Articles

Investment Disputes and Federal Power in Foreign Relations

TIM R SAMPLES*

As with other areas of foreign relations law, sovereign immunity has traditionally been treated as exceptional, an area of executive branch primacy. However, since the end of the Cold War, exceptionalism has given way to normalization, as the United States Supreme Court has grown increasingly assertive in rejecting executive branch dominance in matters of foreign relations. In parallel, a boom in economic globalization and international investment law has created new avenues for disputes between foreign investors and sovereign states. These trends have magnified questions about the relationship between investment disputes and national courts. Yet, in the United States, this relationship remains poorly defined. The Court gave some consideration to this question in BG Group PLC v. Republic of Argentina*, its first encounter with treaty-based*

* Associate Professor of Legal Studies, Terry College of Business, University of Georgia, with a courtesy appointment at the University of Georgia School of Law. The author would like to thank the scholars who joined his *amicus curiae* brief on related topics in connection to a Supreme Court petition filed by the Republic of Argentina and YPF S.A., including Julián Cárdenas, Kevin Fandl, Rodrigo Olivares-Caminal, Michael D. Ramsey, Frédéric G. Sourgens, Rachel L. Wellhausen, and Larry Catá Backer. The author also wishes to thank Sebastian Puerta for his invaluable research assistance, as well as colleagues at the 2019 National Business Law Scholars Conference at UC Berkeley School of Law and the Academy of Legal Studies in Business for their helpful comments. The author also appreciates support from a Terry-Sanford Award as well as a 2017-18 Core Fulbright U.S. Scholar Award, both of which helped pave the way for this research. This Article received the Ralph J. Bunche Award for Best Paper in International Business Law from the Academy of Legal Studies in Business in August 2020.

international investment arbitration, but fundamental uncertainties remain.

The Foreign Sovereign Immunities Act of 1976 (FSIA) provides the sole basis for obtaining jurisdiction over foreign sovereigns in courts of the United States. However, since the adoption of the FSIA, developments in global commerce and international law have dramatically altered the landscape for investor-state disputes. Among them is the international system for investor-state dispute settlement (ISDS), a treaty-based system for resolving disputes between foreign investors and sovereign states. This Article observes that the FSIA has grown out of sync with global commerce and international investment law. In doing so, this Article considers the relationship between national courts and the ISDS system in the context of the normalization versus exceptionalism debate in foreign relations law.

INTRODUCTION

Suits against foreign sovereigns are uniquely complicated. For one, haling a sovereign defendant into the court system of another sovereign poses delicate foreign relations and reciprocity risks.[1] Further, litigation in a foreign judicial system often involves incursions into the internal affairs of the sovereign defendant, creating tension with notions of reciprocal respect and independence among sovereigns.[2] Finally, the limitations of enforceability against a sovereign defendant can place courts in difficult situations with the potential for collateral damage for third parties.[3] Given these complexities, coherent approaches to sovereign immunity—the legal doctrine that defines when and how foreign sovereigns can be sued—are critical for effective diplomacy and foreign relations.[4]

Despite traditional deference to the "comparative institutional competence" of the executive branch, the judiciary is increasingly assertive in matters of foreign affairs.[5] Since the end of the Cold War, foreign relations law has drifted away from exceptionalism—the idea that foreign affairs are fundamentally different from domestic affairs and, fundamentally, a prerogative of the executive—in favor of

1. *See* The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 135 (1812) (describing foreign sovereign immunity as a "very delicate and important" question); Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493 (1983) ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident.").

2. Sovereign immunity is based on the "absolute independence of every sovereign authority" as a matter of international comity, which reflects reciprocal notions of deference and respect among nations. *See* Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1319 (2017) (citing Berizzi Brothers Co. v. S.S. Pesaro, 271 U.S. 562, 575 (1926)).

3. *See, e.g.*, W. Mark C. Weidemaier & Anna Gelpern, *Injunctions in Sovereign Debt Litigation*, 31 YALE J. ON REGUL. 189, 192–93 (2014) (articulating the potential for collateral damage to third parties in enforcement efforts against sovereign defendants).

4. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. IV, ch. 5, intro. note at 391 (AM. L. INST. 1987) (noting the importance of foreign sovereign immunity as "necessary for the effective conduct of international intercourse and the maintenance of friendly relations" with other nations).

5. *See* Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CALIF. L. REV. 919, 950 (1989) (reviewing WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1988)) (defining comparative institutional competence as "a principle built . . . on the assumption that certain institutions are better suited than others to perform particular tasks").

normalization.[6] As part of normalization, the judicial branch is showing less deference to the principle of executive dominance in foreign affairs, increasingly treating questions in foreign relations like routine and justiciable issues of domestic law.[7] This trend is also understood as a movement away from functionalism in favor of formalism in foreign relations law.[8] Both of these conceptual frameworks offer valuable and interrelated perspectives on a common thread: a decidedly more assertive judiciary in the law of foreign relations.[9]

Sovereign immunity is no exception to this trend. Arguably, the normalization of sovereign immunity predates the broader normalization of foreign relations law.[10] A legislative effort culminating in the Foreign Sovereign Immunities Act (FSIA)[11] formally transferred immunity determinations from the executive to the judiciary in 1976,

---

6. *Compare* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1907–08 (2015) (defining the "normalization" of foreign affairs law), *with* Curtis A. Bradley, Breard*, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 539 n.51 (1999) (defining exceptionalism in foreign affairs law), *and* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 461 (1998) (explaining the origins of foreign affairs exceptionalism). In this Article, the terms "foreign relations" and "foreign affairs" are used interchangeably.

7. In this context, "normalization" refers to the treatment by courts of foreign relations issues as justiciable, "run-of-the-mill" matters of domestic law. *See* Sitaraman & Wuerth, *supra* note 6, at 1901.

8. Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 389 (2015) ("Where the Court earlier used functionalism to give the political branches, and in particular the Executive, greater room to maneuver in a globalizing world, the Court now seems determined to rein them in."); Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1424 (1999) ("Since the end of the Cold War, the Supreme Court and lower federal courts have begun to adopt a more formalistic approach to the judicial foreign relations doctrines under consideration here.").

9. During the "war on terror" that followed September 11, a series of decisions saw the Court challenging executive dominance in matters of foreign affairs. *See, e.g.*, Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006). Under the Roberts Court, the Court has continued to challenge executive dominance in an even wider variety of cases, including investment disputes. *See* Cohen, *supra* note 8, at 417–34; *see also* Sitaraman & Wuerth, *supra* note 6, at 1924–34.

10. *See* W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. ILL. L. REV. 67, 77–81 (2014) (outlining the evolution of immunity practices before and after the FSIA); *see also* Adam S. Chilton & Christopher A. Whytock, *Foreign Sovereign Immunity and Comparative Institutional Competence*, 163 U. PA. L. REV. 411, 418–19 (2015) (discussing the FSIA's transfer of immunity decisionmaking authority in the context of comparative institutional competence claims).

11. The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330–1620 [hereinafter "FSIA"].

well before the current era of post-Cold War normalization.[12] More recently, decisions by the Court in FSIA cases reflect a further consolidation of formalism and normalization in foreign relations law. *Republic of Austria v. Altmann* set the tone when the Court accorded "no special deference" to executive views in an immunity case.[13] In *Republic of Argentina v. NML Capital, Ltd*., an immunity case connected to the "trial of the century" in sovereign debt,[14] the Court went even further, making no mention that executive views would even receive case-by-case deference.[15] The Court's assertiveness in these cases departs from roughly two centuries—virtually since the founding of the nation—of deference to the executive branch in sovereign immunity determinations.[16] Some decisions by the Court also suggest a greater appetite for judicial assertions over extraterritorial matters.[17]

Economic globalization has expanded and deepened points of contact between multinational companies and sovereign states.[18] As a byproduct of that trend, disputes between sovereign states and foreign investors have increased sharply since the 1990s.[19] With the gradual narrowing of sovereign immunity, states are also more vulnerable to suits in other countries, increasing opportunities for jurisdictional conflict.[20] Responding to the globalization of capital investments, many countries turned to a treaty-based system—known as investor-state

12. *See* Sitaraman & Wuerth, *supra* note 6, at 1919–35 (cataloging three waves in the trend towards normalization since the end of the Cold War).

13. Republic of Austria v. Altmann, 541 U.S. 677, 701 (2004) ("While the United States' views on such an issue are of considerable interest to the Court, they merit no special deference.").

14. *See, e.g.*, Juan J. Cruces & Tim R Samples, *Settling Sovereign Debt's "Trial of the Century*,*"* 31 EMORY INT'L L. REV. 5, 7 (2016).

15. Republic of Arg. v. NML Cap., Ltd., 573 U.S. 134, 146 (2014).

16. *See infra* Section I.C. (tracing the Court's departure from executive deference in United States sovereign immunity law).

17. *See, e.g.*, Sitaraman & Wuerth, *supra* note 6, at 1932–33 (discussing extraterritoriality issues in recent decisions by the Court); *see also* Karen Halverson Cross, *The Extraterritorial Reach of Sovereign Debt Enforcement*, 12 BERKELEY BUS. L.J. 111, 138 (2015) (exploring legal problems and foreign policy concerns raised by extraterritorial enforcement in *NML*).

18. *See* Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1176 (2007) ("The importance of international relations doctrines has been growing over time – a consequence of the increasing frequency of cross-border activity and the corresponding efforts of the U.S. government to regulate that activity.").

19. *See infra* Section II.C. (illustrating the dramatic increase in investor-state disputes since 1990).

20. *See* Peter B. Rutledge, *Toward a Functional Approach to Sovereign Equality*, 53 VA. J. INT'L L. 181, 184 (2015).

dispute settlement (ISDS)—for resolving investor-state disputes.[21] In a matter of two decades, over three thousand treaties with ISDS provisions were signed, rapidly consolidating the system for resolving conflicts between foreign investors and sovereign states.[22] Since the end of the Cold War, few areas of international law have grown as rapidly as investment law.

In *BG Group PLC v. Republic of Argentina*, the Court contemplated the interpretation of an investment treaty, offering some preliminary considerations, but did not resolve lingering doubts about the relationship between the ISDS system and United States courts.[23] At the same time, the Court's opinion in *BG Group* contained a definitive expression of normalization in foreign relations law, with a direct rejection of the Solicitor General's arguments.[24] In *Petersen Energía Inversora S.A.U. v. Argentine Republic*, also an extraterritorial investment dispute, a Spanish investment company brought a case in the Second Circuit over Argentina's expropriation of its shares in the country's state-owned energy company, YPF (Yacimientos Petrolíferos Fiscales).[25] After the district court denied immunity, Argentina and YPF appealed, lost, and then petitioned for Supreme Court review.[26]

---

21. In this Article, the "ISDS system" is understood as the body of thousands of investment treaties, investment arbitration jurisprudence, and institutional frameworks such as the International Centre for Settlement of Investment Disputes (ICSID). *See* Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427 (2010) (arguing that international treaty frameworks constitute a global "regime" for investment law); *see also infra* Section II.B. (tracing the emergence and dramatic growth of international investment law and dispute resolution frameworks).

22. *See infra* Section II.C. (describing the proliferation of investment treaties during the current era of economic globalization).

23. *See* Diane Marie Amann, *Opinion Analysis: Clear Statement Ruling in Investor-State Arbitration Case Leaves Open Question on U.S. Bilateral Treaties*, SCOTUSBLOG (Mar. 6, 2014, 4:06 PM), https://www.scotusblog.com/2014/03/opinion-analysis-clear-statement-ruling-in-investor-state-arbitration-case-leaves-open-question-on-u-s-bilateral-treaties/ [https://perma.cc/DY33-EJDA].

24. BG Grp. PLC v. Republic of Arg., 572 U.S. 25, 37 (2014) ("We do not accept the Solicitor General's view as applied to the treaty before us.").

25. Argentina lost on appeal in the Second Circuit. *See* Petersen Energía Inversora S.A.U. v. Argentine Republic, 895 F.3d 194 (2d Cir. 2018). Subsequently, the litigation was engulfed in scandal as Burford Capital, the litigation finance fund that owned Petersen's stake in the litigation, was accused of accounting fraud in relation to its valuation of the Argentina/YPF litigation. *See Burford Reveals Petersen Value*, INVS. CHRON. (April 28, 2020), https://www.investorschronicle.co.uk/shares/2020/04/28/burford-reveals-petersen-value/ [https://perma.cc/2K6N-XP4L].

26. Part III of this Article develops some of the views expressed in an amicus brief filed in connection with a writ for certiorari filed by Argentina and YPF. In the interest of full disclosure, I should note that I served as lead author of that amicus brief in support of granting

In denying certiorari, the Court left open questions about the relationship between investment treaties and the United States court system.

Clashes over immunity are not limited to investment disputes. And, where sovereign states are defendants, foreign relations issues often loom large. As an amicus party, the United States routinely urges the Court to review cases while citing foreign relations consequences.[27] At other stages of litigation, the government may also file statements of interest on behalf of a sovereign defendant, as seen recently in an unusual expression of support for Venezuela's state-owned oil company.[28] Last year, the indictment of an unidentified state-owned enterprise in connection with the investigation of Special Counsel Robert Mueller thrust questions of sovereign immunity and foreign relations before the Court.[29] During subpoena hearings, an entire floor of the United States Court of Appeals for the District of Columbia Circuit was shut down to preserve the anonymity of the parties.[30] Prominent cases involving terrorism suspects have also raised

review. The Republic of Chile and the United Mexican States also filed amicus briefs in support of Argentina's petition for review. All three briefs are available at *Argentine Republic v. Petersen Energia Inversora S.A.U.*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/argentine-republic-v-petersen-energia-inversora-s-a-u/ [https://perma.cc/LSQ3-9NKN].

27. Two such instances were granted certiorari in the summer of 2020. One case involves the seizure of artwork by Nazi officials. *See* Brief for the United States as Amicus Curiae, Republic of Ger. v. Alan Philipp, et al., 592 U.S. __ (2021) (No. 19-351) at 20 ("Litigation against foreign sovereigns frequently raises foreign-policy concerns, and U.S. interests may be particularly sensitive where the claims allege serious human rights abuses on the part of a foreign state."). The other case is a class action against Nestlé USA and Cargill Inc. brought by formerly enslaved children who were forced to work on cacao plantations in the Ivory Coast. *See* Brief for the United States as Amicus Curiae, Nestlé USA, Inc. v. John Doe I, __ U.S. __ (2020) (Nos. 19-416, 19-453) at 20–21 (noting sensitive foreign relations consequences that Alien Torts Statute litigation often involves).

28. *See* Mark Weidemaier & Mitu Gulati, *The US Government Mumbles Something in Support of Venezuela*, CREDIT SLIPS (July 27, 2020, 3:55 PM), https://www.creditslips.org/creditslips/2020/07/the-us-government-mumbles-something-in-support-of-venezuela html [https://perma.cc/92AC-YQ84].

29. *See* Ingrid Wuerth, *The D.C. Circuit's Opinion in the Mystery Subpoena Case: Unresolved Personal Jurisdiction Issues*, LAWFARE (Jan. 10, 2019, 4:19 PM), https://www.lawfareblog.com/dc-circuits-opinion-mystery-subpoena-case-unresolved-personal-jurisdiction-issues [https://perma.cc/9AE5-YGJR].

