The Persistent Nation State and the Foreign Sovereign Immunities Act

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One hears a great deal these days about the decline of the nation state. The concept of a sovereign country whose inhabitants share a common ancestry or culture is said to be obsolescent, if not already obsolete. Several factors, apparently, are responsible: the creation of supranational institutions like the European Union and the World Trade Organization; the growing influence of nongovernmental organizations; the emergence of a new global economy; and the formation of a worldwide consumer culture, to name just a few. The law, it is argued, must adapt.

The decline of the nation state is, of course, the premise that underlies this conference. I question that premise. In my view, the decline of the nation state is greatly exaggerated. There are good reasons to believe that, contrary to the conventional wisdom, the nation state will remain “the building block[ ] of international relations” for the foreseeable future. Indeed, the force of nationalism around the world, particularly among groups that do not yet have their own states, suggests that the next century will see many new entities asserting statehood and seeking admission to the community of nations.

An increase in the number of entities claiming to be states has the potential to implicate an interesting and largely unexplored question of United States jurisdiction. The Foreign Sovereign Immunities Act of 1976 (the “FSIA”) confers on United States courts jurisdiction of actions against a “foreign state.” But what if the “foreign state” is a new one that the President has not recognized? Would jurisdiction exist in those circumstances? I argue in this Article that, under the FSIA, United States courts have no jurisdic-

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1 See discussion infra text accompanying notes 22-41.
tion of actions against an unrecognized foreign state. I argue further that this reading of the FSIA comports with sound policy.

**The Persistent Nation State**

The story of the rise of the nation state is by now familiar, and I will only sketch its broad outline here. By most accounts, the idea of the sovereign state, an entity exercising "supreme legitimate authority within a [defined] territory," grew out of the Protestant Reformation. Medieval Europe was, at least in theory, a single, unified polity, a *Respublica Christiana* "in which each individual found his definition, identity and purpose, where all lived in common under the same law and morals and where none was severed or independent in his authority or beliefs." Loyalties were distributed among numerous, interdependent, authorities: the Pope and the Holy Roman Emperor as well as various "nobles, kings, and clerics." Exclusive territorial sovereignty did not exist. "Both the [P]ope and the [E]mperor intervened regularly in the territorial affairs" of kings and princes, particularly in religious matters.

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4. I focus on the European experience, which provides the basis for most scholarship on nationalism and sovereignty, and from which the law of nations derives. See James Crawford, *The Creation of States in International Law* 9 (1979) ("Despite its claims to universality, the early law of nations had its origins in the European State-system."); see also James Mayall, *Nationalism and International Society* 1 (1990) ("[T]he global system of world politics is historically derived from the European states-system as it developed between the seventeenth and twentieth centuries."). For an account of how the European model of statehood spread to other continents and cultures, see Robert H. Jackson, *Quasi-States* 59-81 (1990).


6. See, e.g., Jackson, *supra* note 4, at 50 ("Sovereign states first came into view when medieval Christendom fractured under the combined impact of the Renaissance and the Reformation.").


9. Philpott, *supra* note 5, at 361. As Pope Boniface VIII argued in 1302, in a dispute with Philip IV of France, "*[s]piritual power exceeds any earthly power in dignity and nobility, as spiritual things exceed temporal ones..." If, therefore, the earthly power err, it
All this changed with the Peace of Westphalia that ended the Thirty Years War in 1648. The terms of the settlement greatly curtailed the prerogatives of the Pope and Emperor and made clear that sovereignty resided in the territorial state. The treaty conferred on states authority to form alliances on equal terms without imperial or papal approval. Even more important, perhaps, the Peace of Westphalia clarified that a state had exclusive authority with regard to the question that had instigated the war. Under the principle of *cuius regio, eius religio,* a prince was given the power to determine the religion that would be practiced within his territory—a power with which neither Pope nor Emperor could legitimately interfere. After Westphalia, religion was strictly an internal matter. Indeed, "as it came to be practiced," the settlement "removed all legitimate restrictions on a state's activities within its territory."

If the seventeenth century produced the sovereign state, the eighteenth and nineteenth centuries saw the rise of nationalism.

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10 See Hans Kohn, The Idea of Nationalism 188 (1944). On the Thirty Years War, see C.V. Wedgwood, The Thirty Years War (1938).

11 See Thomas M. Franck, The Power of Legitimacy Among Nations 113 (1990) ("The notion of the sovereign equality of states may be said to have made its debut, in modern Western civilization, with the Peace of Westphalia."); Brand, supra note 7, at 1688 (explaining that Peace of Westphalia formalized "[a] new era of equal sovereigns"); Lane, supra note 9, at 270 (noting "Westphalian emphasis on territorial sovereignty and sovereign equality"); cf. Anne-Marie Burley, Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine, 92 Colum. L. Rev. 1907, 1926 (1992) ("Overall . . . it remains the rule in the late twentieth century that a sovereign, having fulfilled the formal requirements of statehood, is equal to any other sovereign.") (footnote omitted).

12 The principle of *cuius regio, eius religio,* "whose the region, his the religion," had been recognized in the Peace of Augsburg in 1555, but was not put into practice until the Peace of Westphalia almost 100 years later. Philpott, supra note 5, at 363.

13 Cf. Lane, supra note 9, at 275 (noting that parties to Peace of Westphalia "chose to ignore the papal bull condemning the . . . inclusion of clauses granting religious freedom") (footnote omitted).

14 Philpott, supra note 5, at 364.

15 Recent years have seen a surge in scholarship on nationalism, a complex social and intellectual phenomenon that eludes easy explanation. For examples of this scholarship, see Benedict Anderson, Imagined Communities (rev. ed. 1991); John Breuilly, Nationalism and the State (2d ed. 1994); Ernest Gellner, Nations and Nationalism (1983); Gottlieb, supra note 8; Liah Greenfeld, Nationalism (1992); E.J. Hobsbawm, Nations and Nationalism Since 1780 (1990); Michael Ignatieff, Blood and Belonging (1993); William Pfaff, The Wrath of Nations (1993); Anthony D. Smith, The Ethnic Origins of Nations (1986); Yael Tamir, Liberal Nationalism (1993); Lea Brilmayer, The Moral Significance of Nationalism, 71 Notre Dame L. Rev. 7 (1995); Thomas M. Franck, Clan and Superclan: Loyalty, Identity and Community in Law and Practice, 90 Am. J. Int'l L. 359 (1996). The classic study remains Kohn, supra note 10.
Nationalism, which may be defined as a political movement that seeks to unite a people identified by common ancestry or culture with a sovereign state, reordered the psychological allegiances of Europe and gave to the state an emotional appeal it had previously lacked. While the medieval world had been characterized by unity, eighteenth- and nineteenth-century nationalism glorified particularity; in place of fellowship in the universal Respublica Christiana, it substituted membership in the nation. By fostering a sense of “belonging,” of shared participation in a unique, sometimes mythical, heritage, eighteenth- and nineteenth-century nationalism provided the basis for powerful new political identities: French, German, and Italian, of course, but also Croatian, Greek, and Serbian. The strength of these new identities, these new emotional attachments to the state, may be seen in the German and Italian unification movements; in the nationalist struggles that culminated in the First World War; and, of course, in the resistance to two totalitarian ideologies, fascism and communism.

