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ABSTRACT

It has been a long-standing rule in admiralty that in order for a foreign sovereign to assert immunity in U.S. courts, the res that is the object of the maritime claim must be in the actual possession of the foreign state at the time the case is brought. Inasmuch as Samantar *recognized the existence of a "common-law regime" that preexisted the Foreign Sovereign Immunities Act (FSIA), this Article examines whether the actual possession rule remains in force today. The FSIA codified the actual possession rule in its provisions for the handling of admiralty claims against foreign sovereigns, but this has been hotly disputed. Resolution of this question has broad implications, including the measure of deference that should be given to executive branch positions and the extent to which foreign sovereign interests should be accommodated in all forms of collective proceedings.*

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The U.S. Supreme Court's June 2010 decision in *Samantar v. Yousuf*[1] not only revolutionized our understanding of foreign sovereign immunities for individual foreign officials, but also placed in renewed perspective the status of the common law on this subject—before it was codified in the 1976 Foreign Sovereign Immunities Act (FSIA).[2] In the briefing before the Court,[3] and in recent commentary,[4] it was apparently assumed that the only common law enclaves of foreign sovereign immunity that survived the FSIA concerned the immunities of individual foreign officials and heads of state. This short contribution raises the point that there are other pockets of pre-FSIA common law that continue to exert an influence on doctrine in this area. The existence of these other doctrinal enclosures has surprising implications for the entirety of foreign sovereign immunity (FSI) litigation.

The example selected for discussion here is one arising from the admiralty law's requirement that in order to resist the jurisdiction of a U.S. court a foreign sovereign must be in actual possession of a vessel or cargo that is the subject of a pending maritime claim. This requirement is pervasive for all sovereign immunity contexts—whether the sovereign at issue is the United States (under federal common law), the states of the Union (under the Constitution's Eleventh Amendment),[5] or foreign nations. Admiralty actions against foreign sovereigns—whether proceeding in personam (against a

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1. Samantar v. Yousuf, 130 S. Ct. 2278 (2010).

2. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–1611 (2006).

3. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Affirmance at 28–29, Samantar v. Yousuf, 130 S. Ct. 2278 (2010) (No. 08-1555) (arguing that the FSIA did not abrogate the long-recognized immunity of foreign officials); Brief of Professors of Public International Law and Comparative Law as Amici Curiae Supporting Respondents at 17, Samantar v. Yousuf, 130 S. Ct. 2278 (2010) (No. 08-1555) ("The two recognized forms of status-based immunity are diplomatic immunity and head of state immunity."); Brief of Professors of International Litigation and Foreign Relations Law as Amici Curiae in Support of Respondents at 8–9, Samantar v. Yousuf, 130 S. Ct. 2278 (2010) (No. 08-1555) (arguing that FSIA left the immunity of foreign officials to be governed by federal common law).

4. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 GREEN BAG 9, 22 (2009) (arguing that FSIA should be construed to confer immunity in suits against foreign officials for their official acts); Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61, 74 (2010) (mentioning actual possession rule in maritime cases).

5. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). For application of the Eleventh Amendment to admiralty jurisdiction, see generally, David J. Bederman, *Admiralty and the Eleventh Amendment*, 72 NOTRE DAME L. REV. 935 (1997).

named foreign sovereign) or in rem (against a specified res that is the subject of a maritime lien)—are not a major staple of FSI litigation in U.S. courts today. However, prior to 1976 (and especially before World War II and the issuance of the 1952 Tate Letter[6]), these types of proceedings were common in U.S. courts.[7] Thus, there is a rich corpus of pre-FSIA common law on this topic, and the contours of this doctrine continue to develop. Today there are broad implications for questions relating to deference to executive branch positions in FSI cases and other procedural problems in instances of intervention by a foreign sovereign in a collective action in a U.S. court.

This contribution will unfold in several steps. First, I will take stock of the general status of common law foreign sovereign immunities in the wake of *Samantar*. This discussion should make clear that the Supreme Court's 2010 decision, as well as prior holdings, should extend in application to doctrinal pockets other than that for the immunities of current or former foreign officials. Next, I will explore the evolution of the maritime law's actual possession rule in FSI litigation. The principle that U.S. admiralty courts are free to adjudicate a foreign sovereign's claim to maritime property (whether a vessel or cargo), *so long as* that sovereign was not ousted of its actual possession at the institution of the proceeding, is one of long-standing and pedigree.[8] It is also supported by a substantial logic that when maritime property is not in the actual possession of a foreign sovereign, it is likely being employed for commercial and private[9] purposes and thus amenable to the adjudication of a maritime lien.

