NOTES

# SUPRANATIONAL DIVERSITY: WHY FEDERAL COURTS SHOULD HAVE DIVERSITY JURISDICTION OVER CASES INVOLVING SUPRANATIONAL ORGANIZATIONS LIKE THE EUROPEAN UNION

TABLE OF CONTENTS

## I. INTRODUCTION

On November 3, 2000, the European Community (EC) filed a lawsuit in a federal court in New York against a number of defendants, including RJR Nabisco, Inc. and various corporate entities of R.J. Reynolds Tobacco Company.[1] The EC, an intergovernmental organization of European states that was later subsumed into the European Union (EU),[2] alleged that RJR and others had violated the Federal Racketeer Influenced and Corrupt Organizations Act (RICO)[3] by smuggling cigarettes and laundering money.[4] Alleging that these illicit activities caused financial losses to the EU, Michaele Schreyer, a member of the European Commission, which is one of the EU's governing bodies,[5] stated that the lawsuit was "a new step in [the EU's] strategy to fight against fraud and financial irregularities."[6] The EC also sued under several state common law causes of action related to its federal claims, including fraud, public nuisance, unjust enrichment, negligence, and negligent misrepresentation.[7]

After a decade of protracted litigation, amended complaints, and dismissals, the United States District Court for the Eastern District of New York dismissed the EC's Federal RICO claims in

---

[1] Eur. Cmty. v. RJR Nabisco, Inc., No. 02-CV-5771, 2011 WL 843957, at *1 (E.D.N.Y. Mar. 8, 2011).

[2] The European Community was fully subsumed into the European Union as a result of the Treaty of Lisbon. *See infra* note 130 and accompanying text.

[3] 18 U.S.C. §§ 1961–1968 (2006).

[4] *Eur. Cmty.*, 2011 WL 843957, at *1. The EC alleged, *inter alia*, that the defendants were knowingly involved with Colombian and Russian criminal organizations that arranged illicit sales of cigarettes using laundered proceeds from narcotics trafficking. *Id.* at *2–3. The elaborate scheme also allegedly included the smuggling of cigarettes into Iraq and Colombia. *Id.* at *3. The EC alleged that these practices resulted in thirty-six injuries to it and to its member states, including lost profits from cigarette sales, damage to the EC's financial institutions, damage to member states' banks, harm to the euro, and increased costs of fighting organized crime. *See* Second Amended Complaint at 70–85, *Eur. Cmty.*, 2011 WL 843957 (No. 02-CV-5771), 2009 WL 4897429 (listing the alleged injuries).

[5] *See infra* notes 116–24 and accompanying text.

[6] Press Release, European Union, Statement by Commissioner Michaele Schreyer on Civil Action Against Two U.S. Tobacco Companies (Nov. 6, 2000), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/00/1255.

[7] Eur. Cmty. v. RJR Nabisco, Inc., 150 F. Supp. 2d 456, 460 (E.D.N.Y. 2001).

March 2011, leaving only the state-law tort claims.[8] The district court indicated that it would have subject matter jurisdiction over the remaining state-law claims only if the EC were a "foreign state" under the diversity statute. But the court reserved decision on that issue until the EC decided whether it would remain in the suit.[9] After the EC decided to remain a party, the court determined that the EC was not a foreign state and that therefore diversity was lacking.[10] Based on this determination, the court dismissed the state-law claims in May 2011 for lack of subject matter jurisdiction.[11]

Under the diversity statute, a U.S. federal court has jurisdiction over any civil action where the amount in controversy exceeds $75,000 and the suit is between "a foreign state . . . as plaintiff and citizens of a State or of different States."[12] Thus, as with suits between citizens of different states,[13] federal courts may have jurisdiction over cases between American citizens and either foreign states or citizens of foreign states. This type of jurisdiction is referred to as "alienage jurisdiction."[14] The court in *European Community* pointed out that if the EC had simply dropped out of the lawsuit, leaving only the twenty-six EC member states as plaintiffs,[15] the court would have had subject matter jurisdiction over the case because the requirements for alienage jurisdiction would have been satisfied.[16] If the EC member states had been the sole plaintiffs, alienage jurisdiction would have existed because those countries clearly qualified as foreign states under the

---

[8] *Eur. Cmty.*, 2011 WL 843957, at *8.

[9] *Id.*

[10] Eur. Cmty. v. RJR Nabisco, Inc., 814 F. Supp. 2d 189, 208 (E.D.N.Y. 2011).

[11] *Id.*

[12] 28 U.S.C. § 1332(a)(4) (2006); *see also infra* Part II.A (discussing the diversity statute in more detail).

[13] 28 U.S.C. § 1332(a)(1).

[14] The terms *alienage jurisdiction* and *diversity jurisdiction* are often used interchangeably, but it is more useful to think of them as separate grounds for jurisdiction because they are based on separate, though similar, rationales. *See infra* Part II.A (providing an overview of the history and the rationale behind alienage jurisdiction).

[15] Twenty-six EC member states were also plaintiffs in the suit. Eur. Cmty. v. RJR Nabisco, Inc., No. 02-CV-5771, 2011 WL 843957, at *1 (E.D.N.Y. Mar. 8, 2011).

[16] *Id.* at *8.

diversity statute.[17] The EC, on the other hand, did not qualify as a foreign state according to the district court even though it performed many state-like functions and eroded the sovereignty of its member states in many respects.[18] Therefore, the federal court no longer had subject matter jurisdiction over the case because neither diversity nor a claim arising under federal law existed.[19]

According to the court, the EC was "neither a 'foreign state,' a 'political subdivision of a foreign state,' nor an 'agency or instrumentality of a foreign state.' "[20] In deciding that the EC did not even qualify as an agency or instrumentality of a foreign state, the court reached what it deemed "the inescapable conclusion that the European Community really is a supranational body, truly independent of the governments of the Member States."[21] The EC was "not a subsidiary of the Member States, nor was it controlled by them in any meaningful fashion."[22]

Should the European Community have been able to remain a litigant in federal court even though its sole claims against an American corporation were based on state law? The answer hinges on the definition of foreign state. The diversity statute[23] points to the definition of foreign state as codified in the Foreign Sovereign Immunities Act of 1976 (FSIA),[24] which includes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state."[25] Accordingly, for purposes of both foreign sovereign immunity and alienage jurisdiction, the term *foreign state* can encompass an entity other than a foreign state per se.

---

[17] *Id.*

[18] *See infra* Part II.C.*1* (providing an overview of European integration).

[19] Eur. Cmty. v. RJR Nabisco, Inc., 814 F. Supp. 2d 189, 208 (E.D.N.Y. 2011).

[20] *Id.*

[21] *Id.*

[22] *Id.* For a more detailed discussion of the court's analysis, as well as how its analysis would apply to the European Union, see *infra* Part III.

[23] 28 U.S.C. § 1332(a)(4) (2006).

[24] Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.). The FSIA sets forth the procedures by which a party can sue a foreign state or its entities in U.S. courts and prescribes when a foreign state is entitled to sovereign immunity. 28 U.S.C. § 1602 (2006).

[25] 28 U.S.C. § 1603(a) (2006).

Furthermore, whether a federal court has jurisdiction over a case in which a foreign state is a party depends on whether that foreign state is a plaintiff or a defendant. The FSIA contemplates a foreign state's immunity from suit when it is a defendant, but § 1332(a)(4) refers to a foreign state as a plaintiff for the purpose of diversity.[26] If a foreign state is a defendant, the FSIA generally presumes that it is immune from suit unless one of the stated exceptions applies, such as when a foreign state has waived its immunity,[27] a claim is based upon the foreign state's commercial activity in the United States,[28] or the suit arises out of the foreign state's support of terrorism.[29] If the foreign state is not entitled to immunity, federal courts have "original jurisdiction without regard to amount in controversy of any nonjury civil action."[30] The FSIA is "the sole basis for obtaining jurisdiction over a foreign state in [federal] courts."[31] A foreign state bringing suit against an American citizen in federal court under § 1332 must meet the FSIA's definition of foreign state that is also used to determine immunity because § 1332 explicitly points to this definition.[32]

This Note argues that situations arise in which the FSIA's definition of foreign state does not adequately encompass supranational organizations like the European Community, which has been subsumed into the European Union.[33] Part II of this Note provides an overview of alienage jurisdiction, including its origins and historical justifications. Part II also discusses the modern justifications for alienage jurisdiction, which are distinct from the justifications that scholars advance for diversity jurisdiction over cases between citizens of different states. Part II then examines the law and policies behind the Foreign Sovereign

---

[26] *Compare id.* § 1602 (declaring that the purpose of the statute is to set forth principles governing foreign states' claims to immunity in U.S. courts, which can only arise when a foreign state is sued), *with id.* § 1332(a)(4) (granting U.S. courts subject matter jurisdiction over cases between a foreign state as a plaintiff and U.S. citizens as defendants).