But all this is history. Nationalism today is said to be a spent force; the order of nation states, an ancien régime. One hears

For a perceptive essay that summarizes much of the recent scholarship, see Tony Judt, The New Old Nationalism, N.Y. REV. BOOKS, May 26, 1994, at 44.

16 See Breuilly, supra note 15, at 2 (“The term ‘nationalism’ is used to refer to political movements seeking or exercising state power and justifying such action with nationalist arguments.”); Gellner, supra note 15, at 1 (“Nationalism is primarily a political principle, which holds that the political and the national unit should be congruent.”); PfaFF, supra note 15, at 197 (“Nationalism is the political . . . expression of a form of group identity attached to an existing state, or to a community which is not yet a recognized nation-state but which believes that it should become one.”).

17 See Harold J. Laski, The Foundations of Sovereignty and Other Essays 15 (1921); see also Kohn, supra note 10, at 4 (asserting that nationalism “changed” the state “by animating it with a new feeling of life and with a new religious fervor”).

18 See Laski, supra note 17, at 1-6.


20 Some have argued that nationalists fabricated many of the “traditions” they purported to restore. See, e.g., Francis Fukuyama, The End of History and the Last Man 269 (1992) (noting the “deliberate fabrications of nationalists, who had a degree of freedom in defining who or what constituted a... nation”); Anthony D. Smith, Introduction: Ethnicity and Nationalism, in Ethnicity and Nationalism 1, 3 (Anthony D. Smith ed., 1992) (discussing “modernist” theories of nationalism).


22 See Judt, supra note 15, at 44 (describing recent conventional wisdom on passing of nationalism); Richard W. Perry, The Logic of the Modern Nation-State and the Legal Construction of Native American Tribal Identity, 28 IND. L. REV. 547, 559-60 (1995) (same); see
frequently of a “new medievalism” in world affairs, “a secular re- 
incarnation of the system of overlapping . . . authority that charac-
terized” pre-Reformation Europe. Scholars point out that states have ceded sovereignty over significant social and economic ques-
tions to supranational institutions. Under the Treaty on European 
Union, for example, the European Community has authority to legislate in areas as diverse as industrial policy, consumer protec-
tion, and the environment; the treaty contemplates monetary 
union, with a single currency and a central bank, by the end of the 
decade. The dispute-resolution procedures of the new World 
Trade Organization, to give another example, make “adjudicatory 
decisions automatically binding among . . . member states in nearly 
every case.” In this hemisphere, the North American Free Trade 
Agreement has established a binational-panel mechanism that dis-
places domestic judicial review of antidumping and countervailing 
duty cases.

Supranational institutions are not the only beneficiaries of the 
new medievalism. For some time, scholars have been remarking 
on the growing influence of nongovernmental organizations, or 
“NGOs,” on world affairs. The “heightened permeability of na-
tional borders,” the argument goes, along with great improvements
in electronic communication, "have allowed territorially dispersed individuals to develop common agendas and objectives at the international level." As a result, NGOs like Amnesty International and the World Wildlife Fund, which have worldwide memberships devoted to discrete concerns, can have great impact on state policy. Indeed, as my colleague Peter Spiro notes, some NGOs may have more real power in the new order than states themselves:

Just as the leader of the Knights Templars or of the Franciscan order outranked all but the most powerful of princes, so too the secretary general of Amnesty International and the chief executive officer of Royal Dutch Shell cast far longer shadows on the international stage than do the leaders of Moldova, Namibia, or Nauru.

Quite apart from the ascendance of nonstate actors, moreover, economic and demographic trends are said to ensure the demise of the nation state. The "globalization" of trade and finance, it is argued, precludes states from controlling their economies as they once did. National boundaries no longer constrain the movement of capital. Today, even private investors routinely transfer money abroad to take advantage of foreign opportunities. Multinational corporations, which can relocate operations around the world with little trouble, remain largely beyond the reach of state regulators.

International bond markets dictate the success or failure of domes-

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31 Spiro, supra note 23, at 46.

32 Jost Delbrück distinguishes "globalization" and "internationalization" as follows: "globalization . . . denotes a process of denationalization of clusters of political, economic and social activities. Internationalization, on the other hand, refers to cooperative activities of national actors . . . on a level beyond the nation-state but in the last resort under its control." Jost Delbrück, Globalization of Law, Politics, and Markets—Implications for Domestic Law—A European Perspective, 1 Ind. J. Global Legal Stud. 9, 10-11 (1993).


34 See Ohmae, supra note 33, at 2-3.

tic social programs. And the mass migration of peoples, particularly from the developing world, makes it increasingly difficult for states to retain effective control of their borders.

Finally, there is the emergence of a new global consumer culture, a “McWorld” in which American products and idioms pervade the planet. Everywhere, it seems, people watch the same television programs, listen to the same music, eat the same food, and wear the same clothes. Just as nationalism reordered allegiances in the eighteenth and nineteenth centuries, consumerism is said to do so today—but with opposite effect. Consumerism, it is argued, is creating a new identity in which traditional loyalties, including loyalty to the nation state, are of relatively little importance. As a result of the mass marketing of a uniform popular culture, Kenichi Ohmae writes, “[t]here are now . . . tens of millions of teenagers around the world who . . . have a lot more in common with each other than they do with members of older generations in their own cultures.”

These arguments all have some validity. It would be fatuous to suggest that the nation state has remained completely unaffected by the changes of the last fifty years. And yet, in my view, the decline of the nation state has been greatly exaggerated. Consider first the claim about the ascendance of supranational organizations. To be sure, supranational organizations exercise significant authority in some areas. But they remain, in essence, collections of sover-

36 The Economist relates the “possibly apocryphal” story of a piece of “graffiti seen on a wall in Poland: ‘We wanted democracy, but we ended up with the bond market.’” Survey: The World Economy, Economist, Oct. 7, 1995, at 3.


38 BENJAMIN R. BARBER, JIHAD VS. McWORLD 4 (1995); see Alonso, supra note 2, at 594.

39 See BARBER, supra note 38, at 60-72, 88-117; Alonso, supra note 2, at 594.

40 I cannot resist adding a personal anecdote. In the summer of 1995, I traveled to Armenia to participate in a judicial conference. One night, I decided to turn on the television in my hotel room to see what Armenians were watching. My choices? A local news program, The Tonight Show With Jay Leno, CNN’s coverage of the O.J. Simpson trial, and an American business report, complete with stock quotes running at the bottom of the screen. A restaurant I visited entertained diners with Michael Jackson videos.

41 OHMAE, supra note 33, at 15.
The World Trade Organization, for example, "can override neither national laws nor national legislators." Despite some Americans' fears of government from Geneva, decisions of the Organization have no direct effect under United States law. Even the Treaty on European Union has not overcome the lingering attraction of state sovereignty. Witness the continuing debate about notions of "subsidiarity," and the confusion over the status of Community law in domestic courts.

