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Comity & Calamity: Deference to the Executive and the Uncertain Future of the FSIA

Michael Cooper

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INTRODUCTION

In regards to the admittedly low bar for statutes, the Foreign Sovereign Immunities Act[1] of 1976 (FSIA) declares its purposes rather explicitly: "Congress finds that the *determination by United States courts* of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts."[2] A plain reading of the statute would lead one to expect that courts have significant discretion in deciding whether to grant foreign states immunity from the court's jurisdiction in actions brought against them under one of the FSIA exceptions[3] to sovereign immunity. This is theoretically accurate, but it elides an important and influential point. While courts have final say on the grant or denial of immunity, the executive branch frequently files amicus briefs offering its views on the issue—views that often hold significant sway over courts' decisions.

This injection of executive branch influence into judicial decisions is rampant throughout cases that interpret the FSIA and its exceptions, as well as the subsequent decisions that flow from the determinations of whether immunity applies. Certain exceptions, such as abrogating immunity for state sponsors of terrorism, expressly codify the interplay between the executive branch and the judiciary in making immunity decisions.[4] However, this codification of executive participation is more exception than rule, and given the statute's explicit purpose, excessive deference to the executive would seemingly conflict with Congress' express intent in enacting the FSIA. This tension is a product of lingering reverberations from the massive shift in the sovereign immunity doctrine that the FSIA codified from the previous regime that was based on international custom, concerns from political actors, and the various interests of the

1. 28 U.S.C. §1330, § 1391(f), § 1441(d), §§1602–11 (2018).
2. 28 U.S.C. § 1602 (emphasis added).
3. *See, e.g.,* 28 U.S.C. §§ 1605–1605B (2018).
4. 28 U.S.C. 1605A (requiring, inter alia, that the foreign state being sued be declared a state sponsor of terrorism by the State Department).

judiciary and executive branch. As will be shown, the level of deference given by the judiciary to the executive branch, at least at the Supreme Court level, seems to indicate that the executive branch's concerns—be they of a foreign relations, political, or some other nature—are as influential under the FSIA's standards as they were under the previous regime, despite the FSIA's declared intent of putting immunity determinations primarily in the hands of the courts.

This Note examines the extent to which the executive has shaped the jurisprudence regarding grants of sovereign immunity. Part I will detail the pre-FSIA foreign sovereign immunity regime and the rationale behind the passing of the FSIA. Part II will analyze two Supreme Court decisions concerning the FSIA as a whole. Part III will survey four Supreme Court decisions involving specific exceptions to immunity, of which three address the act's "commercial activities exception,"[5] and one discusses its "expropriation exception."[6] Both sections will highlight the arguments made by the executive in amicus briefs and their subsequent influence on the court's decisions. Part IV will analyze the deference shown, examine upcoming concerns raised by the level of deference, and argue for more robust judicial skepticism of executive concerns and greater independence in granting immunity.

I. SOVEREIGN IMMUNITY BEFORE THE FSIA

This part will survey the development of the sovereign immunity doctrine from its earliest roots at the Supreme Court—and the role the executive played in that first case—to the State Department–centric scheme that eventually led to the enactment of the FSIA. It will also consider the reasons and rationales that underpin and necessitate the act.

A. The Schooner Exchange: The Advent of Foreign Sovereign Immunity in the United States

Prior to 1952, foreign states enjoyed near total immunity from suit in domestic courts of the United States (US).[7] The Supreme Court's opinion in *The Schooner Exchange v. McFaddon* established that standard, which would prevail for over

5. 28 U.S.C. § 1605(a)(2).
6. 28 U.S.C. § 1605(a)(3).
7. Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 766 (2019).

one hundred years.[8] In its decision, the court found that although individual nations have no limit on their domestic jurisdiction other than those they place on themselves, the "perfect equality and absolute independence of sovereigns, and [their] common interest impelling them to mutual intercourse, and an interchange of good offices with each other" has led to a variety of situations where a nation implicitly waives its domestic jurisdiction over a foreign state.[9]

The facts of *The Schooner Exchange* are "typical of the predominantly diplomatic and military manner in which sovereigns interacted during the turn of the nineteenth century":[10] a privately owned vessel flying the United States' flag was "violently"[11] taken by French naval forces, likely pursuant to Emperor Napoleon Bonaparte's Rambouillet Decree—an order to seize any vessel making a transatlantic voyage—and eventually retrofitted as a French warship dubbed the *Balaou*.[12] Sometime later, the *Balaou* was damaged during a storm and sought refuge in the port of Philadelphia to make repairs.[13] Once the vessel was safely inside the harbor, its previous owners brought an action for libel[14] and requested that the District Court of Pennsylvania attach the vessel and restore their ownership over it.[15] The district court refused to return the vessel to its American owners, a decision subsequently overturned by the circuit court.[16] The Supreme Court then granted certiorari.[17]

During the proceedings, the US Attorney for the District of Pennsylvania "appeared and (at the instance of the executive department of the government of the United States, as it is un-

8. The Schooner Exchange v. McFaddon, 11 U.S. 116, 137–38 (1812).

9. *Id.* at 138–40 (noting that these exceptions to domestic jurisdiction apply to the "person of the sovereign," foreign ministers, and instances when a nation allows foreign troops to pass through its territory).

10. 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, 378 (2001).

11. *The Schooner Exchange*, 11 U.S. at 117.

12. Caplan, *supra* note 10, at 378.

13. *The Schooner Exchange*, 11 U.S. at 118.

14. "Libel," in this instance, is an out-of-date term meaning to bring an action in admiralty court. *Libel*, BLACK'S LAW DICTIONARY (11th ed. 2019).

15. The Schooner Exchange v. McFaddon, 11 U.S. 116, 117 (1812).

16. *Id.*

17. *Id.*

derstood), filed a *suggestion*" as to the executive's opinions on the matter.[18] That suggestion—the functional equivalent of what would now be an amicus brief—is included in its entirety preceding the court's opinion.[19]

The US Attorney made a number of arguments for immunity in the suggestion, first by stating that whenever a foreign sovereign acts in their "sovereign character, [the dispute] becomes a matter of negotiation, or of reprisals, or of war [as decided by the executive branch], according to its importance."[20] Next, he argued that the executive's position rejects a blunt application of law in line with "fiat Justitia—ruat coelum"[21] in favor of one "with due regard to the law of nations, and to the rights of other sovereigns."[22] This appeal to the "law of nations" is indicative of the executive's stance that sovereign immunity exists outside the scope[23] of the Constitution[24] and the statutory regime of the time; rather, sovereign immunity is a creature of *customary*[25] *international law*.[26]

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18. *Id.* at 117–18 (emphasis in original).

19. *Id.* at 122–31.

20. *Id.* at 122.

21. "[L]et justice be done, though the heavens fall." *Fiat justitia—ruat coelum*, MERRIAM-WEBSTER, https://merriam-webster.com/dictionary/fiat%20justitia,%20ruat%20caelum (last visited Feb. 19, 2020).

22. *The Schooner Exchange,* 11 U.S. at 122–23.

23. The US Attorney makes an intriguing analogy to the sovereignty of the fifty states, noting that when the Supreme Court decided in *Chisholm v. Georgia*, 2 U.S. 419 (1793) that a resident from one state could sue another state in federal court, the Eleventh Amendment was subsequently passed to preclude this type of action. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425, 1473 (1987).

