The Case Against Retroactive Application of the Foreign Sovereign Immunities Act of 1976

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In 1911 the Imperial Chinese government issued bearer bonds in the sum of six million pounds in order to finance the construction of a section of the Hukuang Railway running between Guangzhou and Beijing.¹ In the United States at that time, absolute foreign sovereign immunity prevailed,² and as a result, neither the Imperial Chinese government nor the holders of the notes could have been under the apprehension that the bonds were enforceable in United States courts. Nevertheless, in 1979 a class action was filed in the United States District Court for the Northern District of Alabama on behalf of holders of the notes against the People's Republic of China.³

The plaintiffs believed that U.S. courts could obtain jurisdiction over these claims against the People's Republic of China through the Foreign Sovereign Immunities Act of 1976 ("FSIA").⁴ The FSIA, codifying a United States policy in place since 1952,⁵ made the "restrictive" theory of sovereign immunity the express law of the United States. Under the FSIA, the presumption in favor of sovereign immunity can be overcome in limited circumstances, which usually involve commer-

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¹ These facts are taken from *Jackson v People's Republic of China*, 794 F2d 1490, 1491 (11th Cir 1986).

² See Part I. It is unclear whether the Imperial Chinese government allowed suits by foreigners against itself in its own courts. However, the Republic of China did allow such suits. See *National City Bank v Republic of China*, 348 US 356, 363 (1955) (noting that it appeared that U.S. citizens could sue the Republic of China in Chinese courts). This apparently ceased to be the case with the ascension of the People's Republic of China. See Jerome A. Cohen and John E. Lange, *The Chinese Legal System: A Primer for Investors*, 17 NY L Sch J Intl & Comp L 345, 346-48, 369 (1997) (discussing both the history of the Chinese legal system and current, narrow attitudes towards sovereign immunity).

³ *Jackson v People's Republic of China*, 596 F Supp 386 (N D Ala 1984).

⁴ *Id* at 387. See also Foreign Sovereign Immunities Act of 1976, Pub L No 94-583, 90 Stat 2892 (1976), codified at 28 USC §§ 1602 et seq (1994 & Supp 1997).

⁵ See Letter from Jack B. Tate, Acting Legal Advisor, to Acting Attorney General Philip B. Perlman (May 19, 1952) ("Tate Letter") (setting out the U.S. restrictive immunity policy), in 26 Dept St Bull 984-85 (1952), reprinted in *Alfred Dunhill of London, Inc v Republic of Cuba*, 425 US 682, 711-15 (1976). See also 1 Restatement (Third) of the Foreign Relations Law of the United States § 5 at 391 (1987) (detailing restrictive theory of sovereign immunity, which is the current United States policy).

cial activity by a foreign nation or companies owned by foreign nations.⁶

The court in *Jackson v People's Republic of China*⁷ held that the FSIA could not be applied retroactively to events before 1952.⁸ In fact, this was the conclusion of all courts passing on the question⁹ until the Supreme Court handed down its definitive treatment of retroactivity in *Landgraf v USI Film Products*.¹⁰ In *Landgraf*, the Court restated the presumption against statutory retroactivity¹¹ and at the same time noted that jurisdictional statutes are generally applied retroactively.¹² This language has led the D.C. Circuit to conclude that the FSIA, as a jurisdictional statute, should also apply retroactively.¹³

Such an approach, however, ignores four serious concerns. First, the Court has held that the FSIA, unlike most jurisdictional statutes, is substantive, making retroactive application inappropriate.¹⁴ Second, the Court in *Landgraf* relied on the fact that jurisdictional retroactivity usually operates only to change the forum that the case will be heard in, and did not directly address circumstances in which jurisdictional retroactivity would operate to create a forum where none had existed before.¹⁵ Third, the Court carefully quoted language from its earlier cases holding that jurisdictional retroactivity prejudiced no antecedent rights,¹⁶ but here foreign sovereign immunity can be regarded as just such a right, arising from the common law of nations and recognized in this way by U.S. courts earlier in this century. Fourth, the

⁶ 28 USC § 1605(a)(2) (1994). Virtually all of the FSIA cases cited in this Comment deal with the commercial activity exception, except, notably, *Creighton Ltd v Qatar*, 181 F3d 118, 121–24 (DC Cir 1999) (applying retroactively amendment to FSIA dealing with arbitration awards). See 28 USC § 1605(a)(6) (Supp 1997). See also note 17 and Part III.D. For a general discussion of the restrictive theory of sovereign immunity and the FSIA, see Barry E. Carter and Phillip R. Trimble, *International Law* 599–624 (Aspen 3d ed 1999).

⁷ 794 F2d 1490 (11th Cir 1986).

⁸ *Id* at 1497–99.

⁹ See, for example, *Carl Marks & Co, Inc v Union of Soviet Socialist Republics*, 841 F2d 26, 27 (2d Cir 1988) (per curiam) (holding that the FSIA cannot be applied retroactively); *Lin v Japan*, 1994 US Dist LEXIS 6061, *4–8 (D DC 1994) (same). See also *Corporacion Venezolana de Fomento v Vintero Sales Corp*, 629 F2d 786, 790–91 (2d Cir 1980) (holding jurisdictional provision of FSIA cannot be applied retroactively to cases arising before January 1977, the effectiveness date of the FSIA).

¹⁰ 511 US 244 (1994).

¹¹ *Id* at 265 (“[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.”).

¹² *Id* at 274.

¹³ See *Creighton Ltd*, 181 F3d at 124 (holding that, in light of *Landgraf*, an arbitration provision of FSIA added in 1988, and by extension the entire FSIA, should be applied retroactively). Other courts have followed the D.C. Circuit. See note 94.

¹⁴ *Verlinden BV v Central Bank of Nigeria*, 461 US 480, 481 (1983). See also Part III.A.

¹⁵ 511 US at 274.

¹⁶ *Id*.

expectations of the parties to the commercial contracts in question are defeated by the retroactive operation of the FSIA.¹⁷

The best paradigm to analyze immunity is in the context of bond issues by the governments of foreign nations. In the early twentieth century, when governments issued bonds in order to finance public works, as in the case described above, it was with the implicit understanding that the holders of the notes would have no recourse. At the time, absolute sovereign immunity prevailed around the globe, and unless a nation consented to suits in its own courts, there was no method of enforcement.¹⁸ The market allotted this risk, as it does all such risks, in the form of the interest rate demanded by purchasers of the bonds and the success of the issue.¹⁹ Allowing claims arising from these types of commercial transactions to proceed in the courts of the United States would permit the holders of the notes and other plaintiffs to have the benefit of their bargain twice.²⁰

In this Comment I argue that courts should not apply the FSIA retroactively to commercial transactions occurring before 1952. In Part I, I discuss the history of sovereign immunity in international law and its role in U.S. courts, culminating with the passage of the FSIA in 1976. In Part II, I focus on how courts have treated the question of the FSIA's retroactivity, both before and after the Court's decision in *Landgraf*. In Part III, I argue that, under *Landgraf*, courts should not apply the FSIA retroactively pre-1952.

I. HISTORY OF FOREIGN SOVEREIGN IMMUNITY

Foreign sovereign immunity compels domestic courts to refuse to exercise jurisdiction over a foreign state.²¹ In its absolute form, sovereign immunity extends to the state in all of its avatars, including state-owned commercial operations and entities. Chief Justice Marshall was the first to pronounce this principle as binding in U.S. courts:

¹⁷ Throughout this Comment I will focus on the commercial activity exception to foreign sovereign immunity. See 28 USC § 1605(a)(2) and note 6. The majority of the cases arising before 1952 deal with bond issues and other commercial endeavors of foreign sovereigns. The arguments presented here, such as those focusing on the efficient placement of risk, will have less purchase in cases arising out of other exceptions to foreign sovereign immunity. See Part III.D.

¹⁸ See Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* 1-8 (BNA 1988) (describing the history of absolute sovereign immunity and the emergence of the restrictive theory).

¹⁹ See Richard A. Posner, *Economic Analysis of Law* 471-72 (Aspen 5th ed 1998) (discussing risk and bonds). For a general discussion, see Richard A. Brealey and Stewart C. Myers, *Principles of Corporate Finance* 187 (McGraw-Hill 6th ed 2000) (describing risk calculations and interest rates).

²⁰ See Part III.D.

²¹ See Restatement (Second) of the Foreign Relations Law of the United States § 69 at 209 (1965) (describing presumption of foreign sovereign immunity and explaining commercial activities exception).

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.²²

Note that Marshall's discussion of waiver focuses not on the nation subject to a prospective lawsuit, but on the sovereign that chooses not to exercise jurisdiction over another nation.²³

Until the twentieth century, this absolute form of sovereign immunity prevailed throughout the world.²⁴ Although U.S. courts may have been the first²⁵ to announce the theory as binding in this country, others soon followed.²⁶ However, by the turn of the century, owing to increased commerce among nations, the theory had begun to evolve to include an exception for the private acts of sovereigns.²⁷ This exception

²² *The Schooner Exchange v. McFadden*, 11 US (7 Cranch) 116, 137 (1812).