42 See, e.g., Thomas J. Dillon, Jr., The World Trade Organization: A New Legal Order for World Trade?, 16 Mich. J. Int'l L. 349, 355-56 (1995) (noting that the World Trade Organization does not represent "the advent of a supranational trade institution with power and authority to usurp sovereignty from its Member Nations"); Ian Ward, The European Constitution and the Nation State, 16 Oxford J. Legal Stud. 161, 173 (1996) (book review) ("The [European] Community is still very much a community of nation-states pursuing, as their primary concern, their respective national-interests."); see also Restatement (Third) of the Foreign Relations Law of the United States § 201 cmt. e (1987) ("States do not cease to be states because they have agreed not to engage in certain international activities or have delegated authority to do so to a 'supranational' entity . . . ").


44 Id. at 468; see also Results of the Uruguay Round Trade Negotiations: Hearings Before the Senate Comm. on Finance, 103d Cong., 2d Sess. 122 (1994) (testimony of John H. Jackson, Professor, University of Michigan Law School) (noting that decisions of the World Trade Organization are not self-executing for purposes of United States law).

45 For an argument that the European Community was in fact designed to support, rather than weaken, the nation states of Europe, see Alan S. Milward, The European Rescue of the Nation-State (1992).

46 The doctrine of subsidiarity, as set forth in the Treaty on European Union, provides that the European Community shall take action "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community." Treaty on European Union, Feb. 7, 1992, art. G(5), 31 I.L.M. 247, 258. The doctrine was formulated "to reassure Member State populations, and subcommunities within those populations, that the Community's seemingly inexorable march toward greater legal and political integration would not needlessly trample their legitimate claims to democratic self-governance and cultural diversity." George A. Bermann, Taking Subsidiarity Seriously: Federalism in the European Community and the United States, 94 Colum. L. Rev. 331, 334 (1994). Despite the attempt to reassure, subsidiarity remains an "elusive and sometimes deeply confusing" concept. Id. at 335; see also Gráinne de Búrca, The Quest for Legitimacy in the European Union, 59 Mod. L. Rev. 349, 366-68 (1996) (describing the differing views of subsidiarity held by European institutions).

47 While the European Court of Justice has stressed the need for uniformity and held that Community law takes precedence over national law, see Karl M. Meessen, Hedging European Integration: The Maastricht Judgment of the Federal Constitutional Court of Germany, 17 Fordham Int'l L.J. 511, 521 (1994), the German Federal Constitutional Court has recently indicated that it, not the European Court of Justice, has authority to determine whether acts of European institutions "exceed the sovereign powers transferred to them." Steve J. Boom, The European Union After the Maastricht Decision: Will Germany Be the "Virginia of Europe?", 43 Am. J. Comp. L. 177, 177 (1995) (quoting German court's opinion); see also Matthias Herdegen, Maastricht and the German Constitutional Court:
The impact of NGOs, likewise, has been overstated. Despite their growing prominence, and the calls to give them "a significantly enhanced institutional role," the fact remains that NGOs are powerless to effectuate anything on their own. To accomplish their objectives, NGOs must work through other entities; and those entities are, by and large, nation states. In Ann Marie Clark's memorable phrase, NGOs are "tugboats in international channels": their influence derives from their ability to persuade governmental actors to take certain positions. And while intellectuals have been arguing since before the First World War that a communications revolution would create new identities of interest to supplant national allegiances, those predictions have yet to be fulfilled. National identities have proven quite durable. They will likely survive the fax machine and the internet.

Nor do economic and demographic trends suggest that the nation state is in inevitable decline. Despite increasing economic interdependence, states retain a great deal of control over their economies. Government spending, "the simplest gauge of [a] state's involvement in the economy," has actually increased on average since 1980. In the United States, government spending now comprises thirty-three percent of gross domestic product; in West-

Constitutional Restraints for an "Ever Closer Union", 31 COMMON Mkt. L. REV. 235, 239 (1994) (arguing that German court's decision "amounts to quite a flat . . . denial of the absolute supremacy of Community law and its supreme judicial organ"). The status of Community law in French courts is uncertain as well. See JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 200 (3d ed. 1995); Edward A. Tomlinson, Reception of Community Law in France, 1 COLUM. J. EUR. L. 183, 188 (1995).

48 Spiro, supra note 23, at 54; see also id. at 51-54 (advocating more formal recognition of NGOs in international law).

49 Cf. Clark, supra note 28, at 515 (describing how NGOs can "seek to change the behavior of states through activity related to intergovernmental arenas"). Clark observes that there is an "independent potential for NGO accomplishments outside of the intergovernmental realm," but that that potential is "more difficult to assess." Id. at 524.

50 Id. at 514.

51 Compare NORMAN ANGELL, THE GREAT ILLUSION 318 (4th rev. ed. 1913) ("[N]ever before has it been possible, as it is possible by our means of communication to-day, to offset a solidarity of classes and ideas against a presumed State solidarity.") with Spiro, supra note 23, at 45 ("Dramatically multiplied transnational contacts at all levels of society have . . . created new commonalities of identity that cut across national borders and challenge governments at the level of individual loyalties."). For more on Norman Angell and the International Polity movement, see infra notes 59-61 and accompanying text.

52 For an argument that economic interdependence has in fact become less threatening to state sovereignty over time, see Stephen D. Krasner, Economic Interdependence and Independent Statehood, in STATES IN A CHANGING WORLD, supra note 19, at 301, 318.

53 The Myth of the Powerless State, ECONOMIST, Oct. 7, 1995, at 15, 15. "Since 1980 the public-spending ratio has increased, on average, from 36% of [gross domestic product] to 40%." Id.
ern Europe, the percentages are even higher.\textsuperscript{54} Through favorable
tax treatment and other incentives, moreover, states can do much
to channel the flow of investment capital.\textsuperscript{55} Many states continue
to impose restrictions on the exchange of national currencies.\textsuperscript{56}
And, with regard to migration patterns, states have shown little re-
luctance to exclude aliens they believe to be undesirable.\textsuperscript{57}

In addition, those who argue that economic interdependence
will obliterate the nation state ignore an important historical les-
son. Levels of direct foreign investment are in fact lower now than
they were at the turn of the century.\textsuperscript{58} Indeed, right up until the
outbreak of the First World War, Norman Angell and other mem-
bers of the International Polity movement were arguing that eco-
nomic integration had made the nation state an anachronism.\textsuperscript{59}
In his widely-read book, \textit{The Great Illusion},\textsuperscript{60} Angell asserted that
war was futile: given the “financial interdependence of the capitals
of the world,” he wrote, one state could gain nothing by military
action against another.\textsuperscript{61} Financial interdependence did not pre-
vent the cataclysm of 1914, and the nation state remains with us
today.

