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PRESERVING INTERNATIONAL  
COMITY: THE FOREIGN SOVEREIGN  
IMMUNITIES ACT OF 1976 AND *OBB  
PERSONENVERKEHR AG V. SACHS*

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## INTRODUCTION

In accordance with a time-honored tradition, foreign sovereigns are generally immune from being summoned to court in another country.<sup>1</sup> This doctrine of “sovereign immunity” was codified and modified in the Federal Sovereign Immunities Act of 1976 (“FSIA”).<sup>2</sup> The FSIA divests United States courts of jurisdiction over defendants that are foreign states,<sup>3</sup> subject to a number of general exceptions designed to provide a level of recourse for an aggrieved party against a foreign government.<sup>4</sup> The FSIA codifies the long-standing attitude against suing foreign governments in the United States and “places in the federal courts the task of determining whether the general immunity provided by the Act attaches” in a given scenario, “weighing ‘the interests of justice’ and ‘the rights of both foreign states and litigants in United States courts.’”<sup>5</sup> As such, the Act is designed to protect “both the rights of domestic litigants and foreign states.”<sup>6</sup> However, the framers of the statute were, and those currently adjudicating disputes arising under the statute are, wary that “err[ing] in the former direction could implicate foreign policy concerns, while being overly solicitous of the status of foreign states could make it impossible for aggrieved parties to be made whole.”<sup>7</sup> This virtual tug-of-war between these two interests was at the forefront of a case decided by the United States Court of Appeals for the Ninth Circuit in 2013, *Sachs v. Republic of Austria*, a battle that ultimately reached the Supreme Court.<sup>8</sup>

The case involved Carol Sachs, a United States citizen who purchased a train ticket through an online travel agent located in Massachusetts.<sup>9</sup> While using that ticket in Austria to enter a train operated by OBB Personenverkehr AG (“OBB”), a railway company owned by the Republic of Austria, Sachs fell between the platforms; the train crushed both of her legs, ultimately requiring a double amputation.<sup>10</sup> Sachs subsequently sued

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1. See *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136–37 (1812).

2. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended in scattered sections of 28 U.S.C.). See also 28 U.S.C. § 1604 (2012).

3. 28 U.S.C. § 1604. See also Lucian C. Martinez, Jr., *Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?*, 44 TEX. INT’L L.J. 123, 124–25 (2008).

4. 28 U.S.C. § 1605.

5. Martinez, *supra* note 3, at 125 (quoting 28 U.S.C. § 1602).

6. *Id.*

7. *Id.*

8. *Sachs v. Republic of Austria*, 737 F.3d 584, 587 (9th Cir. 2013) (en banc), *rev’g* 695 F.3d 1021, 1029 (9th Cir. 2012), *rev’d sub nom.* OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015).

9. *Sachs*, 737 F.3d. at 587.

10. *Id.* at 588.

OBB in federal district court in California, accusing OBB of negligence, among other things.<sup>11</sup> In response, OBB filed a motion to dismiss the case, claiming sovereign immunity under the FSIA.<sup>12</sup> Agreeing with OBB, the district court dismissed the case for lack of subject matter jurisdiction, citing the FSIA and its grant of foreign sovereign immunity.<sup>13</sup> On appeal, the Ninth Circuit initially affirmed the district court's ruling, but upon a rehearing en banc, a majority reversed, holding that the "commercial activity" exception to the FSIA applied in this case because OBB is a "common carrier . . . [that] engage[d] in commercial activity in the United States when it [sold] tickets in the United States through a travel agent."<sup>14</sup> In October 2015, the parties presented their case to the Supreme Court in *OBB Personenverkehr AG v. Sachs*, and after two months of deliberation, the Court unanimously reversed the Ninth Circuit's decision, concluding that Sachs's suit "[fell] outside the commercial activity exception" and was, therefore, "barred by sovereign immunity."<sup>15</sup>

At the forefront of the decision was a question regarding the interpretation and scope of one of the principal exceptions set forth in the FSIA, namely the commercial activity exception.<sup>16</sup> The relevant portion of the exception states that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state."<sup>17</sup> While the narrow exception provides a limited avenue for domestic litigants to pursue redress against a foreign sovereign, the Ninth Circuit erroneously expanded the scope of the exception to encompass a dispute arising entirely based on an event that took place abroad.

As such, the Supreme Court correctly reversed the Ninth Circuit's grant of subject matter jurisdiction over the Republic of Austria vis-à-vis OBB, because Sachs's claims, which arose entirely from an accident in Austria, were not "based upon" commercial activity engaged in within the United States. Furthermore, the Court's decision was also correct in light of the policy interests at stake, specifically relating to global commerce and U.S. diplomatic relations. Finally, while the Court declined to address whether the express definition of "agency" in the FSIA, the factors set forth

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11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 587.

15. *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 393 (2015).

16. *See id.* at 392–93, 395.

17. 28 U.S.C. § 1605(a)(2) (2012).

in *First National Bank v. Banco El Comercio Exterior de Cuba* (“*Bancec*”), or common law principles of agency control in defining an agent of a foreign state under the commercial activity exception set forth in the FSIA, the express definition of agency in the FSIA offers the best approach for future cases.<sup>18</sup>

The Supreme Court’s decision will preserve the synergy of global commerce in an era of both e-commerce and the emergence of state-owned corporations.<sup>19</sup> Just in the European railway industry alone, there are hundreds of state-owned railway and shipping companies and “[t]ens of thousands” of United States citizens who use the aforesaid companies annually.<sup>20</sup> Had the Court affirmed the lower court’s far-reaching interpretation of the commercial activity exception, such state-owned enterprises may have seen their foreign sovereign immunity undermined “simply because an American passenger purchased a ticket through a travel agency in the United States.”<sup>21</sup> As a result, “European railways could [have] be[en] forced to defend tort actions in the United States arising from accidents occurring entirely in Europe.”<sup>22</sup> In addition, the Supreme Court’s decision upheld the long-standing policy of favoring sovereign immunity as a mechanism of preserving international comity, and thus, creates a stable platform for diplomatic relations going forward.<sup>23</sup>

Part I of this Note explores the origins of the doctrine of sovereign immunity and the history and application of sovereign immunity in federal courts prior to the FSIA’s codification. Part I also examines the legislative intent underlying the FSIA as well as the Act’s well-defined rules.

In addition, Part I provides an in-depth analysis of the commercial activity exception and the seminal United States cases that have interpreted the scope and substance of this exception. Part II focuses on the Supreme Court’s decision in *OBB Personenverkehr AG*, a case that arose under the

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18. *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983).

19. *See generally* Recent Case, *International Law—Foreign Sovereign Immunities Act—Ninth Circuit Holds That Nonpayment in the United States by Counterparty Is Not a Direct Effect of Foreign State’s Breach of Contractual Duties to Be Performed Abroad—Terenkian v. Republic of Iraq*, 694 F.3d 1122 (9th Cir. 2012), 126 HARV. L. REV. 1170, 1170 (2013) (advocating for the rejection of the Ninth Circuit’s legally-significant-act test as applied to an Iraqi state-owned corporation, given the increasing importance of sovereign immunity in light of the growing number of state-owned companies around the world).

20. *See* Amicus Curiae Brief of the Int’l Rail Transp. Comm. in Support of OBB’s Petition for Writ of Certiorari at 1–2, *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015) (No. 13-1067) [hereinafter Int’l Rail Transp. Comm. Brief].

21. *Id.* at 2–3.

22. *Id.* at 3.

23. *See infra* Part I.

FSIA, particularly reviewing the facts that gave rise to the dispute, the legal issues arising from the incident, the procedural posture of the case, and the legal arguments set forth by each side.<sup>24</sup> Part III begins by demonstrating why the Supreme Court correctly found that Sachs's claims were not based upon a commercial activity engaged in within the United States. In addition, Part III illustrates why, from a public policy standpoint, the Supreme Court was correct in reversing the Ninth Circuit's expansive interpretation of the commercial activity exception. Finally, Part III makes a case for the adoption of the express definition of agency set forth in the FSIA for determining when an entity is an agent of a foreign state. In so doing, Part III briefly addresses the alternative standards proposed for agency determinations under the FSIA. This Note concludes by illustrating the presence of other forms of redress for those injured abroad and reiterates why the Supreme Court was correct in reversing the lower court's decision.

## I. BACKGROUND

The following Section examines the origins of the doctrine of foreign sovereign immunity in American jurisprudence and the policy rationales underlying its promulgation. Specifically, this Section covers the scope and application of the "absolute theory" of sovereign immunity and the circumstances surrounding the movement towards the "restrictive theory" of sovereign immunity.<sup>25</sup> Additionally, this Section takes a closer look at the events leading up to the codification of the restrictive theory of sovereign immunity in the FSIA. Finally, the second half of this Section covers the key legal principles set forth in the FSIA, namely the commercial activity exception and the pivotal cases that have interpreted the Act's scope and substance.

### A. SOVEREIGN IMMUNITY: BEFORE THE FSIA

Sovereign immunity "is a core doctrine of U.S. foreign relations law, implementing a fundamental principle of international law: one nation ordinarily cannot be sued in another nation's court."<sup>26</sup> With its deep roots in American jurisprudence and foreign policy, foreign sovereign immunity "is important both formally, as an expression of the independence and legal equality of sovereign states, and practically, as a way of fostering friendly

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24. *OBB Personenverkehr AG*, 136 S. Ct. at 392.

