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# Restricting RICO Under FSIA

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# NOTES

# RESTRICTING RICO UNDER FSIA

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*"There is no more important way to avoid conflict than by providing clear norms as to which state can exercise authority over whom, and in what circumstances. Without that allocation of competences, all is rancour and chaos."*[1]

## INTRODUCTION

Imagine a foreign financial services company defrauds United States investors of millions of dollars via illegal off-exchange trades of foreign currency futures. Imagine further that the company conspired with officials from a state-owned bank in executing the fraud. This scenario was alleged in *Rosner v. Bank of China*,[2] where aggrieved investors sued both the company and the bank under the civil provision of the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO").[3] Fraudulent transactions, such as those alleged in *Rosner*, often give rise to civil RICO claims. Civil RICO claims are popular because successful plaintiffs are entitled to treble damages.[4] To succeed in a civil RICO claim, the plaintiff must show that the defendant engaged in an underlying criminal act, such as wire fraud.[5] This requirement raises a unique issue when the

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[1] ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 56 (1994).

[2] 349 F. App'x 637, 638–39 (2d Cir. 2009).

[3] 18 U.S.C. § 1964 (2006).

[4] *See* Mark H. O'Donoghue, *International Decisions: Sovereign Immunity—Applicability of RICO to Foreign States and State Entities*, 85 AM. J. INT'L L. 176, 176 (1991).

[5] *See id.* at 176–77.

defendant, like the Bank of China, is a foreign state or an instrumentality thereof: whether the defendant is immune under the doctrine of sovereign immunity.

Under the Commerce Clause, the federal government has exclusive power to regulate foreign trade.[6] Congress has exercised this power to regulate suits against foreign sovereigns by enacting the Foreign Sovereign Immunities Act of 1976 ("FSIA" or "Act").[7] FSIA is the only means of suing a foreign sovereign in United States courts, and its scope is strictly limited to the legislative grant.[8] FSIA grants jurisdiction over foreign sovereigns in civil claims, but creates a blanket rule of sovereign immunity subject only to certain enumerated jurisdictional exceptions.[9] Because FSIA's grant is limited to civil claims against foreign sovereigns and an underlying criminal act is required for a plaintiff to succeed on a civil RICO claim,[10] an important question arises: Are foreign sovereigns immune from civil RICO claims because they are not subject to jurisdiction for the requisite underlying criminal act needed to succeed on a RICO claim?

Despite a global wave of privatization,[11] this question arises in a number of contexts including advanced-fee fraud,[12] investor

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[6] U.S. CONST. art. I, § 8, cl. 3.

[7] *See* 28 U.S.C. §§ 1330, 1602–04 (2006); 28 U.S.C. § 1605 (2006 & Supp. II); 28 U.S.C. § 1606 (2006); 28 U.S.C. § 1607 (2006 & Supp. II).

[8] *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982); Keller v. Cent. Bank of Nig., 277 F.3d 811, 819 (6th Cir. 2002), *abrogated on other grounds by* Samantar v. Yousuf, 130 S. Ct. 2278 (2010).

[9] *See* 28 U.S.C. § 1604.

[10] *See* Pieczenik v. Domantis, 120 F. App'x 317, 320 (D.C. Cir. 2005).

[11] *See* Joseph W. Dellapenna, *Refining the Foreign Sovereign Immunities Act*, 9 WILLAMETTE J. INT'L L. & DISP. RESOL. 57, 62 (2001).

[12] *See* Southway v. Cent. Bank of Nig., 198 F.3d 1210, 1212–13 (10th Cir. 1999) (alleging that the Central Bank of Nigeria participated in advanced-fee fraud in violation of RICO statute). The particular type of fraud detailed in *Southway* and *Keller*, which this Note later contrasts, is known as "Nigerian 419 Fraud"—named after the Nigerian Criminal Code section it violates. PAUL BOCIJ, THE DARK SIDE OF THE INTERNET: PROTECTING YOURSELF AND YOUR FAMILY FROM ONLINE CRIMINALS 100–01 (2006). The scheme is simple: A United States company or individual is sent an e-mail requesting urgent assistance in transferring a huge sum of money to the United States. *See id.* at 101. Once the target agrees to help, they are confronted with a series of fees or bribes needed to complete the transaction. *See id.* Lured by the promise of outrageous profits, the investors pay the fees until they eventually realize the fraud. *See id.* This type of fraud is most successful when perpetrators gather information on the target before contact is initiated. *See id.* at 102. The FBI estimates that in the United States, victims lost between $17 million and $54 million from 2001 to 2002. *Id.* at 103.

fraud,[13] and misappropriation of trade secrets.[14] Although courts have addressed this question before, no clear trend has emerged as to whether the lack of criminal jurisdiction over the foreign sovereign defeats the criminal act element in a civil RICO claim.[15] This Note explores two competing interpretations: (1) that so long as the criminal act underlying the civil RICO suit falls within a FSIA exception, the sovereign may not raise immunity,[16] and (2) that absent a grant of criminal jurisdiction, a foreign sovereign is not amenable to suit in a civil RICO claim.[17] This Note asserts that the courts should find foreign sovereigns immune from civil RICO suits.

Exploring the two FSIA interpretations requires an understanding of both statutes. To better understand FSIA's framework, Part I discusses the underlying theories of immunity that gave rise to its development, as well as the congressional intent behind it. To illustrate civil RICO's quasi-criminal nature, Part I also sketches the development of RICO. Part II explores the two competing interpretations of RICO in light of FSIA by detailing two circuit court cases with substantially similar facts yet diverging outcomes: *Southway v. Central Bank of Nigeria*[18] and *Keller v. Central Bank of Nigeria*.[19] Part II also briefly examines the dispositions of other courts on civil RICO claims brought under FSIA. Finally, Part III analyzes the diverging arguments in light of the statutory text, case law, international law, and policy considerations. Part III argues that granting immunity in civil RICO claims better reconciles FSIA's text and purpose, and better aligns U.S. practice with international law. Part III concludes that, in light of policy concerns, courts should refrain from exercising jurisdiction over foreign sovereigns in civil RICO claims.

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[13] *See, e.g.*, Rosner v. Bank of China, 528 F. Supp. 2d 419, 423 (S.D.N.Y. 2007) (alleging the Bank of China aided a racketeering enterprise centered on foreign currency investment fraud).

[14] *See, e.g.*, Gould, Inc. v. Mitsui Mining & Smelting Co., 750 F. Supp. 838, 840 (N.D. Ohio 1990) (describing a claim arising from an alleged illegal transfer of trade secrets to French-owned copper manufacturer).

[15] *See infra* Part II.

[16] *See Southway*, 198 F.3d at 1215–16.

[17] *See Keller*, 277 F.3d at 821.

[18] 198 F.3d at 1212–14.

[19] 277 F.3d at 814, 821.

## I. HISTORICAL BACKGROUND OF FOREIGN SOVEREIGN IMMUNITY AND CIVIL RICO

A brief overview of both FSIA and RICO provides important insight into the underlying issues. The law in effect before these statutes were enacted, both in and outside the United States, provides a historical background that is important to understanding why Congress enacted these laws and their intended application. Part I.A discusses how absolute and restrictive immunity theories shaped United States immunity doctrines and presents FSIA's current framework. Because of civil RICO's criminal acts requirement, issues arise in applying it to foreign sovereigns, who are generally immune from criminal prosecution.[20] To better understand this issue, Part I.B briefly discusses the history of RICO and its quasi-criminal nature.