\begin{itemize}
\item \textsuperscript{54} \textit{Id.} In Germany, public spending comprises forty-nine percent of gross domestic
product; in Sweden, sixty-eight percent. \textit{Id.}
\item \textsuperscript{55} See Vincent Cable, \textit{The Diminished Nation-State: A Study in the Loss of Economic
Power}, \textit{Daedalus}, Spring 1995, at 23, 40. As Ian Ward points out, the Treaty on Euro-
pean Union conspicuously omits any reference to the possibility of tax harmonization
among the member states. \textit{Ward, supra} note 42, at 171.
\item \textsuperscript{56} Paul B. Stephan III, \textit{Barbarians Inside the Gate: Public Choice Theory and Interna-
\item \textsuperscript{57} See Cable, \textit{supra} note 55, at 38-39.
\item \textsuperscript{58} Krasner, \textit{supra} note 52, at 312-13. Louis Pauly writes that “[c]onditions approximat-
ing what is now commonly, if hyperbolically, referred to as ‘global finance’ existed before
1914 between the most advanced economies and their dependencies.” Louis W. Pauly,
The conventional wisdom that “increased international capital mobility” leads to a loss of
sovereignty, Pauly argues, “downplays the stark historical lesson of 1914: Under conditions
of crisis, the locus of ultimate political authority in the modern age—the state—is laid
bare.” \textit{Id.} at 373.
\item \textsuperscript{59} \textit{See Norman Angell, The Foundations of International Polity} 93-94 (1914);
\item \textsuperscript{60} \textit{The Great Illusion}, which Angell first published in 1910, “was translated into at least
seventeen languages” and sold more than one million copies. \textit{Miller, supra} note 59, at 8.
\item \textsuperscript{61} \textit{Angell, supra} note 51, at 54. David Starr Jordan, President of Stanford University
and a follower of Angell, went even further in 1913:

“What shall we say of the Great War of Europe, ever threatening, ever impend-
ing, and which never comes? We shall say that it never will come. Humanly
speaking, it is impossible . . . . The bankers will not find the money for such a
fight, the industries will not maintain it, the statesmen cannot . . . . There will be
no general war.”
\textit{Miller, supra} note 59, at 9.
Finally, there is the matter of the global consumer culture. An examination of world events makes clear that this culture lacks sufficient power to overcome the appeal of nationalism. Everywhere one sees “new states and nations striving to become states”:62 in the former Eastern bloc;63 in Western Europe;64 and in North America.65 Indeed, nationalist sentiments have a way of turning up where one might least expect them. Italy’s Northern League, for example, which enjoys significant support in places like Venice and Treviso, advocates an independent state called “Padania.”66 Catalonia demands, and receives, increasing autonomy in Spain.67 And Scottish nationalists have obtained the promise of a restored Scottish Parliament—dissolved almost 300 years ago—in the event the Labour Party wins the next general election in Britain.68

As a powerful ordering force in peoples’ lives, then, nationalism seems likely to remain with us. And here it is important to remember something one can easily forget when thinking about the “new medievalism.” The unity of medieval society derived from a sense of common identity, of fellowship in the Respublica Christiana.69 To overcome the powerful attachments nationalism creates, one would need to discover, or invent, a new shared identity.70 “Consumer” seems a poor candidate. People who drink Coca-Cola do not cease to think of themselves as Croats or Serbs.

62 Delbrück, supra note 32, at 12.
64 On the nationalist backlash in Western Europe, see BARBER, supra note 38, at 11; MICHAEL J. BAUN, AN IMPERFECT UNION 130 (1996).
66 See Celestine Bohlen, Italian’s Call for Breakup Stirs Storm, N.Y. TIMES, May 12, 1996, § 1, at 4; Roots of Secession, ECONOMIST, May 25, 1996, at 53.
69 See supra text accompanying note 7.
70 A Romanian intellectual and government minister, Andrei Plesu, put it this way: The consciousness of unity is stronger in Europe than anywhere else in the world. This is explained by the homogeneity of Europe in the Middle Ages, due to Christianity. This Christian Europe no longer exists. What will tie Eu-
In sum, the nation state is not about to disappear. Indeed, if current trends continue, we should expect to see any number of new entities assert statehood in the future. This, in turn, would raise an interesting and largely unexplored question of United States jurisdiction. States today routinely engage in commercial transactions. Just like "private player[s] within' the market," they enter into contracts for the purchase of necessary goods and services. As American firms expand their overseas operations, therefore, they increasingly do business with foreign states.

Not every deal works out, of course; and this is where the question of United States jurisdiction can become important. Assume that a foreign state enters into a contract with an American firm and subsequently defaults. As we shall see, where the state is one that the President has recognized, the firm can bring suit against it in an American court. But what if the firm made the contract with a new state that the President has declined to recognize? Would jurisdiction exist in those circumstances? I address that complicated question in the next section of this article.

THE UNRECOGNIZED STATE AND THE FOREIGN SOVEREIGN IMMUNITIES ACT

To understand the issues raised when an American firm brings suit against an unrecognized foreign state in a United States court, consider the following hypothetical case. In the aftermath

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71 See GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 199 (3d ed. 1996).


73 This development was noted as long as twenty years ago, when Congress enacted the FSIA. See S. REP. NO. 1310, 94th Cong., 2d Sess. 8 (1976).

74 See BORN, supra note 71, at 199 (noting that commercial cases involving foreign states “arise with considerable frequency in contemporary international litigation”).

75 See infra text accompanying note 133.


77 Although the hypothetical case involves an American plaintiff, the Foreign Sovereign Immunities Act of 1976 also confers jurisdiction of actions brought by foreign plaintiffs against foreign states. See Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480 (1983).

78 This Article does not address a related, and complicated, question: whether, in litigation between private parties, a United States court should give effect to the acts of an unrecognized state. “The courts have differentiated between acts of unrecognized govern-
of the breakup of the Soviet empire, a little-known region in central Europe declares itself a state: let's call it the State of "Freedonia." Freedonia has well-defined borders, a permanent population of roughly two million, and a stable government that has begun to exchange ambassadors with neighboring states. Nonetheless, the President of the United States has declined to recognize Freedonia. Indeed, the President has announced that it is United States policy to have no official contacts with anyone claiming to represent the new state.

Freedonia decides to increase its military preparedness by obtaining a new supply of boots for members of its armed forces. Accordingly, persons acting as agents for Freedonia travel to the United States to negotiate a purchase contract with an American shoe manufacturer. After a long bargaining session, the parties sign an agreement at the manufacturer's American headquarters. Freedonia later decides to back out of the deal, however, and informs the manufacturer that it will not pay for the boots it has ordered. The manufacturer, who faces a grave loss on the contract, brings suit against Freedonia for breach in federal district court.

Freedonia moves to dismiss for lack of subject-matter jurisdiction. What result?

The answer depends on the operation of the Foreign Sovereign Immunities Act of 1976 (the "FSIA"), a comprehensive statute that "provides the sole basis for obtaining jurisdiction over a
foreign state" in United States courts. The FSIA comprises a confusing network of interrelated provisions, four of which are relevant for our purposes: sections 1330, 1603, 1604, and 1605 of title 28 of the United States Code. Section 1604 provides that a "foreign state" shall be immune from the jurisdiction of the district courts except as provided in the FSIA. Section 1330(a), in turn, provides that the district courts shall have original jurisdiction of any action against a "foreign state . . . with respect to which the foreign state is not entitled to immunity under" the FSIA. As the Supreme Court has explained, these two provisions "work in tandem: [section] 1604 bars federal . . . courts from exercising jurisdiction when a foreign state is entitled to immunity" under the FSIA, and [section] 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens . . . when a foreign state is not entitled to immunity" under the FSIA.