25. *See infra* Part I.A

26. Adam S. Chilton & Christopher A. Whytock, *Foreign Sovereign Immunity and Comparative Institutional Competence*, 163 U. PA. L. REV. 411, 418 (2015) (citation omitted).

international relations.”<sup>27</sup> Foreign sovereign immunity has its origins in common law, initially pronounced by the Supreme Court in *The Schooner Exchange v. McFaddon*.<sup>28</sup> *The Schooner Exchange* involved two citizens of the United States who had their vessel misappropriated by the then–Emperor of France, Napoleon Bonaparte.<sup>29</sup> When the vessel, which the French subsequently used as a warship, moored in an American port, the owners filed suit, asking the court to restore their property.<sup>30</sup> Relying upon international law and principles of territorial sovereignty, the Supreme Court held on appeal that the [vessel], being a public armed ship, in the service of a foreign sovereign . . . should be exempt from the jurisdiction of the country,” reasoning that:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. . . . Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction . . . [t]his full and *absolute* territorial jurisdiction being alike the attribute of every sovereign.”<sup>31</sup>

The case effectively extended “absolute immunity to foreign sovereigns as ‘a matter of grace and comity,’”<sup>32</sup> and laid the foundation for the theory of absolute immunity for years to come.<sup>33</sup>

Although *The Schooner Exchange* did not provide a bright-line approach to sovereign immunity determinations, courts in the following century regularly applied the absolute theory of sovereign immunity articulated by the Court,<sup>34</sup> “granting foreign states immunity for all their political and commercial activities.”<sup>35</sup> For example, in *Berizzi Bros. Co. v. Steamship Pesaro*, the Court “extended the immunity to foreign vessels owned and operated by the foreign state and engaged in commerce.”<sup>36</sup> The

27. *Id.* (citation omitted).

28. *See* *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136–37 (1812).

29. *Id.* at 117.

30. *Id.*

31. *Id.* at 136–37, 147 (emphasis added).

32. *Sachs v. Republic of Austria*, 737 F.3d 584, 589 (9th Cir. 2013) (en banc) (quoting *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010)), *rev’d sub nom.* *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015).

33. Frederick Watson Vaughan, Note, *Foreign States Are Foreign States: Why Foreign State-Owned Corporations Are Not Persons Under the Due Process Clause*, 45 GA. L. REV. 913, 928 (2011) (citing *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)).

34. *See, e.g.,* *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 705 (9th Cir. 1992).

35. Vaughan, *supra* note 33, at 929.

36. Martinez, *supra* note 3, at 128 (citing *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562, 574 (1925)). The dispute in *Pesaro* arose from a breach of contract involving a state-owned commercial vessel. *Pesaro*, 271 U.S. at 570. In extending the principles articulated in *The Schooner Exchange* to commercial activities, the court stated, “the principles are applicable alike to all ships held and used by

absolute theory of sovereign immunity became the norm largely because the United States Department of State was then charged with the responsibility of evaluating foreign immunity claims, and it generally requested immunity “in all actions against friendly sovereigns.”<sup>37</sup> While the judiciary was “theoretically not bound” by the State Department’s determination, “[b]y the 1940’s, it became the Court’s policy not to second-guess the determination of the executive branch.”<sup>38</sup>

This practice continued to be the norm until the 1950s, when the “modes in which sovereign entities engaged with private actors in other nations began to multiply.”<sup>39</sup> In 1952, as a response to the post war surge in international commerce conducted by state-owned and operated companies, the State Department espoused a “‘restrictive’ theory of sovereign immunity.”<sup>40</sup> Under the restrictive theory, foreign states were immune “with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).”<sup>41</sup> In other words, “[w]hen sovereigns engaged in commercial activities like any private actor, they could not claim immunity to suit.”<sup>42</sup> This shift in policy was “based on the philosophy that where foreign sovereigns engage in commercial dealings there is ‘a much smaller risk of affronting their sovereignty.’”<sup>43</sup>

While the adoption of the restrictive theory changed the executive branch’s approach to sovereign immunity determinations, American courts continued to lack any “concrete legislative standards for determining whether to assert jurisdiction over actions against foreign states,” and as a result, sustained their practice of deferring to the executive branch.<sup>44</sup>

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a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are.” *Id.* at 574.

37. *Siderman de Blake*, 965 F.2d at 705 (citing *Verlinden*, 461 U.S. at 486).

38. Martinez, *supra* note 3, at 128.

39. See *Siderman de Blake*, 965 F.2d at 705; Martinez, *supra* note 3, at 128.

40. *Sachs v. Republic of Austria*, 737 F.3d 584, 589–90 (9th Cir. 2013) (en banc), *rev’d sub nom.* *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015). Accord Martinez, *supra* note 3, at 128. In 1952, Jack Tate, the State Department’s Acting Legal Adviser, wrote a letter notifying the Department of Justice that the State Department was moving toward the restrictive theory of foreign sovereign immunity. *Siderman de Blake*, 965 F.2d at 705. The letter appears in 16 DEP’T OF STATE BULL. 984 (1952). According to some, this letter formally “mark[ed] [the] shift in the U.S. approach to granting sovereign immunity to foreign states.” Vaughan, *supra* note 33, at 930.

41. *Siderman de Blake*, 965 F.2d at 705 (quoting 16 DEP’T OF STATE BULL. 984).

42. Martinez, *supra* note 3, at 128–29. Martinez explains, for instance, that whereas a foreign state would be immune from suit in the United States, a passenger airline owned by that foreign government would have no such immunity from suit. *Id.* (citing Jennifer A. Gergen, Note, *Human Rights and the Foreign Sovereign Immunities Act*, 36 V.A. J. INT’L L., 765, 767–69 (1996)).

43. *Sachs*, 737 F.3d at 590 (citation omitted).

44. *Siderman de Blake*, 965 F.2d at 705–06. According to Naomi Roht-Arriaza, “[w]here the

However, the executive branch's determination of sovereign immunity in a given instance was often influenced by significant political and diplomatic considerations.<sup>45</sup> While such considerations were critical to the preservation of the country's diplomatic relations, they created a degree of arbitrariness.<sup>46</sup> In addition, the courts' continued deference to the State Department for evaluations of sovereign immunity created a concern regarding the "timely administration of justice,"<sup>47</sup> as "[t]he private parties seeking to sue foreign states were left in limbo while the State Department considered the requests by those states for immunity."<sup>48</sup> To address these issues, Congress eventually codified (and slightly modified) the restrictive theory of sovereign immunity in the Foreign Sovereign Immunities Act of 1976.<sup>49</sup>

## B. THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

### 1. Legislative Intent and General Principles

In 1976, Congress promulgated the FSIA, which "established a comprehensive 'set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities'" and "shifted the primary responsibility for determining immunity to the federal courts."<sup>50</sup> Congress enacted the FSIA with the goal of providing the "*sole and exclusive* standards to be used in resolving questions of sovereign immunity raised by foreign states before . . . courts in the United States."<sup>51</sup> The drafters of the federal statute "saw it as a response to the need for legislation to deal with the increasing contact of American citizens with foreign states and entities."<sup>52</sup> One of the

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State Department recommended immunity, the courts almost always granted it. By the late 1960s, foreign states were presenting their immunity claims to the Office of the Legal Advisor in informal, quasi-judicial hearings where both sides presented written and oral arguments." Naomi Roht-Arriaza, *The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back?*, 16 BERKELEY J. INT'L L. 71, 71-72 (1998).

45. See Martinez, *supra* note 3, at 129 (citing HAZEL FOX, *THE LAW OF STATE IMMUNITY* 183, 186-87 (2002)).

46. *Id.*

47. *Id.*

48. *Id.*

49. Foreign Sovereign Immunities Act 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended in scattered sections of 28 U.S.C.); 28 U.S.C. § 1604 (2012). See *Sachs v. Republic of Austria*, 737 F.3d 584, 590 (9th Cir. 2013) (en banc), *rev'd sub nom.* *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015).

50. *Sachs*, 737 F.3d at 590 (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004)).

51. H.R. REP. NO. 94-1487, at 12 (1976) (emphasis added).

52. George K. Chamberlin, Annotation, *Exceptions to Jurisdictional Immunity of Foreign States and Their Property Under the Foreign Sovereign Immunities Act of 1976*, 28 U.S.C.S. §§ 1602 *et seq.*,

principal objectives of the legislation was to promote “stability and predictability” in making immunity determinations.<sup>53</sup> In sum, by enacting a definite and exclusive set of standards, Congress believed 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.”<sup>54</sup>

Substantively, the FSIA outlines the jurisdiction of courts in actions against foreign sovereigns, and the conditions under which foreign sovereigns are granted immunity.<sup>55</sup> The general principle articulated in 28 U.S.C. § 1604 states that, “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States.”<sup>56</sup> The Act defines a foreign state as a “political subdivision of a foreign state or an *agency or instrumentality* of a foreign state.”<sup>57</sup> Further, § 1603(b) defines an “agency or instrumentality of a foreign state” as any entity,

- (1) which is a separate legal person, corporate or otherwise, and
- (2) 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 (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.<sup>58</sup>

Thus, the Act effectively creates a statutory presumption that foreign states and their instrumentalities are exempt from suit in domestic courts.