24. Since sovereign immunity is derived from a source of law outside the constitutional and statutory framework of the United States, there is significant debate as to what, if any, constitutional protections foreign sovereigns are afforded when they are found to be lacking immunity. For a detailed discussion on the application of constitutional protections to foreign sovereigns, see generally Ingrid B. Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 FORDHAM L. REV. 633 (2019); Robin J. Effron, *Doctrinal Redundancy and the Two Paradoxes of Personal Jurisdiction*, 88 FORDHAM L. REV. ONLINE 117 (2019), https://fordhamlawreview.org/wp-content/uploads/2019/11/Effron_November_FLRO_10.pdf.

25. "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of Foreign Relations Law § 102 (Am. Law Inst. 1987).

26. It should be noted that Chief Justice Marshall agreed with the executive's position, finding that the doctrine of sovereign immunity arose out of

The US Attorney then listed the circumstances under customary international law where the foreign sovereign implicitly waives its right to immunity and is subject to the court's jurisdiction: (1) when the "sovereign descend[s] from the throne and become[s] a merchant" (*i.e.*, in instances of trade); (2) when the sovereign acquires real or personal property in the country; and (3) "in the cases of offences against existing laws, such as entering when prohibited, or breaking the peace when in port."[27] Next, the US Attorney delineated instances where there is no implied waiver of immunity, including cases involving (1) ambassadors or officials; (2) the sovereign itself; (3) the passage of the sovereign's armies through another country; and (4) naval vessels navigating United States' waters.[28] To summarize, the executive branch's opinion was that the ship, by that point fully a French vessel since its impressment, was to be considered "part of [French] territory," which is to say it was "within the authority of its sovereign; and if any dispute [arose] concerning the effects within the country or passing through it, it must be decided by the judge the place."[29] The US Attorney concluded by arguing the burden of proving that an exception to sovereign immunity applies belonged to those who sought to recover the vessel.[30]

In deciding that immunity applied, a unanimous court, with an opinion by Chief Justice John Marshall, made a point to recognize that the court did so at least partially because it accepted the suggestion by the executive branch and largely agreed with the positions taken by the US Attorney.[31] Indeed, the court used the executive branch's suggestions as the starting point in the reasoning that led to its decision: it focused on the third example set forth by the US Attorney, where armies passing through another nation's territory are exempted from

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the "common usage [of states], and by common opinion, growing out of that usage"—*i.e.*, sovereign immunity is a function of customary international law. The Schooner Exchange v. McFaddon, 11 U.S. 116, 136 (1812); *see also* Caplan, *supra* note 10, at 379.

27. *The Schooner Exchange*, 11 U.S. at 123, 125.

28. *Id.* at 125.

29. *Id.* at 127.

30. *Id.*

31. *Id.* at 147. Of particular note is the fact that this acknowledgement of the executive branch's influence is the penultimate sentence in the opinion, immediately preceding the reversal order.

that nation's jurisdiction.[32] The court noted that while passage of armies through another state's territory comes with a presumption of immunity, the *license* itself to pass an army through a foreign nation's territory is *not* "presumed"—meaning that a state must have affirmatively consented to another sovereign's armed forces moving through its territory.[33] The court then investigated the necessity of a distinction between the presumption of immunities and the lack of a presumption of license.[34] The court's answer is an obvious one: to allow foreign armed forces freedom of passage without an affirmative grant of license

> would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting by war an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts.[35]

The court, however, found that the "rule which is applicable to armies, does not appear to be equally applicable to ships of war entering the ports of a friendly power."[36] The court reasoned that the injuries and dangers associated with a foreign army marching through a state's territory "do not ensue from admitting a ship of war, without a special license, into a friendly port."[37] With that, the court found that another rule of customary international law "has been generally adopted": if a port is closed off to any vessels of war or of ships from a specific nation, "notice is usually given of such determination."[38] Without such notice of prohibition, "the ports of a friendly nation are considered as open to the *public* ships of all powers with whom it is at peace," where they are under the protection of the host

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32. *Id.* at 140–41.
33. *Id.* at 140.
34. *Id.*
35. *Id.*
36. The court's use of "friendly power" here is likely a reflection of its knowledge that there existed between France and the United States significant tension that could readily inflame into a shooting war. Indeed, its decision in the *The Schooner Exchange*, writ large, is almost certainly colored by this knowledge. Caplan, *supra* note 10, at 384 n.58.
37. *The Schooner Exchange*, 11 U.S. at 141.
38. *Id.*

nation's government so long as they are allowed to remain.[39] Thus, the court reasoned that without a treaty that speaks to the issue of harboring ships, and where a sovereign generally allows "his ports to remain open to the public ships of foreign friendly powers . . . , they enter by his [implied] assent."[40]

The court also couched some of its reasoning in the protections afforded ambassadors and ministers.[41] Quoting Emmerich de Vattel,[42] the court accepted the jurist's reasoning that no state would send an ambassador abroad with the expectation that the ambassador would be subjected to his host nation's authority.[43] From this premise, the court found it "[e]qually impossible . . . to conceive [that a foreign sovereign] should mean to subject his army or his navy to the jurisdiction of a foreign sovereign."[44] As such, the court decided that "the sovereign of the port must be considered [to have] conceded the privilege to the extent in which it must have been understood to be asked."[45] From these premises, the court then decided that the erstwhile *Exchange* was "exempted by the consent [of the United States] from its jurisdiction.[46]

B. The Schooner Exchange Standard: Near Total Immunity

Following *The Schooner Exchange* decision, the Supreme Court took the position that it would "defer[] to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities."[47] In some instances, that deference meant the court entirely abdicated its role as an adjudicative body.[48] For example, the facts of *Ex*

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39. *Id.* (emphasis added).
40. *Id.*
41. *Id.* at 143.
42. Vattel was a Swiss jurist and author of *The Law of Nations*, a work that was particularly influential in the United States due to its harmony with many of the principles of liberty and equality found in the Declaration of Independence. *Emmerich de Vattel*, ENCYCLOPEDIA BRITANNICA, https://britannica.com/biography/Emmerich-de-Vattel (last visited Oct. 22, 2019).
43. *The Schooner Exchange,* 11 U.S. at 143.
44. *Id.*
45. *Id.*
46. *Id.* at 145–46.
47. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983).
48. Ex parte Republic of Peru, 318 U.S. 578, 586–87 (1943).

parte Republic of Peru[49] concerned the "dignity and rights of a friendly sovereign state," an area of dispute that the court found is normally decided by the executive branch when dealing in foreign affairs.[50] The court acknowledged the "public importance" of allowing the "political arm of the Government" to settle disputes between sovereigns should that be the course of action that the Secretary of State elects to pursue.[51] Ultimately, the court found that Peru had not waived its immunity and deferred to the State Department's allowance of Peru's claim of immunity.[52]

The sweeping deference granted to the executive eventually coalesced into a two-step procedure to determine whether foreign states would be granted immunity when plaintiffs attempted to bring suit against them in US courts—a process that was heavily predicated on State Department policy and action.[53] First, foreign diplomats[54] would request a "'suggestion of immunity'" from the State Department that, if granted, would cause a district to "surrender[] its jurisdiction."[55] Within this first step, the foreign state could choose to litigate its immunity status in front of the court or go directly to the State Department.[56] The foreign state could rely strictly on its pleadings to the court in which it found itself, and it could also in-

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49. In describing the facts of the case, the court referred to the details surrounding the request for immunity as a "negotiation" between Peru and the United States, the implication being that, although immunity was near-total at this point in time, it at least had some elements of a transactional nature involved. *Id.* at 581.

50. *Id.* at 586–87.

51. *Id.* at 587.