When is a foreign state entitled to immunity under the FSIA? The FSIA reflects what is known as the "restrictive" theory of foreign sovereign immunity. Under that theory, a foreign state is immune from the jurisdiction of domestic courts with respect to its "public" or "sovereign" activities (jure imperii), but not its "private" or "commercial" activities (jure gestionis). Accordingly, section 1605(a)(2) provides that "[a] foreign state shall not be im-

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84 In full, section 1604 provides:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

85 In full, section 1330(a) provides:

The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity under either sections 1605-1607 of this title or under any applicable international agreement.

86 Argentine Republic, 488 U.S. at 434.
88 BORN, supra note 71, at 201-02. For much of our history, the United States held to the "absolute" theory of foreign sovereign immunity, under which a foreign state is immune from the jurisdiction of domestic courts with respect to all its activities, public and private. See id. at 200. In practice, courts usually deferred to the State Department's recommendation whether a foreign state should be granted immunity; "the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns." Verlinden, 461 U.S. at 486. In 1952, however, the State Department announced that it would follow the restrictive approach. See Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments, DEPT ST. BULL., June 23, 1952, at 984, 985.
mune from the jurisdiction” of the district courts “in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state.” The FSIA defines “commercial activity” by reference to its “nature,” not its “purpose.” Where a state acts as a private player in the market, as by purchasing goods from a vendor, it engages in commercial activity regardless of its motivation for doing so. That the state ultimately will use the goods for a “governmental purpose does not alter the commercial character of the activity.”

Applying these provisions of the FSIA to our hypothetical case, it seems at first glance that there is subject-matter jurisdiction of the manufacturer's action against Freedonia. In negotiating and signing the purchase contract at the manufacturer's American headquarters, Freedonia carried on a commercial activity in the United States; that Freedonia will use the goods for a governmental purpose does not, as we have seen, alter the commercial nature of its activity. The manufacturer's action for breach is “based upon” Freedonia's commercial activity. And, as the manufacturer's claim is one with respect to which Freedonia is not entitled to immunity under the FSIA, section 1330(a) would seem to confer jurisdiction on the district court.

But there is a lurking problem that we have not addressed. By its terms, section 1330(a) confers jurisdiction only with regard to actions against a “foreign state.” Would Freedonia qualify?

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89 In full, section 1605(a)(2) provides:
A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case — in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.


90 The FSIA defines “commercial activity” as follows:
A “commercial activity” means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.


93 See Born, supra note 71, at 244-45, 258-59.

94 Indeed, a foreign state's purchase of boots for its armed forces is a classic example of commercial activity for purposes of the restrictive theory of foreign sovereign immunity. See id. at 236.

95 See Nelson, 507 U.S. at 357.

96 See supra note 85.
Freedonia meets many of the traditional tests for statehood under international law: it has a defined territory, a permanent population, and a stable government that has begun to exchange ambassadors with neighboring states. But the President has declined to recognize the new state. Would this lack of recognition preclude Freedonia from qualifying as a “foreign state” for purposes of the FSIA? Can an unrecognized state be subject to suit in a United States court?

The FSIA’s definition of “foreign state,” contained in section 1603(a), is silent on the issue. Section 1603(a) provides simply that, for purposes of the FSIA, a “foreign state” shall include political subdivisions, agencies, and instrumentalities. Only a few courts have considered the question, and none has given it a great deal of thought. A good example is Klinghoffer v. S.N.C. Achille

97 “Under international law, a state 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.” Restatement (Third) of Foreign Relations Law § 201; see also 1 Oppenheim’s International Law § 34 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992) [hereinafter Oppenheim] (discussing criteria for statehood under international law).

The Third Restatement reflects the “declaratory” theory of statehood, which holds that an entity becomes a state, regardless of recognition by other states, when it meets the objective requirements of statehood. See Restatement (Third) of Foreign Relations Law § 202 reporters’ note 1. Another theory holds that recognition by other states is essential to establish statehood. Under this theory, recognition is “constitutive.” Id. While the majority of scholars favors the declaratory theory, Crawford, supra note 4, at 22, there remains no settled definition of statehood under international law. Id. at 31; see also 1 Oppenheim, supra, at 128 (noting absence of settled view on necessity of recognition to establish statehood). For more on the declaratory and constitutive theories, see infra text accompanying notes 154-57.

98 In full, section 1603(a) provides: “A ‘foreign state,’ except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).” 28 U.S.C. § 1603(a) (1994). Section 1608 relates to service of process. 28 U.S.C. § 1608 (1994).


100 See Hines, supra note 99, at 745 (noting that “[n]o case has devoted much analytical energy to the FSIA’s definition of ‘foreign state’”).
Lauro, which the Second Circuit decided in 1991. Plaintiffs in Klinghoffer were passengers on the Italian cruise ship Achille Lauro, which Palestinian terrorists hijacked in 1985. Plaintiffs sued the ship’s owner and other defendants in federal district court, alleging, among other things, that defendants had negligently failed to prevent the terrorist attack. Defendants, in turn, brought an impleader action against the Palestine Liberation Organization (the “PLO”), which had reportedly instigated the hijacking. Defendants sought indemnification from the PLO, as well as “damages for tortious interference with their businesses.”

The PLO argued that, as an unrecognized foreign state, it could not be subject to suit in a United States court. The Second Circuit disagreed. To begin, the court explained, the PLO met none of the traditional requirements for statehood under international law: it had neither a defined territory nor a permanent population, and exercised no governmental authority. Moreover, the court continued, there was no merit to the assertion that an unrecognized state “lack[ed] the capacity to be sued in United States courts.” Indeed, the court disposed of this argument in a single sentence. “While unrecognized regimes are generally precluded from appearing as plaintiffs in an official capacity without the Executive Branch’s consent,” the court stated, “there is no bar to suit where an unrecognized regime is brought into court as a defendant.”

The question is not so simple as the Klinghoffer court believed. Indeed, in my view, the best reading of section 1330(a) is that it confers jurisdiction only with regard to actions against a recognized foreign state. To see why, one needs to appreciate a bit of statutory history. Before 1976, when Congress enacted the FSIA, jurisdiction of actions against a foreign state was conferred by a provision of the diversity statute, the former section 1332(a)(2).

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101 937 F.2d 44.
103 Id. at 857.
104 Klinghoffer, 937 F.2d at 47. Some passengers brought separate actions against the PLO. Id.
105 Id.
106 Id. at 47-48.
107 Id.
108 Id. at 48.
109 Id. (citations omitted). For more on a foreign sovereign’s capacity to bring suit in a United States court, see infra text accompanying notes 119-25.
That provision granted the district courts jurisdiction of actions between "citizens of a State, and foreign states or citizens or subjects thereof." In the FSIA, Congress revised the former section 1332(a)(2) and divided it into three discrete provisions: section 1330(a), which confers jurisdiction of actions against a "foreign state;" a new section 1332(a)(2), which confers jurisdiction of actions between "citizens of a State and citizens or subjects of a foreign state;" and a new section 1332(a)(4), which confers jurisdiction of actions by a "foreign state" as plaintiff. Nothing in the FSIA—nor, for that matter, its legislative history—suggests that any of these changes were substantive in nature.