However, the FSIA also lists a number of limited exceptions to the presumption of jurisdictional immunity for foreign sovereigns.<sup>59</sup> Among these, the most prevalent include exceptions for actions in which the foreign state “explicitly or by implication” waives its immunity that would

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59 A.L.R. FED. 99, 103–04 (1982).

53. Vaughan, *supra* note 33, at 931 (citing *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary*, 93d Cong. 14–15 (1973) (statement of Hon. Charles N. Bower, Legal Adviser, Dep’t of State)). The FSIA also had as one of its objectives “the provision of a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state, which provision would render unnecessary the seizure or attachment of a foreign state’s property in order to obtain jurisdiction.” Chamberlin, *supra* note 52.

54. 28 U.S.C. § 1602.

55. *See id.* § 1604.

56. *Id.*

57. *Id.* § 1603(a) (emphasis added).

58. *Id.* § 1603(b)(1)–(3).

59. *See id.* §§ 1605, 1605A.

have otherwise been granted under the Act,<sup>60</sup> including actions involving the commission of a tort by a foreign official within the United States<sup>61</sup> and actions based upon commercial undertakings of the foreign sovereign carried on in the United States.<sup>62</sup> Moreover, a 1996 amendment to the Act carved out another exception for a “state sponsor of terrorism.”<sup>63</sup> If any of the specified exceptions apply, “the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.”<sup>64</sup>

The Supreme Court initially reviewed the FSIA in *Dames & Moore v. Regan*, in which the Court concluded that the federal statute did not affect a president’s long-standing authority to settle claims against foreign states.<sup>65</sup> Nonetheless, it was not until 1989 in *Argentine Republic v. Amerada Hess Shipping Co.*, that the FSIA underwent careful judicial scrutiny.<sup>66</sup> Arising out of the 1982 conflict in the South Atlantic waters between the United Kingdom and the Argentine Republic, the case involved the owners of an oil tanker that was destroyed by the Argentine military while operating outside the war zone.<sup>67</sup> The owners filed a tort action in federal district court for the damage they sustained in the attack, asserting the district court’s jurisdiction under the Alien Tort Statute, which “confers original jurisdiction on district courts over civil actions by an alien for a tort committed in violation of the law of nations or a treaty of the United States.”<sup>68</sup> When the case reached the Supreme Court, in denying jurisdiction over Argentina, the Court held that “the FSIA provides the *sole basis* for obtaining jurisdiction over a foreign state in United States courts.”<sup>69</sup> Alternatively, the plaintiffs sought to invoke the FSIA exception for non-commercial torts, which denies immunity in cases “in which money damages are sought against a foreign state for . . . damage to or loss of property, occurring in the United States and caused by the tortious act or

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60. *Id.* § 1605(a)(1).

61. *Id.* § 1605(a)(5). Under this exception, U.S. courts have jurisdiction over claims based on “personal injury or death, or damage to or loss of property occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that [foreign] state while acting within the scope of his office or employment.” *Id.*

62. *Id.* § 1605(a)(2).

63. *Id.* § 1605A(a)(2)(A).

64. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488–89 (1983) (citing 28 U.S.C. § 1606).

65. *Dames & Moore v. Regan*, 453 U.S. 654, 683–84 (1981).

66. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 428 (1989).

67. *Id.* at 431–32.

68. *Id.* at 428. *See also* 28 U.S.C. § 1350.

69. *Argentine Republic*, 488 U.S. at 443.

omission of that foreign state.”<sup>70</sup> The Court denied the plaintiffs’ attempt to broaden the scope of the exception, instead opting for a narrow interpretation, which limits the applicability of the exception to those cases in which the damage to property “occurs in the United States.”<sup>71</sup>

## 2. Commercial Activity Exception

Considering that the statutory exceptions articulated in 28 U.S.C. § 1605 are the source of a bulk of the litigation surrounding the FSIA,<sup>72</sup> it comes with little surprise that the case facing the Supreme Court in 2015, *OBB Personenverkehr AG*, involved the interpretation and scope of one of these exceptions, specifically the commercial activity exception.<sup>73</sup> The commercial activity exception is outlined in § 1605(a)(2):

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.<sup>74</sup>

The first clause of the commercial activity exception, which is at the center of the controversy in *OBB Personenverkehr AG*,<sup>75</sup> is essentially comprised of three elements: (1) “the activity must be commercial rather than sovereign,” (2) “the activity must be ‘carried on in the United States by the foreign state,’” and (3) “the plaintiff’s suit must be ‘based upon’ that activity.”<sup>76</sup>

As for the first element, the statute defines a commercial activity as “either a regular course of commercial conduct or a particular commercial transaction or act,” and “[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”<sup>77</sup> The Supreme Court expanded on the statutory definition of a commercial activity,

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70. *Id.* at 439. *See also* 28 U.S.C. § 1605(a)(5).

71. *See Argentine Republic*, 488 U.S. at 439–42.

72. *See Chamberlin*, *supra* note 52, at 108–33.

73. *See OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 392 (2015).

74. 28 U.S.C. § 1605(a)(2).

75. *OBB Personenverkehr AG*, 136 S. Ct. at 391.

76. *Sachs v. Republic of Austria*, 737 F.3d 584, 604 (9th Cir. 2013) (en banc) (quoting 28 U.S.C. § 1605(a)(2)), *rev’d sub nom. OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015).

77. 28 U.S.C. § 1603(d).

explaining that “[a]lthough activities that customarily are carried on for profit are certainly commercial, an activity need not be motivated by profit to be commercial.”<sup>78</sup> Instead, the principal inquiry is “whether the activity is of a kind in which a private party might engage.”<sup>79</sup>

The statute also defines the second element of the exception.<sup>80</sup> Per 28 U.S.C. § 1603(e), “commercial activity carried on in the United States by a foreign state,” means “commercial activity carried on by such state and having substantial contact with the United States.”<sup>81</sup> The Ninth Circuit narrowly construed this element of the exception in *Terenkian v. Republic of Iraq*.<sup>82</sup> In *Terenkian*, the owner of two oil brokerages signed and executed a series of contracts in New York to purchase oil from the State Oil Marketing Organization (“SOMO”), a firm wholly owned by the Republic of Iraq.<sup>83</sup> SOMO subsequently breached these contracts and the owner of the oil brokerages filed suit against Iraq in the United States District Court for the Central District of California.<sup>84</sup> The Ninth Circuit rejected the plaintiff’s attempt to invoke the commercial activity exception,<sup>85</sup> explaining that the “commercial activity must be significant and have substantial contact with the United States,” and that although the contracts were negotiated and executed in New York, “[t]he mere happenstance that a contract is executed at a location within the physical boundaries of the United States, by itself, is not sufficient to constitute a significant activity or a substantial contract for purposes of the first clause of § 1605(a)(2).”<sup>86</sup>

Notwithstanding the foregoing, recall that for the purposes of the

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78. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 708 (9th Cir. 1992) (citing *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 780 (9th Cir. 1991); *Joseph v. Office of Consulate Gen. of Nigeria*, 830 F.2d 1018, 1024 (9th Cir. 1987)).

79. *Siderman de Blake*, 965 F.2d at 708 (quoting *Joseph*, 830 F.2d at 1024).

80. See 28 U.S.C. § 1603(e).

81. *Id.*

82. See *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1132 (9th Cir. 2012).

83. *Id.* at 1126–28. The United Nations (“UN”) imposed a trade embargo on Iraq in response to Iraq’s invasion of Kuwait in 1990. *Id.* at 1126 n.1. In 1995, the UN formed the Oil for Food Program, which was intended to enable Iraq to sell small quantities of oil, but required that the payments received for such sales were to be placed into a UN escrow account in New York and used to meet “the humanitarian needs of the Iraqi people.” *Id.* *Terenkian*’s contracts to purchase oil from SOMO were made pursuant to this program. *Id.* at 1126. The Ninth Circuit determined that SOMO’s participation in the Oil for Food Program was not a commercial activity because the program implicated Iraq’s role as a sovereign in meeting the humanitarian needs of its people, but the contracts themselves were a commercial activity. *Id.* at 1136.

84. *Id.* at 1127.

85. *Id.* at 1133.

86. *Id.* at 1137.

FSIA, a foreign state includes any foreign state or any “agency or instrumentality of a foreign state.”<sup>87</sup> Consequently, plaintiffs invoking the commercial activity exception against a foreign state, in suits arising out of an incident not directly involving the foreign state, will be faced with an additional layer of analysis. Specifically, these plaintiffs will have to establish an agency relationship between the alleged wrongdoer and the foreign state in question prior to assessing whether the “commercial activity carried on by such state [had] substantial contact with the United States.”<sup>88</sup> Nonetheless, as discussed in depth below, the question remains as to the appropriate standard for determining when an entity is an agent of a foreign state under the first clause of the commercial activity exception of the FSIA.<sup>89</sup>

Finally, while the FSIA does not provide a clear definition for the third element of the exception, which requires the claim to be based upon commercial activity engaged in within the United States, courts have articulated a narrow meaning through judicial construction and interpretation. For example, in *America West Airlines, Inc. v. GPA Group Ltd.*, the plaintiff filed an action against the Republic of Ireland for injuries sustained due to negligent engine maintenance by an airline company wholly owned by Ireland.<sup>90</sup> In interpreting the based-upon requirement of the commercial activity exception, the Ninth Circuit held that there “must be a nexus between the defendant’s commercial activity in the United States and the plaintiff’s grievance.”<sup>91</sup> Further, “[t]he commercial activity relied upon by [the plaintiff] to establish jurisdiction must be the activity upon which the lawsuit is based.”<sup>92</sup> In other words, the focus must solely be on those “*specific* acts that form the basis of the suit.”<sup>93</sup> In so holding, the court refused to apply the commercial activity exception, explaining that “[t]he ‘*specific* acts that form the basis of the suit,’ are the engine maintenance activities of [the Irish company], which took place solely in Ireland.”<sup>94</sup>

The Supreme Court previously espoused a similar “pragmatic

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87. 28 U.S.C. § 1603(a) (2012).