52. *Id.* at 589.

53. Samantar v. Yousuf, 560 U.S. 305, 311 (2010).

54. This is generally through a formal diplomatic request, though in at least one case involving Hungary, the State Department responded to a request for immunity from the Southern District of New York. SOVEREIGN IMMUNITY DECISIONS OF THE DEPARTMENT OF STATE – MAY 1952 TO JANUARY 1977, 1977 DIG. U.S. PRAC. INT'L L. 1017, 1019, 1029 (Michael Sandler, Detlev F. Vagts, & Bruno A. Ristau eds., 1977).

55. *Samantar*, 560 U.S. at 311 (quoting Ex parte Republic of Peru, 318 U.S. 581, 588 (1943)).

56. SOVEREIGN IMMUNITY DECISIONS OF THE DEPARTMENT OF STATE – MAY 1952 TO JANUARY 1977, *supra* note 54, at 1019; *see also Ex parte Republic of Peru*, 318 U.S. at 588–89 (stating that foreign sovereigns may make a special appearance in court to claim immunity or present their claims directly to the State Department).

struct its embassy to make representations to the State Department on its behalf.[57]

In the late 1960s, the State Department began requesting that memoranda from the foreign state's counsel arguing the necessity of immunity be presented directly to the State Department's Office of Legal Adviser and, on occasion, also began to hear informal oral presentations on immunity issues.[58] Generally speaking, the State Department limited its deliberations and decisions strictly to whether immunity attached—though this was not always the case when hearing issues of property attachment, potential waiver of immunity, and the merits of jurisdictional or substantive claims.[59] Later decisions were also deliberate in noting that it was "a matter of grace and comity . . . not a restriction imposed by the Constitution" that limited the jurisdiction of domestic courts over foreign sovereigns.[60]

If the State Department chose not to suggest immunity, the second step fell to the district court to "'decide for itself whether all the requisites for such immunity existed.'"[61] In certain instances, the State Department's decisions in and of themselves were sufficient to grant courts jurisdiction over cases.[62] While the absence of comment from the State Department seemingly empowered the courts to make their own decisions regarding immunity, in reality the standard for assessing whether immunity applied was to consider if "'the ground of immunity is one which it is the established policy of the [State Department] to recognize.'"[63] Further proscribing any judicial power to determine whether immunity attached was the State Department's "general practice" of granting immunity to any

57. SOVEREIGN IMMUNITY DECISIONS OF THE DEPARTMENT OF STATE – MAY 1952 TO JANUARY 1977, *supra* note 54, at 1019 (additionally, the State Department sometimes considered reports from the Department of Justice in their determinations).

58. *Id.*

59. *Id.*

60. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983).

61. Samantar v. Yousuf, 560 U.S. 305, 311 (2010) (quoting *Ex parte Republic of Peru*, 318 U.S. at 587).

62. *See, e.g.,* Republic of Austria v. Altmann, 541 U.S. 677, 687–88 (2004) (noting that in 1949, the State Department expressed a policy that relieved American courts of any restraint on the exercise of jurisdiction when cases involved the acts of Nazi officials).

63. *Samantar*, 560 U.S. at 312 (quoting Republic of Mexico v. Hoffman, 324 U.S. 30, 37 (1945)).

friendly nation that so requested it.[64] In effect, then, the State Department either directly or indirectly controlled, and nearly universally granted, the immunity status of foreign nations.[65] A final neutering of the judiciary's power under this common law regime arose even if a court did have jurisdiction and rendered judgement against a foreign sovereign: the State Department could confer "'absolute immunity to foreign sovereigns from the execution of judgements,'" thus forcing successful plaintiffs to rely on voluntary payment from the defendant sovereign itself.[66]

C. The Tate Letter and the Passing of the FSIA

In 1952, the State Department purported to "join the majority of other countries by adopting the 'restrictive theory' of sovereign immunity."[67] In the now famous Tate Letter,[68] the Acting Legal Adviser laid out restrictive theory as limiting immunity to "sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)."[69] Thus formulated, the restrictive theory limited immunity to a "foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts"[70]—that is, the prior rule of near universal immunity was significantly circumscribed.

In practice, however, the restrictive theory seemed to only have bite when it was politically expedient. Indeed, some scholars have explicitly stated that there is "no coherent re-

64. *Id.* at 312.

65. There are two important points to be made regarding this regime: (1) lawsuits against foreign officials during this time were rather rare (*Id.* at 311); (2) foreign nations had to affirmatively request or raise immunity as a defense, as opposed to the FSIA regime where a foreign nation is presumptively immune from jurisdiction. Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993).

66. Rubin v. Islamic Republic of Iran, 830 F.3d 470, 476–77 (7th Cir. 2016) (quoting Autotech Tech. LP v. Integral Res. & Dev. Corp., 499 F.3d 737, 749 (7th Cir. 2007)).

67. Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193, 199 (2007).

68. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Phillip B. Perlman, Acting Attorney Gen. (May 19, 1952), *reprinted in* 26 DEP'T OF STATE BULL. 984 (1952).

69. *City of New York*, 551 U.S. at 199 (quoting Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711 (1976).

70. Samantar v. Yousuf, 560 U.S. 305, 312 (2010) (quoting Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487 (1983)).

strictive theory of foreign state immunity."[71] Further, the new policy did little to streamline the process of granting immunity and instead served to "throw immunity determinations into some disarray."[72] This ultimately led to foreign states applying "diplomatic pressure" when jockeying for favorable suggestions of immunity from the State Department.[73] Such pressure often proved influential, as "'political considerations[74] sometimes led the [State] Department to file suggestions of immunity in cases where immunity would not have been available under the restrictive theory.'"[75]

In response to the haphazard, fast-and-loose manner in which the State Department applied its own policy,[76] Congress passed the FSIA in 1976 to codify the restrictive theory of sovereign immunity.[77] Congress did not merely codify the restrictive theory, however, as it went so far as to declare that its intent with the FSIA was to "transfer[] 'primary responsibility for

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71. Joan E. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 YALE J. OF INT'L L. 489, 491 (1992).

72. *Samantar*, 530 U.S. at 312 (quoting Republic of Austria v. Altmann, 541 U.S. 677, 690 (2004))

73. Republic of Austria v. Altmann, 541 U.S. 677, 690 (2004) (quoting Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487 (1983)).

74. While the author makes no comment on the substantive quality of allegations, he feels it is illuminative to note the apparent contemporaneous ease with which the State Department succumbed to political considerations regarding allegations that the Trump Administration conditioned congressionally appropriated military aid to Ukraine on a demand for an investigation into a political rival. Nicholas Fandos, *Trump Acquitted of Two Impeachment Charges in Near Party-Line Vote*, N.Y. TIMES (Feb. 5, 2020), https://www.nytimes.com/2020/02/05/us/politics/trump-acquitted-impeachment.html. These allegations spurred the House of Representatives to approve articles of impeachment against President Donald J. Trump. *Id.* President Trump was acquitted by the Senate in the first non-party line vote in United States history. *Id.*

75. *Samantar*, 560 U.S. at 312 (quoting *Altmann*, 541 U.S. at 690).

76. For a comprehensive survey of State Department immunity decisions, see SOVEREIGN IMMUNITY DECISIONS OF THE DEPARTMENT OF STATE – MAY 1952 TO JANUARY 1977, *supra* note 54.

