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## "Head-of-State-Owned Enterprise" Immunity

Pammela S. Quinn

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# “Head-of-State–Owned Enterprise” Immunity

Pammela S. Quinn\*

## ABSTRACT

*While other wealthy individuals and businessmen have served and do serve as heads of state, the Trump presidency appears to be unique in terms of the global scope of the President’s business interests, his propensity to be sued, and his disinterest in disentangling his business interests from his official agenda. This Article conceptualizes Trump’s many business holdings and licenses under the Trump Organization International umbrella as a “head-of-state–owned enterprise.” This raises issues similar to cases involving both head-of-state and state-owned enterprise immunity. Considering existing immunity doctrines, including gaps and contested areas in the law pertaining to them, the Article identifies unique immunity questions that are likely to arise in connection with lawsuits against both President Trump and the Trump Organization during his time in office and beyond.*

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\* Associate Professor of Law, Thomas R. Kline School of Law, Drexel University. Thanks to Tim Meyer, Ingrid Wuerth, and Anil Kalhan for discussing many of these issues with me. All errors are mine. Hans Herzl-Betz provided excellent research assistance.

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## I. INTRODUCTION

Among the overwhelming number of stories that emerged following the election of Donald J. Trump and during the first one hundred days of the Trump presidency were news accounts noting the large number of lawsuits filed against the new US President. In just his first eleven days in office, Trump had been sued some forty-two times.<sup>1</sup> A few days later, the count was above fifty—compared with three to four lawsuits each filed against the three previous presidents over the same time frame.<sup>2</sup> While these suits challenge his official policies as well as his personal conduct,<sup>3</sup> being named as a defendant

1. Elliott C. McLaughlin, *Trump's First Days in Office Spawn Dozens of Lawsuits*, CNN (Feb. 1, 2017, 8:54 AM), <http://www.cnn.com/2017/01/31/us/trump-lawsuits-travel-ban-conflicts-interest/> (last visited Aug. 27, 2017) [<https://perma.cc/AHX8-BKRS>] (archived Aug. 27, 2017).

2. See Phil McCausland, *Trump Named in More Than 50 Lawsuits Since Inauguration*, NBC NEWS (Feb. 2, 2017, 5:28 PM), <http://www.nbcnews.com/news/us-news/trump-named-more-50-lawsuits-inauguration-n716191> (last visited Aug. 27, 2017) [<https://perma.cc/N99G-7K4K>] (archived Aug. 27, 2017).

3. See, e.g., Complaint to Establish and Enforce Mechanic's Lien, at ¶ 18, AES Electrical d/b/a Freestate Electrical Construction Co. v. Trump Old Post Office LLC, Complaint No. 2017-CA-000369-R(RP) (D.C. Super. Ct. Jan. 19, 2017), <http://www.politico.com/f/?id=00000159-d693-dd4c-abf9-ffb289f0000> (last visited Aug. 26, 2017) [<https://perma.cc/4JKC-9XNR>] (archived Aug. 26, 2017) [hereinafter *Mechanics' Lien*]; Press Release, Citizens for Responsibility and Ethics in Washington, CREW Sues Trump Over Emoluments (Jan. 22, 2017), <http://www.citizensforethics.org/press-release/crew-sues-trump-emoluments/> (last visited Aug. 26, 2017) [<https://perma.cc/P4H4-NZX2>] (archived Aug. 25, 2017) [hereinafter *Emoluments*]; Chris Sommerfeldt, *Trump's Muslim Ban Excludes Countries Linked to His Businesses*, N.Y. DAILY NEWS (Feb. 1, 2017, 3:06 AM), <http://www.nydailynews.com/news/politics/trump-muslim-ban-excludes-countries-linked-businesses-article-1.2957956> (subscription required) (last visited Aug. 28, 2017) [<https://perma.cc/SH2Z-XD6M>] (archived Aug. 28, 2017) (discussing Trump's travel ban and the absence of Muslim countries that Trump holds business interests in, despite "deep-seated ties to terrorism") [hereinafter *EO*]; see also Tom Hamburger & Karen Tumulty, *Congressional Democrats to File Emoluments Lawsuit Against Trump*, WASH. POST (June 14, 2017), [https://www.washingtonpost.com/politics/congressional-democrats-to-file-emoluments-lawsuit-against-trump/2017/06/13/270e60e6-506d-11e7-be25-3a519335381c\\_story.html?utm\\_term=.46e9e1effc13](https://www.washingtonpost.com/politics/congressional-democrats-to-file-emoluments-lawsuit-against-trump/2017/06/13/270e60e6-506d-11e7-be25-3a519335381c_story.html?utm_term=.46e9e1effc13) (last visited Aug. 27, 2017) [<https://perma.cc/LR8F-8HN4>] (archived Aug. 27, 2017) (reporting that another emoluments lawsuit will be filed nearly six months after the first one, this one on

is nothing new for Donald Trump. As of June 2016, Trump had been sued dozens of times and “more than 200 liens ha[d] been filed against Trump or his businesses by contractors and employees dating back to the 1980s.”<sup>4</sup> At the same time, over the past thirty years, Trump and his companies have been involved in 3,500 state and federal lawsuits.<sup>5</sup>

A number of the recently filed lawsuits, both public and private, relate to conduct that blurs the line between Trump’s business and political activities. The fact that the two are arguably inextricably intertwined is the subject of one of the most high-profile public lawsuits, citing the Emoluments Clause of the US Constitution<sup>6</sup> and alleging that Trump’s unprecedented failure to “to divest from his businesses [means that] he is now getting cash and favors from foreign governments. . . . When Trump the president sits down to

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behalf of approximately 200 Democratic Congressmen). Similarly, the First Lady, Melania Trump, recently filed a defamation lawsuit in which she alleged that she was injured by allegations she had engaged in sex work before marrying Trump, insofar as she “had the unique, once-in-a-lifetime opportunity, as an extremely famous and well-known person, as well as a former professional model and brand spokesperson, and successful businesswoman, to launch a broad-based commercial brand in multiple product categories, each of which could have garnered multi-million dollar business relationships for a multi-year term [as First Lady] during which Plaintiff is one of the most photographed women in the world. These product categories would have included, among other things, apparel, accessories, shoes, jewelry, cosmetics, hair care, skin care and fragrance.” Laurel Wamsley, *Melania Trump Lawsuit Argues ‘Once In A Lifetime’ Chance To Make Millions Is Lost*, NPR (Feb. 7, 2017, 6:33 PM) (quoting Complaint) <http://www.npr.org/2017/02/07/513970871/melania-trump-lawsuit-argues-once-in-a-lifetime-chance-to-make-millions-is-lost> (subscription required) (last visited Aug. 29, 2017) [<https://perma.cc/57HY-AL3H>] (archived Aug. 29, 2017) [hereinafter *Melania Trump Lawsuit*].

4. *Dozens of Lawsuits Accuse Trump of Not Paying His Bills, Reports Claim*, FOX NEWS (June 10, 2016), <http://www.foxnews.com/politics/2016/06/10/dozens-lawsuits-accuse-trump-not-paying-his-bills-reports-claim.html> (subscription required) (last visited Aug. 26, 2017) [<https://perma.cc/V9GM-JDS8>] (archived Aug. 26, 2017); see also McLaughlin, *supra* note 1 (“The high-profile wheeler and dealer filed numerous lawsuits and faced an array of allegations of his own before stepping into the Oval Office, including claims of sexual harassment, bilking investors and defrauding students of his eponymous university.”).

5. See Nick Penzenstadler & Susan Page, *Exclusive: Trump’s 3,500 Lawsuits Unprecedented for a Presidential Nominee*, USA TODAY (June 1, 2016), <http://www.usatoday.com/story/news/politics/elections/2016/06/01/donald-trump-lawsuits-legal-battles/84995854/> (last visited Aug. 28, 2017) [<https://perma.cc/XFW6-2VRG>] (archived Aug. 28, 2017). Of these, Trump is a plaintiff in approximately 1,900 and a defendant in 1,450. *Id.*

6. Article I, Section 9, Clause 8 of the United States Constitution (sometimes referred to as the “Title of Nobility Clause” or the “Emoluments Clause”) provides that:

No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

U.S. CONST. art. I, § 8, cl. 8.

negotiate trade deals . . . the American people will have no way of knowing whether he will also be thinking about the profits of Trump the businessman.”<sup>7</sup>

Similarly, in what appears on its face to be a purely private lawsuit seeking payment from one of his companies, there are allegations that Trump’s new political office is entangled in his business dealings. Alleging that payment was due on contracted-for electrical work at Trump’s new hotel in Washington, D.C., which was performed on an accelerated work schedule, one suit seeking a mechanic’s lien asserts:

At the time of the [new Trump hotel’s] “soft opening,” Donald J. Trump, President of Defendant, Trump Old Post Office, LLC, was a U.S. presidential candidate and the “soft opening” had to occur to permit Mr. Trump’s nationally televised campaign event from the Hotel on September 16, 2016, which was to honor U.S. veterans. But for [Plaintiff’s] acceleration of work and performance of extra work on the Project, this event would not have been able to occur.<sup>8</sup>

Both of these types of lawsuits, public and private, reflect the significant attention that has been paid to the potential *domestic law* implications of such entanglements.<sup>9</sup>

Quite surprisingly, given the intense focus on and coverage of these domestic law issues, little or no discussion has occurred yet regarding the potential *international law* ramifications of Trump’s continuing stake in his worldwide business enterprise.<sup>10</sup> Yet, for

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7. Emoluments, *supra* note 3.

