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II. Jurisdictional, Preliminary, and Procedural Concerns

Litigation involving international, transnational, foreign, or comparative law frequently poses issues preliminary to considerations of the merits. In this regard, international cases are no different than cases in other fields of law. That said, resolution of preliminary issues in international cases sometimes implicates doctrines that either do not arise, or arise in a different way, in the purely domestic context. Such issues include:

- Jurisdiction
- Preliminary issues such as immunities
- Doctrines like act of state and *forum non conveniens*
- Comity
- Discovery and related procedures

These are discussed in turn below, with emphasis on particular ways that they arise or are treated in international litigation.

A. Jurisdiction

The term "jurisdiction" can have various meanings in transnational cases. The Restatement (Third) of the Foreign Relations Law of the United States[2] divides jurisdiction into three categories:

> (a) jurisdiction to prescribe, *i.e.*, a country's ability to make its law applicable to persons, conduct, relations, or interests;
>
> (b) jurisdiction to adjudicate, *i.e.*, a country's ability to subject persons or things to the process of its courts or administrative tribunals. The U.S. legal categories of personal jurisdiction and subject-matter jurisdiction help delineate the scope of U.S. courts' jurisdiction to adjudicate;
>
> (c) jurisdiction to enforce, *i.e.*, a country's ability to induce or compel compliance or to punish noncompliance with its laws or regulations.

[1] For what this section contains, see the Detailed Table of Contents, http://www.asil.org/benchbook/detailtoc.pdf.
[2] Designated subsequently as *Restatement*, the 1987 Restatement contains many of the doctrines discussed in this chapter. On use of this *Restatement* and the 2012 launch of a project to draft a fourth *Restatement* in this field, *see infra* § IV.B.

This chapter first lays out the five bases upon which countries may exercise their jurisdiction to prescribe. It then considers limitations on the exercise of extraterritorial jurisdiction.

1. Principles or Bases of Jurisdiction

The principles governing the exercise of jurisdiction govern the exercise of jurisdiction by any organ of the United States at every level of government.[3] The five recognized bases for asserting prescriptive jurisdiction are:

- Territoriality (conduct taking place within the country's territory, or designed to have effects within the country's territory)
- Nationality (conduct performed by the country's nationals)
- Passive personality (conduct having the country's nationals as its victims)
- Protective principle (conduct directed against a country's vital interests)
- Universality (conduct recognized by the community of nations as of "universal concern")

See Restatement §§ 402, 404 and comments; *see also* Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 Am. J. Int'l L. 439 (Supp. 1935) (setting forth these principles in a source on which the mid-twentieth-century *Restatement* writers relied). The instant section describes each of the five in turn and considers the reasonableness principle that limits their application (see *Restatement* § 403); subsequently, *infra* § II.A.2, this section examines the interaction of the five principles and U.S. laws.

a. Territoriality, Including Effects

Territoriality is the principle that a country may regulate both civil and criminal matters within its sovereign borders. *See Restatement* § 402 cmt. *c*. It has long been recognized as a basis for the assertion of jurisdiction. Effects jurisdiction may be considered under the heading of territoriality, or under a separate heading. *See id.* § 402 cmt. *d* (taking the position "a state may exercise jurisdiction based on effects in the state, when the effect or intended effect is substantial and the exercise of jurisdiction is reasonable under § 403").

Applications of these propositions in U.S. law – in particular, with respect to two bases of U.S. jurisdiction derived from the principle of territoriality, the effects doctrine/objective territoriality and special maritime and territorial jurisdiction – are discussed *infra* § II.A.3.a.

[3] In international law writings, the term "state" typically refers to a country – a sovereign nation-state – and not to a country's constituent elements. This *Benchbook* follows that usage, so that "state" means country, and individual states within the United States are designated as such.

b. Nationality/Active Personality

Nationality is one of two principles that support the exercise of jurisdiction by reference to a person involved in the conduct at issue. (The other principle is passive personality, described in the section immediately following.) What matters in this first instance is the nationality of the actor, or defendant; for this reason, the nationality principle is sometimes also called the "active personality" principle. *See Restatement* § 402(2).