### *A. The Background and Framework of FSIA*

#### 1. The Absolute Theory of Foreign Sovereign Immunity

Absolute immunity theory arose from the concept that states were of equal standing and thus, did not possess dominion over each other.[21] This theory was grounded in comity and reciprocity concerns[22] and dictated that sovereigns were immune from jurisdiction absent consent.[23] The United States adopted this international theory in 1812 in the seminal case of *The Schooner Exchange v. M'Faddon*.[24] There, two United States citizens sought to reclaim title of a vessel that had been commandeered by the French Navy.[25] In analyzing France's claim that the United States lacked jurisdiction, Chief Justice Marshall looked

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[20] *See infra* Part II.

[21] *See* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 220 (Aspen Publishers 4th ed. 2007) (citing The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 137 (1812)); HIGGINS, *supra* note 1, at 78–79; Dean Brockbank, *The Sovereign Immunity Circle: An Economic Analysis of* Nelson v. Saudi Arabia *and the Foreign Sovereign Immunities Act*, 2 GEO. MASON L. REV. 1, 2 (1994).

[22] Though short of an "absolute obligation," comity in the context of international law involves a "due regard" for "the legislative, executive, [and] judicial acts of [other] nation[s]." *See* Joseph W. Dellapenna, *Civil Remedies for International Terrorism*, 12 DEPAUL BUS. L.J. 169, 175 (1999–2000); *see also* BLACK'S LAW DICTIONARY 330 (9th ed. 2009).

[23] *See Southway*, 198 F.3d at 1215 n.5.

[24] 11 U.S. (7 Cranch) at 133.

[25] *See id.* at 117.

to international law.[26] Marshall concluded that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute," and therefore, a sovereign's immunity could not be disturbed absent consent.[27] Because the French Navy had seized the vessel in French territorial waters and under color of French law, the United States did not have jurisdiction to compel the replevin.[28] *The Schooner Exchange* formed the basis of the United States common law doctrine of sovereign immunity for more than a century.[29] Under this doctrine, courts decided immunity claims as matters of law and continued to look to international law to resolve novel immunity claims.[30] Despite the foreign relations concerns inherent to immunity decisions, courts ignored executive branch views.[31] In 1943, however, an instance of executive intervention prompted a shift in judicial policy that reframed immunity as a political issue.[32]

Two cases marked the shift in United States immunity doctrine, under which immunity determinations turned on foreign relation concerns, rather than the rule of law. First, in *Ex parte Republic of Peru*, the Court granted immunity to a Peruvian government-owned commercial vessel solely because the Department of State had formally recognized Peru's claim of immunity.[33] The Court explained that wrongs wrought by

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[26] *See* BORN & RUTLEDGE, *supra* note 21, at 219.

[27] *Id.* at 220 (quoting *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136). The case arose from a libel action brought by United States citizens John McFaddon and William Greetham, who asserted title over the *Balaou*, a French ship of war, in United States district court. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 117–18. McFaddon and Greetham were in fact the original owners of the vessel—then named the *The Schooner Exchange*—which was captured by the French Navy en route to St. Sebastian, Spain and converted into a French warship in December of 1810. *See id.* at 117; JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 416 (2d ed. 2006). In August of 1811, inclement weather forced the *Balaou* to seek port in Philadelphia, where McFaddon and Greetham sued. *See The Schooner Exchange*, 11 U.S. (7 Cranch) at 117; DUNOFF ET AL., *supra*. The case eventually reached the Supreme Court, where Chief Justice Marshall held that the Court lacked judicial jurisdiction over foreign sovereigns. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 147.

[28] *See id.*

[29] BORN & RUTLEDGE, *supra* note 21.

[30] *See, e.g.*, Berizzi Bros. v. Pesaro, 271 U.S. 562, 569, 576 (1926) (upholding immunity in a commercial claim on international law grounds where an Italian government-owned merchant vessel delivered damaged cargo).

[31] *See* BORN & RUTLEDGE, *supra* note 21.

[32] *Ex parte* Republic of Peru, 318 U.S. 578, 586–87 (1943).

[33] *See id.* at 589 ("The certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the

friendly sovereigns "are [best] righted through diplomatic negotiations rather than by the compulsions of judicial proceedings."[34] Two years later, in the factually similar *Republic of Mexico v. Hoffman*,[35] the Court denied Mexico's immunity claim because the Department of State refused to recognize the claim.[36] In *Hoffman*, the Court made clear that determinations on immunity should come from the executive branch.[37] After *Ex parte Peru* and *Hoffman*, immunity determinations turned on Department of State "suggestion[s]" regarding a state's claim of immunity, because the courts considered the suggestions binding.[38] This politically driven practice, which continued to rely on absolute immunity principles, created uncertainty and fast became unworkable in the modern world.[39]

2. The Restrictive Theory of Foreign Sovereign Immunity

By the mid-twentieth century, many European states had replaced absolute immunity with the so-called "restrictive immunity theory."[40] Restrictive immunity gained popularity as foreign sovereigns increasingly became involved in commercial transactions with private parties, prompting a need to protect the private actors in such transactions.[41] Under restrictive immunity, sovereigns remained immune for public acts, such as expropriations, but were not immune for private or commercial acts, such as contractual obligations.[42]

After World War II, the United States itself became increasingly involved in foreign litigation resulting from

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political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations.").

[34] *Id.*

[35] 324 U.S. 30 (1945).

[36] *See id.* at 35–36.

[37] *See id.* ("It is . . . not for the courts to deny an immunity which [the Executive branch] has seen fit to allow, or to allow an immunity [where it has not].").

[38] *See* BORN & RUTLEDGE, *supra* note 21, at 221.

[39] *See* DUNOFF ET AL., *supra* note 27, at 419.

[40] *See* GAMAL MOURSI BADR, STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW 33 (1984).

[41] Letter from Jack B. Tate, Dep't of State's Acting Legal Advisor, to Philip B. Perlman, Acting Attorney Gen. (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984, 984–85 (1952) [hereinafter The Tate Letter].

[42] *See* BADR, *supra* note 40, at 21–22; *see also* BORN & RUTLEDGE, *supra* note 21, at 221; DUNOFF ET AL., *supra* note 27, at 419.

international trade.[43] This experience and the rise of state-run industries demonstrated the need to protect American parties in transactions with foreign state-owned entities.[44] Once again, the United States looked to international law to shape its own doctrine. In 1952, the Department of State noted the growing acceptance of the restrictive immunity doctrine abroad and incorporated the theory into its immunity doctrine.[45] Though nominally guided by restrictive immunity theory, Department of State decisions were heavily influenced by political pressures.[46] As a result, implementation of restrictive immunity theory was fraught with inconsistency.[47] Concerned over the lack of uniformity and the friction such decisions caused in international relations, Congress sought to shift the decisionmaking process to the courts by codifying the restrictive immunity theory under FSIA.[48]

3. The Foreign Sovereign Immunities Act of 1976

This Part discusses the congressional objectives behind FSIA and describes the framework of the statute. To resolve uniformity and foreign relation concerns, Congress codified restrictive immunity under FSIA and shifted responsibility for immunity determinations back to the courts.[49] Codifying restrictive immunity removed political pressures by making immunity decisions turn on questions of law.[50] Codification also aligned United States practice with international practice and

[43] *See* H.R. REP. NO. 94-1487, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 [hereinafter HOUSE REPORT]; BORN & RUTLEDGE, *supra* note 21, at 219; DUNOFF ET AL., *supra* note 27, at 419–20.

[44] *See* HOUSE REPORT, *supra* note 43.

[45] *See* The Tate Letter, *supra* note 41 (noting that the United States had followed a policy of not claiming immunity with respect to claims against publicly owned or operated merchant vessels).

[46] *See, e.g.*, BORN & RUTLEDGE, *supra* note 21, at 222 ("[T]he State Department was subjected to diplomatic and political pressures in connection with immunity decisions. This produced unpredictable, sometimes unprincipled, results . . . .").

[47] *See* HOUSE REPORT, *supra* note 43, at 6604–06.

[48] *See id.*

[49] *See id.* at 6606.

