COMMENT

A COMMON LAW CORPORATE CRISIS: THE STATUS OF COMMON LAW CRIMINAL IMMUNITIES FOR FOREIGN STATE-OWNED ENTERPRISES IN A POST-*HALKBANK* ERA

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Amidst globalization, State-owned enterprises have increasingly entered the domestic markets of other States. In light of global calls for enhanced corporate accountability, this influx raises critical questions about State-owned enterprises' susceptibility to criminal prosecution and civil liability, particularly regarding their immunity. This Comment explores the intersection between State-owned enterprises and the evolving legal landscape of foreign sovereign immunity in the United States. While the Foreign Sovereign Immunities Act offers a framework for immunity decisions, the Supreme Court's 2023 decision in Türkiye Halk Bankası A.Ş. v. United States *limited its applicability to civil cases, leaving a gap for criminal prosecutions under common law immunity.*

This Comment addresses this gap by asserting that historical U.S. judicial practices and customary international law support affording absolute immunity to foreign States in criminal cases under federal common law. However, it differentiates State-owned enterprises as separate commercial legal entities that

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do not automatically possess the same immunity rights. Instead, it proposes that in the absence of clear legislative policy, courts should employ a conduct-based analysis to determine the immunity afforded to State-owned enterprises. This recommendation aims to balance the need for corporate accountability with respect for sovereign rights, fostering a legal environment that effectively addresses the challenges at the intersection of international commerce and foreign sovereign immunity.

TABLE OF CONTENTS

"In the absence of justice, what is sovereignty but organized brigandage?"
—Saint Augustine[1]

INTRODUCTION

A State-owned enterprise is often defined as a commercial entity owned or controlled by a foreign State[2] and used to engage in some form of private economic activity.[3] As a consequence of globalization, the past few decades have been marked by an increase in State-owned multinational corporations and investment funds participating in the domestic markets of other States.[4] For example, as States seek to expand their economic portfolios, sovereign wealth funds (SWFs) have begun procuring ownership in some of the world's most popular sports

1. SAINT AUGUSTINE, THE FATHERS OF THE CHURCH: THE CITY OF GOD, BOOKS I-VII 195 (Demetrius B. Zema & Gerald G. Walsh trans., Catholic Univ. Press, Inc. ed. 2008) (413–426 A.D.).

2. This Comment differentiates between the uppercase "State" and lowercase "state," referring to uppercase "State" in the international law sense, meaning country like the United States rather than lowercase "state" meaning a United States state like Wisconsin. *See* RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 201 (AM. L. INST. 1987) ("Under international law, a [S]tate is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.").

3. *See, e.g.*, ORG. FOR ECON. COOP. & DEV., RECOMMENDATION OF THE COUNCIL ON GUIDELINES ON ANTI-CORRUPTION AND INTEGRITY IN STATE OWNED ENTERPRISES 5 (2019) (defining State-owned enterprise as "any corporate entity recognized by national law as an enterprise, and in which the state exercises ownership or control"). While there is no agreed-upon definition of State-owned enterprise, many definitions share similar elements. *Infra* Section I.D.1.

4. *See* Hao Liang, Bing Ren & Sunny Li Sun, *An Anatomy of State Control in the Globalization of State-Owned Enterprises*, 46 J. INT'L BUS. STUD. 223, 223, 237 (2015) (arguing that the increase in State-owned enterprises should not be viewed as a threat but rather as a benefit to a host State's local economy).

organizations,[5] including: the parent company to the National Basketball Association (NBA) Wizards, the Women's National Basketball Association (WNBA) Mystics, and the National Hockey League (NHL) Capitals;[6] various Premier League Soccer (PLS) clubs;[7] and the Professional Fighters League (PFL), an American mixed martial arts (MMA) club.[8] While many of the leagues themselves may only be minority-owned by the SWFs—with the exception of some Premier League teams that are either completely or majority-owned and operated by their respective wealth funds—the SWFs themselves are completely State-owned enterprises.[9]

Consider for a moment that a reputable American sports league is being investigated for connection to embezzlement, bribery, fraud, economic espionage, or any other variety of criminal activity in violation of U.S. law, such as the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO).[10] These alleged violations would leave the league susceptible to various degrees of both criminal and

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5. *See* Diego Lopez & Daniel Brett, *2023 Annual Report: State Owned Investors in a Multipolar World*, GLOB. SWF 16, 18 (Jan. 1, 2023), https://global-swf.s3.amazonaws.com/file-uploads/mhWniVufvncRY1KM2QO7VUAlbBjcy2AEUToA4wVU.pdf [https://perma.cc/D6W4-9UGC] (tracking wealth funds and sovereign investment activity, identifying sports as a major investment interest in 2023).

6. *See* Stephan Whyno, *Qatar Sovereign Wealth Fund Buys Stake in Washington's NBA, NHL and WNBA Teams, AP Source Says*, A.P. NEWS (June 22, 2023, 3:54 PM), https://apnews.com/article/qatar-investment-authority-buyswizardscapitals9e2d9e6246f79b5265e9891b29cae690 [https://perma.cc/KTX4-AMY5] (detailing the agreement between the Qatar Investment Authority and Monumental Sports & Entertainment).

7. *See* Hezha Barzani, *Many European Soccer Teams Are Owned by Gulf States. But Why?*, ATL. COUNCIL (Apr. 4, 2022), https://www.atlanticcouncil.org/blogs/menasource/many-european-soccer-teams-are-owned-by-gulf-states-but-why [https://perma.cc/HQ7L-EN8B] (explaining the economic incentives of owning a foreign football club); Natalie Koch, *Global Sport and the Gulf's Sovereign Wealth Funds*, ASPENIA ONLINE (Mar. 22, 2022), https://aspeniaonline.it/global-sports-and-the-gulfs-sovereign-wealth-funds [https://perma.cc/BCC3-LRFQ] (detailing the growth of SWFs and the increase in investment in European soccer clubs).

8. *See* Hayden Campbell, *Saudi Arabia's PFL Investment Elevates Its Global Sporting Presence*, MINISTRY SPORT (Sept. 6, 2023), https://ministryofsport.com/27577-2 [https://perma.cc/UB84-4ECA] (noting the Saudi SWF's strategic investment in a growing sports industry).

9. *See* Victorino J. Tejera, *The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds*, 25 U. MIA. BUS. L. REV. 1, 4–5 (2016) (explaining how sovereign wealth funds "are very diverse in terms of legal structures, purposes, sources of funding, activities, investment strategies, and ultimate goals," yet they have commonly been defined collectively).

10. 18 U.S.C. §§ 1961–68.

civil liability.[11] As spectators and financial contributors to the success of the league, the American public would likely want to see justice brought to economic wrongdoing.[12] Now imagine that a SWF possesses ownership interest in this fan-favorite sports league. As a State-owned enterprise, could the SWF claim immunity from criminal prosecution and suit as an instrumentality of a foreign State while the other franchisees face their day in U.S. courts?[13]

This hypothetical is not a far stretch from reality. In 2002, Major League Baseball (MLB) was implicated in a RICO investigation,[14] and in 2015, fourteen FIFA affiliates were indicted on forty-seven counts under RICO.[15] Further, in 2014, the Organization for Economic Co-operation and Development (OECD) concluded that between 1999 and 2013, eighty percent of bribes investigated in foreign bribery cases were promised, offered, or given to officials at State-owned enterprises.[16] With these two entities—professional sports and State-owned enterprises—now converging, it begs the question of what mechanisms are available to pursue accountability when things inevitably go wrong?

Finding an appropriate mechanism for corporate accountability is already a challenge without adding potential immunities into the

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11. CHARLES DOYLE, CONG. RSCH. SERV. 96-950, RICO: A BRIEF SKETCH 2–3 (2021).

12. *See generally* A.J.W. Taylor, *Justice as a Basic Human Need*, 38 N.Z. J. PSYCH. 5 (2009) (placing justice as a basic safety need within the psychological framework of Maslow's hierarchy of needs).

13. *Compare* Colin Dwyer, *'Scandalous Decision': How a Turkish Banker's Conviction in U.S. Is Roiling Ankara*, NPR (Jan. 4, 2018, 12:44 PM), https://www.npr.org/sections/thetwo-way/2018/01/04/575609816/scandalous-decision-how-a-turkish-bankers-conviction-in-u-s-is-roiling-ankara [https://perma.cc/5SDD-N6MG] (criticizing the conviction of Turkish banker for using Halkbank, a Turkish State-owned bank, to violate U.S. sanctions on Iran), *with* Memorandum in Support of Defendants Motion to Dismiss at 1–2, United States v. Türkiye Halk Bankası A.Ş., No. 15 Cr. 867 (S.D.N.Y. Aug. 10, 2020), ECF No. 646 [hereinafter Memorandum Supporting Motion to Dismiss] (claiming immunity from criminal penalties as an instrumentality of Turkey).

14. *See* Murray Chass, *Baseball: A Group's Racketeering Suit Brings Baseball to Full Bristle*, N.Y. TIMES (July 17, 2002), https://www.nytimes.com/2002/07/17/sports/baseball-a-group-s-racketeering-suit-brings-baseball-to-full-bristle.html (outlining a RICO suit filed against influential administrators of the MLB for mail and wire fraud in connection with the sale and purchase of the Expos and Florida Marlins).

15. Press Release, *Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption*, U.S. DEP'T JUST. (May 27, 2015), https://www.justice.gov/opa/pr/nine-fifa-officials-and-five-corporate-executives-indicted-racketeering-conspiracy-and [https://perma.cc/6NEL-HTCH].

16. ORG. FOR ECON. COOP. & DEV., OECD FOREIGN BRIBERY REPORT: AN ANALYSIS OF THE CRIME OF BRIBERY OF FOREIGN PUBLIC OFFICIALS 23 (2014).

equation.[17] The United Nations Office of the High Commissioner for Human Rights noted, "International human rights treaties generally do not impose direct legal obligations on business enterprises."[18] Instead, it is the onus of national law to both ensure international businesses comply with international human rights standards and establish legal liability for violations of such standards.[19] Unfortunately, national proceedings are confined to a wide array of limitations, most notably, the responsibility to respect the sovereign immunity of all other States.[20]

While there is a general responsibility under international law for States to respect the sovereignty of other States, each State has the authority to enact and exercise its own immunity schemes.[21] Foreign sovereign immunity manifests in three ways: State sovereign immunity, the Act of State Doctrine, and personal immunities.[22] While distinct, there is a substantial amount of overlap between core legal and political philosophies driving all three areas of immunities.[23] When addressing State-owned enterprises, this Comment is primarily concerned with the issues of State sovereign immunity, though all types remain relevant.[24]

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17. *See, e.g.*, Hal Conick, *Corporate Crime and Non-punishment*, KNOWABLE MAG. (June 18, 2020), https://knowablemagazine.org/article/society/2020/how-should-we-punish-criminal-corporations [https://perma.cc/YYM3-8EMV] (illustrating the current problems with the U.S. legal framework for prosecuting corporations).

18. U.N. Off. of the High Comm'r for Hum. Rts., *The Corporate Responsibility to Respect Human Rights, An Interpretive Guide*, at 10, U.N. Doc. HR/PUB/12/02 (2012).

19. *Id.*

20. *See, e.g.*, Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 714–15 (2021) (preserving a foreign State's immunity claims even in instances of grave human rights violations). *But cf.* Larry C. Backer, *The Human Rights Obligations of State-Owned Enterprises: Emerging Conceptual Structures and Principles in National and International Law and Policy*, 50 VAND. J. TRANSNAT'L L. 827, 883 (2017) (advocating for the complete abolition of immunity for State-owned enterprises that commit flagrant human rights violations in the business law context).

21. *See generally* Lori F. Damrosch, *Changing the International Law of Sovereign Immunity Through National Decisions*, 44 VAND. J. TRANSNAT'L L. 1185, 1187–89 (2011) (arguing that the international law of sovereign immunity is a culmination of State practice in combination with existing international treaties).

22. *See* Ferdinand Mesch, *Jurisdictional Immunities of Foreign States*, 23 DEPAUL L. REV. 1225, 1225 & n.4, 1226 (1974) (depicting immunities in an umbrella scheme stemming from sovereignty).

23. *Id.*

24. *See, e.g.*, *infra* notes 235–39 and accompanying text (discussing the Court's consideration of customary international law when granting immunity under the Act of State doctrine).

State sovereign immunity is a unique "point of intersection between international law and national procedural law."[25] It develops through two fundamental principles of international law: the principle of territoriality and the principle of State personality.[26] The principle of territoriality is a State's ability to exercise exclusive jurisdiction over all conduct and persons within its territory but not the territory of other States.[27] The principle of State personality asserts that States have rights and responsibilities under international law and a means of recourse for violations of these rights.[28] The doctrine of State sovereign immunity embodies these principles by balancing the autonomy of national legal systems against the overarching framework of international legal obligations.

Furthermore, State sovereign immunity often manifests in two forms: absolute immunity and restrictive immunity.[29] Absolute immunity is the principle that States enjoy complete protection from the jurisdiction of other States, regardless of the characteristics of the proceedings or alleged transgression.[30] Alternatively, restrictive immunity is characterized as a denial of immunities for transgressions related to a State's commercial activities in the public market.[31] Under most applications of restrictive immunity, a State's official governmental acts are still protected from foreign domestic court jurisdiction.[32] Finally, while there is no universal treaty governing the

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25. Burkhard Hess, *The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property*, 4 EUR. J. INT'L L. 269, 271 (1993).

26. *Report of the Commission to the General Assembly on the Work of Its Thirteenth Session*, [1978] 11 Y.B. Int'l L. Comm'n 153, U.N. Doc. A/CN.4/SER.A/1978/Add.l (Part 2) [hereinafter ILC 1978 Report].

27. *See* RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 402 cmt. c (AM. L. INST. 1987) (describing the territoriality principle as "by far the most common basis for the exercise of jurisdiction to prescribe").

28. *See* ROWAN NICHOLSON, STATEHOOD AND THE STATE-LIKE IN INTERNATIONAL LAW 9–37 (2019) (breaking down the elements of personality and its importance in international law).

29. *See infra* Section I.B.1 (detailing the United States' transition from an absolute to a restrictive immunity scheme in civil proceedings).

30. XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 7 (2012).

31. *See* BARRY E. CARTER, ALLEN S. WEINER & DUNCAN B. HOLLIS, INTERNATIONAL LAW 644 (7th ed. 2018) (describing the foundations of the restrictive immunity doctrine).

32. *See* Letter from Jack B. Tate, Acting Legal Advisor, Dep't of State, to Phillip B. Perlman, Att'y Gen. (May 19, 1952) [hereinafter Tate Letter] (distinguishing between governmental and public commercial acts of State under the restrictive immunity scheme), *reprinted in* 26 STATE DEP'T BULL. 984–85 (1952).

law of State sovereign immunity like there is for personal immunities,[33] many states have codified their own domestic laws governing immunities.[34]

The United States Foreign Sovereign Immunities Act of 1976[35] (FSIA) grants foreign States, including their agencies and instrumentalities, immunity from suit in domestic courts.[36] Initially enacted to provide a comprehensive statutory framework for addressing immunity claims in U.S. courts, the FSIA also grants State property immunity from attachment and execution in satisfaction of judgments against the State.[37] This broad grant of immunity, however, is subject to exception.[38] The most frequently cited exception is the commercial activity exception.[39] Under the commercial activity exception, foreign States do not possess immunity for acts typically engaged in by private commercial actors, regardless of the State's purpose for such acts.[40]

While the FSIA was initially understood to be the primary means for obtaining immunity in U.S. courts, the Supreme Court has limited the FSIA's applicability over the past two decades.[41] Most recently, in *Türkiye Halk Bankası A.Ş. v. United States*[42] (*Halkbank*), the Court held

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33. *See infra* Section I.A.1.a (describing three existing multinational treaties addressing State sovereign immunity). Additionally, for examples of treaties governing personal immunities, see Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, which entered into force with respect to the United States on December 13, 1972; and Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S 261, which entered into force with respect to the United States on November 24, 1969.