88. *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397 (2015) (quoting 28 U.S.C. § 1603(e)).

89. *See id.* at 392–94.

90. *Am. W. Airlines, Inc. v. GPA Grp., Ltd.*, 877 F.2d 793, 795 (1989).

91. *Id.* at 796.

92. *Id.*

93. *Id.* (citing *Joseph v. Office of Consulate Gen. of Nigeria*, 830 F.2d 1018, 1023 (9th Cir. 1987)).

94. *Id.* at 797 (citing *Joseph*, 830 F.2d at 1023).

approach” for this analysis in *Saudi Arabia v. Nelson*, stating that a court must ascertain the “gravamen of the complaint” and the specific commercial acts that the claims are based upon in order to determine the applicability of the exception.<sup>95</sup> The Court further articulated that the “based upon” phrase “is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under this theory of the case.”<sup>96</sup>

## II. *OBB PERSONENVERKEHR AG V. SACHS*

OBB Personenverkehr AG is an independent legal entity, owned by the Austrian Federal Ministry of Transport, Innovation, and Technology.<sup>97</sup> OBB operates a passenger rail service and is a member of the Eurail Group, an organization of railway companies whose primary functions include “marketing and selling rail passes.”<sup>98</sup> OBB, however, is a separate entity from the Eurail Group, with distinct management and employees.<sup>99</sup> In March 2007, Carol Sachs, a California resident, bought a Eurail pass from the Rail Pass Experts (“RPE”), a company based in Massachusetts, for travel in Austria.<sup>100</sup> Sachs purchased the Eurail Pass online through RPE’s website.<sup>101</sup> Upon arriving in Austria, Sachs presented her Eurail pass to OBB for boarding and, as she attempted to board the train, she slipped between the tracks and a moving train injured both of her legs, requiring a double amputation.<sup>102</sup> Although Sachs claimed that OBB was at fault by “negligently moving the train while she attempted to board,” OBB maintained that Sachs attempted to board the train after it began moving.<sup>103</sup>

A legal battle ensued in the United States District Court for the Northern District of California, where Sachs filed suit against OBB claiming negligence, strict liability, and breach of various warranties.<sup>104</sup>

In response, OBB filed a motion to dismiss on the grounds of

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95. Petition for a Writ of Certiorari at 29, *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015) (No. 13-1067) (citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993)).

96. *Nelson*, 507 U.S. at 357.

97. *Sachs v. Republic of Austria*, 737 F.3d 584, 587 (9th Cir. 2013) (en banc), *rev’d sub nom.* *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015).

98. *Id.*

99. *Id.* at 604.

100. *Id.* at 587.

101. *Id.*

102. *Id.* at 588.

103. *Id.*

104. *Id.* See *Sachs v. Republic of Austria*, No. C-08-1840 EMC, 2008 U.S. Dist. LEXIS 120066, at \*1 (N.D. Cal. Apr. 21, 2008), *dismissed*, 2010 U.S. Dist. LEXIS 130316 (N.D. Cal. Nov. 22, 2010).

sovereign immunity under the FSIA.<sup>105</sup> The district court granted OBB's motion, concluding that Sachs failed to establish a legal relationship between OBB and RPE, and thus, RPE's actions in the United States could not be attributed to OBB.<sup>106</sup> Sachs subsequently appealed.<sup>107</sup>

On appeal, the Ninth Circuit initially affirmed the lower court's decision.<sup>108</sup> According to the majority, the ticket transaction between RPE and Sachs could not be "imputed to OBB" for purposes of establishing jurisdiction under the FSIA's commercial activity exception.<sup>109</sup> However, the court ordered rehearing en banc "to clarify whether the first clause of the FSIA commercial-activity exception applies to a foreign sovereign when a person purchases a ticket in the United States from a travel agency for passage on a commercial common carrier owned by that foreign state."<sup>110</sup> The litigants agreed that OBB, as an "agent or instrumentality" of the Republic of Austria, qualified as a foreign state under the FSIA.<sup>111</sup> Nor did the parties dispute that RPE's sale of the Eurail pass was a commercial activity within the meaning of the statute.<sup>112</sup> Instead, the questions presented to the en banc court were:

- (1) whether the sale of the Eurail pass, as the underlying commercial activity, [could] be imputed to OBB for purposes of establishing that OBB carried on a commercial activity in the United States; and, if so,
- (2) whether Sachs's claims [were] 'based upon' that commercial activity as required by the commercial activity exception.<sup>113</sup>

With regard to the first issue, the en banc majority held that RPE's online sale of the Eurail pass was attributable to OBB, and thus OBB engaged in a commercial activity.<sup>114</sup> In reaching this conclusion, the court looked outside the parameters of the FSIA and determined that the carried-on requirement articulated in the Act should be "interpreted in light of broad agency principles."<sup>115</sup> Accordingly, the court determined that RPE was in fact OBB's agent under the traditional common law theories of

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105. *Sachs*, 737 F.3d at 588.

106. *Id.*

107. *Id.*

108. *Sachs v. Republic of Austria*, 695 F.3d 1021, 1029 (9th Cir. 2012), *vacated*, 705 F.3d 1112, *abrogated by* 737 F.3d at 587, *rev'd sub nom.* *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015).

109. *Id.* at 1025–26.

110. *Sachs*, 737 F.3d at 589.

111. *Id.* at 591.

112. *Id.*

113. *Id.* at 590–91.

114. *Id.* at 598.

115. *Id.* at 591 (emphasis added).

agency.<sup>116</sup> In so holding, the en banc majority refused to apply agency principles previously applied by the Ninth Circuit and by the Supreme Court in cases such as *Doe v. Holy See* and *Bancec* and further declined to apply FSIA's express definition of an "agency or instrumentality of a foreign state."<sup>117</sup>

While imputing the RPE ticket transaction to OBB was necessary to establish that the "commercial activity was carried on in the United States," it was not sufficient to do so, as the en banc majority had to also determine whether the sale created "substantial contact" with the United States.<sup>118</sup> After sidestepping their previous holding in *Terenkian*, in which the Ninth Circuit found that "the mere happenstance" of executing a contract for sale of crude oil in the United States was not a substantial contact, the court dubiously held that "[t]he sale and marketing of Eurail passes within the United States [was] sufficient to meet the substantial-contact element, and to show that OBB carried on commercial activity in the United States."<sup>119</sup>

Furthermore, the en banc majority recognized that the phrase "based upon" within the meaning of 28 U.S.C. § 1605(a)(2) "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under [his or her] theory of the case."<sup>120</sup> However, "it is not necessary that the entire claim be based upon the commercial activity [of OBB]."<sup>121</sup> Rather, the based upon requirement would be satisfied "if *an element* of [Sachs's] claim consists in conduct that occurred in commercial activity carried on in the United States."<sup>122</sup> Since the purchase of the Eurail pass formed a "passenger-carrier relationship" between Sachs and OBB, a required component of the negligence and breach of warranty claims, the en banc majority determined that the requisite nexus was established.<sup>123</sup> Ultimately, the en banc majority held that "[a] foreign-state owned

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116. *Id.* at 598. The en banc majority reasoned that "Eurail Group markets and sells rail passes for transportation on OBB's rail lines, making Eurail group an agent of OBB. Eurail Group enlists subagents, like RPE, to sell and market its passes worldwide. Eurail Group's use of these subagents establishes a legal relationship between OBB (the principal) and RPE (the subagent)." *Id.* at 593.

117. *Id.* at 594–95. See *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983) (holding that instrumentalities created by a foreign state could be liable for acts of the foreign state, "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created," or when separateness "would work fraud or injustice" (citation omitted)); *Doe v. Holy See*, 557 F.3d 1066, 1077 (9th Cir. 2009).

118. *Sachs*, 737 F.3d at 598 (quoting 28 U.S.C. § 1603(e) (2012)).

119. *Id.* at 599. See *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1132 (9th Cir. 2012).

120. *Sachs*, 737 F.3d at 599 (citation omitted).

121. *Id.*

122. *Id.* (citation omitted).