[50] *See id.*

provided more consistent application of restrictive immunity theory.[51]

To further ensure uniformity, Congress made FSIA the exclusive means of suing foreign sovereigns in United States courts.[52] FSIA grants civil jurisdiction over all suits against foreign sovereigns,[53] allowing United States citizens to "resolve *ordinary* legal disputes" in United States courts.[54] FSIA's broad jurisdictional grant is tempered by a general rule of immunity, unless a statutory exception applies.[55] Sections 1330 and 1604 of Chapter 28 of the United States Code work in concert to achieve this effect. First, § 1330 grants district courts original jurisdiction—both subject matter and personal—over any civil action against foreign states,[56] which may be a "political subdivision" and any "agency or instrumentality" of a state.[57] Second, § 1604 grants foreign states immunity from jurisdiction unless an enumerated exception applies or an international agreement supersedes the statute.[58] Under FSIA, sovereigns are not entitled to immunity: (1) in terrorism claims,[59] (2) when immunity is waived,[60] (3) in commercial activity claims,[61] (4) in expropriation claims,[62] (5) in property claims,[63] (6) in non-commercial tort claims,[64] (7) in wrongful death claims,[65] and

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[51] *See id.*

[52] *See* 28 U.S.C. § 1602 (2006).

[53] *See id.* § 1330.

[54] Gilson v. Republic of Ir., 682 F.2d 1022, 1028 (D.C. Cir. 1982) (emphasis added) (quoting HOUSE REPORT, *supra* note 43, at 6605) (internal quotation marks omitted). Congress was explicit about this purpose:

> We think that it ought to be difficult for defendants engaged in commercial activity with substantial American contact . . . to invoke successfully sovereign immunity when sued for underlying commercial misdeeds. This is especially so in view of the fact that FSIA was written in great measure to ensure that our citizens will have access to the courts in order to resolve ordinary legal disputes.

*Id.* (quoting HOUSE REPORT, *supra* note 43, at 6605) (internal quotation marks omitted).

[55] *See* 28 U.S.C. § 1604.

[56] *Id.* § 1330.

[57] *Id.* § 1603(a).

[58] *See id.* § 1604.

[59] *See* 28 U.S.C. § 1605A (2006 Supp. II).

[60] *See* 28 U.S.C. § 1605(a)(1) (2006 & Supp. II).

[61] *See id.* § 1605(a)(2).

[62] *See id.* § 1605(a)(3).

[63] *See id.* § 1605(a)(4).

[64] *See id.* § 1605(a)(5).

[65] *See id.*

(8) in counter proceedings brought by the sovereign.[66] Aside from the amended § 1605A, which provided the terrorism exception,[67] there is no exception to the rule of sovereign immunity for criminal acts.

The most commonly raised exception to immunity, and indeed the driving force behind FSIA, is the commercial activity exception.[68] Plaintiffs raise the commercial activity exception so frequently in large part because its definition is so broad. Section 1603(d) defines "commercial activity" as either a course of conduct or a single transaction that is commercial in character.[69] The "character" of a transaction is "determined by reference to [its] nature[,] . . . rather than . . . its purpose."[70] The nature-purpose distinction is widely criticized as vague and broad.[71]

The Supreme Court clarified the definition in *Republic of Argentina v. Weltover, Inc*.[72] There, to protect the integrity of its then-faltering economy, Argentina unilaterally deferred repayment on bonds it had issued to United States investors.[73] The Court held the nature of bonds was commercial, even though Argentina's motive for deferring repayment was sovereign.[74] Under the Court's reasoning, an act is commercial "when a foreign government acts, not as regulator of a market, but [as] a private player."[75]

According to the Court's definition, so long as a foreign sovereign is acting in a private capacity, it cannot raise immunity. This is true whether the underlying transaction is legal or illegal. Read this way, there is no question that a foreign sovereign would be liable for common law fraud arising from a contract dispute. But in a civil RICO suit, a plaintiff must show that the defendant was indictable for some underlying criminal

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[66] *See* 28 U.S.C. § 1606 (2006).

[67] *See* 28 U.S.C. § 1605A (2006 Supp. II).

[68] *See* HOUSE REPORT, *supra* note 43.

[69] *See* 28 U.S.C. § 1603(d) (2006).

[70] *Id.*

[71] *See, e.g.*, Joseph W. Dellapenna, *Foreign State Immunity in Europe*, 5 N.Y. INT'L L. REV. 51, 61–62 (1992); *see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 453 cmt. b (1987); BADR, *supra* note 40, at 32, 87, 91, 94–96; Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 222, 224–25 (1951).

[72] 504 U.S. 607 (1992).

[73] *Id.* at 609.

[74] *Id.* at 614, 617.

[75] *Id.* at 614.

act—hence RICO's quasi-criminal nature.[76] FSIA does not provide courts with the power to indict—that is, to formally charge a sovereign defendant through legal process.[77] Indeed, such power would be contrary to both United States policy and international legal norms.[78] If a United States court lacks jurisdiction to indict a sovereign defendant, is it competent to hear a civil RICO claim brought against one?

### *B. The History, Purpose, and Meaning of RICO*

The civil RICO statute subjects defendants to "potentially devastating liability."[79] Although it was enacted to combat organized crime,[80] the statute's broad scope of prohibitions and treble damages provision have incentivized novel and expansive civil applications, particularly in the commercial context.[81]

#### 1. History and Purpose

RICO resulted from a lengthy legislative effort to combat organized crime.[82] The roar of the 1920s heralded the rise of organized crime in the United States.[83] Prohibition, increased narcotics use, and economic depression allowed organized crime syndicates to gain a foothold in the American economy.[84] Prohibition in particular incentivized the consolidation of numerous criminal activities,[85] which rendered federal

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[76] *See* 18 U.S.C. § 1964(c) (2006).

[77] *See* BLACK'S LAW DICTIONARY, *supra* note 22, at 841.

[78] *See infra* Part III.A.

[79] O'Donoghue, *supra* note 4, at 178.

[80] *See* G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1013 (1980).

[81] 18 U.S.C. § 1964(c); *see, e.g.*, Rosner v. Bank of China, 528 F. Supp. 2d 419 (S.D.N.Y. 2007).

[82] *See* Blakey & Gettings, *supra* note 80.

[83] *See* Frank D'Angelo, Note, *Turf Wars: Street Gangs and the Outer Limits of RICO's "Affecting Commerce" Requirement*, 76 FORDHAM L. REV. 2075, 2080 (2008).

[84] *Id.*

[85] *See* Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213, 226 (1984). Bradley noted that

> prohibition created a need for large-scale distribution networks comprising smugglers, distillers, bottlers, warehouses and trucks as well as numerous

prosecution of the discrete underlying crimes less and less effective.[86]

The legislature responded slowly and incrementally to bolster criminal law so that prosecutors could target the hierarchy of criminal organizations, rather than the low-level criminals who carried out the dirty work. At first, Congress enacted federal kidnapping laws and later, racketeering laws, which focused on prosecuting the criminal organizations, rather than prosecuting the individual criminals.[87] Despite marginal success, the need for more effective measures was apparent.[88] Later, as organized crime infected legitimate businesses,[89] Congress shifted focus away from a pure prosecutorial approach to include regulatory reforms.[90] Notably, civil litigation was seen as a potential weapon against organized crime,[91] turning citizens

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> retailing outlets (speakeasies). Obviously this required far more organization than did operating a house of prostitution or a bookie joint, and organized crime, as we know it today, was born—the unwanted child of an unfortunate act of Congress.

*Id.*

[86] *See* Michael Morrissey, Note, *Structural Strength: Resolving a Circuit Split in* Boyle v. United States *with a Pragmatic Proof Requirement for RICO Associated-in-Fact Enterprises*, 77 FORDHAM L. REV. 1939, 1943 (2009).

