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IS A FOREIGN STATE A "PERSON"?
DOES IT MATTER?: PERSONAL JURISDICTION,
DUE PROCESS, AND THE FOREIGN
SOVEREIGN IMMUNITIES ACT

KAREN HALVERSON*

I. INTRODUCTION

Gustav Klimt's 1907 painting "Portrait of Adele Bloch-Bauer I" (Adele I), displayed at the Austrian Gallery in Vienna, is considered to be a masterpiece and one of Klimt's principal works.¹ Maria Altmann, a niece and heir of Adele Bloch-Bauer, recently brought suit against the Republic of Austria (Austria) seeking restitution for the expropriation of six of Klimt's works, including Adele I. These six paintings together are valued at roughly \$150 million.² Altmann alleges that the six paintings were taken illegally from the family in 1938 when the Nazis invaded Austria. Austria moved to dismiss the claim, arguing among other things that it was immune from suit under the Foreign Sovereign Immunities Act (FSIA).³

In an extraordinary decision, Judge Florence-Marie Cooper of the Central District of California denied Austria's motion to dismiss. Judge Cooper's decision centers on the applicability of an exception to immunity under the FSIA for ac-

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1. Adele I is perhaps the most dramatic example of Klimt's "golden phase," in which he made liberal use of gold and gilding in his portraits. One expert noted that Adele I and similar portraits "are among the most significant pictures within [Klimt's] oeuvre of turn-of-the-century women." GILLES NÉRET, *GUSTAV KLIMT 1862-1918*, at 65 (1997). An on-line reproduction of Adele I can be viewed at http://www.bertc.com/klimt_8.htm (last visited Jan. 20, 2002).

2. *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1192 n.2 (C.D. Cal. 2001). The other Klimt paintings included in the claim are Adele Bloch-Bauer II, Beechwood, Apple Tree I, Houses in Unterach am Attersee, and Amalie Zuckerkandl. See *id.*

3. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1994 & Supp. V 1999).

tions seeking rights in illegally expropriated property. Specifically, the FSIA provides for an exception to immunity in cases in which rights in property taken in violation of international law are at issue and the property at stake is owned or operated by an agency or instrumentality of the foreign state⁴ that is engaged in a commercial activity in the United States.⁵ Judge Cooper found that the expropriation exception applied, reasoning that the paintings were exhibited (or “operated”) by the Austrian Gallery, an instrumentality of the Austrian state engaged in commercial activity in the United States.⁶

Austria also argued that the court lacked personal jurisdiction because Austria and the Austrian Gallery lacked “minimum contacts” with the United States.⁷ In response to this argument, Judge Cooper simply held that foreign states are not “persons” for purposes of the Due Process Clause.⁸ In support of this proposition, Judge Cooper cited a line of federal district court decisions involving the “anti-terrorism amend-

4. The FSIA defines a “foreign state” to include both a political subdivision of a state and an “agency or instrumentality” of a state, which includes any entity organized under the laws of the state that is at least majority-owned by the state (or a political subdivision of the state). 28 U.S.C. § 1603(a)-(b).

5. The FSIA allows an exception to immunity in any case in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3) (expropriation exception). Thus there are two possibilities under the exception: either (i) the expropriated property (or its proceeds) is present in the United States in connection with the commercial activity of the foreign state or (ii) such property is owned or operated by an agency or instrumentality of the foreign state engaged in commercial activity in the United States. The *Altmann* case, 142 F. Supp. 2d 1187, involved the second of these two possibilities.

6. The gallery was found to be engaged in commercial activity in the United States because it published a museum catalogue available for purchase by U.S. residents and advertised its collection in the United States. See *Altmann*, 142 F. Supp. 2d at 1196.

7. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); see also *infra* note 37 and accompanying text.

8. See *Altmann*, 142 F. Supp. 2d at 1206-08.

ment” to the FSIA—a recent amendment allowing an exception to immunity for certain terrorist activity, torture, or hostage-taking by a foreign government or agent.⁹ Courts have applied the anti-terrorism amendment to assert jurisdiction and in some cases issue judgments against a number of “rogue” governments for extraterritorial terrorist acts: Cuba, for the downing of two U.S. aircraft over international airspace;¹⁰ Iran, for involvement in the terrorist bombing of a bus in Israel¹¹ and for holding Terry Anderson and other Americans hostage in Lebanon;¹² Libya, for its role in the bombing of Pan Am Flight 103 over Lockerbie, Scotland;¹³ and Iraq, for committing acts of torture against four Americans.¹⁴ In several of these decisions, the courts held that the “minimum contacts” test does not apply to suits against foreign states because states are not entitled to constitutional protection.¹⁵

The Supreme Court has never addressed directly the applicability of the Due Process Clause to foreign sovereign defendants. However, in *Republic of Argentina v. Weltover*, Justice Scalia suggested that a state may not be a “person” for purposes of the Due Process Clause.¹⁶ Since *Weltover*, a number of

9. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 94-583, 90 Stat. 2891 (1994) (codified in relevant part at 28 U.S.C. § 1605(a)(7)).

10. *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997).

11. *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998).

12. *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107 (D.D.C. 2000); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998).

13. *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325 (E.D.N.Y. 1998), *aff'd in part*, 162 F.3d 748 (2d Cir. 1998).

14. *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38 (D.D.C. 2000).

15. See *Flatow*, 999 F. Supp. at 19-23 (holding that a foreign state is not a “person” for due process purposes but finding minimum contacts in any event); *Daliberti*, 97 F. Supp. 2d at 48-49 (suggesting that a foreign state is not a “person”); see also *World Wide Minerals v. Republic of Kazakhstan*, 116 F. Supp. 2d 98, 103 (D.D.C. 2000) (holding in a case involving the commercial activity exception that no minimum contacts analysis was required for the foreign state defendants involved); cf. *Price v. Socialist People's Libyan Arab Jamahiriya*, 110 F. Supp. 2d 10, 14 (D.D.C. 2000) (“the process of obtaining personal jurisdiction under the FSIA does not follow the traditional approach outlined in *International Shoe Co.*”).

16. *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992).

circuit courts also have questioned whether a foreign sovereign defendant is entitled to due process.¹⁷

Both policy considerations and precedent suggest that a foreign state is not a "person" for due process purposes.¹⁸ Resolving the constitutional question, however, is only a part of the analysis. Even if a foreign state is not a "person," and thus is unable to assert the protections afforded individuals under the Due Process Clause, it does not follow that U.S. courts' exercise of personal jurisdiction over a foreign state is unfettered unless Congress unambiguously provides to that effect. The rules of personal jurisdiction have not always been linked to the Due Process Clause, and perhaps should not be today.¹⁹ This article does not attempt to make that argument, but instead proposes an approach to interpreting the FSIA in the event that a foreign state is not held to be a "person" for Due Process Clause purposes.

Part II of this article sets forth a brief introduction to the FSIA as it was enacted in 1976, the applicability of the "minimum contacts" test to foreign states, and two subsequent amendments to the FSIA that carve out additional exceptions to sovereign immunity but do not contain jurisdictional nexus requirements. Part III explains why, although a foreign state may stand outside the constitutional structure, the Due Process Clause as it relates to personal jurisdiction can be distin-

17. See, e.g., *S & Davis Int'l Inc. v. Republic of Yemen*, 218 F.3d 1292, 1301 (11th Cir. 2000) (raising the due process question raised in *Weltover* but finding minimum contacts in any event); *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 124-25 (D.C. Cir. 1999) (raising the due process question raised in *Weltover* but proceeding on the assumption that a foreign sovereign is entitled to due process); *Hanil Bank v. PT. Bank Negara Indon.*, 148 F.3d 127, 134 (2d Cir. 1998) (questioning whether the holding in *Texas Trading & Milling Co. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), that "the exercise of jurisdiction over foreign states sued under the FSIA was subject to the same constitutional constraints which otherwise regulate every exercise of personal jurisdiction," remains good law).

18. See discussion *infra* Part III.A (addressing the constitutional status of foreign states).

19. Indeed, the Draft Hague Convention on Foreign Judgments calls into question the continued viability of this approach, since the jurisdictional rules recognized under the Convention generally follow the European approach to personal jurisdiction. See Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Oct. 30, 1999, at <http://www.hcch.net/e/conventions/draft36e.html> [hereinafter Draft Hague Convention]; *infra* notes 290-91 and accompanying text.

guished from other constitutional rights in light of the rules of personal jurisdiction under international law and the historical development of personal jurisdiction in the United States prior to *Pennoyer v. Neff*.²⁰ Part III also spells out the international law on jurisdiction to adjudicate, and explains the status of customary international law in the U.S. constitutional framework. Part IV considers the implications of this analysis for the FSIA and its amendments.

II. BACKGROUND TO THE FSIA AND THE JURISDICTIONAL NEXUS REQUIREMENT

A. 1976 Statute

The basic purpose of the FSIA was to set forth consistent guidelines for determining sovereign immunity.²¹ Prior to the adoption of the FSIA in 1976, immunity was determined by the State Department on a case-by-case basis. Perhaps the most important exception to sovereign immunity was established in the United States in 1952 when the State Department embraced the restrictive theory of state immunity.²² Under the restrictive theory, immunity is not absolute, but rather is relinquished when the foreign state engages in commercial or pri-

20. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

21. The House Report accompanying the FSIA cites the following purpose:

A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.

FLOWERS, JURISDICTION OF UNITED STATES COURTS IN SUITS AGAINST FOREIGN STATES, H.R. NO. 94-1487, at 7 (1976). Another purpose of the FSIA was to codify the restrictive theory of sovereign immunity. See Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 33-34 (1978).

22. The State Department's adoption of this policy is evidenced in a letter from Acting Legal Adviser Jack B. Tate to the U.S. Attorney General, dated May 19, 1952, commonly referred to as the "Tate Letter." The letter concludes that, in order to better conform with state practice and to facilitate commercial dealings of foreign states, "it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity" Tate Letter, DEP'T ST. BULL., June 1952, at 984, 985, reprinted in Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711-15 (1976).

vate activity.²³ Until the passage of the FSIA, courts considering whether a foreign sovereign defendant had engaged in commercial activity deferred to the State Department's application of the restrictive theory to individual cases, a process that provided little guidance or certainty to litigants.²⁴

The FSIA is a complicated statute, for it sets out to achieve a number of objectives. First, the FSIA provides the exclusive basis for obtaining jurisdiction over a foreign state in the United States²⁵ and specifies that federal courts shall adjudicate claims against foreign states.²⁶ The FSIA thus intertwines issues of personal and subject matter jurisdiction over foreign states with that of sovereign immunity. Simply stated, federal court jurisdiction over a foreign state exists where process has been validly served and one of the exceptions to immunity can

23. The Tate Letter explains the difference between the "classical" and the "restrictive" theories of sovereign immunity:

According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).

Id.

24. As the House Report to the FSIA explains, although the State Department adopted the "restrictive theory" to sovereign immunity, in practice exceptions to immunity were not always granted, due to diplomatic pressures brought to bear on the State Department from foreign governments seeking immunity. See H.R. REP. NO. 94-1487 at 7. Thus, the Department was in the "awkward position" of attempting to apply a legal rule to cases undergoing litigation in U.S. courts without the benefit of hearing witnesses or taking other evidence and without appellate review. *Id.* at 8.

25. See *Argentine Republic v. Amerasia Shipping*, 488 U.S. 428, 434 (1989). In this case, a Liberian oil tanker was attacked in international waters by an Argentine military aircraft during the Falkland Islands war. The owner of the oil tanker brought suit against Argentina in U.S. court, claiming jurisdiction under the Alien Tort Claims Act, which allows jurisdiction in U.S. courts for torts committed in violation of international law. See *id.* at 432. The Supreme Court refused to find jurisdiction, ruling that the FSIA provides the "sole basis" for obtaining jurisdiction in suits against foreign sovereigns. *Id.* at 434. Since the attack was committed outside of U.S. territory, no exception to immunity under the FSIA applied. See *id.* at 439-41.

26. See 28 U.S.C. § 1330 (1994) (providing that federal district courts shall have original jurisdiction over any claim with respect to which the foreign state cannot claim immunity under the FSIA).

be demonstrated.²⁷ Once an exception to immunity is found, the FSIA provides that a foreign state may be liable "in the same manner and to the same extent as a private individual under like circumstances."²⁸ Finally, the statute specifies which state assets may be attached to execute a judgment against a foreign state.²⁹

As for the scope of immunity under the FSIA, the statute sets forth a rule of absolute immunity and then lists specified exceptions to immunity. In addition to an exception for certain suits in admiralty to enforce maritime liens,³⁰ the FSIA as enacted in 1976 provided an exception to immunity in five cases: waiver,³¹ commercial activity,³² expropriation (the exception at issue in *Altmann*),³³ the determination of rights in property present in the United States,³⁴ and certain torts occurring within U.S. territory.³⁵ It is significant that each of the exceptions to immunity under the 1976 statute (other than the waiver and maritime lien exceptions) contains a jurisdictional nexus requirement—that is, a requirement that the property at issue or the conduct surrounding the claim bears a territorial connection to the United States. The House Report accompanying the FSIA suggests that this requirement was included to ensure that due process concerns were met before asserting personal jurisdiction over a foreign state. The House

27. See *id.* (requiring that service of process be made in accordance with the FSIA). The provisions in the FSIA specifying special procedures for the service of process on foreign states are codified in 28 U.S.C. § 1608 (1994).

28. 28 U.S.C. § 1606 (Supp. V 1999).

29. See 28 U.S.C. §§ 1609-1611 (1994 & Supp. V 1999) (determining when the assets of a foreign state may be immune from attachment, arrest, and execution).

30. See 28 U.S.C. § 1605(b) (1994).

31. See 28 U.S.C. § 1605(a)(1) (1994).

32. See 28 U.S.C. § 1605(a)(2) (1994).

33. See 28 U.S.C. § 1605(a)(3) (1994); see also *supra* note 5 and accompanying text.

34. See 28 U.S.C. § 1605(a)(4) (1994).

35. See 28 U.S.C. § 1605(a)(5) (1994). Although the language of the statute refers to injury occurring in the United States, courts have interpreted this exception to immunity as requiring that the tortious act occur in the United States as well. See *Olsen v. Republic of Mexico*, 729 F.2d 641, 645 (9th Cir. 1984) (stating that the legislative history of the tort exception indicates that the "tortious act or omission must occur within the jurisdiction of the United States").

Report cites to *International Shoe Co. v. Washington*,³⁶ explaining that the jurisdictional nexus requirement "prescribes the necessary contacts which must exist before our courts can exercise personal jurisdiction."³⁷

An examination of the commercial activity exception illustrates the close correlation between the jurisdictional nexus requirement in the statute and the "minimum contacts" requirement of *International Shoe*. Section 1605(a)(2) of the FSIA provides an exception to sovereign immunity where

the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or 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

In other words, Section 1605(a)(2) requires that the action be based on one of three types of U.S.-based conduct: (i) continuous activity within the United States; (ii) an act conducted within the United States; or (iii) an act conducted outside the United States which has a "direct effect" in the United States. Each of the permissible bases for jurisdiction outlined in the commercial activity exception thus requires either U.S.-based conduct or conduct that directly affects the United States.

The commercial activity exception is further analyzed below. The basic point to be emphasized here is that the FSIA, as originally enacted in 1976, was drafted expressly to incorporate limits on personal jurisdiction with respect to each exception to immunity. Indeed, the intent of Congress in the FSIA was to treat foreign state defendants similar to other "persons" who are entitled to due process protection.³⁹ As we will see,

36. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

37. *FLOWERS, JURISDICTION OF UNITED STATES COURTS IN SUITS AGAINST FOREIGN STATES*, H.R. No. 94-1487, at 13 (1976).

38. 28 U.S.C. § 1605(a)(2) (1994).

39. This point was acknowledged by the drafters of the Restatement (Third) of Foreign Relations Law of the United States. See *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 453 (Reporters' Note 3) (1987) [hereinafter *RESTATEMENT (THIRD)*] ("it was apparently the intention of the Foreign Sovereign Immunities Act that foreign states be treated like private enti-

the same cannot be said with respect to the exceptions to immunity that were later added to the FSIA.

B. *FSIA Amendments*

Since its adoption in 1976, the FSIA has been amended twice to include additional exceptions to immunity. It was amended in 1988 to add a new exception for actions to enforce or confirm arbitration awards either issued in the United States or covered under an international agreement for the recognition and enforcement of arbitral awards (arbitration amendment).⁴⁰ The legislation enacting the amendment was entitled "Implementation of the Inter-American Convention on International Commercial Arbitration."⁴¹ The Inter-American Convention on International Commercial Arbitration (Inter-American Convention)⁴² is an international agreement between the United States and other members of the Organization of American States, similar to the New York Convention,⁴³ for the mutual recognition and enforcement of international arbitration awards. The apparent purpose of the arbitration amendment was to facilitate the enforcement of international arbitration agreements by clarifying that a foreign state's agreement to submit a dispute to international commercial arbitration amounts to a waiver of sovereign immunity in any suit to enforce arbitral awards relating to such agreements.⁴⁴

ties for the purpose of determining the necessary connection with the forum."); *see also* 28 U.S.C. § 1606 (1994 & Supp. V 1999) (providing that a foreign state under the FSIA shall be liable "in the same manner and to the same extent as a private individual under like circumstances").

40. *See* 28 U.S.C. § 1605(a)(6) (1994). The exception also applies if the underlying claim, but for the agreement to arbitrate, could have been brought under the FSIA. *See id.*

41. Implementation of the Inter-American Convention on International Commercial Arbitration, Pub. L. No. 100-669, 102 Stat. 3969 (1988).

42. Inter-American Convention on International Commercial Arbitration, *opened for signature* Jan. 30, 1975, 104 Stat. 448 (1990), O.A.S.T.S. No. 42 [hereinafter Inter-American Convention]. The United States became a signatory to the Inter-American Convention effective Oct. 27, 1990.

43. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]; *see infra* note 259 and accompanying text.

44. In statements on the House floor supporting the bill that became the 1988 amendment, the stated purpose of the legislation was to ensure that sovereign immunity (in addition to the related Act of State doctrine) would

Under existing case law in 1988, a number of courts had held that the waiver exception of the FSIA applied to agreements to submit a dispute to international arbitration, but other courts had disagreed with this interpretation.⁴⁵ The arbitration amendment was designed to resolve this conflict between courts, and to comply with the United States's obligations under international agreements relating to the recognition and enforcement of foreign arbitral awards.⁴⁶

Congress amended the FSIA a second time as part of the Anti-Terrorism and Effective Death Penalty Act of 1996 (anti-terrorism amendment),⁴⁷ this time to add an exception to immunity for certain terrorist activities.⁴⁸ This anti-terrorism

not be used to "frustrate" the effect of an arbitration agreement or to "interfere with the enforcement of an arbitral award entered against a foreign state." 134 CONG. REC. H10678 (Oct. 20, 1988) (statement of Rep. Moorhead).

In supporting an earlier version of the legislation, Senator Lugar noted the need to clarify that an agreement by a sovereign to arbitrate a dispute should be interpreted as a waiver of immunity: "Currently, agreements and awards are enforced under the provisions of the FSIA that concern explicit or implied waivers of immunity. Although courts are finding that arbitral agreements constitute waivers in the appropriate cases, the amendment would give more explicit guidance to judges in dealing with these issues." 132 CONG. REC. 28000 (Oct. 2, 1986) (statement of Sen. Lugar).

45. See *infra* note 263 and accompanying text. Note that a finding of implied waiver of immunity from an international arbitration agreement also may extend to any action brought to enforce the arbitration award. See GEORGES R. DELAUME, *TRANSNATIONAL CONTRACTS APPLICABLE LAW AND SETTLEMENT OF DISPUTES (A STUDY IN CONFLICT AVOIDANCE)* 73 (1990).

