SIX DEGREES OF SEPARATION: ATTRIBUTION UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT IN *OBB PERSONENVERKEHR AG V. SACHS*

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INTRODUCTION

In 1810, Napoleon captured an American ship, strapped arms to it, and absorbed it into the French naval fleet. When two American citizens sought to recover the vessel, a unanimous Court relied on customary international law and held France, as a foreign sovereign, was exempt from suit.[1] Since then, foreign sovereign immunity has been a staple of both American common law and international law. The Foreign Sovereign Immunities Act ("FSIA") is the modern United States law.[2]

Foreign sovereigns are generally immune from suit.[3] Recently, the commercial-activity exception[4] has become a significant point of contention in the federal courts.[5] This exception allows a foreign sovereign to be sued in cases where "the action is based upon a

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1. Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 146–47 (1812) (holding that foreign sovereign immunity, as exemplified in customary international law, applied to a vessel owned by American citizens that was seized by the French military and removed the former owners' claim over the ship).

2. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602–11 (2012).

3. *Id.* § 1604; *but see id.* §§ 1605–1605A (establishing exceptions to foreign sovereign immunity).

4. *Id.* § 1605(a)(2).

5. *See* Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (holding a contract with an instrumentality of a foreign sovereign is insufficient to satisfy the exception); Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) (holding a foreign sovereign is not liable under the exception when it regulates foreign currency exchange); Kirkham v. Société Air France, 429 F.3d 288 (D.C. Cir. 2005) (holding a ticket sale by a third party in the United States is sufficient to satisfy the commercial-activity exception); Sun v. Taiwan, 201 F.3d 1105 (9th Cir. 2000) (same).

commercial activity carried on in the United States by the foreign state."[6] However, courts still wrestle with two key issues: first, what makes a claim "based upon" a commercial activity[7]; and second, when are actions of non-sovereign entities attributable to foreign sovereigns.[8] *OBB Personenverkehr AG v. Sachs* addresses these two questions.[9]

This commentary will detail the facts of the case and then proceed with the legal background of foreign sovereign immunity. Next, it will outline the Ninth Circuit's en banc holding. Then it will relate each party's arguments regarding the two issues on appeal. Finally, after analyzing the competing arguments, it concludes that the Supreme Court will likely reverse the lower court, holding that although the claim is "based upon" a commercial activity, the commercial activity of a separate entity cannot be imputed to the foreign state. OBB is immune under FSIA.

I. FACTUAL AND PROCEDURAL BACKGROUND

OBB, as a national rail service, operates solely within the Republic of Austria.[10] It is an "agency or instrumentality" of Austria and therefore constitutes "a sovereign state" under FSIA.[11] Along with other European rail services, OBB is a member of the Eurail Group, an association organized under Luxembourg law.[12] The Eurail Group markets and sells rail passes for these European rail services,[13]

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6. § 1605(a)(2).

7. *Compare Kirkham*, 429 F.3d at 292 ("establish[ing] a fact without which the plaintiff will lose" will suffice for the "based upon" requirement) *with* Kensington Int'l Ltd. v. Itoua, 505 F.3d 147, 156 (2d Cir. 2007) (holding the "based upon" requirement is satisfied when a "degree of closeness" exists "between the commercial activity and the gravamen of the plaintiff's complaint").

8. *Compare* First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba (*Bancec*), 462 U.S. 611, 629 (1983) (holding a foreign sovereign can be liable for actions performed by a state-owned corporation only when the entity is "so extensively controlled by its owner that a relationship of principal and agent is created" or when blindly recognizing separate legal status "would work fraud or injustice") (citations omitted) *with Kirkham*, 429 F.3d at 290 (holding that a ticket sale performed by a travel agency in the United States for a foreign sovereign's state-owned airline is considered a commercial activity in order to trigger liability under § 1605(a)(2)).

9. 135 S. Ct. 1172 (2015).

10. *Sachs v. Republic of Austria*, 737 F.3d 584, 587 (9th Cir. 2013) (en banc), *cert granted sub nom.* OBB Personenverkehr AG v. Sachs, 135 S. Ct. 1172 (2015).

11. *Id.* at 591; *see* 28 U.S.C. § 1603(a)–(b) (2012).

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

13. *Id.*

sometimes using third-party sales agents.[14] One such agent is Rail Pass Experts ("RPE"), a Massachusetts-based company.[15] OBB is not involved in the day-to-day operations of either the Eurail Group or RPE.[16]

In March 2007, Plaintiff Carol Sachs bought a Eurail pass from RPE's website to travel in Austria and the Czech Republic on an OBB train.[17] In April, when Sachs tried to board the train, she fell onto the tracks while the train was moving, crushing her legs.[18] A year later, Sachs filed suit against OBB, OBB Holding, and the Republic of Austria.[19] Plaintiff alleged five causes of action: negligence, design defect, failure to warn, breach of implied warranty of merchantability, and breach of implied warranty of fitness.[20] The district court for the Northern District of California dismissed the action for lack of subject matter jurisdiction, ruling that Sachs did not sufficiently show that OBB was liable under the commercial-activity exception.[21] Sachs then appealed to the Ninth Circuit.[22]