8. Mechanics’ Lien, *supra* note 3.

9. See, e.g., Emoluments, *supra* note 3; Joe Palazzolo & Jacob Gershman, Q&A: How Ethics Laws Apply to Trump as President, WALL ST. J. (Jan. 18, 2017, 4:48 PM), <https://www.wsj.com/articles/q-a-how-ethics-laws-apply-to-trump-as-president-1484776128> (subscription required) (last visited Aug. 27, 2017) [<https://perma.cc/Y83G-6AZ7>] (archived Aug. 27, 2017) (stating, inter alia, that “[t]he president is bound by federal statutes that prohibit bribery and illegal gratuities, or things of value given to officials for the purpose of influencing them. The president is also subject to the federal Stock Act, which bars insider trading by government officials, and a federal anti-nepotism law that bans government officials from appointing relatives to or employing them in agencies controlled by the officials”); see also Chris Woodyard et al., *Trump Blasts Nordstrom After It Dumps Ivanka’s Fashion Line*, USA TODAY (Feb. 8, 2017, 12:02 PM), <https://www.usatoday.com/story/money/business/2017/02/08/trump-blasts-nordstrom-tweet-over-daughter-ivanka/97644392/> (last visited Aug. 29, 2017) [<https://perma.cc/7BBV-ZQC5>] (archived Aug. 29, 2017) (documenting the President’s response to Nordstrom’s dropping his daughter’s fashion line and the ethical implications of said response) [hereinafter *Ivanka Trump Tweets*].

10. Susanne Craig & Eric Lipton, *Trust Records Show Trump Is Still Closely Tied to His Empire*, N.Y. TIMES, at A1 (Feb. 4, 2017), <https://www.nytimes.com/2017/02/03/us/politics/donald-trump-business.html> (subscription required) (last visited Aug. 26, 2017) [<https://perma.cc/M7QE-HWF6>] (archived Aug. 26, 2017) (reporting that Trump has created a revocable trust and ceded day-to-day control of his businesses to his eldest son, Donald J. Trump, Jr., and the Trump Organization’s chief financial officer, Allen H. Weisselberg, a type of trust that

many of the same reasons—involving the unprecedented nature of his business holdings, which include real and intellectual property holdings around the world, his propensity to be sued, and an apparent interest in using his office to enhance his business holdings and vice versa<sup>11</sup>—the Trump presidency might test under-theorized and amorphous concepts within the doctrine of sovereign immunity.<sup>12</sup>

This Article unpacks the potential issues and highlights the at best thin treatment of the legal doctrines at their heart. But resolving the many questions likely to arise is beyond its scope. Even its more modest ambition proves to be a more challenging task than one might expect given the relatively well-developed literature surrounding the doctrines of head of state immunity and the commercial activity exception to sovereign immunity that parallel and overlap—but which do not seem to fully envelop—the phenomenon considered by this Article, “head-of-state-owned enterprise” immunity.

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means he “will receive reports on any profit, or loss, on his company as a whole, [and] can revoke [the trustees’] authority at any time. . . . [T]he purpose of the Donald J. Trump Revocable Trust is to hold assets for the ‘exclusive benefit’ of the president”).

11. See Danny Hakim & Sui-Lee Wee, *From Trump the Nationalist, A Trail of Global Trademarks*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/21/business/donald-trump-trademarks-china.html> (subscription required) (last visited Aug. 26, 2017) [<https://perma.cc/K5MT-T67E>] (archived Aug. 26, 2017); Nick Penzenstadler et al., *Donald Trump: Three Decades, 4,095 Lawsuits*, USA TODAY, <https://www.usatoday.com/pages/interactives/trump-lawsuits/> (last visited Aug. 27, 2017) [<https://perma.cc/QK86-HQVH>] (archived Aug. 27, 2017); THE TRUMP ORG., [www.trump.com](http://www.trump.com) (last visited Aug. 27, 2017) [<https://perma.cc/PUG8-3GA2>] (archived Aug. 27, 2017) [hereinafter Trump Website]; Jeremy Venook, *Trump’s Interest vs. America’s, Dubai Edition*, THE ATLANTIC (Aug. 9, 2017), <https://www.theatlantic.com/business/archive/2017/08/donald-trump-conflicts-of-interests/508382/> (last visited Aug. 29, 2017) [<https://perma.cc/788X-Q3XG>] (archived Aug. 29, 2017); see also Linda Massarella, *Trump Hotels See Boom in Bookings After Election*, N.Y. POST (Nov. 11, 2016, 1:25 AM), <http://nypost.com/2016/11/11/trump-hotels-see-boom-in-bookings-after-election/> (last visited Aug. 27, 2017) [<https://perma.cc/VZS4-A6SF>] (archived Aug. 27, 2017) (discussing a large increase in reservations at Trump hotels); Richard Pérez-Peña & Rachel Abrams, *Kellyanne Conway Promotes Ivanka Trump Brand, Raising Ethics Concerns*, N.Y. TIMES (Feb. 10, 2017), [https://www.nytimes.com/2017/02/09/us/politics/kellyanne-conway-ivanka-trump-ethics.html?\\_r=0](https://www.nytimes.com/2017/02/09/us/politics/kellyanne-conway-ivanka-trump-ethics.html?_r=0) (subscription required) (last visited Aug. 28, 2017) [<https://perma.cc/K3DC-92BL>] (archived Aug. 28, 2017); Ivanka Trump Tweets, *supra* note 9; Melania Trump Lawsuit, *supra* note 3.

12. See Keith Highet et al., *Head-of-State Immunity--Foreign Sovereign Immunities Act--Suggestion by the Department of State*, 88 AM. J. INT’L L. 528, 531 (1994) (stating that the doctrine of sovereign immunity is not well-settled in the United States); see also Laurence R. Helfer & Timothy Meyer, *The Evolution of Codification: A Principal-Agent Theory of the International Law Commission’s Influence*, in CUSTOM’S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 305, 321 (Curtis Bradley ed., 2015), <https://ssrn.com/abstract=2585608> (subscription required) (last visited Aug. 28, 2017) [<https://perma.cc/NB4V-C97Y>] (archived Aug. 28, 2017); see also *infra* notes 79-84 & accompanying text (discussing the extremely thin discussion of civil claims based on financial/business interests in most discussions of the head of state immunity).

While other wealthy individuals and businessmen have served and do serve as heads of state,<sup>13</sup> Donald Trump appears to be unique in terms of the global scope of his business interests, particularly because these business interests are in property (both real and intellectual), increasing the likelihood that foreign courts would be likely fora for lawsuits involving those businesses. Now that he has assumed office, Trump's many business holdings and licenses under the Trump International umbrella can be conceptualized as being at least somewhat similar to a state-owned enterprise. That is, state-owned enterprises occupy a fuzzy space on the border of traditionally public and traditionally private activity insofar as that enterprise is created by a public entity to act on its (public) behalf—but not to engage in traditionally public activities. Instead, state-owned enterprises are specifically intended to carry out traditionally private commercial activities.<sup>14</sup> Likewise, as the complaints about Trump's failure to divest upon assuming the presidency suggest, Trump's assumption of high public office has caused his private business interests to become entangled with his public position in ways that are often difficult to disaggregate.

Of course, the "head-of-state-owned enterprise"—the category this Article uses to describe Trump-the-President's global business holdings—is not a creature of existing doctrine. Looking at immunity issues through the lens of this distinct categorization illuminates the ways that existing doctrine fails to grapple with the consequences of this private/public enterprise—and may need to be reconceptualized

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13. See Paul Owen, *Who Are the Wealthiest World Leaders?*, THE GUARDIAN (Oct. 26, 2012, 9:48 AM), <https://www.theguardian.com/news/blog/2012/oct/26/who-are-the-wealthiest-world-leaders> (last visited Aug. 27, 2017) [<https://perma.cc/3HNZ-ZDXT>] (archived Aug. 27, 2017); see also *Silvio Berlusconi: Italy's Once-Untouchable Prime Minister*, BBC NEWS (June 14, 2016), <http://www.bbc.com/news/world-europe-11981754> (last visited Aug. 26, 2017) [<https://perma.cc/AQ5R-4SMV>] (archived Aug. 26, 2017) (discussing Berlusconi's extreme wealth alongside the fact that his "political career ran in tandem with a litany of [domestic] legal battles").

14. The Foreign Sovereign Immunities Act of 1976 applies to state-owned enterprises as they are commonly known, though without using that term. Rather, the Act covers those entities that meet the definition of what it refers to as "[a]n 'agency or instrumentality of a foreign state,'" defined as

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 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.

28 U.S.C. § 1603(b) (2012).

precisely because of this failure. To make this case, the Article is structured as follows:

Part II describes the Trump International Organization, including its scope and particular business holdings and interests it has in various jurisdictions around the globe. It focuses on holdings and interests in states where Trump has already become embroiled in both diplomatic and legal controversies and in which potential lawsuits are particularly likely to arise.<sup>15</sup>

Part III canvasses the existing understanding of both sovereign immunity (with particular attention to the commercial activities exception to that doctrine) and head-of-state immunity. The origins of head-of-state immunity as part and parcel of sovereign immunity and the evolving understanding of the head of state as distinct and separable from the sovereign are treated in detail to unpack the competing rationales and conflicting contemporary approaches to this doctrine.

Finally, Part IV considers the existing doctrine, including its gaps and contested parameters, in light of the lawsuits described in Part II. This Part describes the questions and challenges that are likely to lie ahead for immunity in civil lawsuits against “head-of-state-owned enterprises.”