34. *See infra* Section I.A.1.b. (discussing the immunities statutes of various States).

35. 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602–11.

36. *Id.* § 1604.

37. *See id.* § 1609 (noting total immunity for foreign owned property kept in the United States absent a preexisting treaty or exception).

38. *See generally id.* §§ 1605–07 (detailing all exceptions to the § 1604's broad immunity grant, including, but not limited to, sponsoring terrorism, exportation, and commercial activity).

39. *See, e.g.*, Julie Nadine Bloch, Comment, *Looking to the Gravamen of the Claim: The Commercial Activity Exception of the FSIA*, 51 INT'L L. & POL. 621, 622–23 (2019) (evaluating the invocation of the commercial activity exception in multiple civil cases).

40. *See* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992) (holding that the Republic of Argentina is not immune from suit in U.S. courts related to bond default since bonds are a typical and publicly accessible commercial instrument).

41. *See infra* Section I.B.3. (discussing the history of Supreme Court interpretation and application of the FSIA).

42. 143 S. Ct. 940 (2023).

that the FSIA only applies to civil, not criminal, cases.[43] The Court further clarified that Halkbank—as a bank majority-owned by the Turkish Wealth Fund—could potentially possess an immunity defense under federal common law.[44] Without providing guidance on how to determine when immunity exists at common law, the Supreme Court simply remanded the case for further deliberation on the legitimacy of Halkbank's immunity claims.[45] As a result, U.S. courts are now faced with the challenge of determining which, if any, immunities exist under federal common law when a foreign State, or its agencies and instrumentalities, are indicted for violating U.S. criminal law.[46]

In his *Halkbank* opinion, Justice Gorsuch asserted, "[M]any thorny questions lie down the common law path and the Court fail[ed] to supply guidance on how to resolve any of them."[47] This Comment embraces Justice Gorsuch's critique and addresses the remaining questions of common law immunity left by the Court's majority. In doing so, this Comment asserts that when considering historical U.S. judicial practice and customary international law, as prescribed by Justice Gorsuch, foreign States possess blanket absolute immunity for criminal prosecution under the common law. State-owned enterprises, however, as separate commercial legal entities, are distinct from the States themselves and thus do not inherently possess the same right to immunity claims. Rather, it is the function of State-owned enterprises that should guide courts in making immunity determinations for State-owned enterprises.

Part I of this Comment discusses the history and development of foreign State sovereign immunities both in the United States and internationally. Part I concludes with a discussion of the development of U.S. common law and the legal status of State-owned enterprises. Part II applies Justice Gorsuch's two recommendations for determining common law immunities, focusing specifically on illustrating the existence of a commercial activity exception to a State's absolute immunity. Part II distinguishes between the State and its instrumentalities and then advocates for decreased reliance on executive deference in the context of immunities for State-owned entities, favoring instead the increased application of customary

43. *Id.* at 280.
44. *Id.*
45. *Id.* at 280–81.
46. *See id.* (remanding the question of federal common law immunities to the lower courts without further comment on the matter).
47. *Id.* at 286 (Gorsuch, J., concurring in part and dissenting in part).

international law in U.S. courts. In arguing for the use of customary international law, Part II outlines the minimal case law related to criminal indictments of State-owned enterprises and identifies a global trend toward increased corporate accountability. Part II concludes by recommending the use of a conduct-based analysis for making immunity determinations related to State-owned enterprises and further advocates for increased clarity from the executive, legislative, and judicial branches accompanied by the codification of a clear criminal immunities statute mirroring the language of the FSIA.

I. BACKGROUND

This Part begins by discussing the international legal concepts, treaties, and cases contributing to the establishment of State sovereign immunity as a principle of customary international law. It continues by providing an account of the application and development of State sovereign immunity within the U.S. legal system. Finally, this Part addresses the status and development of federal common law, provides a brief explanation of the legal status of State-owned enterprises, and summarizes historical domestic proceedings involving State-owned enterprises.

A. Historical Global Practice of Foreign Sovereign Immunity

To effectively address the status of State sovereign immunity in U.S. courts, it is important to understand the doctrine's origins under international law.[48] International law is primarily derived from treaties and international conventions, customary international law, and general principles of law.[49] These primary sources are supplemented by judicial decisions and the teachings of the most highly qualified international legal scholars.[50] The doctrine of State sovereign immunity is one of the oldest and most complicated principles of public international law, and, like many other international legal doctrines, is generally considered to be founded in the doctrine of

48. *See* ILC 1978 Report, *supra* note 26 (explaining the origins of State sovereign immunity as a principle of international law); Hess, *supra* note 25, at 271 (describing the necessarily intertwined nature of domestic and international law principles of State sovereign immunity).

49. Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, 1060 [hereinafter ICJ Statute]; RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 102 (AM. LAW INST. 1987).

50. ICJ Statute, *supra* note 49; RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 102 (AM. L. INST. 1987).

sovereignty.[51] On the most rudimentary level, the doctrine of State sovereign immunity emerged as a recognition of this absolute independence of States, preventing one State from exercising legal authority over the government of another.[52]

While there are some treaties and conventions that recognize and address immunities broadly,[53] the doctrine of State sovereign immunity remains primarily defined through customary international law.[54] Customary international law is regularly defined as "a general and consistent practice of [S]tates followed by them from a sense of legal obligation."[55] Accordingly, customary international law is comprised of two elements: objective State practice and subjective *opinio juris*.[56] *Opinio juris* is a State's "belief that [a] practice is rendered obligatory by the existence of a rule of law requiring it."[57] The mere

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51. Jurisdictional Immunities of the State (Ger. v. It.; Greece Intervening), Judgement, 2012 I.C.J. 99, ¶ 57 (Feb. 3) ("[T]he rule of State immunity . . . derives from the principle of sovereign equality of States"). The modern understanding of sovereignty dates back to the 1648 Treaty of Westphalia; the treaty solidified the concepts of State territorial and legal independence and the practice of non-intervention in an independent State's domestic affairs. *See* Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT'L L. 20, 20, 28–30, 38–39 (1948) (contending that the Westphalian system of sovereignty rests on a respect for law and a balance of power "between rather than above states"); *see also* Daniel Philpott, *Sovereignty: An Introduction and Brief History*, 48 J. INT'L AFFS. 353, 357 (1995) (defining sovereignty as "supreme legitimate authority within a territory").

52. *See* Philpott, *supra* note 51, at 357–58 (emphasizing the complementary nature of the State maintaining both internal and external sovereignty in which the "scope of affairs over which a sovereign body governs within a particular territory" is vital in modern conceptions of sovereignty).

53. *See infra* Section I.A.1.a (outlining three multilateral treaties that all address State sovereign immunity but are limited to immunity in civil cases, rather than criminal cases).

54. *See* Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 21 EUR. J. INT'L L. 853, 856–57 (2010) (noting that while States agree on immunity as a "legally binding concept" in the abstract, they disagree on the breadth of its application).

55. RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 102(2) (AM. L. INST. 1987).

56. *See* North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20) ("Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."); Michael P. Scharf, *Accelerated Formation of Customary International Law*, 20 ILSA J. INT'L & COMPAR. L. 305, 311–12, 322 (2014) (differentiating between objective and subjective State practices in that objective State "conduct was traditionally easier to ascertain than the belief of a State," while the subjective element allows for the interpretation of ambiguous State actions).

57. *North Sea Continental Shelf*, 1969 I.C.J. ¶ 77.

frequency of a practice does not satisfy *opinio juris*, but rather the motivation behind the practice must be rooted in a State's subjective sense of legal obligation.[58]

What qualifies as "State practice" as evidence of customary international law is unsettled.[59] It is generally accepted that diplomatic acts, statutes, and official statements can be considered evidence of State practice.[60] Assent to treaties, both multilateral and bilateral, and judicial opinions from domestic and international courts are also often used to demonstrate the existence of State practice.[61] An absence of action can also be evidence of State practice.[62] Regardless of the nature of the act, to be considered a satisfactory element of customary international law, such State practice must be "general and consistent."[63] The Restatement (Third) of the Foreign Relations Law of the United States ("Third Restatement") says "[a] practice can be general even if it is not universally followed" so long as it reflects "wide acceptance among the [relevant] states."[64] Furthermore, the distinction between State practice and *opinio juris* often becomes blurred, as evidence of motivation is often embodied in acts and

58. *Id.*; *see* RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 102 cmt. c (AM. L. INST. 1987) ("[A] practice that is generally followed but which [s]tates feel legally free to disregard does not contribute to customary law.").

59. CARTER ET AL., *supra* note 31, at 123–33 (summarizing scholarly opinion and relevant statutes defining State practice and how it adds to customary international law).

60. *See* RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 102 cmt. b (AM. L. INST. 1987) ("[State practice] includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other [S]tates."); Ryan M. Scoville, *Finding Customary International Law*, 101 IOWA L. REV. 1893, 1895–96 (2016) (defining State practice and providing guidance for finding strong examples of such practices).

61. *See* Report of the International Law Commission on the Work of Its Seventieth Session, [2018] 2 Y.B. Int'l L. Comm'n 99, U.N. Doc. A/CN.4/SER.A/2018/Add.1 (Part 2) ("State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions."); *see also* Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1117 (1999) (summarizing the key sources of customary international law).

62. RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 102 cmt. b (AM. L. INST. 1987) ("Inaction may constitute [S]tate practice . . . ."); *see* Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59, 76–77 (1990) (arguing that often inaction by many is more telling of a norm than noncompliance by a few).

63. RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 102 (AM. L. INST. 1987).

64. *Id.* § 102 cmt. b.

statements of the State.[65] Regardless, the existence of general State practice in addition to *opinio juris* is essential for establishing a universally binding principle of international law.[66] When evaluating the development of State sovereign immunity through customary international law, it is important to consider all potential sources of State practice in order to identify the most holistic representation of the current immunity standard.[67]

Finally, while general and consistent acts present evidence of State practice, the universally accepted notion is that the State practice must crystalize into a norm of customary international law before it becomes binding on all States.[68] Crystallization occurs when an emerging principle of customary international law becomes binding as a result of a long history of evidence of *opinio juris* and State practice as explained above.[69] Length of time alone does not ensure the crystallization of a norm, but the creation, ratification, and implementation of treaties can speed up the crystallization of customary international law.[70] A crystalized norm is enforceable against all States, even those not party to the treaty, unless the State has

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65. *See* Harmen van der Wilt, *State Practice as Element of Customary International Law: A White Knight in International Criminal Law?*, 20 INT'L CRIM. L. REV. 784, 794–98 (2019) (concluding that international tribunals use national legislation and domestic court case law, which can both be qualified as evidence of state practice and *opinio juris*).

66. *See* RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 102 (listing both general state practice and a sense of legal obligation as elements of customary international law); Scoville, *supra* note 60, at 1895–96 (describing the two-part test for finding customary international law, first identifying State practice).

67. *See infra* Section II.C.1 (considering the acts and statements of multiple States when determining the current status of State sovereign immunity under U.S. criminal law).

68. *See* CARTER ET AL., *supra* note 31, at 123, 136–37 (detailing the formation of custom and the process of crystallization).

69. *See* The Paquete Habana, 175 U.S. 677, 686 (1899) (referring to "usage among civilized nations . . . gradually ripening into a rule of international law").

70. *See* North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 73 (Feb. 20) (holding that "even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself" to turn a conventional rule into a general rule of international law "provided that it includes [S]tates whose interests are specifically affected").

established itself as a persistent objector[71] to the policy.[72] A customary international law principle may also crystalize into a regional norm, rather than a global norm, if only States from a specific region appear to be abiding by the practice.[73] Going forward, in attempting to identify a norm of customary international law on State sovereign immunity it is essential to keep in mind the limitations of crystallization, objectors, and regional norms while conducting a comprehensive survey of all existing examples of State practice on the matter.

1. Evaluating State practice on State sovereign immunities

A thorough canvassing of existing State practice related to State sovereign immunities is essential for clarifying applicable customary international law. Like general international law, evidence of the elements of customary international law is derived from "the usage of nations, judicial opinions, and the works of jurists."[74] Over the years, many international treaties, domestic statutes, and international court cases have sought to address and define State sovereign immunity.[75] A few of the most prominent examples are discussed below.

a. International conventions and treaties

While treaties themselves are a form of international law binding only on parties to the treaty, treaties also provide a basis for the establishment of universally binding customary international law.[76] One of the earliest treaties exclusively addressing State sovereign immunity, the 1926 International Convention for the Unification of

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71. The persistent objector rule is typically understood to mean that if a State "persistently and consistently objects to a newly emerging norm of customary international law during the period of the 'formation' of that norm . . . the objecting state is exempt from the customary norm" even after it has crystalized for all other States. JAMES A. GREEN, THE PERSISTENT OBJECTOR RULE IN INTERNATIONAL LAW 1 (2016).

72. *North Sea Continental Shelf*, 1969 I.C.J. ¶ 73.

73. *See generally* Anthony D'Amato, *The Concept of Special Custom in International Law*, 63 AM. J. INT'L L. 211 (1969) (seeking to distinguish between "special" regional custom and "general custom" through a comprehensive analysis of the origins of the distinction and international court cases on the subject).

74. Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980).

75. *See, e.g.*, Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgement, 2012 I.C.J. 99 (Feb. 3) (defining international law on State immunities through an evaluation of Germany's immunities from prosecution in Italian courts for *jus cogens* violations related to World War II).

76. *Cf.* Goldsmith & Posner, *supra* note 61, at 1117 (noting the frequent but "inconsistent and undertheorized" use of treaties to discern customary international law).

Certain Rules Relating to the Immunity of State-owned Vessels and Accompanying Additional Protocol[77] ("Brussels Convention"), focused solely on State-owned vessels,[78] distinguishing between official public acts (like war vessels) and private commercial activities, denying immunity to vessels engaged in trade.[79] The Brussels Convention did not directly address criminal responsibility, outlining only areas of civil liability.[80]

The 1972 European Convention on State Immunity[81] ("European Convention"), was the first multilateral treaty on State sovereign immunity and is the only multilateral treaty currently in effect.[82] It reflects an international trend toward restrictive immunity by acknowledging "a tendency to restrict the cases in which a State may claim immunity before foreign courts,"[83] and by defining fourteen exceptions, for specific private and commercial acts, to Article 15's remaining grant to absolute immunity.[84] The European Convention

77. International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels, Apr. 10, 1926, 176 L.N.T.S 199 [hereinafter Brussels Convention].

78. *See* Ingrid Wuerth, *A Primer on Foreign Sovereign Immunity*, TRANSNAT'L LITIG. BLOG (Apr. 13, 2023), https://tlblog.org/a-primer-on-foreign-sovereign-immunity [https://perma.cc/U4SL-5WRL] (noting the limited scope of the Brussels Convention when compared to other treaties).

79. HAZEL FOX & PHILIPA WEBB, THE LAW OF STATE IMMUNITY 115–16 (3rd ed. 2013).

80. *See generally* Brussels Convention, *supra* note 77, at 205 (omitting language specific to criminal proceedings and instead vaguely stating "claims relating to" the ship operations of State-owned vessels are subject to the "same rules of liability" as private vessels).

81. European Convention on State Immunity, May 16, 1972, 1495 U.N.T.S 181 [hereinafter European Convention]. The Additional Protocol to the European Convention established the European Tribunal in Matters of State Immunity, but to date, no disputes have been initiated under the Additional Protocol. *Id.* at 217; FOX & WEBB, *supra* note 79, at 118.

82. *See* David Gaukrodger, *Foreign State Immunity and Foreign Government Controlled Investors*, 10 (OECD Publ'n, Working Papers on International Investment No. 2010/02, 2010), https://www.oecd-ilibrary.org/finance-and-investment/foreign-state-immunity-and-foreign-government-controlled-investors_5km91p0ksqs7-en [https://perma.cc/3JBA-FDVQ] (addressing the current state of State immunity, summarizing the impacts of the European Convention).

