL. 984, 985 (noting all of the jurisdictions, even then, that had begun to embrace restrictive immunity as the standard). Even more jurisdictions have recently come around to this standard. *See, e.g.*, HIROSHI ODA, JAPANESE LAW 461 (3rd ed. 2009) (noting that in 2006 the Japanese Supreme Court changed its position on foreign sovereign immunity from an absolute to a restrictive standard).

273. It is not unusual for courts to cite the law of other states in their decisions to support assertions of what constitutes internationally agreed upon practice. Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 135–36 (2006).

274. Steven G. Calabresi, *"A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 BOSTON U. L. REV. 1335, 1341 (2006).

275. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403 (1987) (setting forth factors articulating the interest of the state and informing the jurisdictional reasonableness analysis).

Scalia made clear in the majority opinion in *Morrison* that subject matter jurisdiction and prescriptive jurisdiction are also conceptually distinct.[276] The Court previously made a similar distinction between the contacts necessary for jurisdiction and those necessary for choice of law.[277] Although the Court has not made it abundantly apparent why, in its opinion, these distinctions are valuable, the differences between these concepts and their implications and policy advantages are discernible.[278]

For example, despite the fact that due process's "fairness and substantial justice" prong integrates some measure of foreign relations-related concerns into the personal jurisdiction inquiry,[279] the overall due process analysis under personal jurisdiction is a mandatory constitutional question that is distinct from the more loosely defined and applied comity concerns that have animated the prescriptive jurisdiction inquiry.[280] Indeed, this is reflective of the recognized premise in jurisprudence that foreign states interact through a dynamic and flexible diplomatic framework and not through constitutionally protected relationships.[281] Whether personal jurisdiction is proper is primarily a question meant to protect the individual liberty of litigants. Put differently, personal jurisdiction is concerned with whether courts may fairly exercise power over the person or entity. Similarly, subject matter jurisdiction is a mandatory constitutional question regarding the court's power over the substance of a dispute, e.g., federal question or diverse litigants.[282] In contrast, prescriptive jurisdiction concerns whether the statute reaches the foreign conduct at issue, *given any comity concerns that should apply*.[283] In reality, the prescriptive jurisdictional analysis is primarily concerned

---

276. Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869, 2876–77 (2010).

277. *See, e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302, 317 n.23 (1981) ("[E]xamination of a State's contacts may result in divergent conclusions for jurisdiction and choice-of-law purposes.").

278. The extent to which this separation is possible in a statute like FSIA where the existence of personal and subject matter jurisdiction are statutorily interwoven may be different than in other contexts. It may be that, because of the way that 28 U.S.C. § 1330(a) is written, after the court has determined whether Congress intended FSIA to prescribe such conduct, it will fairly automatically have subject matter jurisdiction, which depends upon meeting the requirements of one of FSIA's exceptions. This may be so unless there is a problem with other elements of the commercial activities exception, such as the action not being based upon the activity that causes the direct effect, as 28 U.S.C. § 1605(a)(2) requires.

279. Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cnty., 480 U.S. 107, 115 (1987) (federal interest in "foreign relations policies" best served by an inquiry into the reasonableness of jurisdiction).

280. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945).

281. Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 202 (D.C. Cir. 2001).

282. *See, e.g.*, Mansfield, Coldwater & Lake Mich. R. Co. v. Swan, 111 U.S. 379 (1884) (holding that a court is obliged to consider questions of federal subject matter jurisdiction whenever they arise).

283. *See supra* Section II.B.

with whether something is, or should be, limited by U.S. law, not with whether an organ of government has the power to limit it.

Equating the prescriptive inquiry to the personal jurisdiction inquiry is not functional in some circumstances. Suppose that a defendant appears voluntarily before the court and defends the suit. The issue of personal jurisdiction is waived, but the questions of whether Congress intended for the conduct at issue to be regulated by a decision in federal court and whether it *should* be so regulated remain unresolved.[284] In addition, in some matters involving foreign conduct, a court may obtain personal jurisdiction over a defendant through contacts unrelated to the substance of the suit.[285] And, for some entities of a foreign state, satisfaction of due process may not be required at all.[286] Furthermore, even the application of foreign law to the merits of a case, reducing the concern over legal conflicts other than the immunity question itself, does not necessarily diminish the court's interest in asserting power over the parties.[287] Finally, FSIA requirements regarding necessary forum contacts to the commercial activities underlying the claim, issues of agency, and abuses of the corporate form may also be incompatible with their analogs under personal jurisdiction jurisprudence.