[87] *See* Bradley, *supra* note 85, at 229–32. Washington's first response was the Federal Kidnapping Act of 1932, which was passed in response the kidnapping of the Lindbergh baby. *Id.* at 229 & n.106. Despite federalism concerns, legislation in 1934 expanded the coverage of the Lindbergh Law, prohibiting "interference with interstate commerce by [way of] threats, force or violence." *Id.* at 231. The effect of organized crime on legitimate business was a primary concern of the Kefauver Committee of the 1950s and Attorney Generals Kennedy and Katzenbach in the 1960s. *See id.* at 236–48.

[88] *Id.* at 235.

[89] *See* Morrissey, *supra* note 86. The Kefauver Committee indentified numerous industries that were being purchased with the profits from organized crime, including: advertising, amusement, appliances, automobiles, cigarettes, coal, communications, steel, and transportation. S. REP. NO. 82-307, at 170–81 (1951). Among the concerns was organized crime's ability "to compete unfairly with legitimate" business persons. *See* S. REP. NO. 81-2370, at 16 (1950).

[90] *See* Blakey & Gettings, *supra* note 80, at 1015 n.25. In 1965, President Lyndon B. Johnson appointed Attorney General Nicholas Katzenbach to study the problem of organized crime. *See* D'Angelo, *supra* note 83. Katzenbach's commission recommended the use of civil litigation and regulatory reforms, as well as traditional criminal prosecution, as a means of fighting organized crime. *Id.* at 2080–81.

[91] *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 208 (1967) ("Law enforcement is not the only weapon that governments have to control organized crime. Regulatory activity can have a great effect.").

into "private attorneys general."[92] Thus, Congress enacted RICO and created a civil private right of action whereby victims of statutorily proscribed criminal activity could sue in federal court for treble damages.[93]

2. Interpreting the Civil RICO Statute

Civil RICO turned victims into private prosecutors by creating a private right of action and prescribing treble damages.[94] To recover in a civil RICO claim, a plaintiff must show that the defendant engaged in a "racketeering activity"[95]—that is, "any act which is indictable under" state laws and several enumerated federal statutes.[96] The predicate RICO offenses include the ubiquitous 18 U.S.C. § 1343, which criminalizes any monetary fraud engaged by wire, radio, or telecommunications.[97] What Congress meant by "indictment" becomes a central issue when the defendant is sovereign and immune from indictment.[98]

Although Congress expressly instructed courts to liberally construe RICO's provisions to "effectuate its remedial purposes,"[99] the most natural reading of the civil RICO statute indicates that a defendant must be subject to criminal prosecution, or "indictable," for victims to maintain the suit. While there is no requirement that the defendant have actually been indicted or convicted, the implication is that the defendant must be amenable to the indictment.[100] This is clear from the Supreme Court's holding in *Sedima, S.P.R.L. v. Imrex Co.*[101]: The predicate offenses are satisfied when the defendant *could be* indicted for an act.[102] Logically, it follows that if a court lacks the power to indict a defendant, then the defendant cannot be indicted and the civil RICO claim must fail. This logic has been

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[92] Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 137 (2d Cir. 2001) (quoting Rotella v. Wood, 528 U.S. 549, 557 (2000)).

[93] *See id.* at 106.

[94] *See* 18 U.S.C. § 1964(c) (2006).

[95] *Id.* § 1962(b)–(d).

[96] *See id.* § 1961(1).

[97] *See* 18 U.S.C. § 1343 (2006 & Supp. II).

[98] *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 488–89 (1985).

[99] Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922.

[100] *See Sedima*, 473 U.S. at 488 ("[R]acketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he could be.").

[101] 473 U.S. 479.

[102] *See id.* at 488.

used by circuit courts to uniformly bar claims against the federal government on the grounds that it is not indictable.[103] This same rationale has been used to bar claims against state legislatures,[104] state institutions,[105] and municipal governments.[106] Despite the general consensus that domestic sovereigns are not indictable and cannot be subject to a civil RICO claim, courts are split when the sovereign is foreign.[107]

## II. THE COMPETING CONSTRUCTIONS OF FSIA IN LIGHT OF CIVIL RICO

Federal courts are divided as to whether or not FSIA grants jurisdiction over foreign sovereigns in civil RICO claims. Courts diverge because RICO requires predicate underlying criminal acts and FSIA does not grant criminal jurisdiction or provide any exception to the general rule of immunity for criminal acts. When examining the conflict, three different contentions emerge. First, courts disagree on the scope of FSIA. While courts agree that FSIA does not confer criminal jurisdiction, they are split as to whether FSIA's silence on criminal jurisdiction means that § 1604's presumption of immunity even applies.[108] Second, courts disagree as to whether the actor or merely the act itself must be "indictable" under RICO.[109] Finally, underlying this split is a general disagreement over the fundamental concepts of sovereign immunity.

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[103] *See, e.g.*, Berger v. Pierce, 933 F.2d 393, 397 (6th Cir. 1991) ("The assertion . . . that [a federal agency] was engaged in a RICO conspiracy under section 1962(d) was patently defective as a matter of law, since it is self-evident that a federal agency is not subject to state or federal criminal prosecution."); *see also* McNeily v. United States, 6 F.3d 343, 350 (5th Cir. 1993) (finding the FDIC not indictable for the predicate racketeering activity and thus not amenable to a civil RICO suit).

[104] *See, e.g.*, Thillens, Inc. v. Cmty. Currency Exch. Ass'n of Ill., 729 F.2d 1128, 1129–30 (7th Cir. 1984) (recognizing that state legislators are immune from civil RICO claims).

[105] *See, e.g.*, Gaines v. Tex. Tech Univ., 965 F. Supp. 886, 889 (N.D. Tex. 1997) (finding that state institutions are immune from civil RICO claims).

[106] *See, e.g.*, Massey v. City of Oklahoma City, 643 F. Supp. 81, 85 (W.D. Okla. 1986) (finding a municipal government incapable of forming the requisite mens rea necessary to engage in racketeering activity).

[107] *See infra* Part II.

[108] *Compare* Keller v. Cent. Bank of Nig., 277 F.3d 811, 820 (6th Cir. 2002), *with* Southway v. Cent. Bank of Nig., 198 F.3d 1210, 1214 (10th Cir. 1999). *But cf.* United States v. Noriega, 117 F.3d 1206, 1211–12 (11th Cir. 1997).

[109] *See Southway*, 198 F.3d at 1214–15 & n.6.

Part II of this Note explores the approaches used by the Sixth and Tenth Circuits in addressing the issues inherent to civil RICO claims against foreign sovereigns, and briefly examines the disposition of other circuits. Part II.A explores this issue in the context of the Tenth Circuit's decision in *Southway v. Central Bank of Nigeria*, which held that FSIA did not render the foreign state defendants immune from a civil RICO claim.[110] Part II.B examines the Sixth Circuit's decision in *Keller v. Central Bank of Nigeria*, which explicitly rejected the Tenth Circuit's rationale.[111] Finally, Part II.C examines the disposition of other circuits with respect to any conflict between FSIA and RICO.

### *A. The Tenth Circuit:* Southway v. Central Bank of Nigeria

The Tenth Circuit approaches civil RICO claims against foreign sovereigns as if they were any other civil claim. That is, so long as there is an exception to FSIA's grant of immunity, the case may proceed. One case applying this approach is *Southway v. Central Bank of Nigeria*.