The nationality principle is grounded in the view that a sovereign state is entitled to regulate the conduct of its own nationals anywhere, for the reason that such nationals owe a duty to obey the state's laws even when they are outside the state. *See Blackmer v. United States*, 284 U.S. 421, 436-37 (1932); *see also* Christopher Blakesley, "Extraterritorial Jurisdiction," *in* 2 *International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms* 116 (M. Cherif Bassiouni, 3d ed. 2008). This basis for exercising prescriptive jurisdiction is widely accepted and exercised by other countries. *Id*.

c. Passive Personality

This is the second of the two principles that support the exercise of jurisdiction by reference to a person involved in the conduct at issue. (The other principle is nationality/active personality, described in the immediately preceding section.) What matters in this second instance is the nationality of the victim or person at whom the conduct at issue was directed. For this reason, it is called the "passive personality" principle. *See Restatement* § 402 cmt. *g*.

For applications of this principle in the United States, see *infra* § II.A.3.d.

d. Protective Principle

Pursuant to the protective principle, a state may exert jurisdiction over conduct committed outside its territory – by its nationals and non-nationals alike – if the conduct falls within a limited class of offenses directed against state security or critical state interests or functions. As laid out in Section 402(3) and comment f of the *Restatement*, representative offenses may include:

- Espionage
- Counterfeiting of government money or seal
- Falsification of official documents
- Perjury before consular officials
- Conspiracies to violate immigration and customs law

For applications of this principle in the United States, see *infra* § II.A.3.b.

e. Universality

According to the principle of universality, a state may exercise extraterritorial jurisdiction even in the absence of all four jurisdictional links discussed above – but only if the conduct alleged constitutes one of a very few, specified international crimes. *Restatement* § 404 (permitting such exercise "for certain offenses recognized by the community of nations as of universal concern"). Universal jurisdiction derives from the view that certain conduct (such as genocide, torture, piracy, aircraft hijacking, hostage taking, war crimes, and the slave trade) so concerns the entire international community of states that the prosecution of offenders by any state is warranted. *See id.* cmt. *a*. It is not limited to criminal jurisdiction but may also involve civil remedies, such as remedies in tort or restitution for victims. *See id.* cmt. *b.*

For applications of this principle in the United States, see *infra* § II.A.3.e.

f. Reasonableness Inquiry

The Restatement (Third) provides that, even when one or more of the five international law bases for jurisdiction are present, the application of national law to conduct linked to another state or states may still be precluded if such exercise is deemed "unreasonable." *See* Restatement § 403. The U.S. Supreme Court has declined to apply § 403. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797-99 (1993). It has also expressed the view that the case-by-case balancing called for in § 403 is "too complex to prove workable." *F. Hoffman-La Roche v. Empagran S.A.*, 542 U.S. 155, 168 (2004).

2. Sources of Jurisdiction Under U.S. Law

Among the provisions of the Constitution that may establish U.S. federal jurisdiction to prescribe are the following:

- *Foreign Commerce Clause:* Article I § 8[3] states in relevant part that "Congress shall have Power … To regulate Commerce with Foreign Nations.…"

- *Offences Clause:* Article I § 8[10] states in relevant part that "Congress shall have Power … To define and punish Piracies and Felonies committed on the high seas, and offences against the Law of Nations.…"

- *Power to Provide for the Common Defense and General Welfare of the United States:* Article I § 8[1].

- *Necessary and Proper Clause:* Article I § 8[18] ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers…").

U.S. state and federal jurisdiction to adjudicate are often analyzed as a matter of U.S. law under the headings of subject-matter jurisdiction and personal jurisdiction.

a. Subject-Matter Jurisdiction

Under U.S. law, the term "subject-matter jurisdiction" refers to the authority of the court to rule on the type of case at hand; that is, the conduct at issue or the status of things in dispute. *See Black's Law Dictionary* 931 (9th ed. 2009). Article III § 2 of the U.S. Constitution provides for federal subject-matter jurisdiction in cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State,— between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." State courts remain courts of general jurisdiction, including for matters with international or transnational elements.

b. Personal Jurisdiction

The term "personal jurisdiction" refers to the "court's power to bring a person into its adjudicative process; jurisdiction over a defendant's personal rights, rather than merely over property interests." *Black's Law Dictionary* 930 (9th ed. 2009).

i. U.S. Constitutional Jurisprudence

In order to exercise jurisdiction over a person, consistent with U.S. law, courts in the United States must determine that such exercise comports with constitutional guarantees of due process. The federal government is bound to conform with the Due Process Clause of the Fifth Amendment to the Constitution, which states in relevant part:

> No person shall … be deprived of life, liberty, or property, without due process of law ….