In both personal and prescriptive jurisdiction inquiries, it is important to recognize the distinction between safeguarding the fairness guarantees embodied in notions of procedural due process to litigants and ensuring fairness to other sovereigns, whose interests in regulating the conduct at issue can be seriously injured by foreign courts applying more stringent standards than those in the sovereigns' domestic law. Justice Stevens has made this conceptual distinction between the due process clause inquiry for choice of law and the Full Faith and Credit clause inquiry.[288] The former protects litigants from unfair surprise, while the latter maintains national

---

284. There is also authority suggesting that the contacts necessary for personal jurisdiction are not always sufficient for the territorial nexus required for a claim under the commercial activity exception. *See* Saudi Arabia v. Nelson, 507 U.S. 349, 378–79 (1993) (Stevens, J. dissenting) (opining with respect to the presence of a nexus under FSIA that "[i]f the same activities had been performed by a private business, I have no doubt jurisdiction would be upheld").

285. *See, e.g.,* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 98–99 (2d Cir. 2000) (general jurisdiction available); *see also* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1677–78 (2013) (Breyer, J. concurring) (noting same).

286. *See supra* notes 256–57 and accompanying text.

287. Benton v. Cameco Corp., 375 F.3d 1070, 1084 (10th Cir. 2004) (Holloway, J., dissenting) (noting that a state's interest in providing a forum to adjudicate injuries to its citizens by foreign corporations is separate from the interest it may have in whether its law is applied in resolving a dispute).

288. Allstate Ins. Co. v. Hague, 449 U.S. 302, 320–23 (1981) (Stevens, J., concurring in the judgment).

unity by avoiding state-to-state conflicts.[289] Although these balances are relevant to both personal and prescriptive jurisdiction, the latter balance of harmony and order amongst sovereigns weighs more heavily in the prescriptive jurisdiction context. For example, in the antitrust cases above, the Court seems to place more emphasis on fairness vis-à-vis sovereigns than it does on fairness vis-à-vis corporate defendants.[290]

Therefore, based on the above distinctions, the prescriptive jurisdiction inquiry will, as it has with antitrust and securities law, allow courts to conduct a multifaceted analysis of the extraterritorial sweep of the direct effect provision.[291] A court can balance concerns about regulating behavior, or the effects of behavior, in the United States with concerns about the intrusion into the regulatory sphere of another sovereign,[292] including the sovereign's immunity from suit in its own jurisdiction.[293] This issue leaves a court to ask: Does the suit touch upon such sensitive foreign relations issues that it would be tantamount to a political question?[294] Would the sovereign be subject to a similar suit in its own jurisdiction? Does the suit create an irreconcilable policy conflict? If so, how important is that policy and to whom?

The use of this multifaceted analysis does not suggest that the reading

---

289. *Id.*

290. *See, e.g.*, F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 163–65 (2004) (focusing on the comity amongst sovereigns as opposed to the adverse effects on consumers inside and outside the United States resulting from anti-competitive behavior)..

291. In *Hartford Fire*, Justice Scalia viewed comity as a limiting principle that courts should assume Congress has incorporated, not a doctrine of judicial abstention. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 818 n.9 (1993) (Scalia, J., dissenting). This analysis offers more form than substance because of how flexible and open to interpretation the test for comity is.

292. It is beyond the scope of this Article to say what deference, if any, in the FSIA context should be given to the judgment of the State Department. *See* Republic of Austria v. Altmann, 541 U.S. 677 (2004) (discussing the role of executive in determinations of immunity). It should suffice for purposes here to say that any "suggestion" by the executive through the Department of State about the influence of the decision on the foreign affairs of the United States should be entitled to consideration in the basket of comity and comity-related concerns that a court may use to determine the proper reach of the direct effect provision of FSIA. Other courts have held that executive judgment is entitled to a substantial degree of deference, although not conclusive deference. Yousuf v. Samantar, 699 F.3d 763, 773 (4th Cir. 2012) ("The State Department's determination regarding conduct-based immunity . . . is not controlling but it carries substantial weight in our analysis of the issue.").

293. Courts have long considered whether a sovereign would be immune in its jurisdiction when considering whether to apply foreign sovereign immunity standards. *See, e.g.*, The Pesaro, 277 F. 473, 483 (S.D.N.Y. 1921) ("But the fact that the steamship Pesaro itself is subject to the ordinary process of the Italian court would seem to be vital and decisive. There is no reason of international comity or courtesy which requires that Italian property not deemed extra commercium in Italy should be treated as res publica and extra commercium in the United States.").