[27] *Id.* § 1605.

[28] *Id.*

[29] *Id.* § 1605A (Supp. IV 2011).

[30] *Id.* § 1330(a).

[31] Argentine Republic v. Amerada Hess Shipping Co., 488 U.S. 428, 434 (1989).

[32] 28 U.S.C. § 1332(a)(4) (2006).

[33] *See infra* note 130 and accompanying text.

Immunities Act since that statute furnishes the definition of foreign state for alienage jurisdiction. Finally, Part II provides background on the European Union, a state-like supranational organization.

Part III begins with an analysis of the European Union as a foreign state for purposes of alienage jurisdiction. Since the district court in *European Community* analyzed the EC, which had its own legal personality apart from the EU until 2009,[34] this Note applies that court's test to the EU, a more expansive organization than the EC, to determine if the outcome of the analysis would be different. This Note concludes that a federal court would likely find that the EU does not qualify as a foreign state.

Next, given the conclusions of Part III, Part IV argues that the definition of foreign state for alienage jurisdiction purposes should be decoupled from the FSIA's definition. The definition of foreign state in § 1332(a)(4) should encompass the EU and should provide a better framework for considering other supranational organizations. This change would better effectuate the policy justifications behind alienage jurisdiction while retaining the definition of foreign state that Congress created for determining foreign sovereign immunity.[35]

## II. BACKGROUND

This part provides background on alienage jurisdiction and the Foreign Sovereign Immunities Act, which reflect policies of adjudicating cases involving foreign citizens or foreign states in federal courts, respectively. This Note then surveys the evolution of the European Union as a supranational organization.

### A. ALIENAGE JURISDICTION

Article III of the Constitution provides the basis for diversity and alienage jurisdiction: "The judicial Power shall extend to all

---

[34] *See infra* Part II.C.*2* (discussing the legal personality of the EC and the EU).

[35] Whether Congress should also amend the definition of foreign state for the purpose of foreign sovereign immunity is beyond the scope of this Note.

Cases, in Law and Equity, . . . between a State and citizens of another State, between Citizens of different states, . . . [and] between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[36] Therefore, just as the Constitution contemplates suits between citizens of different states, it also allows Congress to authorize jurisdiction over suits between American citizens and noncitizens. Some commentators have noted that while alienage and diversity jurisdiction are separate and distinct grounds for federal jurisdiction, they have often mistakenly been fused under the single banner of diversity jurisdiction.[37] Further muddling the distinction, Congress granted federal courts jurisdiction over both diversity and alienage cases in the same statute.[38] As discussed below, independent justifications exist for alienage and diversity jurisdiction.

---

[36] U.S. CONST. art. III, § 2, cl. 1.

[37] *See, e.g.*, Walter C. Hutchens, *Alienage Jurisdiction and the Problem of Stateless Corporations: What Is a Foreign State for Purposes of 28 U.S.C. § 1332(a)(2)?*, 76 WASH. U. L.Q. 1067, 1072 (1998) (noting the difference between alienage and diversity jurisdiction); 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, 4 (1996) (discussing the "academic preoccupation" with diversity jurisdiction and the lack of attention given to alienage jurisdiction).

[38] These provisions are found in 28 U.S.C. § 1332 (2006):

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> . . . .
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Section 1332(a)(1) encompasses diversity jurisdiction between citizens of different states. Some scholars have discussed alienage jurisdiction only in terms of "citizens or subjects of foreign states" in § 1332(a)(2), treating § 1332(a)(4) as a separate ground for jurisdiction. *See* Johnson, *supra* note 37, at 2 n.5 (discussing federal jurisdiction over foreign states separately from alienage jurisdiction over foreign individuals). However, this Note draws parallels between alienage jurisdiction under § 1332(a)(2) and suits between foreign states and American citizens under § 1332(a)(4), showing that the justifications for alienage jurisdiction apply to actions under § 1332(a)(4) as well. *See infra* Part II.A.*2*. Some cases have treated § 1332(a)(4) as a form of alienage jurisdiction. *See, e.g.*, Eur. Cmty. v. RJR Nabisco, Inc., 814 F. Supp. 2d 189, 195 (E.D.N.Y. 2011) (describing a case in which the court did not have *alienage* jurisdiction over Hong Kong under 1332(a)(4)).

*1. Origins and Historical Justifications.* Alienage jurisdiction has been a feature of American law since the Judiciary Act of 1789, which granted federal courts jurisdiction over suits in which "an alien is a party."[39] In fact, the Framers of the Constitution foresaw a need for alienage jurisdiction at the Constitutional Convention in 1787.[40] After the Revolutionary War, British creditors who resorted to state courts to collect debts from American debtors often encountered fierce resistance, including debtor rebellions and state debtor-relief laws.[41] This state resistance was problematic for the national government under the Articles of Confederation because the United States had agreed in the Treaty of Paris of 1783, which ended the Revolutionary War, not to enact legal obstructions to British debt-collection efforts.[42] The difficulty British creditors faced in collecting American debts raised a broader concern that the American economy would fail to attract badly needed foreign capital if foreign citizens did not have access to a fair forum to enforce American citizens' commercial obligations.[43]

Thus, by the time the Framers assembled at the Constitutional Convention, the "[d]ebate over the merits of alienage jurisdiction was not highly controversial," and four of the five plans at the Convention included alienage-jurisdiction provisions.[44] The intent behind these provisions was to remedy the broader problems of the weak national government under the Articles of Confederation, not just to assist British creditors.[45] Alexander Hamilton forcefully argued in favor of federal jurisdiction over cases involving foreign citizens:

---

[39] Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

[40] Johnson, *supra* note 37, at 6.

[41] *Id.* at 7.

[42] *Id.* at 8.

[43] *Id.*

[44] *Id.* at 10.

[45] *See* JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88, 94–95 (2002) ("This penchant of the state courts to disrupt international relations and discourage foreign investment led directly to the alienage jurisdiction provided by Article III of the Constitution."); Hutchens, *supra* note 37, at 1073 ("The Framers intended for alienage jurisdiction to promote a strong central government and healthy foreign relations.").

> [T]he federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. . . . So great a proportion of the cases in which foreigners are parties involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.[46]

Hamilton thus recognized that federal courts should handle suits involving foreign citizens because such cases implicate foreign relations, which undoubtedly involve significant "national questions."[47] The Framers feared that without a neutral national forum, states would continue to interfere with American foreign policy, cause friction with other nations, and even drag the rest of the country into war.[48]

The purpose behind providing a national forum for cases that could impact U.S. foreign relations distinguishes alienage jurisdiction from diversity jurisdiction. Both concepts are rooted in the notion that local courts favor local over nonlocal litigants, be they citizens of another state or of a foreign nation.[49] While some commentators have doubted the justifications for diversity jurisdiction between citizens of different states, the notion that a strong need for alienage jurisdiction existed at the time of the Constitutional Convention is less disputed.[50]

*2. Modern Justifications*. It is difficult to imagine that modern state courts could drag the nation into war, yet commentators provide other contemporary rationales for alienage jurisdiction.

---

[46] THE FEDERALIST NO. 80, at 536 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[47] *Id.*

[48] *See* Johnson, *supra* note 37, at 12 (describing concerns of the Framers regarding state courts' potential interference with foreign policy).

[49] *See, e.g.*, Guar. Trust Co. of N.Y. v. York, 326 U.S. 99, 111 (1945) ("Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias."); THE FEDERALIST NO. 3, *supra* note 46, at 15 (John Jay) (arguing that federal courts' decisions in cases involving foreign parties would be "more wise, systematical and judicious, than those of individual States, and consequently more satisfactory with respect to other nations").

[50] *See* Johnson, *supra* note 37, at 15 (discussing the historical record concerning the need for separate diversity and alienage jurisdiction).