²³ "[E]very sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation." *Id.*

²⁴ Joseph M. Sweeney, *The International Law of Sovereign Immunity* 20–21 (US Dept of State 1963).

²⁵ See Dellapenna, *Suing Foreign Governments* at 1 (cited in note 18), citing Gamal Badr, *State Immunity: An Analytic and Prognostic View* 9–70 (Martinus Nijhoff 1984) (concluding that U.S. courts were the first to announce the theory of immunity for "foreign states and their agents").

²⁶ Sweeney, *The International Law of Sovereign Immunity* at 21 (cited in note 24) (citing cases in the French *Cour de Cassation* and the courts of England).

²⁷ *Id.* See also *Compania Naviera Vascongado v. The Cristina*, [1938] AC 485, 521 (Lord Maugham) ("Half a century ago foreign Governments very seldom embarked in trade with ordinary ships . . . but there has been a very large development of State-owned commercial ships since the Great War, and the question whether the immunity should continue to be given to ordinary trading ships has become acute."), cited in *Republic of Mexico v. Hoffman*, 324 US 30, 40–41 (1945) (Frankfurter concurring).

became a part of what is referred to as the restrictive theory of sovereign immunity.²⁸

The adoption of the restrictive theory of sovereign immunity was slow, but steady. One of the first courts to explicitly invoke this distinction, or restrictive theory, appears to have been the Belgian *Cour de Cassation*.²⁹ Italy was also an early adherent to the theory of restrictive sovereign immunity.³⁰ In the 1920s, even nations that had previously embraced the absolute theory, such as France, were adopting the restrictive theory.³¹ Other nations appeared to adopt the restrictive theory as a matter of first impression.³²

The restrictive theory had also gained adherents in the United States. Justice Story, well ahead of his time, seemed to suggest some sort of restrictive theory.³³ In 1918, the State Department also indicated that it supported the restrictive theory, while the Attorney General disagreed.³⁴ The opinions of Justice Story and the State Department were finally taken up by Circuit Judge Julian Mack in *The Pesaro*,³⁵ a case involving an Italian merchant ship where Mack denied the ship sovereign immunity.³⁶ Despite the urging of the State Department, however, the Supreme Court held that absolute sovereign immunity prevailed in the United States.³⁷ The State Department, in

²⁸ See 1 Restatement (Third) of the Foreign Relations Law of the United States § 5 at 391. The restrictive theory “balance[s] the need for a remedy for injured parties and the need for protection for foreign states . . . of [their] public affairs.” Dellapenna, *Suing Foreign Governments* at 11 (cited in note 18).

²⁹ Sweeney, *The International Law of Sovereign Immunity* at 21 (cited in note 24), citing *Société Anonyme des Chemins de Fer Liègeois Luxembourgeois v The Netherlands*, [1903] Pasiricrie I 294, 301 (“Sovereignty is involved only when political acts are accomplished by the state.”).

³⁰ Tate Letter at 984 (cited in note 5) (noting that Belgium and Italy had “always” embraced the restrictive theory).

³¹ *Id* (noting that “the courts of France, Austria, and Greece, which were traditionally supporters of the classical [absolute] theory, reversed their position in the 20s to embrace the restrictive theory”).

³² *Id* (noting that Denmark, Romania, and Peru seem to have followed the restrictive theory).

³³ See *US v Wilder*, 28 F Cas 601, 604 (Cir Ct D Mass 1838) (noting that “the promises, the conventions, and all the private obligations of the sovereign are naturally subject to the same rules as those of private persons”).

³⁴ See Restatement (Second) of the Foreign Relations Law of the United States § 69 at 211 (describing disagreement between Attorney General and Secretary of State in 1918 over whether merchant vessels owned and operated by a foreign state were entitled to immunity, with the Secretary maintaining they were not).

³⁵ 277 F 473 (S D NY 1921), *affd as Berrizzi Brothers Co v S.S. Pesaro*, 271 US 562 (1926).

³⁶ 277 F at 477, 479–80, 482, 485. After inquiry by Judge Mack, the State Department also indicated in this case that it supported the restrictive form of sovereign immunity. *Id* at 479–80 n 3 (“It is the view of the Department that government-owned merchant vessels . . . employed in commerce should not be regarded as entitled to . . . immunit[y].”).

³⁷ See *The Pesaro*, 271 US at 574 (extending immunity to merchant ship owned and operated by the Italian government). This decision was made over objections by the State Department. See *The Pesaro*, 277 F at 479–80 n 3.

reaction, began to request the extension of sovereign immunity as a matter of course.³⁸

The Court's attitude towards the executive branch on the subject of foreign sovereign immunity changed substantially over the first half of the twentieth century, and eventually resulted in a shift away from *The Pesaro*. In *Republic of Mexico v Hoffman*,³⁹ the Court, citing the potential embarrassment of conflict between the executive and judiciary, held that "it is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which our government has not seen fit to recognize."⁴⁰ The Court noted that this principle was not followed in *The Pesaro* and attempted to distinguish that case on factual grounds.⁴¹ However, the two cases were closely analogous, as noted by Justice Frankfurter.⁴² In fact, the decision in *Hoffman* was heavily criticized.⁴³

After *Hoffman* removed the judiciary from the process, all that remained for the United States to join a growing list of nations⁴⁴ and fully adopt the restrictive theory of sovereign immunity was a statement of policy from the Executive. That statement came in the form of the now famous Tate Letter in 1952.⁴⁵ The Tate Letter declared that the State Department's recommendation to the courts regarding sover-

³⁸ See Restatement (Second) of the Foreign Relations Law of the United States § 69 at 212-13 ("[T]he executive department filed suggestions of immunity in conformity with that decision [*The Pesaro*] in cases involving merchant vessels owned and operated by foreign states.").

³⁹ 324 US 30 (1944).

⁴⁰ *Id.* at 35. The Court had previously enunciated this practice of deference to the executive in *Ex Parte Peru*, 318 US 578, 587 (1943) (enunciating principle of deference to State Department opinion on whether immunity was required). The Court also characterized *The Schooner Exchange* as having been based on the potential for this embarrassment. *National City Bank v Republic of China*, 348 US 356, 361 (1955) ("[A] major consideration for the rule enunciated in *The Schooner Exchange* is the embarrassing consequences which judicial rejection of a claim of sovereign immunity may have on diplomatic relations."). However, such utilitarian concerns were not all that drove Chief Justice Marshall's opinion. See, for example, *Carl Marks & Co, Inc v Union of Soviet Socialist Republics*, 665 F Supp 323, 334-35 n 4 (S D NY 1987) ("Of course, that is not to say that this [potential embarrassment to the government] is the consideration that moved Chief Justice Marshall and his colleagues to enunciate the rule.").

⁴¹ *Hoffman*, 324 US at 35 n 1.

⁴² *Id.* at 39-41 (Frankfurter concurring).

⁴³ See, for example, Michael H. Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 Harv L Rev 608, 616 (1954) (stating that the Court made "seemingly inconsistent statements" in the case); Phillip C. Jessup, *Has the Supreme Court Abdicated One of its Functions?*, 40 Am J Intl L 168, 168-69 (1946). Some have suggested that the shift from a common law of foreign sovereign immunity flowing from the law of nations to a policy of deference to the executive is a reaction to the *Erie* limitation on federal common law. See Curtis A. Bradley and Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 Mich L Rev 2129, 2163 (1999).

⁴⁴ See notes 30-32. However, in 1952, the State Department believed that the British Commonwealth, Czechoslovakia, Estonia, Poland, Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway, and Portugal still adhered to absolute sovereign immunity. Tate Letter at 984 (cited in note 5).

⁴⁵ See note 5.

eign immunity would be governed by the restrictive theory.⁴⁶ These recommendations were initially based only on comparing a submission of the foreign sovereign to the standards of the Tate Letter, but after a few years the State Department began to conduct quasi-judicial hearings on claims of immunity.⁴⁷ Courts also used the Tate Letter standards as a default rule to be applied in cases where the State Department remained silent.⁴⁸

II. RETROACTIVITY AND THE FOREIGN SOVEREIGN IMMUNITIES ACT

Partly due to prudential concerns regarding the implementation of the Tate Letter objectives⁴⁹ and partly due to the need for a consistent adjudication of cases beyond the reach of the diplomatic process,⁵⁰ Congress in 1976 codified the standards contained in the Tate Letter with the passage of the Foreign Sovereign Immunities Act.⁵¹ The FSIA provides the exclusive means for obtaining jurisdiction over foreign sovereigns in the courts of the United States, ending the regime of guided discretion under the Tate Letter.⁵²

⁴⁶ Courts followed this recommendation. See, for example, *Spacil v Crowe*, 489 F2d 614, 619 (5th Cir 1974) (following State Department recommendation in finding immunity for shipping vessel); *Isbrandtsen Tankers, Inc v President of India*, 446 F2d 1198, 1201 (2d Cir 1970) (same); *Rich v Naviera Vacuba SA*, 295 F2d 24, 26 (4th Cir 1961) (same).