*Southway* involved an advanced-fee fraud scheme, whereby individuals purporting to represent the Central Bank of Nigeria ("CBN") duped plaintiffs into forwarding them money in the hopes of receiving a greater sum in return.[112] In November 1995, an individual claiming to be a representative of the Nigerian National Petroleum Corporation ("NNPC") contacted an attorney in Colorado offering a lucrative deal.[113] The purported representative claimed that with the attorney's help, he could access a $21 million "over-invoiced" contract that NNPC had made with a foreign company.[114] Under the proposed agreement, the attorney would claim to be a subsidiary of that company and would wire the funds to his own account in the United States.[115] In compensation for his troubles, the attorney "would receive a percentage of the funds."[116]

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[110] *Id.* at 1215.
[111] 277 F.3d at 820.
[112] Southway v. Cent. Bank of Nig., 994 F. Supp. 1299, 1303 (D. Colo. 1998).
[113] *See id.* at 1302.
[114] *See id.*
[115] *See id.*
[116] *See id.*

The attorney agreed and complied with the representative's instructions to the letter.[117] When the attorney sought payment, however, additional alleged representatives of both the NNPC and the CBN claimed that a series of "advanced fees" were necessary to complete the transaction.[118] The attorney, "short the funds necessary to take full advantage of this opportunity," convinced others to "invest" with him to cover the fees.[119] Unfortunately, the money never materialized.[120]

The investors sued in the United States District Court, District of Colorado, alleging RICO violations by the Federal Republic of Nigeria ("FRN") and the CBN.[121] The FRN and CBN moved to dismiss, asserting FSIA "did not provide . . . [for] jurisdiction over [the] civil RICO claims."[122] The district court denied the motion.[123]

After the district court denied immunity, the Tenth Circuit, on interlocutory appeal, affirmed the district court's holdings that: (1) the alleged fraud fell under the commercial activity exception; and (2) FSIA did not preclude civil RICO jurisdiction.[124] Because the alleged fraud's nature was commercial, the court held that the commercial activity exception applied regardless of the underlying illegality.[125] The court then rejected any specific civil RICO immunity for four reasons. First, the court rejected the argument that Congress intended FSIA to govern jurisdiction in criminal matters.[126] Because FSIA was silent with respect to criminal indictment, the court declined to apply its immunity to the predicate RICO offenses.[127] The court reasoned that it "ha[d] no business attempting to define the scope

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[117] *See id.*

[118] *Id.* at 1303.

[119] *Id.* at 1303–04.

[120] *See id.* at 1304.

[121] *See* Southway v. Cent. Bank of Nig., 198 F.3d 1210, 1213 (10th Cir. 1999).

[122] *Id.* at 1213.

[123] *See Southway*, 994 F. Supp. at 1309.

[124] *See Southway*, 198 F.3d at 1214. On remand, the court discovered that the sovereign defendants had not in fact participated in the fraud and thus dismissed the case against them. *See* Southway v. Cent. Bank of Nig., 328 F.3d 1267, 1273–74 (10th Cir. 2003). The Tenth Circuit affirmed the dismissal but made clear that there was no immunity because the cause of action arose from a RICO violation. *See id.* at 1274.

[125] *See Southway*, 198 F.3d at 1217–18.

[126] *See id.* at 1214.

[127] *See id.* at 1215 n.4.

of foreign sovereign immunity in the first instance,"[128] and that if Congress wished for foreign sovereigns to be immune from criminal indictment, Congress would have expressly provided such an immunity.[129] Second, the court declined to distinguish RICO from other civil claims, despite RICO's unique requirements.[130] Third, the court found that jurisdiction was consistent with Congress's purpose in codifying the restrictive theory of immunity in FSIA.[131] The court distinguished foreign sovereign immunity from domestic sovereign immunity, reasoning that the law had abandoned absolute immunity for foreign sovereigns with the adoption of the Tate Letter.[132] Finally, the court held that in any event, the predicate RICO offense itself must be indictable, not the party that committed it.[133] Accordingly, the court denied immunity to the FRN and CBN.

After the court remanded the case for further proceedings, the FRN and CBN were able to demonstrate at trial that although all communications appeared to be official, they were in fact sent from imposters.[134]

### *B. The Sixth Circuit:* Keller v. Central Bank of Nigeria

The Sixth Circuit's approach to resolving the civil RICO immunity question is diametrically opposed to the Tenth Circuit's approach. The Sixth Circuit considers FSIA's failure to provide for criminal jurisdiction over foreign sovereigns to mean that such sovereigns are not indictable for RICO's predicate criminal acts and thus, are immune from civil RICO suits. An example of this approach can be seen in *Keller v. Central Bank of Nigeria*.

The facts underlying *Keller* mirror those of *Southway*. There, a purported Nigerian official called a sales representative for a Michigan-based manufacturer of mobile medical centers.[135] The official offered the deal of a lifetime: In exchange for

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[128] *Id.* at 1214–15 (citing Doe v. United States (*In re* Doe), 860 F.2d 40, 45 (2d Cir. 1988)).

[129] *See id.* at 1215.

[130] *See id.*

[131] *See id.* at 1216.

[132] *See id.* at 1215 n.5.

[133] *See id.* at 1215 & n.6.

[134] *See* Southway v. Cent. Bank of Nig., 328 F.3d 1267, 1270 (10th Cir. 2003).

[135] *See* Keller v. Cent. Bank of Nig., 277 F.3d 811, 814 (6th Cir. 2002).

exclusive distribution rights of the mobile medical centers, the official would pay the manufacturer $6.63 million for $4.10 million worth of equipment and a $7.65 million licensing fee.[136] The official promised that the Nigerian government had already appropriated the funds[137] and that the manufacturer only needed to establish an escrow account in the United States from which the funds would be disbursed.[138] After they struck the deal, the manufacturer established the escrow account and waited.[139]

When the funds did not materialize, various individuals purporting to hold positions within the CBN and the FRN demanded "advanced fees" from the manufacturer.[140] Reluctantly, the manufacturer paid a series of fees totaling approximately $30,000.[141] Each time the manufacturer paid one fee, the officials demanded another and postponed the transfer.[142] Eventually, a purported official told the manufacturer that the funds were ready, but that the manufacturer had to personally collect the funds in London, England.[143] Undaunted by the string of dubious fees and broken promises, the manufacturer travelled to London only to find that the promised courier never appeared.[144] Finally realizing the fraud, the manufacturer sued under civil RICO in federal district court.[145]

On appeal, the Sixth Circuit reversed the district court's denial of CBN's immunity.[146] Like the Tenth Circuit, the Sixth Circuit held that allegations of criminal activity did not rob the transaction of its commercial nature and thus, the commercial activity exception applied;[147] however, the Sixth Circuit's analysis did not end there and was markedly different in three ways. First, the Sixth Circuit read FSIA's silence on criminal jurisdiction as an indication that Congress did not intend to provide for it—that is, a foreign sovereign could not be indicted

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[136] *See id.*
[137] *See id.*
[138] *See id.*
[139] *See* Final Brief of Plaintiffs-Appellees at *6, *Keller*, 277 F.3d 811 (No. 00-3369), 2000 WL 35555622.
[140] *See id.* at *7.
[141] *See Keller*, 277 F.3d at 814.
[142] *See* Final Brief of Plaintiffs-Appellees, *supra* note 139, at *6–7.
[143] *See id.* at *7.
[144] *See id.*
[145] *See Keller*, 277 F.3d at 814.
[146] *See id.* at 818.
[147] *See id.* at 816.

under FSIA.[148] The Sixth Circuit recognized that its jurisdiction was limited to "the exact degrees and character which . . . Congress [had granted]."[149] Because Congress did not provide for criminal jurisdiction in the only relevant statute, the court could not exercise jurisdiction over a claim that required it.[150]

Second, because FSIA's provisions were "[s]ubject to existing international agreements," foreign sovereigns were immune from criminal prosecution absent a contrary international agreement.[151] The court noted that bringing a criminal proceeding against another nation during peacetime runs counter to United States policy.[152] Finally, the Sixth Circuit rejected the argument that any distinction between indictable acts and indictable actors was material.[153] Relying on its own precedent, the court determined that the actor and not the act "count[ed] for the purposes of RICO 'indictability.' "[154] Thus, since civil RICO required the defendant to be indictable and because sovereigns could not be indicted in United States courts, the Sixth Circuit concluded that sovereigns must be immune.[155]

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[148] *See id.* at 820.