46. These agreements include in particular the Inter-American Convention, *supra* note 42, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention], and the New York Convention, *supra* note 43. The United States became a signatory to the New York Convention effective Dec. 29, 1970. For a discussion of U.S. obligations under the New York Convention, see *infra* note 260 and accompanying text.

47. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). The anti-terrorism amendment also amended the FSIA to allow an exception to immunity from attachment and execution of foreign state property for the satisfaction of judgments brought under the anti-terrorism amendment. See 28 U.S.C. § 1610(a)(7), (f) (Supp. V 1999).

48. For a recent analysis of the anti-terrorism amendment and some of the litigation that has ensued, see S. Jason Baletsa, *The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign*

amendment to the FSIA provides an exception to sovereign immunity in certain personal injury or wrongful death actions against a foreign state involving either torture, extrajudicial killing, aircraft sabotage, hostage taking, "or the provision of material support or resources" for such an act.⁴⁹ The exception does not apply where neither the claimant nor the victim is a U.S. national. Significantly, the exception *only* applies to foreign states that are designated by the State Department as state sponsors of terrorism, which at the present includes only a handful of "rogue" states—Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria.⁵⁰

Sovereign Immunities Act, 148 U. PA. L. REV. 1247 (2000). See also Joseph W. Glannon & Jeffrey Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act*, 87 GEO. L.J. 675, 685-87 (1999); Lee M. Caplan, *The Constitution and Jurisdiction over Foreign States: The 1996 Amendment to the Foreign Sovereign Immunities Act in Perspective*, 41 VA. J. INT'L L. 369 (2001).

49. The anti-terrorism amendment allows an exception to immunity under the FSIA in cases, not otherwise covered under the commercial activity exception, where

money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear such a claim under this paragraph—

if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act; and even if the foreign state is or was so designated, if—

- (i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or
- (ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

28 U.S.C. § 1605(a)(7) (Supp. V 1999).

50. See 48 C.F.R. 252.209-7001 (2001) (defining "terrorist country" as one so determined by the Secretary of State and providing the list of countries).

The legislative history to the anti-terrorism amendment indicates that it was adopted out of concerns relating to the need to better protect the United States from torture and similar acts of foreign governments conducted abroad, such as the abuse at issue in *Saudi Arabia v. Nelson*.⁵¹ Senate hearings on a predecessor bill to the amendment⁵² included discussions of the FSIA's limitations in addressing human rights abuses in cases such as *Nelson*.⁵³ Several victims of human rights abuses at the hands of foreign states appeared and offered their testimony.⁵⁴ In addition, Congress sought a means to impose liability on state agencies and instrumentalities that provided funding and other support for international terrorism, such as the 1993 bombing of the World Trade Center in New York City.⁵⁵

State and Justice Department officials opposed passage of the amendment, citing concerns that the creation of new bases for jurisdiction in U.S. courts might expose the United States to new remedies that could be used against it overseas,⁵⁶ and commenting that the vast extraterritorial scope of the exception would "diverge significantly" from international practice

51. See *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993); see also *infra* note 195 and accompanying text.

52. See *The Foreign Sovereign Immunities Act: Hearings on S.825 before the Subcomm. on Courts and Administrative Practice of the Judiciary Committee*, 103d Cong. (1994), microformed on CIS No. 96:S521-11 (Cong. Info. Serv.) [hereinafter 1994 *Hearings*]. S.825 was a predecessor bill to what became the anti-terrorism amendment.

53. See *id.* at 3 (testimony of Rep. Romano L. Mazzoli) (noting that the State Department in the *Nelson* case "sided with a foreign sovereign against an aggrieved U.S. citizen").

54. See *id.* at 31 (testimony of Auschwitz survivor Hugo Princz and former hostages David P. Jacobsen, Joseph Cicippio, and Clinton A. Hall).

55. See *id.* at 1 (testimony of Sen. Howell Heflin) (making reference to the 1993 bombing of the World Trade Center). To emphasize the urgency of combating international terrorism, Senator Arlen Specter testified that, between 1980 and 1994, more than 6500 international terrorist incidents had occurred, killing over 5100 and wounding 12,500. See *id.* at 23 (testimony of Sen. Arlen Specter). Senator Specter also brought up the taking of U.S. hostages in Lebanon by terrorists sponsored by the Iranian government and noted that the purpose of the anti-terrorism amendment was to allow recourse against foreign governments, such as Iran, that act as perpetrators of such acts of terrorism. See *id.*

56. See *id.* at 9 (testimony of Stuart Schiffer, Deputy Assistant Att'y Gen., Civil Div., U.S. Dep't of Justice).

and risk undermining the overall effectiveness of the FSIA.⁵⁷ In response to these concerns, legislators emphasized the urgency of fighting international terrorism⁵⁸ and suggested that the amendment was consistent with the international law concept of universal jurisdiction. Senator Arlen Specter, in particular, noted that under international customary law, piracy and torture are considered international crimes covered by the principle of universal jurisdiction:

Somebody who commits torture may be prosecuted wherever that person may be found [W]here a foreign government is a co-conspirator, an accessory before the fact or an accessory after the fact, it is just unconscionable that we should not allow our citizens to utilize our courts.⁵⁹

Although the bill proposed by Senator Specter was directed at foreign state support of "acts of international terrorism,"⁶⁰ the final text of the anti-terrorism amendment limits the exception to torture, extrajudicial killing (as such terms are defined in the Torture Victim Protection Act), aircraft sabotage, hostage taking, or "the provision of material support or resources" for such acts.⁶¹

The passage of these two FSIA amendments, in particular the anti-terrorism amendment, marked a departure from the

57. *Id.* at 10 (testimony of Jamison S. Borek, Deputy Legal Adviser, Dep't of State).

58. *See id.* at 22 (testimony of Sen. Arlen Spencer).

59. *Id.* at 22-23 (testimony of Sen. Arlen Specter). For a discussion of universal jurisdiction and how it relates to the anti-terrorism amendment, see Part IV.B.

60. *See id.* at 26-30 (excerpting the text of S.825).

61. *See* 28 U.S.C. § 1605(a)(7) (Supp. V 1999). In order to create a cause of action for state-sponsored terrorism under United States law, Congress enacted a separate amendment to the FSIA, the Civil Liability for Acts of State Sponsored Terrorism, commonly known as the Flatow Amendment. *See* Pub. L. 104-208, 110 Stat. 3009-121, 3009-172 (1996) (codified at 28 U.S.C. § 1605). The Flatow Amendment, which allows for the recovery of compensatory as well as punitive damages, is named in honor of Alisa Flatow, a victim of terrorism and the subject of one of the first cases to apply the anti-terrorism amendment. *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998). For a discussion of the Flatow Amendment, see Warren D. Zaffuto, Comment, A "Pirate's Victory": *President Clinton's Approach to the New FSIA Exception Leaves the Victors Empty-Handed*, 74 TUL. L. REV. 685, 698-700 (1999).

approach of the 1976 statute, which consciously limited the territorial scope of the FSIA exceptions. During the initial years of the FSIA's existence, there was relatively little tension between the statute's extraterritorial reach and U.S. constitutional constraints on personal jurisdiction. After passage of the arbitration amendment, however, a Mongolian state-owned enterprise that agreed to arbitration in Japan might be brought into U.S. court to enforce the award. After passage of the anti-terrorism amendment, a "rogue" state such as Iran might be sued in an action in U.S. court for aiding and abetting hostage taking or aircraft sabotage occurring in Europe. In addition, broad judicial interpretations of the commercial activity exception⁶² and the expropriation exception⁶³ have created tension between the "minimum contacts" requirement and exceptions to immunity under the original 1976 statute. Assuming an exception to immunity under the statute applies, the constitutional issue in each of these examples is whether the foreign state can raise lack of "minimum contacts" as a defense to jurisdiction.

C. "Minimum Contacts"

In the United States, federal circuit and district courts until recently have held that a foreign state is entitled to due process. Due process in this context refers to the protections established in *International Shoe Co. v. Washington*, i.e., that a court may not assert jurisdiction over a foreign sovereign defendant unless that sovereign possesses "minimum contacts" with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"⁶⁴ Since *Pennoyer v. Neff*, the Supreme Court has held that this is a constitutional right, protected by the Due Process Clause of the Fourteenth Amendment.⁶⁵

62. For a discussion of the commercial activity exception, see *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992); *supra* note 38 and accompanying text; and *infra* Part IV.A.

63. See *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001); see also *supra* pp. 115-16.

64. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

65. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877). Of course, where a foreign sovereign defendant is involved, the Due Process Clause that is implicated is that of the Fifth Amendment, since the FSIA provides that any suit

As it has evolved through successive interpretations by the Supreme Court, the “minimum contacts” test entails a two-step inquiry. First, the defendant’s contacts with the forum must be such that the defendant reasonably could anticipate defending there.⁶⁶ In other words, a court will look for some activity by which the defendant has “purposefully availed itself of the privileges and benefits of the laws of the United States.”⁶⁷ Second, the assertion of jurisdiction should not “offend traditional notions of fair play and substantial justice.” Thus, a court also must consider whether asserting jurisdiction is reasonable. As the Supreme Court stated in *World-Wide Volkswagen*, assessing reasonableness entails weighing a number of factors, including the burden on the defendant, the forum’s interest in adjudicating, the plaintiff’s interest in suing in the forum, judicial efficiency, and other policy considerations.⁶⁸

As to the application of the “minimum contacts” test to a foreign state, there are a few aspects of the test that are worth attention. First, when measuring a foreign state’s contacts with a given forum, may the court consider aggregate contacts with the entire United States, or is the court restricted to considering contacts with the forum state? The prevailing view is that the relevant contacts are those with the entire United States.⁶⁹

against a foreign sovereign will be heard in federal court. See 28 U.S.C. § 1330 (1976). For a discussion of *Pennoyer*, see *infra* Part III.B.

66. See Mary Kay Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 404-05 (1983) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

67. *Id.* at 405 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Judge Posner explains the policy behind the “purposeful availment” requirement from a cost-benefit perspective: “the defendant must derive some benefit from the state to balance the cost of exposure to suit in what is likely to be an inconvenient, perhaps even an unfriendly, forum.” *Afram Exp. Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1362 (7th Cir. 1985).

68. See *World-Wide Volkswagen*, 444 U.S. at 292; Kane, *supra* note 66 (citing *World-Wide Volkswagen*, 444 U.S. at 292); cf. Allen R. Kamp, *Beyond Minimum Contacts: The Supreme Court’s New Jurisdictional Theory*, 15 GA. L. REV. 19 (1980) (explaining that *World-Wide Volkswagen* and related cases represent a shift towards greater emphasis on state sovereignty concerns in personal jurisdiction).

69. In *Texas Trading v. Federal Republic of Nigeria*, 647 F.2d 300, 314 (2d Cir. 1981), the Second Circuit held that, given the special service of process provision in the FSIA (similar to the securities and antitrust statutes, providing for worldwide service of process), the relevant area in finding contacts is the entire United States, as opposed to just the State of New York. Professor

For example, if a Texas court were assessing the constitutional-ity of asserting jurisdiction over a foreign sovereign defendant, the relevant contacts to consider would be those with the United States as a whole, not merely those with Texas.

Another factor to consider is the difference between general and specific jurisdiction.⁷⁰ Specific jurisdiction refers to the basis for jurisdiction when a controversy arises out of the defendant's contacts with the forum state.⁷¹ When jurisdiction over a defendant is found on the basis of the defendant's contacts with the forum that are *unrelated* to the cause of action, the state is exercising "general jurisdiction."⁷² Under general jurisdiction, a court might find "minimum contacts" based upon a defendant's activity in the forum state that has nothing to do with the lawsuit. However, in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, the Supreme Court held that the level of contacts necessary to exercise general jurisdiction had to be "continuous and systematic" in order to satisfy due process.⁷³

Kane takes this position as well, citing the *Texas Trading* case. See Kane, *supra* note 66, at 405; see also Ronan E. Degnan and Mary Kay Kane, *The Exercise of Jurisdiction over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 815 (1988). See also *Antoine v. Atlas Turner Inc.*, 66 F.3d 105 (6th Cir. 1995); *Meadows v. Dominican Republic*, 817 F.2d 517 (9th Cir. 1987). But see *Kelly v. Syria Shell Petroleum Dev.*, 213 F.3d 841, 854 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 426 (2000) (considering only foreign sovereign's contacts with state of Texas).

70. The concepts of "general jurisdiction" and "specific jurisdiction" were first defined and analyzed in Arthur T. von Mehren and Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-63 (1966).

71. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (citing *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

72. *Id.* at 414 n.9. Typically, general jurisdiction is premised on defendant's residence within the state. See Friedrich Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1203 (1984) (discussing the Justinian Code and the Supreme Court's recognition of general jurisdiction in *Milliken v. Meyer*). The Draft Hague Convention on Foreign Judgments provides that a defendant may be sued in courts of the state where defendant is "habitually resident." See Draft Hague Convention, *supra* note 19; see also *infra* note 291 and accompanying text.

73. *Helicopteros*, 466 U.S. at 415-16. In *Helicopteros*, the defendant was a Colombian operator of a helicopter that crashed in Peru, killing the U.S. plaintiffs on board. Although the chief executive officer of Helicol had conducted negotiations in connection with the contract in Houston, and although the company had accepted payment from a Houston bank, had pur-

In the context of suits under the FSIA, the issue has been raised as to whether a foreign state's presence in the United States through an embassy or consulate would suffice for purposes of finding general jurisdiction.⁷⁴ If the existence of an embassy alone were sufficient to assert jurisdiction over a foreign state, then the question of whether a foreign state is a "person" for due process purposes would be moot for the vast majority of countries,⁷⁵ since contacts with the United States sufficient to satisfy due process could be found in any event. In fact, while the existence of an embassy or a foreign state's chamber of commerce has been cited by courts as relevant to finding "minimum contacts," in those cases where jurisdiction was found, it was on the basis of specific jurisdiction or the existence of other contacts that related to the suit.⁷⁶ In other words, these cases do not stand for the idea that an embassy or

chased helicopters from Texas, and had sent employees to Texas for training, this did not amount to "continuous and systematic contacts" sufficient to assert jurisdiction over Helicopteros in a wrongful death action in Texas court. *See generally id.*

74. *See, e.g.,* David J. Bederman, *Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT'L & COMP. L. 255, 275 (1995) (citing cases, but stating that the issue of applying general jurisdiction to foreign sovereign defendants is "still open"); Adam C. Belsky et al., *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365, 408 (1989) (arguing that the activities of a foreign state's embassy or tourist promotion agency would provide sufficient contacts for general jurisdiction).

75. As of January 2001, the number of independent states in the world (not including Taiwan) totaled 191. Of these, the United States enjoyed diplomatic relations with all but five: Bhutan, Cuba, Iran, Iraq, and North Korea. *See* U.S. State Dep't, *Independent States in the World*, at http://www.state.gov/www/regions/independent_states.html (last visited Jan. 20, 2002).

76. *See, e.g.,* Olsen v. Republic of Mexico, 729 F.2d 641 (9th Cir. 1984) (discussing general jurisdiction but finding contacts on the basis of specific jurisdiction); Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic, 690 F. Supp. 682 (N.D. Ill. 1988) (finding jurisdiction based on the commercial activity exception in a suit to enforce payment for medical services provided in the United States, where payment was arranged through a U.S. bank); Meadows v. Dominican Republic, 628 F. Supp. 599 (N.D. Cal. 1986) (finding jurisdiction based on the commercial activity exception in a suit to enforce sovereign's obligation to pay dollar-denominated commission to U.S. plaintiff at bank of plaintiff's choosing); *cf.* El-Hadad v. United Arab Emirates, 69 F. Supp. 2d 69 (D.D.C. 1999), *rev'd on other grounds*, 216 F.3d 29 (D.C. Cir. 2000) (finding jurisdiction based on the commercial activity exception in a suit to enforce employment contract by an embassy employee who was fired).

consulate *alone* is enough to find general jurisdiction over a foreign sovereign defendant.⁷⁷ Conversely, in other FSIA cases, courts have found that "minimum contacts" were insufficient, notwithstanding the fact that the foreign state had established an embassy in the United States.⁷⁸ These decisions seem correct, for even where a foreign state has a "continuous and systematic" presence in the United States through an embassy or consulate, it is questionable whether exercising jurisdiction over that state in connection with an unrelated matter would satisfy "traditional notions of fair play and substantial justice."⁷⁹

D. *Texas Trading*

Although the exceptions to immunity outlined in the FSIA incorporate a jurisdictional nexus, courts applying the statute traditionally have employed a "minimum contacts" test in addition to the statutory test. The decision that generally is credited for the proposition that an exercise of jurisdiction under the FSIA must satisfy due process is *Texas Trading v. Federal Republic of Nigeria*.⁸⁰ This case, in the words of the Second

77. One case that seemed to base general jurisdiction on an embassy presence alone was later vacated. See *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 251 n.3 (D.D.C. 1985) (finding minimum contacts are "clearly satisfied" since the Soviet Union "maintains a substantial presence in this District"), *vacated*, 736 F. Supp. 1 (D.D.C. 1990).

78. See, e.g., *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118 (D.C. Cir. 1999) (dismissing the case for lack of "minimum contacts," no discussion of Qatar's presence in the United States through its embassy); *L'Europeene de Banque v. La Republica de Venezuela*, 700 F. Supp. 114 (S.D.N.Y. 1988) (same, with respect to Venezuela).

79. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Miliken v. Meyer*, 311 U.S. 457, 463 (1940)), *cited in* *Bederman*, *supra* note 74, at 275. An analogy can be drawn to a line of cases from the District of Columbia establishing the "government contacts" exception to personal jurisdiction. See, e.g., *World Wide Minerals v. Republic of Kazakhstan*, 116 F. Supp. 2d 98, 105 (D.D.C. 2000); *Mallinckrodt Med., Inc. v. Sonus Pharm., Inc.*, 989 F. Supp. 265, 271 (D.D.C. 1998). Because of the importance of citizens retaining unfettered access to petition the federal government, these decisions hold that a defendant's contacts with U.S. government instrumentalities in the District of Columbia (e.g., filing an application with a government agency or petitioning Congress) are not relevant for purposes of finding minimum contacts. See *Mallinckrodt*, 989 F. Supp. at 271.

80. *Tex. Trading v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981).

Circuit, arose out of "one of the most enormous commercial disputes in history."⁸¹ In the mid-1970s, the Nigerian government entered into 109 contracts for the purchase of more than sixteen million metric tons of cement from suppliers around the world at an aggregate price of close to one billion dollars.⁸² The government ordered the cement to meet pressing demands to build the country's infrastructure in response to an oil-export driven economic boom. The government ordered more cement than it needed, anticipating that most of the suppliers would default.⁸³ When suppliers flooded the docks of Nigeria with massive cement shipments, the government sought to back out of most of its commitments. Four of the suppliers brought suit against Nigeria in New York court for breach of contract. Nigeria raised the defense of sovereign immunity.

On appeal, the Second Circuit held that the commercial activity exception to the FSIA applied. Since payment for the cement was arranged through a New York bank and since each of the plaintiff suppliers was a United States company, Nigeria's failure to pay for the cement caused a "direct effect" in the United States.⁸⁴ In interpreting the FSIA, however, the court also held that, in order to find personal jurisdiction under the statute, Nigeria must be shown to have had "minimum contacts" with the United States: "[The FSIA] cannot create personal jurisdiction where the Constitution forbids it. Accordingly, each finding of personal jurisdiction under the FSIA requires, in addition, a due process scrutiny"⁸⁵ The court found that the constitutional test was met in this case, since (among other things) Nigeria had issued letters of credit in payment for the cement under the contracts through a New York bank with which it had a longstanding relationship.⁸⁶

While the Second Circuit in *Texas Trading* posed the question of whether a foreign state is a "person" for purposes of the Due Process Clause, it did not articulate a rationale for effectively answering that question in the affirmative. The court

81. *Id.* at 302.