⁴⁷ Carter and Trimble, *International Law* at 603-04 (cited in note 6) (discussing history of Tate Letter and restrictive theory of sovereign immunity).

⁴⁸ See, for example, *Heany v Spain*, 445 F2d 501, 503 (2d Cir 1971) (using the standard articulated in the Tate Letter to dismiss a contract claim against Spain); *Victory Transport, Inc v Comisaria General*, 336 F2d 354, 359-62 (2d Cir 1964) (denying sovereign immunity in suit to compel arbitration); *Rovin Sales Co v Romania*, 403 F Supp 1298, 1302 (N D Ill 1975) (holding that Romania was not immune to prosecution because its activities fell outside the restrictive theory).

⁴⁹ Foreign Sovereign Immunities Act of 1976, HR Rep No 94-1487, 94th Cong, 2d Sess 8 (1976), reprinted in 1976 USCCAN 6604, 6607:

The Tate Letter, however, has posed a number of difficulties. From a legal standpoint, if the [State] Department applies the restrictive principle in a given case, it is in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts. Moreover, it does not have the machinery to take evidence, to hear witnesses, or to afford appellate review.

⁵⁰ See *id* ("The foreign state also decides when it will attempt to exert diplomatic influences, thereby making it more difficult for the State Department to apply the Tate Letter criteria."). The State Department also occasionally bowed to pressure from foreign sovereigns to allow immunity even when the act in question was "indisputably commercial." Dellapenna, *Suing Foreign Governments* at 8 (cited in note 18). See, for example, *Flota Maritima Browning de Cuba SA v M/V Ciudad de la Habana*, 335 F2d 619, 623 (4th Cir 1964) (suggesting that the justification for immunity in these cases may lie in the executive's "intimate knowledge of matters affecting foreign affairs which are not public information"); Cardozo, 67 Harv L Rev at 613-14 (cited in note 43) (noting the need to defer to the executive branch on political questions).

⁵¹ 28 USC §§ 1602 et seq.

⁵² 28 USC § 1604.

The FSIA reaffirms the presumption of sovereign immunity⁵³ and delineates several exceptions to that presumption. These include commercial activity,⁵⁴ state sponsored terrorism,⁵⁵ arbitration,⁵⁶ and waiver,⁵⁷ among others. There is no express provision regarding the retroactivity of the FSIA.⁵⁸

A. Retroactivity Analysis before *Landgraf*

Before the Court's ruling in *Landgraf*, courts generally held that the FSIA was not to be given retroactive treatment.⁵⁹ While some courts appeared to apply the FSIA to "events" occurring before 1952, further inquiry reveals these to be peculiar scenarios involving post-1952 operative facts.⁶⁰ Two main arguments were advanced by courts arguing against retroactive application to pre-1952 events. First, courts looked at the language of the statute and identified words indicating prospectivity. This analysis, however, ignores an important point—the

⁵³ 28 USC §§ 1602, 1604.

⁵⁴ The exception still requires some nexus with the United States. 28 USC § 1605(a)(2) ("in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside of 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").

⁵⁵ 28 USC § 1605(a)(7).

⁵⁶ 28 USC § 1605(a)(6).

⁵⁷ 28 USC § 1605(a)(1).

⁵⁸ See, for example, *Jackson*, 794 F2d at 1497 (agreeing with the district court's conclusion that the "Act itself contained no statement indicating that restrictive immunity was intended to apply to transactions that predated 1952").

⁵⁹ See, for example, *Carl Marks & Co, Inc v Union of Soviet Socialist Republics*, 841 F2d 26, 27 (2d Cir 1988) (per curiam) (holding that the FSIA is not to be applied retroactively to events before 1952); *Jackson*, 794 F2d at 1497 (same); *Corporacion Venezolana v Vintero Sales Corp*, 629 F2d 786, 790–91 (2d Cir 1980) (same); *Djordjevich v Bundesminister der Finanzen, Federal Republic of Germany*, 827 F Supp 814, 817 (D DC 1993) (same); *Slade v United States of Mexico*, 617 F Supp 351, 355–58 (D DC 1985), affd 790 F2d 163 (DC Cir 1986) (same).

⁶⁰ See, for example, *Von Dardel v Union of Soviet Socialist Republics*, 623 F Supp 246, 253–56 (D DC 1985) (allowing claim for unlawful seizure, imprisonment, and possible death of Swedish diplomat in 1945), vacated 736 F Supp 1 (D DC 1990); *Schmidt v Polish People's Republic*, 579 F Supp 23, 26–28 (S D NY 1984) (allowing claim to proceed for default on notes issued by Polish government before 1952); *Asociacion de Reclamantes v United Mexican States*, 561 F Supp 1190, 1194–1201 (D DC 1983) (applying the FSIA to claims that plaintiffs were deprived of property in 1848). In the *Carl Marks* litigation, however, the district court persuasively distinguished these three cases. See *Carl Marks & Co, Inc v Union of Soviet Socialist Republics*, 665 F Supp 323, 349 (S D NY 1987) ("Thus, plaintiffs have not directed us to a case that genuinely involves pre-1952 retroactive application of the FSIA."). While representing cases whose operative events occurred before 1952, each of those cited above involved fact sets with post-1952 facts that renewed or continued legal obligations on the part of the defendant-government in a post-Tate Letter environment. For example, in *Von Dardel*, the possibility existed that a Soviet political prisoner, reported dead in 1947, was actually still alive at the time of the suit. 623 F Supp at 249. To the extent that it is retroactively applied to events occurring between 1952 and 1976, the FSIA would reach such conduct. See note 136.

Congress, in enacting the FSIA, clearly did not intend to deprive plaintiffs of a U.S. forum for suits arising from facts between 1952 and 1976. Second, the courts determined that a pre-1952 retroactive application of the FSIA would prejudice antecedent rights. This second argument is discussed in detail in Part III.C.

The FSIA contains no express provision governing its retroactivity. There are, however, several noteworthy elements of the plain language of the statute indicating prospectivity. First, the Act directs that “[c]laims of foreign states to immunity should *henceforth* be decided by courts of the United States . . . in conformity with the principles set forth in this chapter.”⁶¹ Second, the statute indicates in its jurisdictional section that the district courts “shall have” jurisdiction over the cases specified in the FSIA.⁶² In addition to focusing on these two elements of the plain language of the FSIA that seem to indicate prospectivity,⁶³ courts have noted that Congress gave the FSIA an effective date ninety days after its passage. “Such a postponement of a statute’s effective date is evidence of the legislature’s desire that it be given prospective application only.”⁶⁴

While this analysis seems to support full prospectivity, it creates a scenario almost certainly not intended by Congress. Courts have noted the removal of foreign sovereigns from the diversity jurisdiction statute as evidence supporting retroactive application of the FSIA.⁶⁵ The FSIA supplies the exclusive means for obtaining jurisdiction over foreign sovereigns in the courts of the United States.⁶⁶ Before the FSIA, such jurisdiction was treated as diversity jurisdiction under 28 USC § 1332(a).⁶⁷ Since the FSIA supersedes this by supplying the sole means for obtaining jurisdiction over foreign sovereign defendants,

⁶¹ 28 USC § 1602 (emphasis added).

⁶² 28 USC § 1330(a) (1994).

⁶³ See, for example, *Carl Marks*, 665 F Supp at 336 (citing “henceforth” and “shall have” language in the FSIA for the proposition that the statute was intended to be applied prospectively).

⁶⁴ *Id.*, quoting *Buccino v Continental Assurance Co*, 578 F Supp 1518, 1527 (S D NY 1983).

⁶⁵ See *Princz v Federal Republic of Germany*, 26 F3d 1166, 1170 (DC Cir 1994) (finding that removal of provision for diversity jurisdiction strongly implies that FSIA is to be applied retroactively).

⁶⁶ 28 USC § 1330(a) (“The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state.”).