123. *Id.* at 600–02.

common carrier, such as a railway or airline, engages in commercial activity in the United States when it sells tickets in the United States through a travel agent regardless of whether the travel agent is a direct agent or subagent of the common carrier.”<sup>124</sup>

Three judges dissented from the majority in two separate opinions.<sup>125</sup> First, Judge O’Scannlain, joined by the two other dissenters, opposed the en banc majority’s analysis of the agency issue, arguing that the “meaning of ‘foreign state’ remains constant throughout the statute, and textual evidence from other provisions demonstrates that ‘foreign state’ cannot be so broad as to include all authorized agents of a foreign state.”<sup>126</sup> Instead, Judge O’Scannlain argued that the standard articulated in *Bancec*, as refined in *Holy See*, “provides the proper standard for attributing the actions of third parties to foreign states.”<sup>127</sup> While Chief Judge Kozinski agreed with Judge O’Scannlain’s conclusions, he argued that the case should have been dismissed on other grounds.<sup>128</sup> Specifically, Judge Kozinski maintained that “[b]ecause plaintiff’s claim arises from events that transpired entirely in Austria, it isn’t ‘based upon’ commercial activity carried on in the United States.”<sup>129</sup>

In January 2015, the Supreme Court granted a petition for a writ of certiorari.<sup>130</sup> The issues confronting the Supreme Court were twofold: (1) “[w]hether, for purposes of determining when an entity is an ‘agent’ of a ‘foreign state’ under the first clause of the commercial activity exception of the FSIA . . . the express definition of ‘agency’ in the FSIA, the factors set forth in [*Bancec*], or common law principles of agency, control,” and (2) “[w]hether, under the first clause of the commercial activity exception of the FSIA . . . a tort claim for personal injuries suffered in connection with travel outside of the United States is ‘based upon’” a commercial activity carried on in the United States by a foreign state.<sup>131</sup> In December 2015, in a unanimous decision delivered by Chief Justice Roberts, the Court overturned the Ninth Circuit’s assertion of subject matter jurisdiction over the Republic of Austria in the dispute between OBB and Sachs.<sup>132</sup> In reaching this conclusion, the Court recognized that while Sachs purchased

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124. *Id.* at 587.

125. *Id.* at 603–13.

126. *Id.* at 605 (O’Scannlain, J., dissenting).

127. *Id.* at 607.

128. *See id.* at 611.

129. *Id.* (citing 28 U.S.C. § 1605(a)(2) (2012)).

130. OBB Personenverkehr AG v. Sachs, 135 S. Ct. 1172, 1173 (2015).

131. Petition for a Writ of Certiorari, *supra* note 95, at i.

132. OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390, 392–93 (2015).

a Eurail pass in the United States, her suit was not based upon a commercial activity carried on in the United States by a foreign state.<sup>133</sup> Since the case was decided on these grounds, the Court declined to address the second issue, namely, which agency principles control for the purposes of determining when an entity is an agent of a foreign state.<sup>134</sup>

### III. ANALYSIS

The following analysis begins by demonstrating why the Supreme Court was correct in reversing the Ninth Circuit's far-reaching interpretation of the commercial activity exception from a purely legal standpoint. The analysis also illustrates why the Court's decision was appropriate in light of the policy considerations at stake, namely, the potential impact on global commerce and U.S. foreign policy and diplomatic relations. Finally, while the Supreme Court did not address which agency principles should control for the purpose of determining when an entity is an agent of a foreign state, this Note makes the case for the use of the express definition of agency set forth in the FSIA for future cases arising under the FSIA.

#### A. SACHS'S CLAIMS WERE NOT BASED UPON ACTIVITY CARRIED ON IN THE UNITED STATES

The Supreme Court correctly reversed the Ninth Circuit's overly expansive interpretation of the commercial activity exception because Sachs's claims "[arose] from events that transpired entirely in Austria" and thus, were not based upon commercial activity carried on in the United States.<sup>135</sup> While the FSIA does not provide a standard for evaluating whether a plaintiff's suit is based upon activity engaged in within the United States, the Supreme Court previously adopted a "pragmatic approach" for that analysis in *Saudi Arabia v. Nelson*.<sup>136</sup> Under the *Nelson* approach, a court must "identif[y] the particular conduct on which the [plaintiff's] action is based."<sup>137</sup> Further, in identifying the particular conduct, the court must look to the "basis or foundation for a claim"; in other words, to "those elements . . . that, if proven, would entitle a plaintiff

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133. *Id.*

134. *Id.* at 391–92.

135. *Sachs v. Republic of Austria*, 737 F.3d 584, 611 (9th Cir. 2013) (en banc) (Kozinski, J., dissenting), *rev'd sub nom.* *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015). See 28 U.S.C. § 1605(a)(2) (2012).

136. Petition for a Writ of Certiorari, *supra* note 95, at 29; *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993).

137. *Nelson*, 507 U.S. at 356.

to relief,” and to “the gravamen of the complaint.”<sup>138</sup>

However, the Ninth Circuit misconstrued *Nelson* by creating a “broad test that merely requires a nexus between any act in the subject course of events and *any element* of a claim under U.S. law.”<sup>139</sup> As noted in OBB’s petition for a writ of certiorari, the lower court had effectively “done away with the ‘based upon’ requirement by holding that it suffices that one element of any claim be based on any fact occurring in the U.S.; here, the ticket sale by RPE unrelated to OBB.”<sup>140</sup> The approach espoused by the en banc majority in *Sachs* would enable plaintiffs to elude the FSIA’s restrictions through “artful pleading,” since “[a]n action can frequently be brought under multiple theories” and “[e]ach of these theories accords plaintiffs plenty of opportunity to find at least one element involving domestic commercial conduct.”<sup>141</sup> Thus, not only was the lower court’s decision “flatly incompatible” with the Supreme Court’s analysis in *Nelson*,<sup>142</sup> but the decision also “runs contrary to [the] background rule that foreign states are immune from suit, subject only to ‘*narrow exceptions*.’”<sup>143</sup>

By way of analogy, consider the similarity between the circumstances surrounding the plaintiff’s claim in *Nelson* and *Sachs*’s claim against OBB. In *Nelson*, the respondent, Scott Nelson, was recruited and hired in the United States by Saudi Arabian officials to work at a state hospital in Saudi Arabia.<sup>144</sup> While in Saudi Arabia, Nelson was arrested after making a series of complaints about poor working conditions and was subsequently injured while detained.<sup>145</sup> After returning to the United States, Nelson sued Saudi Arabia for unlawful detention and torture.<sup>146</sup> The Supreme Court ultimately held that the commercial activity exception was not applicable, as the plaintiff’s claim was not based upon a commercial activity in the United States, namely Saudi Arabia’s recruitment and official employment, but rather upon the torts that occurred in Saudi Arabia.<sup>147</sup> According to the

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138. *Id.* at 356–57 (citation omitted).

139. Petition for a Writ of Certiorari, *supra* note 95, at 29 (emphasis added).

140. *Id.* at 32.

141. *Sachs v. Republic of Austria*, 737 F.3d 584, 612 (9th Cir. 2013) (en banc) (Kozinski, J., dissenting), *rev’d sub nom.* *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015).

142. *OBB Personenverkehr AG*, 136 S. Ct. at 392.

143. *Sachs*, 737 F.3d at 612 (Kozinski, J., dissenting) (emphasis added) (citing *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1125 (9th Cir. 2010)). *See also* Petition for a Writ of Certiorari, *supra* note 95, at 13.

144. *Saudi Arabia v. Nelson*, 507 U.S. 349, 351–52 (1993).

145. *Id.* at 352–53.

146. *Id.* at 353–54.

147. *Id.* at 356–57.

Court, while the recruitment and signing of the employment contract “led to the conduct that eventually injured [Nelson], they are not the basis for [Nelson’s] suit.”<sup>148</sup> Rather, “[t]hose torts, and not the . . . commercial activities that preceded their commission, form the basis for the suit.”<sup>149</sup> Similarly, Sachs’s negligence and strict liability claims were not based upon the purchase and sale of the Eurail pass in the United States, but rather, her claims were based upon the alleged tortious conduct of OBB that “plainly occurred abroad.”<sup>150</sup> While purchasing a Eurail pass led to the conduct that eventually injured Sachs, all of Sachs’s claims “turn[ed] on the same tragic episode in *Austria*, allegedly caused by wrongful conduct and dangerous conditions in *Austria*, which led to injuries suffered in *Austria*.”<sup>151</sup>

Moreover, consider the attenuated chain of events, as illustrated by Judge Kozinski in his dissent, upon which the en banc majority grounded its decision.<sup>152</sup> The plaintiff purchased a Eurail pass for travel throughout Europe.<sup>153</sup> Sachs was later injured as a result of OBB’s alleged negligence as she attempted to board its train.<sup>154</sup> Both the alleged negligence and the injury took place in Austria.<sup>155</sup> Yet, “because [Sachs] happened to buy her ticket online from a vendor in Massachusetts, a federal court in California now asserts power to hale the Austrian government before it and make it defend against a claim based on facts that occurred in Austria.”<sup>156</sup> Giving jurisdictional significance to such a tenuous relation between a foreign sovereign and some commercial activity that happened to occur in the United States would “effectively thwart the Act’s manifest purpose to codify the restrictive theory of foreign sovereign immunity,”<sup>157</sup> which grants foreign states immunity from lawsuits within the United States, subject to only “narrow exceptions.”<sup>158</sup>

Alternatively, OBB’s petition for a writ of certiorari raised an intriguing argument based on basic statutory interpretation, which further

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148. *Id.* at 358.

149. *Id.*

150. OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390, 396 (2015).

151. *Id.* (emphasis added).

152. Sachs v. Republic of Austria, 737 F.3d 584, 613 (9th Cir. 2013) (en banc) (Kozinski, J., dissenting), *rev’d sub nom.* OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015).

153. *See id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* (citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 363 (1993)).