30. Ultimately, the Court denied certiorari, permitting fines for contempt against the mysterious company. *See* Andrew Prokop, *The Mysterious Grand Jury Appeal Reportedly Tied to the Mueller Investigation, Explained*, VOX (Jan. 8, 2019, 5:15 PM), https://www.vox.com/2018/12/19/18147495/mueller-grand-jury-mystery-country-a [https://perma.cc/3SX2-MA48].

complicated questions about foreign relations and federal authority in immunity determinations.[31]

In the absence of legislation and textual clarity in the Constitution, consensus on the horizontal allocation of federal authority in foreign relations remains elusive.[32] Compelling arguments exist in favor of both exceptionalism[33] (deference to the executive) and normalization[34] (a greater role for the judicial branch) in foreign relations law.[35] Finding that the normalization of sovereign immunity is part of—but also predates—the broader normalization of foreign relations law, this Article applies core arguments in the exceptionalism-normalization debate to the question of investor-state disputes.[36] Drawing on that analysis, this Article suggests that shifts in the global economy and international law merit a rethinking of the relationship between sovereign immunity, United States courts, and extraterritorial investor-state disputes.

This Article proceeds in three parts. Part I of this Article explains the unique sensitivities and challenges inherent in adjudicating claims against foreign sovereigns. These complexities are widely recognized. Supreme Court decisions since the founding of the United

31. *See generally* Harold Hongju Koh, *Foreign Official Immunity After* Samantar*: A United States Government Perspective*, 44 VAND. J. TRANSNAT'L L. 1141 (2011).

32. *See, e.g.*, Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT'L L. 805, 805 (1989) ("[N]o consensus has been reached on the appropriate role for the judiciary in cases relating to U.S. foreign relations."); Peter B. Rutledge, Samantar *and Executive Power*, 44 VAND. J. TRANSNAT'L L. 885, 889–90 (2011) (highlighting prominent cases that grapple with the allocation of power among the branches in matters of international civil litigation); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, YALE L.J. 231, 233 (2001) ("[M]odern scholarship has achieved no consensus on even the most basic framework for resolving disputes over the allocation of particular foreign affairs powers . . . .").

33. *See*, *e.g.*, Curtis A. Bradley, 'Chevron' *Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000); Posner & Sunstein, *supra* note 18; Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507 (2011); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941 (2004); Margaret A. Niles, *Judicial Balancing of Foreign Policy Considerations: Comity and Errors under the Act of State Doctrine*, 35 STAN. L. REV. 327 (1983).

34. *See, e.g.*, Sitaraman & Wuerth, *supra* note 6, at 1901 (articulating a position in favor of normalization in foreign relations law); Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1236 (2007) (arguing that courts should scrutinize executive interpretations of international law).

35. This Article observes that normalization represents an important shift in foreign relations law since the end of the Cold War, but does not take a normative stance in the exceptionalism versus normalization debate.

36. *See infra* Section I.C. (describing the impact of the FSIA in the allocation of federal power over sovereign immunity determinations).

States have acknowledged the delicate implications of sovereign immunity determinations. Sovereign immunity law and international investment law have also responded to these complexities in distinct but parallel ways. Part I then evaluates the recent trend towards normalization and formalism in United States sovereign immunity law. That analysis considers three Supreme Court cases with particular relevance to extraterritorial investment disputes in United States courts: *Altmann*,[37] *BG Group*,[38] and *NML*.[39]

Part II of this Article assesses shifts in the global economy and international law following the Cold War that dramatically reshaped the landscape for investor-state relations. In doing so, three major transformations are addressed: (1) the growth of foreign investment as a major component of global economic activity; (2) the boom in international investment law; and (3) the rise of investor-state arbitration and the ISDS system, which now provides a highly active framework for resolving investment claims against foreign sovereigns. The sum of these developments amounts to a sea change for investment disputes and, more broadly, for investor-state relations. This Part shows how radically the foreign investment and dispute resolution ecosystem has changed since the adoption of the FSIA.

Part III considers the allocation of federal power in foreign relations, applying key issues in the normalization versus exceptionalism debate to the question of extraterritorial investor-state disputes. Among the points addressed are comparative institutional competence, reciprocity and foreign relations risks, and coherence or uniformity in foreign affairs. The discussion in Part III also considers the aims of the FSIA while reflecting on implications involved in the allocation of federal power in foreign relations law. In doing so, this Part adds to the issues raised in *BG Group* regarding the interaction of investment disputes in United States courts and treaty-based ISDS. Finally, a brief conclusion follows.

I. SUING FOREIGN SOVEREIGNS IN THE UNITED STATES

The law of sovereign immunity has roots in the nation's early history, beginning with *The Schooner Exchange v. McFaddon* in 1812. Much later, in the first half of the twentieth century, sovereign immunity evolved rapidly in response to major changes in the global

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

38. BG Grp. PLC v. Republic of Arg., 572 U.S. 25 (2014).

39. Republic of Arg. v. NML Cap., Ltd., 573 U.S. 134 (2014).

commerce and international law. A monumental shift occurred with the transition from absolute to restrictive sovereign immunity, formally expressed through the Tate Letter in 1952. Then came the codification of the restrictive theory of sovereign immunity in 1976 with the enactment of the FSIA. This Part discusses those historical developments within the context of normalization and comparative institutional competence. This Part also addresses the uniquely sensitive and challenging nature of adjudicating investor-state disputes in national court systems. Finally, this Part assesses the more recent normalization of sovereign immunity law in the United States with a focus on investment disputes.

A. The Law of Foreign Sovereign Immunity

Adjudicating claims against a foreign sovereign in the national courts of another sovereign is uniquely complex, with inherent sensitivities and important consequences in foreign relations.[40] These complexities are widely acknowledged in Supreme Court cases, the law of sovereign immunity, and international investment law.[41] Throughout history, an awareness of foreign relations implications has defined approaches to sovereign immunity in the United States. For good reason, sovereign immunity is considered a "core doctrine" of United States foreign relations law.[42] Sovereign immunity has undergone fundamental changes in the past century, particularly in the shift towards the restrictive theory of sovereign immunity, which curtailed immunity in meaningful ways. Whereas the absolute theory of immunity generally only allows suit where a foreign state consents to be sued, the restrictive theory limits immunity to public acts, opening the door for litigation over sovereign acts that are commercial in nature.[43]

Decided by the Supreme Court in 1812, *The Schooner Exchange v. McFaddon* is the classic starting point in sovereign immunity case law.[44] After a distressed French naval vessel, *The Balaou No. 5*, entered the Philadelphia harbor for repairs, two United States

40. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493 (1983) ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States.").

41. *See infra* notes 75–78 and accompanying text.

42. *See* Chilton & Whytock, *supra* note 10, at 418.

43. *See Verlinden*, 461 U.S. at 487 (stating that under the restrictive theory "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts").

44. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).

citizens who claimed to be the rightful owners of the ship filed suit, hoping to regain possession.[45] The plaintiffs claimed that their schooner, named *The Exchange*, had been seized on the high seas by the French Navy, repurposed as a war ship, and eventually renamed *The Balaou No. 5*.[46] Writing on behalf of a unanimous Court, Chief Justice Marshall's opinion held that the warships of a foreign sovereign at peace with the United States are immune from jurisdiction, absent some expression or intervention from the executive branch to the contrary.[47]

Although *The Schooner Exchange* is often considered a seminal expression of the absolute theory of sovereign immunity, the statements on immunity were nuanced.[48] For instance, the opinion provides grounds for distinguishing between the public and private acts of a sovereign.[49] Indeed, twelve years later, the Marshall Court again drew similar public-private distinctions regarding state interests in a trading company.[50] Distinctions between public acts (*acta jure imperii*) and private acts (*acta jure gestionis*) later became the essence of the restrictive theory of sovereign immunity.[51] The opinion further narrowed the scope of the holding by emphasizing that the question of immunity related to a naval ship.[52]

Yet, despite laying the groundwork for commercial versus non-commercial distinctions and despite its narrow holding, *The Schooner*

---

45. *Id*. at 118.

46. *Id*.

47. In *The Schooner Exchange*, the executive branch formally expressed its view—in favor of dismissing the suit, which the Court did—through the filing of a "suggestion" by the United States Attorney. A "suggestion" is a formal expression of the views of the executive branch. *See* A. H. Feller, *Procedure in Cases Involving Immunity of Foreign States in Courts of the United States*, 25 AM. J. INT'L L. 83, 86 (1931).

48. *See, e.g.*, Daniel T. Murphy, *The American Doctrine of Sovereign Immunity: An Historical Analysis*, 13 VILL. L. REV. 583, 587 (1968) (examining the statements on immunity in *The Schooner Exchange* and finding that they are not entirely absolute).

49. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 145 (distinguishing between the hypothetical acts of a prince acquiring private property in a foreign country and the acts of the military force of a sovereign power).

50. Bank of United States v. Planters Bank, 22 U.S. (9 Wheat.) 904, 907 (1824) ("[W]hen a government becomes a partner in any trading company, it [divests] itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen.").

51. *See* Monroe Leigh, *Sovereign Immunity–The Case of the "Imias,"* 68 AM. J. INT'L L. 280, 280 (1974) (articulating restrictive immunity distinctions between commercial and sovereign activities).

52. *See* JOSEPH W. DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS 3 (1988) (analyzing various nuances in Marshall's *Planters Bank* opinion).

Exchange provided the basis for extending virtually absolute immunity to foreign sovereigns in United States courts.[53] For over a century and a half, courts generally adhered to the theory of absolute sovereign immunity.[54] Under that theory, "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign," regardless of the nature of the actions giving rise to a claim.[55] As a result, sovereigns were immune from virtually any and all unwanted litigation abroad. Throughout this period, courts generally deferred to input from the executive branch—namely, the State Department—when making immunity determinations.[56]

Prompted by changes in the global marketplace, absolute immunity waned in the early part of the twentieth century.[57] As sovereign states became more involved as market participants, engaging in activities that were more commercial in nature, absolute immunity became increasingly problematic.[58] The practical and theoretical difficulties of absolute immunity were further exacerbated by the rise of

53. *See id.* at 3 ("Later courts, however, usually seized upon such words as 'absolute' and 'exclusive' in the *Exchange* opinion to read it as announcing a theory of absolute immunity for foreign states before U.S. courts.").

54. *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983) ("For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country."); Samantar v. Yousef, 560 U.S. 305, 311 (2010) (interpreting *The Schooner Exchange* as "extending virtually absolute immunity to foreign sovereigns").

55. Permanent Mission of India to the U.N. v. City of N.Y., 551 U.S. 193, 199 (2007) *citing* Letter from Jack B. Tate, Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984 (1952) [hereinafter Tate Letter].

56. Input on immunity determinations was generally provided by the State Department. *See* Michael H. Cardozo, *Judicial Deference to the State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?*, 48 CORNELL L. REV. 461, 467–76 (1963) (reviewing prominent cases that illustrate State Department approaches to sovereign immunity determinations).

57. *See* DELLAPENNA, *supra* note 52, at 3–8 (tracing the transition from absolute to restrictive immunity); *see also* Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 36–43 (1978) (same).

58. *See* THOMAS M. FRANCK ET AL., FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS, AND SIMULATIONS 307 (3d ed. 2008); *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 30 (1976) (testimony of Bruno A. Ristau, Chief, Foreign Litig. Section, Civil Division, Dep't of Just.) [hereinafter Ristau Testimony] ("That consideration is more forceful today than it was two decades ago, for the intervening years have seen a sharp increase in the volume of trade between American businesses and foreign states or their instrumentalities, acting in a commercial capacity.").

state-owned enterprises in the marketplace.[59] Conferring absolute immunity to sovereigns and their instrumentalities amounted to an unfair advantage with, at times, unjust outcomes for other parties transacting with sovereigns.[60] After World War II, the pivot towards restrictive immunity accelerated rapidly.[61] In 1952, the Tate Letter marked a more formal adoption of the theory of restrictive immunity.[62] The transition towards restrictive immunity underscored changes in the global marketplace as well as in international law.[63] Addressed to the Justice Department from the State Department, the Tate Letter also initiated an effort to transfer at least partial responsibility for immunity determinations to the courts.[64]

Two decades later, efforts to codify restrictive immunity and further transfer the immunity process to the judiciary were under way. In 1973, the State Department and Justice Department jointly

---

59. *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. 24 (1973) (testimony of Charles N. Brower, Legal Adviser, Dep't of State) ("An increasing number of countries in the world have state trading corporations or do business . . . through corporations which are controlled by the state.").

60. *See* Tate Letter, *supra* note 55, at 985 ("[T]he widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts."); *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 27 (1976) (testimony of Monroe Leigh, Legal Adviser, Dep't of State) [hereinafter Leigh Testimony] ("The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties.").

61. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. IV, ch. 5, intro. note at 391 (noting the rapid expansion of restrictive immunity after World War II); *see also* Pierre-Hugues Verdier & Erik Voeten, *How Does Customary International Law Change? The Case of State Immunity*, 58 INT'L STUD. Q. 209, 214–15 (2015) (illustrating the rise of restrictive immunity).

62. *See* Tate Letter, *supra* note 55, at 985 ("[I]t will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity."). However, while clearly embracing restrictive immunity, the Tate Letter did not establish substantive criteria for differentiating commercial acts from public or non-commercial acts. *See* DELLAPENNA, *supra* note 52, at 7 (referring to interpretation difficulties for courts and the State Department due to the absence of criteria for distinguishing commercial and non-commercial acts).

63. *See* Leigh Testimony, *supra* note 60, at 26 ("The Tate Letter was based on a realization that the prior absolute rule of sovereign immunity was no longer consistent with modern international law.").

64. *See* Cardozo, *supra* note 56, at 465–66; *see also* Chilton & Whytock, *supra* note 10, at 425–26 (describing the procedure of immunity determinations following the Tate Letter).

submitted a draft sovereign immunity bill to Congress.[65] After further discussion and debate, a revised draft bill was then submitted in 1975. These efforts culminated in the FSIA, adopted in 1976 after nearly a decade of deliberation, which effectively ended the joint executive-judicial approach.[66] The FSIA aimed to free the State Department from diplomatic pressures while establishing a more objective and predictable framework for immunity determinations. In doing so, the FSIA established a comprehensive statutory framework that codified the restrictive theory of sovereign immunity while also transferring primary responsibility for immunity determinations from the State Department to the judiciary.[67]

Today, the FSIA remains the sole basis for obtaining jurisdiction over foreign sovereign defendants in courts of the United States.[68] Consistent with the broader purpose of sovereign immunity law, the "basic objective" of the FSIA is to free sovereigns from suit.[69] Simultaneously, the FSIA embodies restrictive immunity, confining immunity to the public acts of a foreign sovereign.[70] However, the FSIA also intended to facilitate suits for specifically defined situations, codified as exceptions to immunity.[71] Among them, the "commercial activity" exception[72] is the most important of the immunity exceptions.[73] Although the FSIA provided greater clarity than the Tate Letter on the theory of restrictive immunity in United States law, important

65. *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. 33–35 (1973) (letter from Richard G. Kleindienst, Att'y Gen., and William P. Rogers, Sec. of State, to the Speaker of the House).

66. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. IV, ch. 5, intro. note at 393–94 (stating that the FSIA was the result of "nearly a decade of discussion and debate").

67. Republic of Arg. v. NML Cap., Ltd., 573 U.S. 134, 141 (2014) ("Congress abated the bedlam in 1976, replacing the old executive-driven, factor-intensive, loosely common-law-based immunity regime with the [FSIA].").

68. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989).

69. Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1317 (2017).

70. *See* FSIA, 28 U.S.C. § 1604 ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."); *see also* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983).

71. Republic of Phil. v. Pimentel, 553 U.S. 851, 865 (2008).

72. *See* FSIA, 28 U.S.C. § 1605(a)(2); *see also* Stephen Kim Park, *Guarding the Guardians: The Case for Regulating State-Owned Financial Entities in Global Finance*, 16 U. PA. J. BUS. L. 739, 766 (2014) (defining the commercial activity exception).

73. Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts Like a Private Party, Treat It like One*, 5 CHI. J. INT'L L. 675, 676 (2005).

ambiguities remained. For instance, the scope of the commercial activity exception was left largely undefined by the FSIA.[74]

B. Uniquely Sensitive and Challenging

Adjudicating claims against foreign sovereigns is uniquely sensitive and challenging. These difficulties are recognized in Supreme Court decisions, sovereign immunity legislation, and international law. The Court has long recognized that actions against foreign sovereigns pose risks to foreign relations and reciprocal immunities enjoyed by the United States abroad.[75] In light of these risks, the Court historically deferred to "the political branch of government charged with the conduct of foreign affairs" in deciding questions of immunity.[76] Foreign relations complexities were also central in the legislative history of the FSIA.[77] And, at the international level, the ISDS system aims to mitigate the risk of conflicts stemming from disputes between foreign investors and sovereign states.[78] Similarly, avoiding conflict

74. *See* Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 612 (1992) (observing that the FSIA leaves the definition of commercial "largely undefined"); *see also* George K. Foster, *When Commercial Meets Sovereign: A New Paradigm for Applying the Foreign Sovereign Immunities Act in Crossover Cases*, 52 HOUS. L. REV. 361, 374 (2014) ("The legislative history indicates that the drafters decided not to address this issue in the statute, leaving it to the courts to draw the necessary distinctions.").

75. Nat'l City Bank of N.Y. v. Republic of China, 348 U.S. 356, 362 (1955) (citing reciprocal self-interest and mutual respect among sovereigns as implications in litigation against foreign sovereigns).

76. *See* Republic of Mex. v. Hoffman, 324 U.S. 30, 34 (1945).

77. *See, e.g.*, *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 59 (1976) (testimony of Peter D. Trooboff, Co-Chairman, Comm. on Transnat'l Jud. Proc., American Bar Ass'n, Int'l L. Section) [hereinafter Trooboff Testimony].

78. *See* Tim R Samples, *Winning and Losing in Investor-State Dispute Settlement*, 56 AM. BUS. L.J. 115, 134–35 (2019) ("By channeling disputes to arbitration and limiting claims to the involved parties, ISDS should avoid the escalation of investment disputes into diplomatic conflicts, economic sanctions, or military interventions."); Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation*, 38 GA. J. INT'L & COMP. L. 47, 53 (2009) (referencing statements by the World Bank's general counsel about avoiding the escalation of investment disputes); Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 HARV. INT'L L.J. 353, 357 (2015) (placing the depoliticization of investment disputes among the two main goals of investment treaties).

and retaliation among sovereigns is also a key objective of the World Trade Organization's dispute settlement body.[79]

Foreign policy incoherence is an inherent risk when a state's courts adjudicate claims against foreign sovereigns. When courts make decisions concerning the actions of a foreign sovereign, they create potential for divergence—or multiple voices—among the branches of government on matters of foreign relations.[80] Divergent voices can harm national security interests and defeat diplomatic objectives, or just simply embarrass the executive branch.[81] In some cases, divergence could be desirable—for instance, if the courts are correcting a misguided executive overreach. But the potential for self-inflicted harm is serious. In recognition thereof, the "one-voice" doctrine argues for coordination and harmonization in actions with foreign policy implications.[82] Where sovereign defendants are concerned, reciprocity risks and enforcement difficulties also loom large, adding to the unique complexity of litigation against foreign states.[83]

On top of potential liabilities from unfavorable court judgments, litigation costs can add up quickly.[84] For instance, legal fees associated with defending debt litigation can range from several

79. *DG Azevêdo to Launch Intensive Consultations on Resolving Appellate Body Impasse*, World Trade Org., https://www.wto.org/english/news_e/news19_e/gc_09dec19_e htm [https://perma.cc/FF8W-93E4].

80. *See, e.g.*, IAM v. OPEC, 649 F.2d 1354, 1358 (9th Cir. 1981) ("To participate adeptly in the global community, the United States must speak with one voice and pursue carefully and deliberate foreign policy . . . .").

81. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("In this vast external realm [of foreign affairs], with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."); United States v. Pink, 315 U.S. 203, 242 (1942) ("In our dealings with the outside world, the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states.").

82. Sarah H. Cleveland, Crosby *and the "One-Voice" Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 979–84 (2001) (explaining the origins of the one-voice doctrine); *see also infra* Section III.B. (discussing the one-voice doctrine and investment law policy more broadly). While there is no question that the one-voice doctrine has played a major role in shaping the allocation of federal power in foreign relations, the validity of the doctrine is highly contested. *See, e.g.*, Michael D. Ramsey, *International Law as Non-Preemptive Federal Law*, 42 VA. J. INT'L L. 555, 561 (2002) ("The 'one voice' in foreign affairs has always been more of a slogan than a constitutional reality.").

83. *See infra* Section III.C. (analyzing the reciprocity risks and enforcement challenges alongside foreign relations risks in litigation against foreign sovereigns).

84. *See* Rutledge, *supra* note 20, at 189 (highlighting litigation costs and foreign relations costs as risks of allowing suits against foreign sovereigns).

million to hundreds of millions of dollars for extraordinary litigation.[85] Average litigation costs for sovereigns defending claims in United States courts are unknown, but if average costs of being a respondent in investment arbitration proceedings are any indication, the sums are substantial, numbering in the millions of dollars per case.[86] Defending complex litigation in United States courts is expensive, to be sure.[87] Adding to the costs and indignities of litigation is the nature of United States discovery rules, which are more permissive and far-reaching compared to other jurisdictions.[88] For practical and symbolic reasons, the burden of litigation and judicial orders are understood as a real and material affront to sovereignty.[89]

C. Normalization and Formalism in Sovereign Immunity

For most of the nation's history, the executive branch has played a decisive role in sovereign immunity determinations.[90] Beginning with *The Schooner Exchange*, which embraced a suggestion

85. Julian Schumacher et al., *What Explains Sovereign Debt Litigation?*, 58 J.L. & ECON. 585, 592 (2019) (citing reports of legal fees paid by countries defending sovereign debt litigation: Iraq ($6.5 million), Greece ($8.5 million), and Argentina ($400 million)).

86. One set of estimates places the median cost for a sovereign respondent in international investment arbitration at $3.38 million and the mean at $5.18 million. *See* Matthew Hodgson & Alastair Campbell, *Damages and Costs in Investment Treaty Arbitration Revisited*, GLOBAL ARB. REV. (Dec. 14, 2017), http://www.allenovery.com/SiteCollectionDocuments/14-12-17_Damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf [https://perma.cc/Y5VW-9G6N].

87. One survey found that litigation costs in the United States were between four and nine times higher than costs outside of the United States. *See* U.S. Chamber Institute for Legal Reform, *Litigation Cost Survey of Major Companies* 3, https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf [https://perma.cc/84ZP-DF6X] ("The U.S. litigation system imposes a much greater cost burden on companies than systems outside the United States.").

88. *Id*. at 15–16 (addressing discovery costs in United States litigation); *see also* Daniel Fahrenthold, Note, *Respectful Consideration: Foreign Sovereign Amici in U.S. Courts*, 119 COLUM. L. REV. 1597, 1624 n. 193 (2020) (citing sources that document United States discovery rules as a source of friction with foreign sovereigns); Cross, *supra* note 17, at 135 n.174 (referencing the challenge courts face when deciding how to enforce discovery against a foreign state).

89. *See, e.g.*, *In re* Minister Papandreou, 139 F.3d 247, 251 (D.C. Cir. 1998) (stating that the imposition of the burdens of litigation "may compromise it just as clearly as would an ultimate determination of liability").

90. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983) ("Accordingly, this Court consistently has deferred to 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.").

advanced by the executive branch, immunity determinations were considered more diplomatic than legal in nature.[91] Under the common-law doctrine of sovereign immunity, courts facing an immunity determination could request a "suggestion of immunity" from the State Department.[92] If granted, the court would effectively hand over jurisdiction to the State Department.[93] Alternatively, the State Department could remain silent on an immunity question before the judiciary, and courts would decide on their own.[94] Immunity was routinely requested for "friendly" sovereigns.[95]

Until recently, functionalism and deference to executive branch inputs were prevailing norms in sovereign immunity.[96] In the twentieth century, during the twilight of absolute immunity, courts looked to the "political branch of the government charged with the conduct of foreign affairs" for direction.[97] During that era, executive branch views on immunity determinations were treated as virtually binding upon courts.[98] Prominent cases from the first half of the twentieth century illustrate growing ambivalence towards absolute immunity alongside continued deference to executive branch positions on immunity. In *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, decided in 1938, the Court embraced a restrictive view of immunity, distinguishing between public and non-public purpose of a vessel.[99] In this case, while the State Department declined to weigh in on the immunity question, the Court nonetheless confirmed that

91. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 146 (1812) (characterizing immunity determinations as questions of policy more so than of law, meant "for diplomatic, rather than legal discussion").

92. Samantar v. Yousef, 560 U.S. 305, 311 (2010) (describing the two-step "suggestion of immunity" process under common-law sovereign immunity).

93. *Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943).

94. *See* Koh, *supra* note 31, at 1143 (framing the State Department's options on immunity as the "suggestion" track versus the "silent" track).

95. Republic of Austria v. Altmann, 541 U.S. 677, 689 (2004).

96. The extent of deference to the executive branch in the twentieth century contrasted with sovereign immunity practices in the nineteenth century, however, when courts undertook independent determinations based on customary international law. *See* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 134–45 (1999).

97. Republic of Mex. v. Hoffman, 324 U.S. 30, 34 (1945).

98. *See, e.g.*, *Ex parte Peru*, 318 U.S. at 588 (stating that "courts are required to accept and follow the executive determination that the vessel is immune"). This deference in immunity determinations was part of a broader "triumph" of executive branch discretion in foreign relations. *See* White, *supra* note 96, at 77.

99. Compania Espanola De Navegacion Maritima S. A. v. The Navemar, 303 U.S. 68, 74 (1938).

immunity remained the domain of the executive branch.[100] Several years later, in *Republic of Mexico v. Hoffman*, the State Department again declined to provide input on an immunity determination.[101] Even then, while denying immunity, the Court reiterated the primacy of the executive branch in matters of foreign relations, citing political sensitivities.[102]

Changing norms in commerce and international law in the first half of the twentieth century prompted the decline of absolute immunity.[103] Jurisdictions around the world responded by replacing absolute immunity with restrictive immunity.[104] In the United States, the State Department formally announced a pivot to restrictive immunity with the Tate Letter in 1952.[105] Although that announcement marked a major moment in the evolution of sovereign immunity, the transition did not have an immediate impact on the allocation of federal authority over immunity determinations. Courts continued to abide by the status quo, implementing suggestions of immunity from the State Department.[106]

However, the procedure of sovereign immunity determinations entered a period of relative disarray after the Tate Letter.[107] Applying restrictive immunity proved more "troublesome" than absolute immunity in a number of ways.[108] In practice, the ad hoc approach to joint determination by the executive and judicial branches proved unwieldy.[109] The State Department often declined to provide input.[110]

---

100. *Id.* ("If the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel upon the appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction.").

101. *Hoffman*, 324 U.S. at 38.

102. *Id.* at 35 ("[T]he courts should not so act as to embarrass the executive arm in its conduct of foreign affairs.").

103. *See supra* notes 58–60 and accompanying text.

104. *See supra* notes 61–63 and accompanying text.

105. Tate Letter, *supra* note 55, at 985.

106. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983) (observing that courts continued to abide by "suggestions of immunity" from the State Department following the Tate Letter).

107. Republic of Austria v. Altmann, 541 U.S. 677, 690 (2004).

108. *Verlinden*, 461 U.S. at 487.

109. *See* FRANCK ET AL., *supra* note 58, at 308 (describing the joint determination approach as an "awkward arrangement"); *see also Verlinden*, 461 U.S. at 487–88 (observing that application "proved troublesome" and that "governing standards were neither clear nor uniformly applied").

110. *See, e.g.*, *supra* notes 100–101 and accompanying text.

Other times, the input merely reflected politically expedient views and diplomatic interests.[111] Administrative ownership or authority over immunity determinations came to be viewed as a liability within the State Department.[112] Foreign sovereigns, when sued, sought favorable immunity determinations by exerting diplomatic pressure on the State Department.[113] These burdens motivated the executive branch to lobby for the codification of sovereign immunity law and a fuller transfer of responsibility for immunity determinations to the judicial branch.[114]

On the question of federal authority and comparative institutional competence, the FSIA included an explicit transfer of procedural responsibility for immunity determinations to the courts.[115] But questions persist—even to this day—as to the horizontal allocation of power in sovereign immunity determinations.[116] To what extent should courts heed the views of the executive branch in immunity determinations? Debate on this question is not limited to foreign sovereigns as defendants—the immunity of foreign officials has also raised its share of controversies.[117] At times, the State Department has insisted that the executive should be afforded complete deference in

111. *See* Ristau Testimony, *supra* note 58, at 35 (discussing the temptation of diplomatic pressures in the State Department's immunity determinations); *see also* Leigh, *supra* note 60, at 281 (observing "lively criticism of the State Department [for] being less concerned with the consistent application of international law than with whatever short term diplomatic objectives seemed appropriate at the moment").

112. Trooboff Testimony, *supra* note 77, at 60 ("[T]he Department becomes embroiled in a pending case when another sovereign state chooses to thrust the issue upon the Department by requesting a suggestion of immunity. The Department then finds itself with a political problem that it did not create and which, more than not, it may not need or want.").

113. *See supra* note 111 and accompanying text.

114. Samantar v. Yousef, 560 U.S. 305, 323 n.19 (2010) (the State Department "sought and supported the elimination of its role with respect to claims against foreign states and their agencies or instrumentalities").

115. Republic of Austria v. Altmann, 541 U.S. 677, 678 (2004) ("To remedy these problems, the FSIA codified the restrictive principle and transferred primary responsibility for immunity determinations to the Judicial Branch.").

116. Consensus is also lacking on the appropriate allocation of federal power over foreign affairs, more generally. *See supra* note 32 and accompanying text.