One original justification continues to exist: Suits involving noncitizens in state courts implicate foreign relations, and federal courts should hear such cases to avoid the foreign "entanglements" that so concerned the Founders, which could result from a state court's adverse treatment of a foreign party.[51] More generally, foreigners in state courts may still face bias, which is harmful not only to foreign relations but also to the United States' globally connected economy.[52] Professor Kevin R. Johnson, in his analysis of the history of alienage jurisdiction, expounds on the record of nativism and bias against noncitizens in the United States.[53] He suggests that the potential influence on state and local courts of persistent bias against foreigners supports the continued existence of alienage jurisdiction.[54] Furthermore, "state governments historically have exhibited greater hostility toward 'foreigners' than the federal government."[55] In particular, Johnson emphasizes public anxiety over foreign economic activity in the United States in arguing that the economic rationales for alienage jurisdiction may be stronger today than they were when the Constitution was ratified due to globalization and growing international trade.[56] Even though the American economy has a stronger foundation today than it did in the post-Revolutionary War era, Johnson notes that in the current global economy, judicial decisions in the United States must lend weight to the interests of foreign parties, especially if American businesses expect reciprocal, fair treatment in foreign jurisdictions.[57] Therefore, providing foreign citizens and foreign states access to

---

[51] *See, e.g.*, Matimak Trading Co. v. Khalily, 118 F.3d 76, 88 (2d Cir. 1997) (Altimari, J., dissenting) (stating that a compelling reason behind alienage jurisdiction is to prevent "entanglements with foreign sovereigns"), *abrogated by* JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88 (2002).

[52] *See* Johnson, *supra* note 37, at 31 (stating that disputes in state courts involving foreign citizens could still have the negative impact on foreign policy and international trade that concerned the Framers).

[53] *Id*. at 35–43.

[54] *See id.* at 39 (noting the existence of "antiforeign views in the general public" that likely influence the state judicial system).

[55] *Id*. at 40.

[56] *Id*. at 48.

[57] *Id*. at 49.

federal courts through alienage jurisdiction remains a necessary objective.[58]

### B. THE FOREIGN SOVEREIGN IMMUNITIES ACT

Foreign sovereign immunity in the United States dates back to *Schooner Exchange v. McFaddon*, in which Chief Justice John Marshall turned to international law and the "necessarily exclusive and absolute" nature of a country's jurisdiction to determine that the United States did not have jurisdiction over a French naval vessel.[59] He observed that this characteristic of absolute territorial jurisdiction, which belongs to every nation, would not seem to encompass subjecting other sovereigns to a state's territorial jurisdiction.[60] Furthermore, cases involving foreign sovereigns implicate issues that "are . . . questions of policy [rather] than of law, that . . . are for diplomatic, rather than legal discussion."[61] For years U.S. courts applied as common law the "absolute theory" of foreign sovereign immunity, which granted foreign states immunity based on both their governmental and commercial actions.[62] By the twentieth century, numerous countries began to adopt the "restrictive theory" of foreign sovereign immunity, which granted foreign states immunity with respect to their governmental activities alone.[63] In practice, American courts deferred to the Executive Branch's assessment of whether a country or its agency or instrumentality was entitled to sovereign immunity.[64] This deference meant that the State Department had to analyze the activities at issue and decide whether those acts were "sovereign," an essentially judicial function that the Executive Branch had to perform under

---

[58] For Professor Johnson's analysis of the advantages for foreign litigants in a federal forum as compared to a state forum, see *id*. at 49–52.

[59] 11 U.S. (7 Cranch) 116, 136, 147 (1812).

[60] *Id.* at 137.

[61] *Id.* at 146.

[62] *See* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 232 (5th ed. 2011) (describing the history of foreign sovereign immunity in the United States).

[63] *Id*. at 233.

[64] *Id*.

international and domestic political pressure.[65] Consequently, because American courts were constrained by the State Department's conclusions, they incoherently applied foreign sovereign immunity over the next few decades.[66]

Congress finally addressed this inconsistency by enacting the Foreign Sovereign Immunities Act of 1976[67] to codify the restrictive theory of foreign sovereign immunity.[68] Under the FSIA, foreign states, as well as their agencies and instrumentalities, are presumptively immune from suit[69] unless the case involves activity by a foreign state that falls under one of the stated exceptions, such as carrying on commercial activity in the United States[70] or committing an act of or providing material support for terrorism.[71] The FSIA also shifted the responsibility for deciding foreign sovereign immunity from the Executive Branch to the federal courts.[72] In addition to outlining a scheme for determining immunity, Congress coupled the definition of foreign state under the FSIA with the definition of foreign state in § 1332(a)(4), which determines subject matter jurisdiction over cases between a foreign state as a plaintiff and a U.S. citizen as a defendant.[73]

*1. Definitions of Foreign State.* The FSIA provides several definitions of foreign state, considered below, for both immunity and alienage jurisdiction purposes.[74]

---

[65] *Id.* at 233–34.

[66] *Id.*

[67] Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.).

[68] Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983) ("[T]he Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity.").

[69] 28 U.S.C. § 1604 (2006).

[70] *Id.* § 1605(a)(2).

[71] *Id.* § 1605A (Supp. IV 2011).

[72] *See id.* § 1602 (2006) ("Claims of foreign states to immunity should henceforth be decided by courts of the United States . . . .").

[73] *See id.* § 1332(a)(4) (pointing to § 1603(a) for the definition of foreign state).

[74] The relevant text of 28 U.S.C. § 1603, which provides these definitions, reads:

> (a) A "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign

*a. "Foreign State Proper" and Its Political Subdivisions.* The FSIA's primary category of foreign state under 28 U.S.C. § 1603 is that of a "foreign state proper," which encompasses "a body politic that governs a particular territory."[75] The Supreme Court has noted that the meaning of foreign state under the FSIA is actually broader than this basic definition because the statute also includes a foreign state's political subdivisions, agencies, and instrumentalities.[76] Generally, political subdivisions of foreign states include the governmental units under the central government, such as ministries of trade, culture, and finance.[77] The court in *European Community* concluded that the plain meaning of political subdivision "appears to exclude supranational, treaty-based organizations" like the EC and the EU.[78]

*b. "Agency or Instrumentality" of a Foreign State.* The definition of foreign state under the FSIA also encompasses a foreign state's agencies and instrumentalities.[79] An "agency or instrumentality" is defined as a separate legal person which is an "organ of a foreign state" or a majority state-owned corporation.[80] These bodies can take the form of administrative agencies, geographic subdivisions, and corporations that may have "varying degrees of functional and legal separation from the foreign state that creates them."[81] This part of the statute presents several

---

state or political subdivision thereof, and
(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

[75] Samantar v. Yousuf, 130 S. Ct. 2278, 2286 (2010); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) ("[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.").

[76] *Samantar*, 130 S. Ct. at 2286.

[77] *See* Garb v. Republic of Poland, 440 F.3d 579, 596–97 n.21 (2d Cir. 2006) (explaining the authority supporting this interpretation of the meaning of political subdivision).

[78] Eur. Cmty. v. RJR Nabisco, Inc., 814 F. Supp. 2d 189, 200 (E.D.N.Y. 2011).

[79] 28 U.S.C. § 1603(a).

[80] *Id*. § 1603(b).

[81] BORN & RUTLEDGE, *supra* note 62, at 251.

interpretive problems that the courts have grappled with since 1976.[82]

The Supreme Court has settled some of these issues, such as whether a company can be an agency or instrumentality of a foreign state when the foreign state itself does not directly own shares of a subsidiary but owns a majority of the shares of the corporate parent.[83] In *Dole Food Co. v. Patrickson*, the Court held that "only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement, and thus indirect subsidiaries do not qualify as agencies or instrumentalities of foreign states."[84] Another issue is whether courts can read "a foreign state" as including multiple foreign states by applying "share pooling" so that a corporation that is majority-owned by multiple foreign states may be considered an agency or instrumentality of each foreign state even though no single foreign state is the majority shareholder. The district court in *European Community* discussed this issue,[85] and following the reasoning in other cases, concluded that "an entity established by multiple foreign states can, in principle, be an 'organ of a foreign state' under the FSIA."[86] The cases cited by the court in *European Community* illustrate this principle.

For instance, in *LeDonne v. Gulf Air, Inc.*, the district court held that a corporation owned by four foreign states in equal shares qualified as an agency or instrumentality of a foreign state and that holding otherwise would ignore "the well-established international practice of states acting jointly through treaty-created entities for public or sovereign purposes."[87] As the court in

---

[82] *See id*. at 253 (discussing the interpretive problems with the definition of agency and instrumentality, such as whether certain entities are foreign states proper or organs of foreign states, and the role that the Executive Branch should play in determining foreign-state status).

[83] *See* Dole Food Co. v. Patrickson, 538 U.S. 468, 471 (2003) (deciding the question of whether indirect subsidiaries qualify as instrumentalities of foreign states).

[84] *Id*. at 474.

[85] *See* Eur. Cmty. v. RJR Nabisco, Inc., 814 F. Supp. 2d 189, 201 (E.D.N.Y. 2011) (discussing cases applying the share pooling concept to the definition of agency or instrumentality of a foreign state under the FSIA).