Virtually identical words in the Due Process Clause of the Fourteenth Amendment similarly constrain the constituent states of the United States.

Analysis of whether an assertion of personal jurisdiction meets this constitutional standard typically is analyzed according to the principles enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In his opinion for the Court, Chief Justice Harlan Fiske Stone wrote that if a person is not present in a state, then the state may exercise jurisdiction over the person only if the person has

> certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). *See also Goodyear Dunlop Tires Operations v. Brown*, __ U.S. __, __, 131 S. Ct. 2846, 2850 (2011) ("A state court's

assertion of jurisdiction . . . is therefore subject to review for compatibility with the Fourteenth Amendment's Due Process Clause.").

i.1 Constitutional Due Process and General Jurisdiction over Multinational Corporations

In *Daimler AG v. Bauman*, __ U.S. __, 134 S. Ct. 746 (2014), the Supreme Court applied the test in *Goodyear Tire* and held that, in the absence of a basis for exercising specific jurisdiction over the claims at issue, a multinational corporation that was not "essentially at home" in the forum could not be subjected to the general jurisdiction of U.S. courts for wrongs alleged to have been committed entirely overseas, by one of its foreign subsidiaries.

c. Jurisdiction to Enforce

The concept of "jurisdiction to enforce," also known as executive or enforcement jurisdiction, is described in Sections 401(c) and 431 of the *Restatement* as the authority to "induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action."

Enforcement jurisdiction is primarily territorial. Thus, the United States may enforce a foreign judgment against assets in the United States even if it would have lacked personal jurisdiction over the original case and/or would have had no jurisdiction to prescribe rules for the parties. Conversely, the United States may not seize property abroad to satisfy a U.S. judgment even if the U.S. court had personal jurisdiction over the parties and the United States had jurisdiction to prescribe rules for the case.

As a matter of international law, one state's law enforcement officers may conduct investigations or arrests in the territory of another state only if the latter consents. *Restatement* § 432(2). Engaging in such enforcement measures absent consent is viewed as an infringement of sovereignty and an unlawful use of force.

3. Principles or Bases of Jurisdiction and U.S. Courts

This section provides examples of how U.S. courts apply each of the five principles; that is, territoriality, protective principle, nationality/active personality, passive personality, and universality.

a. Territoriality

Most statutes are presumed to apply in U.S. territory, and a few make this explicit. *E.g.* Foreign Corrupt Practices Act, 15 U.S.C.A. § 78dd-3(a).

Two additional bases of extraterritorial jurisdiction have been derived from the principle of territoriality. Both of these bases rely on interests or concerns within U.S. territory in order to justify the exercise of U.S. jurisdiction outside U.S. territory. Labeled the effects doctrine and special maritime and territorial jurisdiction, each is discussed below.

i. Effects Doctrine / Objective Territoriality

The effects doctrine – linked to the concept of objective territoriality[4] – has roots in jurisprudence of the Supreme Court. Justice Oliver Wendell Holmes, Jr. held more than a century ago:

> Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.

Strassheim v. Daily, 221 U.S. 280, 285 (1911). Thus Judge Learned Hand, deemed the following proposition "settled law" as long ago as 1945:

> [A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.

United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945). Consistent with this U.S. jurisprudence, Section 402(1)(c) of the *Restatement* provides that a state's jurisdiction may be extended to

> conduct outside its territory that has or is intended to have substantial effect within its territory.

See also Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) ("[T]he Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

[4] The two concepts are quite similar. The International Law Commission of the United Nations, comprised of experts on international law, articulated the precise difference as follows:

> 11. The *objective territoriality principle* may be understood as referring to the jurisdiction that a State may exercise with respect to persons, property or acts outside its territory when a constitutive element of the conduct sought to be regulated occurred in the territory of the State.
> 12. The *effects doctrine* may be understood as referring to jurisdiction asserted with regard to the conduct of a foreign national occurring outside the territory [of] a State which has a substantial effect within that territory. This basis, while closely related to the objective territoriality principle, does not require that an element of the conduct take place in the territory of the regulating State.