83. European Convention, *supra* note 81, at 182.

84. *Id.* at 182–85; *see* FOX & WEBB, *supra* note 79, at 121 ("Articles 7 and 4 are the court articles . . . as with all the other exceptions . . . any summary unavoidably omits detail and reference to the text of the Convention is recommended.").

does not mention criminal immunities, specifically addressing only civil suits.[85]

Finally, the most comprehensive multilateral treaty related to State sovereign immunities is the United Nations Convention on Jurisdictional Immunities of States and Their Property[86] ("U.N. Convention on Immunities"), but it is not yet in effect and will not enter into force until it is ratified by at least thirty states.[87] The U.N. Convention acknowledges "that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law."[88] The U.N. Convention on Immunities defines "State" to include agencies or instrumentalities permitted to act on behalf of the State and grants all States immunity from the domestic jurisdiction of other States, except for proceedings involving commercial transactions.[89] It clarifies that when "a State enterprise or other entity established by a State which has an independent legal personality" is involved in a preceding, the immunity of the State should not be affected.[90] While the U.N. Convention on Immunities itself is comprehensive in its protections, it does not address criminal cases, with many State parties making reservations to any forfeiture of immunities in criminal matters.[91]

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85. *See generally* European Convention, *supra* note 81 (making no mention of criminal immunities).

86. G.A. Res. 59/38, U.N. Doc. A/RES/59/38, annex, United Nations Convention on Jurisdictional Immunities of States and Their Property (Dec. 16, 2004) [hereinafter U.N. Convention on Immunities].

87. *Id.* art. 30. As of 2023, the United States has neither signed nor ratified the U.N. Convention on Immunities. *See United Nations Convention on Jurisdictional Immunities of States and Their Property*, U.N. TREATY COLLECTION [hereinafter U.N. Convention Treaty Collection], https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en [https://perma.cc/YR44-5ZLL]. Fourteen States, including Belgium, China, Denmark, Russia, and the United Kingdom, have signed the Convention but have not yet ratified it. *Id.* Twenty-two States, including France, Iran, Italy, Japan, Saudi Arabia, Sweden, and Switzerland have ratified it. *Id.*; *see generally* David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J INT'L L. 194 (2005) (providing a comprehensive analysis of the elements and shortcomings of the UN Convention).

88. U.N. Convention on Immunities, *supra* note 86, at 2.

89. *Id.* art. 10 ¶ 1.

90. *Id.* art. 10 ¶ 3.

91. *See, e.g.*, G.A. Res. 59/38, ¶ 2 (Dec. 2, 2004) ("[T]he United Nations Convention on Jurisdictional Immunities of States and Their Property does not cover criminal proceedings."); U.N. Convention Treaty Collection, *supra* note 87 (listing various interpretive declarations including "Liechtenstein hereby understands that the

b. International Court of Justice cases

Another body of law contributing to the creation of customary international law is international and domestic court opinions.[92] The International Court of Justice (ICJ), established by the U.N. Charter, is the "principal judicial organ of the United Nations" and is responsible for resolving contentious legal disputes between all United Nations member States.[93] The ICJ addresses conflicts related to treaty interpretations, alleged violations of international obligations, and any other questions of international law.[94] The ICJ may use international conventions, customs, and general principles of law, alongside domestic court holdings and "the teachings of the most highly qualified publicists" when resolving these disputes.[95] While judgments of the ICJ are only binding on States party to the controversy,[96] the court's opinions can be used as persuasive authority in other courts and as evidence of customary international law.[97]

The 2012 case *Jurisdictional Immunities of the State*[98] is the ICJ's most comprehensive analysis of State sovereign immunity.[99] In *Jurisdictional Immunities of the State*, Germany requested that the ICJ declare Italy

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Convention does not cover criminal proceedings," and "Switzerland hereby understands that the Convention does not cover criminal proceedings").

92. RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 103(2)(a)–(b) (AM. L. INST. 1987).

93. U.N. Charter arts. 92, 93; *Contentious Jurisdiction*, INT'L CT. OF JUST., https://www.icj-cij.org/contentious-jurisdiction [https://perma.cc/3DH3-N8P7]; *United Nations Charter, Chapter XIV: The International Court of Justice*, U.N., https://www.un.org/en/about-us/un-charter/chapter-14 [https://perma.cc/B7PG-U26P].

94. ICJ Statute, *supra* note 49, art. 36.

95. *Id.* art. 38.

96. *Id.* art. 59; U.N. Charter art. 94, ¶ 1.

97. *See, e.g.*, Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgement, 2012 I.C.J. 99, ¶ 58 (Feb. 3) (relying on two previous ICJ cases when concluding the law of immunities is procedural); Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 712 (2021) (relying on the ICJ's opinion in *Jurisdictional Immunities of the State* when holding that Germany cannot be deprived of immunity simply because it is accused of serious violations of international human rights law); *cf.* Medellín v. Texas, 552 U.S. 491, 510–12 (2008) (holding ICJ opinions are not inherently self-executing, binding, federal law and often necessitate action by Congress despite occasional use by courts).

98. Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgement, 2012 I.C.J. 99 (Feb. 3).

99. *See generally* Marcin Kaldunski, *The Law of State Immunity in the Case Concerning Jurisdictional Immunities of the State (Germany v. Italy)*, 13 L. & PRAC. INT'L CTS. & TRIBS. 54 (2014) (examining the complexities of the ICJ's evaluation of State sovereign immunities).

violated international law when it denied Germany immunity from proceedings related to World War II violations of international humanitarian and human rights law.[100] In evaluating the elements of customary international law as they relate to State sovereign immunity, the ICJ opinioned that State practice is derived from "judgment[s] of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States."[101] Further, the ICJ asserted that *opinio juris* in the immunity context is demonstrated in three ways: (1) the immunity-claiming State's assertion that it has a right to immunity under international law, (2) the immunity-granting State's acknowledgment that it is obligated under international law to grant immunity, and, conversely, (3) a State's assertions that it has the right to exercise jurisdiction over another State.[102] Thus, in breaking down the elements of State practice and *opinio juris*, the court effectively identified elements essential to discerning the status of immunities under customary international law.[103] After evaluating the identified sources, the Court held that "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict."[104] Most importantly, this case provided a thorough analytical framework for other courts' evaluations of customary international law, specifically in the context of international crime.[105]

While the ICJ in *Jurisdictional Immunities of the State* broadly solidified the right of States to be free from criminal prosecution in foreign domestic courts, the court dodged the question of specific jurisdictional immunities for State-owned enterprises twice in *Certain Iranian Assets*.[106] The ICJ originally avoided the question based on lack

100. *Jurisdictional Immunities of the State*, 2012 I.C.J. ¶ 37–51.
101. *Id.* ¶ 55.
102. *Id.*
103. *Id.*
104. *Id.* ¶ 91.
105. *See, e.g.*, Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 712 (2021) (using *Jurisdictional Immunities of the State* to determine if Germany possessed immunity under international and U.S. law).
106. Certain Iranian Assets (Iran v. U.S.), Judgement, 2023 I.C.J 164, ¶ 12, 35–40 (Mar. 30).

of jurisdiction[107] and later avoided responding based on lack of legal need.[108] In *Certain Iranian Assets,* Iran claimed that the United States violated customary international law and the Treaty of Amity by denying Iran and Iranian State-owned companies, specifically the Bank Markazi, immunity from sanction violations.[109] The ICJ declined to rule on the issues related to the international law of immunity, affirming its 2019 judgment and further explaining that it was not necessary to determine whether the bank possessed a legitimate immunity claim when evaluating whether the Bank was a "company" under the Treaty of Amity.[110]

c. State codes and policies

A final source of customary international law to consider is the domestic legislation of States.[111] Many States have implemented domestic legislation outlining their own policies towards State sovereign immunities; however, none address criminal immunities.[112] Most States' domestic legislation resembles that of the United Kingdom's State Immunity Act of 1978[113] ("UK SIA") or the United States' FSIA.[114] The UK SIA begins with a general grant of immunity from the jurisdiction of UK courts, subject to exception.[115] Next, the UK SIA clarifies that a State is not immune in cases involving

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107. Certain Iranian Assets (Iran v. U.S.), Preliminary Objections, Judgment, 2019 I.C.J. ¶ 80 (Feb. 13) (finding "in so far as Iran's claims concern the alleged violation of rules of international law on sovereign immunities," specifically relating to the Bank Markazi, "the Court does not have jurisdiction to consider them").

108. *Certain Iranian Assets*, 2023 I.C.J ¶ 48; *see* Ylli Dautaj & William F. Fox, *Jurisdictional Immunities and Certain Iranian Assets: Missed Opportunities for Defining Sovereign Immunity at the International Court of Justice*, 53 CORNELL INT'L L.J. 379, 380 (2020) (arguing that while the ICJ is the most well suited to address the complicated issues of immunities, it has continually failed to do so).

109. *Certain Iranian Assets*, 2023 I.C.J ¶ 18.

110. *Id.* ¶ 48.

111. RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 102(2) (AM. L. INST. 1987).

112. *See, e.g.*, Law No. 24488, June 22, 1995, B.O. art. 2(e) (Arg.); Foreign States Immunities Act, No. 196 of 1985, § 13(a) (Austl.); State Immunity Act, R.S.C. 1985, c. S-18, § 18 (Can.); Foreign States Immunity Law, 5769-2008, ¶ 9 (Isr.); State Immunity Ordinance No. 6 of 1981, PAK. CODE § 17(2)(b) (Pak.); Foreign States Immunities Act 87 of 1981 § 2(3) (S. Afr.); State Immunity Act, Ch. 313, Pt. 3, § 19(2)(b) (rev. 2014 ed.) (Sing.).

113. State Immunity Act 1978, c. 33 (U.K.).

114. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–11.

115. State Immunity Act 1978, c. 33, § 1(1) (U.K.).

commercial transactions or contract obligations.[116] Most notably, section 14 of the UK SIA specifically defines a State as only including government bodies and excludes entities that are separate from the "executive organs of government."[117] These separate entities are only entitled to immunity in instances where they are acting through sovereign authority.[118] Finally, the UK SIA specifically states that it does not apply to criminal proceedings.[119]

While the UK SIA, alongside other State statutes, multilateral treaties, and court opinions, provide a foundation for understanding the status of State sovereign immunities and the immunities of State-owned enterprises under customary international law, they do not fully address how these principles are applied in U.S. domestic courts.[120] To thoroughly understand the current common-law status of immunities for State-owned enterprises, it is necessary to evaluate the development of State sovereign immunity under U.S. law.

B. Historical Foreign Sovereign Immunity in the United States

The United States follows its own immunities scheme, loosely tied to requirements imposed by international law.[121] This Section chronologically displays the United States' transition from an absolute immunity scheme to a restrictive immunity scheme.[122] Further, this Section outlines the purpose and implementation of the FSIA, concluding with a discussion of historical judicial practice defining and limiting the FSIA's scope into its present form.[123]

1. Pre-FSIA era: Absolute immunity transitioning to a restrictive approach

For almost two centuries, as "a matter of grace and comity,"[124] the United States subscribed to a policy of absolute immunity for foreign States, their agents, and their instrumentalities before transitioning to

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116. *Id.* § 3(1).
117. *Id.* § 14(1).
118. *Id.* § 14(2).
119. *Id.* § 16(4).
120. *See infra* Section II.C (balancing both international evidence and domestic precedent when crafting a narrative of commonality under domestic and international law).
121. CARTER ET AL., *supra* note 31, at 641.
122. *Id.* (explaining how the United States currently applies a restrictive immunity theory "which is broadly—but not universally—applied by other nation states").
123. *See* Samantar v. Yousuf, 560 U.S. 305, 317–20 (2010) (explaining that the FSIA "does not address an official's claim to immunity").
124. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983).

a more restrictive immunity scheme.[125] As explained above, absolute immunity generally means that regardless of reason, crime, complaint, or nature of the legal proceeding, a State cannot be brought as a defendant in a foreign national court without first consenting to jurisdiction.[126] Thus, the United States offered foreign sovereigns complete protection from the jurisdiction of domestic courts for the better part of the nineteenth and twentieth centuries.[127]

The policy of absolute immunity is often traced back to the 1812 case *Schooner Exchange v. McFaddon*,[128] where the Supreme Court, citing principles of sovereign equality and independence, the United States-France relationship, and the ship's military use, concluded a ship allegedly stolen from U.S. citizens under orders from Napoleon, Emperor of France and King of Italy, enjoyed absolute immunity from United States jurisdiction.[129] The Court justified this determination of absolute immunity by stating that recourse for such wrongs is a diplomatic issue, outside the scope of judicial power.[130]

Following *Schooner Exchange*, U.S. courts developed a two-step procedure for resolving foreign State sovereign immunity claims.[131] As a general practice, courts deferred to determinations and grants of immunity from the executive branch when evaluating immunity claims or, where the executive branch was silent, deferred to interpretations of common law requirements.[132] During this time, the State

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125. *See generally* Daniel T. Murphy, Comment, *The American Doctrine of Sovereign Immunity: An Historical Analysis*, 13 VILL. L. REV. 583 (1968) (tracing the historical development of restrictive immunity through case law).

126. *See* YANG, *supra* note 30, at 7 (defining and expanding on the history of absolute immunity).

127. *Verlinden B.V.*, 461 U.S. at 486.

128. 11 U.S. (7 Cranch) 116 (1812); *see* YANG, *supra* note 30, at 8 (expounding on the origins of the practice of absolute immunity).

129. *Schooner Exch.*, 11 U.S. at 117–18, 137, 147 (emphasizing the importance of the "perfect equality and absolute independence of sovereigns."); *id.* at 144–45 (alluding toward a difference between immunities granted to a ship used for private merchant functions and those, like the Schooner, used for public military function).

130. *Id.* at 146 ("The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration, that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign.").

131. *See* Samantar v. Yousuf, 560 U.S. 305, 311 (2010) (outlining the two-step approach used by the courts following the *Schooner Exchange*).

132. *Id.*; *see, e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30, 34–35 (1945) (noting that "in the absence of recognition of the claimed immunity by the political branch of

Department typically requested immunity in all cases brought against foreign allies.[133]

The rise of State involvement in private commercial markets complicated courts' abilities to make immunity determinations absent executive instruction.[134] The increase in the number of State-owned enterprises engaging in international commerce and a global trend toward the restrictive immunity theory pushed the United States to also adopt the restrictive immunity theory.[135] By continuing to award other States absolute immunity in the areas of commerce, the United States put itself in an inferior position of increased liability in foreign domestic courts while also "undermining U.S. business interests."[136] Immunity claims raised by foreign State-owned enterprises left domestic companies without a remedy for violations of business contracts.[137] To protect the commercial interests of domestic corporations, the United States needed to change its immunity granting policy.[138]

The U.S. State Department formally differentiated between absolute and restrictive State sovereign immunity schemes in May 1952, when it issued what is commonly referred to as the Tate Letter.[139] In the Tate Letter, the State Department wrote:

> According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure*

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the government, the courts may decide for themselves whether all the requisites of immunity exist").

133. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983).

134. *See, e.g.*, Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562, 576 (1926) (holding a vessel owned by the Italian government should have immunity, regardless of its engagement in commercial activity, blurring the lines between public and private acts for the courts).

135. CARTER ET AL., *supra* note 31, at 644.

136. *Id.*

137. *See, e.g.*, *Berizzi Bros.*, 271 U.S. at 576 (dismissing a libel in rem suit brought by an American company against an Italian ship based on absolute immunity, thereby disadvantaging the American Company that had been wronged).

138. *See* Penelope Dalton, Comment, *Sovereign Immunity: The Right of the State Department and the Duty of the Court*, 6 WM. & MARY L. REV. 70, 75–76 (1965) (describing the necessary adoption of the Tate Letter based on other States' rejections of absolute immunity).