82. *Id.* at 303.

83. Based on past experience, only about twenty percent of suppliers were expected to be able to perform the contract. *See id.* at 305.

84. *Id.* at 312.

85. *Id.* at 308.

86. *Id.* at 314-15.

did, however, rely on limited precedent for the idea that a "minimum contacts" analysis is appropriate in an action against a foreign state.⁸⁷ In addition, the court addressed potential concerns raised with respect to asserting personal jurisdiction in an international context:

Like the states of our nation, the United States is a member of an international community. While it has not formally renounced part of its long-arm power by signing an international constitution, considerations of fairness nonetheless regulate every exercise of the federal judicial machinery. . . . The analogy between the national and international systems may not be sufficiently exact to lead to the same result in every case, but here we see no reason to stray from our former adherence to the analysis developed under the Fourteenth Amendment.⁸⁸

Notwithstanding any differences between a foreign and a domestic defendant, or between a sovereign state and a private person, for purposes of the Due Process Clause, the court in *Texas Trading* found no compelling reason to treat a foreign state differently from other persons in the constitutional framework. In particular, the court reasoned that the commercial branch of a foreign state should be subject to the same jurisdictional test as that applicable to a foreign corporation.⁸⁹

Texas Trading is the leading case for the idea that a foreign state is a "person" for personal jurisdiction purposes.⁹⁰ For almost ten years following the Second Circuit's ruling in *Texas Trading*, courts applying the FSIA generally assumed that a due process scrutiny is necessary in order to find personal jurisdiction over foreign states. As the following section ex-

87. See, e.g., *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247 (9th Cir. 1980) (holding that minimum contacts did not exist and therefore not reaching the question of whether the FSIA applied); *Purdy Co. v. Argentina*, 333 F.2d 95, 98 (7th Cir. 1964) (stating, pre-FSIA, that minimum contacts are "essential to a valid assertion of extra-territorial assertion of jurisdiction").

88. *Tex. Trading*, 647 F.2d at 316 n.37; see also *supra* note 39.

89. See *Tex. Trading*, 647 F.2d at 316.

90. See, e.g., *Glannon & Atik*, *supra* note 48, at 682 (referring to *Texas Trading* as the "seminal case" on this issue); Peter D. Trooboff, *Foreign State Immunity: Emerging Consensus on Principles*, 200 RECEUIL DES COURS 235, 337-38 (1986 V).

plains, this assumption has been called into question. However, while a foreign state may not be a "person" for due process purposes, international law nonetheless constrains the assertion of jurisdiction to adjudicate over a foreign state and provides a tool for interpreting the FSIA exceptions.

III. FOREIGN STATES, DUE PROCESS, AND PERSONAL JURISDICTION

A. *Constitutional Status of Foreign States*

The question of whether a foreign state may be entitled to claim the constitutional protections of due process is a difficult one. Where, for example, the sovereign defendant is a state-owned company engaged in international commerce, the state is acting like a private person and reason suggests that the state in such a case should be subject to the same jurisdictional rules as a private person. On the other hand, to the limited extent that this issue has been analyzed, both international law experts and judges have taken the view that foreign states stand outside of the constitutional structure and, as such, are not entitled to assert constitutional rights. This is especially true where a foreign state attempts to challenge an act of Congress or the executive branch on constitutional grounds.

Although the status of a foreign state for due process purposes is unclear, the Supreme Court has ruled on related issues, and particularly on the status of aliens and foreign corporations⁹¹ within the U.S. constitutional structure. As for the applicability of the "minimum contacts" test to foreign corporations, it is well settled that foreign corporations are entitled to due process, although the rationale for this has not been elaborated. Consider, for example, Judge Posner's observation in *Afram Export Corp. v. Metallurgiki Halyps, S.A.* that, although "countless cases assume" that foreign companies are entitled to due process protection with respect to assertions of personal jurisdiction, the assumption has never been ex-

91. Of course, the Supreme Court has long adopted the legal fiction that a corporation is a "person" for jurisdictional as well as other purposes. For a discussion of the philosophical background and linguistic basis for treating a corporation as a person, along with an historic overview of the Supreme Court's views on corporate personality, see Sanford A. Shane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563 (1987).

amined.⁹² Indeed, the Supreme Court has held (on at least two occasions) that an assertion of personal jurisdiction over a foreign corporation exceeded the limits of due process without explicitly addressing the threshold question of whether a foreign corporation is entitled to due process.⁹³ Thus it is fairly clear that a foreign corporation is a "person" for due process purposes, although the rationale for this proposition has gone unexplained.

On the other hand, it is also clear that aliens are not entitled to the same level of constitutional protection as U.S. citizens. Although the Supreme Court has held that an alien is entitled to constitutional protection,⁹⁴ and in some contexts is even a "person" for purposes of due process,⁹⁵ the scope of such protection is narrower than that afforded citizens, especially where immigration status is at issue.⁹⁶ Furthermore, when alleged violations of constitutional rights have occurred against aliens outside of the United States, the Supreme Court has been unwilling to extend constitutional protection extra-territorially.⁹⁷ In *United States v. Curtiss-Wright*, the Supreme

92. *Afram Exp. Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1362 (7th Cir. 1985).

93. See *Asahi v. Superior Court of Cal.*, 480 U.S. 102 (1987); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984).

94. See, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971) (finding that state statutes that deny welfare benefits to certain aliens violate the Equal Protection Clause of the Fourteenth Amendment). See generally 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 973-77 (3d ed. 2000).

95. See *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (holding that Civil Service Commission regulation excluding non-U.S. citizens from employment violates due process under the Fifth Amendment).

96. See TRIBE, *supra* note 94, at 973 ("[T]he Court has consistently held that the substantive requirements an alien must meet to enter this country, to remain here, or to become a citizen, are virtually political questions, matters within the discretion of Congress and outside the scope of all but the most limited judicial review."); cf. *Zavydas v. Davis*, 533 U.S. 678 (2001) (holding that illegal aliens are entitled to raise constitutional challenges relating to post-removal detention proceedings).

97. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (holding that a warrantless search conducted by the U.S. Drug Enforcement Agency in Mexico was not in violation of the Fourth Amendment since the search was conducted against an alien outside of U.S. territory; aliens receive constitutional protections only when they have "developed substantial connections" with the United States); *Johnson v. Eisentrager*, 339 U.S. 763 (1949) (finding that German nationals who were convicted of war crimes and detained by U.S. authorities abroad were not entitled to constitutional

Court upheld such a territorial approach to constitutional rights by reasoning that U.S. dealings outside of its borders generally are governed not by the Constitution but by international agreements and principles of international law.⁹⁸ At one level, the line of cases that hold that foreign corporations are entitled to due process for purposes of personal jurisdiction is in conflict with cases such as *Verdugo-Urquidez*, which deny constitutional protections to aliens outside of U.S. territory. The two lines of cases could be reconciled, however, if the issue of personal jurisdiction (at least as it relates to alien defendants) were treated as a limitation on U.S. sovereignty, distinct from other constitutional rights.⁹⁹

Compared with that of aliens and foreign corporations, the status of the foreign state raises additional difficulties both because of foreign policy considerations and the foreign state's relationship to the U.S. constitutional scheme.¹⁰⁰ With one exception (discussed below), the question has received little attention by scholars and judges. The Restatement (Third) of Foreign Relations Law makes only a passing reference to this issue.¹⁰¹ However, the chief reporter for the Restatement,

protections); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory except in respect of our own citizens."); cf. *Reid v. Covert*, 354 U.S. 1 (1957) (finding that U.S. citizens who were convicted of murder by U.S. military tribunals abroad were entitled to the constitutional rights of due process and trial by jury); *Zavydas v. Davis*, 121 S. Ct. 2491, 2500 (2001) ("[O]nce an alien enters the country . . . the Due Process Clause applies to all 'persons' within the United States, including aliens.").

Gary Haugen observes that, if the reasoning of *Verdugo-Urquidez*, 494 U.S. 259, were applied to the personal jurisdiction due process context, the bizarre result would be that such aliens would be entitled only to the "minimum contacts" requirement once the alien established "substantial connections" with the United States. See Gary A. Haugen, *Personal Jurisdiction and Due Process Rights for Alien Defendants*, 11 B.U. INT'L L.J. 109, 115-16 (1993).

98. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936).

99. See *infra* Part III.B.

100. As Lori Fisler Damrosch observes, "[t]o the extent that the Constitution is a social contract establishing a system of self government, permanent outsiders such as foreign states seem to have little claim to invoke constitutional 'rights.'" Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 487 (1987).

101. The Restatement (Third) commentary states (without citation) that, although a foreign state has been held not to be a person for purposes of due process, "it was apparently the intention of the Foreign Sovereign Immunities Act that foreign states be treated like private entities for the pur-

Professor Henkin, has asserted elsewhere that foreign states simply "have no constitutional rights" in the United States.¹⁰²

Professor Henkin does not elaborate on the reasoning for his conclusion, but in a detailed and nuanced analysis of foreign states' status in the U.S. constitutional system, Professor Damrosch argues that constitutional claims against the actions of the federal political branches must fail because of the relationship of foreign states to the federal structure. Damrosch also suggests, however, that where there is no conflict with the legislative or executive branch, application of constitutional norms may be appropriate:

To the extent that the Constitution is a social contract establishing a system of self-government, permanent outsiders such as foreign states seem to have little claim to invoke constitutional "rights" against domestic political decisions¹⁰³ When, on the other hand, a claim does not directly confront or conflict with the political branches' foreign policy, the federal courts should adjudicate the merits of foreign state claims by applying constitutional jurisprudence to sustain or reject the claim.¹⁰⁴

Applying this analysis to the FSIA, Professor Damrosch concludes that the FSIA's jurisdictional nexus language ensures that any case that satisfies the statutory requirements also

pose of determining the necessary connection with the forum." RESTATEMENT (THIRD), *supra* note 39, § 453 (Reporters' Note 3). Thus, the Restatement commentary suggests that existing limits on personal jurisdiction over foreign sovereigns is a function of statutory intent rather than constitutional right.

102. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 293 (2d ed. 1996). In support of this proposition, Henkin cites a series of cases, involving Fourth Amendment challenges against wiretapping foreign intelligence, and Professor Damrosch's article. See Damrosch, *supra* note 100.

103. See Damrosch, *supra* note 100, at 487.

104. *Id.* at 489. Note that the approach proposed by this article is consistent with Damrosch's in terms of practical result. Under the approach taken by this article, similar to Damrosch's analysis, principles of international law yield to acts of Congress, although the two should be construed consistently wherever possible. See *infra* Part III.C (discussing the international origins of jurisdiction). The difference is that my approach relies on international law rules of jurisdiction.

will meet the constitutional requirement;¹⁰⁵ however, if Congress were to direct that a foreign state be subject to suit, that state should not be entitled to resort to constitutional arguments to challenge jurisdiction.¹⁰⁶

An interesting application of Damrosch's ideas is the opinion in *Mendelsohn v. Meese*.¹⁰⁷ In the case, a group of individuals and organizations, including officials of the Palestine Liberation Organization (PLO), challenged the constitutionality of the Anti-terrorism Act of 1987, which prohibited giving to or receiving from the PLO anything of value or establishing or maintaining an office or other facility of the PLO on United States territory. In response to the PLO's argument that the act violated the First Amendment, the court quoted Damrosch's article and held that, just as a foreign state lies outside of the U.S. constitutional system,

[t]he same is true of the PLO, an organization whose status, while uncertain, lies outside the constitutional system. It has never undertaken to abide by United States law or to "accept the constitutional plan." No foreign entity of its nature could be expected to do so.¹⁰⁸

The court concluded that the PLO, due to its status as an outsider to the U.S. constitutional structure, was not entitled to challenge the constitutionality of the Act.¹⁰⁹ Although *Mendelsohn* deals with the status of a political organization and not a state, the analogy to a foreign state is very close.

Although the Supreme Court has never addressed the question of whether a foreign state is a "person" for purposes of the Due Process Clause, the Court has answered that question in the negative with respect to constitutional challenges

105. Damrosch, *supra* note 100, at 500. Note that Damrosch's article was published in 1987, prior to the adoption of the FSIA amendments.

106. *See id.* at 501-03. *See also* Glannon & Atik, *supra* note 48, at 695 (applying Damrosch's analysis to the anti-terrorism amendment and concluding that a minimum contacts analysis is not appropriate in such a context, since the anti-terrorism amendment is exactly the sort of expression of political intent that Damrosch was referring to); Caplan, *supra* note 48, at 398-401 (listing legal and policy arguments against treating foreign states as "persons").

107. *Mendelsohn v. Meese*, 695 F. Supp. 1474 (S.D.N.Y. 1988).

108. *Id.* at 1481.

109. *See id.*

by state government. In *South Carolina v. Katzenbach*, the state of South Carolina brought suit seeking a declaration that the Voting Rights Act of 1965 was unconstitutional.¹¹⁰ In particular, South Carolina alleged that the Act violated due process by precluding judicial review of administrative findings, providing for an expedited challenge procedure, and limiting litigation to a distant forum.¹¹¹ The Supreme Court dismissed these arguments summarily by stating, without elaboration, that "[t]he word 'person' . . . cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union"¹¹² This aspect of the holding in *Katzenbach* has been cited by lower courts to defeat due process challenges by a state agency,¹¹³ a municipality,¹¹⁴ and a foreign mission established by the PLO.¹¹⁵

Notwithstanding this line of precedent, when it comes to the question of due process as it relates to personal jurisdiction, courts until recently have not questioned whether foreign sovereign defendants were entitled to due process. Instead, they either have followed the approach of *Texas Trading* or simply have applied the jurisdictional nexus requirements set forth in the FSIA without conducting a separate constitutional analysis. The idea that a foreign state is entitled to due process first was called into question in 1992 when the Supreme Court decided *Republic of Argentina v. Weltover*.¹¹⁶ This case arose out of a breach of a dollar-denominated sovereign debt obligation issued by the Argentine Central Bank. The terms of the obligation entitled bondholders to collect pay-

110. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

111. *See id.* at 323.

112. *Id.*

113. *See Premo v. Martin*, 119 F.3d 764, 771 (9th Cir. 1997) (upholding arbitration award issued by a federally-convened panel against the California Department of Rehabilitation).

114. *See East St. Louis v. Circuit Court*, 986 F.2d 1142, 1144 (7th Cir. 1993) (rejecting a municipality's constitutional challenge of a writ of execution issued by an Illinois state court conveying the East St. Louis City Hall to satisfy judgment).

115. *See Palestine Info. Office v. Schultz*, 674 F. Supp. 910, 919 (D.C. Cir. 1987), *aff'd*, 853 F.2d 932 (D.D.C. 1988) (rejecting the due process challenge of an order issued to the PLO by the U.S. State Department to cease operations).

116. *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992).

ment either in Frankfurt, Zurich, or New York.¹¹⁷ Swiss and Panamanian bondholders elected payment in New York and brought suit in U.S. court to collect on the obligation. Argentina argued that the commercial activity exception of the FSIA did not apply since the bond issuance (and its breach) was part of a sovereign debt restructuring and, in any event, did not have the necessary jurisdictional nexus with the United States. Justice Scalia, writing for the Court, held that the activity was commercial and that, notwithstanding the fact that both the debtor and the bondholders were foreign, there was a sufficient jurisdictional nexus with the United States since the bondholders elected for payment in New York.¹¹⁸ In other words, because of Argentina's failure to pay, "[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming."¹¹⁹

In response to Argentina's due process challenge, the Court found that Argentina possessed the "minimum contacts" with the United States necessary to satisfy the constitutional test—the debt obligation was dollar-denominated and payable in New York, and Argentina had appointed a financial agent for service of process.¹²⁰ In dicta, however, Justice Scalia seemed to question the necessity of conducting such a test. He cited *Katzenbach* for the proposition that U.S. states are not "persons" for purposes of the Due Process Clause and stated that the Court was "[a]ssuming, without deciding" that Argentina was entitled to due process.¹²¹ Since *Weltover*, several circuit courts have questioned whether foreign states are entitled to due process, and several district courts have held that they are not.¹²²

The academic commentary and case law summarized above suggest that, if and when the Supreme Court addresses the question, it will hold that a foreign state is not a "person" for purposes of the Due Process Clause. This proposition may be correct as a policy matter, and it certainly is a legal position that is consistent with precedent. At the same time, it seems

117. *See id.* at 609-10.

118. *See id.* at 619.

119. *Id.*

120. *See id.* at 619-20.

121. *Id.*

122. *See* discussion of the anti-terrorism amendment and related case law, *supra* notes 9-15 and accompanying text.

absurd to suggest that the rules of jurisdiction do not apply simply because a foreign state is not entitled to raise constitutional claims. There is another basis on which to limit personal jurisdiction over a foreign sovereign defendant in U.S. court—the norms of international law. In fact, limitations on personal jurisdiction can be traced back beyond the Fourteenth Amendment (as courts generally have held since *Pennoyer v. Neff*¹²³) to ancient principles of Roman law.

B. *Personal Jurisdiction Before and Immediately After Pennoyer*

This section describes the influence that international law has exerted on the development of the law of personal jurisdiction in the United States. It demonstrates that the origins of the law of personal jurisdiction in the United States derive from conflicts doctrine and international law. Even if a foreign state is found not to be a “person” for purposes of the Due Process Clause, a U.S. court cannot operate in a vacuum; as discussed below, international law still constrains U.S. courts’ exercise of jurisdiction.

It is worth noting at the outset that it is not universal practice for jurisdictional rules to be given constitutional status. European jurisdictional rules, for example, generally are contained not in a country’s constitution but in its code of civil procedure.¹²⁴ Although the U.S. modern approach to personal jurisdiction comes from *International Shoe*, the idea that limits on personal jurisdiction are protected by the Constitution was espoused first by Justice Field almost seventy years earlier, in the famous old case *Pennoyer v. Neff*.¹²⁵ The issue in the case was the validity of a prior default judgment issued by an

123. *Pennoyer v. Neff*, 95 U.S. 714 (1877); see also *supra* note 65 and accompanying text.

124. See Henry P. deVries and Andreas F. Lowenfeld, *Jurisdiction in Personal Actions—A Comparison of Civil Law Views*, 44 IOWA L. REV. 306, 316 n.40, 330 (1959) (pointing out that French and German rules of jurisdiction are contained in each country’s respective Code of Civil Procedure). Switzerland is an exception. Its constitution contains a provision guaranteeing that any solvent debtor domiciled in Switzerland may be sued only in the canton of its domicile. See *id.* at 308 (citing Article 59 of the Swiss Federal Constitution). Not having surveyed world practice on this issue, I cannot say for certain, but I have a hunch that the United States is in the minority of jurisdictions that afford constitutional status to the rules of personal jurisdiction.

125. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

Oregon court against Neff, a resident of California. The judgment was executed through the sale of a tract of land Neff owned in Oregon, and Neff brought an action in federal court to recover possession of his property.