A divided three-judge panel affirmed the lower court's dismissal.[23] On rehearing en banc, the majority reversed the panel's decision. OBB subsequently filed for a writ of certiorari to the United States Supreme Court, which the Court granted on January 23, 2015.[24]

II. LEGAL BACKGROUND

A. Historical Overview of Foreign Sovereign Immunity

Foreign sovereign immunity first emerged in *The Schooner Exchange v. McFaddon*.[25] Writing for a unanimous Court, Chief Justice Marshall looked to customary international law to determine

14. Brief for Petitioner at 11, OBB Personenverkehr AG v. Sachs, No. 13-1067 (U.S. Apr. 17, 2015).
15. *Sachs*, 737 F.3d at 587.
16. Brief for Petitioner, *supra* note 14, at 11; *see* Brief for Respondent at 4–5, OBB Personenverkehr AG v. Sachs, No. 13-1067 (U.S. June 29, 2015).
17. *Sachs*, 737 F.3d at 587.
18. *Id.* at 588.
19. *Id.* The Republic of Austria was dismissed from the suit after Sachs failed to oppose its motion to dismiss. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. OBB Personenverkehr AG v. Sachs, 135 S. Ct. 1172 (2015).
25. 11 U.S. (7 Cranch) 116 (1812).

the scope of foreign sovereign immunity.[26] The Court found three examples of cases where sovereign immunity arises: cases involving foreign sovereign officials,[27] cases involving foreign ambassadors,[28] and cases in which the domestic country allows a foreign military to enter its territory.[29] The third example applied to *The Schooner Exchange* because the ship was a part of the French naval fleet when the suit began.[30] Marshall concluded this immunity is a reasonable legal rule under international comity; questions of whether a foreign sovereign may be subject to suit are "questions of policy [rather] than of law . . . [and] they are diplomatic, rather than legal discussion[s]."[31]

After *The Schooner Exchange*, a two-step process determined foreign sovereign immunity.[32] A sovereign could "request a 'suggestion of immunity' from the State Department," which the executive branch would grant if prudent.[33] If the sovereign failed to request the suggestion from the State Department, or if the State Department denied a request, a court could nonetheless decide if immunity existed.[34] The court would determine "whether the ground of immunity is one which it is the established policy of the [State Department] to recognize."[35]

Initially, the State Department encouraged courts to grant immunity to all "friendly foreign sovereigns."[36] However, in 1952, the State Department changed course and embraced the "restrictive theory of sovereign immunity."[37] Under the restrictive theory, "a state is immune from the jurisdiction of foreign courts as to its sovereign or

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26. *Id.* at 136–46 ("In exploring an unbeaten path, with few, if any, aids from precedents or written law, the [C]ourt has found it necessary to rely much on general principles, and on a train of reasoning founded on cases in some degree analogous to this.").

27. *Id.* at 137. This is the general principle of foreign official immunity, which is not included in the FSIA. *See* Samantar v. Yousuf, 560 U.S. 305, 311 (2010).

28. *Schooner Exch.*, 11 U.S. (7 Cranch) at 138.

29. *Id.* at 139.

30. *Id.* at 118.

31. *Id.* at 146.

32. *Samantar*, 560 U.S. at 311 (citing *Ex parte* Republic of Peru, 318 U.S. 578, 587–89 (1943)).

33. *Id.* (citation omitted).

34. *Id.*

35. *Id.* at 312 (quoting Republic of Mexico v. Hoffman, 324 U.S. 30, 36 (1945)) (alterations in original).

36. *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983) (recounting the history of the foreign sovereign immunity doctrine).

37. Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't of State Bull. 984–85 (1952).

public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*)."[38] In other words, rather than allowing its allies absolute immunity as it had before, the United States shifted to a policy of allowing immunity for sovereign acts (such as policing and imprisonment)[39] but not for commercial acts (such as advertising for a cultural tour).[40]

B. FSIA Emerges

Congress enacted FSIA for "two well-recognized and related purposes": (1) "adoption of the restrictive view of sovereign immunity" and (2) "codification of international law at the time of the FSIA's enactment."[41] The Act established "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities" to determine foreign sovereign immunity.[42]

FSIA grants immunity for all foreign sovereigns,[43] unless the case falls under an exception, the most significant of which is the commercial-activity exception.[44] This exception reads:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
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> . . . .
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> > (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.][45]

Looking to nature rather than purpose, the Act defines "commercial activity" as "a regular course of commercial conduct or a particular commercial transaction or act."[46] Furthermore, FSIA

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38. Saudi Arabia v. Nelson, 507 U.S. 349, 359–60 (1993) (citing *Verlinden*, 461 U.S. at 487).
39. *Id.* at 361.
40. *See* Sun v. Taiwan, 201 F.3d 1105, 1108 (9th Cir. 2000).
41. Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193, 199 (2007).
42. *Verlinden*, 461 U.S. at 488.
43. Foreign Sovereign Immunities Act of 1976 § 4(a), 28 U.S.C. § 1604 (2012).
44. Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 611 (1992).
45. 28 U.S.C. § 1605(a)(2).
46. *Id.* § 1603(d).