In using the phrase "foreign state" in section 1330(a), then, Congress simply borrowed language from the diversity statute. It is a familiar maxim that, where Congress adopts statutory language with a settled judicial construction, Congress means to adopt the judicial construction as well. And there is a long line of authority that construes the phrase "foreign state" for purposes of the diversity statute. That line of authority makes clear that the phrase refers exclusively to a state that the President has recognized.

The phrase "foreign states" has appeared in the diversity statute since 1875. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (confering jurisdiction of controversies "between citizens of a State and foreign states, citizens, or subjects"). Before that, the statute referred generically to "alien[s]," e.g., Act of Sept. 24, 1789, § 11, 1 Stat. 73, 78, a term that included foreign states. See Paul M. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System 1661 (3d ed. 1988).

Another subsection, not directly relevant here, conferred jurisdiction of actions between "citizens of different States and in which foreign states or citizens or subjects thereof are additional parties." § 1332(a)(3) (1970) (amended 1976). This provision remains in force, as amended. § 1332(a)(3) (1994).

See supra note 85.

Section 1332(a)(4) confers jurisdiction of actions between "a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States." 28 U.S.C. § 1332(a)(4) (1994).


See, e.g., Keene Corp. v. United States, 508 U.S. 200, 212 (1993); Lorillard v. Pons, 434 U.S. 575, 580 (1978); Long v. Director, Office of Workers' Compensation Programs, 767 F.2d 1578, 1581 (9th Cir. 1985); New York Credit Men's Adjustment Bureau, Inc. v. A. Jesse Goldstein & Co., 276 F.2d 886, 888-89 (2d Cir. 1960).

For example, it has long been the rule that an unrecognized state—or, for that matter, an unrecognized government of a recognized state—cannot bring suit in a United States court. This rule follows from constitutional concerns. The Supreme Court has indicated on numerous occasions that the Constitution gives the President exclusive authority to recognize foreign sovereigns. To allow an unrecognized sovereign to have access to a United States court, the theory goes, would impinge on the President's prerogative in this regard and possibly embarrass the nation's foreign relations. To be sure, courts have occasionally permitted an unrecognized sovereign to appear as plaintiff where the President

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119 The President can recognize the existence of a state, of course, without recognizing the particular regime that claims to be its government. See Iran Handicraft & Carpet Export Ctr. v. Marjan Int'l Corp., 655 F. Supp. 1275, 1280 & n.4 (S.D.N.Y. 1987) (noting that United States recognized state of Iran but not Khomeini regime), aff'd mem., 868 F.2d 1267 (2d Cir. 1988); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 203 cmt. a. Courts typically have not drawn a distinction between the recognition of states and governments for purposes of the diversity statute. But see Marjan, 655 F. Supp. at 1280-81. I discuss this matter further, infra note 133.

120 See, e.g., Pfizer, 434 U.S. at 319-20; Guaranty Trust Co. v. United States, 304 U.S. 126, 137 (1938); P & E Shipping Corp. v. Banco Para el Comercio Exterior de Cuba, 307 F.2d 415, 417 (1st Cir. 1962); Lori F. Damrosch, Foreign States and the Constitution, 73 VA. L. REV. 483, 499 (1987).


An extensive discussion of the various arguments in support of the President's exclusive power to recognize foreign sovereigns lies beyond the scope of this article. Courts have stressed the President's responsibilities with regard to foreign affairs; the need for a uniform foreign policy; and the political nature of recognition. See Sabbatino, 376 U.S. at 410-11; Kennett, 55 U.S. (14 How.) at 50-51; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 204 cmt. a (1987); Mary B. West & Sean D. Murphy, The Impact on U.S. Litigation of Non-Recognition of Foreign Governments, 26 STAN. J. INT'L L. 435, 441-42 (1990). For an exhaustive exposition, see W.L. Penfield, Recognition of a New State—Is it an Executive Function?, 32 AM. L. REV. 390 (1898). For an argument that the traditional view on recognition improperly slights the judicial role, see LOUIS L. JAFFE, JUDICIAL ASPECTS OF FOREIGN RELATIONS (1933).

122 See Sabbatino, 376 U.S. at 410 (referring to "possible incongruity of judicial 'recognition,' by permitting suit"); Ronair, 544 F. Supp. at 862-63; Russian Socialist Federated Soviet Republic v. Cibrario, 139 N.E. 259, 262 (N.Y. 1923).
has specifically indicated his willingness that the suit go forward.\textsuperscript{123} But the rule remains one "of complete judicial deference to the Executive Branch."\textsuperscript{124} As the Court has explained, "[i]t is within the exclusive power of the Executive Branch to determine which nations are entitled to sue" in United States courts.\textsuperscript{125}

Similarly, courts traditionally have held that, under the diversity statute, only citizens of recognized states can appear as parties to litigation.\textsuperscript{126} In one leading case, for example, the court dismissed a suit brought by a resident of what was then the British mandate of Palestine.\textsuperscript{127} The President did not recognize the territory as the state of Israel until months after plaintiff had brought the suit, the court noted.\textsuperscript{128} As a result, plaintiff was not a citizen of a "foreign state" at the time he filed the action.\textsuperscript{129} In another, the court permitted residents of India to bring suit where, "[t]o all intents and purposes," the President had recognized that state as "an independent international entity" at the time plaintiffs had filed the complaint.\textsuperscript{130} And, in a third case, the court dismissed an action against a citizen of the Trust Territory of the Pacific Islands.\textsuperscript{131} The United States had not recognized its independence, the court explained; the Trust Territory was not a "foreign state" for purposes of the diversity statute.\textsuperscript{132}

For purposes of section 1330(a), then, the phrase "foreign state" must have the same meaning it has long had for purposes of the diversity statute: a state the President has recognized. It fol-

\textsuperscript{123} E.g., National Petrochemical Co. of Iran v. The M/T Stolt Sheaf, 860 F.2d 551, 555 (2d Cir. 1988) (jurisdiction where United States filed statement of interest that "it is the position of the Executive Branch that the Iranian government . . . should be afforded access to our courts for purposes of resolution of the instant dispute"); cert. denied, 489 U.S. 1081 (1989); Ronair, 544 F. Supp. at 863 (jurisdiction where State Department took position that allowing standing for Angolan agency "would be consistent with the foreign policy interests of the United States").

\textsuperscript{124} Pfizer, 434 U.S. at 320.

\textsuperscript{125} Id.


\textsuperscript{127} Klausner, 83 F. Supp. at 600.

\textsuperscript{128} Id.

\textsuperscript{129} Id.

\textsuperscript{130} Murarka, 215 F.2d at 552.


\textsuperscript{132} Id. at 1124.
allows that section 1330(a) confers jurisdiction only with respect to actions against a recognized foreign state: under the FSIA, a United States court has no jurisdiction of an action against an un-recognized foreign state. This interpretation of the FSIA comports with an earlier view of foreign sovereign immunity—one that predates enactment of the FSIA—that held that an unrecognized sovereign was immune from the jurisdiction of domestic courts. The leading case is Wulfsohn v. Russian Socialist Federated Soviet Republic, which the New York Court of Appeals decided in 1923.