139. Tate Letter, *supra* note 32, at 984–85.

> *imperii*) of a state, but not with respect to private acts (*jure gestionis*).[140]

Thus, by differentiating between public and private acts of States, the State Department effectively held that purely commercial acts, and consequently commercial acts of State-owned enterprises, should not be granted immunity from suit.[141] Consequentially, all U.S. courts were required to engage in the restrictive immunity scheme and deny immunity claims based on commercial acts.[142]

While intended to be uniform, application of the Tate Letter "proved troublesome," and conflict between the supposed policy and government favoritism led to the complicated and non-uniform application of immunities in U.S. courts.[143] While courts seemed readily able to apply the Tate Letter's restrictive theory, absent interference by the State Department, the State Department frequently prioritized foreign policy considerations over compliance with restrictive immunity.[144] This conflict and lack of consistency necessitated a shift in policy in order to curtail executive power and create clear immunity standards for U.S. courts.[145]

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140. *Id.* at 984.

141. *See* John M. Niehuss S.Ed., Comment, *International Law-Sovereign Immunity-The First Decade of the Tate Letter Policy*, 60 MICH. L. REV. 1142, 1142 (1962) (expanding on the challenges of implementing the Tate-Letter restrictive immunity policy despite its distinctions between governmental and commercial acts).

142. *See* Compania Espanola de Navegacion Maritima, S.A. v. The Navenar, 303 U.S. 68, 74 (1938) (holding all decisions of the executive branch are binding); *see also* Regan v. Wald, 468 U.S. 222, 242 (1984) ("Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference'." (alteration in original) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952))).

143. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983); *see* Mesch, *supra* note 22, at 1231–34 (addressing the Tate Letter's failure to curtail executive authority over immunities determinations).

144. *Compare* Weilamann v. Chase Manhattan Bank, 192 N.Y.S.2d 469, 473 (N.Y. Sup. Ct. 1959) (grappling with the State Department's refusal to apply the restrictive doctrine and suggesting immunity for commercial acts by the Soviet Union during the Cold War), *with* New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684, 687 (S.D.N.Y. 1955) (agreeing with the State Department's enforcement of the restrictive scheme and refusing to extend immunity to the Republic of Korea, at the time a diplomatically friendly nation).

145. *See* Mesch, *supra* note 22, at 1231–34 (describing the need for a clearer immunity policy).

2. Implementation of the FSIA: Codification of restrictive immunity

To address the issues that arose under the Tate Letter regime, Congress endeavored to codify the restrictive theory of immunity.[146] In his testimony before the House, Monroe Leigh, legal advisor of the U.S. State Department, addressed the incongruencies of U.S. sovereign immunity policy compared to other States.[147] For other nations "sovereign immunity is a question of international law decided exclusively by the courts and not by institutions concerned with foreign affairs."[148] Therefore, by deferring to the executive on matters of sovereign immunity, the United States was providing foreign States with a diplomatic advantage that the United States itself was not privileged to in courts abroad.[149] Lastly, Leigh noted that the policy created commercial and legal uncertainty for U.S. citizens who chose to deal with State-owned enterprises—leaving them unsure of whether they had a right to legal recourse against these entities when problems arose.[150] As a result, Congress adopted the FSIA, shifting the immunity determination from the executive to the judicial branch and providing a uniform scheme for immunity determinations in U.S. courts.[151]

Under the FSIA, all foreign States enjoy absolute immunity from suit in U.S. courts, except in instances of specified immunity exceptions.[152] These exceptions include the codification of restrictive immunity through the commercial activity exception, the most cited exception of the FSIA.[153] Under the commercial activity exception, a foreign State is not immune if they are sued based on a commercial activity or sufficiently connected act with a nexus to the United States.[154] The FSIA, however, does not clearly define "commercial," and instead broadly defines commercial activity as something that occurs during

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146. H.R. REP. No. 94-1487, at 7, 12 (1976).

147. *Jurisdiction of U.S. Cts. in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. L. & Governmental Rels. of the H. Comm. on the Judiciary*, 94th Cong. 24, 26–27 (1976) (statement of Monroe Leigh, Legal Advisor, Dep't of State) [hereinafter Leigh Statement].

148. *Id.*

149. *See id.* at 56 (describing the political charades that States would conduct when determining if and when to invoke immunities).

150. *Id.* at 24, 26–27.

151. H.R. REP. No. 94-1487, at 7, 12 (1976).

152. 28 U.S.C. § 1604.

153. *Id.* § 1605(a)(2) (outlining the commercial activity exception); *see, e.g.*, Bloch, *supra* note 39, at 622–23 (noting the expansive invocation of the commercial activity exception when suing States and State-owned enterprises).

154. 28 U.S.C. § 1605(a)(2).

regular commercial conduct, transactions, or acts, clarifying that commercial refers to the nature of the conduct itself, not its purpose.[155] While the legislative history indicates that acts traditionally performed for profit, or capable of being performed by a private person, could be considered commercial in nature,[156] much clarification on distinguishing between commercial and government acts has come from the courts.[157]

The Supreme Court first addressed the difference between commercial and government activity under the FSIA in *Republic of Argentina v. Weltover, Inc.*[158] In *Weltover*, Argentina attempted to claim immunity in response to being sued for defaulting on bonds.[159] Argentina argued that since it defaulted on payments to stabilize its national currency, it, therefore, engaged in governmental activity that is immune to suit.[160] Relying on its previous holding in *Alfred Dunhill of London Inc. v. Republic of Cuba*,[161] the Supreme Court disregarded Argentina's argument and denied sovereign immunity protection since the bonds themselves are traditional debt instruments available to the general public and, therefore, use and default on them is commercial, not governmental, regardless of the intent.[162] The Court reasoned that since the FSIA emphasized the nature, rather than the purpose of an act, the question at issue was whether the act is the type of act a private individual would engage in, not why the foreign State engaged in it.[163]

It is also important to distinguish between governmental and commercial functions when determining which entities are entitled to immunity under the FSIA. Notably, the FSIA only applies to acts of

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155. *Id.* § 1603(d).

156. H.R. REP. No. 94-1487, at 16.

157. *See, e.g.*, Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 615–17 (1992) (holding that bond default was not governmental but regular commercial activity, despite being done for a seemingly governmental purpose); Saudi Arabia v. Nelson, 507 U.S. 349, 362–63 (1993) (finding that even a seemingly unlawful exercise of police policy is still a government act, and thus immune from consideration in U.S. courts).

158. 504 U.S. 607 (1992).

159. *Id.* at 609.

160. *Id.* at 615–17.

161. 425 U.S. 682 (1976) (addressing immunity under the Act of State Doctrine).

162. *Weltover*, 504 U.S. at 615.

163. *Id.* at 614; *cf.* Saudi Arabia v. Nelson, 507 U.S. 349, 362–63 (1993) (finding that the State party's torture of Nelson was an abuse of police power, and therefore immune governmental activity—regardless of the fact the torture was a punishment for the performance of a commercial hospital contract).

foreign States, not acts of individuals or government officials—regardless of character.[164] Accordingly, the FSIA defines a "foreign State" as being comprised of three separate categories of entities.[165] Not only is the State itself immune under the FSIA, but so too are "political subdivision[s]" of the State and "agenc[ies] or instrumentalit[ies]" of the State.[166] While all entities constituting a foreign State receive some degree of immunity, the protection for each entity differs; the State itself, and its political subdivisions, receive more protection than agencies and instrumentalities.[167] This difference in immunity protections necessitates that courts apply a "'core functions' approach," whereby entities with predominately governmental functions are treated as the State itself, and entities with predominately commercial functions and structures are treated as agencies and instrumentalities.[168]

When considering State-owned enterprises, courts are primarily concerned with the immunities of agencies and instrumentalities.[169] Agencies and instrumentality are defined as entities:

> (1) which [are] *a separate legal person*, corporate or otherwise, and
>
> (2) which [are] an *organ of* a foreign state or political subdivision thereof, or *a majority of whose shares* or other ownership interest is *owned by* a foreign state or political subdivision thereof, and
>
> (3) which [are] neither a citizen of a State of the United States . . . nor created under the laws of any third country.[170]

Within this definition of agencies and instrumentalities, it is particularly important to notice the requirements and distinction of

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164. *See* Samantar v. Yousuf, 500 U.S. 305, 315–16 (2010).

165. 28 U.S.C. § 1603(a).

166. *Id.*

167. *See, e.g.*, 28 U.S.C. § 1606 (allowing punitive damages to be brought against agencies and instrumentalities, but not the foreign State itself).

168. Garb v. Republic of Poland, 440 F.3d 579, 591 (2d Cir. 2006); *see also* First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 626–27 (1983) ("[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.").

169. *See, e.g.*, Dole Food Co. v. Patrickson, 538 U.S. 468, 473 (2003) (determining what classifies as an agency or instrumentality worthy of immunity); Gaukrodger, *supra* note 82, at 17 (describing the FSIA's classification of State-owned enterprises as agency or instrumentality).

170. 28 U.S.C. § 1603(b) (emphasis added).

"separate legal person" and "majority ownership."[171] The requirement for "majority ownership" was further clarified by the Supreme Court in *Dole Food Co. v. Patrickson*.[172] In *Dole Food Co.*, the Dead Sea Companies, a subsidiary of Dole Food, sought status as an instrumentality of Israel based on the fact that Israel owned shares in Dole Food, its parent company.[173] The Court majority disagreed and denied immunity status, holding that a foreign State, here Israel, must own a majority of direct shares in a company for it to be deemed an instrumentality.[174] Relying on traditional practices of American corporate law, the Court reasoned that a corporation and its shareholders are necessarily separate entities, and thus, a shareholder cannot automatically be deemed an owner of all subsidiary companies.[175]

3. The present: Deciphering the state of non-FSIA common law immunities

While the FSIA, enacted to be a comprehensive immunity scheme, has generally achieved success in simplifying and depoliticizing immunity determinations,[176] the Supreme Court has continually clarified and limited its applicability over the past two decades. Most notably, in *Samantar v. Yousuf*,[177] the Supreme Court limited the FSIA's application to immunity claims brought by individuals or foreign officials.[178] In that case, when individuals alleging persecution sued the former Minister of Defense and Prime Minister of Somalia in a U.S. court under the Torture Victims Protection Act[179] (TVPA), the Minister claimed immunity from suit under the FSIA for the acts authorized in his official governmental capacity.[180] The Supreme Court denied this claim, finding that the statutory construction and legislative history of the FSIA necessitated that it applies to the foreign

171. *See infra* Section II.B (emphasizing the importance of distinguishing between an instrumentality and the State itself when considering the implication of immunity determinations).
172. 538 U.S. 468 (2003).
173. *Id.* at 472.
174. *Id.* at 474.
175. *Id.* at 474–75.
176. *See* Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMPAR. L.Q. 302, 318 (1986) (acknowledging that while the FSIA may present as a complex "statutory labyrinth" it has provided the intended flexibility necessary for cohesive immunity determinations).
177. 560 U.S. 305 (2010).
178. *Id.* at 322–23, 325.
179. 28 U.S.C. § 1350; *Samantar*, 560 U.S. at 308.
180. *Samantar*, 560 U.S. at 308.

State and its non-person agencies, organizations, and instrumentalities, but not to government officials.[181] The Court identified no reason to believe Congress sought to use the FSIA to override the State Department's role in, and traditional common law understanding of, determining official immunities.[182] Rather, the Court remanded the case for further consideration of potential common law immunity claims and provided no further guidance on how those immunities should be determined.[183] Since *Samantar*, when evaluating common law personal immunity claims, lower courts now balance responsibilities imposed by international law against formal recognition of diplomatic status by the State Department but remain split on how much deference should be given to executive branch immunity determinations.[184]

Most recently in 2023 the Supreme Court expanded the reach of common law immunities and limited the applicability of the FSIA to civil proceedings in *Halkbank*.[185] In that case, Türkiye Halk Bankası A.Ş., (Halkbank), a bank majority-owned by the government of Turkey, was indicted for its involvement in a money laundering scheme

181. *Id.* at 317–20.

182. *Id.* at 323.

183. *Id.* at 325–26; *see* Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 917 (2011) (arguing that the lack of guidance given by the Court in *Samantar* opened the door for difficult debates on the breadth of executive and judicial powers).

184. *See, e.g.*, Yousuf v. Samantar, 699 F.3d 763, 773 (4th Cir. 2012) (distinguishing between status-based and conduct-based immunities, denying immunity, and holding the State Department's determination of conduct-based immunity carries "substantial weight" but is not dispositive); Doğan v. Barak, 932 F.3d 888, 895, 897 (9th Cir. 2019) (distinguishing itself from the Fourth Circuit and granting immunity based on the State Department suggestion and a determination that the act was conducted at the request of the Israeli Prime Minister). For various scholarly perspectives on the immunity dilemma remaining after *Samantar*, see Luke Ryan, Note, *The New Tate Letter: Foreign Official Immunity and the Case for a Statutory Fix*, 84 FORDHAM L. REV. 1773, 1783–87 (2016), detailing a circuit split about the amount of executive deference to be given and the type of official conduct to be protected; Chimène I. Keitner, *Between Law and Diplomacy: The Conundrum of Common Law Immunity*, 54 GA. L. REV. 217, 295–96 (2019) [hereinafter *Law and Diplomacy*], advocating for significant, but not absolute, executive deference; Curtis A. Bradley, *Conflicting Approaches to the U.S. Common Law of Foreign Official Immunity*, 115 AM. J. INT'L L. 1, 7 (2021), identifying "at least four questions left open after *Samantar*."

185. Türkiye Halk Bankası A. Ş., v. United States (*Halkbank*), 143 S. Ct. 940, 947 (2023).

in violation of United States sanctions on Iran.[186] The U.S. government alleged that Halkbank deposited and transferred billions of dollars from the sale of Iranian gas and oil into the accounts of sanctioned Iranian State-owned entities.[187] Many of the transactions were dollar-dominated and moved through U.S. accounts, thereby violating U.S. sanctions and opening Halkbank to prosecution in U.S. domestic courts.[188] Upon indictment by the U.S. Department of Justice, Halkbank sought to dismiss the charges for two reasons.[189] Halkbank first argued the federal courts lacked subject matter jurisdiction to bring charges against a foreign State-owned enterprise.[190] Halkbank argued second that regardless of subject matter jurisdiction, it was immune from suit as a State-owned enterprise under the FSIA and common law immunities.[191]

On appeal, the Second Circuit ruled that the district court had jurisdiction to hear "*all* offenses" in violation of U.S. law and that Halkbank did not have immunity from suit under the FSIA.[192] The court reasoned that since Halkbank's activities fell under the commercial activity exception of the FSIA, immunity was rightfully denied.[193] The court only briefly addressed and dismissed common law immunities.[194]

On appeal, the Supreme Court took a different approach to the question of immunity.[195] To the first question, the Supreme Court agreed with the Second Circuit and held that it would not "graft an

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186. Superseding Indictment at 35–41, United States v. Türkiye Halk Bankası A.Ş., No. S6 15 Cr. 867 (S.D.N.Y. Oct. 15, 2019), ECF No. 562 [hereinafter Indictment]; Press Release, *Turkish Bank Charged in Manhattan Federal Court for its Participation in a Multibillion-Dollar Iranian Sanctions Evasion Scheme*, U.S. ATT'Y'S OFF. (Oct. 15, 2019), https://www.justice.gov/opa/pr/turkish-bank-charged-manhattan-federal-court-its-participation-multibillion-dollar-iranian [https://perma.cc/76U7-BKCW] [hereinafter Indictment Press Release].

187. Indictment Press Release, *supra* note 186.

188. *Id.*

189. Motion to Dismiss at 1, United States v. Türkiye Halk Bankası A.Ş., No. S6 15 Cr. 867 (RMB) (S.D.N.Y. Aug. 10, 2020), ECF No. 645; Memorandum Supporting Motion to Dismiss, *supra* note 1313, at 1–2.