[86] *Id*. at 202.

[87] 700 F. Supp. 1400, 1406 (E.D. Va. 1988).

*European Community* explained, other jurisdictions have adopted the *LeDonne* rationale in cases involving an entity owned by multiple foreign states.[88] One of those courts concluded that the European Organisation for the Safety of Air Navigation (Eurocontrol) was an agency or instrumentality of a foreign state when it had been created by fifteen European countries and performed a governmental function that each party to the organization would otherwise perform on its own.[89] Thus, although Eurocontrol was not an agency or instrumentality of any single European state, it still qualified for foreign sovereign immunity under the FSIA as an agency or instrumentality of multiple foreign states.[90]

While some issues regarding the interpretation of the agency or instrumentality definition of foreign state under the FSIA have been resolved, others have yet to be settled.[91] For example, courts are still grappling with the meaning of "organ of a foreign state," a key issue that factored into the court's analysis in *European Community*.[92] Another undetermined issue is the extent to which the Executive Branch should be involved in the adjudication of whether an entity is a foreign state under the FSIA.[93]

---

[88] *See Eur. Cmty.*, 814 F. Supp. 2d at 201–02 (discussing cases following the reasoning in *LeDonne*).

[89] *See* EAL Corp. v. Eur. Org. for the Safety of Air Navigation, No. 93-578-SLR, 1994 WL 828320, at *4 (D. Del. Aug. 3, 1994) (describing Eurocontrol's functions and concluding that it is a foreign state under the FSIA).

[90] *See id.* (recognizing that while the regulation of aviation is "typically performed by a single governmental agency operating within its own national borders, European geography makes that approach impractical," and thus the formation of Eurocontrol by multiple states constituted an agency or instrumentality of those states).

[91] *See* BORN & RUTLEDGE, *supra* note 62, at 253 (listing some of the unresolved interpretive questions about the definition of foreign state under the FSIA).

[92] *See Eur. Cmty.*, 814 F. Supp. 2d at 207–08 (weighing the factors that the court considered in its analysis and concluding that the EC is not an organ of the EC member states).

[93] *Compare* Matimak Trading Co. v. Khalily, 118 F.3d 76, 79–81 (2d Cir. 1997) (discussing cases supporting judicial deference to the Executive Branch's recognition of a foreign state), *abrogated by* JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88 (2002), *with Eur. Cmty.*, 814 F. Supp. 2d at 195 (stating that the Supreme Court has cast doubt on the need for recognition of a foreign state by the Executive Branch for the purposes of the FSIA).

Although the FSIA helped clarify the law of foreign sovereign immunity in the United States, the statute and case law since 1976 have not definitively resolved some of these issues surrounding foreign sovereign immunity, particularly in regard to the various definitions of foreign state in 28 U.S.C. § 1603.[94] How the courts construe these definitions not only affects the application of foreign sovereign immunity in suits against foreign states in U.S. courts but also the determination of which entities are able to bring suit in federal court under the diversity statute.[95] Interestingly, this link between the immunity and diversity statutes means that the definitions of foreign state for diversity purposes come from a statute that mostly contemplates policies behind foreign sovereign immunity, which are distinct from the policies behind allowing foreign entities access to federal courts as plaintiffs.[96]

### C. THE EUROPEAN UNION

*1. History of the European Union.* For hundreds of years, European history was bloody and fraught with conflict that culminated in two world wars that resulted in the deaths of millions of people in Europe and around the world.[97] With this bloody history in mind, many European leaders longed to strengthen the relationships among European states by increasing interdependence in a way that would discourage future conflict.[98]

---

[94] *See generally* Samantar v. Yousuf, 130 S. Ct. 2278 (2010) (addressing whether a government official can qualify as an agency or instrumentality under the FSIA); Michael A. Granne, *Defining "Organ of a Foreign State" Under the Foreign Sovereign Immunities Act of 1976*, 42 U.C. DAVIS L. REV. 1 (2008) (discussing the problems with identifying an organ of a foreign state under the FSIA).

[95] *See* 28 U.S.C. § 1332(a)(4) (2006) (referencing 28 U.S.C. § 1603(a) for the definition of foreign state to determine alienage jurisdiction over a case in which a foreign entity is a plaintiff).

[96] *See supra* Part II.A (explaining the historical and modern justifications for alienage jurisdiction).

[97] *See* DESMOND DINAN, EVER CLOSER UNION: AN INTRODUCTION TO EUROPEAN INTEGRATION 11 (4th ed. 2010) (describing the push for European integration after World Wars I and II).

[98] *See, e.g.*, Winston S. Churchill, The Tragedy of Europe, Address at Zurich University (Sept. 19, 1946), *in* 7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897–1963 (Robert

The first manifestation of this dream was the European Coal and Steel Community (ECSC), an entity that sought to unite the important industries that countries, particularly France and Germany, needed to wage war.[99] This first step toward economic integration included France, Germany, Italy, Belgium, the Netherlands, and Luxembourg.[100]

Over the next few decades, the experiment of European integration slowly culminated in the European Union as it is known today. The ECSC laid the foundation for the European Economic Community (EEC), which the ECSC member states established by treaty in 1957.[101] This treaty envisioned Europe with a single integrated economy, and by 1968 the EEC created a customs union.[102] Finally, in 1986, the Single European Act declared the ambitious goal of establishing a single internal market without any trade or customs restrictions by 1992.[103] The EEC sought to achieve this end through the removal of physical, technical, and fiscal barriers to market integration.[104] While these objectives have realized uneven success,[105] the overall effort has pushed the European member states to an unprecedented level of economic integration. For example, in 1999 many European countries abandoned their own currencies in favor of the euro.[106]

---

Rhodes James ed., 1974), *reprinted in* THE EUROPEAN UNION: READINGS ON THE THEORY AND PRACTICE OF EUROPEAN INTEGRATION 7, 11 (Brent F. Nelsen & Alexander Stubb eds., 3d ed. 2003) [hereinafter EUROPEAN UNION READINGS] ("[W]e must re-create the European family in a regional structure called, it may be, the United States of Europe.").

[99] *See* Robert Schuman, French Foreign Minister, The Schuman Declaration (May 9, 1950), *in* EUROPE—A FRESH START: THE SCHUMAN DECLARATION, 1950–1990 (1990), *reprinted in* EUROPEAN UNION READINGS, *supra* note 98, at 13, 14 ("The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war . . . .").

[100] DINAN, *supra* note 97, at 18.

[101] *See id.* at 25–26 (discussing how the EEC evolved out of the ECSC).

[102] *Id.* at 37.

[103] *See id.* at 81–82 (describing the negotiations related to the Single European Act and the goal of an internal market).

[104] *Id.*

[105] *See id.* at 82–83 (observing that despite the Single European Act's varied reception by the European Community, the Act had far-reaching, positive implications for the EC).

[106] *Id.* at 359.

This was a remarkable development because states rarely surrender their sovereignty over monetary policy and join a common currency except "in exceptional circumstances."[107] For the eurozone, these "circumstances included a high level of economic integration, the intensifying pressure of globalization, and the geopolitical upheavals in the aftermath of the Cold War."[108]

The development of a single integrated market was itself a significant accomplishment "requir[ing] a high degree of trust, political will, and administrative capacity on the part of the participating countries."[109] Such a feat is challenging even for a single nation like the United States, which only developed a fully integrated market in the early twentieth century.[110] The EU's single market spanning national borders is unique and more extensive than common free-trade agreements, which are often narrower in scope.[111]

The project of European integration continued under the Treaty of Maastricht, which entered into force in 1993 and enacted significant institutional changes that created the European Union.[112] Notably, three previously distinct institutions—the European Coal and Steel Community, the European Economic Community, and the European Atomic Energy Community—collectively became one "pillar" of the European Union known as the European Community,[113] the entity that later sued RJR Nabisco.[114] The European Union under this treaty was a more comprehensive institution envisioning integration in the areas of common foreign and security policy and cooperation among police and judicial bodies in addition to advancing the EU's internal

---

[107] *Id*

[108] *Id.*

[109] *Id.* at 360.

[110] *Id.*

[111] *See id.* (comparing the EU to the North American Free Trade Agreement).

[112] Stephen C. Sieberson, *Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity Under the Treaty of Lisbon*, 50 VA. J. INT'L L. 919, 947 (2010).

[113] Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1622–24 (2002) (describing the supranational institutions that became components of the EU under the Maastricht Treaty).