[149] *Id.* (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 433 (1989)) (internal quotation marks omitted).

[150] *See id.*; *see also Amerada Hess*, 488 U.S. at 436 (holding in the context of the Alien Tort Statute, FSIA immunity is granted in cases involving alleged violations of international law not enumerated in FSIA's exceptions); Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982) ("Jurisdiction of the lower federal courts is . . . limited to those subjects encompassed within a statutory grant.").

[151] *Amerada Hess*, 488 U.S. at 434 (quoting 28 U.S.C. § 1604 (2006)) (internal quotation marks omitted). Congress specifically omitted the term "future" international agreements because it was deemed "misleading." HOUSE REPORT, *supra* note 43, at 6608. Congress used the term "existing" to ensure that courts would understand that the Act did not supersede any treaties. *Id.* Congress intended for all treaties, both those in existence in 1976 and those to come, to control in case of conflict. *See id.* at 1616.

[152] *See Keller*, 277 F.3d at 819–20 (quoting Gould, Inc. v. Mitsui Mining & Smelting Co., 750 F. Supp. 838, 844 (N.D. Ohio 1990)) (internal quotation marks omitted).

[153] *See id.* at 820–21.

[154] *Id.* (citing Berger v. Pierce, 933 F.2d 393, 397 (6th Cir. 1991)); Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 488 (1985) ("[R]ackeetering activity consists not of acts for which the defendant has been convicted, but of acts for which *he could be*." (emphasis added)). *But see* S. REP. NO. 91-617, at 158 (1969) ("[The] 'racketeering activity' . . . must be an act in itself subject to criminal sanction . . . .").

[155] *See Keller*, 277 F.3d at 821.

### C. Other Circuits

Although only the *Southway* and *Keller* courts have framed the issue in terms of indictment, other circuits have entertained civil RICO claims against foreign sovereigns. The Second,[156] Eleventh,[157] and Federal Circuits[158] have all held that the courts may exercise jurisdiction under FSIA in civil RICO claims against foreign sovereigns if the commercial activity exception applies. The Seventh Circuit has never spoken on the issue, but one of its district courts has declined to recognize a civil RICO immunity rule.[159] The Fifth Circuit has held that entities not subject to indictment are immune from civil RICO jurisdiction[160]

[156] *See* Kensington Int'l Ltd. v. Itoua, 505 F.3d 147, 153–54 (2d Cir. 2007) (holding that foreign sovereigns were presumptively immune unless an exception applied, but that commercial activity outside the U.S. with no "direct effect" on the U.S. did not satisfy the commercial activity exception); *see also* Rosner v. Bank of China, 528 F. Supp. 2d 419, 424, 427 (S.D.N.Y. 2007) (holding that the alleged activity fell within commercial activity exception of FSIA, but that it did not amount to a RICO violation); Daly v. Castro Llanes, 30 F. Supp. 2d 407, 416, 420 (S.D.N.Y. 1998) (dismissing a civil RICO action against a foreign bank for failing to plead with particularity).

[157] *See* United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997) (holding that the FSIA does not address immunity in the criminal context, and any immunity must be determined from the principles of *The Schooner Exchange*); *see also* United States v. Emmanuel, No. 06-20758, 2007 WL 2002452, at *14 (S.D. Fla. July 7, 2007) (recognizing that Eleventh Circuit precedent bound the court from entertaining the argument for RICO immunity under the FSIA).

[158] *See* Chalabi v. Hashemite Kingdom of Jordan, 503 F. Supp. 2d 267, 274 (D.C. Cir. 2007) (holding that the commercial activity exception applied and the court would have jurisdiction but for the fact that the civil RICO claims were time barred). *But cf.* Pieczenik v. Domantis, 120 F. App'x 317, 320 (D.C. Cir. 2005) (holding that federal agencies could not be sued under RICO because they are not "person[s] capable of violating RICO[,] . . . [they] are not subject to . . . criminal prosecution," and they cannot satisfy the predicate acts (internal quotation marks omitted)).

[159] *See* Am. Bonded Warehouse Corp. v. Compagnie Nationale Air Fr., 653 F. Supp. 861, 863–64 (N.D. Ill. 1987).

[160] *See* McNeily v. United States, 6 F.3d 343, 350 (5th Cir. 1993) (finding the FDIC is not indictable for the predicate racketeering activity and thus not amenable to a civil RICO suit); *see also* St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 447 (5th Cir. 2000) ("Where persons associate 'in fact' for criminal purposes, [ ] each person may be held liable under RICO for his [part] . . . but the association itself cannot be." (quoting Haroco v. Am. Nat'l Bank & Trust Co., 747 F.2d 384, 401 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985)) (citation omitted)).

and affirmed portions of a district court holding extending that rationale to foreign sovereigns.[161]

## III. COURTS SHOULD ADOPT THE SIXTH CIRCUIT'S ANALYSIS IN *KELLER*

This Note urges courts to adopt the Sixth Circuit's analysis in *Keller* and grant foreign sovereigns immunity in civil RICO claims because FSIA does not empower the courts to indict the sovereigns for RICO's predicate criminal acts. Three major considerations favor this broad grant of immunity under FSIA: reconciliation of statutory construction with congressional intent, alignment with international practice, and reduction of transaction costs in commercial dealings with sovereigns.

### *A. Statutory Construction*

The Sixth Circuit's reasoning better reconciles the language of FSIA with the underlying purposes of codifying restrictive immunity and properly considers RICO a crime fighting statute. The Tenth Circuit's analysis in *Southway*, however, raises important points that must be addressed prior to accepting the *Keller* analysis.

First, while FSIA's silence on criminal jurisdiction raises doubts that Congress intended for FSIA immunity to apply to foreign sovereigns in criminal cases, granting immunity in such cases is more consistent with FSIA's blanket immunity rule and underlying purpose. FSIA is the only means by which United States citizens may sue foreign sovereigns in a United States court.[162] FSIA grants civil jurisdiction but not criminal jurisdiction; this exclusion is a signal that FSIA does not give the courts power to indict foreign sovereigns.[163] If courts cannot

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[161] *See* Dale v. Colagiovanni, 337 F. Supp. 2d 825, 842–43 (S.D. Miss. 2004), *aff'd in part*, 443 F.3d 425 (5th Cir. 2006) (holding that because the Vatican was not indictable for the predicate RICO acts under FSIA, it could not be sued under civil RICO).

[162] *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982) (limiting the court's jurisdiction to "subjects encompassed within a statutory grant of jurisdiction"); Keller v. Cent. Bank of Nig., 277 F.3d 811, 819 (6th Cir. 2002).

[163] *Expressio unis est exclusio alterius*. Burke v. United States, 968 F. Supp. 672, 678 (M.D. Ala. 1997); *see* United States v. Vonn, 535 U.S. 55, 65 (2002) ("[E]xpressing one item of a[n] . . . associated group or series excludes another left unmentioned . . . .").

indict foreign sovereigns, then logically, foreign sovereigns are immune from criminal jurisdiction under FSIA. Now some courts, notably the Eleventh[164] and Second[165] Circuits, have argued that FSIA's silence on criminal jurisdiction does not prohibit criminal indictment under common law doctrines. But this argument does apply to FSIA claims brought by private citizens because FSIA is the sole means for private citizens to sue foreign sovereigns, rendering common law doctrines ineffective.[166] Moreover, if FSIA's immunity does not extend to cover criminal acts, then why did Congress amend FSIA to remove immunity for cases arising from terrorism?[167] Not coincidentally, the very acts covered under § 1605A—torture, aircraft sabotage, hostage taking or state sponsorship thereof[168]—are prohibited under RICO's § 1961.[169] In light of the terrorism amendment, the exclusion of any specific fraud immunity exception and FSIA's deafening silence on criminal jurisdiction suggest that courts should render sovereigns immune in civil RICO claims not falling under § 1605A.