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15. Arguably, the fact that he has already reportedly done so in his first weeks in office with respect to several of the most diehard political allies of the United States suggests that almost any location is a potential trigger point for a lawsuit. See, e.g., Tara Palmeri et al., *Trump's Faux-Pas Diplomacy*, POLITICO (Feb. 8, 2017, 5:08 AM), <http://www.politico.com/story/2017/02/trump-foreign-leaders-phone-calls-234770> (last visited Aug. 27, 2017) [<https://perma.cc/F6TR-U22L>] (archived Aug. 27, 2017); Jake Tapper et al., *Trump Had Heated Exchange with Australian PM, Talked 'Tough Hombres' with Mexican Leader*, CNN (Feb. 2, 2017, 6:21 PM), <http://www.cnn.com/2017/02/01/politics/malcolm-turnbull-donald-trump-pena-nieto/> (last visited Aug. 28, 2017) [<https://perma.cc/P7U8-MR99>] (archived Aug. 28, 2017); see also Michael Birnbaum & Rick Noack, *Germans Perplexed as Trump Escalates Feud*, WASH. POST (May 30, 2017), [https://www.washingtonpost.com/world/europe/germans-perplexed-as-trump-escalates-feud/2017/05/30/eeb30fdc-4552-11e7-8de1-cec59a9bf4b1\\_story.html?utm\\_term=.fc632bceeeef](https://www.washingtonpost.com/world/europe/germans-perplexed-as-trump-escalates-feud/2017/05/30/eeb30fdc-4552-11e7-8de1-cec59a9bf4b1_story.html?utm_term=.fc632bceeeef) (last visited Aug. 26, 2017) [<https://perma.cc/EE3H-WQWV>] (archived Aug. 26, 2017); Jon Stone, *Donald Trump Will Not Be Allowed to Address Parliament on UK State Visit, Says Speaker John Bercow*, INDEPENDENT (Feb. 6, 2017, 4:45 PM), <http://www.independent.co.uk/news/uk/politics/donald-trump-uk-state-visit-speaker-address-parliament-a7565651.html> (last visited Aug. 28, 2019) [<https://perma.cc/R44R-XBME>] (archived Aug. 28, 2017); *Trump Agrees to Honour "One China" Policy Despite Threats*, BBC NEWS (Feb. 10, 2017), <http://www.bbc.com/news/world-asia-china-38927891> (last visited Aug. 27, 2017) [<https://perma.cc/A55V-UDTD>] (archived Aug. 27, 2017).



## II. HEAD-OF-STATE-OWNED ENTERPRISE: THE TRUMP INTERNATIONAL ORGANIZATION

### A. *The Trump Organization and Its International Holdings*

Because his companies are all privately owned, it is difficult to discern the exact scope of Donald Trump's international business holdings and interests.<sup>16</sup> In addition to approximately thirty domestic

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16. Since December, the Trump Organization has updated its listings of its domestic and foreign subsidiaries. In December, the search yielded a listing of just three "foreign" subsidiaries (of which two were in fact located in foreign states; the other was located within Puerto Rico, a territory of the United States). As of February 10, 2017, as noted above, that has changed substantially. See *The Trump Organization*, UNIWORLD (Feb. 10, 2017), <http://uniworldonline.com/system/files/userfiles/2034/u-8658-170210-104336-data.pdf> (on file with the author) [hereinafter Uniworld Document]. However, it appears that even the updated listing may not be up to date, as it still lists Donald J. Trump as the Chairman and CEO. Other reports imply that Trump has resigned, or intends to resign, those positions even though he still retains an interest in the Organization through a Revocable Trust. See Craig & Lipton, *supra* note 10; see also Trump Website, *supra* note 11 (listing Donald J. Trump as the "Founder" of the Trump Organization). But, as of February 11, 2017, at least some sources suggest that Trump and his older daughter Ivanka have not resigned their CEO positions in some of their companies; this is despite, in his case, saying he was turning over all his interests through the revocable trust and, in her case, announcing a "formal leave of absence" from her brand businesses. See Derek Kravitz & Al Shaw, *Ivanka Trump Also Promised to Resign from the Family Business, But She Hasn't*, PACIFIC STANDARD (Feb. 8, 2017), <https://psmag.com/news/ivanka-trump-also-promised-to-resign-from-the-family-business-but-she-hasnt> (last visited Aug. 27, 2017) [<https://perma.cc/A6L9-8Z5V>] (archived Aug. 27, 2017). However, more recent news sources have continued to report that the two Trumps have disengaged from running the day-to-day affairs of their businesses and have, instead, remained tied to them via their ownership stakes and through revocable trusts that grant them a great deal of discretion in terms of re-inserting their authority whenever they choose to do so. See Derek Kravitz & Al Shaw, *Trump Lawyer Confirms President Can Pull Money From His Businesses Whenever He Wants*, PROPUBLICA (Apr. 4, 2017, 5:53 PM), <https://www.propublica.org/article/trump-pull-money-his-businesses-when-ever-he-wants-without-telling-us> (last visited Aug. 27, 2017) [<https://perma.cc/S46T-S32C>] (archived Aug. 27, 2017) (revealing that President Trump can withdraw funds from his revocable trust at any time without disclosing those withdrawals, which is yet another indication of his continuing connection to his business empire); Venook, *supra* note 11 (indicating ethical concerns over the President's continuing connections to his many businesses and expressing concern over how these connections may improperly influence Presidential policy); Jackie Wattles & Jill Disis, *Ivanka Trump's Firm Seeks New Trademarks in China, Reviving Ethical Concerns*, CNN (June 5, 2017, 3:12 AM), <http://money.cnn.com/2017/06/04/news/ivanka-trump-chinese-trademarks/> (last visited Aug. 29, 2017) [<https://perma.cc/6KT2-E7V2>] (archived Aug. 29, 2017) (stating that, despite resigning from her positions within her businesses, she still benefits from them through her ownership stake in them and her companies, in turn, are positively influenced by her position in government); see also Editorial Board, *Is China Offering Ivanka Trump Unseemly Favors?*, WASH. POST (June 2, 2017), [https://www.washingtonpost.com/opinions/global-opinions/is-ivanka-trump-receiving-unseemly-favors-from-china/2017/06/02/5dfce500-46ef-11e7-bcde-624ad94170ab\\_story.html?utm\\_term=.2c8b85e18d7b](https://www.washingtonpost.com/opinions/global-opinions/is-ivanka-trump-receiving-unseemly-favors-from-china/2017/06/02/5dfce500-46ef-11e7-bcde-624ad94170ab_story.html?utm_term=.2c8b85e18d7b) (last visited Aug. 29, 2017) [<https://perma.cc/>

subsidiaries, the Trump Organization—of which Donald Trump had served as the Chairman and CEO until just before taking office<sup>17</sup>—discloses that, in addition to thirty-one domestic subsidiaries, it has ten foreign subsidiary corporations in eight countries: South Korea, the United Kingdom, Canada, Panama, the Philippines, India, Uruguay, and Turkey.<sup>18</sup>

Trump allegedly has created a revocable trust and ceded day-to-day control of the business operations of the Trump Organization to his eldest son, Donald J. Trump, Jr., and to the Trump Organization's chief financial officer, Allen H. Weisselberg.<sup>19</sup> However, pursuant to the terms of the trust, while the president will no longer exercise direct control over his businesses, he “will receive reports on any profit, or loss, on his company as a whole, [and] can revoke [the trustees'] authority at any time. . . . [T]he purpose of the Donald J. Trump Revocable Trust is to hold assets for the ‘exclusive benefit’ of the president.”<sup>20</sup> In addition, Trump continues to be the main “face” of the Trump Organization in its promotional materials, such as its website.<sup>21</sup>

In connection with this continuing interest in the Trump Organization, Trump has pledged that the Organization will not pursue any “new” business ventures overseas during his presidential term,<sup>22</sup> but he has not suggested the Organization will scale back in any way. To the contrary, developments in the days following

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R6RF-XT2L] (archived Aug. 29, 2017) (examining whether or not China may be unduly influencing Ivanka Trump through her company and its trademarks); Jeremy Venook, *The Story Behind Trump's Chinese Trademark*, ATLANTIC (Feb. 22, 2017), <https://www.theatlantic.com/business/archive/2017/02/trump-chinese-trademark/517458/> (last visited Aug. 29, 2017) [<https://perma.cc/763L-99S7>] (archived Aug. 29, 2017) (detailing the potential influence of China's trademark decision in his favor on President Trump) [Hereinafter Venook Story]. For a brief overview of the process of Chinese trademark registration and approval, see *Intellectual Property Department, Trademarks: Application Process*, GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, [http://www.ipd.gov.hk/eng/intellectual\\_property/trademarks/application\\_process.htm](http://www.ipd.gov.hk/eng/intellectual_property/trademarks/application_process.htm) (last updated Feb. 20, 2017) (last visited Aug. 26, 2017) [<https://perma.cc/9DB7-T4AQ>] (archived Aug. 26, 2017).

17. Craig & Lipton, *supra* note 10.

18. Uniworld Document, *supra* note 16; see also James Hill, *A Look Inside Trump's Global Business Interests*, ABC NEWS (Jan. 10, 2017, 1:03 PM), <http://abcnews.go.com/Politics/inside-trumps-global-business-interests/story?id=44416694> (last visited Aug. 27, 2017) [<https://perma.cc/K26Z-EW4U>] (archived Aug. 27, 2017) (listing international interests in these same eight countries).

19. Craig & Lipton, *supra* note 10.

20. *Id.*

21. Trump Website, *supra* note 11.

22. See *Donald Trump's News Conference: Full Transcript and Video*, N.Y. TIMES (Jan. 11, 2017), [https://www.nytimes.com/2017/01/11/us/politics/trump-press-conference-transcript.html?\\_r=0&mtrref=](https://www.nytimes.com/2017/01/11/us/politics/trump-press-conference-transcript.html?_r=0&mtrref=) (subscription required) (last visited Aug. 29, 2017) [<https://perma.cc/MV3V-JZRV>] (archived Aug. 29, 2017) (Trump explaining his “no conflict of interest provision as president” and turning down a large deal in the Middle East) [hereinafter Donald Trump's News Conference].