defines "commercial activity carried on in the United States by a foreign state" as a commercial activity that (1) is "carried on by such state" and (2) has "substantial contact with the United States."[47]

Under FSIA, an "agency or instrumentality of a foreign state" satisfies the definition of a "foreign state."[48] An "agency or instrumentality of a foreign state" must be (1) "a separate legal person, corporate or otherwise"; (2) "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof"; and (3) "neither a citizen of a State of the United States . . . , nor created under the laws of any third country."[49]

C. The "Based Upon" Requirement of the Commercial-Activity Exception

The Supreme Court has held that a claim is "based upon" a commercial activity for purposes of § 1605(a)(2) where the commercial activity is part of "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case."[50] This does not mean that "each and every element of a claim [must] be commercial activity by a foreign state."[51] Rather, the claim is not based upon the commercial activity if such activity has nothing to do with the action. For example, an airplane lease cannot be the basis for a tort claim that does not assert "any rights under the lease as a third party beneficiary or otherwise" related to the contract.[52] Exactly how close the commercial activity must be to the claim is an open question among the circuit courts.[53] Some courts have held that a claim is based upon a commercial activity "so long as the alleged commercial activity establishes *a fact* without which the plaintiff will lose."[54] Others have held that a claim is only based upon the commercial activity "when there exists 'a degree of closeness'

47. *Id.* § 1603(e).
48. *Id.* § 1603(a).
49. *Id.* § 1603(b).
50. Saudi Arabia v. Nelson, 507 U.S. 349, 357 (1993).
51. *Id.* at 358 n.4.
52. Santos v. Compagnie Nationale Air France, 934 F.2d 890, 892 (7th Cir. 1991).
53. *Compare* Kirkham v. Société Air France, 429 F.3d 288, 292 (D.C. Cir. 2005) *with* EM Ltd. v. Banco Central de la República Argentina, 800 F.3d 78, 97 (2d Cir. 2015).
54. *Kirkham*, 429 F.3d at 292 (emphasis added).

between the *gravamen* of the plaintiffs' complaint and the commercial activities engaged in by the foreign state or instrumentality."[55]

D. Attribution and Agency under the Commercial-Activity Exception

Foreign sovereigns often use third parties instead of directly engaging in commercial activity. This complicates the determination of what qualifies as a commercial activity "by a foreign state." In these situations, the question is whether a court can attribute actions of entities or persons not considered part of the foreign state to the state for liability.[56] Circuit courts have either followed the Court's holding in *First National City Bank v. Banco Para El Comercio Exterior de Cuba ("Bancec")*[57] or applied common law principles of agency.[58]

In *Bancec*, the Court held that although government instrumentalities should be treated as unique entities separate from the sovereign,[59] traditional corporate law principles support overcoming this presumption in two circumstances.[60] First, when the entity is "so extensively controlled by its owner that a relationship of principal and agent is created."[61] Second, "when to [blindly] do so would work fraud or injustice."[62]

On the other hand, traditional agency law principles hold that an agency relationship exists when two parties consent to such a relationship.[63] This association does not hinge solely on the intent of the parties; so long as there is an agreement, the relationship exists.[64] Furthermore, when an agent has more than one principal, it may, "in any particular matter, act as an agent on behalf of only one principal," provided all the principals consent to the multiple relationships.[65]

The Supreme Court addressed attribution under FSIA in two other recent cases. In *Dole Food Co. v. Patrickson*,[66] several chemical companies, which were once partially owned by Israeli state-owned

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55. *EM*, 800 F.3d at 97 (2d Cir. 2015) (emphasis added).
56. *See* Barkanic v. Gen. Admin. of Civil Aviation of China, 822 F.2d 11, 13 (2d Cir. 1987).
57. 462 U.S. 611 (1983).
58. *Compare* Arriba Ltd. v. Petroleos Mexicanos, 962 F.2d 528, 535 (5th Cir. 1992) *with Kirkham*, 429 F.3d at 292.
59. *Bancec*, 462 U.S. 611, 626–27 (1983).
60. *Id.* at 629.
61. *Id.* (citing NLRB v. Deena Artware, Inc., 361 U.S. 398, 402–04 (1960)).
62. *Id.* (quoting Taylor v. Standard Gas Co., 306 U.S. 307, 322 (1939)).
63. RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958).
64. *Id.* at cmt. b.
65. RESTATEMENT (THIRD) OF AGENCY § 3.14, cmt. b (2006).
66. 538 U.S. 468 (2003).

companies, tried to claim sovereign immunity as instrumentalities of Israel. The Court rejected this argument because it would "ignore corporate formalities and use the colloquial sense of [the] term [ownership]."[67] Mere subsidiaries "of an instrumentality [are] not [themselves] entitled to instrumentality status" under FSIA.[68]

In *Samantar v. Yousuf*,[69] the ex-Prime Minister of Somalia claimed FSIA applied to him as a former official of the foreign sovereign through the definition of "agency or instrumentality of a foreign state."[70] The Court rejected this argument, stating that although "[the proposed] interpretation is literally possible, [the] analysis of the entire statutory text persuades [the Court] that [this] reading is not the meaning that Congress enacted."[71] The Court held that, because the definitional statute "refers to an organization, rather than an individual,"[72] "an official acting on behalf of the foreign state" cannot be considered an "agency or instrumentality" for the purposes of foreign sovereign immunity.[73]