158. *Id.* at 612 (citing *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1125 (9th Cir. 2010)). *See also* Petition for a Writ of Certiorari, *supra* note 95, at 64.

supports the Supreme Court's conclusion.<sup>159</sup> As highlighted by the petitioner, the FSIA specifically enumerates an exception for tortious conduct by a foreign state, which grants jurisdiction to American courts "only over torts occurring in the United States."<sup>160</sup> Accordingly, Congress implied that "acts involving torts occurring entirely overseas (like this case) would not be grounds for jurisdiction under the FSIA."<sup>161</sup> Thus, the lower court arguably ran "afoul" of the Act by creating tort jurisdiction where the legislature has effectively "said there is none."<sup>162</sup>

For the foregoing reasons, the Supreme Court was correct in holding that a tort claim for injuries suffered while traveling outside of the United States was not based upon commercial activity carried on in the United States by a foreign state.

#### B. THE SUPREME COURT'S DECISION IN LIGHT OF POLICY CONSIDERATIONS

Not only was the Supreme Court's decision to overturn the Ninth Circuit's broad assertion of jurisdiction over a state-owned corporation sound from a legal standpoint, but the decision was also correct in light of the policy considerations at stake. Expanding the scope of the commercial activity exception, as was done by the Ninth Circuit en banc majority, would have "allow[ed] for a major, open-ended expansion of . . . jurisdiction into an area with substantial impact on the United States' foreign relations."<sup>163</sup> The Supreme Court was presumably "mindful that judicial resolution" of such jurisdictional matters "might have serious foreign policy implications which courts are ill-equipped to anticipate or handle."<sup>164</sup> Among such implications, are undesirable effects on global commerce and foreign diplomatic relations.

First, expanding the scope of the commercial activity exception would hinder global commerce, especially considering the recent surge of state-owned corporations.<sup>165</sup> In today's global economy, state-owned corporations are rapidly increasing their presence.<sup>166</sup> As illustrated by

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159. Petition for a Writ Certiorari, *supra* note 95, at 32.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Sampson v. Fed. Republic of Ger.*, 250 F.3d 1145, 1155–56 (7th Cir. 2001).

164. Petition for a Writ of Certiorari, *supra* note 95, at 35–36 (quoting *Sampson*, 250 F.3d at 1155–56).

165. Vaughan, *supra* note 33, at 916 (citing Phillip Riblett, *A Legal Regime for State-Owned Companies in the Modern Era*, 18 J. TRANSNAT'L L. & POL'Y 1, 3 (2008)).

166. *Id.*

Frederick Watson Vaughan, an individual “may fly commercially via a state-owned airline,” an American citizen “may seek the services of a state-owned bank,” or as in this case, “[a] person traveling abroad may be injured while boarding a train managed by a state-owned train operator.”<sup>167</sup> Vaughan further notes that the “worldwide financial crisis” of 2008–2009 “prompted many industrialized states to increase their interests in private corporations.”<sup>168</sup> In addition, we have witnessed the growth of state-owned corporations in many developing countries including Brazil, China, India, and Singapore.<sup>169</sup> Because of the “proliferation” of such corporations, there is an ever-increasing likelihood of “doing business with an agency or instrumentality of a foreign state.”<sup>170</sup>

This result is magnified with the ever-increasing ubiquity of Internet transactions.<sup>171</sup> Traditional modes of foreign commerce, which were primarily limited to international manufacturers and distributors, are rapidly reaching a stage of obsolescence, as the Internet has bridged the gap between foreign state-owned corporations and the average consumer by overlooking borders and enabling merchants and consumers to interact wherever in the world they are. The result: unlimited potential contacts taking place daily between millions of consumers within the United States and foreign state-owned enterprises.

With this reality in mind, the Supreme Court’s decision preserves the progression and synergy of global commerce as it protects foreign sovereigns from the possibility of being subjected to a plethora of lawsuits in the United States for commercial dealings with American citizens that otherwise have minimal or insignificant contacts with the United States. Alternatively, the Ninth Circuit’s decision would have caused state-owned corporations to be overly wary when dealing with American nationals. For instance, the government of the Netherlands articulated such concerns in its amicus curiae brief in support of OBB.<sup>172</sup> The Dutch argued that the Ninth Circuit’s erroneous decision “could conceivably extend to situations where

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167. *Id.*

168. *Id.* (citing Francisco Flores-Macias, *The Return of State-Owned Enterprises: Should We be Afraid?*, HARV. INT’L REV. (Apr. 4, 2009), <http://hir.harvard.edu/article/?a=1854>).

169. *Id.* at 916–17.

170. *Id.*

171. See Mitch Barns, *Global E-Commerce Becoming the Great Equalizer*, FORBES (Jan. 20, 2016), <https://www.forbes.com/sites/greatspeculations/2016/01/20/global-e-commerce-becoming-the-great-equalizer/#5fb295025773>.

172. See Brief of the Gov’t of the Kingdom of the Neth. as Amicus Curiae in Support of the Petitioner in Its Petition for a Writ of Certiorari at 7–9, OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015) (No. 13-1067) [hereinafter Neth. Brief].

a foreign state-owned common carrier sells tickets directly from its website to customers all over the world, but otherwise has no contacts with the United States,” adding that “the mere purchase of a ticket from a website accessible in the United States cannot automatically give the U.S. courts global jurisdiction over any injury sustained abroad by a U.S. national while traveling on the ticket.”<sup>173</sup> These concerns articulated by Netherlands likely would have spread to other foreign governments had the Supreme Court affirmed the lower court. As a result, faced with the potential for having to defend a flurry of actions in American courts, foreign state-owned corporations would be overly cautious in dealing with American nationals, leading to inefficient dealings with unnecessarily high transaction costs for both sides. Consequently, the Court’s decision acknowledges that “[c]lear boundaries for the foreign sovereign immunity exceptions are crucial to the FSIA’s role of balancing stable international commerce against the effective execution of foreign policy,” and “[a] vague policy of expansive jurisdiction could appear unduly arbitrary and invite reciprocal scrutiny of U.S. law enforcement by foreign courts.”<sup>174</sup>

In addition, the Supreme Court’s decision averts potential threats to the United States’ foreign policy and diplomatic relations, which would have otherwise existed under the Ninth Circuit’s broad assertion of jurisdiction.<sup>175</sup> “The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—‘the political’—Departments of the Government.”<sup>176</sup> Prior to the FSIA’s enactment, the State Department had the responsibility of assessing whether a foreign state should be afforded immunity in a given dispute.<sup>177</sup> In carrying out this duty, the State Department strongly considered various political and diplomatic matters that were at play, illustrating the government’s recognition of potential adverse effects on its foreign relations.<sup>178</sup>

While the FSIA was enacted to avoid the arbitrary results produced by this case-by-case approach, it did so by providing the courts with clearly defined and narrow boundaries, accounting for ramifications that an assertion of extraterritorial jurisdiction may produce. Even the Supreme Court, in prior decisions, has acknowledged these risks and emphasized the

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173. *Id.* at 7–8.

174. J.H. Trotter, Recent Development, *Narrow Construction of the FSIA Commercial Activity Exception: Saudi Arabia v. Nelson*, 33 VA. J. INT’L L. 717, 733 (1993).

175. See Neth. Brief, *supra* note 172, at 20.

176. *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918).

177. See *infra* Part I.A.

178. Martinez, *supra* note 3, at 129 (citing FOX, *supra* note 45, at 186–87).

importance of staying within the boundaries of the FSIA to avoid impairing our foreign relations.<sup>179</sup> For instance, in *Daimler AG v. Bauman*, while criticizing the lower court's far-reaching assertion of extraterritorial jurisdiction, the Court stated that "[the lower court] paid little heed to the risks to international comity its expansive view of general jurisdiction posed."<sup>180</sup> The Court noted that the risk to international comity had previously shown its teeth, as "[t]he Solicitor General inform[ed] [the Supreme Court], in this regard, that 'foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements."<sup>181</sup>

The controversy around the Justice Against Sponsors of Terrorism Act ("JASTA"), typifies many of the aforementioned concerns.<sup>182</sup> On September 28, 2016, JASTA became law after the House and Senate overrode then-President Obama's veto of the legislation, which was designed in part to allow the victims of the September 11 attacks, or their relatives, to pursue legal action against the Saudi Arabian government for its possible role in the attacks.<sup>183</sup> In short, JASTA grants federal courts jurisdiction over civil claims against foreign governments for injuries that occur within the United States, arising from international terrorism and tortious acts of the "foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, *regardless where the tortious act or acts of the foreign state occurred.*"<sup>184</sup> Notably, JASTA allows such litigation against nations that have "neither been designated by the executive branch as state sponsors of terrorism nor taken direct actions in the United States to carry out an attack" within our borders.<sup>185</sup>

In his three-page veto letter to Congress, President Obama echoed many of the same concerns articulated above with respect to the risks to foreign policy and diplomatic relations resulting from a far-reaching

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179. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014).

180. *Id.*

181. *Id.*

182. See Jennifer Steinhauer et al., *Congress Votes to Override Obama Veto on 9/11 Victims Bill*, N.Y. TIMES (Sept. 28, 2016), <https://www.nytimes.com/2016/09/29/us/politics/senate-votes-to-override-obama-veto-on-9-11-victims-bill.html>.

183. *Id.*

184. Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 1605B(b)(1)–(2), 130 Stat. 852, 853 (2016) (emphasis added).