190. Memorandum Supporting Motion to Dismiss, *supra* note 1313, at 1–2.

191. *Id.*

192. United States v. Türkiye Halk Bankası A.Ş., 16 F.4th 336, 347, 351 (2d Cir. 2021).

193. *Id.* at 351.

194. *Id.* at 350–51.

195. *See* Türkiye Halk Bankası A.Ş., v. United States (*Halkbank*), 143 S. Ct. 940, 943 (2023) (rejecting the Second Circuit's analysis and the application of the FSIA).

atextual limitation onto § 3231's broad jurisdictional grant over 'all offenses.'"[196] The majority's response to the second question and the resulting interpretation and application of immunities was less straightforward.[197] Simply, the Court held that the FSIA does not apply to criminal cases, only civil.[198] Therefore, Halkbank could not claim immunity under the statute.[199] In its rationale, the Court emphasized the importance of considering the statutory context of the FSIA as well as the civil law limiting language, like "suit," which exists in many similar provisions.[200]

The remaining immunity standard would be clear if the case stopped there and the Court left the decision at "Halkbank does not have immunity," which most parties—other than Halkbank—and the lower courts agreed on.[201] Rather, after stripping away the FSIA's immunity-determining framework, the Court noted that Halkbank may still have common law immunity claims.[202] The Court held that while Halkbank and supporting amicus briefs raised the issue of potential common law immunities, these claims mistakenly went unconsidered by the Second Circuit.[203] As a result, rather than providing guidance for determinations of these hypothetical immunities, the Court merely remanded the issue for further consideration by the Second Circuit.[204]

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196. *Id.* at 943–45 (quoting 18 U.S.C. § 3231). This Comment will not further address the question of subject matter jurisdiction since the Supreme Court made clear that federal courts have subject matter jurisdiction over all violations of U.S. law, regardless of parties, thus leaving no pressing legal questions and not inherently implicating immunity issues.

197. *See id.* at 943–46, 952 (rejecting the applicability of the FSIA based on an analysis of legislative intent and textual context but remanding the case for consideration of unclear and undefined common law immunities).

198. *Id.* at 952.

199. *Id.*

200. *Id.* at 945–46.

201. *See, e.g.*, Brief for Petitioner at 33–40, Türkiye Halk Bankası A.Ş., v. United States (*Halkbank*), 143 S. Ct. 940 (2023) (No. 21-1450) [hereinafter United States Brief] (presenting the Justice Department's argument for denying Halkbank immunity); *Halkbank*, 143 S. Ct. 952–53 (Gorsuch, J., concurring in part and dissenting in part) (noting agreement with the Second Circuit's denial of immunity through the FSIA's framework).

202. *Halkbank*, 143 S. Ct. 951–52 (majority opinion).

203. *Id.*; *see, e.g.*, Brief for Amici Curiae Republic of Azerbaijan, Islamic Republic of Pakistan, and State of Qatar in Support of Petitioner at 14–15, Türkiye Halk Bankası A.Ş., v. United States, 143 S. Ct. 940 (2023) (No. 21-1450) [hereinafter Amici Azerbaijan et al.] (supporting Halkbank's immunity claim based on longstanding principles of sovereignty and international law).

204. *Halkbank*, 598 U.S. at 281.

In his opinion, Justice Gorsuch addressed the shortcomings of the majority's decision.[205] He noted the problematic nature of limiting the FSIA to civil cases when the statute was meant to be the only foundation for foreign State sovereign immunity.[206] Additionally, he suggested that the majority's decision now pushes the lower courts to the position they were in before the FSIA.[207] Rather than having a clear statutory scheme to follow, courts are left to navigate an increasingly complicated area of common law.[208] Justice Gorsuch identified two potential options for future determinations of common law immunity: return to a practice of executive deference or consider the existence of immunities under customary international law.[209] Neither option is a clear nor unproblematic alternative to the comprehensive nature of the FSIA.[210]

C. An Introduction to "Federal Common Law": What Is It and How Do We Find It?

Given the Court's assessment of common law immunities in *Halkbank*, it is important to understand the status and origins of "federal common law." The concept of a "federal common law" is contested, with no singular agreed-upon definition.[211] While the Supreme Court has indicated areas of the law in which federal common law applies, the Court has never formally defined the

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205. *See id.* at 283–85 (Gorsuch, J., concurring in part and dissenting in part) (criticizing the Court of unnecessarily limiting the FSIA and complicating the immunity determination process in lower courts).

206. *Id.* at 283; *see, e.g.*, Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983) (stating that FSIA intended to govern claims of immunity in every civil action against a foreign state, its political subdivisions, agencies, or instrumentalities); Republic of Argentina v. NML Cap., Ltd., 573 U.S. 134, 141 (2014) (discussing how the FSIA was established as a "comprehensive" guide to resolve all sovereign immunity claims); Republic of Austria v. Altmann, 541 U.S. 677, 699 (2004) (declaring that FSIA provides "a comprehensive framework for resolving any claim of sovereign immunity").

207. *Halkbank*, 143 S. Ct. at 954.

208. *Id.* at 954–55; *see, e.g.*, Chimène Keitner, *Prosecuting Foreign States*, 61 VA. J INT'L L. 221, 224 (2021) [hereinafter *Prosecuting States*] ("Yet while foreign sovereign immunity constitutes a bedrock doctrine for defining the scope of domestic jurisdiction, its contours remain surprisingly contested and even misunderstood.").

209. *Halkbank*, 143 S. Ct. at 954.

210. *See infra* Section II.A (balancing the challenges of executive deference against those of customary international law).

211. *See* Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 586, 589–90 (2006) (identifying three—"one narrow, one intermediate, and one broad"—definitions of federal common law that have emerged in response to the Supreme Court's lack of clarity on the matter).

doctrine.[212] Even though some scholars argue that the Supreme Court's holding in *Erie Railroad Co. v. Tompkins*[213] forbids courts from making or applying rules of general common law without some applicable statute or treaty,[214] the majority view is that there exists applicable federal common law in specific instances.[215] Despite the *Erie* Court's proclamation that "[t]here is no federal general common law,"[216] U.S. courts, including the Supreme Court, have continually developed federal common law in areas of "uniquely federal" interests and a strong need for uniformity.[217] Thus, in light of subsequent Court decisions creating common law carve-outs, a proper understanding of *Erie* appears to establish the existence and application of federal common law as the exception rather than the rule.[218] Effectively, "'federal common law' [prescribed by the Supreme Court] is genuine federal law that binds the states under the Supremacy Clause and potentially establishes a basis for Article III and statutory federal question jurisdiction."[219]

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212. *See* Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 915 (1996) (noting the Supreme Court has never defined a "consistent theoretical conception of the nature and extent of federal common law making power"); Tidmarsh & Murray, *supra* note 211, at 589 (noting the Supreme Court has "never really tried" to define federal common law).

213. 304 U.S. 64 (1938).

214. *See* Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 319, 324 (1997) [hereinafter *Illegitimacy*] (arguing that *Erie* requires customary international law be authorized by the Constitution or a federal statute); *Erie*, 304 U.S. at 78 (holding "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State").

215. *See, e.g.*, Tidmarsh & Murray, *supra* note 211, at 585–86 (outlining specific areas where federal common law exists, despite *Erie*).

216. *Erie*, 304 U.S. at 78.

217. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 505–06 (1988) (noting civil liability of federal officials for their official acts as one area of "peculiarly federal concern"); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425–26 (1964) (plurality opinion) (reasoning that in foreign affairs, state interests are outweighed by the federal interest in uniformity); Filartiga v. Pena-Irala, 630 F.2d 876, 886 (2d Cir. 1980) (finding that the "law of nations forms an integral part of the common law" and should be consulted in cases involving international interests).

218. *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 950–62 (1986) (advocating for a two-step approach to Judicial discretion when establishing federal common law in limited circumstances); Tidmarsh & Murray, *supra* note 211, at 586, 589–90 (limiting the expansion of federal common law to areas of law specifically delineated by the Supreme Court or Congress).

219. CURTIS BRADLEY, INTERNATIONAL LAW IN THE US LEGAL SYSTEM 9 (3d ed. 2020).

1. International law as common law

For the purpose of this analysis, a precise definition of federal common law is not necessary, because even under the narrowest of definitions, federal common law governs issues of international relations.[220] Rather, the pressing question is where the federal common law of international relations can be derived from, as this determination is crucial for common law immunity determinations. Most often the federal common law in matters of international relations is said to be derived from customary international law, or as it was referred to when the U.S. Constitution was written, "the law of nations."[221]

The application of customary international law in U.S. courts is far from uniform or consistent.[222] Some scholars interpret *Erie* as limiting the federal court system's ability to interpret customary international law.[223] However, as argued by Professor Philip Jessup, one of the twentieth century's most notable international legal scholars, it "would be as unsound as it would be unwise" to require federal courts to follow the customary international law interpretations of state courts.[224] Thus,

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220. *See* Tidmarsh, *supra* note 211, at 594, 599–602 (listing six existing areas governed by federal common law and elaborating on their origins).

221. *See* John Harrison, *The Constitution and the Law of Nations*, 106 GEO. L.J. 1659, 1663 (2018) ("The law of nations might provide the content of state law, it might provide the content of general common or customary law, and it might itself be general common or customary law."); U.S. CONST. art. 1, § 8, cl. 10 (giving Congress the power to "define and punish . . . [o]ffences against the Law of Nations").

222. *See* Gary Born, *Customary International Law in United States Courts*, 92 WASH L. REV. 1641, 1647 (2017) ("[T]reatment of customary international law in [United States] courts is dysfunctional."). *Compare In re* Estate of Marcos Hum. Rights Litig., 978 F.2d 493, 502 (9th Cir. 1992) ("It is . . . well settled that the law of nations is part of federal common law."), *with* Al-Bihani v. Obama, 619 F.3d 1, 13 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc) (arguing that customary international law must be incorporated into a statute or self-executing treaty to become part of U.S. law).

223. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 852–55 (1997) [hereinafter *Customary International Law*] (finding that if customary international law is applicable at all there must at least first be a domestic source of authority permitting federal courts to apply it).

224. Philip C. Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939); *see also* Born, *supra* note 222, at 1665 (discussing the problematic nature of state court decisions contributing to the crystallization of binding international law absent any official stance by the federal government).

scholars generally hold that determinations of customary international law are an issue of federal law, rather than state law.[225]

Despite this debate among scholars on the applicability of customary law in U.S. courts, the courts have continuously made clear that lower courts have a responsibility to consider customary international law in the absence of other sources of law.[226] Most famously, in *The Paquete Habana*,[227] the Supreme Court relied on customary international law to determine what protections should be awarded to fishing vessels during conflict.[228] The Court held that when "there is no treaty, and no controlling executive or legislative act or judicial decision," courts should rely on the "customs and usages of civilized nations."[229] The Court reasoned that since "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction,"[230] the fishing vessel was thereby exempt from capture as a prize of war.[231]

Additionally, in *Banco Nacional de Cuba v. Sabbatino*[232] (*Sabbatino*), the Supreme Court further solidified the importance of considering customary international law in U.S. courts.[233] In *Sabbatino*, a Cuban State-owned bank sued a New York company for breach of contract and failure to pay for promised goods.[234] The suit alleged that the New York company had contracted with the Cuban bank to purchase goods

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225. *E.g.*, Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1560–62 (1984) (positing that cases arising under international law implicate federal, not state, law, and that determinations of customary international law are binding on the states).

226. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980) ("Having examined the sources from which customary international law is derived—the usage of nations, judicial opinions and the works of jurists—we conclude that official torture is now prohibited by the law of nations.").

227. 175 U.S. 677 (1900); *see* Scott W. Stucky, The Paquete Habana*: A Case History in the Development of International Law*, 15 U. BALT. L. REV. 1, 1 (1985) (asserting that "the overriding importance of *The Paquete Habana* is its role as a monument to the continuing vitality of international law").

228. *See The Paquete Habana*, 175 U.S. at 678, 694–95 (synthesizing various examples of State practice, specific treaties, and general sentiments of other States to establish the existence of a customary practice).

229. *Id.* at 700.

230. *Id.*

231. *Id.* at 714.

232. 376 U.S. 398 (1964).

233. *See id.* at 428–32 (evaluating the status of customary international law as it relates to an expropriation claim).

234. *Id.* at 405.

originally belonging to an American-owned Cuban company, but the Cuban government later expropriated the goods, complicating the contract.[235] The New York company claimed that this expropriation was a violation of customary international law and, thus, it should not be required to pay.[236] The Court reversed the holding of the lower courts and sided with the Cuban Bank, citing a traditional federal common law principle, the Act of State Doctrine.[237] In circumventing the New York company's argument that the expropriation was a violation of customary international law, the Supreme Court found that there was no clear international consensus on the matter.[238] As such, the Court held when there is a lack of international consensus on an issue of customary international law, courts should not question the validity of official government acts.[239] Additionally, in quoting Professor Jessup's above-noted argument against state court interpretations of customary international law,[240] the Court affirmed the importance of federal common law rules relating to immunities for official acts of the State (the Act of State Doctrine), warning that if state courts are "left free to formulate their own rules [of international law], the purposes behind the doctrine could be as effectively undermined."[241] In essence, the Court reasoned that if states were permitted to make their own immunity determinations, the inconsistencies likely resulting between jurisdictions would undermine the practice's very purposes of maintaining international comity and establishing uniform foreign relations policies.[242]

Notably, in response to the Supreme Court's holding in *Sabbatino*, Congress passed the Second Hickenlooper Amendment to the Foreign Assistance Act of 1964.[243] This amendment later became the

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235. *Id.* at 405–06.
236. *Id.* at 406.
237. *Id.* at 401.
238. *Id.* at 428–32.
239. *Id.* at 428.
240. *See supra* note 224 and accompanying text (noting Jessup's criticisms of perceived limitations to the weight of federal court determinations of international law principles of following *Erie*).
241. *Sabbatino*, 376 U.S. at 424 (plurality opinion).
242. *Id.*; *see also* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983) (describing the historical practice of respecting sovereign immunity as a "matter of grace and comity"). *See generally* Finke, *supra* note 54 (exploring the foreign affairs purpose for continued grants of sovereign immunity with international comity being a guiding factor).
243. 22 U.S.C. § 2370(e)(2).

foundation of the FSIA's expropriation exception.[244] It prohibited States from invoking the Act of State Doctrine in cases where they faced liability for a taking allegedly in violation of international law.[245] Therefore, by enacting congressional legislation, it was no longer necessary for courts to evaluate customary international law or federal common law on the matter.[246] Rather, the U.S. government's position on illegal international takings was clearly established and embedded into the statutory text, similar to how immunities were originally codified within the FSIA.[247]

Thus, the prevailing argument among both courts and scholars is that customary international law is federal common law.[248] In clarifying this stance, the Third Restatement, relying on *Sabbatino*, states, "[T]he modern view is that customary international law in the United States is federal law and its determination by the federal courts is binding on the state courts."[249] Thus, customary international law "supersedes inconsistent state law or policy whether adopted earlier or later."[250] For the same reason, claims based on customary international law "aris[e] under" federal law for purposes of Article III and statutory federal question jurisdiction.[251] While identifying specific principles of customary international law presents its own challenge,[252] it is nevertheless applicable in U.S. courts and provides a necessary

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244. 28 U.S.C. § 1605(a)(3).

245. *See* Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 712–14 (2021) (explaining the transition from law of international consensus on taking to current understandings of what constitutes a violation under international law).

246. STEPHEN P. MULLIGAN, CONG. RSCH. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 36 (2023).

247. *See* H.R. REP No. 94-1487, at 7, 12 (1976) (setting forth uniform standards on immunities to clarify the ambiguous and incongruent court precedent of the time).

248. *See, e.g.*, Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1835 ("[F]ederal courts retain legitimate authority to incorporate bona fide rules of customary international law into federal common law."); Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980) ("[T]he law of nations . . . has always been part of the federal common law"); *see also* Bradley, *supra* note 184, at 6 ("Although the Court did not say so specifically, scholars have generally assumed that this common law should be treated as *federal* common law."). *But see* Bradley & Goldsmith, *Customary International Law, supra* note 223, at 849 (disagreeing with the majority of academics and arguing that customary international law should not be considered federal common law).

249. RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 111 reporters' note 3.

250. *Id.* § 115 cmt. e.

251. Henkin, *supra* note 225, at 1559–60.

252. *See infra* Section II.A (discussing the challenges of determining customary international law).

foundation for determining the status of international law principles, like State sovereign immunity, under the common law.[253]

D. A Brief Look at the Legal Classification of "State-Owned Enterprises"

State-owned enterprises present a unique legal challenge for comprehending and applying the law of State-sovereign immunities.[254] While the law and economic policy surrounding the purpose, functionality, and distinctions between State-owned enterprises are complex,[255] a few important concepts for discussing an enterprise's potential claims to State sovereign immunity are further outlined below.

1. Defining State-owned enterprises

There is no universally accepted definition of "State-owned enterprise,"[256] and there is no clear definition under U.S. law.[257] That noted, the International Monetary Fund (IMF), alongside many other international institutions, recognizes that most definitions share common elements.[258] These elements include: "(1) the entity has its own, separate legal personality; (2) the entity is at least partially controlled by a government unit; and (3) the entity engages predominantly in commercial or economic activities."[259]

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253. *See infra* Section II.C.2 (evaluating evidence of customary international law related to State sovereign immunity in order to establish federal common law practice).

254. *See* Andrew Dickinson, *State Immunity and State-Owned Enterprises*, 10 BUS. L. INT'L 97, 97 (2009) (acknowledging the complexity of immunity determinations).

255. For a comprehensive analysis of the different classifications of State-owned enterprises and the history of internationalization of State-owned multinational corporations and sovereign wealth funds, see generally Alvaro Cuervo-Cazurra, Anna Grosman & William L. Megginson, *A Review of the Internationalization of State-owned Firms and Sovereign Wealth Funds: Governments' Nonbusiness Objectives and Discreet Power*, 54 J. INT'L BUS. STUD. 78 (2023), evaluating the effects of government ownership on foreign investment and the global economy.

256. ORG. FOR ECON. COOP. & DEV, OECD GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES, 2015 EDITION 14 (2015) ("Countries differ with respect to the range of institutions that they consider as state-owned enterprises.").

257. ORG. FOR ECON. COOP. & DEV., COMPETITION LAW AND STATE-OWNED ENTERPRISES—CONTRIBUTION FROM THE UNITED STATES 2 (2018), *see also* Frederick W. Vaughan, Note, *Foreign States Are Foreign States: Why Foreign State-Owned Corporations Are Not Persons Under the Due Process Clause*, 45 GA. L. REV. 913, 933–34, 941 (2011) (arguing that constitutional ambiguity creates a challenge for courts' assessments of the rights of State-owned enterprises to due process under the Fifth Amendment).

258. INTERNATIONAL MONETARY FUND, FISCAL MONITOR, APRIL 2020: POLICIES TO SUPPORT PEOPLE DURING THE COVID-19 PANDEMIC 47 n.1 (2020).

259. *Id.*

2. Legal issues related to State-owned enterprises

Corporations and other enterprises are expected to abide by the laws of the jurisdictions in which they conduct business, facing legal consequences when they fail to abide by those laws.[260] Generally, State-owned enterprises are expected to abide by the same laws.[261] While the case law surrounding criminal proceedings involving State-owned enterprises in U.S. courts is limited,[262] State-owned enterprises have been party to a variety of criminal and civil proceedings over the years.[263]

Before the implementation of the FSIA, it was not unheard of for a State-owned enterprise to be subjected to elements of criminal proceedings in U.S. courts.[264] In 1952, in *In re Investigation of World Arrangements with Relation to Production, Transportation, Refining & Distribution of Petroleum*[265] (*In re Investigation of World Arrangements*), the U.S. District Court for the District of Columbia granted immunity to the British instrumentality Anglo-Iranian Oil Company, an oil company being investigated for violations of U.S. anti-trust law.[266] The District Court quashed the subpoena on the grounds that successful prosecution of the oil company would effectively be imposing criminal penalties against the British government for violations of U.S. domestic law, which is "contrary to the law of nations."[267] The court further

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260. *See* Will Kenton, *What Is a State-Owned Enterprise (SOE), and How Does It Work?*, INVESTOPEDIA (Sept. 29, 2020), https://www.investopedia.com/terms/s/soe.asp#:~:text=Legally%2C%20most%20SOEs%20qualify%20as,held%20liable%20for%20their%20actions [https://perma.cc/AT9J-ART9] ("Most SOEs qualify as business entities . . . [meaning] they are normally required to follow any laws and regulations governing the operation of their business type.").

261. *Id.*

262. *See Prosecuting States*, *supra* note 208, at 255 (identifying a trend toward exercising jurisdiction over State-owned enterprises despite unclear immunity requirements).

263. *See, e.g.*, Southway v. Cent. Bank of Nigeria, 198 F.3d 1210, 1214 (10th Cir. 1999) (civil RICO case); United States v. Pangang Grp. Co., 6 F.4th 946, 950–51 (9th Cir. 2021) (criminal economic espionage case).

264. *See, e.g.*, *In re* Investigation of World Arrangements with Relation to Prod., Transp., Refining & Distrib. of Petroleum (*In re* Investigation of World Arrangements), 13 F.R.D. 280, 282 (D.D.C 1952) (investigating a violation of federal anti-trust laws by multiple oil companies); *In re* Grand Jury Investigations of Shipping Indus., 186 F. Supp. 298, 300 (D.D.C. 1960) (investigating an alleged violation a federal anti-trust law related to the shipping industry).

265. 13 F.R.D. 280 (D.D.C. 1952).

266. *Id.* at 282.

267. *Id.* at 291.

clarified that although the British government only owned thirty-five percent of the company, it controlled the company, and is therefore indistinguishable from the government itself.[268] Thus, the oil company was entitled to the same immunity from criminal proceedings that the government itself would possess.[269]

Similarly, in *In re Grand Jury Investigations of Shipping Industry*,[270] the U.S. District Court for the District of Columbia reserved judgment on the legitimacy of an immunity claim by a Filipino company in an antitrust investigation.[271] In this instance, the State Department refused to recognize the Philippines' immunity claim based on the restrictive theory of immunity.[272] The District Court held that since it was unclear whether the grand jury would use the evidence to indict the company itself, or merely establish a case against others, the grand jury was permitted to continue so long as the U.S. government demonstrated that the company's acts were substantially commercial, the information requested was essential to the investigation of others, or there was evidence that the company itself violated federal law.[273]

Since the enactment of the FSIA, cases involving the immunities of State-owned enterprises have most commonly arisen under RICO.[274] RICO is characterized by the imposition of both criminal and civil liability.[275] To successfully plead a claim of civil RICO liability, a plaintiff must establish a pattern of "indictable acts," which would satisfy the statutory requirement of "racketeering activity."[276] Courts are split as to whether the "indictable acts" element can be satisfied in the face of a potential immunity claim.[277]

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268. *Id.* at 288–91; *see supra* note 168 and accompanying text.

269. *See* 13 F.R.D. at 291 (granting absolute immunity to the minority State-owned oil company).

270. 186 F. Supp. 298 (D.D.C. 1960).

271. *Id.* at 318–20.

272. *Id.* at 318; *see also supra* notes 139–44 and accompanying text (describing the State Department's restrictive immunity regime under the Tate Letter).

273. *In re Grand Jury Investigations of Shipping Indus.*, 186 F. Supp. at 319–20.

274. *See generally* John D. Corrigan, Note, *Restricting RICO Under FSIA*, 84 ST. JOHN'S L. REV. 1477 (2010) (addressing the circuit split regarding the FSIA's relevance to RICO given RICO's quasi-criminal nature).

275. CHARLES DOYLE, CONG. RSCH. SERV., 96-950, RICO: A BRIEF SKETCH 2–3 (2021) (identifying the criminal and civil elements of the RICO statute).

276. 18 U.S.C. § 962; Southway v. Cent. Bank of Nigeria, 198 F.3d 1210, 1214 (10th Cir. 1999).

277. *Compare* Southway v. Cent. Bank of Nigeria, 198 F.3d 1210, 1214 (10th Cir. 1999) (holding that indictable relates to the character of the act itself, not the party

In *Southway v. Central Bank of Nigeria*,[278] the Tenth Circuit interpreted the FSIA's silence on criminal immunities as a non-issue for determining whether a party could bring a civil RICO claim since "indictable" is related to the alleged act itself and not the parties.[279] Relying on an analysis of congressional intent, the court determined that the FSIA is meant to be used as an affirmative defense and not a jurisdictional bar from suit.[280] Therefore, the acts themselves remain indictable.[281] Further, the court held that it would be unreasonable to believe that the FSIA limited RICO, and rather, the FSIA grants jurisdiction over all non-jury civil proceedings including those in civil RICO cases.[282] The criminal illegality of an act does not detract from it being of commercial character, and it is thus exempt from immunity under the FSIA.[283] On the broader question of the scope of criminal immunities, the court stated that it had "no business" in deciding,[284] and rather, "if Congress intended defendants . . . to be immune from criminal indictment under the FSIA, Congress should amend the FSIA [to say so]."[285]

Conversely, in *Keller v. Central Bank of Nigeria*,[286] the Sixth Circuit declined to follow the Tenth Circuit's holding, reasoning that if a party holds a valid claim to immunity, and thus cannot be indicted, then the party cannot commit an indictable act.[287] The court did not make the same distinction between acts and actors that the court in *Southway* did and instead concluded that absent an international agreement or congressional act stating otherwise, foreign sovereigns enjoy criminal immunity.[288] Therefore, since they possess broad immunity, foreign

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that commits the act), *with* Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 820–21 (6th Cir. 2002) (holding that an act is not indictable if the party can claim immunity).

278. 198 F.3d 1210 (10th Cir. 1999).

279. *Id.* at 1214–15.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* at 1217.

284. *Id.* at 1214.

285. *Id.* at 1215 ("The executive and legislative branches of our government are the principal players in the field of foreign relations and international comity, and consequently are much better equipped than a court of law to address the question of foreign sovereign immunity in the criminal context.").

286. 277 F.3d 811 (6th Cir. 2002).

287. *Id.* at 820–21.

288. *Id.*

States cannot commit the indictable offenses necessary to bring a civil RICO suit.[289]

While most criminal cases involving State-owned enterprises involve RICO proceedings, there are other instances in which State-owned enterprises have been subjected to U.S. criminal jurisdiction.[290] For example, the Pangang Group Company, a group of Chinese State-owned enterprises, was indicted[291] for violating the United States Economic Espionage Act (EEA).[292] The Ninth Circuit denied Pangang's immunity claims, stating that since Pangang could not prove that the Chinese government possessed direct majority ownership in the company—a requirement for instrumentality status under the FSIA but not the EEA[293]—it did not qualify as a foreign State instrumentality worthy of immunity.[294]

Similarly, in 2018, Taiwanese United Microelectronics Corp. ("UMC"), the Chinese State-owned enterprise Fujian Jinhua, and other three individuals were indicted for conspiracy to commit economic espionage and trade secret theft.[295] While UMC pled guilty to one count of trade secret theft in 2020, the Chinese State-owned

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289. *Id.*

290. *See, e.g.*, United States v. Pangang Grp. Co., 6 F.4th 946, 950–51 (9th Cir. 2021) (indicting a Chinese State-owned company for economic espionage).

291. *Id.* at 949.

292. Economic Espionage Act of 1996, 18 U.S.C. §§ 1831–39.

293. *Compare* 28 U.S.C. § 1603(b) (defining agency or instrumentality as "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" (emphasis added)), *with* 18 U.S.C. § 1839(2) (defining foreign instrumentality as "any agency, bureau, component, institution, association, or any legal, commercial, or business organization, firm, or entity that is *substantially owned*, controlled, sponsored, commanded, managed, or dominated by a foreign government" (emphasis added)).

294. *Pangang Grp. Co.*, 6 F.4th at 960; *see also* United States v. Pangang Group Co., 135 HARV. L. REV. 1680, 1686 (2022), https://harvardlawreview.org/print/vol-135/united-states-v-pangang-group-co [https://perma.cc/VP2G-656C] (arguing that the court's refusal to deny the FSIA's applicability in criminal cases undermines United States' foreign policy interests).

295. Indictment at 2, United States v. United Microelectronics Corp., No. 18 Cr. 456 (N.D. Cal. 2018), https://www.justice.gov/d9/press-releases/attachments/2018/11/01/filed_indictment_ndca_final_0.pdf; Press Release, *Taiwan Company Pleads Guilty to Trade Secret Theft in Criminal Case Involving PRC State-Owned Company*, DEP'T OF JUST. (October 28, 2020) [hereinafter UMC Press Release], https://www.justice.gov/opa/pr/taiwan-company-pleads-guilty-trade-secret-theft-criminal-case-involving-prc-state-owned [https://perma.cc/JN8N-47C8] (explaining that one indicted party pleaded guilty pre-trial); *see also* 18 U.S.C. § 1832(a)(5) (criminalizing conspiracy to commit theft of trade secrets).

Fujian Jinhua proceeded to trial, raised no immunity claims throughout the trial, and was ultimately found not guilty in February 2024.[296] Finally, in 2018, an unspecified State-owned enterprise was subpoenaed in relation to an investigation concerning interference with the 2016 presidential election.[297] While the unspecified State-owned enterprise claimed immunity from such a subpoena, in 2019, the D.C. Circuit denied the existence of such immunity under the FSIA, holding that granting such immunity would leave the U.S. government "powerless" against clear exploitations of U.S. law.[298] The Supreme Court denied certiorari later that year.[299] In summary, the commonality between these cases is the increasing involvement of State-owned enterprises in various degrees during criminal proceedings, complicated by an unclear standard for addressing State sovereign immunities.

With the increase in State presence in the commercial arena, more courts will be faced with the challenge of parsing this complicated legal field of State sovereign immunities.[300] It is, therefore, essential that courts have a clear understanding of their responsibility under

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296. UMC Press Release, *supra* note 295; *see* Bonnie Eslinger, *Fujian Jinhua Execs Stole Micron IP, Feds Argue at Trial's End*, L. 360 (September 20, 2023, 9:59 PM), https://www.law360.com/articles/1723880 [https://perma.cc/AFY6-V8J2] (describing the logistics of the Fujian Jinhua trial and focus of closing arguments, absent of any invocations of immunity); Rachel Graf & Robert Burnson, *Chinese Chipmaker Cleared in US Criminal Trade Secrets Case,* BLOOMBERG (Feb. 27, 2024, 3:37 PM), https://www.bloomberg.com/news/articles/2024-02-27/chinese-chipmaker-cleared-in-us-criminal-trade-secrets-case.

297. *In re* Grand Jury Subp., 912 F.3d 623, 626 (D.C. Cir. 2019). For a clear and comprehensive evaluation of *In re Grand Jury Subpoena*, see *Prosecuting States*, *supra* note 208, at 255–61; see also Chimène Keitner, *Deciphering the Mystery Subpoena Case: Corporate Claims to Foreign Sovereign Immunity from U.S. Criminal Proceedings*, JUST SEC. (December 31, 2018), https://www.justsecurity.org/62068/deciphering-mystery-subpoena-case-corporate-claims-foreign-sovereign-immunity-u-s-criminal-proceedings [https://perma.cc/7BW5-DPMF], speculating about the identity of the unknown State-owned enterprise and the proceedings implications for foreign policy.

298. *In re Grand Jury Subp.*, 912 F.3d at 629–30 (finding that by granting immunity the court would be saying "foreign-sovereign-owned, purely commercial enterprise operating within the United States could flagrantly violate criminal laws and the U.S. government would be powerless to respond save through diplomatic pressure").

299. *In re* Grand Jury Subp., 139 S. Ct. 1378 (2019) (denying cert.).