III. HOLDING

The Ninth Circuit, sitting en banc, held OBB liable under the commercial-activity exception of FSIA.[74]

The court first addressed whether RPE's ticket sale to Sachs could be attributed to OBB and therefore considered "commercial activity carried on in the United States by the foreign state" under the commercial-activity exception.[75] The majority rejected OBB's argument that an agent must first satisfy the definition of "agency or instrumentality of a foreign state" under 28 U.S.C. § 1603(b) before applying common law principles of agency.[76] The court found that the definitional statute had nothing to do with the question of attributing RPE's actions to OBB.[77] The court reasoned that the definition of "agency or instrumentality of a foreign state" determines "what type

67. *Id.* at 474.
68. *Id.* at 473.
69. 560 U.S. 305 (2010).
70. *Id.* at 309.
71. *Id.* at 315.
72. *Id.*
73. *Id.* at 319.
74. Sachs v. Republic of Austria, 737 F.3d 584, 603 (9th Cir. 2013) (en banc).
75. Foreign Sovereign Immunities Act of 1976 § 4(a), 28 U.S.C. § 1605(a)(2) (2012).
76. *Id.*
77. *Id.* at 595.

of entity can be considered a foreign state for purposes of claiming sovereign immunity"[78] and does not determine attribution.[79]

The court looked to traditional agency law principles to determine if there was a relationship between OBB and RPE.[80] Because the Eurail Group sells tickets for OBB and because Eurail uses subagents for some of these sales, the majority found that "Eurail Group's use of these subagents establishes a legal relationship between OBB (the principal) and RPE (the subagent)."[81] Consequently, the majority found that RPE's ticket sale to Sachs could be attributed to OBB through the Eurail Group.[82] Thus, OBB "carried on commercial activity in the United States."[83]

The court then focused on "whether the claims of Sachs are 'based upon' this commercial activity" or on her injuries that occurred in Austria.[84] The court held the "based upon" requirement is satisfied "if *an element* of [her] claim consists in conduct that occurred in commercial activity carried on in the United States."[85] Furthermore, the majority considered each of Sachs's five claims and found them all based upon OBB's commercial activity.[86]

Accordingly, because the court found Sachs's claims to be based upon commercial activity and that RPE's ticket sale in the United States could be attributed to OBB based on common-law principles of agency, the Ninth Circuit reversed and reinstated all five of Sachs's claims.[87]

IV. ARGUMENTS

A. OBB's Arguments

First, OBB argues the "based upon" requirement of the commercial-activity exception refers to the gravamen of the complaint, and therefore Sachs's claims fail because they are "based

78. *Id.*
79. *Id.* (citing Gates v. Victor Fine Foods, 54 F.3d 1457, 1460 n.1 (9th Cir. 1995)).
80. *Id.* at 593.
81. *Id.*
82. *Id.*
83. Foreign Sovereign Immunities Act of 1976 § 4(a), 28 U.S.C. § 1605(a)(2) (2012).
84. Sachs v. Republic of Austria, 737 F.3d 584, 599 (9th Cir. 2013) (en banc).
85. *Id.* (quoting Sun v. Taiwan, 201 F.3d 1105, 1109 (9th Cir. 2000)) (alteration in original) (emphasis in original).
86. *Id.* at 602 (citation omitted).
87. *Id.* at 603.

upon" the accident in Austria, not any commercial activity in the United States.[88] Second, OBB then claims that even if the ticket sale was commercial activity, it was not performed "by the foreign state" because RPE cannot be considered an agency of Austria under either FSIA's definition of "agency or instrumentality,"[89] or the Supreme Court's decision in *Bancec*.[90] OBB submits the Court should reverse the Ninth Circuit's decision.[91]

1. "Based Upon" Refers to the Gravamen of the Complaint

OBB reads the Court's holding in *Saudi Arabia v. Nelson*[92] to mean the "based upon" requirement refers to "the gravamen of the complaint."[93] Therefore, Sachs's claim should be dismissed because it is based upon her accident in Austria, not the ticket sale.[94] OBB claims that Sachs's case is analogous to *Nelson*. In *Nelson*, the plaintiff asserted the commercial-activity exception applied to his action regarding his arrest, beating, and torture by foreign police because it resulted from a contract he signed in the United States.[95] The Court held that, "[w]hile [the contract] led to the conduct that eventually injured the [him], [it is] not the basis for [his] suit."[96] By this logic, although Sachs's ticket purchase may have led to the injuries she sustained, it "is not the basis for her suit."[97] Her injuries are "based upon" her activity on the train platform in Austria.[98]

According to OBB, if Sachs's claim were upheld, foreign sovereigns would be exposed to the artful pleading the Court sought to avoid in *Nelson*.[99] The Court, in *Nelson*, refused "[t]o give jurisdictional significance to this feint of language" because it "would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity."[100] OBB argues that if an online ticket sale in the United States is a basis for tort claims regarding