Int'l L. Comm'n, *Report on the work of its fifty-eighth session*, Annex E, at 521-22 (1 May to 9 June and 3 July to 11 August 2006), GAOR, 61st sess., Supp. No. 10 (A/61/10) (emphasis in original), *available at* http://legal.un.org/ilc/reports/english/a_61_10.pdf.

ii. Special Maritime and Territorial Jurisdiction

Within its discussion of grounds for assertion of extraterritorial jurisdiction, *Restatement* § 402 cmt. *h* provides:

> A state may apply its law to activities, persons, or things aboard a vessel, aircraft, or spacecraft registered in the state, as well as to foreign vessels or aircraft in its territorial waters or ports or airspace.

That principle is reflected, for example, in 18 U.S.C. § 7 (2006), titled "Special maritime and territorial jurisdiction of the United States." This statute extends U.S. jurisdiction in certain circumstances and on a variety of bases (including nationality and passive personality), including to:

- Vessels "registered, licensed, or enrolled" under U.S. law and operating on the Great Lakes, *id*. § 7(2);
- Aircraft belonging to the United States or U.S. corporations or citizens when operating outside jurisdiction of a particular state, *id*. § 7(5);
- Any spacecraft registered to the United States, while it the spacecraft is in flight, i*d*. § 7(6); and
- "To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States," *id*. § 7(8).

b. Protective Principle

Among the U.S. laws relying on the protective principle is 18 U.S.C. § 1546 (2006), which defines, as a felony, fraud and misuse related to visas – including a visa application filed at an overseas U.S. consulate by a non-U.S. national alleged to have made a false statement. Other examples include 18 U.S.C. § 470 (counterfeiting outside the United States); 18 U.S.C. §§ 792-99 (espionage); 18 U.S.C. § 1114 (murder of government officials).

Some courts have looked to international law jurisdiction principles explicitly. *See, e.g.*, *United States v. Vilches-Navarete*, 523 F.3d 1, 21-22 (1st Cir.) (discussing the protective principle in the context of jurisdiction over a vessel on the high seas), *cert. denied*, 555 U.S. 897 (2008); *United States v. Peterson*, 812 F.2d 486, 493-94 (9th Cir. 1987) (Kennedy, J.) (same); *Laker Airways, Ltd. v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984). *See also United States v. Benitez*, 741 F.2d 1312, 1216 (11th Cir. 1984) (conviction of foreign national for attempted murder of DEA agents abroad consistent with protective principle); *U.S. v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir. 1968) (conviction of foreign national for making false statement on visa application to consular officer outside the United States consistent with protective principle).

A more recent discussion of the principle may be found in *United States v. Yousef*, 327 F.3d 56, 110-11 (2d Cir.), *cert. denied*, 540 U.S. 933 (2003).

c. Nationality/Active Personality

The Supreme Court has relied on the nationality principle in cases including *Blackmer v. United States*, 284 U.S. 421, 436-37 (1932). *See also Skiriotes v. Florida*, 313 U.S. 69, 73 (1941) ("[T]he United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed.")

Provisions that apply on the basis of U.S. citizenship or residence include:

- Taxation. 26 U.S.C.A. § 7701(a)(30(A) (defining "United States person" under the Internal Revenue Code to include "a citizen or resident of the United States").

- Treason by a U.S. citizen. 18 U.S.C. § 2381 (2006); *see Chandler v. United States*, 171 F.2d 921, 930 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).

- Failure by male U.S. citizens to register for military service. 50 U.S.C. App. § 453 (2006).

- Violating export controls. *See* Trading with the Enemy Act, 50 U.S.C. App. §§ 5, 16 (2006); Cuban Assets Control Regulations, 31 C.F.R. § 515.329 (2012) (stating that a "[p]erson subject to the jurisdiction of the United States," includes, *inter alia*, "(a) Any individual, wherever located, who is a citizen or resident of the United States; . . . (c) Any corporation organized under the laws of the United States or of any state, territory, possession, or district of the United States").

- Travel by a U.S. citizen or permanent resident in interstate or foreign commerce to engage in illicit sexual conduct with a minor. PROTECT Act, 18 U.S.C. § 2423(c) (2006); *see United States v. Clark*, 435 F.3d 1100 (9th Cir. 2006), *cert. denied*, 549 U.S. 1343 (2007).

With respect to corporations, the United States exercises nationality jurisdiction sometimes on the basis of their law of incorporation, sometimes on the basis of their principal places of business, and sometimes on the basis of both. *See, e.g.*, 15 U.S.C. § 78dd-2(h)(1)(B). Both definitions of corporate nationality are permitted under international law. Case Concerning the Barcelona Traction, Light and Power Company (Belg. v. Spain), 1970 I.C.J. 3, 42 (Feb. 5).