117. *See, e.g.*, Chimène I. Keitner, *Between Law and Diplomacy: The Conundrum of Common Law Immunity*, 54 GA. L. REV. 217, 217 (2019); Lewis S. Yelin, *Head of State Immunity as Sole Executive Lawmaking*, 44 VAND. J. TRANSNAT'L L. 911, 927 (2011); Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 921 (2011); *supra* note 31, *infra* note 119, and accompanying text.

immunity determinations.[118] However, in a departure from historical tendencies—and, at times, in defiance of the executive's arguments—the Court has grown more assertive in matters of foreign relations since the end of the Cold War. That trend towards normalization or formalism has not spared sovereign immunity, despite arguments by the United States government that courts still owe the executive branch absolute deference in at least some areas of immunity.[119]

In *Altmann*, a case involving artwork that was either looted by the Nazis or expropriated by Austria after World War II,[120] the Court confronted questions of the FSIA's retroactive application.[121] Finding that the FSIA can apply retroactively, the Court rejected arguments advanced in an amicus brief from the United States government.[122] In doing so, the *Altmann* opinion afforded no "special deference" to executive views on the scope of the FSIA.[123]

But the dismissal of the executive's views was somewhat nuanced. The Court cited the tradition of executive branch primacy in foreign relations.[124] The Court also distinguished between executive views on statutory construction and executive views on foreign policy.[125] The opinion took that distinction further in a footnote, observing that greater deference is owed to the executive branch in "its area of expertise" (foreign relations) than in matters of statutory interpretation.[126] The *Altmann* opinion also disclaims any opinion on whether deference should be granted in FSIA cases.[127] While the majority's statement in *Altmann* about affording "no special deference" to

118. *See* Wuerth, *supra* note 117, at 918 nn.9–10.

119. Yousuf v. Samantar, 699 F3d 763, 769 (4th Cir. 2012) (noting that "[t]he United States, participating as *amicus curiae*, takes the position that federal courts owe absolute deference to the State Department's view of whether a foreign official is entitled to sovereign immunity").

120. This case, which involved six Gustav Klimt paintings, was the subject of a film titled "Woman in Gold" (also the title of Klimt's portrait of Adele Bloch-Bauer). *See* Stephen Holden, *Review: "Woman in Gold" Stars Helen Mirren in Tug of War Over Artwork*, N.Y. TIMES (Mar. 31, 2015), https://www.nytimes.com/2015/04/01/movies/review-woman-in-gold-stars-helen-mirren-in-tug-of-war-over-artwork html [https://perma.cc/N2EU-S6QG].

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

122. *Id.* at 701.

123. While recognizing some role for executive branch statements of interest in FSIA cases, the Court stated that such executive views deserve no special deference. *See id.*

124. *Id*. at 702 (quoting Am. Ins. Assn. v. Garamendi, 539 U.S. 396, 414 (2003) (citing the executive's "vast share of responsibility for the conduct of our foreign relations")).

125. *Altmann*, 541 U.S. at 702.

126. *Id*. at 677 n.23.

127. *Id*. at 702.

executive branch input is remarkable, that rejection was fairly narrow and hedged.[128]

A decade later, in *BG Group*, the Court ruled on a question of treaty interpretation stemming from an extraterritorial investment dispute between a British-chartered energy company and Argentina. Again, the United States filed an amicus brief, arguing that Argentina's consent to arbitrate was not effective until a local litigation requirement in the treaty was fulfilled.[129] The Court dismissed the Solicitor General's views on consent in *BG Group*, adopting its own interpretation of the bilateral investment treaty (BIT) between Argentina and the United Kingdom.[130] Traditionally, courts have given "great weight" to executive branch interpretations of international treaties.[131] But that deference has waned amid normalization and formalism.[132] Therefore, despite expressing "respect [for] the Government's views about the proper interpretation of treaties," the Court in *BG Group* opted to interpret the treaty as a routine contract.[133] The Court cast aside the government's appeals to foreign relations deference in no uncertain terms: "We do not accept the Solicitor General's view as applied to the treaty before us."[134]

NML was coined the "trial of the century" in sovereign debt litigation.[135] The Court ruled against Argentina—over objections

128. Justice Kennedy's dissent (joined by Justice Thomas) questioned executive primacy in foreign relations even more aggressively than the majority opinion. *Id.* at 738 (Kennedy, J., dissenting).

129. *See* Brief for the United States as Amicus Curiae in Support of Vacatur and Remand at 31, BG Grp. PLC v. Republic of Arg., 572 U.S. 25 (2014) (No. 12-138). Ecuador also filed an amicus brief in this case, raising concerns about reciprocity and implications for foreign relations. *See* Brief of Amicus Curiae the Republic of Ecuador in Support of Respondent at 1, BG Grp. PLC v. Republic of Arg., 572 U.S. 25 (2014) (No. 12-138). Both briefs are available at *BG Group PLC v. Republic of Argentina*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/bg-group-plc-v-republic-of-argentina/ [https://perma.cc/MN9X-HLBS].

130. *BG Grp.*, 572 U.S. at 37.

131. *See, e.g.*, Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

132. *See* Sitaraman & Wuerth, *supra* note 6, at 1968–70 (reviewing normalization trends in executive agreements and treaties); *see also* Cohen, *supra* note 8, at 443–44 (discussing the Court's formalist turn away from executive primacy in treaty interpretation).

133. *BG Grp.*, 572 U.S. at 25, 38.

134. *Id*. at 36–37. Expressions of skepticism by the Court in response to the government's pleas for deference has been observed in other cases as well. *See* Cohen, *supra* note 8, at 390–91 (referencing the Court's "sense of distrust" regarding executive branch deference).

135. *See, e.g.*, Cruces & Samples, *supra* note 14, at 7. The *NML* petitions for certiorari also prompted a flurry of notable amicus briefs. *See* Anna Gelpern, *Pari Passu VIPs and Mexico's CAC Gravitas*, CREDIT SLIPS (Mar. 24, 2014, 7:39 PM), https://www.creditslips.org/

raised by the United States—in finding that the FSIA does not limit the scope of discovery against a sovereign defendant in post-judgment phase.[136] The United States expressed concerns that broad discovery orders imposed by courts would create tensions and complicate relations with foreign sovereigns.[137] The Court addressed the executive branch's views with a wry dismissal, observing that those "apprehensions" should be directed at the political branches responsible for transferring authority to the courts through the FSIA.[138] In doing so, the Court struck a remarkably assertive tone with regard to the executive's role in immunity law. The *NML* opinion is also notable for what it did not say: whereas in *Altmann* the Court explicitly recognized the potential role of executive branch views in FSIA cases, the *NML* opinion stopped short of saying that executive views would even receive case-by-case deference.

The Court's posture in recent immunity cases—including *Altmann*, *BG Group*, and *NML*—stands in stark contrast with previous eras of sovereign immunity. Together, these three cases represent a significant departure from exceptionalism in this area of the law. This shift in sovereign immunity decisions is consistent with broader trends towards normalization and formalism in foreign relations law following the Cold War.[139] Combined with indications that the Court has developed a greater appetite for making law with extraterritorial implications, these trends have positioned the judiciary to participate and intervene in matters of foreign relations to a greater extent than before.[140]

II. THE INTERNATIONAL INVESTMENT LANDSCAPE SINCE 1976

The investor-state landscape has changed drastically since the adoption of the FSIA in 1976. This Part explains three developments that have fundamentally altered investor-state relations: (1) foreign

creditslips/2014/03/mexicos-cac-gravitas html [https://perma.cc/JL7K-GZUA] (Brazil, France, and Mexico were among those filing).

136. Republic of Arg. v. NML Cap., Ltd., 573 U.S. 134, 145 (2014).

137. Brief for the United States as Amicus Curiae in Support of Petitioner at 20, Republic of Arg. v. NML Cap., Ltd., 573 U.S. 134 (2014) (No. 12-842).

138. *NML Cap.*, 573 U.S. at 146.

139. *See supra* notes 7–9 and accompanying text; *see also infra* note 205 and accompanying text.

140. *See supra* note 17 and accompanying text.

direct investment (FDI)[141] is now a significant component of global economic activity, quadrupling in the 1990s alone; (2) international treaties with investment provisions also boomed during the 1990s, becoming one of the most active areas of international law in the last fifty years; and (3) investor-state arbitration through the ISDS system now provides an active and established framework for resolving investment claims against foreign sovereigns. These developments in the legal and commercial environment have rendered the FSIA outdated—much like absolute immunity was outpaced in the early twentieth century. These changes have also prompted new questions about the optimal relationship between national courts and extraterritorial investment disputes.

A. Foreign Direct Investment in the Global Economy

Capital flows across borders now number in the trillions, but such volumes were not always the norm. A wave of globalization that reconfigured the global economy saw FDI volumes quadruple during the 1990s alone.[142] FDI volumes have stabilized since that period of intense globalization, averaging over $1.7 trillion from 2000 to 2018.[143] Figure 1, below, illustrates the cumulative amount of global outward FDI stocks, which now exceed $30 trillion.[144] That number represents the aggregate amount of capital invested across borders as FDI. It is important to note that Figure 1 does not illustrate a causal link between sovereign immunity law and foreign investment. The FSIA likely had little to no material impact on investment flows. Rather, Figure 1 demonstrates the globalization of financial capital and the dramatic extent to which the landscape for international commerce has changed since the FSIA was conceived.

---

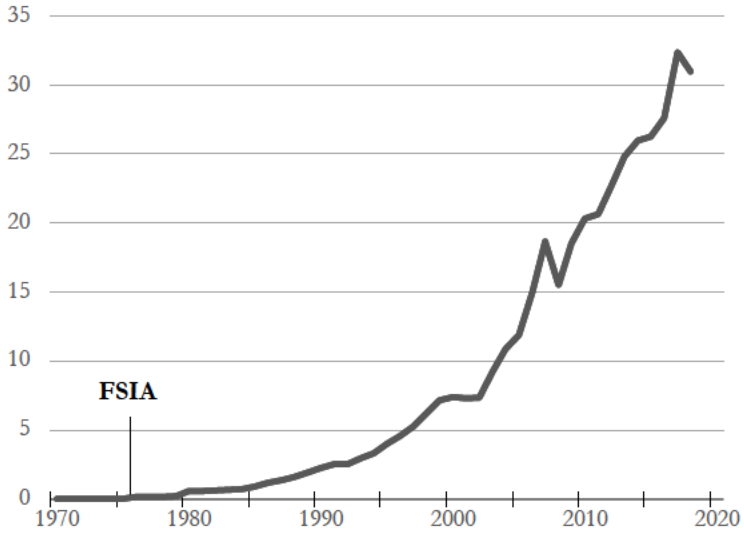
141. *See Foreign Direct Investment Statistics: Explanatory Notes*, OECD 1, 1–2 https://www.oecd.org/daf/inv/FDI-statistics-explanatory-notes.pdf [https://perma.cc/ZYX7-LAHK] (defining FDI as "a category of cross-border investment made by a resident in one economy . . . with the objective of establishing a lasting interest in an enterprise . . . that is resident in an economy other than that of the direct investor").

142. *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 2 (2d ed. 2008).

143. *Foreign Direct Investment, Net Outflows (BoP, Current US$): World*, WORLD BANK GRP., https://data.worldbank.org/indicator/BM.KLT.DINV.CD.WD [https://perma.cc/XYG7-RQ62] [hereinafter WORLD BANK GROUP, *FDI Outflows: World*] (illustrating global FDI flows).

144. *FDI Stocks*, OECD, https://data.oecd.org/fdi/fdi-stocks htm [https://perma.cc/6U3C-YNCR] (defining FDI stocks as the measure of the "total level of direct investment at a given point in time").

Figure 1: Cumulative Global FDI Stocks, 1970-2018 (in trillions USD)



Source: UNCTAD, UNCTADStat

As illustrated above, FDI has grown dramatically as a component of the modern global economy since the adoption of the FSIA. Relative to current levels, FDI was essentially a non-factor when the FSIA was designed and adopted. During the 1970s, global FDI outflows averaged just $0.032 trillion per year, compared to over $1.7 trillion per year from 2000 to 2018.[145] FDI has also shown significant growth in relative terms. For instance, as a percentage of global GDP, FDI averaged approximately 0.56 percent in the 1970s versus 2.83 percent from 2000 to 2017.[146] During peak years, from 2006 to 2008, FDI averaged 4.54 percent of global GDP.[147] FDI in the United States has mirrored global trends. During the 1990s, inward FDI stocks in the United States jumped from $0.539 trillion at the beginning of the

145. WORLD BANK GROUP, *FDI Outflows: World*, *supra* note 143.

146. *Foreign Direct Investment, Net Outflows (% of GDP): World*, WORLD BANK GRP., https://data.worldbank.org/indicator/BM.KLT.DINV.WD.GD.ZS [https://perma.cc/4BBV-WE8J].

147. *Id.*

decade to $2.798 trillion in 1999.[148] FDI stocks in the United States continued to climb, reaching $7.807 trillion in 2018.[149]

FDI is an important and defining feature of the modern global economy.[150] As with trade flows, the movement of capital across borders will wax and wane over time. FDI is currently waning, having stagnated in recent years as economic globalization recedes. Major global events have also taken their toll: the 2008–09 economic crisis, Brexit, and the trade and investment war between China and the United States, to name a few.[151] Adding to the pressure, the Covid-19 crisis is currently having drastic effects on the flow of global capital, as with other areas of human and economic activity.[152] The longer-term impacts of the pandemic on cross-border activity remains to be seen.

Even with recent declines in economic globalization, commerce today involves dramatically higher volumes of cross-border capital flows than the era in which the FSIA was conceived. As a result, investors today have much higher exposure to the legal environments of foreign sovereigns. FDI, by nature, involves significant legal and regulatory exposure because it typically involves a long-term interest that is often less liquid that portfolio investments.[153] Thus, FDI generally implies a deeper exposure to the legal system of the host economy.[154] Between the rising tide of cross-border capital flows and

148. *World Investment Report: Annex Tables*, UNCTAD, https://unctad.org/en/Pages/DIAE/World%20Investment%20Report/Annex-Tables.aspx [https://perma.cc/M6U2-S6QK] (providing data on cumulative stock of inward FDI).

149. *Id*.

150. FDI flows dropped by twenty-three percent to $1.43 trillion in 2017 from $1.87 trillion in 2016. *See* U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2018, U.N. Doc. UNCTAD/WIR/2018 (Overview), U.N. Sales No. E.18.II.D.4 at 10 (2018).

151. *See* Jill Ward, *Pandemic Is Last Nail in Globalization's Coffin, Says Carmen Reinhart*, BLOOMBERG (May 21, 2020, 10:10 AM), https://www.bloomberg.com/news/articles/2020-05-21/reinhart-says-pandemic-is-last-nail-in-globalization-s-coffin [https://perma.cc/DN8H-FW5Y].

152. *Has Covid-19 Killed Globalisation?*, ECONOMIST (May 14, 2020), https://www.economist.com/leaders/2020/05/14/has-covid-19-killed-globalisation [https://perma.cc/K5QD-MKUU].

153. *See* DOLZER & SCHREUER, *supra* note 142, at 21 ("Whereas a trade deal typically consists in a one-time exchange of goods and money, the decision to invest in a foreign country initiates a long-term relationship between the investor and the host country.").