88. Brief for Petitioner, *supra* note 14, at 28–38.
89. Foreign Sovereign Immunities Act of 1976 § 4(a), 28 U.S.C. § 1603(b) (2012).
90. Brief for Petitioner, *supra* note 14, at 38–64.
91. *Id.* at 64.
92. 507 U.S. 349 (1993).
93. Brief for Petitioner, *supra* note 14, at 29 (quoting *Nelson*, 507 U.S. at 358).
94. Reply Brief for Petitioner at 4, OBB Personenverkehr AG v. Sachs, No. 13-1067 (U.S. July 28, 2015).
95. *Nelson*, 507 U.S. at 358.
96. *Id.*
97. Brief for Petitioner, *supra* note 14, at 32.
98. *Id.*
99. *Nelson*, 507 U.S. at 363.
100. *Id.*

incidents occurring outside of the United States, then artful pleading will blur clear legal lines.[101] OBB contends that Sachs's claim "is merely a semantic ploy" to give her action some semblance of legitimacy.[102]

OBB rejects Sachs's "one-element" test—under which "based upon" refers to just one element of the plaintiff's claim[103]—because it would treat foreign sovereigns like private parties, contrary to the purpose of FSIA.[104] Although, according to the restrictive theory, sovereigns should be treated like private parties when they perform private actions, "[i]t does not mean that foreign states and private parties are treated alike for *all purposes*."[105]

2. Attribution is Determined by § 1603(b) or *Bancec*

Even if the Court finds Sachs's claim is based upon the ticket sale, OBB argues that RPE's actions cannot be imputed to it.[106] OBB asserts that because FSIA controls with respect to foreign sovereign immunity, the Act's definitions determine attribution.[107]

Because FSIA is the "sole basis for obtaining jurisdiction over a foreign state,"[108] OBB argues that the definition of "agency or instrumentality of a foreign state" leaves no room for common law agents.[109] Under this definition, an agency exists if it is:

> a separate legal person, corporate or otherwise . . . an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof . . . [and] neither a citizen of a State of the United States . . . , nor created under the laws of any third country.[110]

RPE does not satisfy the definition of an agency under § 1603(b). OBB argues that because the plain language of the statute controls,

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101. Brief for Petitioner, *supra* note 14, at 35.
102. *Id.*
103. *See* Brief for Respondent, *supra* note 17, at 37–51. See *infra* Section IV.B.1 for a full discussion of the one-element test.
104. Reply Brief for Petitioner, *supra* note 94, at 10–12.
105. *Id.* at 11.
106. Brief for Petitioner, *supra* note 14, at 38.
107. *Id.* at 25–26.
108. Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993) (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989)).
109. Brief for Petitioner, *supra* note 14, at 40•41.
110. Foreign Sovereign Immunities Act of 1976 § 4(a), 28 U.S.C. § 1603(b) (2012).

RPE is not an agency of Austria, and therefore its actions cannot be attributed to OBB.

Alternatively, OBB argues that *Bancec*'s two-pronged test should apply.[111] If the Court is to look outside FSIA, then this "inquiry should be dictated by the precepts of the restrictive theory of [foreign sovereign immunity] that Congress sought to codify."[112] OBB does not have any control over RPE.[113] The only possible relationship between OBB and RPE may be as "a *subagent* of an unidentified *general sales agent* accredited by the *Eurail Group*, not OBB itself."[114] And even then, the Eurail Group is comprised of thirty European rail services, so it can hardly be said that OBB exercised sufficient control over the Eurail Group to establish liability.[115] Furthermore, OBB did not create this relationship in order to "work fraud or injustice"; in fact, "there [is] no evidence that OBB even knew RPE existed prior to the filing of this suit."[116]

Finally, OBB argues that the Ninth Circuit's holding would lead to an inconsistent application of jurisdiction between foreign sovereigns and foreign private parties.[117] The Court held in *Daimler AG v. Bauman*[118] that federal courts could not assert general personal jurisdiction over a foreign company unless "that corporation's affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State."[119] However, under the Ninth Circuit's holding in this case, a court may assert jurisdiction over a foreign state if there is a connection between it and another company that markets in the United States.[120] If the Ninth Circuit's holding persists, it "would create the untenable anomaly that it is easier for a plaintiff to obtain jurisdiction in the courts of the United States over a foreign *state* than a foreign *corporation*."[121]

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111. Brief for Petitioner, *supra* note 14, at 50–55.

112. *Id.* at 50.

113. *Id.* at 53 ("[T]here is *no evidence*, or even allegation, that OBB exercised any degree of direction or control, or element of control, over RPE.").

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 61–64.

118. 134 S. Ct. 746 (2014).

119. *Id.* at 761 (citation omitted) (alterations in original).

120. *See* Brief for Petitioner, *supra* note 14, at 61 ("A foreign-state owned common carrier, such as a railway or airline, engages in commercial activity in the United States when it sells tickets in the United States through a travel agent.") (quoting Sachs v. Republic of Austria, 737 F.2d 584, 587 (9th Cir. 2013) (en banc)).

121. *Id.* at 63.