294. *See* Balzano, *supra* note 28, at 108–09 (2011) (arguing that courts should determine whether or not they should decline to adjudicate a case based upon the standards in the political question doctrine rather than mechanically listening to the opinions of the other branches regarding avoidance).

of FSIA's direct effect provision need necessarily be any narrower than it is currently; indeed, it may actually be read more expansively by courts. This increased breadth is probably appropriate in many cases. For example, it is difficult to discern any unreasonable interference with foreign affairs in the *Guirlando* case. The United States clearly had a strong interest in protecting against serious financial injury to its citizens by alleged collusive fraud abroad. It is difficult to locate any significant foreign relations concern that would have counseled against an ordinary commercial suit against a Turkish bank, especially when the allegations were of fraudulent conduct that nations universally condemn. Efficiency concerns, i.e., those best reserved for a forum non conveniens motion, may ultimately dictate that the suit be brought elsewhere, of course. Moreover, this case illustrates the difference that exists between commercial litigation and antitrust and securities cases, which arguably strike more at the heart of a government's targeted efforts to regulate the economy than do tort or contract disputes.[295] Indeed, if every tort or contract dispute requires serious consideration of foreign relations, then the future development of the global economy may be in trouble.

The fact that FSIA cases deal with a foreign sovereign further alters the calculation. Somehow the lower courts seem to have lost track of the fact that, as the Supreme Court acknowledged in *Verlinden B.V. v. Central Bank of Nigeria*, Congress never restricted the class of plaintiffs in an FSIA suit.[296] It left open the possibility that foreign plaintiffs could bring a claim against a foreign sovereign in a U.S. court, provided that some connection with the United States, such as those in the commercial activity exception, exists. Allowing such a broad class of claims to come before U.S. courts exhibits a congressional intent that the statute should sweep broadly, not looking to whether foreign sovereigns have *purposefully* directed their conduct at the United States but rather at whether their foreign commercial activity, potentially with a non-U.S. party, has resulted in some direct effect in the United States.

Foreign sovereigns are also in a much different position than are private companies. Courts must view this policy issue in the context of

---

295. *The Pesaro*, 277 F. at 485 ("[I]t seems improbable that in these days the judicial seizure of a publicly owned merchantman like the Pesaro would affect our foreign relations in any greater degree than the judicial seizure of a great privately owned merchantman like the Aquitania. Indeed, it would seem that foreign relations are much less likely to be disturbed if the rights and obligations of foreign states growing out of their ordinary civil transactions were dealt with by the established rules of law, than if they were made a matter of diplomatic concern."); *see also* Laker Airways Ltd. v. Pan Am. World Airways, 568 F. Supp. 811, 817 (D.D.C. 1983) (referring to the Sherman Act as "our charter of economic liberty").

296. 461 U.S. 480, 490 (1983).

FSIA. Foreign sovereigns possess greater contacts with the world—indeed, likely a branch (or embassy) in every country with which they have relations. The possibility of sovereign bankruptcy is also questionable because there are no internationally-accepted rules for such an event.[297] Moreover, unlike private companies, foreign sovereigns possess coercive powers, which have broad implications for the way in which the sovereigns are treated. Even if they are acting in a private capacity, therefore, they have a unique advantage. Because of this, it may be that in many cases, to ensure that private parties are not disadvantaged by dealing with an entity connected with a foreign state, it is fair to extend jurisdiction and law to foreign sovereigns in their private actions to a greater extent than is fair for private corporations.[298]

In contrast, an argument exists for narrower jurisdiction against foreign sovereigns, not simply because of vague foreign relations concerns but also because the sovereigns' resources should be preserved for the benefit of the sovereigns' citizens.[299] This argument may have less force in the FSIA context because the statute allows for execution and attachment only if the property is in the United States and has relevance to commercial activity, mitigating concerns over the entanglement of sovereign property.[300] The statute also maintains heightened protections for military and central bank property.[301] These issues will provide background "context" as courts analyze FSIA's reach.

B. Prescription of Foreign Conduct by Federal or State Law

Aside from the substantive standards of foreign sovereign immunity, a court's analysis of the direct effect provision may be affected by the law that will ultimately apply to the merits. Although this is surely one of the foreign relations-related concerns, perhaps more needs to be said on how much weight a court should give this factor. While FSIA applies a universal federal standard to questions of immunity, it contains no bar

297. Ross Buckley, *A Tale of Two Crises: The Search for the Enduring Reforms of the International Financial System*, 6 UCLA J. INT'L L. & FOREIGN AFF. 1, 14 (2001) (noting the famous comment by the CEO of Citicorp Walter Wriston that "[c]ountries never go bankrupt," which has now become synonymous with a theory by the same name).

298. *See id.* (noting that private investors can certainly go bankrupt lending to foreign sovereign borrowers).

299. *Cf.* Republic of Iraq v. ABB AG, 920 F. Supp.2d 517, 532–33 (S.D.N.Y. 2013) (holding that, despite quasi-sovereign interest in the health and welfare of its people, Iraq has no standing to pursue those interests in U.S. court *parens patriae*).

300. 28 U.S.C. §§ 1609–1610 (2012).