77. *See Samantar*, 560 U.S. at 313; *see also,* Republic of Argentina v. NML Capital Ltd., 573 U.S. 134, 141 (2014) (noting that Congress passed the FSIA to "abate[] bedlam" and replace the "executive-driven, factor-intensive" immunity determinations with a comprehensive legal standard); *Verlinden B.V.*, 461 U.S. at 488 (finding that Congress passed the FSIA to "free the Government from the case-by-case diplomatic pressures.").

immunity determinations from the Executive to the Judicial branch.'"[78] Despite this expressed shift in responsibility, the Supreme Court still accords "special attention" to the views of the State Department regarding the foreign sovereign.[79]

Before progressing to Part II, it is prudent to define the scope of the FSIA. The Supreme Court has held that the immunity of foreign *officials* was not governed by the act and did not directly challenge an assertion by the State Department that immunity decisions for such individuals was within the exclusive province of the executive branch.[80] Additionally, in 2019, the court held that the immunity of *international organizations* should be "understood to [be] link[ed] . . . to the law of foreign sovereign immunity, so that one develops in tandem with the other"— that is, the FSIA also governs the scope of immunity enjoyed by international organizations as defined by the International Organizations Immunities Act of 1945.[81]

II. ANALYZING THE FSIA AS A WHOLE

This section will first survey two Supreme Court decisions involving the whole of the FSIA before moving on to the analysis of two of the act's specific exceptions. The court has on occasion made determinations regarding the scope and legitimacy of the FSIA as a whole.[82] The analysis will begin with *Republic of Austria v. Altmann*, where the court was tasked with determining whether the FSIA could be applied to actions that occurred prior to its enactment.[83] Next, the analysis will turn to *Verlinden B.V. v. Central Bank of Nigeria* where the court confronted the issue of whether the FSIA's grant of jurisdiction ran afoul of Article III of the Constitution.[84]

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78. Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 766 (2019) (quoting *Altmann*, 541 U.S. at 691). *See also,* 28 U.S.C. § 1602.

79. *Jam*, 139 S. Ct. at 770–71 (chastising the D.C. Circuit for not considering the opinion of the State Department) (quoting Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co. 137 S. Ct. 1312, 1320 (2017)).

80. *See Samantar*, 530 U.S. at 325.

81. J*am*, 139 S. Ct. at 769.

82. *See, e.g., Altmann*, 541 U.S. at 677 (2004); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983).

83. *Altmann*, 541 U.S. at 681.

84. *Verlinden B.V.*, 461 U.S. at 482.

A. Altmann and the Retroactive Applicability of the FSIA

Altmann involved a dispute over ownership of certain valuable paintings that were plundered from a Jewish home in Austria after the owner fled the country following its annexation by Nazi Germany.[85] The paintings eventually ended up in the possession of the Austrian Gallery.[86] The plaintiff's complaint alleged the expropriation exception abrogated Austria's immunity,[87] but the court limited its inquiry to whether the FSIA "applies to claims that . . . are based on conduct that occurred before the Act's enactment, and even before the United States adopted the . . . 'restrictive theory' of sovereign immunity in 1952."[88]

The government's argument first claimed that the FSIA was subject to the court's retroactivity jurisprudence; that is, substantive statutes, such as the FSIA and particularly the expropriation exception, should only apply prospectively.[89] Further, the government argued that because the exception to immunity for state sponsors of terrorism explicitly stated it applied retroactively, an expression of intent the expropriation exceptions lacks, such was evidence that Congress did not intend for the expropriation exception to apply retroactively.[90] The government continued and claimed that retroactivity would violate accepted norms of international law.[91] Finally, the government argued that the Ninth Circuit engaged in "unfounded speculation" that the executive branch would have "recognized a special exception for Holocaust claims before the enactment of the FSIA."[92]

The Supreme Court, however, focused primarily on the "*sui generis* context" of this case to reach the opposite conclusion.[93] It noted that the presumption of immunity to sovereigns was a

85. *Id.* at 681–82.

86. *Id.* at 681.

87. 28 U.S.C. § 1605(a)(3).

88. *Altmann*, 541 U.S. at 681.

89. Brief for the United States as Amicus Curiae Supporting Petitioners at 9–10, 12, Republic of Austria v. Altmann, 541 U.S. 677 (2004) (No. 03-13).

90. *Id.* at 16.

91. *Id.* at 17. In support of its argument, the government pointed to an article discussing procedure at the International Court of Justice (ICJ) and a single ICJ case that rejected an argument for retroactive application of a treaty provision from 1926.

92. *Id.* at 20.

93. *Altmann*, 541 U.S. at 696.

function of international comity,[94] and when resolving issues of sovereign immunity, the court had long looked to the guidance of the political branches of government to make determinations.[95] In this instance, the court turned to Congress' decision to pass the FSIA and decided that, without indications that Congress specifically indicated a preference against retroactivity, the presumption against retroactivity was inapplicable.[96]

The court turned to the FSIA's preamble[97] and focused on the language, "*[c]laims* of foreign states to immunity should *henceforth* be decided by the courts of the United States."[98] The court interpreted the statute to cover *claims* of immunity, not *actions* that would give rise to a claim of immunity, and that courts were to make immunity decisions in conformity with the FSIA "regardless of when the underlying conduct occurred."[99] The court also emphasized that the purpose of the FSIA would be "frustrated" if current or future claims brought because of conduct that occurred before the act went into effect were governed by the "same ambiguous and politically charged 'standards' that the FSIA replaced."[100] In holding that the FSIA applies retroactively, the court made a rare break from the government's position and even stated that in this context—an instance of pure statutory interpretation—the government's in-

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94. "International comity" was defined most famously by the Supreme Court as

> neither a matter of absolute obligation … nor of mere courtesy and good will [between sovereigns]. [I]t is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard … to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163–64 (1895). In contemporary times, "international comity" comes in three forms, with "executive comity" providing the basis for courts to defer to foreign sovereigns—*i.e.*, the presumption that powers the FSIA. Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U. CAL. DAVIS L. R. 11, 47 (2010).

95. *Altmann*, 541 U.S. at 696.

96. *Id*. at 697.

97. *Id.*

98. 28 U.S.C. § 1602 (emphasis added).

99. *Altmann*, 541 U.S. at 698–99.

100. *Id.* at 699 (quoting Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487–88 (1983)).

terest deserved "no special deference."[101] The court did, however, leave open the possibility of the State Department receiving deference regarding *specific* actions from *specific* foreign states, though expressed no opinion on whether said deference should be granted.[102]

B. Verlinden and the FSIA's Compatibility with Article III

In an earlier case, *Verlinden B.V. v. Central Bank of Nigeria*, the Supreme Court had to determine whether the FSIA's authorization of a "foreign plaintiff to sue a foreign state in a United States District Court on a non-federal cause of action [] violates Article III of the Constitution."[103] The conflict arose after Verlinden B.V., a Dutch corporation, entered into an agreement with the Federal Republic of Nigeria to provide over 240,000 tons of cement.[104] Nigeria, however, had entered into numerous other contracts providing cement, the deliveries of which began to overwhelm Nigerian ports.[105] In response, Nigeria sought to alter its letter of credit issued in connection with its contract with Verlinden B.V.; in response, the Dutch corporation brought suit in the Southern District of New York and alleged that Nigeria's actions amounted to an anticipatory breach of a letter of credit.[106]

The government's argument began by noting that the "arising under" grant of jurisdiction in Article III, Section 2 has been construed "expansively" to extend to all cases where federal issues *might* be litigated.[107] It also noted that where one interpretation of the Constitution or a law would defeat the grant of jurisdiction, jurisdiction could still be proper so long as there was a construction that *would* grant it.[108] In the government's view, a case properly arises under federal law "when a potential federal law ingredient exists by virtue of Congress' exercise of its legislative powers."[109] The government then ar-