B. Sachs's Arguments

Sachs contends that FSIA's "based upon" requirement is satisfied either when a general "course of conduct" results in substantial contact with the United States,[122] or when one element of a claim has substantial contact with the United States.[123] Sachs also asserts that common law agency principles require that RPE's ticket sale be attributed to OBB, satisfying the definition of "commercial activity."[124]

1. "Based Upon" Refers to a General Course of Conduct or One Element of the Action

According to Sachs, the term "activity" in "commercial activity" means the Court should focus on the entire enterprise of OBB, not just the specific act at issue.[125] Sachs distinguishes the first clause of the commercial-activity exception, which is at issue here, with its sister clauses. The first clause refers to "based upon a commercial activity," whereas the latter two are "based upon an act" related to commercial activity.[126] Furthermore, "commercial activity" is defined as "a regular course of commercial conduct."[127] Therefore, if this regular course of commercial conduct has a substantial contact with the United States, it falls under the commercial-activity exception.[128]

Moreover, because commercial activity must have a "substantial contact with the United States, there is already a requirement for some geographical nexus in the first clause of the commercial-activity exception."[129] If "based upon" also included a geographical requirement, then "the statute's 'substantial contact' requirement would become superfluous."[130]

Even if the Court rejects Sachs's "general course of conduct" argument, she also claims that *Saudi Arabia v. Nelson* requires only that the commercial act "constitut[e] one element of the plaintiff's

122. Brief for Respondent, *supra* note 16, at 24–36.
123. *Id.* at 37–51.
124. *Id.* at 12–23.
125. *Id.* at 24.
126. *Id.*
127. Foreign Sovereign Immunities Act of 1976 § 4(a), 28 U.S.C. § 1603(d) (2012).
128. Brief for Respondent, *supra* note 16, at 25; *see* 28 U.S.C. § 1603(e) ("A 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States.").
129. Brief for Respondent, *supra* note 16, at 29.
130. *Id.*

action."[131] In *Nelson*, the Court held that "based upon" referred to "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case."[132] In that case, none of the elements of Nelson's claims stemmed from the commercial activity of his employment contract, and therefore the Court found that his action did not satisfy the "based upon" requirement.[133] Although Sachs concedes that *Nelson* did not explicitly adopt the one-element test, the Court did not base its holding on OBB's gravamen test.[134]

Sachs argues that, in order to establish a clear, bright-line rule, "based upon" should be read as a one-element test.[135] Sachs contends that OBB's gravamen test is unclear.[136] If courts use the gravamen test, judges would have to "concoct an approach for determining the 'gist or essence' of the lawsuit, with no clear guideposts at hand."[137] Whereas, under the one-element test, Sachs's claim is based upon the ticket sale because it constitutes the duty element of her claim.

2. Attribution is Determined by the Common Law of Agency

Sachs argues that RPE's ticket sale is attributable to OBB under common law principles of agency.[138] Sachs rejects OBB's contention that FSIA's definition of "agency or instrumentality of a foreign state" exclusively governs the relationship between RPE and OBB. FSIA is the sole basis for *asserting jurisdiction* over a foreign state; it does not determine the entire inquiry of an exception's meaning.[139] Thus, a plaintiff need only assert that one of the FSIA exceptions applies to the case, not that FSIA controls all questions relating to the case.[140]

Furthermore, FSIA is meant to codify the restrictive theory of sovereign immunity, which "is designed to treat foreign states like private actors when such states operate as 'every day participants' in

131. *Id.* at 37 (citing Kirkham v. Société Air France, 429 F.3d 288, 292 (D.C. Cir. 2005)).
132. Saudi Arabia v. Nelson, 507 U.S. 349, 357 (1993).
133. *Id.* at 358.
134. Brief for Respondent, *supra* note 16, at 39.
135. *Id.* at 40–41.
136. *Id.* at 43–44.
137. *Id.* at 44. In response, OBB asserts that the one-element test would also complicate matters because it would "requir[e] courts to analyze the elements of each state law claim." Reply Brief for Petitioner, *supra* note 94, at 13.
138. Brief for Respondent, *supra* note 16, at 12–23. In her brief, Sachs addressed the attribution issue first and then turned to the "based upon" requirement because she believes "once one properly focuses on the overall commercial activity involved, the precise meaning of 'based upon' is irrelevant here." *Id.* at 27.
139. *Id.* at 14 (citing Dole Food Co. v. Patrickson, 538 U.S. 468, 473–78 (2003)).
140. *Id.*

the marketplace." [141] Private actors would be subject to the common law principles of agency. Therefore, the common law on agency should apply to foreign sovereigns if they are liable under a FSIA exception.[142] If foreign states decide to use agents, then "attributing the agents' actions to the states ensures that all commercial actors in this country are treated alike."[143]

V. ANALYSIS

Although Sachs is likely to prevail in asserting that the "based upon" requirement should be construed according to the one-element test, RPE's ticket sale should not be attributed to OBB. Under the *Bancec* test, RPE's ticket sale is not OBB's action.