Trump's pledge suggest that it "leave[s] plenty of wiggle room."<sup>23</sup> Just three days after he held a press conference in which he stated his companies would not pursue new overseas investments during his term of office,<sup>24</sup> it was reported that "[t]he Trump Organization will press ahead with multimillion-dollar plans to expand one of the [US President's] golf resorts in Scotland."<sup>25</sup> The Trump Organization argued that this project "did not conflict with [Trump's] promise not to pursue new or 'pending' deals outside the US," because the implementation of "future phasing of existing properties does not constitute a new transaction."<sup>26</sup> The scope of the project is enormous, to include a second eighteen-hole golf course, as well as "a new 450-room five-star hotel, timeshare complex and private housing estate."<sup>27</sup>

### B. *Other International Business Interests of Donald J. Trump*

While the Trump Organization has a number of significant real estate holdings and is frequently characterized as a real estate business, its most significant asset is likely its intellectual property.<sup>28</sup> Even before Trump expressed aspirations to hold a high public office, he licensed his name to other real estate projects.<sup>29</sup>

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23. Venook, *supra* note 11, at Those Expansion Plans (discussing Trump's plan and the room for expansion within the United States).

24. See Donald Trump's News Conference, *supra* note 22.

25. Severin Carrell, *Trump's Scotland Golf Resort Proceeds with Expansion Despite Business Pledge*, THE GUARDIAN (Jan. 14, 2017, 11:22 AM), [https://www.theguardian.com/us-news/2017/jan/14/trump-scotland-golf-resort-conflicts-of-interest?CMP=share\\_btn\\_tw](https://www.theguardian.com/us-news/2017/jan/14/trump-scotland-golf-resort-conflicts-of-interest?CMP=share_btn_tw) (last visited Aug. 26, 2017) [<https://perma.cc/Y57L-CWYW>] (archived Aug. 26, 2017).

26. *Id.*

27. *Id.*

28. International real property holdings in which the Trump Organization has maintained a managerial role have had significant problems. For instance, the first Trump branded international hotel, the Trump Ocean Club in Panama City, "began to unravel" soon after its 2011 opening. See Noah Kirsch, *Inside the Chaos at Trump's Panama City Ocean Club*, FORBES (Mar. 20, 2017, 7:45 AM), <https://www.forbes.com/sites/noahkirsch/2017/03/20/inside-the-chaos-at-trumps-panama-city-ocean-club/#76751681bdeb> (last visited Aug. 27, 2017) [<https://perma.cc/8L5T-MKWK>] (archived Aug. 27, 2017). In 2013, the "Trump Organization's Panamanian partner . . . filed for bankruptcy. Building occupants later reportedly tried to get the Trumps removed from their management role. Amid the dispute, the Trumps cut internet and phone service at club offices . . . and filed an arbitration suit at the International Chamber of Commerce in Paris seeking a reported \$75 million in damages. The outcome of the case has not been made public." *Id.*

29. See Aaron Williams & Anu Narayanswamy, *How Trump has Made Millions by Selling His Name*, WASH. POST (Jan. 25, 2017), <https://www.washingtonpost.com/graphics/world/trump-worldwide-licensing/> (last visited Aug. 29, 2017) [<https://perma.cc/3SBP-2JTQ>] (archived Aug. 29, 2017) (describing various licensing agreements Trump has made world-wide before running for President).

These branding ventures, in which a developer licenses the Trump brand and attaches it to a project with no additional connection to Trump or his companies, include a number of different projects around the world. Examples include:

- A Trump-branded office building in Buenos Aires, Argentina;<sup>30</sup>
- Several Trump-branded residential complexes and an office building in five different Indian cities;<sup>31</sup> and
- Two Trump-branded golf clubs—the Trump International Golf Club and The Trump World Golf Club—in Dubai.<sup>32</sup>

These branded properties all predated Trump's run for office.

Now that he is a world leader, the value of his brand has likely increased.<sup>33</sup> Obviously, there are certain financial benefits that may

30. Allegra Kirkland, *Why Trump Trained His Eye on a New Building Project in Buenos Aires*, TALKING POINTS MEMO (Nov. 21, 2016, 5:21 PM), <http://talkingpointsmemo.com/dc/trump-yy-development-group-projects-buenos-aires-uruguay> (last visited Aug. 27, 2017) [<https://perma.cc/RWJ7-UXRA>] (archived Aug. 27, 2017) (describing how, in early 2016, “the Trump family entered discussions with YY Development Group, an Argentine developer, to license its name for ‘Trump Office Buenos Aires,’ a luxury office building”); Peter Schroeder, *Report: Trump Pressed Argentina's President About Stalled Building Project*, THE HILL (Nov. 21, 2016, 12:37 PM), <http://thehill.com/policy/finance/307050-report-trump-pressed-foreign-building-project-in-congratulatory-phone-call> (last visited Aug. 28, 2017) [<https://perma.cc/6WLU-5AL7>] (archived Aug. 28, 2017) (“According to a report in the Argentine paper *La Nacion*, when President Mauricio Macri called Trump to congratulate him on winning the election, Trump used the opportunity to urge him to clear the way for a stalled office building development.”).

31. *Five Ongoing Realty Projects in India with Trump Organization Tie-Ups*, ECON. TIMES (Jan. 8, 2017, 10:44 AM), <http://economictimes.indiatimes.com/wealth/real-estate/donald-trump-just-the-name-is-enough-for-indian-real-estate/articleshow/56390279.cms> (last visited Aug. 26, 2017) [<https://perma.cc/9GSF-HNPY>] (archived Aug. 26, 2017) (reporting on Trump projects in India and noting that “India only gets the Trump brand and not his money” because the “Trump Organization has brand-licensing agreements with local developers but made no equity investments. . . . Without investing a single penny in Indian real estate, Trump Organization can make millions in just licensing fees”).

32. Venook, *supra* note 11, at That Emirati Businessman (describing “Sajwani as a ‘billionaire developer in Dubai’ who has ‘paid Trump millions of dollars to license the Trump name for golf courses in Dubai’”).

33. Kirkland, *supra* note 30 (quoting development partner's sense that “the campaign had made the Trump brand even more high-profile than it was before he launched a presidential bid”). Of course, it is possible that, at least in some places, the Trump brand may now be worth less than previously because of the significant negative view of Trump and his administration held by many around the world. *See, e.g.*, Athena Jones et al., *White House Denies Report Trump Will Delay State Visit to UK*, CNN (June 11, 2017, 12:40 PM), <http://www.cnn.com/2017/06/11/politics/trump-uk-visit/index.html> (subscription required) (last visited Aug. 27, 2017) [<https://perma.cc/M9DU-G6L9>] (archived Aug. 27, 2017) (noting that “Trump has become increasingly unpopular in Britain” following “[h] is vociferous Twitter attack on London Mayor Sadiq Khan in the wake of the London Bridge terrorist attack” and that

flow from this, in the form of increased interest from potential business partners and higher licensing fees.<sup>34</sup> In fact, while there are more corrupt explanations for the decisions,<sup>35</sup> one explanation for China's decisions to grant trademarks to "Trump" brands following the election and inauguration is more innocuous. Chinese trademark law requires a brand to have strong name recognition before a mark can be granted.<sup>36</sup> Thus, Trump's winning the presidency may have legitimately catapulted his brand into a category suddenly worthy of Chinese trademark protection.<sup>37</sup>

*C. Presidential Business: The Public/Private Nature of a Head-of-State-Owned Enterprise*

Even before his election, commentators expressed concerns about the impact of Trump's businesses on his policy positions. One columnist noted that, "[i]n a Twitter post on Feb[ruary] 24, 2015 Trump wrote, 'I have a lawsuit in Mexico's corrupt court system that I won but so far can't collect. Don't do business with Mexico!'" and asked whether "a candidate who tweeted 'Don't do business in Mexico!' shortly before he launched his presidential bid [can] have an open mind about U.S.-Mexican ties."<sup>38</sup>

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"opposition Labour leader Jeremy Corbyn voiced his support for canceling Trump's [state visit]"); Tracy Watkins & Stacey Kirk, *Bird-flipping Welcome for U.S. Secretary of State Rex Tillerson in New Zealand*, STUFF (June 6, 2017, 5:14 PM), <http://www.stuff.co.nz/national/politics/93382262/birdflipping-welcome-for-us-secretary-of-state-rex-tillerson-in-new-zealand> (last visited Aug. 29, 2017) [<https://perma.cc/QW6G-XM7N>] (archived Aug. 29, 2017) (discussing Trump's unpopularity in New Zealand and the resistance shown to the visit of Secretary of State Rex Tillerson).

34. For example, membership fees to join Trump's country club, Mar-a-Lago, have doubled since he was elected President. See Robert Frank, *Mar-a-Lago Membership Fee Doubles to \$200,000*, CNBC (Jan. 25, 2017, 3:47 PM), <http://www.cnbc.com/2017/01/25/mar-a-lago-membership-fee-doubles-to-200000.html> (last visited Aug. 26, 2017) [<https://perma.cc/872L-3FRU>] (archived Aug. 26, 2017) ("People close to the Florida resort said the increase took effect Jan. 1.").

35. See Venook Story, *supra* note 16 & accompanying text (discussing China's influence on the Trump family through trademarks).

36. See *Trademarks [FAQs]*, CHINA IPR (last updated Aug. 30, 2017), <http://www.china-iprhelpdesk.eu/content/trademarksfaqs> (last visited Aug. 29, 2017) [<https://perma.cc/XU2K-7XXN>] (archived Aug. 29, 2017) (explaining the procedure for obtaining a well-known trademark in China).