Second, while RICO's language speaks of indictable "acts" and not "actors," relevant precedent suggests that the court must be able to indict the actor to satisfy the "predicate criminal acts" element. The Supreme Court made clear in *Sedima S.P.R.L. v. Imrex Co.*[170] that while civil RICO does not require that the defendant have been convicted of the underlying act, it does require an indictable act.[171] As shown in Part I.B, the circuit courts have followed this logic to bar civil RICO claims against

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[164] *See, e.g.*, United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997) ("Because the FSIA [does not] address[ ] . . . foreign sovereign immunity in the criminal context, [it] . . . could [only] attach . . . pursuant to the principles and procedures outlined in *The Schooner Exchange* and its progeny.").

[165] *See, e.g.*, Doe v. United States (*In re* Doe), 860 F.2d 40, 45 (2d Cir. 1988) (declining to apply FSIA to resolve a head-of-state immunity issue).

[166] *See Keller*, 277 F.3d at 819; *see also Ins. Corp. of Ir.*, 456 U.S. at 701.

[167] The jurisdictional basis for prosecution of such crimes is often called "universal jurisdiction." DUNOFF ET AL., *supra* note 27, at 380–83. Universal jurisdiction allows any court to hear a claim against any defendant that has violated the so-called "law of nations." *See id.* at 380–82. What constitutes such a violation is hotly debated and beyond the scope of this Note, but certainly includes piracy, war crimes, and genocide. *Id.* at 380.

[168] *See* 28 U.S.C. § 1605A(a)(1) (2006 Supp. II).

[169] *Cf.* 18 U.S.C. § 1961(1) (2006) (defining racketeering activity as "any act or threat involving murder[ or] kidnapping").

[170] 473 U.S. 479 (1985).

[171] *Id.* at 488.

the United States government, our domestic sovereign.[172] For example, the Sixth Circuit in *Berger v. Pierce*[173] held that civil RICO claims against federal agencies were "defective as a matter of law" because federal agencies were not indictable.[174] While the Tenth Circuit agreed with the *Berger* Court, it distinguished between the immunity available to domestic sovereigns, absolute immunity, and the immunity available to foreign sovereigns, restrictive immunity.[175] This argument ignores restrictive immunity theory, as codified by FSIA, which has never contemplated criminal prosecutions against foreign sovereigns. Restrictive immunity arose to provide redress to private parties when commercial transactions with foreign sovereigns soured,[176] and no court has used restrictive immunity theory to justify criminal jurisdiction over foreign sovereigns.

Third, although the conduct in both *Southway* and *Keller* is properly described as commercial in nature, immunity should not be excepted in civil RICO claims, which is not the type of relief contemplated by FSIA. FSIA codified the restrictive immunity theory to regulate foreign commerce by protecting private parties in transactions with foreign sovereigns.[177] Congress protected private parties by giving them access to United States courts to "resolve *ordinary* legal disputes."[178] But with civil RICO, ordinary protection crosses the line into private prosecution. RICO's unique history and its design as a crime-fighting tool

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[172] *See* McNeily v. United States, 6 F.3d 343, 350 (5th Cir. 1993) (finding the FDIC is not indictable); Berger v. Pierce, 933 F.2d 393, 397 (6th Cir. 1991) (finding "that a federal agency is not subject to state or federal criminal prosecution").

[173] 933 F.2d 393.

[174] *See id.* at 397; *see also McNeily*, 6 F.3d at 350 (finding the FDIC is not indictable and thus cannot engage in a "racketeering activity"). *But c.f.* Republic of Phil. v. Marcos, 862 F.2d 1355, 1359 (9th Cir. 1988) (affirming jurisdiction in civil RICO claims against the deposed President of the Philippines without discussing the indictment issue); Am. Bonded Warehouse Corp. v. Compagnie Nationale Air Fr., 653 F. Supp. 861, 863–64 (N.D. Ill. 1987) (exercising jurisdiction in a civil RICO claim against an instrumentality of the French government without addressing the indictment issue).

[175] *See Southway*, 198 F.3d 1210, 1215 n.5 (10th Cir. 1999).

[176] *See* HOUSE REPORT, *supra* note 43, at 6605–06.

[177] *See* Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 496 (1983) ("Congress expressly exercised its power to regulate foreign commerce."); *see also* Transamerican S.S. Corp. v. Somali Democratic Republic, 767 F.2d 998, 1001 (D.C. Cir. 1985) ("The purpose of the FSIA is to facilitate suits in United States courts arising from the commercial conduct of foreign sovereigns.").

[178] Gilson v. Republic of Ir., 682 F.2d 1022, 1028 (D.C. Cir. 1982) (quoting HOUSE REPORT, *supra* note 43) (emphasis added).

makes it far from ordinary.[179] It seems unlikely that Congress intended to empower individuals to serve as "private attorneys general"[180] against foreign sovereigns. Such intent would run counter to international understandings of restrictive immunity, which were codified in the Act.[181] Given this unique nature, it is unlikely that RICO was within congressional contemplation when the drafters included the terms "any nonjury civil action."[182]

Therefore, the Tenth Circuit's interpretation of FSIA is inconsistent with the Act's underlying purpose. Accordingly, statutory analysis suggests that the Sixth Circuit's interpretation better reconciles FSIA's text with its purpose and should be adopted by courts.

### *B. Alignment with International Law*

The Sixth Circuit's narrow reading of FSIA's jurisdictional grant would better align United States practice with international immunity practices. The United States has always looked to international practice to shape its own immunity doctrines; FSIA is no different.[183] Indeed, using international law to temper the "reach of statutes is firmly established in United States jurisprudence."[184] Up until this point, this Note has

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[179] *See* Blakey & Gettings, *supra* note 80, at 1013–14.

[180] Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 137 (2d Cir. 2001) (quoting Rotella v. Wood, 528 U.S. 549, 557 (2000)).

[181] *See* HOUSE REPORT, *supra* note 43.

[182] 28 U.S.C. § 1330(a) (2006).

[183] *See* The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136–38 (1812); HOUSE REPORT, *supra* note 43, at 6606 (following international law in codifying the FSIA).

[184] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 818 (1993) (Scalia, J., dissenting) ("[T]he practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence."). Although Justice Scalia argues in the context of the Sherman Act, this argument applies equally well to RICO, where extension of the statute's reach has foreign relations consequences. Justice Scalia derived this argument from maritime law, where foreign relations concerns are also prevalent. *See, e.g.*, Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 359–60 (1959); Lauritzen v. Larsen, 345 U.S. 571, 577 (1953) ("[Resolving] to apply [The Jones Act] only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law."); *see also* McCulloch v. Sociedad Nacional de Marineros de Hond., 372 U.S. 10, 21–22, (1963) (applying the *Charming Betsy* canon to restrict application of National Labor Relations Act to foreign-flag vessels). This same logic has been applied to construe statutes in light of international law in various other contexts. *See, e.g.*, Sale v.

argued that courts lack jurisdiction—the "power to adjudicate"[185]—over criminal or quasi-criminal claims against foreign sovereigns. There is, however, another relevant type of jurisdiction, so-called "legislative jurisdiction"—the power to prescribe.[186] As is the case here, where the extent of congressional authority is broad,[187] the relevant inquiry is not whether Congress has power to extend RICO over foreign sovereigns via FSIA, but whether it has *elected* to do so.[188] This inquiry considers the relationship of a statute to international law and is guided by two canons.[189]

First, the *Charming Betsy* cannon states that "an act of Congress ought never to be construed to violate [customary international law] if any [alternative] construction remains."[190] Put simply, statutes should not be interpreted to conflict with customary international law if it can be avoided. While there is no consensus within the international community on the particulars of a state's jurisdictional limits,[191] it is well-accepted that unilaterally imposing criminal liability on sovereign defendants violates international law.[192] Rather, criminal proceedings against sovereigns or their officials must be brought before international criminal courts or ad hoc international

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Haitian Ctrs. Council, Inc., 509 U.S. 155, 178 n.35 (1993); Weinberger v. Rossi, 456 U.S. 25, 32 (1982).