The Supreme Court held that the Oregon judgment was void for lack of personal jurisdiction, emphasizing the "exclusive jurisdiction" that each state has over persons and property within its boundaries.¹²⁶ Since Neff was a resident of California, the Oregon court's judgment, obtained without personal service upon him, amounted to an invalid "encroachment" on the independence of California.¹²⁷ What is particularly relevant for our purposes is Justice Field's assertion that this territorial limitation on jurisdiction is protected by the Fourteenth Amendment:

Whatever difficulty may be experienced in giving to [the Due Process Clause of the Fourteenth Amendment] a definition which will embrace every permissible exertion of power affecting private rights . . . there can be no doubt of [its] meaning when applied to judicial proceedings. . . . To give such proceedings any validity, there must be a tribunal . . . to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.¹²⁸

As an interpretive matter, one wonders whether the drafters of the Fourteenth Amendment truly meant for "due process" to encompass territorial limits on personal jurisdiction (in addition to notice and the opportunity to be heard).¹²⁹ Whether

126. *Id.* at 722. The Court also suggested that, although the Oregon court in this case had proceeded by attempting to obtain personal jurisdiction over Neff, the Oregon court might have obtained *in rem* jurisdiction by attaching Neff's property and proceeding on that basis. *See id.* at 727-28.

127. *Id.* at 723.

128. *Id.* at 733.

129. *See generally* Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses: Part 2*, 14 CREIGHTON L. REV. 735 (1980-81) (demonstrating that, prior to *Pennoy*, "due process" was not understood commonly to encompass territorial limits on jurisdiction); *see also* Harold L. Korn, *The Development of Judicial Jurisdiction in the United States: Part 1*, 65

or not that was the original intent, however, *Pennoyer* firmly established the notion that, under U.S. law, personal jurisdiction over defendants is protected by the Due Process Clause.¹³⁰

Looking at *Pennoyer* itself, Justice Field's analysis of personal jurisdiction relies heavily on international law notions of territorial limits on sovereignty,¹³¹ in particular, Justice Joseph Story's celebrated treatise on conflict of laws.¹³² Justice Story's treatise was considered the definitive work on the topic; it was described by one scholar as being not only the first English-language treatise on the topic worthy of the name, but also one whose influence on legal thinking during the nineteenth and early twentieth centuries "can scarcely be overestimated."¹³³ Professor Hazard described the tremendous impact of Justice Story's thinking on the *Pennoyer* opinion:

There is no question . . . that Story influenced *Pennoyer v. Neff* itself. The basic organization, the intellectual structure, and much of the language of Justice Field's opinion is taken straight from Story, with the consequence that all the logical and practical difficul-

BROOK. L. REV. 935, 983 (1999) (noting that *Pennoyer*, "by using the word 'process' in this double sense, conflated the notice and nexus elements of jurisdiction in a single, conceptually indivisible phrase").

130. This was the case particularly after the Court reaffirmed this principle in *International Shoe*. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See also discussion of *Milliken v. Meyer*, 311 U.S. 457 (1940), *infra* notes 148-50.

131. Numerous commentators on the *Pennoyer* decision have made this observation. See, e.g., Degnan & Kane, *supra* note 69, at 814-15; Korn, *supra* note 129, at 977-82; Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 260-65.

132. See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (8th ed. 1883). In contrast with public international law, conflicts doctrine addresses the differences between the "private" laws—such as contract, tort, and property—of different states; it attempts to reconcile these differences by determining which jurisdiction's law is to govern in a particular case. As Harold Korn describes it, conflict of laws embraces three sub-topics: judicial jurisdiction, choice of law, and recognition and enforcement of foreign judgments. See Korn, *supra* note 129, at 954. Europeans refer to the subject of conflict of laws by the term "private international law."

133. Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 307 (1953).

ties implicit in Story's system were translated whole-sale into constitutional law.¹³⁴

While Hazard and other commentators have criticized the way in which Story distorted the European authorities that he cited in his work,¹³⁵ the underlying fact, that Story's pronouncements on sovereignty and limits on extraterritorial assertions of jurisdiction formed the basis of Justice Field's ruling in *Pennoyer*, remains unchallenged.¹³⁶

For a full century before *Pennoyer*, United States courts ruled on jurisdictional questions. These opinions also drew on international law¹³⁷ and on the law of the European continent,

134. Hazard, *supra* note 131, at 262.

135. *See id.* at 258-60 (describing how Justice Story embellished on the writings of the Dutch jurist Huber). What is ironic is that Story, the renowned expert of his day on conflicts law, allowed theory to overcome pragmatics in restating the works of continental theorists on jurisdiction. As Professor Juenger observes, Story relied on metaphysics and "deduced jurisdiction from mystical notions of sovereignty and territoriality." Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1, 5 (1993) [hereinafter Juenger, *American Jurisdiction*]. The more pragmatic approach to jurisdiction—basing jurisdiction on the defendant's relationship with the forum through a scheme of general and specific jurisdiction—was a feature of Roman law dating back to the time of Justinian, but did not figure into Story's scheme. *See id.*

A number of commentators have argued that the European approach to personal jurisdiction is preferable to the U.S. approach. *See* Juenger, *American Jurisdiction*, *supra*, at 19 (arguing that with the adoption of the Brussels Convention, *see infra* note 289, European jurisdictional law works with "far greater efficiency" than the U.S. approach). *See also* Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89 (1999) (arguing that the "United States' law of territorial jurisdiction in civil cases is a mess," and advocating that Congress adopt as domestic law the jurisdictional rules of the Draft Hague Convention); Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT'L L. 111, 117 (1998) (discussing negotiations to the Draft Hague Convention and noting that "American jurisdictional law is simply not fit for export").

136. To give one concrete example, in *Pennoyer*, Justice Field cited Justice Story for the proposition that "no State can exercise direct jurisdiction and authority over persons or property without its territory." *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877). This language was taken almost verbatim from Story's treatise, from the chapter entitled "General Maxims of International Jurisprudence." Justice Story wrote that "no state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein." STORY, *supra* note 132, at 22.

137. *See* Hazard, *supra* note 131, at 258; Roger H. Transgrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 871-73 (1989)

since English courts had not developed conflicts law principles until at least the early nineteenth century.¹³⁸ At the time, U.S. courts were more receptive than they are now to comparative approaches to deciding cases—counsel during the 1800s routinely cited to civil law as well as common law sources.¹³⁹ A particularly salient issue during the years leading to *Pennoy* was territorial jurisdiction among the states in the context of interpreting the Full Faith and Credit Clause.¹⁴⁰ In resolving this issue, the Supreme Court consistently relied on international law, in particular Story's notions of territoriality derived from European authorities.

The first of these cases is *Mills v. Duryee*, where the Supreme Court in effect held that the Full Faith and Credit Clause (and the legislation Congress passed in 1790 to implement it)¹⁴¹ requires a state to recognize and enforce a sister state judgment without inquiring into whether the sister state had jurisdiction over the defendant.¹⁴² Justice Johnson dissented. He argued that such an interpretation would undermine the purpose of the Full Faith and Credit Clause in promoting unity among the states.¹⁴³ Almost forty years later in

(arguing that the original common law rules were based on territorial rules derived from the Law of Nations).

138. Consider this excerpt from the preface of the 1834 edition of Story's treatise:

I am not aware that the works of these eminent [continental European] jurists have been cited at the English bar; and I should draw the conclusion that they are in a great measure, if not altogether, unknown to the studies of Westminster Hall. How it should happen that, in this age, English lawyers should be so utterly indifferent to all foreign jurisprudence, it is not easy to conceive.

STORY, *supra* note 132, at xii. Hazard suggests that until about 1830 there was no developed English case law on interstate jurisdiction. See Hazard, *supra* note 131, at 253. Korn explains that, since until about the early eighteenth century, English courts entertained no cases with foreign parties and applied only English law, there was no need for conflicts doctrine. Notions of territoriality only applied to internal administrative matters, such as the reach of a local officer's authority to serve process. See Korn, *supra* note 129, at 986-87.

139. See Juenger, *American Jurisdiction*, *supra* note 135, at 5.

140. U.S. CONST. art. IV, §1.

141. Full Faith and Credit Implementing Act of 1790, ch. 11, 1 Stat. 192, cited in *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 483-84 (1813).

142. *Mills*, 11 U.S. at 481.

143. Justice Johnson supported his jurisdictional arguments by reference to "eternal principles" of justice:

D'Arcy v. Ketchum, the Court adopted Justice Johnson's interpretation of the Full Faith and Credit Clause.¹⁴⁴ Significantly, the Court also observed that this interpretation was consistent with "international law as it existed among the States in 1790," when the implementing legislation was enacted.¹⁴⁵ The *D'Arcy* holding, adopting Justice Johnson's position in *Mills* along with its reliance on international law, was cited by the Court in a number of subsequent cases,¹⁴⁶ including finally *Pennoyer* itself.¹⁴⁷

For a time after *Pennoyer* was decided, the Supreme Court seemed to retreat from the idea that limitations on jurisdiction are protected by the Due Process Clause and turned to conflict of laws principles instead. *Milliken v. Meyer* raised the issue of Wyoming's jurisdiction over a defendant who lived in Wyoming but was absent from the state at the time of suit.¹⁴⁸ In upholding jurisdiction, the Court affirmed *Pennoyer*'s reliance on the Due Process Clause, but only with respect to the requirement that service of process be adequate to meet, to use the often-cited words, "traditional notions of fair play and substantial justice."¹⁴⁹ As for the territorial limits of Wyoming's jurisdiction, the Court found that jurisdiction was present due

There are certain eternal principles of justice, which never ought to be dispensed with, and which courts of justice never can dispense with, but when compelled by positive statute. One of these is, that jurisdiction cannot be justly exercised by a state over property not within the reach of its process, or over persons not owing them allegiance, or not subjected to their jurisdiction, by being found within their limits.

Id. at 486 (Johnson, J., dissenting). In fact, the "eternal principles" referred to in Justice Johnson's dissent in *Mills v. Duryee* have been cited as the basis for the dicta in *Pennoyer* that links personal jurisdiction to the Fourteenth Amendment. See Philip B. Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts: From Pennoyer to Denckla*, 25 U. CHI. L. REV. 569, 572 (1958) (observing that *Pennoyer*'s dicta read Johnson's "eternal principles" into the Due Process Clause).

144. *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165 (1850).

145. *Id.* at 176.

146. See *Lafayette Ins. Co. v. French*, 59 U.S. 404, 406 (1855) (referring to "rules of public law which protect persons and property within one State from the exercise of jurisdiction over them by another"); *Hall v. Lanning*, 91 U.S. 160, 168-69 (1875) (citing international law for the same idea).

147. *Pennoyer v. Neff*, 95 U.S. 714, 729 (1877).

148. *Milliken v. Meyer*, 311 U.S. 457 (1940).

149. *Id.* at 463.

to the defendant's domicile in Wyoming. For this proposition, the court relied not on the Due Process Clause but on the Restatement of Conflict of Laws.¹⁵⁰ Any doubt that *Milliken* may have cast on the legal basis for personal jurisdiction, however, was eliminated by *International Shoe*. In the very first sentence of the opinion, Justice Stone framed the issue in the case as whether the defendant was amenable to proceedings in Washington court "within the limitations of the due process clause of the Fourteenth Amendment."¹⁵¹ Thus the Court in *International Shoe* expressly reaffirmed the aspect of *Pennoyer* that elevates personal jurisdiction to a constitutional right.¹⁵²

To summarize, before and even for some time after *Pennoyer* was decided, the Supreme Court found limits on personal jurisdiction to be governed by international law and conflict of laws principles. If the Court follows the *Katzenbach* approach and holds that a foreign state is not a "person" for due process purposes, this will mean that the limits on personal jurisdiction over foreign states will not have the status of a constitutional right. Legal limits on jurisdiction still exist, however, and, as the following section elaborates, the rules of personal jurisdiction under international law parallel Supreme Court jurisprudence on "minimum contacts"—that is, the basic principles of each are very similar.

C. *Limits on Jurisdiction Under International Law*

International law limits on assertions of jurisdiction to prescribe, adjudicate, and enforce law still are based essentially on territoriality and nationality. Professor Brownlie's treatise on international law summarizes the essential principles limiting extraterritorial jurisdiction. Professor Brownlie states that extraterritorial conduct may be subject to a state's jurisdiction only under the following conditions:

150. See *id.* at 464. See also Korn, *supra* note 129, at 997 (stating that in *Milliken*, Justice Douglas "recognized and overcame *Pennoyer's* unwarranted conflation" of the notice aspect and the jurisdictional nexus aspect of due process). The court in *Milliken* also cited to taxation cases that tie the enjoyment of the privileges and protections of a state to the state's right to exact reciprocal duties. See *Milliken*, 311 U.S. at 463.

151. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 311 (1945).

152. See Kurland, *supra* note 143, at 571 (commenting that the "eternal principles" referred to by Justice Johnson in *Mills v. Duryee* formed the basis for the Court's opinion in *Pennoyer*).

- (i) that there should be a substantial and bona fide connection between the subject-matter and the source of the jurisdiction;
- (ii) that the principle of non-intervention in the domestic or territorial jurisdiction of other states should be observed;
- (iii) that a principle based on elements of accommodation, mutuality, and proportionality should be applied¹⁵³

These principles recognize that any extraterritorial exercise of jurisdiction potentially infringes on the sovereignty of another state, and require that any such exercise be reasonable in light of other states' legitimate interests in the dispute.

The Restatement (Third) of Foreign Relations Law of the United States first sets forth the general principle of international law that any extraterritorial exercise of jurisdiction to adjudicate must be reasonable and then lists specific instances where such jurisdiction would be reasonable, including familiar factors such as presence of the defendant or property within the territory, nationality or residence of the defendant, the carrying out of regular activity by the defendant within the state, and the consent of the defendant.¹⁵⁴ These factors bear a striking resemblance to U.S. law on personal jurisdiction; in-

153. IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 313 (5th ed. 1998).

154. Paragraph (2) of Restatement (Third) section 421 provides in full:

In general, a state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if, at the time jurisdiction is asserted:

- (a) the person or thing is present in the territory of the state, other than transitorily;
- (b) the person, if a natural person, is domiciled in the state;
- (c) the person, if a natural person, is resident in the state;
- (d) the person, if a natural person, is a national of the state;
- (e) the person, if a corporation or comparable juridical person, is organized pursuant to the law of the state;
- (f) a ship, aircraft or other vehicle to which the adjudication relates is registered under the laws of the state;
- (g) the person, whether natural or juridical, has consented to the exercise of jurisdiction;
- (h) the person, whether natural or juridical, regularly carries on business in the state;
- (i) the person, whether natural or juridical, had carried on activity in the state, but only in respect of such activity;

deed, the commentary to the Restatement rule observes that the rules of jurisdiction to adjudicate under international law are "similar to those developed under the due process clause of the United States Constitution"¹⁵⁵ and cites to *International Shoe* and related cases.¹⁵⁶

The principles of international law described above are rules that apply generally; a separate question is whether the rules change when a foreign sovereign defendant is involved. Prior to 1952, when the restrictive theory of immunity¹⁵⁷ was accepted in the United States and elsewhere, authorities on international law would not have addressed this question because states prior to that time enjoyed absolute immunity from suit.¹⁵⁸ With the development of the restrictive theory of immunity, however, authorities on international law seem to concur that traditional limitations on personal jurisdiction apply as much to sovereign defendants as to private defendants. For example, consider the current version, promulgated by the International Law Commission (ILC), of the Draft Articles on Jurisdictional Immunities of States and their Property. The commentary to Article 10 (the article that provides an exception to immunity for commercial transactions) states that the doctrine of sovereign immunity "presupposes the existence of jurisdiction or the competence of a court in accordance with the relevant internal law of the State of the forum . . . [which] may also include the applicable rules of private international law."¹⁵⁹ In other words, even if the commercial activity excep-

(j) the person, whether natural or juridical, had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state, but only in respect of such activity; or

(k) the thing that is the subject of adjudication is owned, possessed, or used in the state, but only in respect of a claim reasonably connected with that thing.

RESTATEMENT (THIRD), *supra* note 39, § 421(2).

155. *Id.* § 421 (Reporters' Note 1).

156. *See id.* (Reporters' Note 2).

157. For discussion of the restrictive theory, *see supra* Part II.A.

158. *See The Schooner Exch. v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute.").

159. International Law Commission, Draft Articles on Jurisdictional Immunities of States and their Property, art. 10, cmt. 3, *published in* Report of the International Law Commission to the General Assembly, U.N. GAOR, 43d Session, Supp. No. 10, U.N. Doc. A/46/10 (1991). For a discussion of

tion to sovereign immunity applies, the forum state also is limited by the rules of personal jurisdiction. The two questions are thus treated as distinct. Professor Higgins also submits that the question of jurisdictional nexus is separate from that of sovereign immunity:

[T]his is really a question of *jurisdiction*, not of immunity. It is for countries to formulate the circumstances in which they will be prepared to assert jurisdiction over events occurring abroad. I see no reason of principle why jurisdiction over a foreign State should not stand or fall on these principles¹⁶⁰

Professor Higgins suggests that, where an exception to sovereign immunity applies, territorial limits on jurisdiction should apply equally to a foreign state as to a private party.¹⁶¹

To summarize, the rules limiting jurisdiction under international law are similar to the limits that the Supreme Court has developed in the *International Shoe* line of cases. These limits apply to sovereign defendants (assuming, of course, that an exception to immunity applies) just as they to do private defendants. While there are other accepted bases of extraterritorial jurisdiction under international law,¹⁶² these relate more

an earlier version of ILC Draft Article 10 and commentary, see Trooboff, *supra* note 90, at 327-29. See also James Crawford, *International Law and Foreign Sovereigns: Distinguishing Immune Transactions*, 1983 BRIT. Y.B. INT'L L. 75, 108-09 (1983) (reviewing an earlier version of Draft Article 10 and concluding that "the Draft Article tends to confirm the view that no *special* jurisdictional links are required for commercial transactions" (emphasis added)).

160. Rosalyn C. Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 NETH. INT'L L. REV. 265, 273 (1982), *quoted in* Trooboff, *supra* note 90, at 322.

161. Higgins, *supra* note 160, at 268-72. Note that the current version of the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters takes a similar approach to the matter, by separating the questions of immunity and personal jurisdiction. See Draft Hague Convention, *supra* note 19, art. 1(3) (providing that a dispute is not excluded from the scope of the Convention simply because a party is a government or governmental entity); *cf. id.* art. 1(4) (providing that nothing in the Convention affects the privileges and immunities of sovereigns). See also *infra* Part V.

162. The Restatement (Third) lists the protective principle (offenses, such as counterfeiting, directed against the security of a state) and the passive personality principle (offenses, such as terrorism, directed against the nationals of a state) as recognized bases for exercising jurisdiction to prescribe law. See RESTATEMENT (THIRD), *supra* note 39, § 402 cmts. f, g. The Restate-

to a state's jurisdiction to prescribe law to punish individual crimes. The idea of universal jurisdiction and the extent to which it relates to the anti-terrorism amendment is discussed in Part IV.B below.

D. *Status of International Law in the U.S.
Constitutional Framework*

The previous sections explain why, although a foreign sovereign defendant may not be entitled to challenge jurisdiction on constitutional grounds, it can challenge jurisdiction on international law grounds. Since the FSIA is the sole basis on which a suit against a foreign state may be brought in the United States,¹⁶³ the issue becomes how international law on extraterritorial jurisdiction may be used to interpret the jurisdictional nexus provisions of the FSIA. The following section considers the status of international law in the U.S. constitutional system, and suggests an approach to interpreting and applying the FSIA.