[114] *See supra* notes 1–7 and accompanying text.

market.[115] Moving beyond the economic and industrial responsibilities of the EC, the Treaty of Maastricht established a framework to allow EU member states to cooperate on domestic issues while working toward a unified international voice.

Currently, four of the main institutions in the European Union are the Council of Ministers, the European Commission, the European Parliament, and the European Court of Justice.[116] The legislative functions are split between the Council of Ministers, the Commission, and the Parliament.[117] The Council of Ministers is made up of one representative from each member state[118] and is the "senior legislative body" of the EU, even though it lacks the ability to introduce legislation.[119] This power instead belongs to the Commission,[120] which also primarily acts as the EU's executive and manages its daily functions.[121] Commissioners are appointed by the Council,[122] with one representative from each member state,[123] and act independently of any government or political party.[124] The European Parliament in turn approves most legislation by a majority vote, and European citizens directly elect its members.[125] The European Court of Justice serves as "the final authority in the interpretation of the Treaties and EU law and in determining the legality of the activities of the other Union institutions."[126] Judges' independence must be "beyond doubt,"

---

[115] *See* Sieberson, *supra* note 112, at 947 (explaining the additional areas of cooperation added to the EU's focus under the Maastricht Treaty).

[116] *See* Stephen C. Sieberson, *Did Symbolism Sink the Constitution? Reflections on the European Union's State-Like Attributes*, 14 U.C. DAVIS J. INT'L L. & POL'Y 1, 25–26, 45 (2007) (providing an overview of the EU's institutions).

[117] *See id.* at 25, 45 (noting that the Council "acts as the senior legislative body of the EU," although the Commission "has the primary right to initiate EU legislation," and that the European Parliament "serves as the second legislative chamber").

[118] *Id.* at 25.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *See* Consolidated Version of the Treaty on European Union art. 17(7), Mar. 30, 2010, 2010 O.J. (C 83) 26 [hereinafter TEU] (describing the procedures for selecting members of the Commission).

[123] *Id.* art. 17(4).

[124] *Id.* art. 17(3).

[125] Sieberson, *supra* note 116, at 45.

[126] *Id.* at 25.

and they are appointed by the governments of the member states for six-year terms.[127]

*2. Legal Personality of the European Union.* The EU lacked a legal personality even after the extensive changes under the Maastricht Treaty.[128] The EC, on the other hand, had a legal personality under its foundational treaty, which permitted it to negotiate international agreements and bind the EC.[129] In 2009, the Treaty of Lisbon fully merged the European Community into the European Union[130] and conferred upon the EU its own legal personality, simply declaring that "[t]he Union shall have legal personality."[131] Thus, the legal personality that the EC enjoyed exclusively prior to the Treaty of Lisbon is now vested in the EU. This legal personality includes both (1) an ability on an international level to enter into agreements with other countries or international organizations and (2) a private law personality, which EU treaties refer to as a "legal capacity," that permits the EU to be a party in private legal matters.[132] Possessing such a personality is important for an organization aiming to politically and economically integrate Europe because otherwise, "every step taken by the Union might arguably depend for its validity on an endorsement or ratification by a different entity that enjoy[s] legal personality—likely one of the Member State governments."[133] Furthermore, if the EU lacked this "state-like legal status," it "would be a more nebulous organization, always at risk of being questioned as to the firmness of its commitments."[134] The EU's legal personality after the Treaty of Lisbon grants the Union's

---

[127] TEU art. 19(2).

[128] *See* Sieberson, *supra* note 116, at 17 (discussing the EU's lack of legal personality before the Treaty of Lisbon).

[129] *See id.* (contrasting the legal personalities of the EC and the EU before the Treaty of Lisbon).

[130] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 1(2), Dec. 13, 2007, 2007 O.J. (C 306) 1 ("The [European] Union shall replace and succeed the European Community.").

[131] *Id.* art. 1(55).

[132] *See* Sieberson, *supra* note 116, at 18–19 (describing the EU's legal capacity under the Treaty of Lisbon).

[133] *Id.* at 20.

[134] *Id.*

institutions robust power, enabling the EU to act more like a sovereign state than it ever could before.

## III. THE EUROPEAN UNION AS A FOREIGN STATE UNDER THE FSIA

The district court in *European Community* analyzed whether the EC was a foreign state even though it no longer operated as an independent organization because it had been subsumed into the EU. What mattered for the purpose of diversity was the status of the parties at the time the complaint was filed.[135] This Note now analyzes whether the European Union is a foreign state under the FSIA's definition, which encompasses not only a foreign state proper but also "a political subdivision of a foreign state or an agency or instrumentality of a foreign state."[136] Even though the EU is a more expansive authority than the EC and has more state-like attributes, the outcome of the test that the district court used in *European Community* would likely be the same for the European Union because as discussed below, the EU does not meet the definition of foreign state.

The district court rejected the EC's status as a foreign state under each of the possible definitions. This Note discusses each possible definition of foreign state in the context of the European Union, focusing primarily on the definitions of (1) foreign state proper and (2) agency or instrumentality of a foreign state. The Note then concludes that a court would likely hold that the European Union could not properly be considered a foreign state under any of these statutory definitions.

### A. THE EUROPEAN UNION IS NOT A FOREIGN STATE PROPER

The district court in *European Community* had no trouble deciding that the EC was not a foreign state proper. In so deciding, the court looked to *Matimak Trading Co. v. Khalily*, in which the Second Circuit held that a Hong Kong corporation suing New York defendants in federal court did not qualify as a citizen

---

[135] Eur. Cmty. v. RJR Nabisco, Inc., 814 F. Supp. 2d 189, 194 (E.D.N.Y. 2011).
[136] 28 U.S.C. § 1603(a) (2006).

or subject of a foreign state for the purpose of alienage jurisdiction under § 1332(a)(2).[137] The court there reasoned that Hong Kong was not a foreign state because the State Department did not afford de jure or de facto recognition to it as an independent sovereign, either one of which was required for Hong Kong to be deemed a foreign state under the FSIA.[138] The court noted the usual deference shown to the Executive Branch in matters regarding foreign policy, including in the context of alienage jurisdiction.[139] According to the court, "[i]t is beyond cavil that '[w]ho is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges.' "[140] The Executive extends de jure recognition to a country when that country is "recognized by the United States as 'a free and independent sovereign.' "[141] A state may also have de facto recognition if the Executive Branch treats it as an independent sovereign without formally recognizing it as such.[142] Hong Kong was not a foreign state because the Executive did not formally recognize Hong Kong as an independent sovereign,[143] and neither federal policy acts nor State Department communications evidenced de facto treatment of Hong Kong as independent.[144] Because the Second Circuit concluded that Hong

---

[137] 118 F.3d 76, 78 (2d Cir. 1997), *abrogated by* JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88 (2002). In narrowly abrogating *Matimak*, the Supreme Court specifically reserved decision on whether "a foreign state must be diplomatically recognized by our own Government to qualify as such under the jurisdictional statute." *JPMorgan Chase Bank*, 536 U.S. at 92. Therefore, a court could still consider whether the U.S. government has de facto recognized a foreign state even if it has not done so formally.

[138] *Matimak*, 118 F.3d at 80–82.

[139] *See id.* at 81 (collecting cases).

[140] *Id.* at 80 (quoting Jones v. United States, 137 U.S. 202, 212 (1890)).

[141] *Id.* (quoting Iran Handicraft & Carpet Exp. Ctr. v. Marjan Int'l Corp., 655 F. Supp. 1275, 1278 (S.D.N.Y. 1987)) (internal quotation mark omitted).

[142] *See id.* (noting that the de facto test relies primarily on whether the Executive treats the entity as an "independent sovereign nation" (quoting *Iran Handicraft*, 655 F. Supp. at 1278 (internal quotation marks omitted))).

[143] *See id.* (noting that the parties did not dispute that Hong Kong lacked formal U.S. recognition as an independent sovereign).

[144] *See id.* at 81–82 (analyzing the Executive Branch's stance toward Hong Kong and concluding that it did not amount to de facto recognition).