At the outset the parties disagree as to the order of the issues. OBB claims that the "based upon" inquiry is the first question,[144] but Sachs asserts that attribution should be considered first.[145] The Court should first decide the "based upon" inquiry. This order is plainly part of the logic of *Saudi Arabia v. Nelson*: "We begin our analysis by identifying the particular conduct on which the Nelsons' action is 'based' for purposes of the Act."[146] The Court should address the issues in this same order. If the Court determines that Sachs's action is not "based upon" a commercial activity, the attribution question is irrelevant because even if RPE's activity is attributable, it cannot trigger an exception to foreign sovereign immunity.

A. Mincing Words: The "Based Upon" Requirement of the Commercial-Activity Exception

Sachs will likely prevail as to the meaning of "based upon" with her one-element test applied on a claim-by-claim basis under *Nelson*.

Sachs's course of conduct theory is erroneous. Although Sachs offers a clever way of reading the statute by parsing the distinctions between "activity" and "act" with the clauses of the subsection of the statute, her claim undermines the restrictive theory of sovereign

141. *Id.* at 15 (quoting H.R. REP. NO. 94-1487 at 7 (1976)).
142. *Id.*
143. *Id.*.
144. Brief for Petitioner, *supra* note 14, at 28 (quoting Saudi Arabia v. Nelson, 507 U.S. 349, 356–57 (1993)).
145. Brief for Respondent, *supra* note 16, at 27; *but see* Brief for the United States as Amicus Curiae Supporting Reversal at 6, OBB Personenverkehr v. Sachs, No. 13-1067 (U.S. Apr. 24, 2015) (addressing the attribution question before the "based upon" question).
146. Saudi Arabia v. Nelson, 507 U.S. 349, 356 (1993).

immunity. The restrictive theory allows for exceptions to sovereign immunity in "cases arising out of a foreign state's strictly commercial acts."[147] Expanding "commercial activity" to include general conduct would allow plaintiffs to file actions with tenuous connections to the United States, in direct conflict with the essential presumption that a foreign state is immune from suit.[148]

For example, in *Santos v. Compagnie Nationale Air France*[149] the plaintiff sued a foreign airline after one of its employees accidentally ran over his foot while on the job. Santos argued that his claim was based on a lease between Air France and his employer.[150] The court found that his action was not based on a commercial activity because the contract had nothing to do with his claim. "[I]f it had been [any other airline's] employee who had been driving, Santos would [have sued] one of those airlines instead" regardless of whether there was a lease or not.[151] Under Sachs's broad theory, however, Santos's claim would stem simply from Air France's commercial activity of operating as an airline. Even though his claim has nothing to do with being a passenger on an airline, and therefore he has no common carrier relationship with Air France, Santos could bring suit against a foreign instrumentality simply because the sovereign chose to operate an airline. This undermines the narrow view of the restrictive theory.

Sachs is nonetheless correct that the Court should apply the one-element test for the "based upon" requirement, as several circuit courts have already held.[152] OBB claims that the gravamen test is superior because it would minimize the dangers of artful pleading,[153] but the one-element test avoids this artful pleading concern. By asserting that an element of a claim is based upon a commercial activity in the United States, a plaintiff must directly connect the action to the United States. The only risk of artful pleading Sachs's one-element test presents is that if the plaintiff can assert one element *of one claim*, then the entire action would be based upon a

147. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983).
148. *Nelson*, 507 U.S. at 355.
149. 934 F.2d 890 (7th Cir. 1991).
150. *Id.* at 892.
151. *Id.*
152. Kirkham v. Société Air France, 429 F.3d 288, 292 (D.C. Cir. 2005); Santos v. Compagnie Nationale Air France, 934 F.2d 890, 892 (7th Cir. 1991); Barkanic v. Gen. Admin. of Civil Aviation of China, 822 F.2d 11, 13 (2d Cir. 1987).
153. Brief for Petitioner, *supra* note 14, at 35 (citing *Nelson*, 507 U.S. at 363).

commercial activity.[154] However, the Ninth Circuit went through a claim-by-claim analysis of Sachs's lawsuit.[155] Therefore, those claims lacking substantial contact with the United States would be dismissed. Considering this, the Court should hold not only that the one-element test is correct, but also that it should be performed on a claim-by-claim basis.

B. It's (Not Really) Complicated: Bancec*, FSIA, and the Relationship of OBB and RPE*

Although Sachs should succeed on the "based upon" issue, OBB correctly asserts that the *Bancec* two-pronged test should apply.

OBB errs with its first argument that FSIA directly controls the attribution issue.[156] FSIA "indisputably governs the determination of whether a foreign state is entitled to sovereign immunity,"[157] not if actions are attributable to it.[158]

In fact, OBB cites to cases that undercut its own argument, such as *Dole Food Co. v. Patrickson*[159] and *Samantar v. Yousuf*.[160] In *Dole*, the plaintiffs were not trying to attribute liability to a foreign sovereign; they wanted to attribute their actions to the sovereign *to seek* immunity.[161] Similarly, in *Samantar*, the former Prime Minister of Somalia was *seeking* foreign sovereign immunity under the "agency or instrumentality of a foreign state" definition in § 1603(b).[162] The Court used the statutory language in both cases because defendants were trying to *achieve* sovereign immunity, not because plaintiffs wanted to attribute an agent's actions in order to *exempt* defendants from immunity.