101. *Id.* at 701.
102. *Id.* at 702.
103. *Verlinden B.V.*, 461 U.S. at 482.
104. *Id.*
105. *Id.* at 483.
106. *Id.*
107. Brief for the United States as Amicus Curiae at 10, Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) (No. 81-920).
108. *Id.* at 11.
109. *Id.* at 13.

gued that because cases brought under one of the exceptions requires interpretation of the FSIA's standards for abrogating immunity, it amounts to an essential federal element and thus arises under a federal law.[110] The United States also made a point to reject the Second Circuit's decision that the FSIA was strictly a jurisdictional statute, instead arguing that because sovereign immunity provides foreign states with a defense to a court's jurisdiction, it has a significant substantive component.[111]

Finally, the government rejected the contention that because the federal question statute[112] parrots the "arising under" language of Article III, it also serves to circumscribe Congress' Article III powers to grant jurisdiction.[113] Congress' power under Article III, the government argued, was to be interpreted broadly because it was a *constitutional* grant of power, not a statutory one, which would require a distinctly restrictive interpretation.[114]

The court began its analysis by noting that the plain language of the statute made "no indication of any limitation based on the citizenship of the plaintiff."[115] The court also found that the legislative history supported a finding that Congress did not intend to limit jurisdiction to American citizens under the FSIA and held that, should the substantive requirements of the act be met, "an action may be brought in federal court regardless of the [plaintiff's] citizenship."[116]

The court then turned to the issue of whether the FSIA comported with the "arising under" jurisdictional grant found in Article III.[117] It quickly accepted the government's broad interpretation of "arising under" and that an action brought under the FSIA *necessarily* raises questions of substantive federal law.[118] The court reasoned, much like the government, that because an action brought under the FSIA requires a threshold

110. *Id.* at 13–14.
111. *Id.* at 15–16.
112. 28 U.S.C. § 1331 (2018).
113. Brief for the United States as Amicus Curiae, *supra* note 107, at 18–19.
114. *Id.* at 19.
115. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 490 (1983).
116. *Id.* at 490–91.
117. *Id.* at 491–92.
118. *Id.* at 493.

inquiry into whether one of the exceptions to immunity is appropriate through the application of "detailed federal law standards set forth in the Act," it properly arises under federal law for the purposes of Article III jurisdiction.[119] Finally, the court also rejected the Second Circuit's reasoning that the limits imposed by the federal question statute similarly constrict the scope of Article III.[120]

When interpreting the FSIA as a whole, the Supreme Court has on occasion shown a rare willingness to break with the executive's arguments. However, as will be shown, this does not carry over when the court analyzes specific exceptions.

III. ANALYZING SPECIFIC EXCEPTIONS: COMMERCIAL ACTIVITY AND EXPROPRIATION

In this section, the analysis will turn from the court's examination of the FSIA writ large to specific exceptions that abrogate the immunity afforded to foreign sovereigns. Before commencing the analysis, however, it is necessary to first identify certain definitions provided by the FSIA. The act defines "Foreign state" to include "political subdivision[s]" and "agenc[ies] or instrumentalit[ies] of a foreign state."[121] The latter two are further defined as

> any entity . . . which is a separate legal person, corporate or otherwise, and . . . which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and . . . which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.[122]

For purposes of the FSIA, "United States" refers to "all territory and waters, continental or insular, subject to the jurisdiction of the United States."[123] "Commercial activity" is defined as "either regular course of commercial conduct or a particular commercial transaction or act" with its "commercial character . . . determined by reference to the nature of the course or conduct or particular transaction or act, rather than . . . to its pur-

119. *Id.* at 493–94.
120. *Id.* at 494–95.
121. 28 U.S.C. § 1603(a).
122. 28 U.S.C. § 1603(b)(1)–(3).
123. 28 U.S.C. § 1603(c)

pose."[124] Finally, "'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such a state and having substantial contact with the United States."[125]

A. The Commercial Activities Exception

The commercial activities exception of 28 U.S.C. § 1605(a)(2) removes immunity when

> 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 causes a direct effect in the United States.[126]

This exception serves to most explicitly codify the Tate Letter's directive to abrogate immunity when the foreign state acts in a commercial manner, *not* as a sovereign.[127] Just as the Tate Letter failed to clearly delineate this abrogation, so too has this section been heavily litigated, as will be shown below.

In *Republic of Argentina v. Weltover, Inc.*, the Supreme Court confronted the issue of whether to enforce obligations against a foreign state after the state had unilaterally altered its agreements for the purpose of saving its economy.[128] In an effort to revitalize its economy in crisis, Argentina issued government bonds to foreign creditors that provided for the payment of principal and interest in US dollars through, inter alia, the New York market.[129] As the bonds neared their maturation date, the Argentine government determined they lacked the necessary funds to retire the bonds and "unilaterally extended the time for payment."[130] The complainants, two Panamanian corporations and a Swiss bank, refused the Argentinians rescheduled payment plan, demanded payment in New York,

124. 28 U.S.C. § 1603(d).
125. 28 U.S.C. § 1603(e).
126. 28 U.S.C. § 1605(a)(2) (emphasis added).
127. Letter from Jack B. Tate, *supra* note 68.
128. Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992).
129. *Id.* at 609.
130. *Id.* at 610.

and, upon Argentina's failure to pay, instituted a breach of a contract claim in the Southern District of New York.[131]

At issue was the third clause of section 1605(a)(2).[132] The US asserted an interest in the case due to the interpretation of the FSIA having a "substantial impact on [the government's] conduct of foreign relations" and subsequently agreed with the lower courts' decisions to abrogate immunity.[133] First, noting the "'pragmatic approach'" taken by the circuit courts in interpreting the FSIA, the US argued that the issuance of a bond by Argentina was not materially different than if it was issued by a business in the private sector, and, thus, it "is by its nature a commercial activity."[134]

Next, the government sidestepped Argentina's assertion that rescheduling its obligations did not have a direct effect on the United States due to the foreign nature of the plaintiffs by asserting that the breach of contractual obligations in the US is a "specific, legally significant event."[135] The government continued that, although the third clause of section 1605(a)(2) does not *require* a "substantial" or "foreseeable" effect in the US, both criteria would be met as the effect is "substantial" in the sense that the breach prevents the performance of the "central" obligation of the contract (*i.e.*, payment) in the US and is "foreseeable" because, as Argentina itself allowed, "New York is the designated place of performance."[136] Finally, the government summarily rejected an Argentinian due process argument by referencing a House Report that states the FSIA "embodies the 'requirements of minimum jurisdictional contacts and adequate notice.'"[137]

The court limited its inquiry to two questions: (1) whether the refinancing of the bonds was taken in connection with a commercial activity and (2) whether said refinancing had a direct effect in the United States.[138] In his first line of analysis, Jus-

131. *Id*.
132. *Id*. at 611; *see* 28 U.S.C. § 1605(a)(2).
133. Brief for the United States as Amicus Curiae Supporting Respondents at 1, 10, Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) (No. 91-763).
134. *Id*. at 12–13.
135. *Id*. at 19–20
136. *Id*. at 20–21.
137. *Id*. at 23–24.
138. *Weltover, Inc.*, 504 U.S. at 612.