Kong was not a foreign state proper, the Hong Kong corporation was not a citizen or subject of a foreign state under § 1332(a)(2). It was instead essentially a "stateless person" and thus could not sue a U.S. party under alienage jurisdiction.[145]

By applying *Matimak*'s reasoning, the *European Community* court concluded that the EC had been afforded neither form of recognition.[146] The court looked to the State Department's formal list of foreign states for guidance[147] and found that the EC was not listed at the time the complaint was filed, meaning that the State Department did not consider the EC a de jure foreign state.[148] Turning to de facto recognition, the district court first examined a letter from the State Department and concluded that it failed to address the EC's de facto status as a foreign state.[149] The court then considered a 1972 Executive Order that afforded diplomatic privileges to the Mission of the Commission of the European Communities to the United States.[150] The court noted, however, that extending diplomatic privileges to an entity does not amount to de facto recognition of its sovereignty because "Congress has authorized the President to grant diplomatic immunity to numerous entities, none of which could possibly be construed as sovereignty [sic] entities in their own right."[151] The court was therefore unconvinced that the United States recognized the EC as a de jure or de facto sovereign state.[152]

Similarly, the European Union is not a foreign state proper under the *Matimak* analysis. Like the EC, the EU is not recognized as a de jure independent sovereign because the State Department does not include the EU among its list of independent

---

[145] *Id.* at 86.

[146] Eur. Cmty. v. RJR Nabisco, Inc., 814 F. Supp. 2d 189, 197 (E.D.N.Y. 2011).

[147] *See id.* at 196 (discussing other courts' consultation of the list for guidance regarding foreign statehood).

[148] *Id.*

[149] *Id.* at 197.

[150] *Id.*

[151] *Id.* Such entities include the African Union Mission, the International Committee of the Red Cross, and the International Development Law Institute. *Id.* (citing 22 U.S.C. §§ 288f-2, 288f-3, 288j (2006)).

[152] *Id.*

states.[153] And the United States has not extended de jure recognition to the EU most likely because the Executive has not decided to treat the EU as an informally recognized independent sovereign. The United States continues to formally recognize each of the EU's member states,[154] and the Executive has given no indication that it intends to recognize the independent sovereignty of the EU instead of the sovereignty of each member state. The United States maintains a Mission to the European Union,[155] but the grant of diplomatic privileges does not amount to de facto recognition, as evidenced by the fact that the United States also has missions to the United Nations (UN) and a host of other international organizations that it does not recognize as sovereign states.[156]

The Supreme Court has since indicated that the *Matimak* court's deference to the Executive may not have been warranted because Congress passed the FSIA with the intent of eliminating the State Department's role in immunity cases, a move that the State Department supported.[157] Since the passage of the FSIA in 1976, the Executive has not played a role in determining the immunity of foreign states or in deciding what constitutes a foreign state for immunity purposes.[158] The *European Community* court noted that the Supreme Court, however, has not addressed whether the Executive must diplomatically recognize a foreign state in the context of alienage jurisdiction.[159] As an alternative

---

[153] *See* BUREAU OF INTELLIGENCE & RESEARCH, U.S. DEP'T OF STATE, INDEPENDENT STATES IN THE WORLD (2012), *available at* http://www.state.gov/s/inr/rls/4250.htm (listing no international organizations as foreign states).

[154] *See id.* (including each of the member states of the EU as independent states).

[155] *See generally About Us*, UNITED STATES MISSION TO THE EUROPEAN UNION, http://useu.usmission.gov/about-us.html (last visited May 21, 2012) (providing an overview of the United States Mission to the European Union).

[156] *See generally IO's Diplomatic Missions*, U.S. DEP'T OF STATE, http://www.state.gov/p/io/c44629.htm (last visited May 21, 2012) (describing the United States' different missions to the UN and other international organizations).

[157] *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2291 n.19 (2010) ("The [State] Department sought and supported the elimination of its role with respect to claims against foreign states and their agencies or instrumentalities.").

[158] *See* 28 U.S.C. § 1602 (2006) ("Claims of foreign states to immunity should henceforth be decided by courts of the United States . . . .").

[159] Eur. Cmty. v. RJR Nabisco, Inc., 814 F. Supp. 2d 189, 195 (E.D.N.Y. 2011).

course of analysis, the court analyzed whether the EC was a foreign state under the principles in *Samantar v. Yousuf*, in which the Supreme Court stated that "[t]he term 'foreign state' on its face indicates a body politic that governs a particular territory."[160]

The *Samantar* definition is the classic definition of foreign state proper and is virtually identical to the definition of "state" in the Restatement (Second) of Foreign Relations Law of the United States (Restatement), which defines a state as "an entity that has a defined territory and population under the control of a government and that engages in foreign relations."[161] The EC did not fit this characterization of foreign state because it was unclear if the EC fully exercised governmental authority over its member states, which "were still able, independent of their inclusion in the European Community, to receive ambassadors, sign treaties, and wage war."[162] Therefore, the EC was not a foreign state proper even though it engaged in foreign relations and had a defined territory and population.

Likewise, the European Union is not a foreign state proper under the reasoning in *Samantar*. The EU, however, comes closer to possessing the characteristics of a foreign state than the EC did in *European Community*. The EU, like the EC, necessarily has a defined territory and population since it comprises member states. But unlike the EC, which "did nothing to abrogate the powers of international sovereignty of its member states,"[163] the EU strives to do just that with its pillar of common foreign and security policy.[164] Despite the EU's efforts to present a united European diplomatic front, the friction over NATO intervention in Libya[165] and the division among European states over recognition of

---

[160] *Samantar*, 130 S. Ct. at 2286.

[161] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 4 (1965).

[162] *Eur. Cmty.*, 814 F. Supp. 2d at 198.

[163] *Id.*

[164] *See supra* notes 112–15 and accompanying text.

[165] *See, e.g.*, Steven Erlanger & Judy Dempsey, *In Tending Its Interests, Germany Steps Away from European Unity*, N.Y. TIMES, Mar. 24, 2011, at A14 (discussing Germany's break with Britain and France in its abstention from a UN Security Council Resolution authorizing military action to protect Libyan civilians).

Palestinian statehood[166] attest to the difficulty of coordinating a truly unified European foreign policy. Each nation retains full control of its own military and makes its own decisions regarding funding and deployment of military forces.[167] Thus, even though EU member states have ceded some of their sovereignty over domestic matters and even over international relations, the Union itself is not considered an independent state because each member state "retains an independent capacity to engage in foreign relations and to assume separate responsibility for its acts."[168] According to the Restatement, a state may delegate some of its functions to another entity without losing all of its sovereignty, but if the delegation is so extensive that it amounts to "a surrender of all state functions," then the state may cease to be a state.[169] Because EU member states have not fully surrendered their capacity to engage in foreign policy and have not delegated all of their state functions to the EU, the EU is not a foreign state proper under the guidelines in *Samantar* and in the Restatement.[170] Even if an entity does not qualify as a foreign state proper, it may nevertheless qualify as a foreign state if it is a political subdivision, agency, or instrumentality of a foreign state.[171]

### B. THE EUROPEAN UNION IS NOT A POLITICAL SUBDIVISION OF A FOREIGN STATE

A political subdivision of a foreign state "includes all governmental units beneath the central government, including

---

[166] *See, e.g.*, Justyna Pawlak & Gabriela Baczynska, *EU States Divided on Palestinian Statehood Bid*, REUTERS, Sept. 2, 2011, *available at* http://www.reuters.com/article/2011/09/02/us-eu-palestinians-idUSTRE7816AJ20110902 (discussing the EU member states' diverging views regarding Palestinian membership in the United Nations).

[167] *See* DINAN, *supra* note 97, at 546 ("National sovereignty remains a formidable barrier to the development of a truly common foreign policy, let alone a common defense policy or a common army.").

[168] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 4 cmt. c (1965).

[169] *Id*. § 4 cmt. d.

[170] *See supra* note 75 and accompanying text (describing both guidelines).

[171] 28 U.S.C. § 1603(a) (2006).

local governments."[172] This term does not encompass a supranational structure like the European Union. For example, the district court in *European Community* stated that the term "seem[ed] to inaccurately describe the European Community's relationship with the member states."[173] The term *political subdivision* simply refers to units beneath a national government, not units above it, and by definition "appears to exclude supranational, treaty-based organizations."[174] As with the European Community, the term *political subdivision* does not accurately reflect the relationship that the EU has with its member states. The member states have certainly ceded some functions and authority to the EU, but this delegation has flowed upward to a supranational body rather than downward to a unit beneath the individual national governments of the member states. Therefore, the EU does not qualify as a foreign state under the political subdivision definition.