In addition, the nationality principle has sometimes been applied in cases involving subsidiaries of U.S. corporations. A foreign-incorporated subsidiary of a U.S. company may be subject to U.S. regulations on the basis of the nationality of its parent company. *See Restatement* § 414. Fiscal regulations of foreign-incorporated subsidiaries have given rise to little controversy; that stands in contrast with reactions to attempts to compel foreign subsidiaries to

comply with embargoes and export control regulations imposed by the United States, 50 U.S.C. App. § 2415(2). *Id*. cmt. *a*; *see also id.* § 414, rep. notes 2-4.

d. Passive Personality

Examples of passive personality jurisdiction may be found in matters including those related to terrorism; for example:

- Passive personality has been applied to support jurisdiction in instances of terrorist or other organized, overseas attacks against U.S. nationals, U.S. government officials, or U.S. government property (such as an embassy or military vessel). *See Restatement* § 402(2) cmt. *g* & rep. note 3; *see also United States v. Benitez*, 741 F.2d 1312, 1316-17 (11th Cir. 1984) (discussing the passive personality principle in the course of approving of the prosecution of a Colombian citizen for shooting U.S. agents in Colombia), *cert. denied*, 471 U.S. 1137 (1985).

- Section 1202 of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853, codified at 18 U.S.C. § 2332 (2006), makes murder and physical violence committed against U.S. nationals abroad a felony punishable in some cases by the death penalty or by life imprisonment.

- The United States has also exercised passive personality jurisdiction to create civil liability in some instances, for example under the Anti-Terrorism Act, 18 U.S.C. § 2333, and the Foreign Sovereign Immunities Act exception for state sponsors of terrorism, 28 U.S.C. § 1605A(c).

e. Universality

Justice Stephen G. Breyer provided a useful discussion of the universality principle in his concurring opinion in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), a case arising out of the Alien Tort Statute, 28 U.S.C. § 1350 (stating, in full, that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"). As emphasized in Breyer's concurrence, 542 U.S. at 761-63, and in Section 404 of the *Restatement*, the list of offenses deemed serious enough to warrant a state's exercise of universal jurisdiction is short. Frequently included are:

- Piracy
- Slave trading
- Genocide
- War crimes
- Crimes against humanity
- Torture

In a few instances related to such crimes, Congress has enacted legislation resting in whole or in part on the universality principle. *E.g.*, 18 U.S.C. § 1651 (2006) (piracy under the law of nations); 18 U.S.C. § 1091 (2006) (genocide); 18 U.S.C. § 2340A (2006) (torture); 18 U.S.C. § 2441 (2006) (war crimes).

Under certain multilateral treaties, states parties agree to extradite or prosecute individuals alleged to have committed offenses specified in the treaties, even if the conduct occurred outside the state's territory and even if none of the state's nationals is alleged to be involved. When the United States has become a party to treaties with such provisions, it has implemented them via federal statute. In addition to the statutes enumerated above, examples of this type of jurisdiction include:

- Articles 4, 7 and 8 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 22 U.S.T. 1641, 860 *U.N.T.S.* 105, *available at* http://treaties.un.org/doc/db/Terrorism/Conv2-english.pdf;

- Articles 5, 7 and 8 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 24 U.S.T. 565, 974 U.N.T.S. 178, *available at* http://www.un.org/en/sc/ctc/docs/conventions/Conv3.pdf;

- Articles 3, 7 and 8 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, 28 U.S.T. 1975, 1035 U.N.T.S. 167, *available at* http://legal.un.org/ilc/texts/instruments/english/conventions/9_4_1973.pdf; and

- Articles 5, 8 and 10 of the 1979 International Convention against the Taking of Hostages, T.I.A.S. No. 11081, 1316 U.N.T.S. 205, *available at* http://www.un.org/en/sc/ctc/docs/conventions/Conv5.pdf.

f. Reasonableness

Section 403 of the *Restatement* indicates that even in the presence of one or more of the above jurisdictional links, extraterritorial jurisdiction ought not to be exercised if such an exercise would be "unreasonable" – an inquiry determined by consideration of enumerated factors.

The Supreme Court has rejected a case-by-case balancing of interests as "too complex to prove workable" in determining reasonableness. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004). The question instead has been decided on a statute-by-statute basis.