tice Scalia made direct reference to the United States' arguments as an amicus.[139] As to the first issue, Justice Scalia identified the "key question" as whether the issuance of the bonds was a "commercial activity" for the purposes of the FSIA.[140] Justice Scalia harmonized with the government's assertion that there is no substantive difference between a government and a private party issuing bonds by holding that "when a foreign government acts . . . in the manner of a private player within [a market, its] actions are 'commercial' within the meaning of the FSIA."[141]

Regarding "direct effect," Justice Scalia agreed with both the lower courts and the government that the effect need *not* be "substantial[]" or "foreseeabl[e]."[142] In concluding there was a "direct effect," Justice Scalia again aligned with the government and concluded that the plaintiffs' foreign nature is irrelevant; he also placed significant emphasis for his decision on the fact that New York was the designated place of payment.[143]

A year later, the Supreme Court again confronted the commercial activities exception in *Saudi Arabia v. Nelson*, in which the complainant alleged causes of action based on intentional tort, negligent failure to warn, and derivative injury theories.[144] Unlike in *Weltover*, *Nelson* involved analysis of section 1605(a)(2)'s first clause, which abrogates immunity when "'the action is based upon a commercial activity carried on in the United States by the foreign state.'"[145] Nelson was recruited from the US to work at the King Faisal Specialist Hospital in Riyadh where he reported safety defects at the hospital, eventually leading to his imprisonment in Saudi Arabia where he was allegedly beaten and tortured.[146] At issue was whether Nelson's recruitment and hiring in the US were sufficient for his actions to be "*based upon* a commercial activity . . . carried on in the United States."[147] The District Court found this activ-

139. *Id*.
140. *Id*.
141. *Id.* at 614.
142. *Id.* at 618.
143. *Id.* at 618-19.
144. Saudi Arabia v. Nelson, 507 U.S. 349, 353–54 (1993).
145. *Id.* at 356; *see* 28 U.S.C. 1605(a)(2).
146. *Saudi Arabia*, 507 U.S. at 352–53.
147. *Id.* at 353–55 (emphasis added).

ity within the US too attenuated to remove immunity, but the Eleventh Circuit then reversed.[148]

The government, in its amicus to the Supreme Court, first noted that the "based upon" requirement had caused significant confusion and divergent approaches within the lower courts, arguing that "the precise content of the 'based upon' requirement [was a] question ripe for [the] Court's resolution," and that, given this specific case involved Saudi Arabia exercising its law enforcement powers "within its own territory," it was a "matter[] of particular sensitivity among sovereign nations."[149] First, the government quickly concluded that Nelson's recruitment constituted "commercial activity" for FSIA purposes, stating, much as it did in its amicus in *Weltover*, that the hospital's status as a sovereign-owned entity made no appreciable difference in its actions than if they were carried out by a private hospital.[150]

However, the US then concluded that Nelson's recruitment was insufficient to satisfy the "based upon" requirement.[151] The government began by providing a "straightforward" example: if a contract that creates a legally enforceable right in the US is breached, the lawsuit would be sufficiently "based upon" commercial activity within the country to remove immunity—a possible allusion, though there is no direct reference, to the facts and arguments of *Weltover*.[152] Since Saudi authorities did not recruit Nelson, the government argued, "with intent to injure or imprison," his intentional tort claims could not be said to be "based upon" the commercial activity that took place in the US.[153] This argument also precluded the possibility of sustaining the derivative tort claims.[154] The government further argued that the negligent tort claims could not be sustained, though for different reasons.[155] The government acknowledged that if "Saudi Arabia [breached] a duty of reasonable care in its

148. *Id.* at 354-55.

149. Brief for the United States as Amicus Curiae at 8–9, 12–13, Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (No. 91-522).

150. *Id.* at 14.

151. *Id.* at 16.

152. *Id.* at 15.

153. *Id.* at 16.

154. *Id.* at 16.

155. *Id.* at 17.

recruitment activity," it might be subject to a negligence suit.[156] However, because the circuit court applied the wrong standard for its "based upon" analysis, that question was not reached.[157]

In its analysis of the "based upon" requirement, the court focused on the "most natural meaning" of the phrase and the clause's context in order to determine that section 1605(a)(2)'s first clause requires a claim to be predicated on "something more than a mere connection with, or relation to, commercial activity."[158] Thus, Justice Souter drew a distinction between the tort claims that made up the basis of the Nelsons' suit and "the arguably commercial activities that preceded their commission."[159] Justice Souter then held that tortious conduct was not "commercial activity" within the meaning of the FSIA, but instead was an exercise of the Kingdom's law enforcement powers—actions that inherently are "not the sort of action by which private parties can engage in commerce."[160] In reaching this conclusion, Justice Souter emphasized the fact that the FSIA was meant to codify the "restrictive theory" of sovereign immunity, which is intended to abrogate immunity for a foreign state when it acts in a private or commercial character.[161]

The most recent case to deal with this exception is *OBB Personenverkehr AG v. Sachs*, decided in 2015.[162] *Sachs* involved a Californian claimant bringing a variety of tort and contract actions against a railway, OBB, owned through a holding company by the Republic of Austria.[163] OBB in turn is a member of Eurail Group, which markets and manages the Eurail pass program.[164] The claimant purchased a Eurail pass from a Massachusetts company, which the Ninth Circuit, sitting en banc, found to be an agent of OBB, thus attributing the sale to the railway.[165] The Ninth Circuit then found that the sale of the Eurail pass formed a necessary element of each of the claimant's actions and concluded that each claim was sufficiently

156. *Id.* at 17.
157. *Id.* at 17.
158. Saudi Arabia v. Nelson, 507 U.S. 349, 357–58 (1993).
159. *Id.* at 358.
160. *Id.* at 358–62.
161. *Id.* at 359–60.
162. OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015).
163. *Id.* at 393.
164. A Eurail pass allows passengers unlimited access to Eurail Group railways for a set period of time. *Id.*
165. *Id.* at 394.

"'based upon a commercial activity carried on in the United States'" and abrogated immunity.[166] OBB raised two arguments in its petition to the court, but the Supreme Court only reached one: even if attribution was proper, the claims were not "based upon" the sale of the Eurail pass.[167]

In its amicus brief, the United States supported the Ninth Circuit's decision regarding the application of agency principles to the FSIA but urged the court to overturn the Circuit's decision that the sale of the Eurail pass in the United States was sufficient to satisfy the "based upon" requirement of section 1605(a)(2).[168] The government, relying on *Nelson*, argued for a "gravamen" approach in which the commercial activity must be "the gist or essence of a claim, and not simply an analysis of whether an essential fact or a single element of the claim turns on the existence of such activity."[169]

The government's biggest concern regarding the test used by the Ninth Circuit was that the applicability of the commercial activity exception "would depend on the artfulness of the plaintiff's pleadings rather than on the nature of the sovereign's acts."[170] The gravamen approach, on the other hand, would "ensure[] a meaningful linkage between the United States and an action over which US courts may exercise jurisdiction."[171] The government's concerns were twofold: first, the Ninth Circuit's "based upon" approach would "attenuate" the "territorial basis of jurisdiction" supplied by the commercial activity exception.[172] Second, the United States wanted to avoid a broad interpretation that would allow US courts to have jurisdiction over claims that would be better resolved in foreign jurisdictions; tellingly, this concern was tied to the potential that such action by US courts could "raise delicate questions of *foreign relations* when a foreign sovereign is the defendant."[173]

In its analysis, the court agreed with the United States that the gravamen approach was the correct one, though it did so

166. *Id.* at 394–95.
167. *Id.* at 395.
168. Brief for the United States as Amicus Curiae Supporting Reversal at 6, OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015) (No. 13-1067).
169. *Id.* at 21.
170. *Id.* at 26.
171. *Id.* at 24.
172. *Id.* at 24.
173. *Id.* at 24 (emphasis added).

without mention of the government's position, instead relying on its reasoning from *Nelson*.[174] In discussing its previous analytical framework, the court noted that it did not perform an exhaustive review of each claim, as the Ninth Circuit did in *OBB*, but instead, "zeroed in on the core of [the] suit: . . . the sovereign acts that actually injured [the claimant]."[175] The court then found the gravamen of the complainant's suit occurred abroad, precluding the commercial activity exception from abrogating immunity.[176] Notably, though, in its last comment on the FSIA, the court parroted the United States' "artful pleading" language by declaring that any approach other than the gravamen standard would allow crafty plaintiffs to impermissibly "evade the [FSIA's] restrictions [on limiting jurisdiction over foreign sovereigns."[177]

Thus, while not always a perfect match in rationale, the court has shown considerable deference to the government's end positions regarding the FSIA's commercial activities exception.