### C. THE EUROPEAN UNION IS NOT AN AGENCY OR INSTRUMENTALITY OF A FOREIGN STATE

An entity must meet three requirements to qualify as an agency or instrumentality of a foreign state: (1) It must be a separate legal person; (2) it must be an organ of a foreign state or a political subdivision thereof, or a majority of its shares or other ownership interest must be owned by a foreign state or a political subdivision of a foreign state; and (3) it must not be a citizen of the United States or be created under the laws of any third country.[175] Just as the EC was found to be a separate legal person,[176] the EU also satisfies this requirement because it has a legal personality.[177] Furthermore, the EC was not created under the laws of any third

---

[172] H.R. REP. NO. 94-1487, at 15 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613.
[173] Eur. Cmty. v. Nabisco, Inc., 814 F. Supp. 2d 189, 200 (E.D.N.Y. 2011).
[174] *Id.*
[175] 28 U.S.C. § 1603(b).
[176] *Eur. Cmty.*, 814 F. Supp. 2d at 200.
[177] *See supra* Part II.C.*2*.

country because courts view treaty-based organizations as being created under the laws of the "owner nations."[178]

The organ prong of the agency or instrumentality test is the most problematic prong for the EC and the EU. As a threshold matter, the district court in *European Community* explored whether the FSIA applied if an entity was an organ of multiple foreign states rather than a single foreign state.[179] The language in the statute refers to a single foreign state, but the court concluded that this language did not preclude an entity from being an organ of multiple foreign states under the line of cases applying the concept of share pooling in the context of the FSIA.[180] The *LeDonne* court, for example, stated that the FSIA must apply to "treaty-created instrumentalities jointly owned by foreign states" to fully satisfy the FSIA's policies.[181] Pursuant to this case law, the fact that the EU is a treaty-based organization comprising multiple states would not preclude it from being classified as an organ of a foreign state.

The *European Community* court, like most courts, applied the *Filler v. Hanvit Bank* balancing test to decide the organ prong.[182] This test instructs courts to weigh:

> (1) whether the foreign state created the entity for a national purpose;
>
> (2) whether the foreign state actively supervises the entity;
>
> (3) whether the foreign state requires the hiring of public employees and pays their salaries;
>
> (4) whether the entity holds exclusive rights to some right in the [foreign] country; and

---

[178] *Eur. Cmty.*, 814 F. Supp. 2d at 208 (quoting LeDonne v. Gulf Air, Inc., 700 F. Supp. 1400, 1406 (E.D. Va. 1988)).

[179] *Id.* at 201.

[180] *Id.* at 202; *see also supra* notes 87–90 and accompanying text (discussing the *LeDonne* case and its application to cases involving organs of multiple foreign states).

[181] *LeDonne*, 700 F. Supp. at 1406.

[182] Some scholars have criticized the courts' organ-prong tests. For example, the factors may not properly take into account Congress's intent behind the FSIA. *See generally* Granne, *supra* note 94, at 20–31 (describing the failure of current case law to take into account the policies behind the FSIA in fashioning balancing tests for the organ prong).

> (5) how the entity is treated under foreign state law.[183]

The district court in *European Community* analyzed each of these *Filler* factors before it ultimately concluded that the EC was not an organ of a foreign state.[184] This Note, in turn, considers these factors and how they apply to the European Union.

*1. National Purpose.* The *European Community* court stated that being created for a national purpose means that the entity fulfills "a quintessential government purpose, such as the preservation of countries' financial industries."[185] Under this definition, the EU was clearly created for a national purpose. The Maastricht Treaty, which created the EU, set forth objectives such as establishing economic and monetary union, implementing a common foreign and security policy, and cooperating on justice and home affairs.[186] These functions are of the kind that fall under a national purpose, so this factor weighs in favor of considering the EU an organ of its member states.

*2. Supervision.* This factor examines the extent to which the EU member states "regulate the entity or direct the entity's appointments or official acts."[187] Just as the EC's member states did not actively supervise the EC,[188] the EU's member states do not exert enough control over the EU to categorize the EU as an organ of its member states. For example, while the member states each appoint an official to the Commission, this power is not unlimited. Once a commissioner is appointed, the member state may not recall the commissioner, even if there is a change in power in that state.[189] The Commission is also accountable to the European Parliament, which can sack the entire Commission by a

---

[183] Filler v. Hanvit Bank, 378 F.3d 213, 217 (2d Cir. 2004) (quoting Kelly v. Syria Shell Petroleum Dev. D.V., 213 F.3d 841, 846–47 (5th Cir. 2000)).

[184] *Eur. Cmty.*, 814 F. Supp. 2d at 208.

[185] *Id.* at 202 (internal quotation mark omitted).

[186] Treaty on European Union title I(B), Feb. 7, 1992, 1992 O.J. (C 191) 1.

[187] *Eur. Cmty.*, 814 F. Supp. 2d at 203.

[188] *Id.*

[189] DINAN, *supra* note 97, at 181.

two-thirds majority vote.[190] Member state governments have no direct control over the European Parliament because European citizens directly elect members of the European Parliament every five years.[191] Furthermore, although member states appoint judges to the European Court of Justice, the judges generally act independently of their nationalities, as they are required to do.[192] EU member states thus do not actively supervise the EU because the member states do not regulate the EU's institutions or direct its official acts.

*3. Hiring of Public Employees and Payment of Their Salaries.* In *European Community*, the court stated that this factor considers "whether the [EC's employees] were public employees of the *foreign states*, not the *entity*."[193] There the court concluded that the EC public employees were not employees of the member states but rather of the EC institutions themselves because "the legislators, judges, and executives of the European Community held no power to legislate, judge, or execute the laws of their home countries."[194] The court's analysis of this factor also applies to the EU because those institutions continue to hire and pay their public employees, who are obligated to follow EU public law. This factor thus cuts against regarding the EU as an organ of a foreign state.

*4. Exclusive Rights.* The *Filler* test also analyzes whether the entity has "exclusive rights to some right in the [foreign] country."[195] The Treaty on European Union mentions the exclusive rights that the EU enjoys in some areas of lawmaking, as illustrated by the "principle of subsidiarity": "Under the principle of subsidiarity, in areas which do not fall within its *exclusive competence*, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States . . . but can rather . . . be better achieved at

---

[190] *Id.* at 321.

[191] *Id.* at 242.

[192] *See id.* at 271 (noting that the Treaty on European Union requires judges to "be chosen from persons whose independence is beyond doubt").

[193] *Eur. Cmty.*, 814 F. Supp. 2d at 205.

[194] *Id.*

[195] Filler v. Hanvit Bank, 378 F.3d 213, 217 (2d Cir. 2004).

Union level."[196] The EC possessed these same rights.[197] The EU therefore enjoys exclusive rights in some areas where it can presumably act at the Union level. One of these areas includes the power to enact a common commercial policy.[198] On the other hand, the principle of subsidiarity diminishes the EU's power in areas where it does not have exclusive competence by declaring that the Union can only act if a Union-level solution is needed.[199] The retention of some exclusive rights by the member states weighs in favor of considering the EU an organ of those states.

*5. Treatment Under Foreign State Law.* Courts also look to foreign law to see if the foreign state at issue treats the entity in question as an organ of its government.[200] The *European Community* court could not find any law of an EC member state that considered the EC an organ of that state.[201] The court noted that the EC instead seemed more like "a truly supranational body with a reasonably autonomous institutional existence of its own."[202] Rather than advancing the autonomy of its member states as an organ of a government would do, the EC diluted their autonomy.[203] This analysis of the EC also describes the relationship that the EU has with its member states. Without any evidence that European Union member states treat the EU an organ of their governments under their laws, the fact that the EU in many ways binds the states and circumscribes their sovereignty weighs against the EU's organ status.

*6. The EU Is Not an Organ of Its Member States.* On balance, these factors demonstrate why a court would likely hold that the EU is not an organ of its member states. The EU has a national

---

[196] TEU art. 5(3) (emphasis added).

[197] *See Eur. Cmty.*, 814 F. Supp. 2d at 206 (referring to the principle of subsidiarity in relation to the EC).

[198] DINAN, *supra* note 97, at 502–03.

[199] *See* Alex Mills, *Federalism in the European Union and the United States: Subsidiarity, Private Law, and the Conflict of Laws*, 32 U. PA. J. INT'L L. 369, 393 (2010) (arguing that the EU's principle of subsidiarity is "an attempt to strive for some sort of rational negotiated balance between different levels of regulation").

[200] *Eur. Cmty.*, 814 F. Supp. 2d at 207.

[201] *Id.*

[202] *Id.* (quoting Young, *supra* note 113, at 162 n.32).

[203] *Id.*

purpose, but the member states do not supervise the EU, and they do not hire and pay the EU's public employees. While the EU has some exclusive rights over its member states, the states do not appear to treat the EU as an organ of their governments under their domestic laws. Thus, the EU more closely resembles an autonomous supranational organization than an organ of the individual EU member states. Because the EU cannot properly be considered an organ of a foreign state, it cannot be an agency or instrumentality of a foreign state under the FSIA. The EU therefore is not a foreign state under any of the FSIA definitions and cannot benefit from alienage jurisdiction as a foreign citizen or a foreign state.