37. See Editorial Board, *supra* note 16 (discussing China's influence on Ivanka through trademarks for her company); *Trademarks [FAQs]*, *supra* note 36 (explaining the requirements for a well-known trademark in China); Venook Story, *supra* note 16 (discussing China's influence on President Trump through Chinese trademark law). Thanks to Professor Nicholas Howson for making this point during the Symposium panel in which a prior version of this Essay was presented.

38. Andrés Oppenheimer, *Is This The Real Reason Trump Holds Grudge Against Mexico?*, MIAMI HERALD (Apr. 22, 2016, 4:00 AM), <http://www.miamiherald.com/news/local/news-columns-blogs/andres->

Concerns like these crystallized almost as soon as Trump won the November election, as reports emerged that Trump might be using his victory to further his business interests. Relatedly, there were rumors and concerns that his personal business interests might be informing his diplomatic and early policy decisions.

For instance, one of the first congratulatory phone calls that Trump received after his election victory was from Turkish President Recep Tayyip Erdoğan. It was reported that during their conversation, Trump took the opportunity to talk up his business partners in Turkey. “According to the Huffington Post, while on the line with Erdogan, Trump relayed praise for the leader from Mehmet Ali Yalcindag, whose father-in-law, Aydin Dogan, owns the holding company that operates the Trump Towers in Istanbul.”<sup>39</sup>

In the days following the election, reports claimed that Georgia and Argentina suddenly green lighted other Trump-branded overseas projects. The first involved a project in the former Soviet Republic of Georgia that “[had] been in the works in the seaside resort city of Batumi since 2010, was initially scheduled to break ground in 2013, but [had] been in stasis” since then—possibly because of “the 2013 electoral defeat of President Mikheil Saakashvili, a friend of Trump’s and a supporter of the deal.”<sup>40</sup> Likewise, “the local developer of a Trump Tower planned for Buenos Aires announced [in mid-November], three days after Trump spoke with Argentina’s president, that the long-delayed project was moving ahead.”<sup>41</sup>

Other early meetings with politicians gave rise to reports that Trump was using his new position to lobby for issues related to his business interests. For instance, shortly after winning the election, Trump met with UK Independence Party leader Nigel Farage, whom he reportedly “discouraged . . . from supporting offshore wind farms, which Trump believes mar the view from one of his coastal

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[openheimer/article73214132.html# storylink=cpy](https://perma.cc/4RQ6-VRR4) (last visited Aug. 27, 2017) [<https://perma.cc/4RQ6-VRR4>] (archived Aug. 27, 2017).

39. Venook, *supra* note 11, at That Phone Call with Erdogan.

40. *Id.* at That Property in Georgia (noting that, although “green-lighting of the Trump property in Batumi has not been linked to a specific conversation with Georgian leaders . . . numerous public statements in the days since suggest that Trump’s election was a major factor, including an interview with a real-estate entrepreneur who said, ‘Cutting the ribbon on a new Trump Tower in Georgia will be a symbol of victory for all of the free world.’”); Rosalind S. Helderman & Tom Hamburger, *Trump’s Presidency, Overseas Business Deals and Relations with Foreign Governments Could All Become Intertwined*, WASH. POST (Nov. 25, 2016), [https://www.washingtonpost.com/politics/trumps-presidency-overseas-business-deals-and-relations-with-foreign-governments-could-all-become-intertwined/2016/11/25/d2bc83f8-b0e2-11e6-8616-52b15787add0\\_story.html?utm\\_term=.2f5c6bbfdd3](https://www.washingtonpost.com/politics/trumps-presidency-overseas-business-deals-and-relations-with-foreign-governments-could-all-become-intertwined/2016/11/25/d2bc83f8-b0e2-11e6-8616-52b15787add0_story.html?utm_term=.2f5c6bbfdd3) (last visited Aug. 27, 2017) [<https://perma.cc/E7B9-MNTG>] (archived Aug. 27, 2017) (discussing Trump’s projects moving forward in Georgia and Argentina).

41. Helderman & Hamburger, *supra* note 40.

properties in Scotland.”<sup>42</sup> Still other business-oriented diplomacy occurred after Trump’s election, including allegedly pressuring the Ambassador of Kuwait to hold its Embassy’s annual independence day celebration at the Trump International Hotel in Washington, D.C.:<sup>43</sup>

The potential impact of his international business holdings may be playing a role in the executive decisions made since Trump assumed the presidency.<sup>44</sup> For instance, it was noted that the first executive order imposing travel restrictions on persons holding citizenship in certain Muslim-majority states included only countries in which Trump apparently has no business interests—but left out states with “deep-seated ties to terrorism” in which he has business interests (and included others without such “deep-seated ties” in which he has no such interests).<sup>45</sup> Likewise, almost immediately after Trump publicly affirmed his commitment to the “One China” policy—which had been in question since he took a call from the leader of Taiwan soon after his election—Trump’s application to trademark his name in China was approved after more than a decade of hold-ups in court.<sup>46</sup> As *The Atlantic* noted about the timing of the two and the

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42. Elise Viebeck, *Trump Tweets that He Will Hand Over Control of Businesses to Sons*, CHI. TRIB. (Dec. 13, 2016, 12:47 AM), <http://www.chicagotribune.com/news/nationworld/politics/ct-trump-business-conflicts-20161212-story.html> (last visited Aug. 26, 2017) [<https://perma.cc/J9XL-WJV5>] (archived Aug. 26, 2017); see *Donald Trump’s New York Times Interview: Full Transcript*, N.Y. TIMES (Nov. 23, 2016), <https://www.nytimes.com/2016/11/23/us/politics/trump-new-york-times-interview-transcript.html> (subscription required) (last visited Aug. 28, 2017) [<https://perma.cc/XW2K-B46Z>] (archived Aug. 28, 2017) (mentioning Trump’s golf courses in relation to energy and environmental policy); Danny Hakim & Eric Lipton, *With a Meeting, Trump Renewed a British Wind Farm Fight*, N.Y. TIMES (Nov. 22, 2016), [https://www.nytimes.com/2016/11/21/business/with-a-meeting-trump-renewed-a-british-wind-farm-fight.html?\\_r=0](https://www.nytimes.com/2016/11/21/business/with-a-meeting-trump-renewed-a-british-wind-farm-fight.html?_r=0) (subscription required) (last visited Aug. 26, 2017) [<https://perma.cc/Z9HD-XWUN>] (archived Aug. 26, 2017).

43. See Venook, *supra* note 11, at That Kuwaiti Event (“[O]riginally scheduled to take place at the Four Seasons Hotel in Georgetown; the location was allegedly changed after members of the Trump Organization contacted the [Kuwaiti] ambassador.”).

44. In addition to decisions based on his own holdings, President Trump also used the official presidential Twitter account to share his message slamming Nordstrom from treating his daughter “unfairly” after it decided to stop carrying her eponymous retail clothing line. See Ivanka Trump Tweets, *supra* note 9. Potential impacts on family members’ business opportunities appears to be a significant aspect of the Trump presidency generally. See, e.g., Melania Trump Lawsuit, *supra* note 3.

45. See Sommerfeldt, *supra* note 3 (“[S]ome Muslim countries were spared from the order’s blacklist, even though they have deep-seated ties to terrorism. Conspicuously, Trump doesn’t hold any business interests in any of the countries on the list, but holds major stakes in several of those excluded from it, records show.”).

46. Venook Story, *supra* note 16. It is not at all clear how linked the two actually are, but “what the story demonstrates is just how much the president’s financial dealings complicate any understanding of the motivations behind his policy decisions.” See *id.*

speculation that a *quid pro quo* might have been involved: “Whether on purpose or by mere coincidence, the outcome of a decade-long legal dispute is now inextricably linked, in the public imagination if not in fact, to a high-profile question of international diplomacy.”<sup>47</sup>

#### D. *Overseas Lawsuits Against Trump and His Business Enterprise*

The international scope of his business interests, the frequency with which he engages in litigation, and the branded nature of his holdings all suggest that Trump is uniquely likely to be the subject of lawsuits while serving as a head of state. Any of the above described projects, which have been the subject of public/private discussions between Trump and other world leaders, could become the subject of litigation. Trump might also be a target for lawsuits, with or without merit, because of his unpopularity in many countries around the world.<sup>48</sup>

Foreign lawsuits against Trump and/or his business are not just hypothetical. Unhappy investors recently named Donald Trump as a defendant after they reportedly lost millions of dollars in connection with the Trump International Hotel and Tower in Toronto—a development that licensed the Trump brand name.<sup>49</sup> In particular, investors who lost their money claim they were misled into believing that Trump was building the hotel based on the fact that Trump’s name was “splashed all over the marketing. . . . [The plaintiffs-investors] thought he was building the hotel, because he certainly gives you the impression that . . . [it is] his hotel.”<sup>50</sup> A Canadian appellate court ruled in October 2016 that, while some claims against

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47. *Id.*

48. See, e.g., Alexis Flynn, *Trump Loses Battle to Stop Wind Farm Near His Scottish Golf Resort*, WALL ST. J. (Dec. 16, 2015, 11:19 AM), <https://www.wsj.com/articles/trump-loses-battle-to-stop-wind-farm-near-his-scottish-golf-resort-1450275439> (subscription required) (last visited Aug. 26, 2017) [<https://perma.cc/992X-GVSH>] (archived Aug. 26, 2017) (describing disdain for Trump in the UK following campaign remarks about banning Muslims from entering the U.S. leading to, inter alia, “Britons petitioning lawmakers to hold a parliamentary debate on whether to ban the businessman from entering the U.K, on the grounds that he incited hate”).