300. *See, e.g.*, ORG. FOR ECON. COOP. & DEV., STATE-OWNED ENTERPRISES AS GLOBAL COMPETITORS: A CHALLENGE OR AN OPPORTUNITY? 56, 98 (2016) (noting increased State involvement in the global markets lead to increased competition between private and public entities, increased need for cross border investigations, and raises important questions of immunity and law enforcement).

international and domestic law and adopt a cohesive analytic framework for making immunity determinations.[301] While the *Halkbank* decision did not provide such a framework, Gorsuch's separate opinion provides some guidance. Utilizing Gorsuch's recommendations, a preliminary attempt at identifying these responsibilities and crafting an analytical approach is expanded on below.[302]

II. ANALYSIS

The common law of criminal immunities is widely underdeveloped, with little guidance—whether that be from existing case law, statutes, or international examples—available for use when determining an appropriate and uniform judicial practice.[303] The Supreme Court's continued silence on such federal common law criminal immunities and the absence of clear expectations from the executive and legislative branches has left the lower courts with the challenge of balancing political pressures and unclear legal requirements when determining these immunities themselves.[304] Nevertheless, through a thorough evaluation of United States and international State practice, it is possible to identify the current state of customary international law relating to immunities and, thus, federal common law practice.[305] As it stands, while there exists a form of absolute immunity for foreign States from prosecution in U.S. courts, this criminal immunity does not, and need not, extend to the commercial activities of State-owned enterprises.

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301. *Cf.* Leigh Statement, *supra* note 147, at 26–27 (expanding on the immunities challenges and lack of legal clarity that plagued the courts prior to the clear set of guidelines provided by the FSIA).

302. *See infra* Part II.

303. John B. Bellinger, III, James W. Cooper, Sally Pei, Kevin M. Toomey, R. Reeves Anderson, Stephen K. Wirth et al., *The Supreme Court Removes Two Obstacles to the Criminal Prosecution of Foreign States in U.S. Courts*, ARNOLD & PORTER (May 5, 2023), https://www.arnoldporter.com/en/perspectives/advisories/2023/05/prosecution-of-foreign-states-in-us-courts [https://perma.cc/LY9C-U545] ("[T]he common law of immunities is largely underdeveloped."); *see* Keitner, *Prosecuting States*, *supra* note 208, at 261 (noting that their comprehensive study is the first of its kind, yet is limited by the number of cases addressing criminal immunities).

304. *Cf. supra* notes 143–45 and accompanying text (describing the circumstances of legal uncertainty and political charades the courts encountered following the Tate Letter that led to the adoption of the FSIA).

305. *See supra* Section I.C (discussing the creation of federal common law).

A. State-owned Enterprises as Instrumentalities of Foreign States

At present, States themselves enjoy absolute immunity from criminal prosecution in foreign domestic courts.[306] That noted, the true controversy is not whether the State enjoys immunity, but rather whether a State-owned enterprise, when classified as an agency or instrumentality, enjoys the same.

The petitioner in *Halkbank* argued that for the purpose of immunities, the State-owned enterprise is the State,[307] but this is contrary to established principles of U.S. corporate law.[308] *Dole Foods* held that "[a] basic tenet of American corporate law is that the corporation and its shareholders are distinct entities . . . the fact that the shareholder is a foreign [S]tate does not change the analysis."[309] Thus, while the FSIA defines an "instrumentality" majority-owned by the State as the "foreign State",[310] the FSIA also classifies an instrumentality as a "separate legal person."[311] As separate legal entities, it is possible to appreciate the immunities of the State itself, without extending all immunities to the instrumentality.[312] Even the FSIA distinguished between the rights of the State and its "agencies and instrumentalities" in that punitive damages cannot be brought against the State but can be brought against the majority-owned

306. *See* YANG, *supra* note 30, at 427 ("[O]ne can safely assert that, under current international law, States . . . still enjoy absolute immunity from criminal proceedings . . . ."); Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgement, 2012 I.C.J. 99, ¶ 91 (Feb. 3) ("[U]nder customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict.").

307. Reply Brief of the Petitioner at 11–12, Türkiye Halk Bankası A.Ş., v. United States (*Halkbank*), 143 S. Ct. 940 (2023) (No. 21-1450) [hereinafter Petitioner Reply Brief] ("Halkbank is sovereign . . . Türkiye's government views Halkbank as part of the Turkish state.").

308. Dole Food Co. v. Patrickson, 538 U.S. 468, 474–75 (2003).

309. *Id.* at 474–75.

310. 28 U.S.C. § 1603(b).

311. *Id.* § 1603(a).

312. First Nat'l City Bank v. Banco Para Comerciao Exterior de Cuba, 462 U.S. 611, 626–27 (1983) ("[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such."); Amtorg Trading Corp. v. United States, 71 F.2d 524, 529 (Cst. & Pat. App. 1934) ("[T]he fact that the government may own all or a majority of the capital stock [does not] take from the corporation its character as such, or make the government a real party in interest."); *Cf.* U.N. Convention on Immunities, *supra* note 86, art. 10 ¶ 2 (specifying that an instrumentality can be implicated in a proceeding without effecting the rights of the State).

agencies and instrumentalities.[313] Thus, State-owned enterprises, despite being instrumentalities, are distinct entities and can be subjected to a separate immunity standard from that traditionally granted to the State itself.

B. Balancing Executive Deference with Customary International Law

With a clear legal distinction between the State and State-owned enterprises as instrumentalities established, it is possible to clarify the status of criminal immunities for State-owned enterprises. In his *Halkbank* opinion, Justice Gorsuch provided two avenues for identifying such criminal immunities: executive deference and reliance on customary international law.[314] Both avenues present a unique set of challenges when applied to the State immunity context, as described below.

When applying executive deference, courts face the challenge of balancing legal requirements with inconsistent and often politically motivated recommendations from the current Administration.[315] Immunity determinations have historically been given great weight and deference by the courts.[316] However, given the foreign affairs implications of certain immunities determinations, even a straightforward policy is often difficult to apply in practice.[317] In the decade following *Samantar*, scholars have noted the dissonance that arises when executive political motivations conflict with requirements under federal and international law.[318] Additionally, while some argue that merely bringing forth an indictment is indicative of the executive's

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313. 28 U.S.C. § 1606.

314. Türkiye Halk Bankası A.Ş., v. United States (*Halkbank*), 143 S. Ct. 940, 954 (2023) (Gorsuch, J., concurring in part and dissenting in part).

315. *See supra* notes 143–45 and accompanying text (discussing the historical challenges applying executive policy); *see also* Wuerth, *supra* note 183, at 938–39 (detailing the political shortcomings of executive deference in the foreign official immunity context).

316. *See* Regan v. Wald, 468 U.S. 222, 242 (1984) (arguing that political issues, like those of foreign policy, should be free from judicial interference).

317. *See supra* note 144 (applying the Tate letter policy to a foreign ally but not a foreign adversary).

318. *See supra* note 184 and accompanying text (citing cases in which courts gave executive opinion different weight in guiding personal immunity determinations); Wuerth, *supra* note 183, at 930–33 (addressing the political motivations of the president and Congress in determining immunities law and how courts should be expected to balance conflicting expectations).

stance on a party's immunities,[319] this is misguided, as offices of the executive branch often disagree.[320] Disagreements between executive offices will likely continue to prevail when determining immunities on a case-by-case basis, given the nature of the U.S. governmental and political system.[321] Thus, the decision to pursue an indictment cannot be viewed as indicative of executive determination. Rather, just as executive immunities determinations were taken with a grain of salt before the FSIA,[322] they should continue to be closely evaluated today.

Like executive deference, applying customary international law in U.S. courts—Justice Gorsuch's second recommendation—is similarly inconsistent and lacks clarity. First, determining what constitutes customary international law is a complex endeavor.[323] There is no formula for identifying principles of customary international law or establishing whether an existing practice has crystallized into a binding principle of customary international law.[324] Rather, courts are required to engage in a balancing act of evaluating evidence of state practice

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319. United States Brief, *supra* note 201, at 21.

320. *See generally*, Daniel A. Farber & Anne J. O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375 (2017) (crafting a comprehensive analysis of all adversary relations that exist within the agencies of the executive branch and the mechanisms in place for inevitable conflict resolution).

321. *Cf.* Sharif Paget, *State Department Official Resigns Over Biden Administration's Handling of Israel-Hamas Conflict*, CNN (Oct. 20, 2023, 2:58 AM), https://www.cnn.com/2023/10/19/politics/state-department-official-resigns-israel-gaza/index.html [https://perma.cc/LK7V-DLF8] (detailing the resignation of an eleven year State Department official over a policy disagreement with the Biden Administration); Michael Cooper, *Comity & Calamity: Deference to the Executive and the Uncertain Future of the FSIA*, 45 BROOK. J. INT'L L. 913, 923 (2020) (discussing executive interference).

322. *See, e.g.*, *In re* Grand Jury Investigations of Shipping Indus., 186 F. Supp. 298, 320 (D.D.C. 1960) (considering executive opinion but ultimately deciding based on the nature of the indictment, not the character of the defendant).

323. *See supra* Section I.A. (elaborating on all the possible elements that comprise customary international law and acknowledging that there is no singular formula).

324. *See supra* notes 68–73 and accompanying text (detailing the process of crystallization); The Paquete Habana, 175 U.S. 677, 686–712 (considering multiple historical and international sources to determine customary international law). *See generally* László Blutman, *Conceptual Confusion and Methodological Deficiencies: Some Ways that Theories on Customary International Law Fail*, 25 EUR. J. INT'L L. 529 (2014) (expanding on problems with modern attempts to define and characterize customary international law).

and *opinio juris*.[325] Depending on the evidence evaluated, it is entirely possible for two courts to come to different conclusions.[326] Additionally, the debate over the status of customary international law as a basis for federal common law further complicates its applicability for determining common law immunities.[327] At a minimum, customary international law is persuasive authority in matters of international affairs like State sovereign immunity.[328]

Given the benefits and limitations of both approaches described above, courts need to balance both of Justice Gorsuch's recommendations when determining the true state of immunities law.[329] Accordingly, since the practice of executive deference is straightforward in application in the presence of a policy or decision, the remainder of this analysis will rely on an evaluation of customary international law and federal common law in the absence of an executive policy.

C. The Status of Common Law Criminal Immunities for State-owned Enterprises

By eliminating a statutory framework to follow, the Court's decision in *Halkbank* has returned U.S. courts to the analytical practices employed pre-FSIA.[330] In a similar position to the courts' struggles to determine the federal common law of foreign official immunities following *Samantar*, courts must now engage in a struggle to determine federal common law State sovereign immunities in criminal

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325. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 429–30 (1964) (plurality opinion) (balancing elements of customary international law to determine there was not consensus on the status of the challenged immunities); Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgement, 2012 I.C.J. 99, ¶ 55 (Feb. 3) (relying on both State practice and *opinio juris* to make an immunity determination).

326. *Cf. infra* note 368 and accompanying text (explaining the different immunity determinations for the Bank of Nigeria in the Sixth and Tenth Circuits despite the courts' reliance on the same laws).

327. *See supra* Section I.C.1. (describing the use of international law to form federal common law).

328. *See* Wuerth, *supra* note 183, at 961 (noting reliance on international law is insufficient for determining common law foreign official immunity post-*Samantar*).

329. *Cf. supra* note 184 and accompanying text (outlining the challenges of a similar balancing act necessary for determining common-law immunities post-*Samantar*).

330. *See* Samantar v. Yousuf, 560 U.S. 305, 325 (2010) (dismissing the FSIA in favor of common law foreign official immunity).

proceedings.[331] Just as courts post-*Samantar* have relied on international obligations and historical domestic court determinations for government officials, this analysis now considers elements of customary international law and trends in criminal proceedings before and since the FSIA.[332]

1. Status of State sovereign immunities under customary international law

To adequately identify the customary international law status of State sovereign immunities, it is necessary to evaluate all sources of State practice and *opinio juris*.[333] This includes the statutes and court decisions of foreign States, international treaties and conventions, and the writing of international scholars and reputable organizations.[334] To demonstrate prior precedent for how courts should handle this legal area, the following analysis is structured similarly to the Supreme Court's evaluation of customary international law in *The Paqueta Habana* and supplemented by the ICJ's analytical framework in *Jurisdictional Immunities of the States*.[335]

First, no country expressly permits criminal jurisdiction over foreign States.[336] Most States also do not consider State-owned enterprises to

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331. *See* Türkiye Halk Bankası A.Ş., v. United States (*Halkbank*), 143 S. Ct. 940, 951–52 (2023) (comparing the present case to *Samantar* for the applicability of common law immunities); Bradley, *supra* note 184, at 1 ("[L]ower courts are now divided on a number of issues relating to the scope of foreign official immunity.").

332. *See* Bradley, *supra* note 184, at 9 (addressing the conflict in lower courts, acknowledging how some courts have relied on the "history of judicial deference" for foreign official immunities specifically while others have considered international law, at least to some degree).

333. *See* RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S § 102(2) (AM. L. INST. 1987) (defining customary international law as requiring evidence of both State practice and *opinio juris*).

334. *See supra* notes 49–50, 60, 74 and accompanying text (addressing all potential sources of customary international law employed in the legal analysis of different courts).

335. *See supra* notes 101–02, 233 and accompanying text (describing elements of State practice and *opinio juris* used to decide *Jurisdictional Immunities of the State* and the impact of *The Paqueta Habana* on federal common law). *See generally* Laura P. Moyer, Todd A. Collins & Susan B. Haire, *The Value of Precedent: Appellate Briefs and Judicial Opinions in the U.S. Courts of Appeals*, 34 JUST. SYS. J. 62 (2013) (addressing trends in appellate courts' treatment of precedent raised by litigant briefs).

336. *See supra* note 112 and accompanying text (listing all State statutes addressing immunities).

be States themselves within their immunity statutes.[337] Thus, when reviewing the laws of foreign States, a grant of immunity to the State cannot automatically be viewed as a grant of the same immunity to a State-owned enterprise.[338] However, while no State has expressly denied criminal immunities to State-owned enterprises, some States believe such immunities should be respected.[339] For example, in *Halkbank*, Turkey asserted immunity for its State-owned bank.[340] Similarly, Azerbaijan and Pakistan submitted an amicus brief in *Halkbank* arguing that criminal immunities of State-owned enterprises like Halkbank should be respected in foreign domestic courts.[341] Finally, in *Certain Iranian Assets*, Iran argued that the United States violated international law by not granting immunity to an Iranian State-owned bank.[342] By contrast, however, in these cases the United States did not appear to believe State-owned enterprises deserved such immunities.[343] Given this apparent regional reaction to the United States' behaviors, these few States' opinions cannot be concluded to be representative of international opinion on the status of State sovereign immunities since State practice must be general, widespread, and consistent before it becomes binding customary international law.[344]

There is also no clear determination of the immunities of State-owned enterprises in existing international treaties and case law. In

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337. *See, e.g.*, *supra* notes 115–19 and accompanying text (explaining how the UK SIA does not grant immunity to State-owned enterprises unless they are engaged in a solely government function).

338. *Cf. supra* notes 89–90 and accompanying text (addressing civil proceedings, the UN Convention acknowledges that since State-owned enterprises are separate entities, determinations on their immunity are not directly tied to the State).

339. *See supra* note 203 and accompanying text (presenting the arguments in favor of granting immunity to the Turkish bank in *Halkbank*).

340. Petitioner Reply Brief, *supra* note 307, at 11–12.

341. *See* Amici Azerbaijan et al., *supra* note 203, at 5 ("The continuing vitality of foreign sovereign immunity in the domestic criminal sphere is critical to both American and international interests.").