## IV. AMENDING THE DEFINITION OF FOREIGN STATE

### A. THE CURRENT DEFINITION OF FOREIGN STATE OMITS SUPRANATIONAL STATE-LIKE ENTITIES

International institutions play an ever-greater role on the world stage. Some of these organizations provide a forum in which states can discuss and agree on common issues.[204] Others have gone further than previous international organizations and are eroding state sovereignty to an even greater degree than before.[205] The EU is the most striking example of a supranational organization whose members have surrendered a great degree of their sovereignty to gain the benefits of membership in the Union.[206] While international organizations are not new to the international system, supranational organizations like the EU are a novel development, and more supranational institutions may take form as global economic interdependence increases. This

---

[204] *See* Patrick Tangney, *The New Internationalism: The Cession of Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany*, 21 YALE J. INT'L L. 395, 402–03 (1996) (describing early international organizations such as the League of Nations and the International Labor Organization as providing means for states to coordinate action to solve international problems).

[205] *See id.* at 406 (noting that developing countries have ceded competences over fiscal, monetary, and exchange rate policies to the IMF and the World Bank).

[206] *See id*. (describing the European Union as the most ambitious effort yet on the part of industrialized countries to cede sovereign competences to a supranational organization).

trend has legal ramifications because international organizations of various forms have legal personalities that would permit them to litigate in U.S. courts.[207]

As the above analysis demonstrates, it is unlikely that the EU would qualify as a foreign state under the FSIA's definitions. Therefore, because § 1332 uses the FSIA's definitions for diversity purposes, if the EU solely brought state-law claims in federal court in the United States, the court most likely would dismiss the claims for lack of subject matter jurisdiction. The EU does not amount to a foreign state proper even though it has expanded its sovereignty at the expense of its member states and is becoming more like a foreign state in many respects.[208] The *Filler* factors further illuminate many of the state-like attributes of the EU and the sovereign functions it performs.[209] Yet the EU falls outside the definitions Congress provided for foreign state in the FSIA even though the FSIA provides a broad definition encompassing entities that take on a variety of forms.

The FSIA definitions generally contemplate a state's sovereign authority flowing downward through an entity, be it a governmental department,[210] a state-owned corporation,[211] or a treaty-based organization performing a sovereign function.[212] These types of entities are generally considered foreign states under the FSIA because Congress evidently wanted to extend immunity to these entities if their actions could be sufficiently credited to a foreign sovereign.[213] The definitions in § 1603,

---

[207] *See, e.g.*, Rafael Leal–Areas, *EU Legal Personality in Foreign Policy?*, 24 B.U. INT'L L.J. 165, 197–211 (2006) (discussing the EU's legal personality).

[208] *See supra* Part III.A.

[209] *See supra* Part III.C.

[210] *See* S & Davis Int'l, Inc. v. Republic of Yemen, 218 F.3d 1292, 1298 (11th Cir. 2000) (stating that the Yemeni Ministry of Supply and Trade is a political subdivision of Yemen).

[211] *See* Dole Food Co. v. Patrickson, 538 U.S. 468, 477 (2003) ("Majority ownership by a foreign state . . . is the benchmark of instrumentality status.").

[212] *See* EAL Corp. v. Eur. Org. for the Safety of Air Navigation, No. 93-578-SLR, 1994 WL 828320, at *4 (D. Del. Aug. 3, 1994) (holding that a treaty-based entity responsible for European air traffic control was an agency or instrumentality of a foreign state).

[213] *See* H.R. REP. NO. 94-1487, at 15 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613 (noting that the term *foreign state* in the FSIA includes more than just the foreign state proper).

however, do not speak to supranational organizations like the EU.[214] Under the definitional scheme in the FSIA, the EU has not assumed enough of its member states' sovereignty to be considered an independent sovereign itself, yet it has too much sovereignty and independent decisionmaking capacity to be fairly considered an organ of those states.[215] In that sense, the EU sits above the European states while not attaining statehood status.

### B. CONGRESS SHOULD DECOUPLE THE DEFINITION OF FOREIGN STATE UNDER THE DIVERSITY STATUTE FROM THE DEFINITION OF FOREIGN STATE UNDER THE FSIA

Allowing the European Union access to federal courts under alienage jurisdiction would better reflect Congress's policy of favoring adjudication of matters affecting foreign relations in a national forum.[216] Congress should therefore remove the reference to the FSIA in § 1332(a)(4) and specifically provide for jurisdiction over cases in which the EU is a plaintiff. Congress should also provide the same privilege for other state-like supranational organizations that may arise in the international system in the future. As more supranational organizations take shape in the coming decades, it may become possible to develop a comprehensive test to determine which entities should be considered foreign states for jurisdictional purposes. Until then, Congress should evaluate these entities on a case-by-case basis with input from the Executive Branch to determine which ones should be considered foreign states under the alienage-jurisdiction statute.

The rationale behind alienage jurisdiction and the policies animating the FSIA both point to a need for Congress to provide for federal subject matter jurisdiction in the event that the EU or a similar supranational authority attempts to litigate a state-law claim against a U.S. citizen in federal court. The long history of

---

[214] *See* 28 U.S.C. § 1603 (2006) (neglecting to include supranational entities in the definition of foreign state).

[215] *See supra* Part III.C.

[216] *See supra* notes 44–58 and accompanying text (discussing the rationales for alienage jurisdiction).

alienage jurisdiction affirms the well-established policy of providing a neutral forum for foreign citizens, including foreign states, to litigate as plaintiffs.[217] Such jurisdiction provides a fair forum while ensuring that matters implicating foreign affairs are adjudicated in national courts.

The FSIA's purpose also highlights Congress's preoccupation with affording foreign states special status in U.S. courts. Even states that do not qualify for immunity are afforded procedural benefits under the FSIA. For example, a foreign state sued in state court has the absolute right of removal to federal court[218] no matter the amount in controversy.[219] These protections, regardless of the immunity outcome, were "intended to encourage the bringing of actions against foreign states in Federal courts."[220]

Congress thus wanted to provide a system of predictable rules and processes for litigation involving foreign states in their various forms because of the preeminent policy of allowing matters implicating foreign sovereigns and foreign affairs into national courts where the risk of bias is presumably lower. These policies support favoring federal alienage jurisdiction over cases involving the EU as a plaintiff against an American citizen. The EU performs many of the same sovereign functions that a state would, and its involvement in commercial policy and international trade makes it an important world actor with an interest in accessing American courts. Congress should therefore permit the EU to access federal courts as a foreign state under § 1332(a)(4).

## V. CONCLUSION

The future of American litigation will almost certainly include previously unforeseen entities such as the European Union that will attempt to gain access to federal courts based on alienage jurisdiction. These supranational organizations may increasingly assert their interests via the courts just as the European

---

[217] *See* discussion *supra* Part II.A.

[218] 28 U.S.C. § 1441(d) (2006).

[219] *Id.* § 1330(a).

[220] H.R. REP. NO. 94-1487, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6612.

Community attempted to do. While foreign states may bring suit against an American citizen under § 1332(a)(4), the EU or any similar state-like supranational body would likely fail under the current definition of foreign state found in the Foreign Sovereign Immunities Act, which controls the diversity determination in § 1332(a)(4).

The FSIA defines foreign state more broadly than a foreign state proper. A foreign state's political subdivision, agency, or instrumentality may be considered a foreign state for the purposes of immunity and alienage jurisdiction. Courts have struggled with whether various types of entities match one of the FSIA's definitions, and supranational organizations like the EU seem to fall outside these classifications. This is nonsensical considering the nature of the EU. Its member states have ceded a large amount of their sovereignty in their quest for economic and political union. Although European countries are not likely to cede all of their sovereignty to the EU in the near future, especially their capacity to conduct foreign relations, the EU nevertheless binds its member states on many economic, trade, and regulatory matters to a greater extent than other international organizations.

Congress should provide a way for organizations like the EU to gain access to federal courts based on alienage jurisdiction. Because the EU is more like a state actor than other international organizations, it may be more likely to sue American citizens in federal courts in the future. Federal courts have an interest in adjudicating cases involving these types of organizations because of the policies underlying alienage jurisdiction and the rationale for granting foreign states and their various subdivisions, agencies, and instrumentalities broad access to federal courts. Congress should adhere to these policies while recognizing the rise of supranational state-like organizations like the European Union in the evolving international system. Congress, therefore, should update the definition of foreign state for the purposes of alienage jurisdiction to allow these types of organizations to qualify as foreign states and gain access to federal courts.

*John Thomas Dixon*