49. See Jackie Northam, *Trump Tower in Toronto Is Up for Sale and Facing Legal Woes*, NPR (Feb. 8, 2017, 4:33 AM), <http://www.npr.org/sections/parallels/2017/02/08/513946283/trump-tower-in-toronto-is-up-for-sale-and-facing-legal-woes> (subscription required) (last visited Aug. 27, 2017) [<https://perma.cc/SJF6-T63K>] (archived Aug. 27, 2017).

50. *Id.* In fact, “Trump has no ownership stake in the Toronto building,” although “the Trump Organization[] has a long-term management contract for the property, and Trump licenses his brand — his name — for a fee.” *Id.*



Trump were properly dismissed, others—“based on oppression, collusion, or breach of fiduciary duties”—could proceed.<sup>51</sup>

Similarly, a large group of “would-be condo buyers who lost millions of dollars” sued Trump when a Trump-branded luxury condominium project was slated to be built in Mexico but never got off the ground.<sup>52</sup> While Trump settled the suit, other potential plaintiffs may still have claims related to the same fraud allegations in the earlier suit, which they could bring in Mexico. One of the investors (who has yet to bring or settle a claim) gave a lengthy interview not long ago, in which she alleged that “she used her life savings to pay a deposit of just over \$50,000” and “still wants her money back—with interest.”<sup>53</sup>

### III. HEAD-OF-STATE AND SOVEREIGN IMMUNITY DOCTRINES

The specter of lawsuits against a head of state in foreign courts immediately raises the issue of potential claims of immunity. Many previous authors have done an excellent and thorough job of expounding upon the historically linked, but now separate doctrines of sovereign and head-of-state immunity.<sup>54</sup> This Part therefore only briefly summarizes them before delving into the areas where these doctrines intersect at least tangentially with potential lawsuits against Trump and his business enterprise. In particular, this Part describes aspects of head-of-state immunity law that are amorphous, under-theorized, subject to disagreement, and likely relevant to lawsuits against head-of-state-owned enterprises.

The notion that foreign heads of state should enjoy immunity has ancient roots.<sup>55</sup> This doctrine has clearly evolved over time, but

51. Alastair Sharp, *Canadian Court Rules Trump Can Face Claims in Toronto Tower Case*, REUTERS CAN. (Oct. 13, 2016, 3:07 PM), <http://ca.reuters.com/article/topNews/idCAKCN12D2UO?pageNumber=2&virtualBrandChannel=0> [<https://perma.cc/VH8Q-6QKN>] (archived Aug. 29, 2017) (citing Singh v. Trump, 2016 ONCA 747, docket number: C60787).

52. Stuart Pfeifer, *Donald Trump Settles Lawsuit Over Baja Condo Resort That Went Bust*, L.A. TIMES (Nov. 27, 2013, 10:43 AM), <http://www.latimes.com/business/la-fi-mo-donald-trump-settles-baja-mexico-condo-resort-lawsuit-20131127-story.html> [<https://perma.cc/DX4N-ZRSE>] (archived Aug. 29, 2017).

53. Michael Finnegan, *Trump's Failed Baja Condo Resort Left Buyers Feeling Betrayed and Angry*, L.A. TIMES, (June 27, 2016, 3:00 AM), <http://www.latimes.com/politics/la-na-pol-trump-baja-snap-story.html> [<https://perma.cc/EZ5D-2YE7>] (archived Aug. 28, 2017) (noting also several other investors who claim to have lost even bigger down payments who did not join in the now-settled fraud lawsuit).

54. See, e.g., G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 27–28, 134–45 (1999).

55. Christopher D. Totten, *Head-of-State and Foreign Official Immunity in the United States After Samantar: A Suggested Approach*, 34 FORDHAM INT'L J. 332, 332

continues to be a part of customary international law, having never been codified, either in a multilateral treaty or in a US statute. As discussed in more detail below, the modern contours of the doctrine, including when and why it should be applied, is an area about which there continues to be theoretical uncertainty and divergent practice.

In US law, both the concepts of head-of-state and sovereign immunity are typically traced to the 1812 Supreme Court decision in *The Schooner Exchange v. McFaddon*.<sup>56</sup> *The Schooner Exchange* is frequently cited for the proposition that the United States had long followed the classic absolute immunity approach<sup>57</sup> to sovereign immunity,<sup>58</sup> though as one commentator points out, “Chief Justice Marshall’s opinion suggests that there are limitations to sovereign immunity when a foreign sovereign takes on the character of a private individual.”<sup>59</sup>

Though such hints of a more restrictive immunity approach<sup>60</sup> may be gleaned from pre-twentieth century case law and practice, in fact US courts continued to follow an absolute immunity approach well into the twentieth century.<sup>61</sup> In 1952, Jack B. Tate, then-Acting Legal Adviser at the U.S. Department of State, wrote a letter setting

(2011) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, ch. 6, intro. Note (1987)).

56. *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 147 (1812).

57. The “absolute” or “classical” approach to sovereign immunity recognizes “no exceptions save for the consent of the sovereign.” Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT’L L. 915, 925 (2011).

58. Totten, *supra* note 54, at 338 (“Traditionally, under the theory of absolute foreign sovereign immunity, states that were sued in US courts made special appearances to assert immunity, resulting in dismissal of the suit. . . . As early as 1943, the US Supreme Court ruled that a suggestion of immunity from the executive branch must be accepted by the courts.”).

59. Daniel M. Singerman, Note, *It’s Still Good to Be the King: An Argument for Maintaining the Status Quo in Foreign Head of State Immunity*, 21 EMORY INT’L L. J. 413, 421 (2007) (citation omitted).

60. In contrast to the “absolute” approach, “restrictive” immunity means the recognition of some “explicit exceptions to immunity, especially when sovereigns were engaged in trade or commerce.” Wuerth, *supra* note 57, at 925.

61. See, e.g., *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 573 (1926) (recognizing immunity of a commercial vessel and rejecting the contrary view of the U.S. Department of State); see also *LADY HAZEL FOX, THE LAW OF STATE IMMUNITY*, 201–11, 224–30 (2d ed. 2008) (describing emergence of restrictive immunity approach); ANTHEA ROBERTS, IS INTERNATIONAL LAW REALLY INTERNATIONAL? 158 (2017) (“Many states have since moved to adopting the restrictive approach to sovereign immunity, but China is not one of them.”); Ingrid Wuerth, *Pinochet’s Legacy Reassessed*, 106 AM. J. INT’L L. 731, 736 (2012) (noting that, although “most countries had accepted [the restrictive] approach [to sovereign immunity],” “China recently made clear that it adheres to the absolute view”); Wuerth, *supra* note 57, at 925 n.54 (describing judicial determination in 1930s and 1940s that courts should henceforth defer to executive suggestion of immunity) (citing *Compañía Española de Navegación Marítima S.A. v. The Navemar*, 303 U.S. 68, 74–75 (1938); *Ex Parte Peru*, 318 U.S. 578, 588–89 (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945)).

forth the Department's position that it "would henceforth follow the more limited form of immunity known as restrictive immunity,"<sup>62</sup> a doctrine that "essentially recognizes the immunity of the sovereign for public acts but not for private."<sup>63</sup>

Initially, the Department continued its prior practice of making determinations as to whether to recommend immunity in suits against sovereign states based upon the new Tate formula—determinations that would then be relied upon by courts to rule on whether or not to grant immunity. Eventually, however, the restrictive view was codified by statute in the Foreign Sovereign Immunities Act of 1976 (FSIA).<sup>64</sup> While the formal legal standard announced by Tate did not change, the statute shifted the legal determinations from the executive to the judicial branch.<sup>65</sup>

The restrictive view of sovereign immunity, described in the Tate Letter and codified in the FSIA, seeks to balance competing interests. On the one hand, it recognizes that individuals will seek and should sometimes be able to access remedies for injuries incurred as a result of their commercial business dealings with foreign sovereigns. At the same time, it is mindful that the United States continues to enjoy judicial immunity sufficient to permit it to engage in the legitimate public functions of foreign governments without concern for liability. With the passage of the FSIA and a return of sovereign immunity determinations to the judicial branch, immunity determinations have become more uniform and the formal legal analysis of whether and when an exception to sovereign immunity should be recognized has deepened substantially.<sup>66</sup>

This is particularly true with respect to cases involving the commercial activity exception to sovereign immunity, which has been litigated extensively since the passage of the FSIA. In *Republic of Argentina v. Weltover, Inc.*,<sup>67</sup> the Supreme Court distinguished between commercial and non-commercial acts, explaining that "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions

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62. Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Attorney Gen., Dep't of Justice (May 19, 1952), reprinted in 26 DEP'T OF STATE BULLETIN 984-85 (1952).

63. Totten, *supra* note 54, at 339.

64. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611 (2012). *See also supra* note 14.

65. Wuerth, *supra* note 57, at 927-28 (discussing shift from executive to judicial immunity decisionmaking with the passage of the FSIA).

66. *See also id.* at 927 (noting that "the system of executive control [over immunity determinations] ultimately proved unsatisfactory for several reasons," including that the fact that "the State Department sometimes made immunity determinations that differed from case to case and were inconsistent with its overall policy").

67. *Rep. of Argentina v. Weltover, Inc.*, 504 U.S. 607, 607 (1992).

are ‘commercial’ within the meaning of the FSIA.”<sup>68</sup> Moreover, the Court went on to clarify that the “nature,” and not the “purpose,” of an act determines whether that act is commercial. That is, the Court held:

[T]he issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in “trade and traffic or commerce.” Thus, a foreign government’s issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a “commercial” activity, because private companies can similarly use sales contracts to acquire goods.<sup>69</sup>

Despite the benefits of codification and judicial interpretation, some commentators have complained that the FSIA is unclear. In particular, critics charge that it “fails to convincingly define state ‘agencies or instrumentalities,’ and . . . [that it] is unclear in explaining when such state agencies or instrumentalities are exempt from jurisdiction.”<sup>70</sup>

Since the enactment of the FSIA, the doctrine of head-of-state immunity has emerged as its own distinct category—in both US<sup>71</sup> and international law. As a procedural matter, because head-of-state immunity was not made a part of the FSIA, US courts continue to look to the State Department for guidance on head-of-state immunity questions.<sup>72</sup> Without suggestions from the executive branch, courts sometimes independently analyze head-of-state immunity issues. But the case law is sparse, unlike the significant doctrinal developments that have occurred since the FSIA’s passage.