342. Certain Iranian Assets (Iran v. U. S.), Judgement, 2023 I.C.J 1 ¶ 18 (Mar. 30).

343. *See, e.g.*, United States Brief, *supra* note 201, at 21 (denying that Halkbank should have immunity for violations of U.S. law). These cases regard sanctions violations and such sanctions are notably regarded as political, rather than legal, instruments. *See generally* Michael Brzoska, *International Sanctions: A Useful but Increasingly Misused Policy Instrument*, VISION HUMAN., https://www.visionofhumanity.org/international-sanctions-a-useful-but-increasingly-misused-policy-instrument [https://perma.cc/LAW3-DZA5] (arguing that the expansion of sanctions has "eroded legal principles").

344. *See supra* notes 63–64 and accompanying text.

Jurisdictional Immunities of the States, the ICJ made clear that States possess absolute immunity from criminal prosecution in the domestic courts of other States, regardless of whether the crimes charged are violations of *jus cogens* norms.[345] The Supreme Court affirmed this decision in *Philipp*.[346] An important distinction, however, is that there are other appropriate forums for seeking justice in cases of *jus cogens* violations; no such forum exists for corporate and economic crimes.[347] Rather, the burden to seek redress for such crimes falls on national courts susceptible to immunities claims, not international ones, where immunities claims are irrelevant.[348] Furthermore, in *Certain Iranian Assets*, the ICJ's decision to punt the issue of immunities for State-owned enterprises indicates a lack of legal foundation for the determination.[349] This lack of legal foundation is further affirmed by two multilateral treaties on the issue, the European Convention and the UN Convention on Immunities, which do not address the status of criminal immunities for States or State-owned enterprises.[350]

Finally, legal scholars generally agree that under current international law, States enjoy absolute immunity from criminal proceedings and that "the adoption of a restrictive doctrine has not been treated as having any relevance in relation to [absolute] criminal

345. *See* Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgement, 2012 I.C.J. 99, ¶ 96–97 (Feb. 3) (listing all domestic proceedings that have rejected the argument that violation of jus cogens displaces State immunity and holding "even on the assumption that the proceedings . . . involved violations of *jus cogens* rules, the applicability of the customary international law on State immunity was not affected").

346. Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 712 (2021) (citing *Jurisdictional Immunities of the State* as the foundation for granting Germany immunity).

347. *See* YANG, *supra* note 30, at 428 (addressing how international human rights law is "largely couched in terms of criminal law whereas the rules and principles of state immunity have been developed almost exclusively in the civil (as opposed to criminal) context, focusing as it had on commercial activities in particular").

348. *See, e.g.*, Rome Statute of the International Criminal Court art. 27.2 (denying immunity for proceedings before the International Criminal Court for grave breaches of international law); FRANÇOISE BOUCHET-SAULNIER, LAURA BRAV & CAMILLE MICHEL, THE PRACTICAL GUIDE TO HUMANITARIAN LAW 227 (3d ed. 2013) (noting the distinction between denials of immunity in the International Criminal Court, but maintenance of immunity for States in foreign domestic courts).

349. *See* Dautaj & Fox, *supra* note 108, at 386–87 (highlighting the continued avoidance of the immunity questions despite readily deciding on other matters).

350. *See supra* notes 85, 91 and accompanying text (denoting the limitations of the two multilateral treaties addressing State-immunity broadly).

immunity."[351] Fox and Webb, however, recognized that "these developments in civil jurisdiction might indirectly point the way . . . to the fashioning of an [commercial] exception to immunity from criminal proceeding."[352] Additionally, an emerging trend in international human rights law is increased accountability for corporate entities that commit flagrant human rights violations.[353] Some scholars even advocate for a complete abolition of immunities for State-owned enterprises in the human rights context.[354] While none of these opinions indicate that State-owned enterprises currently lack immunity, they do indicate a potential for conduct-based denials of immunity.[355] Therefore, considering the opinions of these scholars in light of the available international case and treaty law on the matter, while there is not sufficient evidence to indicate a crystallized principle of customary international law necessitating the denial of immunities to State-owned enterprises, there is sufficient uncertainty that would permit domestic State courts to begin to develop their own State practice on the matter.

2. Determining U.S. State practice through existing case law

As a State, the United States can exercise its own immunity scheme that contributes to evidence of State practice and *opinio juris* forming customary international law.[356] An evaluation of U.S. case law addressing State sovereign immunity not only depicts U.S. judicial precedent but also provides a foundation for customary international law, thereby informing and shaping the federal common law.[357] The following analysis considers judicial practice from before the FSIA was

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351. FOX & WEBB, *supra* note 79, at 92; *see* YANG, *supra* note 30, at 427 (referencing multiple statutes that specifically state that they do not apply to criminal proceedings or only reference civil immunities).

352. FOX & WEBB, *supra* note 79, at 93.

353. U.N. Off. of the High Comm'r for Hum. Rts., *The Corporate Responsibility to Respect Human Rights, An Interpretive Guide*, at 10, U.N. Doc. HR/PUB/12/02 (2012) (noting the limitations of current corporate accountably laws).

354. *See, e.g.*, Backer, *supra* note 20, at 883 ("Perhaps it is time to detach sovereign immunity from [State-owned enterprise] human rights duty/responsibility concepts.").

355. *See id.* at 684–87 (advocating for increased accountability for State-owned enterprises for their corporate and human rights related conduct).

356. *See supra* note 21 and accompanying text (acknowledging a State's right to enact its own immunity legislation based on the doctrine of sovereignty).

357. *See* Field, *supra* note 218, at 950–62 (discussing the establishment of federal common law through consideration of historical judicial practice, amongst other factors).

enacted into the modern day to provide a comprehensive picture of the United States perspective.

Before the FSIA was enacted, in both *In re Grand Jury Investigations of Shipping Industry* and *In re Investigation of World Arrangements*, the courts grappled with the legal consequences of subpoenaing a State-owned entity.[358] While the courts reached different conclusions, the distinguishing feature in these cases is the purpose of the subpoena itself, and not the entity being subpoenaed.[359] The primary concern for both courts was whether the purpose of the subpoena was to bring criminal charges against the foreign State.[360] In *In re Grand Jury Investigations of Shipping Industry*, the subpoena was only allowed because the purpose of it was merely to obtain information on other parties, not bring charges against the foreign State instrumentality.[361] Similarly, *In re Investigation of World Arrangements*, the court dismissed the subpoena because it deemed it intended to bring charges against the British instrumentality for its governmental acts.[362] Thus, these cases made clear that under U.S. law, a foreign State itself cannot be subjected to criminal penalties in U.S. courts for official government acts, but also demonstrated a potential avenue for instrumentality accountability when the State itself is not at risk.

Distinctions between immunities for the State and State-owned entities become less clear in the post-FSIA era. The courts in *Keller* and *Southway* disagreed on the applicability of the FSIA to criminal proceedings and grappled with the effects that criminal immunity uncertainties had on the nature of "indictable acts" necessary for a civil RICO claim.[363] While the court in *Keller* understood the FSIA's silence on criminal immunities to mean that such immunities existed,[364] the court in *Southway* declined to affirmatively decide on the existence of

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358. *See supra* notes 265–67 and accompanying text (summarizing the proceedings before and analysis employed by the two courts).

359. *See supra* notes 265, 273 and accompanying text (noting the difference in the emphasis on the acts themselves and the entity tied to the acts).

360. *See supra* notes 269, 273 and accompanying text (focusing on the relationship between the enterprise, the State, and the nature of the subpoena).

361. *In re* Grand Jury Investigations of Shipping Indus., 186 F. Supp. 298, 319–20 (D.D.C. 1960).

362. *In re* Investigation of World Arrangements, 13 F.R.D. 280, 291 (D.D.C. 1952); *see supra* note 267 and accompanying text (explaining the D.C. Circuit's reason for quashing the subpoena).

363. *See supra* notes 279, 297–99 and accompanying text (narrating the distinction between the reasoning of both cases).

364. Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 819–20 (6th Cir. 2002).

such immunities.[365] Both courts agreed that it was Congress's responsibility to clarify the FSIA in a way that would explicitly exclude or permit criminal immunities.[366] While the Supreme Court's *Halkbank* decision resolved this FSIA-related circuit split, it did not resolve the more pressing question of whether the State-owned enterprises enjoyed immunity from criminal indictment.[367] As the law stands, a defendant could be granted immunity in one circuit but denied that very same immunity in another, just as the Central Bank of Nigeria was in *Southway* and *Keller*.[368] The inconsistency in application is the exact problem the FSIA was enacted to resolve in civil suits and leaves room for a similar resolution in the criminal context.[369]

This inconsistency of criminal immunities for State-owned enterprises has become even more apparent in the past decade with a few identifiable trends in immunity determinations emerging. First, in *United States v. Pangang Group Co.*, the Court denied Pangang instrumentality status because it did not satisfy the FSIA's majority ownership requirement.[370] Further, in *In re Grand Jury Subpoena* the court denied a majority State-owned enterprise's immunity claim and upheld the contempt fines.[371] When compared to the pre-FSIA *In re Grand Jury Investigations of Shipping Industry* and *In re Investigation of World Arrangements*, *In re Grand Jury Subpoena* makes clear that consideration of the purpose of a subpoena prevails over the party being subpoenaed.[372] Finally, and most interestingly, in the UMC trade secret case, Fujian Jinhua never brought forth immunity claims despite being a Chinese State-owned enterprise.[373] Although the reason Fujian Jinhua decided to proceed to trial is unknown, the case was highly politicized and presents a prime example of uncertainties that arise when immunity claims are left to foreign State discretion.[374]

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365. Southway v. Cent. Bank of Nigeria, 198 F.3d 1210, 1214 (10th Cir. 1999).

366. *See supra* notes 285, 289 and accompanying text (summarizing the holdings of each circuit); Dickinson, *supra* note 254, at 126 (comparing RICO cases).

367. Türkiye Halk Bankası A.Ş., v. United States (*Halkbank*), 143 S. Ct. 940, 951–52 (2023).

368. *Keller*, 277 F.3d at 820–21; *Southway*, 198 F.3d at 1214.

369. Leigh Statement, *supra* note 147, at 24, 26–27.

370. United States v. Pangang Grp. Co., 6 F.4th 946, 960 (9th Cir. 2021).

371. *In re* Grand Jury Subpoena., 912 F.3d 623, 629–31 (D.C. Cir. 2019).

372. *See supra* note 359 and accompanying text.

373. *See supra* notes 296–98 and accompanying text (discussing the oddities of Fujian Jinhua's choice to proceed to trial).

374. *Cf. supra* note 149 and accompanying text (criticizing the political games played by foreign State's under the Tate Letter policy).

In parsing the limited case law on the matter, it is evident there is no clear standard for evaluating immunity claims by State-owned enterprises. What does appear relevant, however, is an emphasis on the acts rather than strictly the identities of the State-owned enterprises and the potential of immunity denials stemming from those acts.[375] Thus, while there inherently exists a form of absolute immunity for foreign States from prosecution in U.S. courts, these immunities do not, and need not, extend to State-owned enterprises.

D. Recommending a Conduct-Based Immunity Approach

While there is no clear trend under domestic or customary international law explicitly denying immunities to State-owned enterprises, there is also no clear trend explicitly granting them. Therefore, absent an act of Congress, clarification from the Supreme Court or the Executive, or a clear determination of customary international law insinuating otherwise, U.S. courts are permitted to make immunity determinations for State-owned enterprises in criminal cases on a case-by-case basis.[376] In doing so, courts should take a conduct-based approach, applying a core-functions test, similar to that used in conduct-based personal immunities determinations,[377] Act of State cases,[378] and when distinguishing between instrumentality and State in FSIA determinations.[379] Based on their separate legal identity, denying State-owned enterprise immunity would not inherently violate the rights of the States themselves.[380] However, by distinguishing between governmental and commercial acts, courts would ensure they do not violate the long-standing principle of not questioning the

375. *See supra* text accompanying notes 364–65, 372 (summarizing the act-based rationale for granting and denying immunity).

376. *See* The Paquete Habana, 175 U.S. 677, 700 (1900) (acknowledging judicial discretion in the absence of any other precedential or binding law).

377. *See, e.g.*, Yousuf v. Samantar, 699 F.3d 763, 773 (4th Cir. 2012) (describing the balancing test used for conduct-based immunities).

378. *See supra* note 163 and accompanying text (describing the Court's distinction between public and government acts in *Weltover*).

379. *See supra* note 168 and accompanying text (identifying the core-functions test as a means of evaluating the nature of a State-owned or operated body).

380. *See supra* note 312 and accompanying text (arguing for a legal separation between State and State-owned enterprise while providing examples of legal instruments clarifying the legal distinction between the two).

official acts of other States,[381] while respecting the global trend toward increased corporate accountability.[382]

While a conduct-based approach presents a potential solution to the common law immunities question, as previously addressed, leaving the issue of State sovereign immunity to lower courts creates unique problems. These problems include an inconsistent application across circuits[383] and solidification of U.S. State practice under international law, which may contradict United States foreign policy perspectives.[384] To mitigate these problems, Congress should enact legislation explicitly defining State-owned enterprises, distinguishing States from State-owned enterprises, and clarifying the status of criminal immunities under U.S. law.[385] If structured similarly to the FSIA, this legislation would allow courts to make consistent determinations of immunities based on statute rather than having to embrace the challenges of executive deference and customary international law determinations.[386] In the absence of an act of Congress, however, the Supreme Court or the executive branch needs to clarify and solidify the United States' position on criminal immunities granted to States and their instrumentalities, including State-owned enterprises. Until further clarification, U.S. courts are free to either accept or deny immunities but should embrace a conduct-based approach.[387] Regardless, state courts should follow the guidance of federal courts,[388]

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381. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964) (plurality opinion) (recognizing that traditionally "the courts of this country [are precluded] from inquiring into the validity of the public acts" of another State).

382. *See, e.g.*, Backer, *supra* note 20 (identifying the need to close the current loopholes in corporate accountability laws).

383. *See supra* notes 184, 368 and accompanying text (providing examples of inconsistent common law immunity determinations that have already occurred due to unclear immunity laws).

384. *See* Born, *supra* note 222, at 1665 (discussing the problematic nature of state court decisions contributing to the crystallization of binding international law absent any official stance by the federal government).

385. *Cf.* Leigh Statement, *supra* note 147, at 26–27 (explaining why the enactment of the FSIA was essential for the consistent application of U.S. immunity policy).

386. *Cf.* Ryan, *supra* note 184, at 1804 (presenting a similar argument for the codification of foreign official immunity because it would enable congressional oversight, limit political strain on the executive, and clarify judicial procedure).

387. *See supra* note 132 and accompanying text (noting the practice of judicial self-sufficiency in the absence of executive policy).

388. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 424 (1964) (plurality opinion) (holding that state courts should defer to federal courts in matters of foreign policy).

and federal courts should closely track the activities of the Legislature, the executive branch, and other States.[389]

CONCLUSION

In the aftermath of the Court's *Halkbank* decision, the federal common law of foreign sovereign criminal immunities remains underdeveloped, leaving courts with the challenge of harmonizing international responsibilities with domestic interests. This Comment argued that State-owned enterprises do not inherently possess an immunity defense to criminal prosecution under common law, even when foreign States themselves hold absolute immunity.[390] While Congress should endeavor to codify this denial of immunity in cases of corporate crime, U.S. courts should take a conduct-based approach, denying immunity claims by State-owned enterprises engaging in commercial acts until the executive or judicial branches formally say otherwise.[391] By doing so, U.S. courts will act in accordance with emerging legal obligations trending in both domestic and international law, solidify State practice, and contribute to the growing body of customary international law that seeks accountability for corporate entities involved in criminal activity.[392]

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389. *See supra* notes 132–33, 151, 184 and accompanying text (detailing the historic practice of executive deference and the importance of the implementation of the FSIA).

390. *See supra* Part II (arguing for a distinction between the State and its nongovernmental instrumentalities).

391. *See supra* Section II.D (advocating for lower courts to take a conduct-based approach to the immunity determinations for State-owned enterprises until there is further clarification on the matter).

392. *See supra* Section I.A (discussing the creation of customary international law).