185. Message to the Senate Returning Without Approval the Justice Against Sponsors of Terrorism Act, 2016 DAILY COMP. PRES. DOC. 628 (Sept. 23, 2016) [hereinafter Message to the Senate].

assertion of extraterritorial jurisdiction.<sup>186</sup> For instance, according to Obama, exposing our allies and other international partners to a litany of litigation in American courts “threatens to limit their cooperation on key national security issues” and “create[s] complications in our relationships with even our closest partners.”<sup>187</sup> Regardless of any prognosticating into the ramifications on foreign policy and diplomatic relations resulting from far-reaching assertions of extraterritorial jurisdiction, since JASTA’s inception, many international counterparts have contacted the American government with “serious concerns.”<sup>188</sup> Amongst these nations is Saudi Arabia, a long-standing ally, who has threatened to dispose of up to \$750 billion in United States Treasury securities and other assets in response to this piece of legislation.<sup>189</sup> Obama voiced an additional concern, one relating to “reciprocity,” which he argued “plays a substantial role in foreign relations.”<sup>190</sup> According to Obama, a far-reaching assertion of jurisdiction over foreign governments “could encourage foreign governments to act reciprocally and allow their domestic courts to exercise jurisdiction over the United States or U.S. officials” for various actions overseas.<sup>191</sup>

Faced with the potential threat to diplomatic relations and international comity, the Supreme Court appropriately conducted a careful interpretation of the FSIA and exercised a degree of caution before concluding whether Congress intended for the commercial activity exception to apply to this case. Otherwise, expanding this narrow exception beyond the parameters of the FSIA and into the realm of foreign policy would have been detrimental, as the adjudication of such issues by the politically out-of-touch judiciary would have adversely affected the strategic foreign diplomatic endeavors or policies adopted by the executive branch. To illustrate this point, consider diplomatic relations between the United States and the Islamic Republic of Iran during Barack Obama’s presidency. While the United States’ relationship with Iran has grown, due in part to the efforts of the executive branch under Obama, this relationship remains fragile at best.<sup>192</sup> The United States and Iran conducted a series of

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186. *See id.*

187. *Id.*

188. *Id.*

189. Mark Mazzetti, *Saudi Arabia Warns of Economic Fallout if Congress Passes 9/11 Bill*, N.Y. TIMES (Apr. 15, 2016), <https://www.nytimes.com/2016/04/16/world/middleeast/saudi-arabia-warns-of-economic-fallout-if-congress-passes-9-11-bill.html>.

190. Message to the Senate, *supra* note 185.

191. *Id.*

192. *See* GARY SAMORE ET AL., HARVARD KENNEDY SCH. BELFER CTR. FOR SCIENCE & INT’L AFFAIRS, *THE IRAN NUCLEAR DEAL: A DEFINITIVE GUIDE* (Gary Samore, ed., 2015),

negotiations in order to reach a deal curtailing Iran's nuclear proliferation program.<sup>193</sup> Throughout the course of those negotiations, each nation exhibited a great deal of distrust and tension toward the other.<sup>194</sup> While I surely would not go as far as to say that an assertion of jurisdiction over an Iranian state-owned corporation would have undermined all diplomatic efforts by the United States, one could plausibly argue that a broad and *unwarranted* assertion of jurisdiction over an Iranian state-owned corporation would have increased the skepticism and sense of distrust on the part of our foreign counterpart, and possibly imperiled negotiations.

In sum, the Supreme Court appropriately "guard[ed] against" the lower court's broad reading of the commercial activity exception to foreign sovereign immunity "because expanding federal jurisdiction in this area can have serious foreign policy consequences."<sup>195</sup>

#### C. THE QUESTION LEFT UNANSWERED: THE PROPER STANDARD FOR ASSESSING AGENCY ISSUES UNDER THE FSIA

As noted in Part I.B.2., the commercial activity exception, as set forth in 28 U.S.C. § 1605(a)(2) of the FSIA, requires that the action be "based upon a commercial activity *carried on in the United States by the foreign state*."<sup>196</sup> Under the FSIA, "commercial activity carried on in the United States by a foreign state" is defined as "commercial activity carried on by such [foreign] state and having substantial contact with the United States."<sup>197</sup> Furthermore, recall that according to the FSIA, a foreign state includes a foreign state, as well as "an agency or instrumentality of a foreign state."<sup>198</sup> As such, deciding when an entity acts as an agent of a foreign state is critical, as "an agent's actions can abrogate the sovereign immunity typically afforded to the foreign state."<sup>199</sup>

However, the Supreme Court in *OBB Personenverkehr AG* left unanswered the critical question of whether the express definition of

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<http://www.belfercenter.org/sites/default/files/legacy/files/IranDealDefinitiveGuide.pdf>.

193. *Id.*

194. *See id.*

195. *Sachs v. Republic of Austria*, 737 F.3d 584, 603 (9th Cir. 2013) (en banc) (O'Scannlain, J., dissenting), *rev'd sub nom.* *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015).

196. 28 U.S.C. § 1605(a)(2) (2012) (emphasis added).

197. *Id.* § 1603(e).

198. *Id.* § 1603(a).

199. Jennifer Lichtman, Comment, *She's Got a Ticket to Ride: The Ninth Circuit's Determination in Sachs v. Republic of Austria That a Ticket Sale by a Common Law Agent Abrogates a Foreign State-Owned Common Carrier's Sovereign Immunity*, 56 B.C. L. REV. E. SUPP. 92, 98 (2015), <http://lawdigitalcommons.bc.edu/bclr/vol56/iss6/8>.

agency in the FSIA, the factors set forth in *Bancec*, or common law principles of agency should control for the purposes of determining when an entity is an agent of a foreign state under the first clause of the commercial activity exception.<sup>200</sup> As a result, there is a great deal of uncertainty amongst federal courts regarding the proper standard for determining who is an agent or subagent of a foreign state for the purposes of evaluating whether a commercial activity was carried on in the United States. Notwithstanding this uncertainty, the express definition of agency set forth in the FSIA should be utilized for determining when an entity is an agent of a foreign state under the first clause of the commercial activity exception of the FSIA.

### 1. The Express Definition of Agency Set Forth in the FSIA

Section 1603(a) of the FSIA defines a foreign state as including a “political subdivision of a foreign state or an agency or instrumentality of a foreign state.”<sup>201</sup> The Act further defines “agency or instrumentality” of a foreign state as an entity,

- (1) which is a separate legal person, corporate or otherwise, and
- (2) 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 (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.<sup>202</sup>

Both the plain language and the legislative intent underlying the FSIA suggest that the express definition of agency set forth above is the appropriate standard for deciding when an entity is an agent of a foreign state for the purposes of the commercial activity exception.

There is no dispute among the courts that the aforementioned statutory language is “relevant insofar as determining which entities may claim *sovereign immunity*” under the FSIA.<sup>203</sup> However, as noted by Judge O’Scannlain in his dissenting opinion in *Sachs*, “[a] standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning.”<sup>204</sup> In accordance with this principle, the term “foreign state” in the FSIA, as

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200. *OBB Personenverkehr AG*, 136 S. Ct. at 391–92.

201. 28 U.S.C. § 1603(a).

202. *Id.* § 1603(b)(1)–(3).

203. Lichtman, *supra* note 199, at 101. *See also* *Sachs v. Republic of Austria*, 737 F.3d 584, 595 (9th Cir. 2013) (en banc), *rev’d sub nom.* *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015).

204. *Sachs*, 737 F.3d at 605 (O’Scannlain, J., dissenting) (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 170 (2012)).

defined in 28 U.S.C. § 1603(a), has a consistent meaning throughout the statute, and thus, the statutory language is not only relevant “insofar as determining which entities may claim *sovereign immunity*,” but also in determining whether acts of an agent can be imputed to the principal.<sup>205</sup> Consequently, the use of any other standard for such determinations would directly contradict the statutory text.

In addition, the framers of the FSIA enacted the statute with the principal purpose of providing the “sole and *exclusive* standards to be used in resolving questions of sovereign immunity raised by foreign states before . . . courts in the United States.”<sup>206</sup> The framers were motivated primarily by the arbitrariness prevalent in sovereign immunity determinations prior to the FSIA’s codification, and by the need to establish uniform standards for evaluating such claims.<sup>207</sup> Therefore, adopting the express definition of agency set forth in the FSIA is consistent with the purpose of the FSIA, as this approach promotes the uniformity the framers sought to achieve while avoiding the confusion that could arise from the use of standards outside the scope of the statute.

Pursuant to the express definition of agency set forth in the FSIA, in the case at hand, RPE is not an authorized agent of OBB, nor does RPE have any legal relations with OBB. First, RPE is an entity independently owned and operated in Massachusetts,<sup>208</sup> and therefore is an entity “which is a separate legal person, corporate or otherwise.”<sup>209</sup> In addition, RPE is likely not “an organ of a foreign state,” specifically of the Republic of Austria, or a “political subdivision” thereof.<sup>210</sup> While the FSIA does not define the term “organ” as used in 28 U.S.C. § 1603(b)(2), a number of appellate courts have had the opportunity to construe the term and have used various factors in assessing whether an entity is an organ of a foreign state.<sup>211</sup> These factors include, but are not limited to, “the degree of supervision by the government,” “the level of government financial support,” “the entity’s employment policies, particularly regarding whether the foreign state requires the hiring of public employees and pays their salaries,” and “the ownership structure of the entity (i.e., whether it is

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205. Lichtman, *supra* note 199, at 101.