The Constitution, federal statutes, and treaties are the "supreme law" of the United States.¹⁶⁴ In addition to these, the Supreme Court recognized a century ago in *The Paquete Habana* that the rules of international law are also part of U.S. law:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations" ¹⁶⁵

Note the caveat about legislative acts. The Restatement (Third) of Foreign Relations Law takes the position that cus-

ment (Third) also recognizes that, under the principle of universal jurisdiction, a state has jurisdiction to prescribe law to punish "certain offenses recognized by the community of nations as of universal concern," such as piracy, genocide and aircraft hijacking. *Id.* § 404. For an analysis proposing broader utilization of the universal jurisdiction principle, see Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988).

163. *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 434, 439 (1989).

164. U.S. CONST. art. VI.

165. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

tomary international law is federal law and thus preempts inconsistent state law.¹⁶⁶ The Restatement also provides, however, that an act of Congress supersedes an earlier rule of international law if that is the clear purpose of the act or if the act cannot be fairly reconciled with international law.¹⁶⁷ In other words, if a federal statute violates existing principles of international law, the "last in time" rule applies and the federal statute will prevail over an earlier rule of international law.¹⁶⁸

United States v. Yunis illustrates the application of this principle in the context of the extraterritorial application of a federal statute.¹⁶⁹ This case involved the 1985 hijacking of a Royal Jordanian Airlines flight in Beirut. Undercover FBI agents lured Yunis, a participant in the hijacking, onto a yacht in the Mediterranean Sea, arrested him, and flew him to the United States where he was convicted of conspiracy, hostage taking, and air piracy.¹⁷⁰ On appeal, Yunis argued that U.S. courts lacked subject matter jurisdiction over him since he was brought into the jurisdiction by force. He argued that the relevant statutes, the Hostage Taking Act and the Antihijacking Act, should be construed not to apply to him in order to comply with international law.¹⁷¹ The D.C. Circuit Court of Appeals rejected the argument. It noted that the Hostage Taking Act reflected the unambiguous intent of Congress to authorize prosecution of those who take U.S. nationals hostage, no matter where the offense occurs.¹⁷² In response to Yunis's international law argument, the court responded that its duty is "to enforce the Constitution, laws and treaties of the United States, not to conform the law of the land to norms of custom-

166. RESTATEMENT (THIRD), *supra* note 39, § 111 (1986). *But see* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (arguing against the proposition that customary international law should attain the status of federal common law).

167. RESTATEMENT (THIRD), *supra* note 39, § 115(1)(a).

168. However, even if arguably developed "last in time," it is unlikely that a rule of customary international law would ever be held to supersede an act of Congress. *See id.* § 115 (Reporters' Note 4); *see also* Bradley & Goldsmith, *supra* note 166, at 843.

169. *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

170. *See id.* at 1089-90.

171. *See id.* at 1090.

172. *See id.* at 1091.

ary international law.”¹⁷³ The court was unwilling to apply international law limits on jurisdiction to defeat the clear intent of Congress as reflected in the statute.

The Supreme Court, however, has held, consistent with the Restatement (Third),¹⁷⁴ that a statute should be construed, wherever possible, in accordance with international law. This canon of statutory interpretation dates back to Supreme Court Chief Justice John Marshall who, in *Murray v. The Charming Betsy*, stated that “an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains”¹⁷⁵ More recently, Justice Scalia, in *Hartford Fire Insurance Co. v. California*, cited *The Charming Betsy* for the proposition that the Sherman Act should not apply extraterritorially where such application would conflict with principles of international law:

[The canon of construction in *The Charming Betsy*] is relevant to determining the substantive reach of a statute because “the law of nations,” or customary international law, includes limitations on a nation’s exercise of its jurisdiction to prescribe. Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.¹⁷⁶

Citing the Restatement (Third), Justice Scalia argued that, notwithstanding the fact that it was “well established” that the Sherman Act applies extraterritorially, the Court should refrain from applying the Sherman Act to the extraterritorial acts of a group of London-based insurance companies because such assertion of jurisdiction was unreasonable under interna-

173. *Id.*

174. See RESTATEMENT (THIRD), *supra* note 39, § 115 cmt. a (1986) (“when an act of Congress and an international agreement or a rule of customary international law relate to the same subject, the courts . . . will endeavor to construe them so as to give effect to both.”).

175. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). The Court held that an embargo imposed by Congress to suspend “all commercial intercourse” between the United States and France could not be applied to an American citizen living and conducting business in St. Thomas whose ship was documented with Danish papers. See *id.* at 120-21.

176. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting).

tional law.¹⁷⁷ Although *Hartford Fire Insurance* involved the extraterritorial reach of the Sherman Act, a question of subject matter jurisdiction, Justice Scalia's approach is also applicable to interpret the extraterritorial reach of personal jurisdiction over foreign sovereign defendants under the FSIA.

*United States v. Palestine Liberation Organization*¹⁷⁸ demonstrates the lengths to which a court may go to interpret a federal statute so as not to conflict with U.S. international obligations. The case involved the application of the Anti-terrorism Act of 1987 to the activities of the Palestine Liberation Organization (PLO) in the United States.¹⁷⁹ The United States, relying on the Anti-terrorism Act, sought an injunction to close the PLO's permanent observer mission to the United Nations in New York City. The court refused to issue the injunction on the grounds that such a ruling would abrogate the United States's obligation to establish an international enclave in New York City for the United Nations's headquarters.¹⁸⁰ Although the Anti-terrorism Act prohibits the establishment of any "office, headquarters, premises or other facilities" by the PLO within the United States,¹⁸¹ the court interpreted this language not to apply to the PLO's permanent observer mission to the United Nations. Citing *The Charming Betsy* as well as the Restatement (Third),¹⁸² the court held that, in order to reconcile the Anti-terrorism Act with U.S. obligations under the

177. *Id.* at 814, 818. Justice Scalia also supported his argument by reference to Judge Learned Hand's opinion in *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945) ("We are not to read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.'"), cited in *Hartford Fire Ins.*, 509 U.S. at 814.

178. 695 F. Supp. 1456 (S.D.N.Y. 1988).

179. For discussion of *Mendelsohn v. Meese*, 695 F. Supp. 1474 (S.D.N.Y. 1988) (challenging the constitutionality of the Anti-terrorism Act of 1987), see *supra* text accompanying note 108.

180. This obligation is contained in the Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, June 26, 1947, T.I.A.S. No. 1676, 11 U.N.T.S. 11 (1947) [hereinafter Headquarters Agreement], cited in *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1458 n.2 (1988).

181. Anti-terrorism Act of 1987, 22 U.S.C. § 5202, reprinted in *Palestine Liberation Org.*, 695 F. Supp. at 1472 app. a.

182. *Palestine Liberation Org.*, 695 F. Supp. at 1465 (quoting RESTATEMENT (THIRD), *supra* note 39, § 115).

Headquarters Agreement, an exception must be read into the Anti-terrorism Act to allow PLO representatives access to the United Nations.¹⁸³ Although *United States v. Palestine Liberation Organization* involves an international agreement as opposed to customary international law, both this opinion and Justice Scalia's dissent in *Hartford Fire Insurance* rely on Supreme Court precedent applying the maxim in *The Charming Betsy* to reconcile conflicts between statutes and customary international law.¹⁸⁴

If we apply these principles to the FSIA and its amendments, we have a basis for interpreting the ambiguous language of the commercial activity and expropriation exceptions in the FSIA in accordance with customary international law, a basis that provides an alternative to the *Texas Trading* approach of applying the constitutional "minimum contacts" test. The anti-terrorism amendment to the FSIA, however, presents a potential conflict between Congressional intent and customary international law principles relating to personal jurisdiction. Customary international law limitations on jurisdiction cannot trump the unambiguous intent of Congress. Although the anti-terrorism exception arguably transcends customary international law limitations on jurisdiction, a court in applying the amendment is constrained to follow the intent of Congress in enacting the amendment. In addition, the arbitration amendment, which provides an exception to immunity to enforce international commercial arbitration awards, does not require an independent jurisdictional nexus with the United States because international law does not require one. I elaborate upon these conclusions in the following section.

183. See *id.* Such a reading was possible since neither the PLO mission to the United Nations nor the Headquarters Agreement was mentioned expressly in the text of the Anti-terrorism Act. See *id.* at 1468.

184. See *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 21-22 (1963) (holding that the National Labor Relations Act does not apply to crews on ships flying under foreign flag but owned by U.S. corporations; for jurisdiction to extend to this "delicate field of international relations," Congress must provide for it unambiguously); *Lauritzen v. Larson*, 345 U.S. 571, 573 n.1, 578 (1953) (holding, in accordance with international maritime law, that a U.S. statute allowing "[a]ny seaman who shall suffer personal injury in the course of his employment" to bring a tort claim does not apply to a Danish seaman who was injured while sailing under the Danish flag).

IV. IMPLICATIONS FOR THE FSIA.

A. *Commercial Activity and Expropriation Exceptions*

The FSIA as originally enacted provided an exception to immunity in cases of waiver, commercial activity, expropriation, determining rights in property present in the United States, and adjudicating certain torts occurring within U.S. territory.¹⁸⁵ Other than waiver (discussed in Part IV.C), the two exceptions that have the greatest potential extraterritorial reach are the commercial activity and the expropriation exceptions, each analyzed below.

As discussed in Part II, the commercial activity exception to the FSIA contains a jurisdictional nexus requirement—that is, the statute only allows an exception to sovereign immunity if the suit is based on conduct in or directly affecting the United States.¹⁸⁶ As the legislative history to the FSIA demonstrates, Congress included the condition of some connection to the United States in order to comply with due process requirements.¹⁸⁷ This would suggest that, to the extent that the statutory requirement under the FSIA is met, the constitutional test is met as well. Indeed, in his recent opinion in *Rein v. Socialist People's Libyan Arab Jamahiriya*, Judge Calabresi of the Second Circuit noted that the language of the commercial activity exception to the FSIA and the constitutional requirement of “minimum contacts” amount to essentially the same test.¹⁸⁸ In discussing a related case, Judge Calabresi observed:

The finding of subject matter jurisdiction under the commercial activities [sic] exception also entailed a finding of minimum contacts In other words, the issues of subject matter jurisdiction and personal jurisdiction were inextricably intertwined, because the court could not have answered the former without saying everything that was required to answer the

185. Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a) (1994 & Supp. V 1999).

186. See *supra* Part II.A.

187. See *id.*

188. See *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 760-61 (2d Cir. 1998). This case involved Libya's alleged involvement in the terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland. The families of the victims of Flight 103 brought suit against Libya under the anti-terrorism amendment to the FSIA.

latter. Indeed . . . the issues were more than inextricably intertwined: they were essentially identical.¹⁸⁹

Thus according to Judge Calabresi, conducting a "minimum contacts" test to determine personal jurisdiction under the commercial activity exception to the FSIA would be superfluous, since the language of the statute already incorporates the same test.¹⁹⁰

To the extent that the constitutional test is consistent with international law, applying the statutory language as Judge Calabresi describes also would be consistent with customary international law. Since the language of the commercial activity exception is ambiguous, however, courts have interpreted the jurisdictional language in different ways, some of which create tension with international law norms.

One such ambiguity relates to the extent to which the U.S.-based activity required under the statute must form the basis for the cause of action. In other words, does the commercial activity exception allow the exercise of personal jurisdiction over a foreign sovereign defendant based on mere general, as opposed to specific, jurisdiction?¹⁹¹ In some of the earlier cases applying the commercial activity exception, courts asserted jurisdiction in cases where commercial activity conducted by the foreign state in the United States was related only loosely to the cause of action.¹⁹² However, in *Saudi Arabia*

189. *Id.* at 760-61 (discussing *Hanil Bank v. PT. Bank Negara Indon.* (Perseo), 148 F.3d 127 (2d Cir. 1998)). Interestingly, Judge Calabresi left for another day the difficult issue of whether Libya was entitled to due process. Since the case was brought to the Second Circuit on interlocutory appeal, the only issue that the court addressed was whether the anti-terrorism exception to sovereign immunity applied. The scope of the court's jurisdiction on interlocutory appeal did not extend to the question of personal jurisdiction (i.e., minimum contacts). *See id.* at 756.

190. *See also* *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1304 (11th Cir. 2000) ("The 'direct effects' language of section 1605(a)(2) closely resembles the 'minimum contacts' language of constitutional due process and these two analyses have overlapped."); *cf. In re Papatrou, 139 F.3d 247, 253* (D.C. Cir. 1998) (holding that, as for the first prong of § 1605(a)(2), the commercial activity on which the action is based must have "substantial contact" with the United States, which is "more than the minimum contacts sufficient to satisfy due process in establishing personal jurisdiction").

191. *See supra* notes 70-72 and accompanying text.

192. *See, e.g., Sideman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) (applying the commercial activity exception in an expropria-

v. Nelson, the Supreme Court interpreted the “based upon” language in the statute as requiring a tight nexus between the U.S.-based activity and the claim.¹⁹³ Specifically, the Court held that the commercial activity exception did not apply to an international tort claim brought by a U.S. employee against his Saudi government-owned employer.¹⁹⁴ Although the employment contract was concluded in the United States—a “commercial activity”—Nelson’s claim was based on the imprisonment and other mistreatment that he suffered in Saudi Arabia.¹⁹⁵ The Court concluded that the U.S.-based activity of the Saudi government did not form the basis for Nelson’s claim, and that therefore there was no jurisdiction under the FSIA.¹⁹⁶ The *Nelson* decision, by denying jurisdiction over the alleged torture of a U.S. citizen, shows the need for a statutory exception to sovereign immunity for certain human rights violations,¹⁹⁷ but the Supreme Court’s holding in *Nelson* is correct

tion claim based on Argentina’s solicitation of U.S. clients for the Argentine hotel that was expropriated from plaintiff); *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982) (applying the commercial activity exception in a claim for conversion and theft of intellectual property rights and proprietary information from a venture based in Ireland based on preliminary negotiations for the venture conducted in the United States); *Rio Grande Transp., Inc. v. Compagnie Nationale Algerienne de Navigation*, 516 F. Supp. 1155 (S.D.N.Y. 1981) (allowing jurisdiction under the commercial activity exception in a maritime collision case on the basis of Algeria’s unrelated commercial activity in the United States).

193. *Saudi Arabia v. Nelson*, 507 U.S. 349, 356-63 (1993). This language comes from the text of 28 U.S.C. § 1605(a)(2), which requires that the action be “based upon” one of the three prongs of the test. *See supra* text accompanying note 38 (quoting the language of § 1605(a)(2)).

194. *See Nelson*, 507 U.S. at 349.

195. *Id.* at 351-53. Nelson alleged that Saudi government agents detained him in a Saudi prison, where he was beaten and tortured, in retaliation for his reporting of safety violations in the Saudi hospital where he was employed. *Id.* at 352-53.

196. *See id.* at 352-53. Strangely, however, the Court also held, without elaboration, that it lacked jurisdiction over Nelson’s separate claim based on the Saudi government’s negligent failure to warn him of the dangers associated with the employment. *See id.* at 363. Justice Kennedy dissented from this aspect of the holding, reasoning (correctly, I believe) that this separate claim was in fact “based upon” U.S.-based activity, i.e., the negotiation and execution of Nelson’s employment contract. *See id.* at 371-73 (Kennedy, J., dissenting).

197. *See also Sideman de Blake*, 965 F.2d at 713-19 (recognizing that the prohibition against torture has attained the status of a *jus cogens* norm, but holding that violation of a *jus cogens* norm does not in itself confer jurisdic-

for purposes of interpreting the commercial activity exception. The Supreme Court's narrow interpretation of the statute, only allowing jurisdiction where the U.S.-based contacts are closely related to the cause of action, is an approach that is consistent with international practice.¹⁹⁸

Another ambiguity that opens the door to extraterritorial assertions of jurisdiction is the third prong of the commercial activity exception—the prong of FSIA section 1605(a)(2) that allows jurisdiction where an act outside of the United States causes a “direct effect” in the United States. The Supreme Court's interpretation of this prong of the commercial activity exception in *Republic of Argentina v. Weltover*,¹⁹⁹ in contrast to its holding in *Nelson*, arguably exceeds international norms.

Until the Supreme Court decided *Weltover* in 1992, courts tended to interpret the “direct effect” language to mean that the effect also had to be “substantial and foreseeable” in order to support jurisdiction.²⁰⁰ This interpretation was based in part on the legislative history of the 1976 statute, which states that the “direct effect” prong of the commercial activity exception should be applied in a manner “consistent with the principles set forth in” the Restatement (Second) of Foreign Relations Law, and, in particular, the section describing limits on a state's jurisdiction to prescribe law.²⁰¹ This section allows pre-

tion under the FSIA, *citing* *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428 (1989).

198. See RESTATEMENT (THIRD), *supra* note 39, § 421 (2) (allowing jurisdiction to adjudicate either where the defendant “regularly carries on business” or where the defendant “had carried on activity in the state, *but only in respect of such activity*” (emphasis added)).

199. *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992); *see also supra* text accompanying note 16.

200. *See, e.g.,* *Rush-Presbyterian-St. Luke's Ctr. v. Hellenic Republic*, 877 F.2d 574, 581 (7th Cir. 1989) (“[T]o support jurisdiction under the FSIA the domestic effects of a foreign state's actions must be ‘substantial’ and ‘direct and foreseeable.’”); *Am. W. Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 799 (9th Cir. 1989); *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 453 (6th Cir. 1988) (holding that economic injury to a U.S. company could satisfy the “direct effect” prong of the test, but only if the company were the direct victim of the conduct and “if injurious and significant financial consequences to that corporation were the foreseeable, rather than the fortuitous, result of the conduct”).

201. *See* FLOWERS, JURISDICTION OF UNITED STATES COURTS IN SUITS AGAINST FOREIGN STATES, H.R. No. 94-1487, at 19 (1976).

scriptive jurisdiction based on "effects" within the territory of a state *if* such effects are substantial, direct, and foreseeable.²⁰²

In *Weltover*, the Supreme Court dispensed with the idea that the "direct effect" requirement of the commercial activity exception must be substantial or foreseeable. With no explanation (other than describing the Restatement section cited in the legislative history as "a bit of a *non sequitur*" since it deals with prescriptive rather than adjudicative jurisdiction), the Court simply rejected the requirement that effects must be substantial or foreseeable.²⁰³ While agreeing that "purely trivial effects" in the United States would not be sufficient to confer jurisdiction, the Court held that an effect is sufficiently "direct" if it follows "as an immediate consequence of the defendant's . . . activity."²⁰⁴ It is particularly notable that the Court reached this conclusion because it was not necessary to the outcome of the case. Since the debt obligation at issue was to be performed in New York, Argentina's failure to repay that obligation in a timely fashion produced an effect in the United States that was both substantial and foreseeable.²⁰⁵

This aspect of the holding in *Weltover* effectively broadens the jurisdictional nexus in the commercial activity exception beyond internationally-recognized limits to encompass any commercial act of a foreign state that produces a direct effect in the United States. Notwithstanding the Supreme Court's

202. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18(b) (1965).

203. *Weltover*, 504 U.S. at 617-18.

204. *Id.* at 618, (quoting *Republic of Argentina v. Weltover*, 941 F.2d 145, 152 (2d Cir. 1991)).

205. The U.S. government, in the amicus brief filed by Solicitor General Kenneth Starr, argued that Argentina's breach of the bond obligation was sufficient to confer jurisdiction:

The breach is a 'substantial' effect in the legally relevant sense because the place of payment is central to performance of a contractual debt obligation, and the failure to pay there denies the creditor the benefits to which he is contractually entitled. Furthermore, a breach in the United States was foreseeable in light of the fact that New York is the designated place of performance.