The doctrine is not clear or uniform across jurisdictions either. “Although all nations generally agree that heads of state should be afforded some form of immunity, they disagree as to how far the immunities should extend and in what circumstances.”<sup>73</sup> The fact

68. *Id.* at 614.

69. *Id.* at 614–15 (citation omitted).

70. Singerman, *supra* note 59, at 423.

71. See Totten, *supra* note 55, at 337; see also Mark S. Zaid, *Sovereign Immunity: A Comparative Perspective*, 88 AM. SOC’Y INT’L L. PROC. 509, 513 (1994) (discussing how it is not treated as separate under, for example, UK law (citing UK State Immunity Act of 1978)).

72. Totten, *supra* note 55, at 342–43; see also, e.g., Yousuf v. Samantar, No. 1:04cv1360 (LMB/JFA), 2012 U.S. Dist. LEXIS 122403, at \*4 (E.D. Va. Aug. 28, 2012) (ordering, based on the State Department’s Statement of Interest, that the defendant was not entitled to immunity). *But see* Wuerth, *supra* note 57, at 923 (arguing that although, in some cases, courts should apply “very significant deference to the views of the executive branch,” they “should not, however, simply replace generalized executive branch lawmaking with ‘substantial’ deference on all issues”).

73. Singerman, *supra* note 59, at 427.

that head-of-state immunity remains a creature of both common law and customary international law reflects this lack of uniformity and encourages it to persist.<sup>74</sup>

#### IV. GAPS AND CONFLICTS IN VARIOUS IMMUNITY DOCTRINES

There are many areas of confusion and conflict surrounding the doctrines of sovereign and head-of-state immunity. A number of these appear to be particularly salient in light of the types of suits that could be seen in the Trump era.

First, there are conflicting views as to whether heads of state should enjoy absolute immunity. In recent years, it has been contended, the formerly sacrosanct principle has begun to erode, particularly in the wake of the prosecution of General Augusto Pinochet, the former ruler of Chile, by the United Kingdom.<sup>75</sup> While the International Court of Justice recognized shortly after the Pinochet prosecution that absolute immunity continues to exist under customary international law *vis-à-vis* domestic court criminal prosecutions for sitting heads of state, it acknowledged that a sitting head of state *could* be criminally prosecuted in an international tribunal.<sup>76</sup>

Indeed, a few years after this decision, the International Criminal Court (ICC) prosecuted a sitting head of state, Kenyan President Uhuru Kenyatta, for the first time. President Kenyatta “handed over power to his deputy, William Ruto, before flying to The Hague in Holland” to deny and contest charges that he committed

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74. See *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) (characterizing law applicable to official immunity determinations as the “common law”); Singerman, *supra* note 59, at 427 (“[N]o international multilateral treaty codifies head of state immunity as the VCDR does for diplomatic immunity.”); Wuerth, *supra* note 61, at 738 (footnotes omitted) (“The relatively low number of state parties to these [immunity] conventions has been attributed to their complexity and to substantive disagreement about their terms. Customary international law continues to govern this area of law.”); Wuerth, *supra* note 57, at 962–64 (arguing that the applicable “common law” should be federal common law interpreted by courts not the executive).

75. *Regina v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 3), [2000] 1 AC 147 (HL) 200; see also Totten, *supra* note 55, at 366 (describing Spain and Germany also taking aggressive positions with respect to prosecuting former heads of state and high foreign officials for human rights violations following Pinochet). *But see* Wuerth, *supra* note 61, at 732 (arguing “that under customary international law as it stands today, there is no human rights or international criminal law exception . . . to the customary international law of functional immunity” and noting that “[v]irtually all scholars take the opposite view, arguing or positing that customary international law recognizes such an exception, especially in criminal cases”).

76. Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14).

“crimes against humanity for his alleged role in unleashing a wave of post-election violence during 2007–08.”<sup>77</sup> The ICC prosecuted Kenyatta over the African Union’s strong assertions that sitting heads of state retain full immunity under customary international law and that it violates the sovereignty of these officials’ home states to subject them to prosecution while in office.<sup>78</sup>

Second, suits (criminal or civil) based on commercial or “purely private activities” may be an exception to head-of-state immunity. Then again, they may not. The question is under-theorized and seldom litigated directly. The idea that private or commercial activity may constitute an exception to absolute immunity, similar to the exception contained in the FSIA, is frequently mentioned in passing.<sup>79</sup> However, those making this claim always appear to be citing others making the same statement—but not cases actually denying immunity.<sup>80</sup> To the contrary, to the extent the actual legal question is decided in such cases, immunity has been granted, never denied.<sup>81</sup>

Furthermore, discussions of this concept, though often merging “private” and “commercial” conduct, often go on to discuss conduct that is quite different from the types of private commercial conduct that arise in the sovereign immunity context. For instance, one author discusses the possible “commercial activity” exception to head-of-state immunity by reference to illegal drug trafficking and to other criminal behavior, such as “ordinary” murder or theft as examples of “private” acts by a head of state.<sup>82</sup>

Occasionally, courts encounter cases involving more mainstream commercial activity. In *Tachiona v. Mugabe*,<sup>83</sup> the Southern District

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77. Owen Bowcott, *Kenya’s Uhuru Kenyatta Becomes First Head of State to Appear Before ICC*, THE GUARDIAN (Oct. 8, 2014, 7:47 AM), <https://www.theguardian.com/world/2014/oct/08/kenya-uhuru-kenyatta-head-of-state-icc-hague> [<https://perma.cc/JC2W-ALQ2>] (archived August 28, 2017).

78. *African Union Agrees on ICC Immunity for Heads of State*, THE TELEGRAPH (Oct. 12, 2013, 1:51 AM), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/10374538/African-Union-agrees-on-ICC-immunity-for-heads-of-state.html> [<https://perma.cc/AQ6M-QGDU>] (archived Aug. 29, 2017).

79. Even the ICJ has alluded to this possibility in dicta. See Arrest Warrant of 11 April 2000, *supra* note 76, ¶ 61 (suggesting that former officials might lack immunity in domestic courts for “acts committed during that period of office in a private capacity”).

80. See, e.g., *Tachiona v. Mugabe*, 169 F. Supp.2d 259, 296 (S.D.N.Y. 2001) (citing *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1112–13 (D.D.C.1996) and *Lasidi, S.A. v. Financiera Avenida, S.A.*, 538 N.E.2d 332, 333 (1989)).

81. See, e.g., *Tachiona*, 169 F. Supp.2d at 296; *Lasidi*, 538 N.E.2d at 333 (failing to note that immunity was ultimately granted in both of these cases despite the commercial character of the head of state’s alleged misconduct).

82. Totten, *supra* note 55, at 371–72.

83. 169 F.2d at 259.

of New York asserted that one reason for an increase in cases against heads of state following the passage of the FSIA is the fact that, “as international trade and opportunities to expand wealth in global markets has continued to expand, more heads-of-state themselves may be engaging in private foreign investment and commercial ventures funded by their personal and family fortunes.”<sup>84</sup> Yet, in making this argument, the court apparently found no actual cases in which such immunity was set aside based on a commercial activity exception. To the contrary, the one reported case to which the *Mugabe* court cited in this section of the opinion involved a sitting head of state who was deemed entitled to immunity in a case involving allegations that “defendants [including H.H. Sheikh Zayed, the sitting head of state of the United Arab Emirates], as senior officers, managers, agents and nominees for the Bank of Credit and Commerce International . . . illegally and secretly sought to acquire ownership and maintain control of First American Corporation.”<sup>85</sup>

Third, even beyond the question of whether a “commercial activity” exception might apply to sitting (or former) heads of state, the contours of the commercial activity exception to sovereign immunity are themselves uncertain. While the standard established in *Weltover* is reasonably easy to state,<sup>86</sup> what constitutes a “private person” commercial activity versus activity that intersects commercial activity and “traditional” public functions is not always easy to discern in practice.<sup>87</sup> While certain categories of cases clearly constitute commercial activity, other governmental activities that involve commercial conduct do not fall clearly on one side of the fuzzy borders surrounding the commercial activity exception; ultimately, the determination is a factual inquiry and continues to be “one of the most frequently litigated” provisions of the FSIA.<sup>88</sup>

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84. *Id.* at 278 (citations omitted).

85. *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1107, 1112 (D.D.C. 1996).

86. *See, e.g.*, Singerman, *supra* note 59, at 422.

87. *See Nelson v. Saudi Arabia*, 507 U.S. 349, 358 n.4 (1993) (holding that a connection between sovereign and commercial activities did not trigger the FSIA exception if the claim itself can be said to rest “entirely upon activities sovereign in character”).