B. The Expropriation Exception

The FSIA's expropriation exception provides jurisdiction to the courts when

> 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 commercial activity in the United States[.][178]

Surprisingly, given the sensitive subject matter of the exception, the Supreme Court has rarely analyzed the expropriation exception.[179] This Note will analyze the court's recent—and on-

174. OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390, 396 (2015).
175. *Id*.
176. *Id*.
177. *Id*.
178. 28 U.S.C. § 1605(a)(3).
179. Only four Supreme Court cases cite the expropriation exception: Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312 (2017); Republic of Austria v. Altmann, 541 U.S. 677 (2004); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) (notably,

ly—decision addressing this exception in *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co*.[180]

The dispute in *Bolivarian Republic of Venezuela* arose out of an alleged deprivation of Helmerich's—a United States corporation—property rights in its Venezuelan subsidiary that, in essence, dismantled Helmerich's voting power, effectively destroyed its ownership, and frustrated its control over the subsidiary when the Venezuelan government allegedly expropriated said subsidiary's oil rigs.[181] At issue was whether the expropriation exception's language requiring a "case . . . in which rights in property taken in violation of international law are in issue"[182] mandates only that the complaining party make a *nonfrivolous* argument that their claim falls within the exception.[183] In other words, whether the substantive elements of the exception—here, that a property right was at issue and was taken in violation of international law—must be met as a threshold to confer jurisdiction upon the courts.[184] Below, the D.C. Circuit found only that the facts *may* amount to a taking of property in violation of international law, and held that so long as the claim met the "'exceptionally low bar'" of being nonfrivolous, then it fell within the exception's scope.[185]

The government's argument was twofold: first, relying on precedent, it argued that the "substantive question of immunity must be resolved at the outset of the case."[186] This high bar,[187] the government argued, reflected Congress' intent to limit the scope of the FSIA, particularly because a sovereign's actions regarding property within its own territory are general-

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this is the only case in which the United States did not file an amicus brief in); and Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983).

180. *Bolivarian Republic of Venezuela*, 137 S. Ct. at 1316.

181. *Id.* at 1317–18.

182. 28 U.S.C. § 1605(a)(3).

183. *Bolivarian Republic of Venezuela*, 137 S. Ct. at 1316.

184. *Id*.

185. *Id.* at 1318.

186. Brief for the United States as Amicus Curiae Supporting Petitioners at 14, Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312 (2017) (No. 15-423).

187. It is worth noting that two *former* State Department attorneys filed an amicus brief arguing that this high bar would, in fact, *frustrate* the purpose of the FSIA's expropriation exception. Brief of Former State Department Attorneys John Norton Moore and Edwin D. Williamson as Amici Curiae in Support of Respondent at 19, Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312 (2017) (No. 15-423).

ly left "free of interference by the courts of another nation."[188] The government continued that, without the substantive determination at the outset of the proceedings, the case could then only raise issues of the domestic law of the foreign sovereign or it would be insufficiently connected to the US to warrant a grant of jurisdiction in US courts.[189] To hold otherwise, the argument went, could lead to an affront on the foreign sovereign's dignity and upset the "comity between nations."[190]

Second, the government argued that by granting jurisdiction based on the claim's frivolousness, the D.C. Circuit misconstrued the "arising under"[191] requirement of federal question jurisdiction.[192] The issue with applying this standard was that it "separate[d] the jurisdictional inquiry from . . . [an] examination of the legal sufficiency of the plaintiff's claim"; a separation that would be in direct conflict with FSIA jurisprudence requiring that the substantive elements of an exception be met.[193] The government contended that this separation of inquiries thus made the federal-question statute and frivolity standard inapplicable to the FSIA.[194]

The court agreed with the government's position that a nonfrivolous claim was insufficient to confer jurisdiction under the expropriation exception.[195] In doing so, the court relied on the statute's requirement that property be taken in violation of international law, express language that, in the court's view, "would normally foresee a judicial decision on the jurisdictional matter."[196] The court also found support for its position in precedent, noting that in *Permanent Mission of India to United Nations v. City of New York*, the court granted jurisdiction not be-

188. Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 186, at 17.

189. *Id.* at 17.

190. *Id.* at 20.

191. 28 U.S.C. § 1331.

192. Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 186, at 25.

193. *Id.* at 24; *see* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 490–91 (1983).

194. Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 186, at 27.

195. Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1316 (1993).

196. *Id.* at 1319.

cause of a nonfrivolous argument but because property rights were "'directly implicated'" in the case.[197]

Further, the court emphasized the importance of maintaining international comity, that the FSIA was enacted to reflect the prevailing standards in international law, and, most notably, the State Department's views on sovereign immunity, to which the court "has paid special attention."[198] Because the property at issue belonged to the subsidiary, a Venezuelan national, the court reasoned that Venezuela's alleged expropriation was the sort of sovereign action that the FSIA was designed to provide immunity for.[199]

Finally, the court agreed that the federal-question statute[200] was an ill-fitting analogy for the expropriation exception.[201] In fact, the court found a better, if still not "particularly helpful," analogy in the diversity jurisdiction statute,[202] noting the substantive requirement of differing citizenship necessitates a finding that the "parties are in fact diverse, not simply whether they are arguably so."[203] In closing its opinion, the court reiterated the similar need for determining a foreign sovereign's immunity defense at the outset of the action.[204]

IV. OVERWHELMING DEFERENCE AND POTENTIAL FUTURE ISSUES

The analysis of the above cases can lead to only one conclusion regarding the deference shown to the executive once a case brought under the FSIA reaches the Supreme Court. In a word: overwhelming. While this has yet to seriously impair the act's objectives, looming cases now before the Supreme Court leave open the possibility for a judicial overwrite that could mark a return to the politically motivated pre-FSIA immunity regime for immunity determinations.

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197. *Id.* (quoting Mission of India to United Nations v. City of New York, 551 U.S. 193, 201 (2007)).
198. *Id.* at 1320–21.
199. *Id.* at 1321.
200. 28 U.S.C. § 1331.
201. *Bolivarian Republic of Venezuela*, 137 S. Ct. at 1322.
202. 28 U.S.C. § 1332.
203. *Bolivarian Republic of Venezuela*, 137 S. Ct. at 1324.
204. *Id.* at 1324.