On the other hand, Sachs's assertion that common law agency rules apply to this case is also incorrect. Sachs argues that "FSIA is designed to treat foreign states like private actors when such states operate as 'every day participants' in the marketplace."[163] This

154. Brief for Respondent, *supra* note 16, at 49.
155. Sachs v. Republic of Austria, 737 F.3d 584, 599–602 (9th Cir. 2013) (en banc).
156. Brief for Petitioner, *supra* note 14, at 39.
157. Samantar v. Yousuf, 560 U.S. 305, 313 (2010).
158. Brief for Respondent, *supra* note 16, at 18.
159. 538 U.S. 468 (2003).
160. 560 U.S. 305 (2010).
161. *Dole*, 538 U.S. at 471.
162. *Samantar*, 560 U.S. at 314–15.
163. Brief for Respondent, *supra* note 16, at 15 (quoting H.R. REP. NO. 94-1487 at 7 (1976)).

argument puts the cart before the horse. The foreign sovereign is only treated like a private actor when it falls under one of the FSIA exceptions. Sachs would have the Court treat a foreign sovereign like a private actor in order to *reach* the FSIA exception. Common law principles could only possibly apply if the foreign sovereign is *already liable* under an FSIA exception. Sachs cannot use the restrictive theory in order to create a loophole in FSIA.

The Court should use the *Bancec* two-pronged test to determine attribution under FSIA because that case provides a clear rule for determining when a foreign sovereign is clearly acting *through* an agent. *Bancec* correctly declares that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such."[164] Furthermore, the first prong of *Bancec* focuses on the control the foreign sovereign exerts over the entity.[165] This allows for liability when the foreign sovereign is clearly acting through the agent. Nonetheless, it also mitigates this liability; a foreign sovereign who has no control over an entity cannot direct the entity to act on its behalf. If there is control under *Bancec*, then the foreign sovereign has clearly assented to the relationship with the entity.

The present case exemplifies why *Bancec*'s test is the most consistent with FSIA's purpose. The Ninth Circuit attributed RPE's ticket sale to OBB even though OBB had no control over RPE.[166] It is absurd to attribute RPE's commercial activity to OBB. RPE is a travel agent working for the Eurail Group, of which OBB is a member, along with nearly thirty other rail services.[167] Although the Eurail Group's actions arguably can be attributed to OBB because OBB has some control over that group, the same cannot be said for RPE. RPE operates independently of both OBB and the Eurail Group. RPE sells train tickets to American citizens not just for OBB but for other Eurail Group members. OBB is simply too many degrees removed from the American vendor for the commercial-activity exception to reasonably apply in this case.

The second prong of *Bancec* addresses Sachs's concern that without common law agency principles, foreign states could use non-

164. *Bancec*, 462 U.S. 611, 626 (1983).
165. *Id.* at 630.
166. Brief for Petitioner, *supra* note 14, at 53.
167. *Id.* at 54.

attributable entities to operate in the United States without fear of liability.[168] If a foreign sovereign is abusing the corporate structure in order to "work fraud or injustice" and circumvent otherwise applicable liability, the Court should ignore the corporate structure. Indeed, this was the exact outcome of *Bancec*.[169]

Finally, in comparing the Ninth Circuit's holding to the Court's recent decision in *Daimler AG v. Bauman*, OBB presents a particularly compelling case to the Court in light of international comity.[170] Comity has been a concern of the Court since *The Schooner Exchange v. McFaddon*. The Court disfavors getting involved in foreign policy issues, and its decision in *Daimler* directly refers to this concern.[171] In *Daimler*, the Court held that foreign private companies could not be subject to general personal jurisdiction unless the entity's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State."[172] The same concern for comity should influence the Court's determination of foreign sovereign immunity. If private companies cannot be held under personal jurisdiction for their particular activities in the United States, it seems completely anomalous to hold foreign *sovereigns* liable for activities performed by third-party entities over which the state has no control.[173]

CONCLUSION

Foreign sovereign immunity is a legal doctrine that treads a fine line between law and politics. At one point, it was almost exclusively political; the United States would make foreign sovereign immunity decisions purely on foreign policy grounds.[174] Today, FSIA and the restrictive theory have pushed the decision into the judicial realm, with a continued emphasis on the importance of international comity. Due to the deep connection between the law and foreign affairs, legal questions regarding the scope of FSIA risk encroaching on the policy side of the law. The Court should keep this frame of reference in mind when it decides this case. It should conclude that the "based upon"

168. Brief for Respondent, *supra* note 16, at 15.
169. *Bancec*, 462 U.S. at 632.
170. 134 S. Ct. 746 (2014).
171. *Id.* 763.
172. *Id.* at 761 (alterations in original) (citation omitted).
173. Brief for Petitioner, *supra* note 14, at 63.
174. *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983) (recounting the history of the foreign sovereign immunity doctrine).

requirement is governed by the one-element test under *Saudi Arabia v. Nelson* on a claim-by-claim basis, but that *Bancec* should control the determination of attribution of a non-sovereign entity's actions to a foreign sovereign.