88. Crowell & Moring, *The Foreign Sovereign Immunities Act—2014 Year in Review*, 22 L. & BUS. REV. AM. 141, 157 (2014). For instance, as Crowell & Moring’s 2014 Annual Review of FSIA litigation recounts, a number of cases tested the “commercial activities” exception that year, see *id.* at 157–60 – some with quite surprising outcomes, see, for example, *McEachern v. Inter-Country Adoption Bd. of the Republic of the Phil.*, 62 F. Supp. 3d 187, 188–92 (D. Mass. 2014) (holding that a foreign adoption of a child constituted “commercial activity”). Moreover, the “commercial activity” exception may not be interpreted in other states in precisely the same manner as the U.S. Supreme Court. For instance, the United Kingdom recently narrowed their interpretation of a similar exception. *SerVaas Inc. v. Rafidain Bank*, [2012] UKSC 40, ¶¶ 30–33 (appeal taken from ECWA). In that opinion, they noted that other jurisdictions, such as Hong Kong, continue to follow an absolute immunity

Fourth, the FSIA contains an exception for “rights in immoveable property” as part of the restrictive view of sovereign immunity.<sup>89</sup> There is even less discussion of this potential exception in discussions of head-of-state immunity than the little that has taken place regarding private or commercial activity. To some extent, this may turn on notions of whether sovereign immunity doctrine generally should be applied to head-of-state immunity questions.

But, this last point too is highly contestable. There are multiple rationales for recognizing head-of-state immunity; it serves more than one purpose, some of which have been more and less important than others at various points in the doctrine’s history.<sup>90</sup> Some approaches continue to view the head of state as more or less part and parcel of the sovereign entity. On this view, head-of-state immunity may be treated as a form of sovereign immunity, or the analysis of when to recognize it may be similar to analyses of when to grant sovereign immunity.<sup>91</sup> Others view it as more akin to diplomatic immunity or a function of diplomatic law.<sup>92</sup> Here, there may be less reason to distinguish between private and public acts, at least while the head of state is in office. Depending on the reasons why a court recognizes head-of-state immunity, it may or may not make sense to recognize immunity generally or in a particular case.

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approach and do not recognize a commercial activity exception in their own immunity laws. *See id.* at ¶29.

89. Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193, 196–97 (2007) (citing FSIA § 1605(a)(4)).

90. *See* Michael A. Tunks, Note, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 52 DUKE L. J. 651, 654 (2002) (“Head-of-state immunity has sought to achieve the goals of both sovereign and diplomatic immunity by (1) recognizing an appropriate degree of respect for foreign leaders as a symbol of their state’s sovereign independence; and (2) ensuring that they are not inhibited in performing their diplomatic functions.”); *see also, e.g.*, Shobha Verughese George, Note, *Head of State Immunity in the United States: Still Confused After All These Years*, 64 FORDHAM L. REV. 1051, 1055, 1061 (1995) (citations omitted) (tracing head of state immunity back to its origin within the sovereign immunity doctrine when the sovereign was indistinguishable from that state but also noting that head of state immunity is sometimes thought to be grounded in principles of comity, with “each state protect[ing] the immunity concept so that its own head-of-state will be protected when he or she is abroad”); Singerman, *supra* note 59, at 418–26 (discussing head of state’s dual origins in sovereign and diplomatic immunity rationales).

91. *See, e.g.*, Jones v. Ministry of Interior of the Kingdom of Saudi Arabia, [2006] UKHL 26, ¶¶ 89–93, 101-02 [2007] 1 AC 270 (HL) (appeal taken from Eng.) (distinguishing Pinochet and concluding that the U.K. State Immunity Act of 1978 conferred immunity on both the Kingdom of Saudi Arabia and on former state officials) (reported by Elina Steinerte & Rebecca Wallace at 100 AM J. INT’L L. 901, 902 (2006)).

92. *See* Singerman, *supra* note 59, at 423–26; Tunks, *supra* note 90, at 654–55.



## V. UNCHARTED TERRITORY: NOVEL QUESTIONS SURROUNDING HEAD-OF-STATE-OWNED ENTERPRISE IMMUNITY

The uncertainty surrounding immunity law reflects many things, not least of which perhaps is the dearth of cases testing many of the issues. This has the potential to change during the Trump presidency. The scope of Trump's international business interests, the frequency with which he engages in litigation, and the disinterest he has shown so far to disentangle his public and private business suggest that many of these doctrinal questions may soon come to the fore.

Attempting to reach satisfactory answers about whether and when immunity should attach to suits against this "head-of-state-owned enterprise" is beyond the scope of this relatively short Article. Even attempting to identify all of the likely questions that may emerge is a daunting task. This Part attempts to illuminate a significant number of possible ones.

One can imagine suits against this "head-of-state-owned enterprise" brought in several different formats and fora. To the extent that the lawsuits are similar to those that have been brought against Trump-the-Businessman in the past, one imagines civil lawsuits<sup>93</sup> targeting what was, before his taking office, clearly private commercial activity. These suits may be brought against the Trump Organization or may name Trump himself, as frequently has happened in part because of the branded nature of many of his businesses and the frequent allegations that investors fraudulently were led to believe that Trump would be more involved in ventures in which they invested than he actually turned out to be.

To the extent that the suits name Donald Trump in his personal capacity and not just the Trump Organization, a number of questions about acting head-of-state immunity and its parameters may arise. Just a few that immediately come to mind: Can Trump be sued as a defendant in a civil lawsuit while he is in office? Can he be sued for alleged misconduct that occurs during his time in office even after he leaves office? Do the answers to the previous questions depend upon the link between the alleged misconduct and official acts in which he engages as a head of state?<sup>94</sup> What standards would be used to

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93. One can imagine that certain allegations that frequently have arisen, particularly relating to fraud, could be criminal activity in some jurisdictions. Or that mixing his public office and private business could open Trump up to charges of corruption or other criminal activity, depending on a nation's criminal laws, that would not have been in play had he engaged in the same conduct as a private citizen dealing only with other private citizens. However, the notion that Trump might be charged criminally not only seems significantly less likely, it is much more closely aligned to existing immunity doctrine and therefore much less likely to raise novel questions.

94. See Wuerth, *supra* note 61, at 735 (distinguishing between "[i]mmunity *ratione personae*, or status immunity, [which] protects high-level officials from

determine how close the link must be or whether the function is a quintessentially sovereign act or not? Is there a “commercial activity” exception to the head-of-state immunity doctrine and, if so, what are its parameters?

These questions all appear to be novel, as immunity discussions around civil suits against sitting heads of state (and former heads of state for that matter) are exceedingly rare.<sup>95</sup> Moreover, looking to cases involving legal standards in closely related areas, such as diplomatic immunity, may not always be particularly helpful, as the global reach and potential influence on diplomacy of the “head-of-state-owned enterprise” that has emerged with Trump’s winning election and taking office feels very different from the alleged private misconduct with which most diplomats are charged.

## VI. CONCLUSION

Given the novel nature of the enterprise, how courts might treat immunity claims raised in suits brought against the Trump Organization (or against Trump-branded businesses in which his interest is relatively attenuated) is an open question. The Trump Organization is arguably acting as a “head-of-state-owned enterprise” precisely because Trump continues to benefit from these businesses, and they benefit from their association with their namesake.<sup>96</sup> While technically they continue to operate as private businesses, with Trump’s ascendancy to the highest executive office, it is difficult to disentangle them and their business from Trump.

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virtually all suits in foreign national courts while they are still in office” and “functional immunity, or immunity *ratione materiae*, [which] attaches not to the office of the individual but to the type of act performed” and “applies only to official, not private, conduct, and [which] continues to apply after the individual leaves office”).

95. *Id.* at 740–41 (noting that, despite the possibility that heads of state may sometimes not be entitled to immunity from civil proceedings, “[c]ivil proceedings in national courts against foreign sitting heads of state nonetheless remain rare”). It is possible that the dearth of civil lawsuits against heads of state reflects the fact that these officials have only infrequently engaged in private business while in office that could give rise to such claims abroad. It may also reflect that the possibility immunity claims will be raised reduces the chances of success in bringing such suits and the costs of prosecuting them.

96. Early data suggests a financial boon for affiliated business ventures. See Jonathan O’Connell, *Trump D.C. Hotel Turns \$2 Million Profit in Four Months*, WASH. POST. (Aug. 10, 2017), [https://www.washingtonpost.com/politics/trump-dc-hotel-turns-2-million-profit-in-four-months/2017/08/10/23bd97f0-7e02-11e7-9d08-b79f191668ed\\_story.html?tid=ss\\_fb&utm\\_term=.aea5290d4e4d](https://www.washingtonpost.com/politics/trump-dc-hotel-turns-2-million-profit-in-four-months/2017/08/10/23bd97f0-7e02-11e7-9d08-b79f191668ed_story.html?tid=ss_fb&utm_term=.aea5290d4e4d) [https://perma.cc/JHT9-A9YU] (archived Aug. 29, 2017) (reporting that “Donald Trump’s company turned a \$1.97 million profit at its opulent Trump International Hotel so far in 2017, dramatically beating its [projection of a \$2.1 million loss during the first quarter of 2017] and giving the first hard numbers to critics who charge that Trump is profiting from his presidency”).

While almost certainly not falling under the technical definition of an entity covered by the FSIA,<sup>97</sup> there are reasonable arguments that might be made in favor of treating this business as an extension of Trump himself, at least while he is serving as a head of state.

Whether the business *qua* business could raise his status as head of state directly, or whether some other category akin to a state-owned enterprise is created, remains to be seen. But courts and other governmental actors around the globe soon may face these and other difficult questions.

Of course, only time will tell what types of lawsuits will be filed against Trump and his business interests, as well as in what jurisdictions. The unprecedented combination of his extensive business interests around the globe, the inclination to use his high office to bolster those interests (and potentially vice versa), and the frequency with which he engages in litigation mean that President Trump's term in office is likely to create new precedent in many areas, particularly immunity law. Whatever one may think of the propriety, legality, or ethics surrounding the novel integration of the new President's international business interests and policy agenda, at the very least it provides an opportunity for immunity law to develop deeper and more nuanced accounts of many of its principles.

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97. See *supra* note 14 & accompanying text.

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