A. The Level of Deference Shown to the Executive

Across the spectrum of cases analyzed, the Supreme Court broke with the executive's suggestion only once, in *Republic of Austria v. Altmann*.[205] However, even that decision was heavily qualified and provided that the State Department's opinions "might well be entitled to deference" in specific cases as opposed to the scope of the FSIA in the abstract as analyzed in that case.[206] It is difficult to square this broad and near-uniform alignment with the executive with the court's common refrain that Congress intended to "transfer[] 'primary responsibility for immunity determinations from the Executive to the Judicial branch.'"[207] It is similarly difficult to reconcile with the concerns about ad hoc executive decisions that led Congress to enact the FSIA. In essence, much of the Tate Letter regime appears to live on. By routinely acquiescing to the executive's arguments, the court has left the judiciary vulnerable to, and arguably more concerned with, the influence of the executive's political considerations than an adherence to the uniform application of the law.

These incongruities all but demand a more skeptical judiciary that is willing to break with the executive in an effort to maintain Congress' intent in enacting the FSIA. As will be discussed below, a case that is currently awaiting a decision on its writ of certiorari to the Supreme Court illuminates the need for an active, muscular judiciary to preserve the FSIA regime in a way that comports with its express purpose.

B. Phillipp v. Federal Republic of Germany and the Potential Gutting of the FSIA

Similar to the facts of *Altmann*, at issue in *Phillipp v. Federal Republic of Germany*—currently awaiting the Supreme Court's decision whether to grant certiorari—is the ownership of artwork currently in the possession of Germany that was taken by the Nazis in the lead up to World War II.[208] The D.C. Circuit held, inter alia, that the expropriation exception appropriately

205. Republic of Austria v. Altmann, 541 U.S. 677, 701 (2004).

206. *Id.* at 701–02.

207. Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 766 (2019) (quoting *Altmann*, 541 U.S. at 691).

208. Philipp v. Federal Republic of Germany, 894 F.3d 406, 408 (D.C. Cir. 2018).

rejected Germany's motion to dismiss[209] and then denied a petition to rehear the case en banc.[210] Germany has filed a writ of certiorari to the Supreme Court as of July 2019 that presents two questions, the relevant one being whether the doctrine of international comity is unavailable when the case involves substantial historical and political significance to the foreign sovereign.[211] The Supreme Court has famously defined "international comity" as

> neither a matter of absolute obligation . . . nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[212]

This definition's focus on "acts" seemingly removes the doctrine from applying to sovereign immunity,[213] which the FSIA presumptively grants to foreign nations unless their actions—generally *commercial* actions—fall into one of the act's exceptions.[214] Still, by presenting the question to the court, it is not a stretch to think that Germany's lawyers are attempting to capitalize on the broad deference shown to the executive and enshrine a new defense from the FSIA's narrow immunity exceptions in the jurisprudence—a defense that would entirely defeat the act's purpose.

Germany is in effect asking the court to allow the executive to entertain and express political considerations when cases are brought under the FSIA. This exact scenario was one of the very reasons Congress *chose to enact* the act and empower the courts to make final decisions on immunity.[215] This did not stop

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209. *Id.* at 414.

210. Philipp v. Federal Republic of Germany, 925 F.3d 1349 (D.C. Cir. 2019).

211. Philipp v. Federal Republic of Germany, 925 F.3d 1349 (D.C. Cir. 2019), *petition for cert. filed* (U.S. Oct. 22, 2019) (No. 19-520).

212. Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

213. William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2075 (2015).

214. 28 U.S.C. § 1604.

215. Samantar v. Yousuf, 560 U.S. 305, 312 (2010) (quoting *Altmann*, 541 U.S. at 690).

the government from filing an amicus brief with the D.C. Circuit arguing that a comity abstention *was* available in this case.[216] The government analogized comity to a number of other federal common law abstention doctrines, but most forcefully pressed its position based on the court's own language in *Republic of Austria v. Altmann*, in which it left open the possibility of courts declining to exercise jurisdiction at the United States' urging.[217] The amicas went on to distinguish a more recent decision, *Republic of Argentina v. NML Capital, Ltd.*, in which the court said that a foreign sovereign's immunity defense depends entirely on the FSIA's text by pointing to a footnote in that opinion stating that comity can be taken into consideration when defining the scope of discovery.[218] Increasing the importance of resolving this issue is the existence of a current split between the Seventh and D.C. Circuits; the former allowed for a comity abstention while the latter did not.[219] Before deciding whether to grant certiorari, the Supreme Court has asked the Solicitor General to file an amicus brief further detailing the United States' opinions on the issue.[220]

Should the Supreme Court side with the appellants in *Phillipp*, it would expand the doctrine of international comity from granting a presumption of immunity[221] that can then be defeated by one of the FSIA's exceptions, to an *affirmative defense* to the application of those exceptions. This is the end result of a judiciary that has overwhelmingly allowed the executive to inform and influence its immunity decisions made under the FSIA. If allowed, this new defense would essentially gut the FSIA's purpose and return it to the Tate Letter regime characterized by a lack of any salient consistency and subject to the whims of the executive branch's political caprice. In recognition of the danger and conflict with Congress' intent should such a

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216. Brief for the United States as Amicus Curiae in Support of Rehearing En Banc at 3, Philipp v. Federal Republic of Germany, 925 F.3d 1349 (D.C. Cir. 2019) (No. 17-7064).

217. *Id.* at 5–8.

218. *Id.* at 9.

219. Reply to Brief in Opposition to Petition for Writ of Certiorari, Philipp v. Federal Republic of Germany, 925 F.3d 1349 (D.C. Cir. 2019) at 8–9, (No. 19-351).

220. *Federal Republic of Germany v. Philipp,* SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/federal-republic-of-germany-v-philipp/ (last visited May 16, 2020).

221. Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993).

defense be allowed, the court should either reject certiorari in regards to the comity question or, more favorably, it should take the opportunity to reassert its primacy in immunity decisions and reject this broad grant of discretion to the executive.

CONCLUSION

As a whole, the FSIA has been a success and struck a careful, narrow balance between denying immunity to foreign sovereigns when they act in capacities that should not be protected and an interest in maintaining strong foreign relations. At the same time, the Supreme Court has maintained a broad avenue for the executive branch to influence immunity decisions seemingly in conflict with Congress' expressed intent in passing the act.[222]

This significant discretion has led to a pending writ of certiorari[223] before the court that could, in essence, demolish the FSIA's narrow exceptions and mark a return to the ad hoc regime that characterized sovereign immunity decisions prior to the act's passing. Those flexible standards are as unworkable now as they were prior to 1976, and, therefore, the court should either refuse certiorari or, more favorably, accept it and strongly reclaim its power over immunity decisions and pare back its showings of deference to the executive.

Michael Cooper[*]

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222. *See* 28 U.S.C. § 1602.

223. Philipp v. Federal Republic of Germany, 925 F.3d 1349 (D.C. Cir. 2019), *petition for cert. filed* (U.S. Oct. 22, 2019) (No. 19-520).

* B.A., The University of Michigan (2013); J.D., Brooklyn Law School (expected 2021); Editor-in-Chief, *Brooklyn Journal of International Law* (2020–21). I would like to thank the uniformly excellent professors at Brooklyn Law, particularly Professors Robin Effron and Julian Arato for their guidance and support. Hannah Sarokin and Abigayle Erickson must also be thanked for their efforts in shaping this Note and their dedication to the *Journal*. I also want to thank Katherine Teng and Alanna Phillips, without whom I would not have survived 1L. The same must be said of Rachel Lieb, who was instrumental in preserving my sanity with sound advice and encouragement. Additional thanks to Alexandra Blair, a friend, confidante, and editor without peer. Finally, a special and sincere thank you to my parents for their unequivocal, persistent support and belief—without them, none of this would have been possible. All errors or omissions are my own.