154. *See* Lise Johnson et al., *Aligning International Investment Agreements with the Sustainable Development Goals*, 58 COLUM. J. TRANSNAT'L L. 58, 60 (2019) ("[FDI] represents real economic activity being directed into a country."). Accordingly, the legal and regulatory environment of the target economy is a top factor in foreign investment decisions. *See Global Investment Competitiveness Report 2017/2018*, WORLD BANK GRP., http://documents.worldbank.org/curated/en/169531510741671962/pdf/121404-PUB-

diminishing sovereign immunity, sovereigns are more vulnerable in foreign court systems than before. These trends have opened new doors to jurisdictional conflicts and foreign relations risks.[155]

B. International Investment Law

Although the earliest investment agreements were signed centuries ago, investment law is relatively new as a major area of international law.[156] The vast majority of investment law consists of treaties entered into after 1990, when a sharp rise in economic globalization following the Cold War prompted a frenzy of trade and investment agreements.[157] During that boom, investment law became one of the most active areas of international law in recent history. Today, the investment law system constitutes a mosaic of different institutions, thousands of freestanding treaties, and a vast body of investment arbitration jurisprudence. Though fragmented, in the aggregate, international investment law constitutes a highly active and far-reaching system.[158]

On the institutional side, the architecture for investment disputes predates the current era of economic globalization by decades. The institutional groundwork of the ISDS system was laid during the construction of the modern global economic order following World War II with the establishment of the International Centre for the Settlement of Investment Disputes (ICSID) in 1965.[159] A division of the World Bank formed specifically for resolving disputes between

---

PUBLIC-PUBDATE-10-25-2017.pdf (identifying the legal and regulatory environment of a target market among the top factors influencing foreign investment decisions).

155. *See* Rutledge, *supra* note 20, at 183–84; *see also infra* Section III.C. (addressing the foreign relations risks inherent in sovereign immunity determinations).

156. *See* Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 203–06 (1988) (tracing the emergence of United States investment treaty practices to "Friendship, Commerce, and Navigation" treaties signed shortly after the Declaration of Independence); *see also* Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 433 (2010) (discussing Germany's BITs with Pakistan and the Dominican Republic as initiating, in 1959, the modern era of investment treaties).

157. *See* DOLZER & SCHREUER, *supra* note 142, at 19–20.

158. The extent to which international investment law constitutes a "regime" is subject to some debate among scholars. For contrasting positions on this question, compare Salacuse, *supra* note 156, at 463–68, with Louis T. Wells, *The Emerging Global Regime for Investment: A Response*, 52 HARV. INT'L L.J. ONLINE 42, 42–44 (2010).

159. *See* Lowenfeld, *supra* note 78, at 48–55 (describing the political and legal context of the ICSID Convention).

sovereigns and foreign investors, ICSID remains the primary institutional body for ISDS.[160] Founded during the first United Nations Development Decade, which was launched in 1961, ICSID was designed to facilitate capital flows to developing countries by fostering greater protection of foreign investment.[161]

The investment law system is sometimes referred to as the product of a "grand bargain" between capital-importing countries and wealthier, capital-exporting countries.[162] But this bargain—if that description is accurate, given the imbalanced negotiating positions of the two sides at that point in time—was not without its controversies, and remains contentious today.[163] The history of the ICSID Convention illustrates tension between the interests of capital-importing countries (attracting foreign capital without ceding too much sovereignty) and capital-exporting countries (protecting the investments of domestic nationals abroad).[164] In that context emerged the institutional framework that supports the international investment law system today.

On the treaty side, investment law was reshaped by fundamental changes in the international economic and political landscape following World War II. Decolonization in the twentieth century gave rise to dozens of new sovereign states where colonies formerly stood.[165] A wave of postwar decolonization altered the relations

160. ICSID, ICSID Convention, Regulations and Rules, ICSID/15, at 5 (Apr. 2006) (explaining the origins and current practices of the ICSID). Though slightly less common, ad hoc arbitrations are also common for investment disputes. *See* Rachel L. Wellhausen, *Recent Trends in Investor–State Dispute Settlement*, 7 J. INT'L DISP. SETTLEMENT 117, 121 (2016) (showing that approximately sixty-eight percent of ISDS cases are filed at ICSID).

161. United Nations, *Introduction, 1960-1970*, http://research.un.org/en/docs/dev/1960-1970 [https://perma.cc/ZX2U-86ST].

162. *See*, *e.g.*, Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 77 (2005).

163. ICSID, *Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, in 1 HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 2 (1970) (recounting the origins of the ICSID Convention).

164. *See* Samples, *supra* note 78, at 132–35 (discussing the foundations and contested aims of the ISDS system); *see also* DOLZER & SCHREUER, *supra* note 142, at 14 (explaining broader tensions between newly independent developing countries and industrialized states over customary investment law).

165. Between 1945 and 1960, a tide of decolonization in Africa and Asia saw three dozen states achieve autonomy or outright independence from European colonizers. U.S. DEP'T OF STATE, *Decolonization of Asia and Africa 1945–1960*, https://history.state.gov/milestones/1945-1952/asia-and-africa [https://perma.cc/4J3B-KCWT].

between the Global South (former colonies) and the Global North (imperial powers), redefining trade and investment relationships.[166] Dealing with newly independent sovereigns where, formerly, there were colonies, foreign investors faced a vastly different legal landscape.[167] Many multinational companies in capital-exporting countries increased their demands for investment protections in the post-war global environment.[168] Capital-exporting countries responded by initiating investment treaty programs to protect investors with capital abroad.[169]

Following the end of the Cold War, during the peak years of the Washington Consensus, the ISDS system underwent rapid expansion and consolidation. As economic globalization boomed, the treaty-based system for investment law and ISDS grew dramatically during the 1990s. Roughly eighty-five percent of investment treatymaking occurred after 1990. Prior to 1990, only about 500 international investment treaties had been signed.[170] During the 1990s, 1,629 investment treaties were signed—roughly half the total amount existing today.[171] Another 1,304 treaties were signed between 2000 and

166. *See* Samples, *supra* note 78, 129–30 (describing the impact of decolonization on international investment law); *see also* Scott J. Shackelford et al., *Using BITs to Protect Bytes: Promoting Cyber Peace by Safeguarding Trade Secrets Through Bilateral Investment Treaties*, 52 AM. BUS. L.J. 1, 25 (2015) (discussing the global dynamics that set the stage for BIT programs).

167. *See* Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 L. & BUS. REV. AM. 155, 155 (2007) (describing the deficiencies of international investment law after decolonization from a foreign investor's perspective).

168. *See* Salacuse, *supra* note 156, at 433 (noting investment treaty programs initiated by European nations to protect national interests abroad, particularly in former colonies).

169. *See, e.g.*, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159, https://treaties.un.org/doc/Publication/UNTS/Volume%20575/v575.pdf [https://perma.cc/M6WD-6E8T].

170. The United Nations Conference on Trade and Development (UNCTAD) maintains a comprehensive database of investment agreements and related information. *See International Investment Agreements Navigator*, UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements [https://perma.cc/SHY5-GVWC] [hereinafter UNCTAD, *IIA Navigator*].

171. *See* UNCTAD, *Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties* 2, 5 fig.4, IIA Issues Note (June 2017), https://unctad.org/en/PublicationsLibrary/diaepcb2017d3_en.pdf [https://perma.cc/5RVY-VJU9] (describing progress and policy implications of reforms in investment treaties); *see also* Elisabeth Tuerk, *Reforming the IIA Regime: Are We Getting There? Lessons from Recent Treaty Practice*, INV. POL'Y HUB BLOG (Nov. 26, 2015), https://investmentpolicy.unctad.org/blogs/46/reforming-the-iia-regime-are-we-getting-there-lessons-from-recent-treaty-practice

2010.[172] Now, as of 2020, over 3,300 treaties have been signed.[173] Though some investment protections exist under customary international law, treaties have become the leading source of international law on foreign investments.[174] Most treaties with investment provisions are bilateral[175] but multilateral treaties contain investment protections, as well.[176]

The specific content of investment treaties varies and continues to evolve.[177] But their fundamental effect is fairly consistent: the creation of reciprocal obligations among sovereigns on the treatment of foreign investments.[178] Generally speaking, treaties with investment provisions contain both substantive and procedural protections for foreign investors. Among substantive protections are guarantees of fair and equitable treatment of foreign investments by the host government.[179] As an enforcement mechanism to the substantive obligations, investors typically receive procedural rights to sue sovereigns via

---

[https://perma.cc/UC9D-BAEA] (reviewing trends in the evolution of investment treaty terms).

172. UNCTAD, *IIA Navigator*, *supra* note 170.

173. UNCTAD estimates that the total number of signed international investment agreements currently stands at 3,284 (2,895 bilateral investment treaties plus 389 treaties with investment provisions). Of those, approximately 2,654 are currently in force. *See* UNCTAD, *The Changing IIA Landscape: New Treaties and Recent Policy Developments* 1, IIA ISSUES NOTE (July 2020), https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d4.pdf [https://perma.cc/K3UB-NUTJ].

174. *See generally* Salacuse, *supra* note 167.

175. Almost ninety percent (2,957 out of 3,324) of investment treaties are bilateral investment treaties. *See* UNCTAD, *World Investment Report: Investment and the Digital Economy, Key Messages and Overview* 22 (2017), https://unctad.org/system/files/official-document/wir2017_overview_en.pdf [https://perma.cc/E8KL-5PL6].

176. *See*, *e.g.*, Energy Charter Treaty, *opened for signature* Feb. 1, 1995, 34 I.L.M. 360, *in* INT'L ENERGY CHARTER, *The International Energy Charter Consolidated Energy Charter Treaty* 37, https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf [https://perma.cc/6Y3W-G6UR].

177. *See*, *e.g.*, UNCTAD, *Recent Developments in the International Investment Regime: Taking Stock of Phase 2 Reform Actions* (Sept. 2, 2019), https://unctad.org/meetings/en/SessionalDocuments/ciid42_en.pdf [https://perma.cc/5EY7-FWUT] (reviewing recent developments in investment treaties). Substantively, the scope of obligations in trade and investment agreements has expanded significantly to encompass a broader spectrum of environmental, labor, and social matters. *See, e.g.*, Alex Reed, *NAFTA 2.0 and LGBTQ Employment Discrimination*, 57 AM. BUS. L.J. 5 (2020) (examining the question of LGBTQ protections in the USMCA).

178. Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 172 (2005).

179. DOLZER & SCHREUER, *supra* note 142, at 130–48 (discussing the evolution of fair and equitable treatment in international jurisprudence).

arbitration in the ISDS system.[180] As a result, investors can take investment treaty claims against sovereigns directly to arbitration—no litigation in national court systems is required.[181]

Traditionally, the United States has been an active promoter of international investment protections.[182] Along with other capital-exporting countries, the United States was at the forefront of efforts to establish and consolidate the ISDS system.[183] With forty-five bilateral investment treaties and sixty-nine treaties with investment provisions worldwide, the United States is a highly active participant in the ISDS system.[184] As illustrated in Figure 2 below, coinciding with the tide of economic globalization, the 1990s were a peak period for United States bilateral treaty activity. Since then, treaties with investment provisions (TIPs) have become more common in United States treatymaking.

180. *See* Joachim Pohl et al., *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey* 10 & n.2 (OECD Working Papers on Int'l Inv., 2012/02, 2012), https://www.oecd-ilibrary.org/docserver/5k8xb71nf628-en.pdf?expires=1606173615&id=id&accname=guest&checksum=1184857BDFC758B0CA348D60203C65D0 [https://perma.cc/ZH48-AAME] (finding that ninety-six percent of treaties in a sample of 1,660 IIAs contained ISDS provisions).

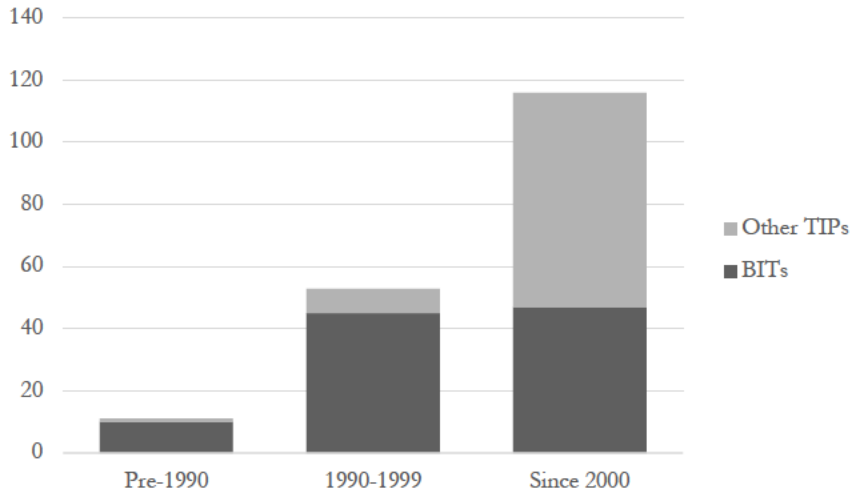
181. *See* Salacuse & Sullivan, *supra* note 162, at 77 (addressing the sovereignty trade-offs for states that sign investment treaties).

182. *See* U.S. DEP'T OF STATE, *Bilateral Investment Treaties and Related Agreements*, https://www.state.gov/investment-affairs/bilateral-investment-treaties-and-related-agreements/ [https://perma.cc/CVC2-2BU6] (articulating the benefits of the U.S. bilateral investment treaty program).

183. The United States launched its bilateral investment treaty program in 1981. *See* Pamela B. Gann, *The U.S. Bilateral Investment Treaty Program*, 21 STAN. J. INT'L L. 373, 373 (1985).

184. UNCTAD, *IIA Navigator*, *supra* note 170.

Figure 2: Cumulative Number of TIPs Signed by the United States



Source: UNCTAD, International Investment Agreements Navigator

C. Investor-State Dispute Settlement

Investment law has also played an extremely important role in the area of disputes. As of today, over 1,000 known cases have been brought in the ISDS system[185]—far more than in any other field of public international law.[186] By comparison, since 1995, approximately 597 disputes have been brought through the dispute settlement body of the World Trade Organization.[187] And, since its creation in 1946, just

185. *Investor–State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019*, UNCTAD (July 8, 2019), https://investmentpolicy.unctad.org/news/hub/1655/20200708-investor-state-dispute-settlement-cases-pass-the-1-000-mark-cases-and-outcomes-in-2019 [https://perma.cc/WPQ7-2X3G].

186. Nathalie Bernasconi-Osterwalder, *USMCA Curbs How Much Investors Can Sue Countries—Sort Of*, INT'L INST. FOR SUSTAINABLE DEV., https://www.iisd.org/library/usmca-investors [https://perma.cc/Z2CC-CSJJ].

187. *Dispute Settlement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_e htm [https://perma.cc/RKR8-3LDX].