301. 28 U.S.C. § 1611 (2012).

against the application of foreign law to the merits of the case.[302] There is a split of authority amongst the circuits as to whether FSIA's text and structure support the use of the state forum's or federal common law's choice of law rules.[303] In some cases, however, the distinction will be meaningless as both the state and federal common law will apply the Restatement (Second) of Conflict of Laws.[304] And, in all cases, the choice of law rules may point to the application of the law of a foreign nation. Therefore, in a close case, how much does the fact that FSIA's structure will permit Arizona contract law to govern the dispute matter to whether the direct effect provision will apply? In other words, would the application of Arizona law create a conflict between its requirements or standards and those of the foreign country defendant's law? In other contexts this seems of paramount importance. After all, it is this regulatory conflict rule that prevents a literal operation of the effects provision in the Sherman Act via the Foreign Trade Antitrust Improvement Act and prompts courts to exercise restraint.

In the case of FSIA, although the law that will ultimately govern the merits should be a factor in the court's reasoning, it is cleaner to rest upon the FSIA's denial of immunity and permission of jurisdiction as sufficient evidence of legislative intent that U.S. immunity law may prescribe foreign conduct. Still, because the "comity concerns" analysis that allowed the Supreme Court to escape seemingly destructive applications of the antitrust laws counsels in favor of courts having the option to *consider* what law will

---

302. *See* 28 U.S.C. § 1606 (2012). FSIA prohibits punitive damages against the foreign state proper, but in wrongful death suits, it takes local law and its stance on pecuniary damages into account in awarding actual and compensatory damages for the family. *Id.*

303. Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of the Republic of Venez., 575 F.3d 491, 498 (5th Cir. 2009) ("Because this case arises under the FSIA, we apply the choice-of-law rules of the forum state."); Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 84 (2d Cir. 2002) (quoting Barkanic v. Gen. Admin. of Civil Aviation of China, 923 F.2d 957, 959 (2d Cir. 1991)) ("[R]ather than directing courts to apply the choice of law rules of the place of [the relevant events], the FSIA implicitly requires courts to apply the choice of law provisions of the forum state with respect to all issues governed by state substantive law."); *see also* O'Bryan v. Holy See, 556 F.3d 361, 381 n.8 (6th Cir. 2009) (holding that, in an FSIA case, the forum state's choice of law rules apply to all issues but jurisdiction); Falcon Invs., Inc. v. Republic of Venez., No. 00-4123-DES, 2001 U.S. Dist. LEXIS 6941, at *14–15 (D. Kan. May 22, 2001) (tending toward forum choice of law principles). *But see* Schoenberg v. Exportadora de Sal, S.A. de C.V., 930 F.2d 777, 782 (9th Cir. 1991) ("Although the general rule is 'that a federal court sitting in diversity applies the conflict-of-law rules of the state in which it sits,' jurisdiction in this case is based on FSIA, not diversity. Therefore, federal common law applies to the choice of law rule determination. Federal common law follows the approach of the Restatement (Second) of Conflict of Laws (1969)." (citations omitted)).

304. Vargas v. Air Fr. Freighter, No. 02 C 5912, 2003 U.S. Dist. LEXIS 4524, at *6 (N.D. Ill. Mar. 24, 2003) (determining whether forum or federal common law governed choice of law analysis was unnecessary because "both Illinois and federal law look to the Restatement (Second) of Conflict of Laws to decide choice of law questions").

ultimately apply and the importance of the sovereign interests behind that policy, a court should analyze this factor in determining whether to exercise restraint. Moreover, the conflict of laws analysis of the interest of the forum in, and its connection to, the suit will distill this factor for the court and make apparent how and whether significant issues of foreign law counsel in favor of jurisdictional restraint.

CONCLUSION

In essence, the key to creating a more uniform interpretation of FSIA's direct effect provision may be to understand that its reach is determined by principles of statutory interpretation and judicial restraint—e.g., general principles of international law and comity concerns. This balance is the core of the multifaceted extraterritoriality inquiry that the Supreme Court has conducted in other areas of the law, and its structure may help courts to resolve questions regarding the reach of FSIA's direct effect provisions in a more uniform way, avoiding the circuit split that has emerged over the legally significant act test. In addition, using this inquiry for FSIA cases may also create clarity in other areas of the law because it will generate useful analogies as to the relationship between federal and state law in these cases, whether judicial restraint is truly necessary, and whether courts here have been too cautious in their approach to the extraterritorial reach of U.S. law and jurisdiction.

Disparate frameworks of analysis will only create illogical double standards and confusing jurisprudential tests that harm litigants and the administration of justice. The time is right to integrate the analysis for extraterritoriality under FSIA's direct effect provision with the analysis conducted under other federal statutes.