⁶⁷ 28 USC § 1332(a)(2)–(3) (1970) (extending jurisdiction to suits between “(2) citizens of a State, and foreign states or citizens or subjects thereof; and (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties”). Compare 28 USC § 1332(a)(2)–(4) (1994) (eliminating the category of foreign sovereign defendants and extending jurisdiction to “citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States”).

the two statutes would be redundant; Congress, therefore, eliminated that portion of the diversity statute.⁶⁸

This raises a significant problem, however. As Judge Douglas Ginsburg has argued,⁶⁹ by removing foreign sovereign defendants from the diversity jurisdiction statute, a prospective FSIA would have the effect of preventing suits arising from events prior to 1976 from being heard in U.S. courts. This would create a "blank period" from 1952 to 1976 when the U.S. had already adopted, but not codified, the restrictive theory of sovereign immunity. "Unless one is to infer that the Congress intentionally but silently denied a federal forum for all suits against a foreign sovereign arising under federal law that were filed after enactment of the FSIA but based upon pre-FSIA facts, the implication is strong that all questions of foreign sovereign immunity, including those that involve an act of a foreign government taken before 1976, are to be decided under the FSIA."⁷⁰

Judge Ginsburg's position is supported by the legislative history. The history clearly shows that Congress intended the FSIA to be a codification of the principles of the Tate Letter, which embodied the principle of restrictive sovereign immunity, "followed by the courts and by the executive branch ever since [1952]."⁷¹

This argument is convincing, however, only inasmuch as it concludes that retroactivity is appropriate back to 1952 and no further. Neither Judge Ginsburg nor any court has found evidence of congressional intent for pre-1952 application of the FSIA. This is unsurprising, given Congress's impression that it was codifying a policy that *began* in 1952.⁷² In the absence of such intent, for pre-1952 retroactive application we are thrust into the analytical framework of *Landgraf*.⁷³

B. *Landgraf v USI Film Products* and the Retroactivity of Jurisdictional Statutes

In *Landgraf*, the Supreme Court handed down its definitive treatment of statutory retroactivity. The Court restated the time honored presumption against statutory retroactivity⁷⁴ and affirmed that

⁶⁸ See HR Rep No 94-1487 at 14 (cited in note 49) ("[S]ince jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous.").

⁶⁹ *Princz*, 26 F3d at 1170-71 (postulating, though not specifically holding, that the FSIA applies retroactively to events before 1976 and before 1952, the date of the Tate Letter).

⁷⁰ *Id* at 1170.

⁷¹ HR Rep No 94-1487 at 7 (cited in note 49).

⁷² *Id*.

⁷³ See Part III.

⁷⁴ *Landgraf*, 511 US at 265 (noting that the canon is "deeply rooted in our jurisprudence"), citing *Kaiser Aluminum & Chemical Corp v Bonjorno*, 494 US 827, 842-44, 855-56 (1990) (Scalia concurring), and *Dash v Van Kleeck*, 7 Johns 477, 503 (NY 1811) ("It is a principle of the English

this presumption finds its roots in the basic unfairness of the disruption of settled expectations.⁷⁵ The Court did admit that there can be many “benign” and “legitimate” uses of retroactive legislation⁷⁶ and thus repeated that Congress need only “make its intention clear” in order for such retroactivity to be recognized by the courts.⁷⁷

In the absence of clear intention, the retroactivity principles announced in *Landgraf* operate. These include the presumption against retroactivity and exceptions to this presumption for certain types of statutes.

The Court reaffirmed and clarified this position in *Lindh v. Murphy*.⁷⁸ Rejecting an argument that the *Landgraf* framework was reached immediately upon a court’s conclusion that the statute had no express provision governing retroactivity, the Court held that “in determining whether a statute’s terms would produce a retroactive effect, however, and in determining a statute’s temporal reach generally, our normal rules of construction apply.”⁷⁹ These rules include, of course, the use of congressional intent to determine the temporal reach of the statute.⁸⁰

Without qualification, the term “retroactive” could have near limitless application. The Court in *Landgraf* stated that the determination of whether a statute operates “‘retroactively’ is not always a simple or mechanical task.”⁸¹ “A statute does not operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment, or upsets expectations based in prior law.”⁸²

Finally, noting that the presumption against retroactivity can, when the statute is ambiguous, find itself in tension with the recogni-

common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect.”).

⁷⁵ *Landgraf*, 511 US at 265 (“Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.”), citing *General Motors Corp v. Romein*, 503 US 181, 191 (1992) (“Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions.”) (emphasis added). It is exactly the retroactive application of the FSIA that will “upset settled transactions” based upon the reasonable belief that contracts made against the background of absolute sovereign immunity include bargained elements reflecting that fact. See Part III.D.

⁷⁶ *Landgraf*, 511 US at 268.

⁷⁷ *Id.* However such intent is difficult to find in the FSIA or its legislative history. See text accompanying notes 71–72.

⁷⁸ 521 US 320, 325–26 (1997).

⁷⁹ *Id.* at 326.

⁸⁰ *Id.* (discussing congressional intent in amending habeas corpus statute). See also *id.* at 337–41 (Rehnquist dissenting) (discussing congressional intent before concluding that *Landgraf* analysis is appropriate).

⁸¹ 511 US at 268.

⁸² *Id.* at 269 (citations omitted).

tion that a court should “apply the law in effect at the time it renders its decision,”⁸³ the Court proceeded to deliver this pronouncement on the retroactivity of jurisdictional statutes, which finds itself at the center of the confusion over the retroactivity of the FSIA:

We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed. Thus, in *Bruner v. United States*, 343 U.S. 112, 116–117 (1952), relying on our “consisten[t]” practice, we ordered an action dismissed because the jurisdictional statute under which it had been (properly) filed was subsequently repealed. Conversely, in *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 607–608 & n.6 (1978), we held that, because a statute passed while the case was pending on appeal had eliminated the amount-in-controversy requirement for federal-question cases, the fact that respondent had failed to allege \$10,000 in controversy at the commencement of the action was “now of no moment.” Application of a new jurisdictional rule usually “takes away no substantive right but simply changes the tribunal that is to hear the case.” Present law normally governs in such situations because jurisdictional statutes “speak to the power of the court rather than to the rights or obligations of the parties.”⁸⁴

In order to understand the application of *Landgraf* to the FSIA, further dissection of this passage is necessary. Here, it is unnecessary to explore those cases, such as *Bruner v. United States*,⁸⁵ where the Court dismissed an action after a jurisdictional statute had been repealed, because they are not analogous to the FSIA retroactivity cases.⁸⁶ The issue of FSIA retroactivity deals with cases not yet before the court, not the effect of a change in a jurisdictional statute on pending cases.

The Court cited *Andrus v. Charlestone Stone Products Co.*⁸⁷ for the proposition that jurisdiction may still exist where the statute enabling jurisdiction has been passed after the commencement of the action.⁸⁸

⁸³ Id at 273, quoting *Bradley v School Board of Richmond*, 416 US 696, 711 (1974).

⁸⁴ *Landgraf*, 511 US at 274 (citations omitted).

⁸⁵ 343 US 112 (1952).

⁸⁶ Id at 115–17 (holding that the Court lacks jurisdiction over a case that was pending at the time Congress repealed the Tucker Act). The same is true for the other cases the Court cites for this type of “retroactive application.” See *Hallowell v Commons*, 239 US 506, 508–09 (1916) (holding that the Court lacks jurisdiction to determine heirs to property held in trust at the time the statute was repealed); *Assessors v Osbornes*, 76 US (9 Wall) 567, 573–75 (1870) (holding that the Court lacks jurisdiction to hear dispute over tax assessment when statute conferring jurisdiction was repealed).

⁸⁷ 436 US 604 (1978).

⁸⁸ *Landgraf*, 511 US at 274.

In *Andrus*, Congress eliminated the amount-in-controversy requirement for federal question cases.⁸⁹ However, the claim could have been refiled in federal court after dismissal under the old jurisdictional statute.⁹⁰ This fact gives vitality to the *Landgraf* Court's reliance on *Hallowell v Commons*,⁹¹ and its statement that the "[a]pplication of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'"⁹² In *Andrus*, it is even the same tribunal that would hear the case, just at an earlier time than if dismissal had come from a failure to allege a specific amount in controversy. In fact, in no case cited by the Court did the forum "change" involve creation of a new forum where none had existed previously as opposed to a mere alteration of the forum.⁹³

Courts have used the jurisdictional retroactivity passage from *Landgraf* to justify holding that the FSIA, as a jurisdictional statute, is to be applied retroactively to pre-1952 events.⁹⁴ In the most detailed discussion to date, the D.C. Circuit applied the FSIA retroactively in *Creighton Ltd v Qatar*.⁹⁵ Although this case dealt with the retroactive application of the FSIA's arbitration provision,⁹⁶ added by amendment in 1988, the analysis was extended by implication to the entire FSIA.⁹⁷ One court has followed the lead of the D.C. Circuit and applied the FSIA retroactively to events before 1952 without further detailed discussion.⁹⁸

⁸⁹ 436 US at 607-08 n 6 (holding that the failure to allege the amount in controversy is "now of no moment").

⁹⁰ Presuming the statute of limitations had not run, of course.

⁹¹ 239 US 506 (1916).

⁹² *Landgraf*, 511 US at 274, quoting *Hallowell*, 239 US at 508.