[185] *See Hartford Fire*, 509 U.S. at 813.

[186] *Id.*; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a) (1987).

[187] U.S. CONST. art. I, § 8, cl. 3. Congress has broad power to regulate foreign commerce. *See* Ford v. United States, 273 U.S. 593, 620–22 (1927); United States v. Bowman, 260 U.S. 94, 98–99 (1922); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909).

[188] *See Hartford Fire*, 509 U.S. at 814.

[189] *See id.* Ordinarily there is a third relevant canon, the presumption against extraterritoriality, which presumes that Congress means for its statutes to apply only within the United States, unless a contrary intent is evident. *See id.* at 817. This canon is inapplicable where United States law is the operative law, as was the case in *Southway* and *Keller*. *See Romero*, 358 U.S. at 382–83.

[190] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

[191] *See* Joan E. Donoghue, *Taking the "Sovereign" out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 YALE J. INT'L L. 489, 498–99 (1992) (arguing that the international norms that structure relations, that is "jurisdiction and competence," are ill-defined and no well-accepted doctrine exists).

[192] *See, e.g.*, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 I.C.J. 3 (Feb. 14) (holding that Belgium's issuance of international arrest warrants against Congo's incumbent foreign minister violated international law).

tribunals.[193] Applying the *Charming Betsy* cannon: Since, unilateral criminal sanctions against foreign sovereigns are prohibited by customary international law, courts should presume that FSIA does not provide for criminal jurisdiction against sovereigns and that sovereigns are immune from civil RICO claims because of their quasi-criminal nature.

Second, international comity concerns temper legislative jurisdictional reach. In interpreting statutes with extraterritorial reach, courts should assume that comity concerns have been incorporated by the legislature in drafting the laws.[194] Comity involves "the respect . . . nations afford each other by limiting the reach of their laws."[195] When determining the extraterritorial reach of a statute, courts should assume that Congress did not intend to interfere with the actions of another nation. Hailing a sovereign to court for a civil matter is itself disruptive, but it is tolerated as a cost of doing business.[196] Imposing criminal liability on another sovereign, however, impermissibly interferes with the actions of another nation.[197] Thus, courts should assume that Congress did not intend to extend RICO to foreign sovereigns through FSIA.

Moreover, bringing criminal or quasi-criminal proceedings against foreign sovereigns can embarrass the executive branch and even result in reciprocal treatment abroad.[198] Finally, the United States does not bring criminal proceedings against foreign states in peacetime situations.[199] Because the policy implications of indicting a sovereign are significant,[200] the

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[193] *See, e.g.*, Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶¶ 53–54 (May 31, 2004), *available at* http:www.scsl.org/LinkClick.aspx?fileticket=7OeBn4RulEg=&tabid=191.

[194] *See* Lauritzen v. Larsen, 345 U.S. 571, 578–79 & n.7 (1953); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 609–10 (9th Cir. 1976).

[195] *See* Hartford Fire Ins. v. California, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

[196] *See* Brockbank, *supra* note 21, at 18.

[197] *See, e.g.*, *Taylor*, 2002 I.C.J. 3 (holding that Belgium's issuance of international arrest warrants against Congo's incumbent foreign minister violated international law).

[198] *See Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943); *see also* Donoghue, *supra* note 191, at 521. Reciprocity implications shaped the Department of State's understanding of restrictive immunity. *Id.* at 521 n.170.

[199] *See* Gould, Inc. v. Mitsui Mining & Smelting Co., 750 F. Supp. at 844 (N.D. Ohio 1990).

[200] *See Ex parte Peru*, 318 U.S. at 588–89.

decision to extend or curtail the extraterritorial reach of United States criminal law should not be made by the judicial branch.

Therefore, the Tenth Circuit's analysis would run contrary to international law. The Sixth Circuit's analysis better aligns United States practice with international law and should be adopted by courts.

### *C. Reduction of Economic Costs*

Finally, while the Tenth Circuit's analysis provides the greatest level of protection to private parties, it creates uncertainties that destabilize the market. The Sixth Circuit's analysis creates more stability by better balancing the interests of both private and sovereign parties. Some commentators call for abandoning the concepts of immunity altogether, in favor of fostering a contractarian-business climate. Those commentators argue that "[t]he elimination of immunity promotes the security of contract and minimizes disruption in the normal rules of the marketplace, and thus furthers more broadly the interests of the U.S. economic and political system."[201] Though not without merit, such arguments ignore political realities. Of course, denying redress entirely would "stifl[e] . . . international commerce"[202] and would ignore the underlying purpose of restrictive immunity.[203] But subjecting foreign sovereigns to quasi-criminal actions would have deleterious effects, as sovereigns would be wary of attracting United States investments. Exempting foreign sovereigns from civil RICO liability does not rob transaction partners of judicial protection.[204] Rather, ordinary remedies are available under FSIA, and only those with unclean hands are barred redress in common law fraud;[205] thus, plaintiffs who are complicit in the fraud would rightly be denied relief. Furthermore, foreign sovereigns are not afforded the same insolvency protections as United States citizens,[206] and as such, restricting plaintiffs to ordinary litigation is not so unjust.

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[201] Donoghue, *supra* note 191, at 521.

[202] *See* Brockbank, *supra* note 21, at 11.

[203] *See id.* at 18.

[204] *See* HOUSE REPORT, *supra* note 43, at 6605–06.

[205] *See* Keller v. Cent. Bank of Nig., 277 F.3d 811, 815 (6th Cir. 2002).

[206] Jeremy Ostrander, Note, *The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgments*, 22 BERKELEY J. INT'L L. 541, 574 (2004).

Finally, if private parties desire more protection than that afforded by traditional litigation other than civil RICO, they can bargain for a FSIA immunity waiver.[207] While private citizens, even corporate ones, do not always posses the same bargaining power as foreign sovereigns,[208] unequal bargaining power does not entitle them to act as "private attorneys general"[209] against foreign sovereigns. Certainty and predictability in the law would help lower transactional costs, as both parties could comfortably rely on the integrity of agreements without fear of quasi-criminal reprisal. The current lack of uniformity in the judiciary's application of FSIA undermines stability;[210] however, allowing private citizens to prosecute foreign sovereigns would not rectify the situation. Because the Sixth Circuit's analysis better balances the concerns of both private and public parties, it creates greater stability and certainty.

## CONCLUSION

The Sixth Circuit's analysis offers several advantages over the Tenth Circuit's. Granting foreign sovereigns immunity in civil RICO claims reconciles FSIA's text with its purpose, aligns United States practice with international law, and lowers transaction costs between private parties and sovereigns.

Although privatization may one day render immunity questions moot, that day is a long way off. A uniform approach to immunity is essential to lowering transaction costs and increasing foreign trade. Any decision to extend or curtail jurisdiction in criminal or quasi-criminal matters is best left to the political branches because of the foreign relations concerns involved.

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[207] *See* 28 U.S.C. § 1605(a)(1) (2006 & Supp. II).

[208] *See* Brockbank, *supra* note 21, at 21.

[209] Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 137 (2d Cir. 2001) (quoting Rotella v. Wood, 528 U.S. 549, 557 (2000)).

[210] *See* Brockbank, *supra* note 21, at 20.