206. H.R. REP. NO. 94-1487, at 12 (1976) (emphasis added).

207. See Martinez, *supra* note 3, at 129.

208. *Sachs*, 737 F.3d at 609.

209. 28 U.S.C. § 1603(b)(1) (2012).

210. *Id.* § 1603(b)(2).

211. TOM MCNAMARA, DAVIS GRAHAM & STUBBS LLP, A PRIMER ON FOREIGN SOVEREIGN IMMUNITY 6 (Mar. 2006), <https://www.dgslaw.com/images/materials/McNamara1.pdf>.

indirectly owned by the foreign state).”<sup>212</sup> Based on the foregoing factors, RPE is likely not an organ of Austria, as Austria does not supervise RPE, nor does it provide RPE with any financial support.

Finally, there is no evidence in the record that even remotely indicates that RPE is a subordinate group of OBB; rather, the facts indicate that RPE is an entity completely independent of OBB, with distinct management and operations. Lastly, neither Austria nor OBB own any “shares or other ownership interest” in RPE.<sup>213</sup> Thus, while the sale of the Eurail Pass by RPE took place in the United States, OBB did not carry on that activity, but rather, that transaction is attributable solely to RPE.

## 2. The *Bancec* Standard

Some argue in the alternative, as did the dissent in *Sachs*,<sup>214</sup> that the standard set forth in *Bancec* should control.<sup>215</sup> In *Bancec*, the Supreme Court held that instrumentalities formed by foreign states could subject the foreign state to liability under two circumstances:<sup>216</sup> first, “where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created;” and second, where separateness, as provided by corporate law, “would work fraud or injustice.”<sup>217</sup> While *Bancec* addressed liability, the Ninth Circuit in *Holy See* later adopted this standard for determining when acts of a third party could be imputed to a foreign state for the purposes of ascertaining subject matter jurisdiction under the Act.<sup>218</sup> In *Holy See*, the Ninth Circuit also clarified that the first prong is satisfied where the foreign state engages in “day-to-day [or] routine involvement” in the affairs of another corporation.<sup>219</sup>

Nevertheless, the *Bancec* standard is not the appropriate test for future agency determinations under the FSIA because, as articulated by the en banc majority in *Sachs*, both *Bancec* and *Holy See* “determined agency in the context of assessing responsibility of corporate affiliates,” such as a

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212. *Id.* at 7. *See also* USX Corp. v. Adriatic Ins. Co., 345 F.3d 190, 209 (3rd Cir. 2003); EOTT Energy Operating Ltd. P’ship v. Winterthur Swiss Ins. Co., 257 F.3d 992, 997 (9th Cir. 2001); Kelly v. Syria Shell Petroleum Dev. B.V., 213 F.3d 841, 846–47 (5th Cir. 2000); RSM Prod. Corp. v. Petroleos de Venez. Societa Anonima, 338 F. Supp. 2d 1208, 1212 (D. Colo. 2004).

213. *See* 28 U.S.C. § 1603(b).

214. *Sachs v. Republic of Austria*, 737 F.3d 584, 607 (9th Cir. 2013) (en banc) (O’Scannlain, J., dissenting), *rev’d sub nom.* OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015).

215. *See* First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 629 (1983).

216. *Id.*

217. *Id.*

218. *Doe v. Holy See*, 557 F.3d 1066, 1078 (9th Cir. 2009).

219. *Id.* at 1079.

parent-subsidiary relationship.<sup>220</sup> In addition, as noted by Jennifer Lichtman, “common sense dictates” that the *Bancec* standard would not be appropriate for determining when an entity is an agent of a foreign state under the commercial activity exception, because under this standard, “a foreign state-owned common carrier would be exempted from liability in any circumstance where the passenger’s ticket was purchased by a travel agent whose day-to-day operations did not include involvement from the foreign state.”<sup>221</sup> As Lichtman argues, “a foreign state’s sophisticated lawyers could intentionally craft ownership structures to preserve immunity.”<sup>222</sup>

### 3. Common Law Principles of Agency

Others have advocated for the use of common law principles of agency for determining when an entity is an agent or subagent of a foreign state. According to the Restatement (Third) of Agency, a principal may “expressly or impliedly” authorize an agent to appoint a subagent to perform certain functions on behalf of the principal.<sup>223</sup> Implied authorization arises when the principal knows, or has reason to know, that the agent employed a subagent and does not attempt to terminate the subagent’s employment.<sup>224</sup> Consequently, a subagent’s actions carry “the same legal consequences for the principal as if it were the agent acting.”<sup>225</sup> As a result, “where a subagent acts within the scope of the subagency relationship, the acts are attributable to the principal.”<sup>226</sup>

However, the use of common law principles of agency for determining when an entity is an agent of a foreign state for the purposes of the commercial activity exception, as done by the en banc majority in *Sachs*, is erroneous and unmoored to the doctrines and principles set forth in the FSIA. FSIA was meant to provide the “sole and exclusive standards to be used in resolving questions of sovereign immunity.”<sup>227</sup> Looking beyond the parameters of the statute to alternative bodies of law for settling questions of sovereign immunity contradicts its fundamental purpose. Similarly,

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220. *Sachs v. Republic of Austria*, 737 F.3d 584, 594 (9th Cir. 2013) (en banc), *rev’d sub nom.* *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015).

221. Lichtman, *supra* note 199, at 103.

222. *Id.*

223. RESTATEMENT (THIRD) OF AGENCY § 3.15 cmt. f (AM. LAW INST. 2006). *See also* 19 WILLISTON ON CONTRACTS § 54:15 (4th ed. 2016).

224. 19 WILLISTON, *supra* note 223, § 54:15.

225. Lichtman, *supra* note 199, at 99 (citing RESTATEMENT (THIRD) OF AGENCY § 3.15 cmt. d).

226. *Id.* (citing RESTATEMENT (THIRD) OF AGENCY § 7F.04).

227. H.R. REP. NO. 94-1487, at 12 (1976).

Lichtman points out that since the FSIA provides the “sole basis for obtaining subject matter jurisdiction over a foreign state, uniformity is essential.”<sup>228</sup> Yet the common law approach inherently lacks uniformity, since the common law varies from jurisdiction to jurisdiction.<sup>229</sup>

For the foregoing reasons, the express definition of agency set forth in the FSIA is the appropriate standard for determining when an entity is an agent of a foreign state under the first clause of the commercial activity exception of the FSIA.

### CONCLUSION

In sum, the Supreme Court correctly reversed the Ninth Circuit’s broad assertion of jurisdiction over the Republic of Austria, *vis-à-vis* OBB, because Sachs’s claims, which arose entirely from an accident that took place abroad, were not based upon commercial activity engaged in within the United States. Moreover, the Court’s decision to overturn the Ninth Circuit’s ruling was also appropriate in light of the public policy interests at stake, specifically those relating to global commerce and diplomatic and foreign relations. Finally, although the Court declined to articulate the correct standard for determining when an entity is an agent of a foreign state under the first clause of the commercial activity exception to the FSIA, both the plain language and legislative intent underlying the FSIA suggest that the express definition of agency set forth in the Act should be utilized.

Once again, this Note highlights the need for the cautious adjudication of future sovereign immunity cases, not only to preserve the synergy of global commerce in the face of rapid globalization, but also to maintain a stable platform for American diplomatic relations going forward. Furthermore, this Note conveys the significance of establishing the correct standard to apply when determining whether an agency relationship exists between an entity and a foreign state, as the standard selected will be outcome-determinative for almost every suit brought against a foreign government for acts of a third party within the United States.

Taking a step back, it is quite possible that “[u]nderlying the Ninth Circuit’s opinion may have been the unexpressed fear that without a means to overcome sovereign immunity, Americans like Ms. Sachs would lack redress for injuries suffered on European railways,” and so the *en banc* majority, with good intentions, widely expanded the scope of the

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228. Lichtman, *supra* note 199, at 104.

229. *See id.*

commercial activity exception to the FSIA as a means of protecting Sachs.<sup>230</sup> However, as noted by the International Rail Transport Committee, this “notion is wholly unfounded.”<sup>231</sup> There is an abundance of international law under which Sachs, and others like her, could pursue recourse against the Austrian government for their alleged wrong. For instance, the Convention Concerning International Carriage by Rail (“COTIF”), “govern[ing] rail travel in nearly 50 nations in Europe, Caucasia, the Maghreb, and the Middle East,” sets forth “detailed provisions governing carrier liability for passengers who suffer delays or accidents.”<sup>232</sup> With that being said, the exceptions to the FSIA were indeed enacted to provide domestic litigants with an *alternative* means for redress within the United States despite such international laws, and thus, American courts should not simply disregard these express provisions in favor of international law. Instead, future courts dealing with such issues must bear in mind the primary purpose underlying the FSIA, namely to preserve the liberties of domestic litigants in the United States, *as well as* the rights of foreign sovereigns.<sup>233</sup> In doing so, the judiciary must try to stay within the boundaries articulated by Congress in the FSIA, as being overly protective of a domestic litigant will not only undercut the spirit of the Act, but will also lead to undesirable implications.

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230. See Int'l Rail Transp. Comm. Brief, *supra* note 20, at 7.

231. *Id.*

232. *Id.*

233. See Martinez, *supra* note 3, at 125.