4. Determining if Congress Intended to Give a Statute Extraterritorial Reach

This section discusses the methodology by which courts determine whether Congress intended a particular statute to have extraterritorial reach. The answer is easily found when the statutory language is explicit or when a high court already has rendered an authoritative

interpretation. When these conditions do not exist, courts consider, as appropriate, various canons of construction, pertaining to the presumption against extraterritoriality and the avoidance of conflicts between U.S. and international law or foreign countries' interests.

a. Express Statutory Language

To determine whether a statute expressly addresses the question of extraterritoriality, courts should examine the statute carefully. By way of example, here are three statutes that make explicit Congress' intent that they apply extraterritorially:

- Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. (2006). This statute defines "employee" to include persons employed in a foreign country:

> The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. *With respect to employment in a foreign country*, such term includes an individual who is a citizen of the United States.

Id. § 2000e(f) (emphasis added); *see also id.* § 2000e-1 (detailing scope of application to foreign corporations).

- Maritime Drug Law Enforcement Act, 46 U.S.C. § 70501 *et seq*. (2006). Known as the MDLEA, this statute expressly confers extraterritoriality to its prohibition on drug trafficking in certain circumstances. It states:

> (a) Prohibitions. An individual may not knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance on board –
>
> (1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or
>
> (2) any vessel if the individual is a citizen of the United States or a resident alien of the United States.

Id. § 70503(a); *see also id.* § 70503(b) ("Subsection (a) applies even though the act is committed outside the territorial jurisdiction of the United States.").

- Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261 *et seq*. (2006). Enacted in

2000 to regulate the overseas activities of private military contractors, this statute, known as MEJA, provides, as codified at 18 U.S.C. § 3261(a):

> Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States –
>
> (1) while employed by or accompanying the Armed Forces outside the United States; or
>
> (2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice),
>
> shall be punished as provided for that offense.

b. Authoritative Judicial Interpretation

In the absence of explicit language, an authoritative judicial interpretation may establish whether a statute has extraterritorial reach. Statutory provisions for which the question has been resolved in this manner include:

- Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b) (2006). In *Morrison v. National Australia Bank*, 561 U.S. 247, __, 130 S. Ct. 2869, 2888 (2010), the Court held that this section applies only to fraud in connection with the purchase or sale of a security in the United States.

- Section 1 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2006). In *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993), the Court held that this antitrust law does reach extraterritorially; that is, it "applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."

c. Pertinent Canons of Construction

Canons of construction particularly pertinent to interpretation of an ambiguous statute about which there is no authoritative precedent include the:

- Presumption against extraterritoriality
- *Charming Betsy* canon
- Presumption against unreasonable interference with another state's authority.

Each is discussed in turn below.

i. Canon Presuming Against Extraterritoriality

In a 2010 decision, the Supreme Court reaffirmed what it termed a longstanding principle of American law that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison*, 561 U.S. at __, 130 S. Ct. at 2877 (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (citation omitted)).

Application of this presumption should not turn mechanically on where the conduct at issue occurred, but rather upon the "focus" of the statutory provision. For example, in *Morrison*, 561 U.S. at __, 130 S. Ct. at 2884, the Supreme Court rejected claims by a class of foreign investors who sued an Australian banking company and a U.S. subsidiary for overstating the value of the U.S. subsidiary in public documents. The Court applied the presumption against extraterritoriality to hold that Section 10(b) of the Securities Exchange Act of 1934 does not apply extraterritorially because there is "no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially." *Morrison*, 561 U.S. at __, 130 S. Ct. at 2883. The Court reasoned that although some deceptive conduct may have originated in the United States, "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States," which did not occur in this case. *Id*. at __, 130 S. Ct. at 2884. The Court concluded that § 10(b) reaches the use of manipulative or deceptive devices or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States. *Morrison*, 561 U.S. at __, 130 S. Ct. at 2888.

However, the Court has clarified that the presumption against extraterritoriality is not a "clear statement rule." *Id*. at 2883. Rather, a court should consider "all available evidence about the meaning" of a provision. *Sale v. Haitian Centers Council, Inc*., 509 U.S. 155, 177 (1993).

At times the Court also has referred to the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Small v. United States*, 544 U.S. 385, 388 (2005) (quoting *Smith v. United States*, 507 U.S. 197, 204 n. 5 (1993)). This notion is a basis for the presumption against extraterritoriality.