Brief for the United States as Amicus Curiae Supporting Respondents at 14, *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992) (No. 91-763). Finding jurisdiction on these facts also would be consistent with the Draft Hague Convention, which allows for specific jurisdiction over breach of contract actions in the place where the obligation is to be performed. See Draft Hague Convention, *supra* note 19, art. 6.

dismissal in *Weltover* of the legislative history to the 1976 statute, customary international law does limit jurisdiction to adjudicate just as it limits jurisdiction to prescribe. Since the notion of asserting extraterritorial jurisdiction on the basis of "effects" within a territory is itself controversial,²⁰⁶ the Restatement (Third) recognizes "effects"-based jurisdiction to adjudicate only in limited circumstances—specifically, where the defendant has carried on extraterritorial activity "having a substantial, direct, and foreseeable effect within the state."²⁰⁷

Honduras Aircraft Registry, Ltd. v. Government of Honduras illustrates the potential breadth of the "direct effects" language as interpreted by *Weltover*.²⁰⁸ The case arose out of a technical assistance contract between a Honduran company and the Honduras government to upgrade Honduras's civil aeronautics program. The contract contemplated establishing a computing center in Honduras that would be in communication with a database managed by the plaintiff in Miami, Florida.²⁰⁹ After a change of leadership in the Honduras government, the government cancelled the contract. Plaintiff brought suit in U.S. court to recover payment for services rendered, and Honduras raised the defense of sovereign immunity. The existence of the Miami database, plus the potential involvement of U.S. inspectors in the upgrade process, was held by the court to be a sufficient jurisdictional nexus to satisfy the "direct effect" prong of the commercial activity exception.²¹⁰ Yet any U.S.-based effects resulting from the breach in this case are indirect; they certainly would not amount to the "substantial, direct, and foreseeable effects" required by the Restatement (Third) standard in order to confer jurisdiction.

Fortunately, cases such as *Honduras Aircraft Registry* are relatively unusual. While *Weltover* is often cited by U.S. courts for

206. See, e.g., 1 OPPENHEIM'S INTERNATIONAL LAW at 474-75 (9th ed. 1992) (describing the commercial activity exception to the FSIA and commenting that "[t]he justification for such assertions of jurisdiction on the basis of an alleged 'effects' principle of jurisdiction has not been generally accepted, and the matter is still one of controversy").

207. RESTATEMENT (THIRD), *supra* note 39, § 421(2)(j) (emphasis added).

208. *Hond. Aircraft Registry, Ltd. v. Gov't of Hond.*, 129 F.3d 543 (11th Cir. 1997).

209. See *Hond. Aircraft Registry*, 129 F.3d at 545.

210. See *id.* at 549. The opinion is silent as to whether Honduras had established "minimum contacts" with the United States.

the proposition that all that is necessary to confer jurisdiction is a "direct effect," the situations where jurisdiction is found tend to be those where a state-owned bank or company defaults on a debt obligation payable in the United States.²¹¹ Courts have tended *not* to find jurisdiction, for example, where the commercial activity of a foreign state results in personal injury or death of a U.S. citizen abroad. They are unwilling to hold that the death or injury of a U.S. person abroad is a "direct effect" of the commercial activity, or that the cause of action is "based upon" any commercial activity that the foreign state may have conducted in the United States.²¹² This distinction is consistent with international practice, which supports asserting jurisdiction in breach of contract actions in the forum where the performance is due and in tort actions in the forum where the tort or the injury occurs.²¹³

The expropriation exception²¹⁴ is an additional ambiguity that may result in extraterritorial assertions of jurisdiction. It is a more narrow exception to immunity than the commercial activity exception and therefore is litigated less frequently. It only applies where "rights in property" have been taken in violation of international law and where one of two jurisdictional nexus requirements apply: (i) the expropriated property (or its proceeds) is present in the United States in connection with the commercial activity of the foreign state or (ii) such property is owned or operated by an agency or instrumentality of the foreign state engaged in commercial activity in the United States.²¹⁵ One obstacle to recovery under the expropriation

211. See *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998), *cert. denied*, 525 U.S. 1041 (1998) (involving a breach of a U.S. dollar-denominated letter of credit); *Hanil Bank v. PT. Bank Negara Indon.*, 148 F.3d 127 (2d Cir. 1998); *Parex Bank v. Russian Sav. Bank*, 116 F. Supp. 2d 415 (S.D.N.Y. 2000) (involving a breach of rubles-for-dollars forward exchange contract payable in the United States).

212. See, e.g., *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841 (5th Cir. 2000), *cert. denied sub nom. Kelly v. Al Furat Petroleum Co.*, 531 U.S. 979 (2000); *Peré v. Nuovo Pignone, Inc.*, 150 F.3d 477 (5th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999).

213. See Draft Hague Convention, *supra* note 19, art. 10(1) (allowing specific jurisdiction for torts in either the state where the act occurred or the state where the injury occurred), art. 6 (allowing specific jurisdiction for contracts in the state where performance is due).

214. For the full text of the expropriation exception, see *supra* note 5.

215. See 28 U.S.C. § 1605(a)(3).

exception is that, in order to implicate international law, the expropriation must be from a person who is not a national of the defendant state at the time of the taking.²¹⁶ Furthermore, the taking must be illegal under international law. Courts have held, for example, that in order to constitute an illegal taking, the plaintiff must show that recourse to legal remedies in the state's jurisdiction has been exhausted or would be futile.²¹⁷ Other courts have held that the expropriation exception only applies to takings of "tangible" property.²¹⁸ Finally, even if jurisdiction is found, any action involving an expropriation is subject to dismissal on act of state grounds.²¹⁹

As for the jurisdictional nexus requirements, the first one is met rarely, if ever, since it would be prohibitively difficult in most cases to trace the proceeds from any sale of expropriated property and it would be unusual for the expropriated property itself to make its way into the United States.²²⁰ The second jurisdictional nexus requirement, allowing jurisdiction where the expropriated property is owned or operated by an

216. See, e.g., *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711 (9th Cir. 2002) ("[E]xpropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law.") (quoting *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990)).

217. See *Millicom Int'l Cellular v. Republic of Costa Rica*, 995 F. Supp. 14, 23 (D.D.C. 1998) ("[A] claimant cannot complain that a 'taking' or other economic injury . . . violates international law unless the claimant has first pursued and exhausted domestic remedies in the foreign state.").

218. See *Canadian Overseas Ores, Ltd. v. Compania de Acero*, 528 F. Supp. 1337 (S.D.N.Y. 1982), *aff'd*, 727 F.2d 274 (2d Cir. 1984).

219. The Act of State doctrine is a judicially-created rule that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). The doctrine, while related to international law, derives its force from concerns relating to the separation of powers. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1963). See generally Lee C. Buchheit, *Act of State and Comity: Recent Developments*, in JUDICIAL ENFORCEMENT OF INTERNATIONAL DEBT OBLIGATIONS (D. Sassoon & B. Bradlow eds., 1987). Since expropriations typically are conducted within the territory of a foreign sovereign, lawsuits challenging the legality of expropriations in U.S. courts often are dismissed on Act of State grounds. See, e.g., *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

220. One hypothetical possibility (apparently not a basis for jurisdiction in the actual case) would be if Adele I or the other paintings claimed by the plaintiff in the *Altmann* case were exhibited in the United States at the time of suit.

agency or instrumentality of a foreign state engaged in a commercial activity in the United States, is invoked more frequently in cases involving the expropriation exception.²²¹ Thus, similar to the commercial activity exception, jurisdiction ultimately turns on whether an agency or instrumentality of the foreign state is “engaged in commercial activity” in the United States.

The rule in *Saudi Arabia v. Nelson* requiring a close connection between the U.S.-based commercial activity and the cause of action has not been held to apply to the expropriation exception. Indeed, since the statutory language of the expropriation exception does *not* require expressly that the action be “based upon” the commercial activity of the agency or instrumentality,²²² courts have held that the jurisdictional nexus requirement in the expropriation exception only requires that the agency or instrumentality be “doing business” in the United States.²²³

Such a broad interpretation of the jurisdictional nexus requirement was adopted by the court in *Altmann v. Republic of Austria* to assert jurisdiction over Austria for the 1938 expropriation of six Gustav Klimt paintings from the plaintiff’s fam-

221. One such case finding jurisdiction under the expropriation exception is *Kalamazoo Spice Extraction Co. v. Provisional Military Gov’t of Socialist Eth.*, 616 F. Supp. 660 (D.C. Mich. 1985). The case involved the Ethiopian government’s expropriation from a U.S. shareholder of a majority of the stock of a spice extraction joint venture. The Act of State doctrine was not a bar to the suit, due to a bilateral treaty between Ethiopia and the United States. *See id.* at 661. Since, subsequent to the expropriation, the spice extraction company exported \$1.2 million worth of oleoresins to the United States and imported supplies from the United States, the court held that the company was an instrumentality of the Ethiopian government engaged in commercial activity in the United States. *See id.* at 664.

222. The exception only requires that the expropriated property (or any property exchanged for such property) be “owned or operated” by the agency or instrumentality that is engaged in commercial activity in the United States. 28 U.S.C. § 1605(a)(3).

223. *See Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 202 (5th Cir. 1984) (per curiam) (observing, in a case arising before *Nelson*, that the expropriation exception, unlike the commercial activity exception, “clearly embodies a ‘doing business’ test”); *cf. Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 1996 WL 413680, at *6 (S.D.N.Y. July 24, 1996) (“The second prong of the expropriation exception permits lesser contacts with the United States than ordinarily would be required to comply with due process.”).

ily.²²⁴ Jurisdiction under the expropriation exception was premised on the Austrian Gallery's publication (presumably in Austria) of a museum guidebook in English and the advertisement in the United States of the gallery's collection.²²⁵ Similarly, in *Siderman de Blake*, the Ninth Circuit asserted jurisdiction over Argentina for the expropriation of the plaintiff's company, on the basis of Argentina's "solicitation and entertainment of American guests" and the "acceptance of American credit cards and traveler's checks" in Argentina at the hotel that was taken from plaintiff.²²⁶

Again, such an expansive reading of the FSIA puts it in conflict with international norms relating to personal jurisdiction. The language of the expropriation exception, while not containing the express nexus language of the commercial activity exception, is nonetheless susceptible to a construction that is more consistent with international law. Looking again to the Restatement (Third), international law restricts a state's exercise of jurisdiction to adjudicate to specific jurisdiction (i.e., on the basis of contacts that are closely connected to the cause of action)²²⁷ or to where the defendant "regularly carries on business in the state."²²⁸ It would not be a stretch to interpret the "engaging in a commercial activity" language in the expropriation exception so as to require at least *regular* ac-

224. See *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001); see also *supra* Part I.

225. See *Altmann*, 142 F. Supp. 2d at 1204-06.

226. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 712 (9th Cir. 1992).

227. See RESTATEMENT (THIRD), *supra* note 39, § 421(2)(i).

228. *Id.* § 421(2)(h). While an established part of the U.S. law on personal jurisdiction, the idea of premising jurisdiction on "doing business" alone is somewhat controversial internationally. See, e.g., *Vencedora Oceanica*, 730 F.2d at 209 (Higginbotham, J., dissenting) ("'[D]oing business' is a more controversial jurisdictional ground to assert over foreign entities than is a nexus ground."). Indeed, differences between the U.S. and European approaches on this issue were one of the sticking points between the United States and European countries during the negotiation of the convention. See Memorandum from the United States Department of State, Draft Hague Convention on Jurisdiction and the Recognition and Enforcement of Foreign Civil Judgments 2 (Aug. 5, 1999) (on file with author) [hereinafter Memorandum] ("[C]ivil law attorneys (and their clients) are profoundly uncomfortable with jurisdiction based on doing business or minimum contacts, which they find vague and unpredictable.").

tivity *within* the United States. Such a construction would suggest a different result in *Altmann* as well as in *Siderman de Blake*.

To summarize, while Congress in drafting the FSIA expressly incorporated a jurisdictional nexus for each of the commercial activity and expropriation exceptions, the statutory language is ambiguous and has been subjected to differing interpretations. This article proposes that these exceptions be interpreted narrowly so as to harmonize the FSIA with international norms of personal jurisdiction.

B. *Anti-Terrorism Amendment*

As discussed above in Part II.B, the anti-terrorism amendment allows an exception to immunity for torture, extrajudicial killing, aircraft sabotage, hostage taking, or the "provision of material support or resources" for such act. In contrast with the exceptions to immunity listed in the 1976 statute, the anti-terrorism amendment has no jurisdictional nexus requirement other than a requirement that either the claimant or the victim be a U.S. national at the time that the criminal act was perpetrated.²²⁹ Because of the very broad extraterritorial scope of the amendment, courts applying it are presented squarely with the question of whether jurisdiction may be asserted against a foreign state under the FSIA if the state lacks "minimum contacts" with the United States.

Of the handful of cases that have addressed this question to date,²³⁰ the decision that contains the most detailed analysis of whether a foreign state is a "person" for due process purposes is *Flatow v. Islamic Republic of Iran*.²³¹ Alisa Flatow was a

229. See 28 U.S.C. § 1605(a)(7)(B)(ii). The very broad extraterritorial scope of the anti-terrorism amendment can be contrasted with that of the tort exception under the 1976 statute, which is limited to certain torts "occurring in the United States." 28 U.S.C. § 1605(a)(5).

230. See, e.g., *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107 (D.D.C. 2000); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38 (D.D.C. 2000); *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1 (D.D.C. 2000); *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97 (D.D.C. 2000); *Price v. Socialist People's Libyan Arab Jamahiriya*, 110 F. Supp. 2d 10 (D.D.C. 2000); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998); *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325 (E.D.N.Y. 1998), *aff'd in part*, 162 F.3d 748 (2d Cir. 1998); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997).

231. 999 F. Supp. 1 (D.D.C. 1998).

twenty year-old college student who was killed when an Israeli bus was destroyed by a suicide bomber.²³² Relying on the anti-terrorism amendment, the Flatow family brought a wrongful death action against the Iranian government for its financial support of the terrorist cell that claimed responsibility for the bombing. Judge Lamberth of the District Court for the District of Columbia issued a default judgment in favor of the Flatows and ordered that Iran pay \$22.5 million of compensatory damages plus \$225 million in punitive damages.²³³

In upholding jurisdiction, the *Flatow* court found that the anti-terrorism amendment to the FSIA clearly was intended to apply to extraterritorial conduct such as Iran's involvement in the bombing.²³⁴ After a discussion of *Katzenbach* and Justice Scalia's dicta in *Weltover*, Judge Lamberth also concluded that a foreign state is not a "person" for purposes of the Due Process Clause.²³⁵ The court nonetheless applied the "minimum contacts" test to find that Alisa Flatow's nationality as a U.S. citizen along with Iran's general "sovereign contacts" with the United States, were sufficient contacts to satisfy the constitutional test.²³⁶

232. *See id.* at 7.

233. *See id.* at 5.

234. *See id.* at 15. Interestingly, the decision cites *EEOC v. Aramco*, 499 U.S. 244 (1991) (holding that a statute will not be given extraterritorial effect unless Congress so indicates).

235. *See id.* at 19-21.

236. *Id.* at 21-23. The court concluded that "a foreign state that sponsors terrorist activities, which cause the death or personal injury of a United States national, invariably will have sufficient contacts with the United States to satisfy Due Process." *Id.* at 23. Other decisions applying the anti-terrorism amendment have used similar reasoning to find "minimum contacts" from a foreign state's support of terrorist activity affecting U.S. nationals. *See Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325, 330 (E.D.N.Y. 1998) (finding that Libya's role in the bombing of Pan Am Flight 103 satisfied the constitutional test since "[a]ny foreign state would know that the United States has substantial interests in protecting its flag carriers and its nationals from terrorist activities . . ."); *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1, 7 (D.D.C. 2000) (concluding, as in *Flatow*, that a foreign state that causes the death of a U.S. national through an act of state-sponsored terrorism has the requisite "minimum contacts" with the United States so as not to offend "traditional notions of fair play and substantial justice"). For a critique of this approach, see Caplan, *supra* note 48, at 411-15 (characterizing the decisions in *Flatow* and *Rein* as a "distortion" of personal jurisdiction law).

Assuming that Judge Lamberth is correct and a foreign state is not a "person," the analysis set forth in Part III.D above suggests that the anti-terrorism amendment, an act of Congress, "trumps" international law norms of personal jurisdiction. Thus, regardless of the anti-terrorism amendment's legality under international law, a court is constrained to apply it. It is still worthwhile to consider the international law of jurisdiction as it relates to the anti-terrorism amendment, however, as a guide to the interpretation and application of that amendment.

Some have suggested that the anti-terrorism amendment is supported by international law under the passive personality principle²³⁷ or under universal jurisdiction.²³⁸ While there is still substantial disagreement over the scope of universal jurisdiction,²³⁹ a credible argument can be made that at least some of the crimes listed in the anti-terrorism amendment (in particular, torture, aircraft sabotage, and hostage taking) fall within the doctrine of universal jurisdiction.²⁴⁰ Even if Con-

237. See *Price v. Socialist People's Libyan Arab Jamahiriya*, 110 F. Supp. 2d at 12-13 (suggesting that "[t]he passive personality" principle forms the underpinnings of Congress' grant of subject matter jurisdiction under the FSIA," and rejecting Libya's argument that the principle is disfavored under international law); see also Glannon and Atik, *supra* note 48, at 699. For an explanation of the principle, see *supra* note 162.

238. See 1994 *Hearings*, *supra* note 52, at 23 (testimony of Sen. Arlen Specter) (supporting the anti-terrorism amendment), *quoted at supra* note 55 and accompanying text; see also *Flatow*, 999 F. Supp. at 14 (noting that "international terrorism is subject to universal jurisdiction"). For a discussion of universal jurisdiction, see *supra* note 162.

239. Just to give one example, consider the sharply contrasting concurring opinions in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (affirming the dismissal of claims brought against the Palestine Liberation Organization for torture, hostage taking, and other tortious acts committed in Israel). Judge Edwards argues that "commentators have begun to identify a handful of heinous actions—each of which violates definable, universal and obligatory norms" *Id.* at 781 (Edwards, J., concurring). On the other hand, Judge Bork considers that "[a]djudication of [plaintiff's] claims would require the analysis of international legal principles that are anything but clearly defined and that are the subject of controversy touching 'sharply on national nerves.'" *Id.* at 804 (Bork, J., concurring). See also Randall, *supra* note 162.

240. See RESTATEMENT (THIRD), *supra* note 39, § 404 (listing "attacks on and hijacking of aircraft" and "perhaps certain acts of terrorism" as falling under universal jurisdiction); *Id.* Reporters' Note 1 (listing international agreements providing for general jurisdiction for certain offenses, including

gress has jurisdiction to prescribe the offenses listed in the amendment, however, there is a difference between jurisdiction to prescribe and jurisdiction to adjudicate. U.S. cases basing extraterritorial jurisdiction on the passive personality principle involve jurisdiction to prescribe law to punish crimes or other wrongs committed by individuals or corporations.²⁴¹ Similarly, recent cases suggesting an expansion of universal jurisdiction²⁴² tend to involve criminal actions against individual

the Hague Convention for the Suppression of Unlawful Seizure of Aircraft and the International Convention against the Taking of Hostages, and stating that the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment "in effect provides for universal jurisdiction"). See also Randall, *supra* note 162, at 816-27 (considering whether these conventions create rights or obligations vis-à-vis nonsignatory states).

241. See, e.g., *United States v. Felix-Gutierrez*, 940 F.2d 1200 (9th Cir. 1991) (finding jurisdiction to apply the penal statute for kidnapping and murder of a DEA agent); *United States v. Romero-Galue*, 757 F.2d 1147 (11th Cir. 1985) (finding jurisdiction to apply the Marijuana on the High Seas Act to foreign residents whose vessel was seized on the high seas); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161 (E.D. Penn. 1980) (finding jurisdiction to apply an antitrust statute to an alleged conspiracy among Japanese companies).

242. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (upholding jurisdiction to hear genocide, torture, and other claims under the Alien Tort Act against Bosnian war criminal Radovan Karadzic); *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (affirming an almost \$2 billion judgment in a class action suit under the Alien Tort Act for acts of torture and summary execution committed under the command of former Philippines ruler Ferdinand Marcos); *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985) (upholding the extradition to Israel of "Ivan the Terrible," a former SS guard at the Treblinka concentration camp, under the principle of universal jurisdiction); *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (upholding jurisdiction to hear a wrongful death claim under the Alien Tort Act against a Paraguayan police official who allegedly tortured plaintiffs' son).

On the international level, jurisdiction increasingly has been asserted over individuals for the commission of international crimes. See, e.g., *Regina v. Bow St. Stipendiary Magistrate, ex parte Pinochet Ugarte*, 3 W.L.R. 1456 (H.L. 1998), available at 1998 WL 1043992 (1998) (holding that former Chilean dictator Gen. Augusto Pinochet could not assert immunity for torture and hostage taking); Marlise Simons, *An Awful Task: Assessing 4 Roles in Death of Thousands*, N.Y. TIMES, Apr. 30, 2001, at A3 (describing proceedings conducted in Belgium against four Rwandans for their complicity in the 1994 massacre of a half million people in Rwanda).

Belgium recently revised its law to permit jurisdiction of its courts over suits involving genocide and other crimes against humanity, regardless of whether the suit bears any connection with Belgium. In response to this law, suits have been filed in Belgian courts not only against the Rwandan defend-

defendants who were either extradited or served with process while residing in or visiting the adjudicating jurisdiction.²⁴³ The passive personality principle and universal jurisdiction relate to a state's authority to define and punish crimes committed by individual persons, and thus may not be applicable to the issue of state responsibility.

However, there are two principles that might support at least some assertions of extra-territorial jurisdiction over foreign states under the anti-terrorism amendment: the "effects principle" of jurisdiction to adjudicate and the notion of an implied waiver of personal jurisdiction due to violation of a *jus cogens* norm. As for the first of these principles, the effects principle, the Restatement (Third) allows for the assertion of jurisdiction to adjudicate where the defendant carried on an activity outside of the state having a "substantial, direct, and foreseeable" effect within the state.²⁴⁴ An argument might be made that jurisdiction over state sponsors of terrorism is justified under the effects principle. This argument is analogous to *Flatow* and *Rein*, in which the courts found "minimum contacts" on the rationale that the defendant state was committing terrorist acts against U.S. nationals.²⁴⁵ However, the Restatement (Third) only allows the assertion of jurisdiction on the basis of "substantial, direct, and foreseeable" effects²⁴⁶ where such assertion of jurisdiction is "reasonable."²⁴⁷ Application of the "effects" principle might be reasonable in a case like *Rein*,

ants, but also against Yasir Arafat, Ariel Sharon, and Fidel Castro, among others. Marlise Simons, *Human Rights Cases Begin to Flood into Belgian Courts*, N.Y. TIMES, Dec. 27, 2001, at A8.

243. For example, the defendant in *Filartiga* was arrested and later served with a complaint after he relocated to the United States. See *Filartiga*, 630 F.2d at 878-79. Similarly, Ferdinand Marcos was served with complaints shortly after he fled the Philippines for Hawaii. See *Hilao*, 103 F.3d at 771. Radovan Karadzic was served personally with a complaint while he was in New York City. See *Kadic*, 70 F.3d at 237. General Pinochet and Ivan Demjanjuk were subject to extradition proceedings, and the Rwandan defendants had been residing in Belgium at the time they were charged. See Simons, *supra* note 242.

244. See RESTATEMENT (THIRD), *supra* note 39, § 421(2)(j); see also *supra* Part III.C.

245. See *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998); *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325 (E.D.N.Y. 1998), *aff'd in part*, 162 F.3d 748 (2d Cir. 1998).

246. RESTATEMENT (THIRD), *supra* note 39, § 421(2)(j).

247. *Id.* § 421(1).

where Libya allegedly was closely involved in the bombing of an aircraft flying under the U.S. flag and headed for the United States. Application of the "effects" principle is more suspect in a case such as *Flatow*, where the connection between the alleged act and the effect (Iran's financial support of the terrorist cell that perpetrated a suicide bombing of an Israeli bus containing U.S. and other tourists) is less direct.²⁴⁸

A second argument that might justify assertion of jurisdiction under the anti-terrorism amendment could be made in cases where the foreign state violated a *jus cogens* norm. A *jus cogens* norm of international law is one that is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."²⁴⁹ The general idea is that certain practices—for example genocide or slavery—are so universally condemned that any civilized nation would regard the practice as criminal. At least one prominent U.S. judge has argued that a foreign state that violates a *jus cogens* norm waives its immunity from suit. In a case involving a claim of an Auschwitz survivor against the Federal Republic of Germany, Judge Wald of the Circuit Court of the District of Columbia argued in a dissenting opinion that Germany implicitly waived its immunity defense to plaintiff's reparations claims:

Jus cogens norms are by definition nonderogable, and thus when a state thumbs its nose at such a norm, in effect overriding the collective will of the entire international community, the state cannot be performing a sovereign act entitled to immunity. When the Nazis tore off Princz's clothes, exchanged them for a prison uniform and a tattoo, shoved him behind the barbed wire fences of Auschwitz and Dachau, and

248. As a general matter, that both U.S. and foreign courts tend to find jurisdiction over tort actions in the state where the injury occurred rather than on the basis of the victim's nationality also cuts against the "effects" principle. See *supra* notes 212, 213 and accompanying text.

249. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 53. The Vienna Convention on Treaties also uses the term "peremptory norm." *Id.* Note that, in contrast with universal jurisdiction, which addresses violations of individual responsibility, *jus cogens* addresses state responsibility. See Randall, *supra* note 162, at 830, n.252 (citing sources). Randall also notes that *jus cogens* means "compelling law." *Id.* at 830.

sold him to the German armament industry as fodder for their wartime labor operation, Germany rescinded any claim under international law to immunity from this court's jurisdiction.²⁵⁰

A similar argument was made by the Ninth Circuit in *Siderman de Blake v. Republic of Argentina*, where the court recognized that any state that engages in official torture violates *jus cogens*.²⁵¹ Although Judge Wald referred to waiver of immunity and not waiver of personal jurisdiction, an analogous argument can be made with respect to personal jurisdiction; that is, a sovereign that commits crimes such as torture effectively waives any objection to personal jurisdiction in a suit to punish such crime.²⁵² Thus the implied waiver theory provides a lim-

250. *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1182 (D.C. Cir. 1994) (Wald, J., dissenting) (citing Adam C. Belsky et al., *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365, 396 (1989)). The majority in *Princz*, however, rejected Judge Wald's position, refusing to find that the violation of a *jus cogens* norm amounts to an implied waiver of immunity under the waiver exception to the FSIA. *Princz*, 26 F.3d at 1173-74. The federal courts that have recently considered this question have followed the majority in *Princz*, rejecting Judge Wald's argument that the violation of a *jus cogens* norm amounts to a waiver of sovereign immunity. See *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1151-55 (7th Cir. 2001) (considering and rejecting Judge Wald's position); *Hwang Guem Joo v. Japan*, 172 F. Supp. 2d 52, 60-61 (D.D.C. 2001) (same); *Abrams v. Societe Nationale des Chemins de Fer Francais*, 175 F. Supp. 2d 423 (E.D.N.Y. 2001) (same).

251. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-17 (9th Cir. 1992). In an eloquent passage, the court stated:

The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate. . . . That states engage in official torture cannot be doubted, but all states believe it is wrong, all that engage in torture deny it, and no state claims a sovereign right to torture its own citizens.

Id. at 717. The court in *Siderman*, however, ultimately held, citing *Argentine Republic v. Amerasia Shipping*, 488 U.S. 428, 434 (1989), that the FSIA is the sole basis under U.S. law for finding an exception to sovereign immunity. See *id.* at 718-19.

252. The commission of such crimes effectively represents a waiver of the right to object to a court's assertion of personal jurisdiction. See *infra* notes 264-65 and accompanying text. Indeed, this idea is implicit in Judge Wald's analysis, since the *Princz* facts also implicated the issue of extraterritorial assertion of personal jurisdiction over Germany. See *Princz*, 26 F.3d at 1176-85 (Wald, J., dissenting).

ited argument that an exercise of personal jurisdiction under the anti-terrorism amendment is consistent with international law, an argument valid only to the extent that the violation at issue is a violation of a *jus cogens* norm.²⁵³ This position, however, has yet to be accepted by the courts.

To summarize, certain applications of the anti-terrorism amendment may be consistent with international practice. Two examples discussed above are assertions of jurisdiction under the “effects” principle or under the implied waiver theory for violations of *jus cogens* norms. In other respects, the anti-terrorism amendment represents a dramatic departure from past international practice. First, the amendment addresses state (rather than individual) responsibility for international crimes. Second, while the amendment is overly narrow in that it only applies to a short list of “rogue” states,²⁵⁴ the language of the amendment is at the same time very broad in that it applies whenever a foreign state provides “material support or resources” for a terrorist act.²⁵⁵ This vague language neither rises to the level of a *jus cogens* violation nor falls within the principle of universal jurisdiction.²⁵⁶ A court applying the

253. While a detailed discussion of the offenses that amount to a *jus cogens* violation is beyond the scope of this article, there is support for the idea that at least the crime of torture, one of the crimes listed in the anti-terrorism amendment, is prohibited by *jus cogens*. See *Siderman de Blake*, 965 F.2d at 717 (concluding that official torture has attained the status of a *jus cogens* norm); see also *Sampson*, 250 F.3d at 1155 (while declining to find an implicit waiver under the FSIA, court conceded that Nazi Germany’s acts of genocide and enslavement are a “paradigm case” of a *jus cogens* violation).

254. See *supra* note 50 and accompanying text. In light of the events following the September 11 terrorist attacks, the fact that this list includes such states as Syria and Iran—states that may prove useful to the United States in its fight against Osama bin Laden and the Taliban regime—but omits Afghanistan illustrates the potential problems this legislation may create for U.S. foreign policy.

255. Specifically, section 1605(a)(7) allows an exception to immunity where a foreign state provides “material support or resources” for an act of torture, extrajudicial killing, aircraft sabotage, or hostage taking. 28 U.S.C. § 1605(a)(7). “Material support or resources” is defined broadly to mean “currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.” 18 U.S.C. § 2339A(b).

256. There is a difference between “command responsibility”—that is, holding a ruler such as Marcos or Karadzic responsible for the acts of his

FSIA may try to interpret the statute wherever possible in a manner consistent with international law, but, notwithstanding these problems, otherwise is constrained to apply the statute as written.

C. Arbitration Amendment

Congress enacted the arbitration amendment to the FSIA in 1988 to add a sixth exception to sovereign immunity, applicable where an action is brought to enforce or confirm certain arbitration awards to which a foreign state is a party.²⁵⁷ The

subordinates—and asserting jurisdiction over a state that provides financial or other support for terrorist acts. The terrorist attacks of September 11 and the United States's response to them, while driving home the need to combat terrorism, also illustrate how the anti-terrorism amendment focuses on the wrong target. The focus of the Bush Administration's response has been to hunt down and bring to justice Osama bin Laden, rather than to bring a lawsuit against the state of Afghanistan. Along these same lines, Professor Slaughter raises a number of policy reasons why the international community should prosecute individual terrorists, or terrorist leaders, for such crimes, rather than the states that allegedly support them. She argues that suing "unpopular" states complicates diplomacy, threatens U.S. assets abroad, and runs the risk of politicizing the U.S. court system. See Anne-Marie Slaughter & David Bosco, Editorial, *Sue Terrorists, Not Terrorist States*, WASH. POST, Oct. 28, 2000, at A25.

Indeed, because of its unprecedented nature, in practice the anti-terrorism amendment has proven to be difficult to enforce. After winning multi-million dollar judgments against foreign sovereign defendants, plaintiffs in cases such as *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998), and *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997), were frustrated in their efforts to attach foreign state assets to enforce their judgments, either because the assets were held to be diplomatic assets and therefore not subject to attachment, or because the U.S. government acted to block the attachment. For details of the unsuccessful efforts by plaintiffs to attach foreign state assets to enforce the *Flatow* and *Alejandro* judgments, see Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 102, 117-23 (2000).

To address these problems, Congress recently enacted legislation to ensure payment of compensatory damages to plaintiffs such as Alisa Flatow's estate. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, § 2003, 114 Stat. 1464 (2000) (codified at 42 USC § 10601) (establishing a reserve fund for the compensation of U.S. victims of international terrorism). Thus, the end result of the anti-terrorism amendment may be that the damages awarded against states such as Cuba and Iran simply are being paid out of U.S. funds, with the State Department assuming the task of negotiating for reimbursement from the defendant states.

257. See *supra* Part II.B.

purpose of the arbitration amendment was to encourage reliance on international commercial arbitration by facilitating the enforcement process and, in particular, to implement international agreements to which the United States is a party relating to the recognition and enforcement of arbitral awards.²⁵⁸ One such agreement is the New York Convention, which obligates U.S. courts to recognize and enforce arbitration awards issued in any other contracting state.²⁵⁹ Whenever a foreign state agrees to arbitrate an international commercial dispute in a state that is signatory to the New York Convention (or a similar treaty relating to the recognition and enforcement of arbitration awards to which the United States is a party), that arbitral award falls within the arbitration exception. Thus it is possible that a foreign sovereign defendant who owns property in the United States but otherwise lacks "minimum contacts" with the United States could be brought into U.S. court in an action to enforce an arbitral award against it. The question this section addresses is, assuming that foreign states are not entitled to challenge jurisdiction on constitutional grounds, whether such an action would violate international customary law on jurisdiction. Since the arbitration exception involves actions to *enforce* arbitral awards rendered elsewhere rather than an action to litigate the underlying dispute, the plaintiff in such a suit should be able to enforce the award wherever the foreign state's assets may be

258. In discussing an earlier version of the bill that became the arbitration amendment, Senator Mathias explained the policy behind the amendment: "This amendment will reassure Americans engaged in international business that the arbitration mechanism works. By preventing a foreign government from invoking the sovereign immunity defense to escape enforcement of an arbitral award, it will help secure the safety of U.S. companies' interests abroad." 132 CONG. REC. S33742 (1986) (statement of Sen. Mathias). Although the amendment itself was part of implementing legislation for the Inter-American Convention, the United States is a signatory to two additional agreements for the recognition and enforcement of arbitral awards: the New York Convention, *supra* note 43, and the ICSID Convention, *supra* note 46.

259. See *supra* Part II.B. The New York Convention was implemented through a 1970 amendment to the Federal Arbitration Act and is codified at 9 U.S.C. § 201 (1999).

found²⁶⁰ regardless of whether the state possesses "minimum contacts" with the place of enforcement.

It is worth noting that sovereign immunity and personal jurisdiction can be waived.²⁶¹ Even prior to 1952 when absolute immunity was the rule, it had been long accepted that waiver was a permissible exception to sovereign immunity.²⁶² Before Congress amended the FSIA to add the arbitration exception, a number of courts had interpreted agreements to arbitrate as implied waivers of immunity. The arbitration amendment eliminated any ambiguity on this issue.²⁶³ It also

260. Of course, not all assets of a foreign sovereign are subject to attachment and execution. The FSIA provides special exceptions to immunity against attachment and execution of assets owned by a foreign state. See 28 U.S.C. §§ 1609-1610 (setting forth a general rule of immunity and enumerating exceptions to the rule). One such exception is any case where "the judgment is based on an order confirming an arbitral award rendered against the foreign State." 28 U.S.C. § 1610(a)(6). In addition, the FSIA provides that certain assets of a foreign state, such as central bank or military assets, are never subject to attachment or execution. 28 U.S.C. § 1611(b).

261. Section 1605(a)(1) of the FSIA provides for an exception to sovereign immunity when immunity has been waived "either explicitly or by implication." For an analysis of the waiver exception to the FSIA that emphasizes the distinction between waiving sovereign immunity and waiving personal jurisdiction, see Victoria A. Carter, *God Save the King: Unconstitutional Assertions of Personal Jurisdiction over Foreign States in U.S. Courts*, 82 VA. L. REV. 357 (1996).

262. For example, in *The Schooner Exchange v. M'Faddon*, Chief Justice John Marshall recognized express or implied waiver as the only legitimate exception to sovereign immunity, stating that any exception to sovereign immunity "must be derived from the consent of the sovereign . . ." *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 143 (1812).

263. The House Report accompanying the FSIA in 1976 commented that "[w]ith respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country." FLOWERS, JURISDICTION OF UNITED STATES COURTS IN SUITS AGAINST FOREIGN STATES, H.R. No. 94-1487, at 18 (1976). While a number of courts have found implied waivers in international arbitration agreements, the issue is not settled. See *Seetransport Wiking Trader v. Navimpex Centrala*, 989 F.2d 572, 578-79 (2d Cir. 1993) (implying a waiver of sovereign immunity from an agreement to submit disputes to international arbitration); *M.B.L. Int'l Contractors v. Republic of Trinidad*, 725 F. Supp. 52 (D.D.C. 1989) (same); *Ipi-trade Int'l v. Federal Republic of Nigeria*, 465 F. Supp. 824, 826 (D.D.C. 1978) (same). But see *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292 (11th Cir. 2000); *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 122-3 (D.C. Cir. 1999) (finding international arbitration agreement not to be a waiver, since the sovereign is not a party to the New York Convention); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th

has long been accepted that personal jurisdiction can be waived; this idea has been accepted both on the international level²⁶⁴ and by the Supreme Court almost thirty years ago in its decision *The Bremen v. Zapata Offshore Co.*²⁶⁵ However, it should not be necessary to find a waiver of personal jurisdiction where a U.S. court is enforcing an arbitral award issued against a foreign state. Instead, what should matter in the enforcement context is whether the award is valid under the criteria set forth in the Convention and whether there are assets

Cir. 1985) ("[M]ost courts have refused to find an implicit waiver of immunity to suit in American courts from a contract clause providing for arbitration in a country other than the United States."); *M.B.L. Int'l Contractors*, 725 F. Supp. at 54 n.3.

In commenting on an earlier version of the bill that became the arbitration amendment, Senator Lugar observed that the amendment would eliminate any ambiguity over whether agreements to arbitrate should be enforceable in U.S. courts against foreign sovereigns:

Consistent with our longstanding policy favoring arbitration in international commerce, the other provisions of this amendment would perfect the [FSIA] to provide explicitly for the enforcement of arbitral agreements or awards. Currently, agreements and awards are enforced under the provisions of the FSIA that concern explicit or implied waivers of immunity. Although courts are finding that arbitral agreements constitute waivers in the appropriate cases, the amendment would give more explicit guidance to judges in dealing with these cases.

132 CONG. REC. S14795 (1986) (statement of Sen. Lugar).

264. See RESTATEMENT (THIRD), *supra* note 39, § 421(2)(g) (allowing jurisdiction to adjudicate if the defendant has consented to the exercise of jurisdiction); Draft Hague Convention, *supra* note 19, art. 4; DICEY AND MORRIS ON THE CONFLICT OF LAWS, Rule 23(15) (9th ed. 1973) (explaining the English law that permits personal jurisdiction where the contract terms allow it).