⁹³ See, for example, *Andrus*, 436 US at 607-08 n 6 (allowing retroactive application of amended jurisdiction statute that only altered the forum); *United States v Alabama*, 362 US 602, 604 (1960) (declining to dismiss an action by the United States against the State of Alabama under the Voting Rights Act because Congress, subsequent to filing of the action, had conferred jurisdiction and dismissal would still have allowed a refile in federal court).

⁹⁴ See, for example, *Creighton Ltd v Qatar*, 181 F3d 118, 124 (DC Cir 1999) (holding that arbitration provision of the FSIA and, by implication, the entire Act, was to be applied retroactively); *Haven v Rzeczpospolita Polska (Republic of Poland)*, 68 F Supp 2d 943, 945-46 (Shadur) (N D Ill 1999) (applying the FSIA retroactively to events during and shortly after the end of World War II), aff'd *Haven v Polska*, 215 F3d 727 (7th Cir 2000), cert denied 121 S Ct 573 (2000); *Crist v Republic of Turkey*, 995 F Supp 5, 9 (D DC 1998) (applying the FSIA retroactively, under *Landgraf*, to events in 1974 without mention of the Tate Letter). See also *Princz v Federal Republic of Germany*, 26 F3d 1166, 1170-71 (DC Cir 1994) (postulating that the FSIA may be applied retroactively in light of *Landgraf*).

⁹⁵ 181 F3d 118, 121-24 (DC Cir 1999).

⁹⁶ 28 USC § 1605(a)(6).

⁹⁷ See *Creighton Ltd*, 181 F3d at 124 (citing *Princz* and supporting a reading of *Landgraf* that would give the FSIA retroactive application to events before 1952, the year of the Tate Letter).

⁹⁸ See *Haven*, 68 F Supp 2d at 945-46 (citing *Creighton Ltd* and *Princz* in applying FSIA retroactively). In *Haven*, the plaintiffs sued for wrongful seizure and expropriation of property seized during and after World War II and for interference with insurance contracts related to this

None of this general discussion reaches the special case of a jurisdictional statute that gives a forum to a cause of action where none existed before. As I have noted, none of the cases cited by the Court address this scenario, and *Creighton Ltd* deals with a mere change of forum for the appeal of an arbitration award.⁹⁹ It is this critical gap in lower courts' reliance on the *Landgraf* discussion of jurisdictional statutes that I criticize in Part III.B.

III. THE CASE AGAINST RETROACTIVITY

Landgraf indicates that courts should presume jurisdictional statutes to be retroactive.¹⁰⁰ It does not, however, indicate when courts should find exceptions to this retroactivity presumption. The Court cites *Hallowell*—which gives a two-pronged explanation arguing that jurisdictional retroactivity “simply changes the tribunal” and “takes away no substantive right”—to indicate when jurisdictional statutes can be permissibly retroactive.¹⁰¹

The FSIA fits neither of these criteria. First, and most importantly, regarding the FSIA as effecting a procedural, rather than a substantive, change conflicts with the Court's holding that the FSIA satisfies the “arising under” requirement of Article III¹⁰² because it is, by definition, substantive. Since the FSIA is substantive, the retroactive operation of the FSIA to pre-1952 events would do exactly what the Court in *Landgraf* claimed jurisdictional statutes typically do not—take away a substantive right.

Moreover, even ignoring the Article III arguments, the FSIA effects a substantive change. It can operate to *create* a forum for suits where none existed before¹⁰³ and therefore cannot sensibly be viewed

property, among other claims. *Id.* at 946. The operative events occurred before 1952 and the defendants moved to dismiss for lack of subject matter jurisdiction, arguing that the FSIA did not operate retroactively. The court denied the motion, favoring *Creighton* over *Carl Marks and Jackson* simply because *Creighton* postdated *Landgraf*. *Id.* at 944. The case was eventually dismissed on other grounds. See *id.* at 958.

⁹⁹ See *Creighton Ltd*, 181 F3d at 124 (applying *Landgraf*'s reasoning about merely changing the tribunal: “So it is in this case, for § 1605(a)(6) [the arbitral award provision of the FSIA] does not affect the contractual right of the parties to arbitration but only the tribunal that may hear a dispute concerning the enforcement of an arbitral award.”). The court's reliance on the obvious, but special, facts surrounding the addition of the arbitration provision in 1988 to the FSIA is inappropriate when applied to the FSIA generally. See Part III.B.

¹⁰⁰ 511 US at 274.

¹⁰¹ *Id.*, citing *Hallowell*, 239 US at 508.

¹⁰² US Const Art III, § 2, cl 1. See *Verlinden BV v Central Bank of Nigeria*, 461 US 480, 497 (1983) (per curiam) (holding the FSIA constitutional under Article III).

¹⁰³ Prior to the Tate Letter in 1952, no U.S. forum would have existed. See note 5 and accompanying text.

as merely “chang[ing] the tribunal”—a crucial fact overlooked by the court in *Creighton Ltd.*¹⁰⁴

The FSIA also abridges what is arguably an antecedent right: that of sovereign immunity. As the court in *Carl Marks & Co, Inc v Union of Soviet Socialist Republics*¹⁰⁵ capably argued, the international common law of sovereign immunity persuasively indicates that it should be treated as an antecedent right, abridged via the Tate Letter and the FSIA.¹⁰⁶ National rights to sovereign immunity have received less deference since 1952.¹⁰⁷ However, at least until 1926, when the Court began to defer to the executive on the issue of foreign sovereign immunity, every investor and foreign sovereign viewed sovereign immunity as a well-established right.

Finally, the FSIA should not be permitted to operate retroactively because it will, in effect, alter the terms of the bargained-for contract between the defendant nation and the plaintiff. Typically these cases involve bond issues, and the interest rate associated with the issue most certainly would have taken into account the inability of the noteholder to sue on the notes in U.S. courts.¹⁰⁸ To change the legal rules *ex post* gives the plaintiff the benefit of his bargain twice. In this Part, I argue that the FSIA should not be applied retroactively to pre-1952 events.

A. The FSIA Is Not a Mere Jurisdictional Statute, but Substantive Law

Article III of the Constitution grants to the federal courts jurisdiction over cases “arising under this Constitution, the Laws of the United States, and Treaties made.”¹⁰⁹ Exactly what claims “arise under” in this fashion has long been the subject of dispute.¹¹⁰ The Court has retreated from Chief Justice Marshall’s expansive reading in *Osborn v Bank of United States*,¹¹¹ but it has never established a clear rule. From

¹⁰⁴ This is an understandable oversight given that *Creighton* dealt with the more recent arbitration provision of the FSIA. See text accompanying notes 96–97. Less understandable is the absence of any discussion of the problem posed by *Verlinden*. See Part III.A.

¹⁰⁵ 665 F Supp 323 (S D NY 1987).

¹⁰⁶ *Id* at 338–39 (holding that sovereign immunity is an antecedent right and that the FSIA cannot be viewed as merely remedial).

¹⁰⁷ Compare *Carl Marks*, 665 F Supp at 339 (discussing sovereign immunity as an antecedent right), with *The Schooner Exchange v McFadden*, 11 US (7 Cranch) 116, 136 (1812) (discussing sovereign immunity as the result of sovereigns’ “interchange of good offices with each other”).

¹⁰⁸ See Brealey and Myers, *Principles of Corporate Finance* at 809–10 (cited in note 19).

¹⁰⁹ US Const Art III, § 2, cl 1.

¹¹⁰ For a general discussion, see Charles Alan Wright, *Federal Courts* 100–08 (West 5th ed 1994) (describing history of interpretation of the “arising under” clause).

¹¹¹ 22 US (9 Wheat) 738, 823 (1824) (“We think, then, that when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original

Justice Holmes's heavily criticized but influential statement that "[a] suit arises under the law that creates the action"¹¹² to Justice Cardozo's caution against easy definitions,¹¹³ no test has risen to general acceptance.¹¹⁴

The "arising under" prong of Article III jurisdiction would not be necessary in analyzing claims under the FSIA were those claims exclusively between U.S. citizens and foreign sovereigns. Federal courts can be granted jurisdiction over those claims by virtue of the diversity clause of Article III, Section 2, which provides jurisdiction for controversies "between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."¹¹⁵ The FSIA, however, uses broad language that can be read to include suits by foreign citizens or corporations against foreign sovereigns.¹¹⁶ If the federal courts are to obtain jurisdiction over these cases, an Article III justification, other than diversity, must be found. The Court held that the "arising under" requirement was satisfied by the FSIA in *Verlinden BV v Central Bank of Nigeria*.¹¹⁷

In *Verlinden*, a contractual dispute arose between a Dutch corporation and the Central Bank of Nigeria. The trial court held that the FSIA applied to suits between foreign corporations and foreign sovereigns,¹¹⁸ but dismissed the claim for failure to satisfy any of the statutory exceptions of the FSIA. The Court of Appeals affirmed, but on the ground that the FSIA did not meet Article III's "arising under"

cause, it is in the power of Congress to give the Circuit Courts jurisdiction.").