In *Kiobel v. Royal Dutch Petroleum Co*., __ U.S. __, __, 133 S. Ct. 1659, 1669 (2013), the Court considered whether the presumption against extraterritoriality applied to the creation of a cause of action under the Alien Tort Statute, 28 U.S.C. § 1350 (2006). In his opinion for the Court, Chief Justice John G. Roberts, Jr., wrote that the presumption was to be applied, and that no facts in the case at bar served to rebut the presumption. *See Kiobel*, __ U.S. at __, 133 S. Ct. at 1669. This decision is discussed in detail *infra* § III.E.1.

i.1. Exception in Criminal Cases

In general, the same rules of statutory interpretation apply equally to criminal statutes as to civil statutes. There is an exception, however, with regard to extraterritorial reach of criminal statutes, as discussed below.

i.1.a. General Approach to Ambiguity in Criminal Statutes

- First, the court considers whether the statutory provision expressly addresses the question of territorial application. *United States v. Neil*, 312 F.3d 419, 421 (9th Cir. 2002) ("First, we look to the text of the statute for an indication that Congress intended it to apply extraterritorially."). Examples of such statutes include:

    - 18 U.S.C.A. § 2340A(a) (2006) (stating that "[w]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both");

    - 18 U.S.C. § 2423(c) (2006) (prohibiting "engaging in illicit sexual conduct in foreign places"); and

    - 21 U.S.C.A. § 959(c) (2006) (making explicit that "[t]his section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States").

- Second, the court determines whether there exists an authoritative interpretation of the territorial scope of the statutory provision. *Neil*, 312 F.3d at 421. *See also United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002); *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991), *cert. denied*, 508 U.S. 906 (1993). If a higher court has determined the territorial scope of a statutory provision in a civil context, the statute should be given the same scope in a criminal prosecution. *See United States v. Nippon Paper Industries Co., Ltd*., 109 F.3d 1, 4-7 (1st Cir. 1997) (determining that the Sherman Act should be given the same construction in a criminal prosecution as in a civil case), *cert. denied*, 522 U.S. 1044 (1998).

- Third, if neither of the above steps establishes congressional intent, a court may resort to one of the canons of interpretation discussed *supra* § II.A.4.c.

i.1.b. Presumption of Extraterritoriality in Criminal Statutes

In *United States v. Bowman*, 260 U.S. 94, 98 (1922), the Supreme Court distinguished between crimes that "affect the peace and good order of the community" like murder, robbery, and arson, which are presumed to be territorial, and other crimes that are "not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated," which are not presumed to be territorial.

Following the holding in *Bowman*, courts have applied this analysis to the presumption against extraterritoriality to particular statutes. For example, the U.S. Court of Appeals for the Second Circuit held, based on the following reasoning, that a criminal charge for conspiracy to bomb aircraft applied extraterritorially:

> … Congress is presumed to intend extraterritorial application of criminal statutes where the nature of the crime does not depend on the locality of the defendants' acts and where restricting the statute to United States territory would severely diminish the statute's effectiveness.

United States v. Yousef, 327 F.3d 56, 87 (2d Cir.), *cert. denied*, 540 U.S. 933 (2003). *See also United States v. Frank*, 599 F.3d 1221, 1230 & n.9 (11th Cir.) (giving examples of drug trafficking and smuggling statutes that courts have applied extraterritorially), *cert. denied*, __ U.S. __, 131 S. Ct. 186 (2010).

ii. *Charming Betsy*: Construing Statute to Comport with International Law

Another pertinent canon of construction is known as the *Charming Betsy* principle. It derives from this early pronouncement in an opinion for the Court by Chief Justice John Marshall:

> [A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.

Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804). The result was the *Charming Betsy* canon, an interpretive rule that continues to this day. *See Restatement* § 114. *See generally* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L.J. 479 (1997) (providing an overview of the development and justifications for this canon).

iii. Canon Disfavoring Undue Interference with Foreign States

In a 2004 judgment, the Supreme Court wrote that it

> ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.

F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004). The Court affirmed this proposition three years later, writing:

> As a principle of general application . . . courts should assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.

Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 455 (2007) (internal quotation marks omitted). This canon has not subsequently been invoked by the Court, making its status somewhat uncertain, particularly since the concerns it addresses are already built into the presumption against extraterritoriality.