178 cases have been brought before the International Court of Justice.[188]

Virtually nonexistent prior to 1990, disputes between foreign investors and sovereigns surged in the wake of economic globalization and the expansion of international investment law.[189] After rapid growth in the 1990s, ISDS case volumes stabilized at high levels, averaging forty-nine cases per year between 2006 and 2015.[190] In more recent years, case volumes inched higher: eighty in 2015, seventy-five in 2016, sixty-five in 2017, and eighty-four in 2018. At fifty-five, the number of cases initiated in 2019 is the lowest since 2012. As of 2020, the number of known ISDS cases exceeds 1,000.[191] Foreign investors have claimed and recovered tens of billions of dollars through the ISDS system.[192]

Data on ISDS is uneven—primarily because there is no centralized institution with a database of known investor-state litigation in national courts. However, the United Nations Conference on Trade and Development (UNCTAD) does maintain a comprehensive database on ISDS that includes information about disputes, a repository of investment agreements and policy tools, and publications on trends in investor-state disputes.[193] Additionally, ICSID has a database of ISDS

188. *Cases*, INT'L COURT OF JUSTICE, https://www.icj-cij.org/en/cases [https://perma.cc/KG4M-XZH5].

189. UNCTAD maintains a comprehensive database of investment disputes. *Investment Dispute Settlement Navigator*, UNCTAD [hereinafter UNCTAD, *ISDS Navigator*], https://investmentpolicy.unctad.org/investment-dispute-settlement [https://perma.cc/T58F-6XNS].

190. *Chapter III: Recent Policy Developments and Key Issues*, WORLD INV. REP. 114 (2017), https://unctad.org/en/PublicationChapters/wir2017ch3_en.pdf [https://perma.cc/6RE9-BVQS].

191. UNCTAD, *ISDS Navigator*, *supra* note 189.

192. *See* Samples, *supra* note 78, at 170–71 (estimating ISDS wins and losses for a set of highly active participants).

193. *See Investment Policy Hub*, UNCTAD, https://investmentpolicy.unctad.org/ [https://perma.cc/GB87-FZ9R].

cases that are heard in that forum.[194] Finally, scholars[195] and media outlets[196] have worked to fill in the gaps. But the data remains uneven.

Investors from the United States have relied heavily on ISDS to resolve investment disputes with foreign governments.[197] Between 1993 and 2017, investors from the United States used treaties with investment provisions to bring 177 known claims against foreign governments in ISDS.[198] In doing so, these investors claimed nearly $120 billion in damages and recovered a great deal from foreign states in cash settlements and awards.[199] Investors from the United States continue to rely heavily on the ISDS system. In 2018, investors from the United States made far more claims than investors from any other country.[200] It should be noted that all of these statistics are significantly underestimated because many cases, settlements, and awards remain confidential.[201] The actual numbers are substantially higher.[202]

194. *Concluded Cases with Details*, ICSID, https://icsid.worldbank.org/en/Pages/cases/concludedcases.aspx?status=c [https://perma.cc/2FJ3-UBGA].

195. *See, e.g.*, Michael Faure & Wanli Ma, *Investor-State Arbitration: Economic and Empirical Perspectives*, 41 MICH. J. INT'L L. 1 (2020); Krzysztof J. Pelc, *What Explains the Low Success Rate of Investor-State Disputes?*, 71 INT'L ORG. 559 (2017); Wellhausen, *supra* note 160; Thomas Schultz & Cédric Dupont, *Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study*, 25 EUR. J. INT'L L. 1147 (2014); Daniel Behn, *Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art*, 46 GEO. J. INT'L L. 363 (2015); Susan D. Franck, *Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes*, 55 VA. J. INT'L L. 13 (2014).

196. *See, e.g.*, *Newly Posted Awards, Decisions & Materials*, INV. TREATY ARB., https://www.italaw.com/ [https://perma.cc/78KK-G67D]; *News Headlines*, INV. ARB. REP., https://www.iareporter.com/ [https://perma.cc/XAG6-N5UY].

197. *See* Kevin P. Gallagher & Elen Shrestha, *Investment Treaty Arbitration and Developing Countries: A Re-Appraisal*, 12 J. WORLD INV. & TRADE 919, 925–26 (2011) (analyzing outcomes of ISDS for United States claimants).

198. Investors from the United States have received billions of dollars in ISDS awards. *See* Samples, *supra* note 78, at 171 (estimating amounts claimed and recovered by United States claimants through ISDS).

199. *Id*.

200. Investors from the United States accounted for fifteen of seventy-one known ISDS cases filed in 2018 (over twenty percent). The next highest country was the Russian Federation, with six cases. *See New ISDS Numbers: Takeaways on Last Year's 71 Known Treaty-Based Cases, ISDS Navigator Update*, UNCTAD (Mar. 13, 2019), https://investmentpolicy.unctad.org/news/hub/1609/20190313-new-isds-numbers-takeaways-on-last-year-s-71-known-treaty-based-cases [https://perma.cc/K3EA-YU9F].

201. *See* Samples, *supra* note 78, at 140–42 (discussing confidentiality and transparency issues in the ISDS system).

202. *Id.* at 158 (observing the incomplete nature of data on ISDS outcomes).

III. FEDERAL POWER AND INVESTMENT DISPUTES

The allocation of power among the branches is rightly considered a "core but unsettled" question in foreign relations law.[203] Where sovereign immunity is concerned, even though authority was transferred to the judiciary decades ago, the appropriate level of deference to executive views is still uncertain.[204] This Article observes a meaningful shift away from exceptionalism, towards greater normalization and formalism, both in the application of sovereign immunity and in foreign relations law more broadly. That trend, which has accelerated since the end of the Cold War, shows no signs of an impending reversal.[205] A more assertive judicial branch in foreign relations has coincided with the rise of the ISDS system, raising novel questions about the relationship between national courts and extraterritorial investor-state disputes. This Part weighs implications and considers the tradeoffs involved in the allocation of federal power in foreign relations law in today's environment for investor-state disputes.

A. Comparative Institutional Competence

In foreign affairs, deference to the executive branch was the norm for much of the nation's history,[206] with some notable ebbs and flows.[207] A variety of comparative institutional competencies are often cited in justifications for the dominance of political branches in foreign relations law.[208] Likewise, the judiciary's relative disadvantages—in

203. *See* Sitaraman & Wuerth, *supra* note 6, at 1958 (describing the question of judicial deference to the executive as a "core but unsettled issue in foreign relations law").

204. *See supra* notes 115–119 and accompanying text.

205. *See* Sitaraman & Wuerth, *supra* note 6, at 1935 (observing "an unmistakable pattern of normalization across the most important debates in foreign relations law over the last century"); *see also* Cohen, *supra* note 8, at 385 (remarking that the shift "marks a significant break with the functionalism that dominated the Court's approach to foreign affairs law over much of the twentieth century").

206. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767 (1972) ("[T]his Court has recognized the primacy of the Executive in the conduct of foreign relations . . . .").

207. The first half of the twentieth century, for instance, was marked by particularly extensive deference to the executive in foreign relations. *See* White, *supra* note 96, at 3 (characterizing the period between 1900 and the 1940s as one of "hegemony of the Presidency and the Department of State as America's principal foreign policymakers").

208. Comparative expertise is among the most compelling justifications for executive dominance in foreign relations. Other widely cited advantages of the executive in foreign relations include speed, flexibility, and secrecy. *See* Sitaraman & Wuerth, *supra* note 6, at

particular, lack of expertise and access to information—have often been considered relatively acute in the area of foreign relations.[209] These comparative limitations have been explicitly recognized by the Court itself at various points in history.[210] Given that the executive branch possesses intelligence agencies and a diplomatic corps, the judiciary's limitations in this area are fairly concrete.[211] After all, the political branches are charged with the majority of the nation's conduct in foreign relations.[212] Below, this Article considers the allocation of federal powers and sovereign immunity as they concern extraterritorial investment disputes.

1. The Limitations of Enforcement

Because of the uniqueness of sovereigns as defendants, investor-state disputes involve an extra layer of complexity. Even when sovereigns can be hauled into court and sued like private parties, the enforcement stage of litigation is uniquely problematic and poses distinct foreign relations risks.[213] In an amicus brief filed during the appellate stage of the *NML* litigation, the United States noted that the court's injunction against Argentina was "particularly likely to raise foreign relations tensions."[214] And in fact, it did. The *NML* litigation was a highly-charged issue in Argentine politics for years, even spawning a video game targeting "vulture fund" plaintiffs.[215] The litigation

---

1935–49 (addressing arguments in favor of exceptionalism and generally making the case for normalization).

209. *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 429 (2012) (discussing"limitations on the judiciary's expertise and access to information, limitations that are thought to be especially acute in the area of foreign affairs").

210. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 431 (1964).

211. *See* Nzelibe, *supra* note 33, at 986.

212. Republic of Mex. v. Hoffman, 324 U.S. 30, 34 (1945).

213. *See* H.R. REP. NO. 94-1487, at 31 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6630 (noting that "execution against the reserves of foreign states could cause significant foreign relations problems"); *see also* Michael D. Ramsey, *Acts of State and Foreign Sovereign Obligations*, 39 HARV. INT'L L.J. 1, 94 (1998) (observing the "difficulty of enforcing injunctions against foreign governments and the serious issues of sovereign offense that would be raised by such an order").

214. Brief for the United States of America as Amicus Curiae in Support of Reversal at 29, NML Cap., Ltd. v. Republic of Arg., 699 F.3d 246 (2d Cir. 2012) (No. 12-105-cv(L)).

215. Camila Russo, *Forget Angry Birds. This Video Game Targets Angry Investors*, BLOOMBERG (July 26, 2015), https://www.bloomberg.com/news/articles/2015-07-26/forget-angry-birds-this-video-game-takes-aim-at-angry-investors [https://perma.cc/JPF2-R26F].

catapulted the federal judge overseeing *NML* into an unfortunate status of infamy in Argentine politics.[216]

Enforcing judicial orders against an unwilling sovereign defendant is almost impossible.[217] Many sovereign assets are completely immune from attachment, and non-immune assets can be kept away from creditors.[218] Furthermore, judicial enforcement tools like sanctions for contempt and injunctive relief do not have the same effect on sovereign defendants.[219] As a result, sovereign creditors have, at times, resorted to extraordinary measures in pursuit of attachable sovereign assets.[220]

Faced with the futility of enforcing orders against foreign sovereigns, some courts have resorted to drastic measures. The limitations of judicial enforcement against unwilling sovereigns were on full display in *NML*. In an effort to give its judicial orders more teeth, the trial court aimed injunctive remedies at third parties to indirectly force Argentina's compliance.[221] Ultimately, the injunctions were—at very best—a crude remedy for a delicate situation. Collateral damage for

216. *See, e.g.*, Linette Lopez, *Check Out This Crazy Argentine Propaganda Poster with an American Judge's Head on a Vulture's Body*, BUS. INSIDER (Aug. 13, 2014), https://www.businessinsider.com/argentina-judge-griesa-propaganda-poster-2014-8 [https://perma.cc/Y2YS-K2M6] (illustrating political propaganda related to the case).

217. *See* Weidemaier & Gelpern, *supra* note 3, at 190 ("Courts can inconvenience sovereigns; they cannot make them pay."); Anna Gelpern, *A Skeptic's Case for Sovereign Bankruptcy*, 50 HOUS. L. REV. 1095, 1098 (2013) (describing sovereign debt obligations as simultaneously "unenforceable-yet-nondischargable"); Anna Gelpern, *Contract Hope and Sovereign Redemption*, 8 CAP. MKTS. L.J. 132, 132 (2013) ("The law can do little to make an unwilling government pay, or hand over its property to the creditors.").

218. *See* Weidemaier & Gelpern, *supra* note 3, at 190 (noting that sovereigns can "easily (if not cheaply)" keep non-immune assets away from creditors).

219. *See* Ramsey, *supra* note 213, at 94 (articulating the difficult nature of enforcing injunctive remedies against foreign sovereigns).

220. One hedge fund is reported to have initiated over 900 attachment attempts on Argentine assets. *Argentina and Hedge Fund NML Capital Ratify Their Commitment to Keep Fighting*, MERCOPRESS (Nov. 6, 2014), https://en mercopress.com/2014/11/06/argentina-and-hedge-fund-nml-capital-ratify-their-commitment-to-keep-fighting [https://perma.cc/7ZAE-U43B]. Attachment efforts targeted a wide variety of interests, including satellite contracts with SpaceX in California, a three-masted frigate that docked in Ghana, and Argentina's presidential airplane, the *Tango 01*. *See, e.g.*, Shane Romig & Santiago Pérez, *Hedge Fund Seeks Assets in Nevada in Battle over Argentine Debt*, WALL ST. J. (Apr. 7, 2014), https://www.wsj.com/articles/hedge-fund-seeks-assets-in-nevada-in-battle-over-argentine-debt-1396831172 [https://perma.cc/57PJ-7MB9].

221. *See* Weidemaier & Gelpern, *supra* note 3, at 193 (observing that the nature of litigation against sovereign defendants incentivizes courts to resort to drastic remedies aimed at third parties).

third parties was a serious downside of the injunctions in *NML*.[222] At times, the district court also seemed overwhelmed by the complexities and uniqueness of sovereign debt disputes.[223] That difficulty is understandable, given that judges are unlikely to routinely hear sovereign debt disputes during their careers.[224] However, it underscores the challenges facing a court in cases with sovereign defendants.[225]

As a matter of comparative institutional competence, enforcement is particularly problematic in investment disputes, where defendants have the power and privilege of sovereignty.[226] Beyond supplying expertise, diplomatic agencies provide additional channels and flexibility for dispute resolution. In *Sabbatino*, the Court noted disparities in the enforcement options available among the various branches of government.[227] Judicial remedies are somewhat narrow in comparison to the wide array of options at the disposal of the executive branch. Whereas the tools available for judicial enforcement often fall short for unwilling and noncompliant sovereign defendants, the political branches can offer negotiable concessions in a dispute scenario.[228] As a result, the executive branch has greater flexibility to negotiate with foreign sovereigns.[229]

---

222. *See* Cruces & Samples, *supra* note 14, at 43–44 (discussing collateral costs for innocent third parties stemming from judicial attempts at enforcement in sovereign debt); *see also An Illusory Haven*, ECONOMIST (Apr. 20, 2013), https://www.economist.com/finance-and-economics/2013/04/20/an-illusory-haven [https://perma.cc/24ZJ-JFUD] ("But the battle has inflicted collateral damage on a host of third parties, from Ghanaian ports to American custodian banks.").

223. *See, e.g.*, Floyd Norris, *The Muddled Case of Argentine Bonds*, N.Y. TIMES (July 24, 2014), https://www.nytimes.com/2014/07/25/business/rulings-add-to-the-mess-in-argentine-bonds html [https://perma.cc/RC34-N2ZC] ("Only now is [Judge Griesa] learning how complicated life can be for a judge seeking to control actions by a sovereign government and issuing orders that are supposed to be binding on those who would ordinarily never be within the jurisdiction of an American court.").

224. *See* John A. E. Pottow, *Mitigating the Problem of Vulture Holdout: International Certification Boards for Sovereign-Debt Restructurings*, 49 TEX. INT'L L.J. 221, 227 (2014) ("Judges are nevertheless asked to make important policy decisions in one-off interventions that occur every few years, a task to which they are poorly suited.").

225. *See* Gelpern, *Contract Hope and Sovereign Redemption*, *supra* note 217, at 133 (referring to debt disputes with sovereigns as "hard cases prone to make bad law").

226. *See supra note* 220 and accompanying text.

227. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 431, 435–36 (1964) (noting that the executive branch can negotiate compensation for plaintiffs through diplomatic channels, economic and political sanctions, and foreign aid).

228. *Id.* at 431–32.

229. *Id.*

2. ISDS and the Aims of the FSIA

Driven by the logic of comparative institutional competence, the FSIA's procedural shift in responsibility for immunity determinations was designed to produce two outcomes. First, the FSIA was expected to produce greater access to justice by facilitating suits against sovereigns in specific situations.[230] Second, transferring responsibility to the courts aimed to de-politicize sovereign immunity determinations.[231] With the FSIA, immunity determinations now have a statutory foundation and clearer guidelines.[232] Theoretically, immunity determinations today are more a product of legal analysis than a matter of "friendly" diplomatic status.

Yet, somewhat ironically—where extraterritorial investment disputes are concerned—ISDS may further the goals of the FSIA more effectively than the FSIA itself. Sovereign immunity law and investment law share a common aim in seeking to prevent the escalation of investor-state disputes into state-state conflicts. By channeling disputes towards neutral arbitration forums—and thereby limiting claims to the involved parties—the ISDS system aims to prevent the escalation of investment disputes into diplomatic conflicts, economic sanctions, or military interventions by home states against host states.[233] Enabling investors to bring claims on their own relieves the home states of the investors from using diplomatic channels to pressure the respondent state.[234]

Reciprocity risks are a dimension of foreign relations problems unique to suits against sovereigns. After all, foreign states have national courts systems, too. The same is true of official sanctions.[235] Thus, the desire for immunity of one state depends on other states granting reciprocal immunity in their courts.[236] Reciprocity risks are not trivial, especially for a country with the global reach and presence

230. Chilton & Whytock, *supra* note 10, at 420.

231. *Id.*

232. *See* W. Mark C. Weidemaier & Mitu Gulati, *Market Practice and the Evolution of Foreign Sovereign Immunity*, 31 L. & SOC. INQUIRY 496, 504 (2018) ("Although the FSIA clarified much about the US law of sovereign immunity, it left questions unanswered.").

233. *See* Lowenfeld, *supra* note 78, at 53 (referencing statements by the general counsel of the World Bank).

234. *See supra* note 78 and accompanying text.

235. Benedict Mander, *Companies Fear Radical Turn in Argentina*, FIN. TIMES (Aug. 24, 2014), https://www ft.com/content/42b95dbc-29e9-11e4-914f-00144feabdc0 [https://perma.cc/AUC3-7PQL] (reporting on retaliatory sanctions following confrontations between a U.S. court and Argentina).

236. Nat'l City Bank of N.Y. v. Republic of China, 348 U.S. 356, 362 (1955).

of the United States. According to the Justice Department's Office of Foreign Litigation, the United States is, at any given point in time, represented in some 1,800 lawsuits in the courts of 100 different countries.[237] The FSIA's technical reallocation of responsibility for immunity determinations to the judiciary certainly gave the process more procedural and substantive formality. However, it is far from certain that the transfer suddenly solved the foreign relations and reciprocity risks inherent in litigation against foreign sovereigns. Whether it is technically the executive or the judiciary making an immunity determination may matter little to foreign sovereign defendants and their domestic constituencies.

If the volume of amicus briefs filed by sovereigns in FSIA cases is any indication, foreign states are clearly concerned with the scope and direction of immunity in United States courts.[238] Even when FDI was only a minor component of the global economy, there were concerns that increasing the vulnerability of sovereigns to civil claims could flood courts with cases, expending judicial resources and increasing foreign relations risks.[239] The FSIA responded to those concerns by implementing limitations of scope, but that was well before the rise of modern economic globalization.[240] In the current era of globalized commercial activity, the reciprocity and foreign relations risks inherent in litigation against foreign sovereigns are as prominent as ever.[241]

Potential for politicization of investor-state disputes exists on at least two distinct planes. First, on the international level, investment disputes can fuel tensions between states, as feuds between the courts of one state and a sovereign defendant spill over into diplomatic and political channels.[242] That risk—the danger that investor-state

237. U.S. DEP'T OF JUST., OFF. OF FOREIGN LITIG. (Dec. 7, 2020), https://www.justice.gov/civil/office-foreign-litigation [https://perma.cc/AA5Y-BU2R].

238. Kristen E. Eichensehr, *Foreign Sovereigns as Friends of the Court*, 102 VA. L. REV. 289, 308 (2016) (illustrating that FSIA cases receive the highest number of sovereign amicus briefs in the dataset examined). For example, *NML* produced a flurry of amicus filings by a variety of interested parties. *See supra* note 135 and accompanying text.

239. Those concerns were raised during FSIA hearings in Congress. *See* Ristau Testimony, *supra* note 58, at 31 (addressing concerns that expanding jurisdiction through the FSIA could turn United States courts into de facto "international courts of claims").

240. *See supra* Section II.A. (noting FDI volumes before and after the economic globalization boom of the 1990s).

241. *See* Republic of Mex. v. Hoffman, 324 U.S. 30, 35 (1945) ("Every judicial action . . . has its effect upon our relations with that government."); Rutledge, *supra* note 20, at 184–85 (discussing areas of potential conflict emerging from the decline of absolute immunity).

242. *See, e.g.*, Keith Johnson, *What's Really Happening with the Yukos Case*, FOREIGN POL'Y (June 19, 2015), https://foreignpolicy.com/2015/06/19/whats-really-happening-with-

litigation will fuel state-state conflict—is recognized in sovereign immunity law and international investment law alike. Claims against sovereigns in foreign courts have proven to agitate domestic political sensitivities.[243] Second, on the domestic level, politicization has referred to the diplomatic dynamics involved in the State Department's immunity determinations.[244] While the FSIA technically accomplished a transfer of responsibility for determinations from the State Department to the courts, immunity determinations remain politicized.[245]

Another key aim of the FSIA was to improve access to justice for investors wronged by sovereign acts. Concerns about unjust outcomes for parties transacting with sovereigns with absolute immunity surfaced in both the Tate Letter and in congressional hearings for the FSIA.[246] To a large extent, the ISDS system resolves that problem, too. The ISDS system offers well-established and highly active forums for investment dispute resolution.[247] If anything, the ISDS system may be overly permissive in opening channels for investment claims against sovereigns.[248] While the extensive protections provided to investors by the ISDS system have created secondary problems, the access to justice problem is greatly diminished.[249] Furthermore, investors have access to local remedies through the domestic legal systems

---

the-yukos-case-russia-putin-belgium-france/ [https://perma.cc/AHD2-NNDT] (reporting that European court orders in the Yukos investment dispute "[have] the Kremlin apoplectic and threatening reprisals").

243. In the sovereign debt context, research has illustrated a strong connection between partisan politics and attitudes towards investor-state litigation in foreign courts. *See* Stephen C. Nelson & David A. Steinberg, *Default Positions: What Shapes Public Attitudes About International Debt Disputes?*, 62 INT'L STUD. Q. 520, 531 (2018).

244. *See supra* notes 111–112 and accompanying text.

245. *See* Chilton & Whytock, *supra* note 10, at 420 (observing evidence that "political factors—including the foreign state's economic strength, the nature of the foreign state's political system, and the judge's political ideology—are systematically related to the judiciary's foreign sovereign immunity decisions").

246. *See supra* notes 58–61 and accompanying text.

247. *See supra* Section II.C.

248. *See, e.g.*, Julian Arato, *The Private Law Critique of International Investment Law*, 113 AM. J. INT'L L. 1 (2019); Johnson, Sachs & Lobel, *supra* note 154.

249. The ISDS system has favored over-enabling investor claims against sovereign states. *See* Samples, *supra* note 78, at 137–38.

where investments are located[250] and frequently obtain explicit waivers of immunity when contracting directly with sovereign parties.[251]

That the FSIA in fact depoliticized immunity determinations and facilitated access to justice is far from clear. Empirical research has called into question the FSIA's record on both outcomes, suggesting that the State Department was more competent in immunity determinations.[252] The results of the research suggest that courts are actually more politicized in making immunity determinations than the State Department was prior to the FSIA.[253] The study also found that courts were as likely as the State Department to grant immunity in FSIA cases, leaving plaintiffs in essentially the same position as before in terms of access to justice.[254]

B. Federal "Voices" in Foreign Relations

As written by James Madison in *The Federalist Papers*, "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations."[255] Divergence risks have justified executive deference in foreign affairs in a wide variety of cases.[256] Almost two hundred years ago, in *Williams v. Suffolk Ins. Co.*, the Court, referring to potential divergences among the branches in foreign affairs, noted, "[n]o well regulated government has ever sanctioned a principle so

250. *See generally* George K. Foster, *Striking a Balance Between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration*, 49 COLUM. J. TRANSNAT'L L. 201 (2011).

251. *See, e.g.*, Weidemaier, *supra* note 10, at 88 (illustrating the use of immunity waivers in bond issuances under New York law).

252. Chilton & Whytock, *supra* note 10, at 420.

253. *Id.* at 420–21.

254. *Id.* at 419.

255. THE FEDERALIST NO. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961).

256. *See, e.g.*, Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1854) ("And it would be impossible for the executive department of the government to conduct our foreign relations . . . if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the [authority to do so]."); Baker v. Carr, 369 U.S. 186, 211 (1962) (asserting that foreign relations poses questions that "uniquely demand single-voiced statement[s] of the Government's views"); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 380 (2000) (holding that a Massachusetts law was "at odds with the President's intended authority to speak for the United States"); Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976) ("[T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments . . . ."); *supra* notes 80–81 (referencing other prominent instances of the one-voice doctrine).

unwise, and so destructive of national character."[257] In that opinion, the Court articulated an early form of the "one-voice" doctrine, which rests on the idea that deference to the executive branch promotes more coherent approaches to foreign affairs.[258] Multiple voices in foreign affairs, in other words, create risks for poorly coordinated or even contradictory foreign conduct.

The one-voice doctrine has played a major role in defining the allocation of federal power in foreign relations in three primary areas: the boundaries of judicial authority in foreign relations law, the scope of presidential authority in foreign affairs, and the limits of state action in foreign affairs.[259] For roughly two centuries, relying on the one-voice logic, the Court has treated many foreign relations questions as more political than legal while deferring to the executive.[260] In *Baker v. Carr*, a legislative apportionment case, the Court consolidated the notion that courts should refrain from scrutinizing actions by the political branches, including in matters of foreign affairs.[261] Regarding foreign relations, *Baker* emphasized the "possible consequences of judicial action" as grounds for judicial restraint.[262]

Despite compelling reasons and the intuitive appeal for a coherent voice in foreign relations, reality defies the platonic ideal of a single, cohesive voice.[263] A widespread and divergent federal system like the United States has a propensity for multiple voices in foreign relations.[264] Although the executive branch is widely recognized as the branch with primary responsibility for foreign relations, there are

257. Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839).

258. *See* David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 954–55 (2014) (articulating the essence of the doctrine).

259. *See id.* at 958–59, 976–80 (tracing the scope and application of the doctrine).

260. *See, e.g.*, Cleveland, *supra* note 82, at 979–84 (reviewing the judicial origins of the doctrine); Moore, *supra* note 258, at 963–64 nn.31–32 (observing that the practice began in political question cases over two centuries ago but did not take on express one-voice language until the mid-1900s).

261. *See* Goldsmith, *supra* note 8, at 1401–02.

262. Baker v. Carr, 369 U.S. 186, 211–12 (1962).

263. *See* Bradley, *supra* note 6, at 445 ("The one-voice argument has strong intuitive appeal.").

264. *See* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1688 (1997) ("Foreign relations law is replete with struggles between the statute-makers, the treaty-makers, the President, and sometimes the courts, for control of the federal relations voice.").

numerous forms of "non-executive" conduct.[265] In addition, with the increasing normalization of foreign relations law, the Court's traditional hesitancy to intervene in foreign affairs has been replaced by a more assertive posture. While they do not directly conduct foreign relations on behalf of the United States, courts frequently make decisions with critical implications in the realm of foreign affairs.[266] Where investment disputes are concerned, there are two key areas where the judicial branch shapes foreign relations: interpreting treaties and adjudicating investment disputes against foreign sovereigns.

A more assertive judicial voice in foreign relations law certainly creates potential tension with the treatymaking prerogatives of the political branches. The political branches are charged with negotiating and ratifying international treaties, including trade and investment agreements. An assertive judiciary may contradict those efforts, effectively subverting the priorities of the political branches. Where international investment law is concerned, open questions remain as to the appropriate balance of power among the branches. Outside of *BG Group*, the Court has not considered cases with a direct bearing on the interpretation and application of investment treaties, which underpin the ISDS system. However, the *BG Group* Court rejected the executive branch's interpretation of an investment treaty, embracing its own understanding of the agreement, signaling an appetite to read treaties with a normalized (or formalist) eye.[267]

As a sovereign entity, the United States has spoken with multiple voices—both on investment law policy broadly and in specific investment dispute cases. Until recently, the political branches were, by and large, committed to promoting investment law and the ISDS system as part of broader support for the international economic order established after World War II and as a source of legal protection for domestic companies abroad.[268] That support—promoted for decades by the political branches—was more than symbolic. Since the United States launched a BIT program in 1981,[269] 116 (forty-seven BITs and another seventy other treaties with investment provisions) have been

265. *See id*.; *see also* Kristen E. Eichensehr, *Courts, Congress, and the Conduct of Foreign Relations*, 85 U. CHI. L. REV. 609, 612 (2018) (defining "nonexecutive" conduct in foreign relations).

266. *See* Goldsmith, *supra* note 8, at 1398.

267. *See supra* note 24 and accompanying text.

268. *See* Samples, *supra* note 78, at 128–30 (discussing the origins of the investment law system).

269. Pamela B. Gann, *The U.S. Bilateral Investment Treaty Program*, 21 STAN. J. INT'L L. 373, 373 (1985).

signed.[270] Of those, Congress has ratified ninety-two (forty-one BITs and fifty-one other treaties with investment provisions).[271]

Yet the United States' longstanding commitment to the ISDS system was recently reversed by the executive branch itself. Investor-state dispute resolution in the North American Free Trade Agreement (NAFTA) was a primary issue during the tumultuous renegotiations of the agreement in 2018.[272] Despite enjoying an overwhelmingly positive record in NAFTA's investor-state mechanisms, the United States targeted them for removal.[273] In the revised version of NAFTA, the United States-Mexico-Canada Agreement (USMCA), investment protections were scaled back drastically—perhaps the most significant trade policy shift in the USMCA.[274] Since then, the United States Trade Representative has suggested that treaties with investor-state dispute provisions are essentially political risk insurance subsidized by the federal government.[275] As part of a broader turn towards unilateralism, this investment policy reversal in the United States adds uncertainty to a global economic order already destabilized by trade wars and economic nationalism.[276]

The lack of continuity and coherence on a critical question for international trade and investment policy underscores a fundamental weakness in the one-voice logic: the executive branch may not be as stable and coherent in foreign affairs as the doctrine assumes.

---

270. UNCTAD, *IIA Navigator*, *supra* note 170.

271. *Id.* For a direct link to IIAs for the United States, see *International Investment Agreements Navigator*, UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements/countries/223/united-states-of-america [https://perma.cc/S4TS-ET6K].