¹¹² *American Well Works Co v Layne & Bowler Co*, 241 US 257, 260 (1916).

¹¹³ In *Gully v First National Bank in Meridian*, 299 US 109 (1936), Justice Cardozo stated:

If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.

Id at 118.

¹¹⁴ For a general discussion, see Sandra Slack Glover, Comment, *Article III and the Westfall Act: Identifying "Federal Ingredients,"* 64 U Chi L Rev 925 (1997) (describing Article III and proposing an alternative functional test: If a statute governs federal and state courts then it arises under.). The FSIA would also satisfy this test, as it provides the exclusive means of obtaining jurisdiction over foreign sovereigns in state and federal court. The FSIA accomplishes this through its removal provision, allowing any proceeding against a foreign sovereign to be removed to federal court. 28 USC § 1441(d) (1994).

¹¹⁵ US Const Art II, § 2.

¹¹⁶ See note 66.

¹¹⁷ 461 US 480 (1983).

¹¹⁸ *Verlinden BV v Central Bank of Nigeria*, 488 F Supp 1284, 1292 (S D NY 1980), affd 647 F2d 320 (2d Cir 1981). The Court agreed that this was the natural reading of the statute, which embraces "any nonjury civil action" against a foreign state provided the foreign state is not rendered immune by operation of the FSIA. *Verlinden*, 461 US at 489-91. See also 28 USC § 1330(a).

requirement.¹¹⁹ The Supreme Court reversed, concluding that Article III's "arising under" requirement had been met and making two important conclusions about the FSIA in the process.

First, the Court concluded that "a suit against a foreign state under this Act necessarily raises questions of substantive federal law at the very outset, and hence clearly 'arises under' federal law, as that term is used in Art. III."¹²⁰ The Court concluded that since Congress has authority over foreign commerce and foreign relations, it necessarily could decide under what conditions foreign sovereigns could be sued in federal court.¹²¹ At the same time, exercise of this power must be regarded as substantive, in part because it "raise[s] sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident."¹²² The Court, without qualification,¹²³ concluded that "every action against a foreign sovereign necessarily involves application of a body of substantive federal law, within the meaning of Art. III."¹²⁴

Second, the Court rejected an argument, advanced by the Court of Appeals,¹²⁵ that because statutes merely granting jurisdiction to the federal courts without satisfying the "arising under" requirement were unconstitutional,¹²⁶ it followed that "a jurisdictional statute can never constitute the federal law under which the action arises, for Art. III purposes."¹²⁷ The Court reasoned that, since Congress had acted under its power to regulate foreign commerce, "the jurisdictional provisions of the Act are simply one part of this comprehensive scheme."¹²⁸ While many courts, including the D.C. Circuit in *Creighton Ltd.*,¹²⁹ have treated the substantive and jurisdictional elements of the FSIA together, they can also be treated separately.¹³⁰ Under this analysis, the

¹¹⁹ *Verlinden BV v Central Bank of Nigeria*, 647 F2d at 330.

¹²⁰ *Verlinden*, 461 US at 493.

¹²¹ *Id* at 497.

¹²² *Id* at 493.

¹²³ The Court did not limit its discussion to cases between foreign plaintiffs and foreign sovereign defendants and focused solely on the defendant in determining that the FSIA was more than a mere jurisdictional statute—substantive rather than procedural. *Id.*

¹²⁴ *Id* at 497. Contrast this approach with the qualified language used in *Landgraf*, stating that jurisdictional statutes are generally to be applied retroactively.

¹²⁵ *Verlinden*, 647 F2d at 328–29 n 24.

¹²⁶ Such statutes, if constitutional, would allow Congress to completely bypass the "arise under" requirement by simply enacting jurisdictional statutes. See Glover, Comment, 64 U Chi L Rev at 935 (cited in note 114) ("The limits on the exercise of federal judicial power protect the states from federal usurpation of all judicial power.").

¹²⁷ *Verlinden*, 461 US at 496.

¹²⁸ *Id.*

¹²⁹ 181 F3d at 121–24 (discussing the FSIA without distinguishing substantive and jurisdictional elements).

¹³⁰ See *Corporacion Venezolana de Fomento v Vintero Sales Corp.*, 629 F2d 786, 790 (2d Cir 1980) (distinguishing cases that have focused on jurisdictional and substantive aspects of the

jurisdictional part of the FSIA could be applied retroactively to pre-1952 events under *Landgraf*, but the substantive part (creating exceptions to absolute sovereign immunity) could not.

By concluding that the FSIA should be applied retroactively, the D.C. Circuit and one other court have relied on *Landgraf* inappropriately, treating the FSIA as just another jurisdictional statute. Since the FSIA is substantive, not merely procedural, it cannot be applied retroactively under the general rule of *Landgraf*. Courts finding that the FSIA applies to pre-1952 events have ignored the combined dictates of both *Verlinden* and *Landgraf*. The former declares that foreign sovereign immunity is by nature substantive and the latter counsels that jurisdictional statutes are usually applied retroactively because they abridge no "substantive right" and speak only "to the power of the court." Courts should apply the canon of statutory construction holding that statutes should be construed so as to avoid rendering them unconstitutional.¹³¹ The FSIA should be regarded by courts, as it was in *Verlinden*, as affecting substantive rights—those of sovereign immunity—and therefore as incapable of retroactive application under the general rule of *Landgraf*.

One objection to this analysis of the FSIA would be that it proves too much, mandating that the FSIA never be applied retroactively before January 1977 (the effective date of the FSIA). This would create a period between 1952 and 1977 where no claims could have arisen against foreign sovereigns that could be heard in U.S. courts. A vacuum results because the Court has declared the FSIA as the exclusive basis for the exercise of jurisdiction over a foreign state¹³² (even under a waiver of sovereign immunity).¹³³ Claims between 1952 and 1977 would be barred despite the operation of the restrictive theory under the Tate Letter during this time.

Landgraf does not, however, completely prohibit retroactive application of substantive law. Instead, *Landgraf* authorizes retroactive application when Congress "has made clear its intent."¹³⁴ In *Lindh*, the Court reaffirmed that this includes the usual means of statutory construction, including analysis of legislative history.¹³⁵ It is clear that Congress meant only to codify the existing Tate Letter regime, and must have intended retroactive application to 1952.¹³⁶

FSIA).

¹³¹ See, for example, *NLRB v Catholic Bishop of Chicago*, 440 US 490, 500 (1979) (describing canon of constitutional avoidance).

¹³² *Argentine Republic v Amerada Hess Shipping Corp.*, 488 US 428, 438 (1989).

¹³³ The FSIA includes, among the many exceptions to the general rule of foreign sovereign immunity, one for waiver. 28 USC § 1605(a)(1).

¹³⁴ 511 US at 270.

¹³⁵ 521 US at 326.

¹³⁶ See, for example, *Yessenin-Volpin v Novosti Press Agency*, 443 F Supp 849, 851 n 1 (S D

B. Applied Retroactively, the FSIA Can Create a Forum

The Court in *Landgraf* gave great weight to the *Hallowell* statement that the retroactive application of a new jurisdictional statute “simply changes the tribunal that is to hear the case.”¹³⁷ The Court did not, however, address the possibility that the retroactive application of a new jurisdictional statute would effectively create a forum where none had previously existed.

As the FSIA applies to numerous commercial agreements between foreign sovereigns and plaintiffs in the United States, it is difficult to generalize about the facts surrounding those commercial agreements. Recent cases have, like *Jackson*, dealt with bond issues, and this example serves as a useful paradigm to discuss the effect of FSIA pre-1952 retroactivity. Background evidence suggests the parties bargained for many of these agreements under the assumption that the sovereign’s domestic courts would not enforce the contract.¹³⁸ Markets supplemented this “enforcement” by regulating the continued ability of the sovereign in question to borrow at low interest rates—when a country repudiates its debt, investors will be all the more wary about the next bond issue.¹³⁹

Using *Jackson* as an example,¹⁴⁰ we see that the People’s Republic of China did not subscribe to the restrictive theory of sovereign immunity as of 1988.¹⁴¹ When the agreement at issue in that case was

NY 1978) (applying the FSIA retroactively to events occurring just before its effective date of January 21, 1977 and noting State Department approval of this application, as well as the fact that “the Act does not purport to create new rights of immunity . . .”).

¹³⁷ *Landgraf*, 511 US at 274, quoting *Hallowell*, 239 US at 508. See also Dellapenna, *Suing Foreign Governments* at 349–51 (cited in note 18) (comparing the FSIA to long-arm jurisdictional statutes and noting that the *Jackson* court did not consider this analogy). Dellapenna ignores the fact that the FSIA in *Jackson* created a forum for the case rather than merely shifting the forum from Chinese domestic courts to U.S. courts.