Plaintiff in Wulfsohn was an American citizen who had stored some furs in Russia. The Soviet government confiscated the furs, and plaintiff brought a tort action for conversion in the New York courts. Although the United States had not yet recognized it, the Soviet regime argued that it was the de facto government of

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133 The President cannot recognize the government of a state he does not acknowledge to exist. Where the President declines to recognize a foreign state, therefore, it follows that he also declines to recognize its “government.” See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 203 cmt. a (1987).

A plaintiff might argue that, while the unrecognized state itself is immune from United States jurisdiction, its unrecognized “government” is amenable to suit under the diversity statute as an unincorporated foreign association. See Klinghoffer v. S.N.C. Achille Lauro, 739 F. Supp. 854 (S.D.N.Y. 1990), vacated on other grounds, 937 F.2d 44 (2d Cir. 1991). One can readily identify at least three problems with this approach. First, “as interpreted by the Supreme Court,” the diversity statute “requires that the citizenship of every member of an unincorporated association be considered for jurisdictional purposes.” Kevin R. Johnson, Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens, 21 YALE J. INT’L L. 1, 59-60 (1996). As a result, for jurisdiction to exist, each member of the unrecognized government would need to be the citizen of a recognized foreign state. See supra text accompanying note 118. In any given case, this might be a difficult requirement to meet. Second, as an unrecognized government is unlikely to possess many assets apart from state property, the plaintiff’s recovery would be greatly limited. See Hines, supra note 99, at 754-55. Finally, a court might hold that the political question doctrine precludes the exercise of jurisdiction over a foreign government—even one that the President has not recognized. See John O. McGinnis, Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers, 56 LAW & CONTEMP. PROBS. 293, 307-08 (1993) (noting that Supreme Court has largely ceded control over foreign affairs to Executive through application of political question doctrine).


135 Wulfson, 138 N.E. at 25.

136 Id.
Russia—a fact conceded by plaintiff—3—and, as such, entitled to immunity from suit in the United States. The Court of Appeals agreed. A lawsuit against an unrecognized sovereign, the court reasoned, had as much potential to “vex the peace of nations”3 as one against a sovereign that the President had recognized:

In either case the hands of the state department would be tied. Unwillingly it would find itself involved in disputes it might think unwise. . . . The question is a political one, not confided to courts, but to another department of government. Whenever an act done by a sovereign in his sovereign character is questioned, it becomes a matter of negotiation, or of reprisals, or of war.138

As a consequence, the court believed, an unrecognized sovereign must possess immunity from suit in domestic courts.139

With all this as background, return to our hypothetical case. Recall that, under the terms of the hypothetical, the President has declined to recognize Freedonia and has announced that it is the policy of the United States to have no official contacts with anyone claiming to represent the new state.140 As a result, on my reading of the FSIA, the manufacturer's claim against Freedonia must be dismissed for lack of subject-matter jurisdiction. As an unrecognized state, Freedonia is not subject to suit in a United States court. For reasons I discuss below, this result may at first seem somewhat odd. Nonetheless, I believe that my reading of the FSIA makes sense, not only as a matter of statutory construction, but as a matter of policy as well.

One objection to my reading of the statute has to do with the apparent advantage it confers on an unrecognized state. Return again to our hypothetical case. Had the President recognized Freedonia, the manufacturer’s suit could have proceeded.141 In declining to recognize the new state, therefore, the President has conferred on Freedonia an immunity from suit it would not otherwise possess.142 Now, the facts do not indicate why the President has declined to recognize Freedonia. His discretion in that regard is exclusive, after all, and his reasons, strictly speaking, irrelevant.143 Nonetheless, the mere fact that the President has declined to recognize the new state, and, indeed, has forbidden official contacts

137 Id.
138 Id. at 26.
139 See id.
140 See supra p. 1093.
141 See supra text accompanying notes 93-95.
142 See DELLAPENNA, supra note 98, at 18.
143 See discussion supra note 121 and accompanying text.
with persons claiming to represent it,\textsuperscript{144} does suggest disapproval. Surely the President's failure to recognize Freedonia was not meant to confer a benefit?\textsuperscript{145}

This objection is specious. Immunity from suit is a handicap, not an advantage, for an unrecognized state. This is so because immunity creates a disincentive for American firms that wish to do business with the state. Consider: An American firm that makes a contract with a recognized foreign state has the assurance that, if the foreign state breaches, the firm can file an action against it in a United States court, a tribunal whose procedures and rules of decision are familiar and reasonably predictable.\textsuperscript{146} Indeed, as the Supreme Court has noted in another context, recognition is meant to provide just such guidance for Americans who wish to do business abroad. "The very purpose of" recognition, the Court explained in \textit{Guaranty Trust Co. v. United States},\textsuperscript{147} "is that our nationals may be conclusively advised with what government they may safely carry on business transactions."\textsuperscript{148}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{144} See supra p. 1093.
\item \textsuperscript{145} Cf. Kadic v. Karadžić, 70 F.3d 232, 245 (2d Cir. 1995) ("It would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor with a foreign regime . . . had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors."). cert. denied, 116 S. Ct. 2524 (1996). In Karadžić, plaintiffs brought suit against the President of the unrecognized state of "Srpska," alleging that he had directed a campaign of brutal violations of their human rights under international law. Id. at 236-37. Plaintiffs asserted subject-matter jurisdiction under the Alien Tort Statute, which grants district courts jurisdiction of a "civil action by an alien for a tort . . . committed in violation" of international law. 28 U.S.C. § 1350 (1994). The court noted that "[t]he customary international law of human rights . . . applies to states without distinction between recognized and unrecognized states," and concluded that plaintiffs' "allegations entitle[d] them to prove that Karadžić's regime satisfies the criteria for a state, for purposes of those international law violations requiring state action." Karadžić, 70 F.3d at 245.

As an action against a state official under the Alien Tort Statute, Karadžić is not directly relevant to the issues discussed in this article. Indeed, the Supreme Court has held that the Alien Tort Statute does not provide a basis for subject-matter jurisdiction of an action against a foreign state. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989). With regard to the specific allegations in Karadžić, the Supreme Court held in 1993 that the FSIA does not confer jurisdiction of actions that are based upon claims of torture by state officials. See Saudi Arabia v. Nelson, 507 U.S. 349 (1993). Just this year, Congress amended the FSIA to provide that a foreign state shall not be immune in certain cases alleging such conduct. See Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1241 (1996).

\item \textsuperscript{146} Cf. BORN, supra note 71, at 5 (noting disadvantages faced by a foreign litigant in an unfamiliar forum). The American firm will also appreciate, no doubt, the comparative advantage that plaintiffs enjoy in American courts. See id. at 4-5.
\item \textsuperscript{147} 304 U.S. 126 (1938).
\item \textsuperscript{148} Id. at 140.
\end{enumerate}
\end{footnotesize}
Now consider the situation with regard to an unrecognized state. An American firm that makes a contract with an unrecognized state has no assurance that disputes will be resolved in a familiar forum. If the state should breach, the firm will need to look elsewhere for relief: to the courts of the unrecognized state, perhaps, or the courts of a third country, if the contract includes an appropriate forum-selection clause.\textsuperscript{149} As a result, an unrecognized state, like Freedonia in our hypothetical case, makes a less attractive business partner than a recognized state. Of course, the expected return on the contract may be such that the firm will wish to proceed despite the state's immunity from United States jurisdiction. The point, though, is that the state's immunity is an obstacle to be overcome, not a benefit.