272. *See* Josh Wingrove, *These Are Five Sticking Points to a New Nafta Deal*, BLOOMBERG (April 13, 2018, 12:00 AM), https://www.bloomberg.com/news/articles/2018-04-13/these-are-five-sticking-points-to-a-new-nafta-deal-quicktake [https://perma.cc/8Z9E-D5G6].

273. *Id.* ("U.S. negotiators are also targeting investor-state dispute settlement panels, which deal with disagreements between a company and a government.").

274. *See* CHRISTOPHER A. CASEY & M. ANGELES VILLARREAL, CONG. RSCH. SERV., IF11167, USMCA: INVESTMENT PROVISIONS (2019), https://fas.org/sgp/crs/row/IF11167.pdf (identifying the "curtailment of ISDS" as the "biggest change from NAFTA and recent U.S. [free trade agreements]").

275. *See* Robert E. Lighthizer, *The Era of Offshoring U.S. Jobs Is Over*, N.Y. TIMES (May 11, 2020), https://www nytimes.com/2020/05/11/opinion/coronavirus-jobs-offshoring.html [https://perma.cc/5KB4-VPTP].

276. *See The Rules-Based System Is in Grave Danger*, ECONOMIST (Mar. 8, 2018), https://www.economist.com/leaders/2018/03/08/the-rules-based-system-is-in-grave-danger [https://perma.cc/M4LE-X39Z] ("Not since its inception at the end of the second world war has the global trading system faced such danger.").

Established expertise in executive agencies should, theoretically—and certainly does, in practice—reduce volatility in foreign relations. But deepening polarization and hyper-partisanship in the United States political system may weaken the ability of the executive to provide a coherent voice in foreign relations.[277] Unlike courts, the executive branch is not constrained by *stare decisis*, has a more concentrated power structure (i.e., centered in one President versus dispersed among nine Justices), and has fewer internal controls (i.e., judicial appeals mechanisms). Perhaps foreign relations—like other areas of law and policy—would benefit from more robust judicial oversight. A less deferential judiciary in foreign relations may be an additional voice, but a stabilizing one.

C. Sovereigns and Investment Law Today

Adjudicating challenges to the regulatory decisions and national policies of foreign sovereigns can lead courts to make direct incursions into the internal affairs of other sovereigns, raising normative questions at the core of sovereign equality.[278] For instance, the act of resolving extraterritorial disputes and enforcing judicial orders can—wittingly or unwittingly—convert one sovereign's courts into ad hoc tribunals with influence over the internal legal and regulatory actions of other sovereigns.[279] Infringements upon sovereignty are inevitable when the courts of one state adjudicate the acts of another.[280] Similar infringements occur when ISDS tribunals adjudicate disputes between

277. These trends could also further incentivize non-executive conduct in foreign affairs. *See* Eichensehr, *supra* note 265, at 613 ("Perhaps most importantly, the hyperpartisanship that dominates US political discourse, especially when combined with the Trump administration's perceived incompetence at and inattention to diplomacy, will incentivize US officials outside the executive branch to reach out to foreign governments.").

278. The problem of judicial imperialism arises in a number of dispute-related contexts. *See generally* Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against "Judicial Imperialism"*, 73 WASH. & LEE L. REV. 653 (2016). For instance, the Supreme Court has at times expressed reservations about adjudicating extraterritorial matters under the Alien Tort Statute. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 123 (2013); Sosa v. Alvarez-Machain, 542 U.S. 692, 727–28 (2004).

279. *See* Weidemaier & Gelpern, *supra* note 3, at 201 (exploring problems associated with supervisory injunctions against sovereigns).

280. "Sovereigntist imperialism" has been defined as the elevation of the sovereignty of one state over that of others. *See* David H. Moore, *United States Courts and Imperialism*, 73 WASH. & LEE L. REV. ONLINE 338, 339 (2016). Meanwhile, the term "legal imperialism" has accompanied expressions of concern about the extraterritorial application of U.S. laws. *See, e.g.*, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 169 (2004).

foreign investors and sovereigns[281] or when WTO panels settle trade disputes among sovereigns.[282] In the case of ISDS or WTO proceedings, however, a sovereign has consented to be bound by the treaty that establishes those mechanisms.[283] Judicial proceedings in the court system of another sovereign are not so straightforward from the standpoint of consent.[284]

ISDS is far from a panacea—the system has its share of flaws and drawbacks. The widespread and sustained backlash against the system is a testament to that.[285] In many cases, the ISDS system facilitates the intrusion of private rights in matters of sovereign prerogative in a wide variety of matters.[286] The concentrated distribution of outcomes in the system and the proportionality of its impact also loom large.[287] ISDS does not offer a comprehensive solution for the

281. One comprehensive study of 1,812 claims in 742 ISDS cases since 1993 shows that a majority of investor-state disputes challenge the regulations and policy objectives of democratically-elected governments. *See* Pelc, *supra* note 195, at 560 (showing that the majority of investor-state disputes involve challenges to regulatory measures implemented by democratic governments).

282. *See, e.g.*, Edward T. Hayes, *Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments Within Their Territories*, 25 NW. J. INT'L L. & BUS. 1, 6–9 (reviewing the context of debates about sovereignty in the GATT/WTO era).

283. Sovereign consent was a major issue in the *BG Group* decision, particularly for Chief Justice Roberts. *See* BG Grp. PLC v. Republic of Arg., 572 U.S. 25, 51 (2014) (Roberts, C.J., dissenting).

284. *See* Richard C. Chen, *Bilateral Investment Treaties and Domestic Institutional Reform*, 55 COLUM. J. TRANSNAT'L L. 547, 583–84 (2017) (outlining standard consents to arbitrate in investment treaties).

285. Early ISDS opposition tended to be led by specialized constituencies. *See, e.g.*, Lucien J. Dhooge, *The Revenge of the Trail Smelter: Environmental Regulation as Expropriation Pursuant to the North American Free Trade Agreement*, 38 AM. BUS. L.J. 475, 479 (2001) (referencing opposition among environmental groups to NAFTA's investor-state provisions). Today, the backlash is widespread. *See, e.g.*, Frédéric G. Sourgens, *Keep the Faith: Investment Protection Following the Denunciation of International Investment Agreements*, 11 SANTA CLARA J. INT'L L. 335, 356 (2013) (noting the "academic and political backlash" facing the ISDS system).

286. *See, e.g.*, Arato, *supra* note 248, at 50 (identifying distortive effects of the ISDS system on areas of domestic law, such as contracts); Stratos Pahis, *BITs & Bonds: The International Law and Economics of Sovereign Debt*, 115 AM. J. INT'L L. (forthcoming).

287. *See, e.g.*, Samples, *supra* note 78, at 164 (discussing the concentration of outcomes in the ISDS system).

complexity of disputes arising from a national debt crisis.[288] But, to be fair, national courts facing similar situations have not fared much better.[289]

Since the FSIA came into force, courts have tended to overlook the role of international law in immunity determinations.[290] Yet major changes in international law—including the extensive proliferation of the investment law and the ISDS system—increasingly invite the question: Why would a sovereign state expend judicial resources and diplomatic capital on cases that have a forum for precisely that purpose?[291] This question is likely to be especially compelling for capital-exporting states, which tend to gain more and lose less in the ISDS system.[292] In important ways, ISDS mitigates problems inherent in adjudicating claims against foreign sovereigns through national court systems. ISDS does not drain judicial resources, and it also eases reciprocity and foreign relations risks. Finally, ISDS reduces—but does not fully resolve—enforcement problems.[293] The nature of sovereign power makes exercising jurisdiction over foreign sovereigns complex, regardless of the forum.

If acting in rational self-interest, perhaps a capital-exporting state like the United States would defer more to the ISDS system, effectively outsourcing the burden of adjudicating disputes against foreign sovereigns to an independent and external tribunal. Curiously, the United States is taking the opposite approach with respect to ISDS.[294] While investors from the United States have recovered

---

288. *See, e.g.*, Stephen Kim Park & Tim R Samples, *Tribunalizing Sovereign Debt: Argentina's Experience with Investor-State Dispute Settlement*, 50 VAND. J. TRANSNAT'L L. 1033 (2017) (analyzing the use of ISDS to enforce sovereign debt obligations).

289. *See, e.g.*, *supra* notes 221–225 and accompanying text.

290. *See* Lori Fisler Damrosch, *Changing the International Law of Sovereign Immunity Through National Decisions*, VAND. J. TRANSNAT'L L. 1185, 1187 (2011) (questioning the understanding of sovereign immunity law that overemphasizes the FSIA and fails to consider the relevance of international law).

291. *See* Rutledge, *supra* note 32, at 900 (citing Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010)) (stressing the importance of judicial resources in considering legal doctrines with complex jurisdictional tests, which can be time-consuming).

292. *See* Samples, *supra* note 78, at 165–67 (illustrating the disparity in ISDS outcomes among capital-importing and capital-exporting countries).

293. Because arbitral tribunals lack enforcement mechanisms, claimants have turned to national court systems to enforce arbitral awards in the event that a sovereign respondent refuses to pay. *See, e.g.*, Marisa Anne Pagnattaro & Stephen Kim Park, *The Long Arm of Section 337: International Trade Law as a Global Business Remedy*, 52 AM. BUS. L.J. 621, 650–51 (2015) (discussing the leveraging of trade remedies to encourage the enforcement of arbitral awards).

294. *See supra* notes 272–275 and accompanying text.

billions through the ISDS system, the United States has not lost any cases as a respondent.[295] Nevertheless, the United States has turned away from ISDS in one of the most important shifts in trade and investment policy in recent times.[296] It is especially remarkable that a country with an extremely favorable record in the ISDS system, having spent decades promoting and enabling the system, has abruptly reversed course.[297] We might interpret that as a sign of the times for international economic law.

CONCLUSION

Beginning with *The Schooner Exchange*, prevailing geopolitical and economic realities have shaped sovereign immunity and foreign relations law. Landmark shifts in sovereign immunity responded to transformations in the legal and commercial landscape.[298] In fact, the most significant reform in sovereign immunity law—the pivot from absolute to restrictive immunity—was a reaction to developments in the global marketplace and international law.[299] Geopolitical events have also impacted the theory and application of sovereign immunity. A wave of expropriations connected to the Cuban Revolution provided a catalyst for the FSIA.[300] The shadow of impending war and

295. *See* Samples, *supra* note 78, at 170–71 (illustrating the track records of various countries, including the United States, in ISDS).

296. *See supra* note 236 and accompanying text.

297. The United States has tended to conclude investment treaties with less developed countries, which have limited capital exports and pose minimal risk for adverse ISDS claims to the United States. *See* Kathleen Claussen, *Dispute Settlement Under the Next Generation of Free Trade Agreements*, 46 GA. J. INT'L & COMP. L. 611, 619 n.30 (2018) ("In contrast with trade agreements, the United States has concluded most of its bilateral investment treaties with developing or least-developed countries with asymmetric trading relationships with the United States."). However, many trade agreements have investment chapters. *See, e.g.*, Kevin J. Fandl, *Bilateral Agreements and Fair Trade Practices: A Policy Analysis of the Colombia-U.S. Free Trade Agreement*, 10 YALE HUM. RTS. & DEV. L.J. 64, 78 (2006) (outlining investment protections in the Colombia-U.S. free trade agreement).

298. *See supra* notes 58–61, 63 (citing changes in the international law and increasing participation by sovereigns as market actors as catalysts for the Tate Letter and, later, the FSIA).

299. *See* Weidemaier & Gulati, *supra* note 232, at 496 (referring to the transition to restrictive immunity as a "tectonic shift").

300. Ronald Mok, *Expropriation Claims in United States Courts: The Act of State Doctrine, the Sovereign Immunity Doctrine, and the Foreign Sovereign Immunities Act – A Roadmap for the Expropriated Victim*, 8 PACE INT'L L. REV. 199, 217 (1996) ("Collectively, the Cuban expropriation cases led to the enactment of the FSIA.").

factors in the political climate likely shaped the Court's remarkable deference to executive hegemony in foreign affairs cases of the 1940s.[301] What will shape sovereign immunity in the years ahead?

This Article demonstrates the drastic pace of change in the international investment landscape after the Cold War—interestingly, on a parallel timeline with the normalization of foreign relations law.[302] In the years leading up to the FSIA, international economic activity was only just emerging at the center stage of United States policymaking.[303] Put simply, the FSIA was enacted in a vastly different era for international commerce and investment law. That disconnect invites reflection, particularly at a time of disruption for the global economic order, which was under tremendous pressure even before the onset of the Covid-19 pandemic. Fundamental changes in the global economy and international law should prompt courts and states alike to reconsider their approaches to extraterritorial investment disputes. As the global landscape changes, the law of sovereign immunity need not be static or "frozen" in time.[304]

This Article also observes that the relationship between sovereign immunity and international investment law is, at best, convoluted. For better or worse, that relationship is likely destined to remain muddled amid disruption in the global economic order. On top of pre-existing legitimacy problems facing trade and investment frameworks, national security now casts an increasingly long shadow over the system.[305] Additional stress has been caused by the Covid-19 pandemic and the escalating great-power rivalry between China and the United States.[306] Would investment conflicts—the TikTok ban and Huawei sanctions, for instance—be better resolved by impartial tribunals on

301. *See* White, *supra* note 96, at 7–8 (discussing foreign relations law in the context of major world events).

302. *See supra* Section II.B. (tracing the rapid growth of international investment law during the extensive economic globalization of the 1990s).

303. Under the Nixon administration, the President began producing an international economic report. The First Annual International Economic Report was issued in 1973. In 1975, the Committee on Foreign Investment in the United States (CFIUS) was established by executive order. *See* Exec. Order No. 11858, 40 F.R. 20263 (May 7, 1975).

304. *See* Damrosch, *supra* note 290, at 1200 (arguing that customary international law on sovereign immunity should respond to needs of justice rather than "frozen in place").

305. *See generally* J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020 (2020); Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097 (2020); Rachel Brewster & Sergio Puig, Symposium Introduction, *Can International Trade Law Recover?*, 113 AM. J. INT'L L. UNBOUND 38 (2019).

306. *See generally* Harlan Grant Cohen, *Nations and Markets*, J. INT'L ECON. L. (forthcoming).

technical grounds? Perhaps. But existing systems for de-escalating investment disputes rely on treaty-based relationships, and rival nations are unlikely to conclude trade and investment treaties with each other amid escalating tensions.[307]

At a time when stabilizing forces are needed most, the rules-based system faces serious threats. Comprehensive solutions seem distant, at best. Even more modest outcomes—for instance, greater clarity on the appropriate relationship between national court systems and the international investment law system—may remain hostage to the urgency of disruption and emergencies. Yet disruptions may eventually bring opportunities to reimagine and improve the way extraterritorial investment disputes are resolved—perhaps even in ways that better balance public-private tensions and avoid past imperialisms.[308]

307. Investment treaty negotiations between China and the United States, for instance, have stalled since launching in 2008. PETERSON INST. FOR INT'L ECON., PIIE BRIEFING 15-1 TOWARD A US-CHINA INVESTMENT TREATY 3 (2015).

308. *See supra* Section III.C. (referencing "sovereigntist imperialism" and discussing regressive outcomes in investment dispute resolution).