¹³⁸ See, for example, *Jackson v People’s Republic of China*, 596 F Supp 386, 389 (N D Ala 1984) (discussing the parties’ expectations when the bonds were issued).

¹³⁹ This will happen because repudiation increases the expected value probability of future repudiation, thereby increasing default risk. See Brealey and Meyers, *Principles of Corporate Finance* at 689–700 (cited in note 19) (discussing the relationship between default risk and interest rates).

¹⁴⁰ Defendants may also have not simply defaulted, but repudiated previous debt. See, for example, *Carl Marks*, 665 F Supp at 340–46 (discussing effect of U.S.S.R.’s repudiation of debt that predates the Communist revolution). These changes in government leave creditors with a right without a remedy, “but this [would put] them in the same position any creditor was in, with respect to a sovereign, before the Tate Letter.” *Id.* at 346. That is, creditors of a foreign sovereign before the Tate Letter had to expect that at any moment, the foreign sovereign might repudiate its debt and claim sovereign immunity in its own courts. Investors, it will be argued, assume the risk of such an event, and should incorporate such a risk when calculating interest rates. See Part III.D.

¹⁴¹ The *Jackson* court noted:

At the time of the issuance of the bonds in 1911 up until the date of their maturity in 1951, China relied on the well-founded expectation that the then extant, almost universal doc-

made, there was no forum in which its breach could be sued upon, as the government of China at that time had not consented to any waiver of its sovereign immunity¹⁴² and the United States was still uniformly applying the doctrine of absolute foreign sovereign immunity.¹⁴³ Given this, the adoption of the restrictive theory of sovereign immunity by the United States in 1952 created a forum where suits for breach of these contracts could now be heard. The FSIA, as a codification of that restrictive immunity policy, should not be applied retroactively under the reasoning of *Landgraf* when the effect of that application is considered against this background understanding.

This argument would not have the same vitality in a case where the foreign sovereign had expressly waived its sovereign immunity in its domestic courts and there had been no change of government and repudiation of debt. In this scenario, the FSIA would merely operate to change the forum from the courts of the foreign sovereign to those of the United States. This would still leave the other obstacles to retroactive application.¹⁴⁴

C. Foreign Sovereign Immunity Is an Antecedent Right Abridged by the FSIA

In *Landgraf*, the Supreme Court was careful to characterize the retroactive application of jurisdictional statutes as abridging no antecedent rights.¹⁴⁵ As we have seen, despite indications from the executive branch and lower courts about the restrictive theory of sovereign immunity, as late as 1926 the Court held that absolute sovereign immunity was the law in U.S. courts.¹⁴⁶ In doing so, the Court relied on

trine of absolute sovereign immunity governed all interactions between her and the United States and the citizens of the two respective countries. Concomitantly, China had no apprehension of being haled into a court in the United States to answer for any default of the bond issue. Similarly, the predecessors in interest of the plaintiff bondholders class had no expectation of any right to bring an action in a court of the United States upon a default of the bond issue.

596 F Supp at 389.

This position has not changed. See Cohen and Lange, 17 NY L Sch J Intl & Comp L at 369 (cited in note 2) (discussing People's Republic of China's continued support for absolute sovereign immunity).

¹⁴² See Cohen and Lange, 17 NY L Sch J Intl & Comp L at 369 (cited in note 2).

¹⁴³ See text accompanying notes 22–24.

¹⁴⁴ See Parts III.A, III.C, and III.D.

¹⁴⁵ 511 US at 274 (“Application of a new jurisdictional rule *usually* ‘takes away no substantive right.’”) (emphasis added), quoting *Hallowell*, 239 US at 508.

¹⁴⁶ See Part I. After 1926 (*The Pesaro*) and before *Ex Parte Peru* and *Hoffman*, when deference to the executive had not yet been established, the State Department began to recommend the extension of immunity to the courts, opting to do so in every case in response to *The Pesaro*. See *Carl Marks*, 665 F Supp at 338, citing Restatement (Second) of the Foreign Relations Law of the United States § 69 at 212–13.

*The Schooner Exchange*¹⁴⁷ and the fact that while this was not a matter of constitutional command, absolute sovereign immunity flowed from customary international law.¹⁴⁸ As Chief Justice Marshall wrote, "A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world."¹⁴⁹ Neither Chief Justice Marshall, nor the Court in *The Pesaro* apparently regarded foreign sovereign immunity as merely procedural.¹⁵⁰ Contemporary courts view sovereign immunity as a matter of "grace and comity."¹⁵¹

Some may rely on the Court's characterization of foreign sovereign immunity as a matter of grace and comity to argue that sovereign immunity could not be considered an antecedent right. However, courts, nations, and investors all regarded absolute sovereign immunity as an antecedent right, grounded in judicial precedent, at least until the 1940s.¹⁵² Only after courts began deferring to the President (and later Congress) did sovereign immunity cease to be a matter of judicial precedent and become a matter of discretion. More importantly, only after 1952 did the United States espouse the restrictive theory as the standard.¹⁵³ The words "grace and comity" should not become incantations that sweep aside the previously settled law of foreign sovereign immunity.¹⁵⁴

This interpretation also finds support from elsewhere in *Landgraf* itself, because sovereign immunity affects primary conduct. The Court, noting that procedural changes can be applied retroactively, relied on

¹⁴⁷ *The Schooner Exchange v McFadden*, 11 US (7 Cranch) 116 (1812).

¹⁴⁸ This interpretation has been largely endorsed by scholars. See, for example, Bradley and Goldsmith, 97 Mich L Rev at 2161–62 (cited in note 43) (discussing customary international law as the source of early Court decisions on foreign sovereign immunity).

¹⁴⁹ *The Schooner Exchange*, 11 US (7 Cranch) at 137.

¹⁵⁰ See *The Pesaro*, 271 US at 571–72, quoting *The Schooner Exchange*, 11 US (7 Cranch) at 136.

¹⁵¹ *Verlinden*, 461 US at 486, citing *The Schooner Exchange*, 11 US (7 Cranch) at 136.

¹⁵² See Part I.

¹⁵³ While it might be argued that foreign sovereigns could not rely on absolute sovereign immunity after *Ex parte Peru* and *Hoffman* in the early 1940s, because the rule had changed to deference to the executive, no clear statement of the restrictive policy came until 1952. This convinced the *Carl Marks* court to conclude that "a foreign sovereign's pre-1926 settled expectation that it was absolutely immune from suit in the United States courts rises to the level of an antecedent right. . . . Only after 1952 was it reasonable for a foreign sovereign to anticipate being sued in the United States courts on commercial transactions." 665 F Supp at 338–39. See also *Slade v United States of Mexico*, 617 F Supp 351, 358 (D DC 1985) ("The Court finds that because Mexico may have reasonably relied on these factors in structuring its conduct prior to 1952, it would be inequitable to divest Mexico of the absolute immunity it enjoyed in 1922 by applying the FSIA to the case.").

¹⁵⁴ See *Carl Marks*, 665 F Supp at 338.

the fact that such changes affect secondary rather than primary conduct.¹⁵⁵ This distinction did not escape the notice of the *Creighton Ltd* court either, for it called attention to the fact that the arbitration exception did not affect the “contractual right” of the parties to enter arbitration.¹⁵⁶ Foreign sovereign immunity, for several reasons, affects primary conduct and therefore should not be abridged retroactively under the Court’s logic in *Landgraf*.

First, foreign sovereign immunity provides the sovereign party with the assurance that the dispute will not be litigated in a foreign court that is not institutionally competent to decide issues of the sovereign party’s domestic law.¹⁵⁷ This operates as a forum selection provision, since the only place the contract can be sued upon (presuming the U.S. courts grant immunity) is in the domestic courts of the foreign sovereign, if at all. Such provisions, and in this case the default rule of foreign sovereign immunity, can provide a powerful inducement to enter the bargain and therefore affect primary, rather than secondary, conduct.¹⁵⁸

Second, the availability of the courts of the United States to the non-sovereign party will cause a substantial adjustment in risk allocation, which will in turn alter the terms of the contract significantly.¹⁵⁹ Bargaining for fundamental terms such as price and interest rate¹⁶⁰ can only be viewed as “primary conduct.” In contrast, the procedural changes in the examples cited by the Court in *Landgraf*, which affect

¹⁵⁵ 511 US at 275.

¹⁵⁶ 181 F3d at 124.

¹⁵⁷ See, for example, *Piper Aircraft v Reyno*, 454 US 235, 251 (1981) (discussing “substantial practical problems” with courts “interpret[ing] the law of foreign jurisdictions”).