Another objection to my reading of the statute has to do with its emphasis on recognition. As I noted earlier, most international legal scholars today subscribe to the declaratory theory of statehood, which holds that recognition is not essential to the establishment of a state.\textsuperscript{150} Under the declaratory theory, an entity becomes a state, whether or not other states recognize it, when it satisfies certain objective criteria: defined borders, a permanent

\textsuperscript{149} Because, on my reading of the FSIA, United States courts lack subject-matter jurisdiction of actions against unrecognized foreign states, the parties could not select a federal forum. "[N]o action of the parties can confer subject-matter jurisdiction upon a federal court." Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982); see also Patrick J. Borchers, \textit{Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform}, 67 WASH. L. REV. 55, 88 (1992) (explaining that parties cannot agree to litigate a case in federal court unless there exists some basis for subject-matter jurisdiction).

Could the parties select a state forum? The FSIA "clearly contemplates" that suits against foreign sovereigns may be brought in state court. Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480, 489 (1983). The statute contains a provision authorizing a "foreign state" to remove to federal court an action brought against it in state court, 28 U.S.C. § 1441(d), but, on my reading, that provision would apply only to a recognized foreign state. Assuming that the unrecognized state did not enjoy immunity under section 1604, then, see supra note 84, a state court arguably could exercise jurisdiction of an action against it. The Supreme Court has indicated, though, that state law must give way when it interferes with "foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government." Zschernig v. Miller, 389 U.S. 429, 436 (1968). To allow a state court to exercise jurisdiction over an unrecognized sovereign could, as the \textit{Wulfsohn} court understood, disrupt United States foreign policy. See supra text accompanying notes 134-39 (discussing \textit{Wulfsohn v. Russian Socialist Federated Soviet Republic}, 138 N.E. 24 (N.Y. 1923)); cf. \textit{Verlinden}, 461 U.S. at 493 ("Actions against foreign sovereigns . . . raise sensitive issues concerning the foreign relations of the United States."); id. at 497 (noting that, in enacting FSIA, "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 States"). A further discussion of this complicated issue is beyond the scope of this Article.

\textsuperscript{150} See supra note 97.
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population, and so on.\textsuperscript{151} Moreover, with respect to new governments, current United States practice tends to minimize the importance of formal recognition.\textsuperscript{152} Why, then, should subject-matter jurisdiction turn on recognition? If neither international law nor domestic practice regards recognition as a signal event, why should courts?

This objection has some merit. It is a familiar canon that statutes are to be construed, where possible, so as to conform with principles of international law;\textsuperscript{153} and were there a settled principle that statehood does not depend on recognition, there would be a good argument that the phrase “foreign state,” for purposes of section 1330(a), should be read to apply to an unrecognized state. But there is no such settled principle. Despite the popularity of the declaratory theory, there is still “no generally accepted and satisfactory modern legal definition of statehood.”\textsuperscript{154} Indeed, there is significant support for a competing view of statehood, the constitutive theory, that holds that statehood is dependent on recognition.\textsuperscript{155} As Thomas Franck observes, states continue to regard recognition as an act of crucial symbolic importance.\textsuperscript{156} Witness the role of recognition in the current Balkan crisis.\textsuperscript{157}

Moreover, whatever its current practice with regard to governments, the United States continues to regard the recognition of states as a significant exercise of discretion.\textsuperscript{158} “‘In the view of the United States,’” the State Department has explained, “‘international law does not require a state to recognize another entity as a

\textsuperscript{151} See id.

\textsuperscript{152} See National Petrochemical Co. of Iran v. The M/T Stolt Sheaf, 860 F.2d 551, 554 (2d Cir. 1988), cert. denied, 489 U.S. 1081 (1989); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 203, reporters’ note 1; West & Murphy, supra note 121, at 436. For a history of United States practice with regard to the recognition of governments, see L. THOMAS GALLOWAY, RECOGNIZING FOREIGN GOVERNMENTS (1978). On the distinction between the recognition of a government and the recognition of a state, see supra note 119.

\textsuperscript{153} See Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114.

\textsuperscript{154} Crawford, supra note 4, at 31; see also 1 Oppenheim, supra note 97, at 128 (no settled view on necessity of recognition).

\textsuperscript{155} See supra note 97. Lauterpacht famously attempted to reconcile the declaratory and constitutive views by positing a duty to recognize a state that met the objective criteria specified by international law. H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 6 (1947). “[S]tate practice reveals that Lauterpacht’s theory has not been adopted.” MALCOLM N. SHAW, INTERNATIONAL LAW 247 (3d ed. 1991).

\textsuperscript{156} See FRANCK, supra note 11, at 112-16.


\textsuperscript{158} FRANCK, supra note 11, at 124-26.
state; it is a matter for the judgment of each state whether an entity merits recognition." And Presidents have traditionally employed the recognition of states as an important foreign-policy tool, particularly in politically sensitive cases: Colombia in 1822; Haiti and the Dominican Republic in the 1860s; Panama in 1903; Manchuko in 1932; Israel in 1948; and the Balkans in the 1990s. There is no reason to think that future Presidents will cease to employ recognition in that fashion.

Indeed, if my earlier predictions are correct—if a number of new entities assert statehood in the future—there will be many more opportunities for the use of recognition as a tool of foreign policy. As the Wulfsohn court realized, it is precisely with regard to such sensitive questions that the President needs room to maneuver. To permit an unrecognized state to appear as a party to litigation in a United States court, even as defendant, might draw the President into disputes he would rather avoid. It might force him to make a decision on recognition at an inappropriate time, or upset sensitive informal negotiations with the entity seeking recognition. In short, a lawsuit against an unrecognized state has the potential greatly to disrupt the nation's foreign relations.

159 Diplomatic Relations and Recognition, 1976 DIGEST § 3, at 19; see also FRANCK, supra note 11, at 126 (explaining that United States asserts that recognition of a new state "is entirely optional and governed by no rules except our political sensibilities or self-interest"); SHAW, supra note 155, at 247-48 (citing 1976 State Department statement as indicative of United States approach to recognition).

160 See JULIUS GOEBEL, JR., THE RECOGNITION POLICY OF THE UNITED STATES 134-38 (1915); JAFFE, supra note 121, at 104.

161 JAFFE, supra note 121, at 105-06.

162 GOEBEL, supra note 160, at 212-17.


164 Statement by the President Announcing Recognition of the State of Israel, PUB. PAPERS 258 (1948).


166 See discussion supra p. 1092.


168 See Wulfsohn, 138 N.E. at 26.

confusing world of entities vying to become states, denying jurisdiction seems the more prudent approach.

CONCLUSION

The nation state is not in decline. Indeed, the strength of nationalism around the world suggests that we should expect a number of new entities to assert statehood in the future. As I have shown in this Article, American firms that do business with such entities act at their peril. In the absence of presidential recognition, such entities fail to qualify as “foreign state[s]” for purposes of the FSIA. As a result, they remain outside the jurisdiction of United States courts: American firms with grievances must go elsewhere for relief. This conclusion is not only a matter of sound statutory construction. It is sound policy as well.