265. *The Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972). In *The Bremen*, the Court upheld the validity of a forum selection clause in a contract between a U.S. and a German company specifying that any dispute arising out of the contract would be heard by the London Court of Justice. The Court rejected the argument that such clauses are improper, reasoning that resistance to such clauses "reflects something of a provincial attitude regarding the fairness of other tribunals," and suggesting that it should "give effect to the legitimate expectations of the parties." *Id.* at 12. Of course, by agreeing to hear all disputes in the London Court of Justice, the U.S. company effectively waived any defense it may have had relating to personal jurisdiction. The Supreme Court also has held explicitly that the constitutional requirement of "minimum contacts" can be waived intentionally. See *Ins. Corp. of Ir. v. Compagnie des Bauxites*, 456 U.S. 694 (1982).

of the foreign state in the United States against which to enforce the award.

The law on enforcement of foreign judgments is somewhat analogous. Whether we look at U.S. or international law on enforcement of judgments, lack of "minimum contacts" does not constrain the power of a court to attach a defendant's assets in order to enforce a judgment issued in another jurisdiction.²⁶⁶ The issue in such a case is not whether the defendant possesses "minimum contacts" within the jurisdiction of the enforcing court, but rather whether the defendant had such contacts within the jurisdiction of the court that issued the judgment.²⁶⁷

The same principle should apply to the enforcement of arbitral awards. Indeed, if anything, the policy behind the free enforceability of foreign arbitral awards may be stronger than

266. See, e.g., RESTATEMENT OF THE LAW (SECOND) OF JUDGMENTS (1980), § 8, which addresses attachment jurisdiction:

"(1) A court may exercise jurisdiction to seize property whose situs is in the state . . . in an action concerning a claim against the owner of the property if: The court could properly exercise jurisdiction to adjudicate the claim . . . or The action is to enforce a judgment against the owner of the property. . . ." (emphasis added).

The comments to section 8 explain that jurisdiction may be exercised in an action to enforce a judgment, even in situations where jurisdiction might otherwise not be found to exist, in order to further the broader social purpose of facilitating the enforceability of judgments. See *id.* § 8 cmt. d. On the international level, see RESTATEMENT (THIRD), *supra* note 39, § 481 cmt. h ("[W]hereas a state has jurisdiction to adjudicate a claim on the basis of presence of property in the forum only where the property is reasonably connected with the claim, an action to enforce a judgment may usually be brought wherever property of the defendant may be found.").

267. Of course the situation is different where the action to attach defendant's property is brought *prior* to judgment. The Supreme Court held in *Shaffer v. Heitner*, 433 U.S. 186 (1977) that the use of attachment to establish *quasi in rem* jurisdiction in Delaware, based solely on the presence of defendant's property within Delaware, violated the Due Process Clause. The Court also suggested, however, that the outcome would have been different if the action were brought to enforce a judgment. See *id.* at 210 n.36 ("Once it has been determined by a court . . . that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property . . ."). See also *Smith v. Lorillard, Inc.*, 945 F.2d 745 (4th Cir. 1991) (holding that *Shaffer* does not set limits on an ancillary action to enforce a previously-issued judgment); RESTATEMENT OF THE LAW (SECOND) OF JUDGMENTS § 8 cmt. d (1980) (specifying that the use of attachment and other methods as *provisional remedies* is circumscribed by the Due Process Clause).

that of foreign judgments, since the United States is bound by international agreement to recognize and enforce arbitral awards issued in other signatory states.²⁶⁸

Article III of the New York Convention requires that each state "shall recognize arbitral awards as binding,"²⁶⁹ and Article V of the Convention allows a U.S. court to refuse recognition and enforcement of an arbitral award only on very limited bases.²⁷⁰ Although Article V allows a signatory state to refuse recognition and enforcement of an arbitral award on public policy grounds, in practice this exception is applied in very narrow circumstances; courts have *not* invoked the public policy exception to decline enforcement of a foreign arbitral award on the grounds that a party lacked "minimum contacts" with the United States. The New York Convention requires U.S. courts to recognize and enforce foreign arbitral awards so long as the arbitration panel had authority to hear the dispute and the arbitration was conducted in a state that is signatory to the Convention. In this respect, it is analogous to the Full

268. See RESTATEMENT (THIRD), *supra* note 39, § 487 cmt. c (explaining that because of the New York Convention, *supra* note 43, which imposes a treaty obligation to enforce arbitral awards, arbitral awards are more automatically enforced than judgments).

269. Article III provides in full:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

New York Convention, *supra* note 43, art. III.

270. Article V of the New York Convention provides that recognition and enforcement of an arbitral award may be refused only on the following bases: invalidity of the agreement to arbitrate; lack of notice to the adversely affected party; *ultra vires* awards; arbitral procedure not in accordance with the arbitration agreement; award set aside in the country of issue; subject matter not capable of settlement by arbitration under the law of the enforcing court; and recognition and enforcement would violate the public policy of the enforcing court. New York Convention, *supra* note 43, art. V. The ICSID and the Inter-American Conventions similarly obligate signatory states to recognize and enforce arbitral awards with very limited exceptions. See ICSID Convention, *supra* note 46, art. 54 (providing no exceptions); Inter-American Convention, *supra* note 42, art. 5 (listing essentially the same exceptions as the New York Convention).

Faith and Credit Clause,²⁷¹ which requires enforcement of a judgment rendered in another state (regardless of whether the defendant has "minimum" contacts with the *enforcing forum*).²⁷²

Although the implementing legislation to the New York Convention allows for confirmation of a foreign arbitral award by application to any court "having jurisdiction,"²⁷³ the personal jurisdiction requirement should be met once the presence within the jurisdiction of defendant's property can be shown.²⁷⁴ There are very few cases involving the enforcement of a foreign arbitral award where the court refused to enforce the award for lack of personal jurisdiction. In *Transatlantic Bulk Shipping v. Saudi Chartering*, the only such case outside of the FSIA context, a Liberian shipping company filed an action in the Southern District of New York seeking confirmation of an award issued by an arbitration panel in London against a Panamanian corporation.²⁷⁵ The court dismissed the petition on the basis that it lacked personal jurisdiction over the Panamanian corporation, noting that the defendant had no office, bank account, employee, agent, or person authorized to receive process in New York.²⁷⁶ The court also commented that the legislation implementing the New York Convention

271. U.S. CONST., art. IV, § 1.

272. See, e.g., JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE 711 (3d ed. 1999) (citing *Penmoyer* and explaining that due process can trump the full faith and credit obligation where there was no personal jurisdiction "in the first court").

273. 9 U.S.C. § 207 (1994).

274. The Restatement (Third) states that "[a]s in respect to judgments, § 481, Comment *h*, an action to enforce a foreign arbitral award requires jurisdiction over the award debtor or his property." RESTATEMENT (THIRD), *supra* note 39, § 487 cmt. c (1986). Section 481, comment *h* explains that, whereas under U.S. law a state has jurisdiction to adjudicate a claim on the basis of property only where the property is related to the claim, "an action to enforce a judgment may usually be brought wherever property of the defendant is found, *without any necessary connection between the underlying action and the property, or between the defendant and the forum.*" *Id.* § 481 cmt. *h* (emphasis added). Thus, it would seem that in such enforcement actions international law does not require a jurisdictional nexus between the defendant and the enforcing forum.

275. *Transatlantic Bulk Shipping v. Saudi Chartering*, 622 F. Supp. 25 (S.D.N.Y. 1985).

276. See *id.* at 26.

does not . . . give the court power over all persons throughout the world who have entered into an arbitration agreement covered by the Convention. Some basis must be shown, whether arising from the [defendant's] residence, his conduct, his consent, the location of his property or otherwise, to justify his being subject to the court's power.²⁷⁷

Although the opinion cites *International Shoe*, the ruling in the case might be explained by the fact that there was no property of the defendant present in the jurisdiction against which to execute the arbitral award.

U.S. courts have conducted a "minimum contacts" analysis in a number of actions to enforce arbitral awards against foreign sovereign defendants. It is somewhat ironic that all of these cases (other than *Transatlantic Bulk Shipping*) involve foreign sovereign defendants under the FSIA rather than private defendants.²⁷⁸ Application of the "minimum contacts" test in these cases generally did not affect the outcome of the suit, because the courts generally found sufficient contacts in any event to assert jurisdiction and enforce the arbitral award.²⁷⁹

277. *Id.* at 27.

278. I conducted a search of all federal cases in the LEXIS database using the terms (convention w/10 arbitral or ICSID) and ("minimum contacts" or "international shoe") (search conducted June 27, 2001). The only case I could find involving the recognition or enforcement of an arbitral award against a *private* party where the court conducted a minimum contacts analysis was *Transatlantic Bulk Shipping*.

279. *See, e.g.,* Seetransport Wiking Trader v. Navimpex Centrala, 989 F.2d 572 (2d Cir. 1993) (finding both implied waiver and minimum contacts); *Am. Constr. Mach. & Equip. Corp. v. Mechanised Constr. of Pak. Ltd.*, No. 85 Civ. 3765, 1986 WL 2973 (S.D.N.Y. Mar. 5, 1986) (finding both implied waiver and minimum contacts); *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahirya*, 482 F. Supp. 1175, 1177 (D.D.C. 1980) (finding both implied waiver and minimum contacts), *vacated*, 684 F.2d 1032 (D.C. Cir. 1981); *see also* *Employers Ins. of Wausau v. Banco de Seguros del Estado*, 199 F.3d 937 (7th Cir. 1999) (finding implied waiver in a post-*Creighton* case); *S & Davis Int'l Inc. v. Republic of Yemen*, 218 F.3d 1292 (11th Cir. 2000) (finding jurisdiction under the commercial activity exception and minimum contacts in a post-*Creighton* case). *But see* *Concord Reinsurance Co. v. Caja Nacional de Ahorro Y Seguro*, No. 94 Civ. 2218, 1994 WL 259826, at 1 (S.D.N.Y. June 7, 1994) (dismissing without elaboration what was apparently an action to enforce a foreign arbitral award against a foreign sovereign due to lack of minimum contacts).

However, the D.C. Circuit in *Creighton Ltd. v. Government of State of Qatar* refused to enforce an arbitral award under the arbitration exception on grounds that the foreign sovereign defendant did not possess “minimum contacts” with the United States.²⁸⁰ Creighton, a Cayman Islands company with offices in the United States, had entered into an agreement with the government of Qatar to build a new hospital. The construction contract provided that the agreement was to be governed by Qatari law and that all disputes were to be resolved “under the Rules of Conciliation and Arbitration of the International Chamber of Commerce” (ICC).²⁸¹ The contract did not specify where the arbitration was to be conducted. About four years after the contract was signed, Qatar attempted to expel Creighton from the project and Creighton commenced arbitration. Since the contract was silent as to the place of arbitration, the ICC conducted the arbitration in Paris. The arbitration panel awarded Creighton damages of over \$8 million. After Creighton was unsuccessful in attaching Qatari assets in France, it brought an action in U.S. district court to enforce the arbitration award. After the district court dismissed the action, Creighton appealed. Although the circuit court found an exception to sovereign immunity under the arbitration amendment,²⁸² it ultimately affirmed the district court’s dismissal on the grounds that Qatar lacked “minimum contacts” with the United States.²⁸³

Assuming that Qatar had assets present within the United States with which to enforce the award, the outcome in *Creighton* undermines the purpose of the arbitration amendment. By refusing to enforce an arbitral award on grounds other than those specified in Article V, the outcome is also in tension with the U.S. obligation under the New York Convention and similar agreements. As one expert on international arbi-

280. *Creighton Ltd. v. Gov’t of the State of Qatar*, 181 F.3d 118 (D.C. Cir. 1999).

281. *See id.* at 120.

282. *See id.* at 124.

283. Interestingly, the court raised the possibility that the Due Process Clause does not apply to foreign sovereigns. The Court referred to *Weltover* and its “question[ing]” of the applicability of the Due Process Clause to foreign states. *See Creighton*, 181 F.3d at 124. However, the court fudged on this issue and applied the “minimum contacts” test on the grounds that the issue was not argued by the plaintiff. *See id.* at 124-25.

tration put it, allowing a state that has agreed to arbitration to avoid confirmation of the arbitral award on the basis of sovereign immunity "should make a mockery of the arbitration process."²⁸⁴ International practice relating to recognition and enforcement of foreign arbitration awards generally has been to recognize and enforce arbitration awards on principles analogous to the recognition and enforcement of foreign judgments. Thus, a finding that a foreign state is not a "person" should have little effect on cases involving the enforcement of awards falling under the arbitration exception;²⁸⁵ these awards should be enforceable without regard to "minimum contacts" wherever the state's attachable assets may be found.

V. CONCLUSION

The United States, along with fifty²⁸⁶ other countries, is currently in the process of negotiating the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.²⁸⁷ The draft treaty has been in negotiations for almost ten years and, if adopted, could fundamentally alter the United States's approach to jurisdictional questions. Although the implications of the agreement for Internet-related activity

284. DELAUME, *supra* note 45, at 73.

285. An issue that the FSIA does not directly address is whether an action may be brought against a foreign sovereign to enforce a foreign judgment. In contrast to the arbitration exception, there is no special exception to immunity under the FSIA to recognize or enforce a foreign judgment in the United States. U.S. courts have dismissed actions brought to enforce a foreign judgment against a foreign sovereign defendant where the foreign sovereign defendant did not waive immunity and the conduct underlying the judgment fell outside the commercial activity exception. See *Transatlantic v. Shanghai Foreign Trade Corp.*, 204 F.3d 384 (2d Cir. 2000), *cert. denied* 121 S. Ct. 1227 (2001); *Int'l Hous. Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 10-11 (2d Cir. 1989).

286. For a list of member countries to the Hague Conference, see the website for the Hague Conference at <http://www.hcch.net/e/members/members.html> (last visited Jan. 7, 2002).

287. Draft Hague Convention, *supra* note 19. There is a subsequent, interim draft of the convention that contains a substantial number of proposed revisions to the text. See Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001, Interim Text prepared by the Permanent Bureau and the Co-reporters, at <http://www.hcch.net/e/workprog/jdgm.html> (last visited Jan. 28, 2002). This article refers to the October 1999 version of the Draft Convention, and not the interim draft.

have become the subject of recent controversy in the United States,²⁸⁸ the proposed treaty could benefit U.S. plaintiffs greatly. Among other things, the treaty, if enacted, would facilitate greatly the enforcement of judgments in jurisdictions that often have been unwilling to do so, so long as the court issuing the judgment had jurisdiction over the dispute and both that court and the enforcing court are in signatory states. By enacting the treaty, the United States in effect would be agreeing to a more "European" approach to jurisdictional law in exchange for facilitating the enforcement of U.S. judgments in other signatory states.²⁸⁹

The Draft Hague Convention's approach to jurisdiction is "European" in that it centers around principles of general and specific jurisdiction rather than on a determination of "minimum contacts." Although in some instances jurisdiction may be allowed under the treaty where existing U.S. law might prohibit it,²⁹⁰ personal jurisdiction under the treaty is in many

288. See, e.g., *Tied up in Knots*, *ECONOMIST*, Jun. 9-15, 2001, at 67; Christopher Stern, *Copyright Holders v. Telecoms: Interests Clash in Debate on Regulating Global Commerce*, *WASH. POST*, May 16, 2001, at E4.

289. See Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 *CORNELL L. REV.* 89, 95-97 (1999). For more than twenty years, the European Union countries' approach to recognizing and enforcing each other's judgments has been governed by international agreement. See Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 8 *I.L.M.* 229 (1969), revised by Convention on Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and of the Protocol on its Interpretation by the Court of Justice, Oct. 9, 1978, 18 *I.L.M.* 8 (1979) [hereinafter Brussels Convention]. For a description of the Brussels Convention, see Degnan & Kane, *supra* note 69, at 850-54; Juenger, *American Jurisdiction*, *supra* note 135, at 17-20.

290. For example, specific jurisdiction for tort actions is allowed under the Draft Hague Convention in the courts of the state "in which the injury arose," unless the defendant can establish that "the person claimed to be responsible could not reasonably have foreseen that the act or omission" could have resulted in injury in that state. See Draft Hague Convention, *supra* note 19, art. 10(1)(a). It is thus conceivable that jurisdiction could be asserted over a tortfeasor that lacked "minimum contacts" with the state. See also Memorandum, *supra* note 228, at 2 (explaining that the United States cannot, consistent with the Due Process Clause, "accept tort jurisdiction based solely on the place of injury, or contract jurisdiction based solely on place of performance stated in the contract").

ways more circumscribed than under U.S. law.²⁹¹ It seems likely that, under the Draft Hague Convention, the *Altmann* court's assertion of jurisdiction over the Republic of Austria would be prohibited,²⁹² and no enforcing court would be allowed to recognize and enforce any judgment issued by the *Altmann* court.²⁹³

In the opinion of some experts, the Draft Hague Convention's approach to jurisdictional questions would improve greatly upon the existing U.S. approach by making the rules of jurisdiction more certain and restrained.²⁹⁴ In my opinion, the Draft Hague Convention also would improve on U.S. jurisdictional law in another respect—by clarifying that the treaty and its jurisdictional rules apply equally to (non-immune) gov-

291. For example, general jurisdiction under the Draft Hague Convention is limited to the state where the defendant is "habitually resident" and prohibits the exercise of jurisdiction based solely on "doing business" in the state. See Draft Hague Convention, *supra* note 19, arts. 3(1), 18(2)(e); see also William S. Dodge, *Antitrust and the Draft Hague Judgments Convention*, 32 LAW & POL'Y INT'L BUS. 363 (2001) (arguing that the Draft Hague Convention's approach to limiting jurisdiction in antitrust cases is too stringent).

292. This follows from two different provisions of the Draft Hague Convention: First, under article 10, tort jurisdiction is only allowed in the place where the tort or the injury occurs, and second, under article 18(2)(e), the treaty specifically prohibits the exercise of jurisdiction based solely on "the carrying on of commercial or other activities" in the forum unless the cause of action arises directly out of such activity. Draft Hague Convention, *supra* note 19. Although there is a proposed exception for violations of international law, see *id.* art. 18(3), the variants of the exception that have been proposed are limited at the very least to violations that amount to "a serious crime under international law."

293. For discussion of the facts of *Altmann*, see *supra* Part I.

294. Professor Clermont writes that the Draft Hague Convention, if adopted, would be the "salvation" of U.S. law on territorial authority to adjudicate, and suggests that Congress should enact the jurisdictional part of the treaty as domestic law:

The limits and failures of the current constitutional doctrine demonstrate that the Supreme Court has tried to do too much in shaping the law of territorial jurisdiction out of the few bare words of a constitutional clause. Nothing in the Court's raw material—the Constitution, subject to judicial interpretation—can generate a set of criteria that would be both sensible and certain. Legislative regulation is necessary.

Clermont, *supra* note 289, at 106.

ernment and non-government defendants.²⁹⁵ Thus, if the treaty were adopted and ratified by the United States, it would set clear limits on a U.S. court's ability to exercise jurisdiction over a foreign sovereign defendant, limits that would trump the jurisdictional provisions of the FSIA.

Regardless of whether the Draft Hague Convention is enacted, the Convention's recognition of the applicability of jurisdictional rules to sovereign defendants is the correct approach. U.S. courts addressing this issue should separate the constitutional question (whether a foreign state is entitled to raise constitutional challenges to U.S. government action) from the jurisdictional question (whether assertion of jurisdiction over a sovereign defendant would violate internationally-recognized limits). Even if a foreign state is held not to be a "person" for due process purposes, the state still should be entitled to protection from certain extraterritorial assertions of personal jurisdiction. For the time being, the customary international law of personal jurisdiction is an appropriate protective filter through which to interpret and apply the FSIA.

295. See Draft Hague Convention, *supra* note 19, art. 1(3) (specifying that a dispute is "not excluded from the scope of the Convention by the mere fact" that a foreign state is a party).