¹⁵⁸ The extent of reliance on the robustness of the applicable legal rule (absolute sovereign immunity or the enforceability of forum selection clauses) will affect the strength of this argument. See *Professional Insurance Corp v Sutherland*, 700 S2d 347, 352 (Ala 1997) (holding that forum selection clauses are now valid in the courts of Alabama, and retroactive enforcement of this ruling is permissible because the national trend is toward the enforceability of such provisions, putting the parties on notice that the Supreme Court of Alabama might change its reasoning on the question). As in *Professional Insurance*, even in the early twentieth century, the trend was towards the adoption of the restrictive theory of sovereign immunity. See Part I. Whether or not this diminishes the reliance hypothesized sufficiently to allow retroactive application without reference to the effect of foreign sovereign immunity on primary conduct is thus an open question.

¹⁵⁹ See *Original Great American Chocolate Chip Cookie Company Inc v River Valley Cookies, Ltd*, 970 F2d 273 (7th Cir 1992) (Posner), where the court stated:

The idea that favoring one side or the other in a class of contract disputes can redistribute wealth is one of the most persistent illusions of judicial power. It comes from failing to consider the full consequences of legal decisions. Courts deciding contract cases cannot durably shift the balance of advantages to the weaker side of the market; they can only make contracts more costly to that side in the future, because franchisors will demand compensation for bearing onerous terms.

Id. at 282.

¹⁶⁰ See Part III.D.

facts involving substantially "diminished reliance,"¹⁶¹ do not affect primary conduct.

D. Investors Should Not Be Given a Double Return¹⁶²

Investors in United States Treasury bonds can be reasonably assured that the United States government is extremely unlikely to repudiate those obligations. As a result, the United States can enjoy low interest rates on its Treasury notes.¹⁶³ In contrast, countries likely to undergo political or economic instability cannot avail themselves of such rock solid certainty and stability, and hence the interest rates on their bonds are significantly higher.¹⁶⁴ Today, however, investors benefit significantly from the FSIA in that if a foreign issuer defaults on its obligation, it is no longer immune from suit in the courts of the United States. Even in the case of a complete bankruptcy or debt repudiation, the foreign sovereign will likely have assets in the United States that can be attached.¹⁶⁵ This fact alone serves to drive down interest rates on bonds issued by risky foreign sovereigns.¹⁶⁶

¹⁶¹ 511 US at 275, citing *Ex parte Collett*, 337 US 55, 71 (1949) (holding that 28 USC § 1404(a) governed the transfer of an action instituted prior to the statute's enactment).

¹⁶² For background on risk and interest rates, see Brealey and Myers, *Principles of Corporate Finance* at 187–220 (cited in note 19).

¹⁶³ See *id.* at 156 (comparing yields on U.S. Treasury notes and other government bonds and showing that average annual return on U.S. Treasury notes has been significantly lower than returns from government bonds, corporate bonds, common stocks, and small-firm common stocks from 1926–97).

¹⁶⁴ See, for example, *Investors' Interest in February Treasury Bills Wanes*, Polish News Bulletin (Mar 2, 2000) (available on Lexis News; allnews file) (discussing higher interest rates in Polish Treasury bills due to macroeconomic and political instability but continuing demand from foreign investors due to their comparably high interest rates); *Russian Domestic Bond Prices Climb After Rate Cut*, Interfax News Agency (Mar 21, 2000) (available on Westlaw at 2000 WL 17230451) (discussing lowering of refinancing rate to 33 percent, an order of magnitude greater than U.S. Treasury note interest rates). One of the contributions of portfolio theory is that unsystematic risks can be diversified away by investors, and therefore there should be no risk premiums for such unsystematic risk. See Harry Markowitz, *Portfolio Selection*, 7 J Fin 77 (1952) (analyzing relationships between investors' beliefs about expected returns and portfolio choices). However, while this diversification alters the discount rate at which such investments' present values are calculated, it does not affect the expected return of the cash flows, which will be strongly impacted by a substantial risk of default, thereby increasing the interest rate that investors demand.

¹⁶⁵ For instance, after the Soviet Union repudiated its debt, U.S. citizens claimed liens on Russian property in the United States. *Carl Marks*, 665 F Supp at 327. These liens were eventually transferred to a claims fund established by the U.S. government. *Id.*

¹⁶⁶ Evidence of this should not be difficult to adduce from foreign bond prices and interest rates across 1951–52 (year of adoption of the Tate Letter), but would require a statistical analysis that is beyond the scope of this Comment. Nevertheless, elementary risk calculus would suggest that the greater certainty of a U.S. court remedy for foreign contract breaches would lower risk, which would in turn, in an efficient market, lower interest rates. See Brealey and Meyers, *Principles of Corporate Finance* at 195–203 (cited in note 19) (discussing the Capital Asset Pricing Model and the relationship between risk and return in efficient markets).

Before the Tate Letter, however, investors had no reason to believe that they could successfully hale foreign issuers into the courts of the United States.¹⁶⁷ Consequently, the risk that they would be unable to litigate claims on such notes, whether that was unity¹⁶⁸ or some smaller quantity, should, and in fact must have been, calculated into the interest rates. It defies common sense to suggest that the unavailability of U.S. courts would not factor into such a calculation for a U.S. investor, or in fact for any U.S. party to a commercial agreement with a foreign sovereign.¹⁶⁹

If this is in fact the case, then allowing the FSIA to operate retroactively to give a remedy in U.S. courts in effect gives the noteholders the benefit of their bargain twice. The noteholders will have benefited from higher interest payments during the time that the securities are paid and also from the availability, *ex post*, of a remedy in U.S. courts where none had existed before. The obverse of this is clear: the foreign issuer will have been forced to pay higher interest payments during the period it was paying the noteholders, but will also be exposed to a previously unforeseeable legal authority when in default. Allowing this double return has the effect of forcing a transaction onto the parties. If the sovereign had valued its immunity less than the plaintiff valued the right to sue in U.S. courts, then the parties would have contracted for such an outcome. Instead a court has forced this result upon them, and there can be no assurances that this will "increase net

¹⁶⁷ Plaintiffs apparently persisted in their attempts to sue sovereigns in U.S. courts, presumably on the theory that the United States would adopt the restrictive theory at some point. See, for example, *Republic of Mexico v Hoffman*, 324 US 30, 35 (1945) (holding that the Court should defer to the executive on issues of foreign sovereign immunity, which at the time resulted in *de facto* absolute foreign sovereign immunity despite the plaintiff's argument that the restrictive theory prevailed in other Western nations). See also Restatement (Second) of the Foreign Relations Law of the United States § 69 at 211–12 (discussing pre-Tate Letter attempts to haul foreign sovereigns into U.S. courts).

¹⁶⁸ A risk of unity would mean that the foreign issuer had not even consented to suit under such contracts in its own courts. This may seem strange, but it is apparently the situation in the People's Republic of China today. See Cohen and Lange, 17 NY L Sch J Intl & Comp L at 369 (cited in note 2). The market could always discipline such a foreign issuer, as default would drive future interest rates higher still.

¹⁶⁹ When negotiating the price terms of contracts, parties will assess the risk of default (or breach) and the likelihood and magnitude of recovery in the event of such breach. See Brealey and Meyers, *Principles of Corporate Finance* at 195–203 (cited in note 19) (discussing the relationship between risk and price). For the basic economic model of litigation, see Posner, *Economic Analysis of Law* at 607–15 (cited in note 19). The likelihood of recovery will be close to zero if the contract is unenforceable in any court, and will be an increasing function of the number of forums, because the plaintiff will be able to choose the forum most advantageous to him. See, for example, *Piper Aircraft v Reyno*, 454 US 235, 245–46 (1981) (Scottish plaintiffs attempt to get into U.S. court in order to take advantage of strict liability in wrongful death suit). Thus, additional forums will affect the probability of successful recovery, which will affect the calculation of the expected loss caused by a breach or default, which will affect price.

happiness . . . because the misery of the (uncompensated) losers may exceed the joy of the winners.”¹⁷⁰

CONCLUSION

Full retroactive application of the FSIA is inadvisable. Although the Supreme Court in *Landgraf* tells us that jurisdictional statutes are meant to be applied retroactively as a general matter, the retroactive application of the FSIA presents several unique problems that the Court's general instruction does not cover. Courts should decline to apply the FSIA retroactively to events before 1952 because this result is required by an analysis of congressional intent and the Court's holding in *Verlinden*. Furthermore, *Landgraf*'s general instruction on the retroactivity of jurisdictional statutes does not apply. The FSIA is no mere jurisdictional statute, but a matter of substantive law. To apply it retroactively to pre-1952 events would give plaintiffs the benefit of their bargain twice, upset the settled expectation and antecedent right of foreign sovereign immunity held by sovereign defendants, and create a forum for such suits where none had existed before, in contravention of the Court's logic in *Landgraf*.

¹⁷⁰ Posner, *Economic Analysis of Law* at 16 (cited in note 19).