Assuming that there is a body of preexisting FSI common law (as confirmed in *Samantar*) and that admiralty's actual possession rule is part of that law, I will then examine whether Congress intended in the 1976 FSIA (and subsequent amendments[10]) to alter that common law, in whole or in part. This was, of course, the fighting issue in

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6. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Phillip B. Perlman, Acting Att'y Gen., U.S. Dep't of Justice (May 19, 1952) [hereinafter Tate Letter], *reprinted in* 26 DEP'T ST. BULL. 984, 984–85 (1952), *and in* Alfred Dunhill, Inc. v. Republic of Cuba, 425 U.S. 682, 711–15 (1976) ("[Other countries have announced that] immunity for government owned merchant vessels is waived. In addition the United States . . . some years ago announced and has since followed, a policy of not claiming immunity for its public owned or operated merchant vessels.").

7. *See infra* text accompanying notes 56–76.

8. *See infra* text accompanying notes 56–76.

9. *See* Tate Letter, *supra* note 6, at 1 ("According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).").

10. Act of Nov. 9, 1988, Pub. L. No. 100-640, § 1, 102 Stat. 3333 (amending the FSIA with respect to admiralty jurisdiction).

Samantar—at least as to the immunities of foreign officials.[11] Given the complexities of Congress's codification in the FSIA of provisions concerning maritime claims,[12] congressional intent could well be a point of conflict for suits in admiralty as well. Nevertheless, I conclude here that the actual possession rule *did* survive the FSIA's codification on this subject and, indeed, is textually mandated by the FSIA's relevant provisions.[13]

That leaves two other matters to be addressed here—both having broad import for FSI litigation. The first is the measure of judicial regard courts should afford to executive branch positions in cases involving these FSI common law enclaves. In the wake of *Samantar*, it seems clear that the Executive Branch desires substantial, if not absolute, respect to be given to its litigation positions in common law cases, especially on the ultimate question of whether a foreign sovereign defendant should be granted immunity.[14] But the pre-FSIA common law of the actual possession rule in admiralty cases is suggestive of a different result; one that could be regarded as rather less deferential to executive branch positions.[15] In a similar vein, the U.S. Supreme Court's 2008 decision in *Republic of the Philippines v. Pimentel*[16] has implications whenever a foreign sovereign intrudes into a collective proceeding in a U.S. court. Such collective proceedings would not only include in rem admiralty actions (where there are competing claims to a res), but also bankruptcy and forfeiture actions. The Supreme Court held in *Pimentel* (involving a foreign sovereign that was not joined in an interpleader action) that "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign."[17] In short, *Pimentel* established a principle of indispensable parties in FSI litigation.[18] But such a dictate may be incompatible with inherently collective proceedings—especially those

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11. *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2289–90 (2010) ("[T]he antecedent question [is] whether, when a statute's coverage is ambiguous, Congress intended the statute to govern a particular field—in this case, whether Congress intended the FSIA to supersede the common law of official immunity.").

12. *See* 28 U.S.C. § 1605(b)–(c) (1976).

13. *See* § 1605(b)(1).

14. *See* Brief for the United States as Amicus Curiae Supporting Affirmance, *supra* note 3, at 2, 9 ("[T]he Court historically looked to 'the political branch of the government charged with the conduct of foreign affairs' to determine if immunity should be granted."); *see also* Keitner, *supra* note 4, at 72 (noting judicial deference to State Department recommendations regarding foreign sovereign immunity).

15. *See infra* text accompanying notes 162–74.

16. Republic of the Philippines v. Pimentel, 553 U.S. 851 (2008).

17. *Id.* at 867.

18. *See id.* at 855–56 (noting that although the term "indispensable party" was dropped from the latest revision of FED. R. CIV. P. 19, "it still had the latent potential to mislead").

sounding in admiralty. When a foreign sovereign has been denied immunity under the pre-FSIA common law actual possession rule, it should not (in effect) be immunized by application of *Pimentel*'s indispensable party holding.

The existence of other doctrinal pockets of common law foreign sovereign immunity should hardly come as a surprise for scholars and practitioners of FSI litigation. But the common law surrounding admiralty's actual possession rules does appear to have a number of unexpected and significant consequences. This contribution will briefly explore these.

I. THE GENERAL STATUS OF FOREIGN SOVEREIGN IMMUNITY COMMON LAW

Samantar v. Yousuf was not the first instance in which the Supreme Court recognized that the 1976 FSIA may not have entirely supplanted the common law of foreign sovereign immunity. In *Permanent Mission of India to the United Nations v. City of New York*,[19] the issue before the Court was whether liens (for unpaid taxes) against real property owned by foreign sovereigns could be litigated. Although not strictly necessary for the Court's decision, it was noted that its textual reading of the FSIA was consistent with "two well-recognized and related purposes of the FSIA: adoption of the restrictive view of sovereign immunity and codification of international law at the time of the FSIA's enactment."[20] Inasmuch as the "restrictive view of sovereign immunity"—as enshrined in the Tate Letter[21]—was part of the pre-FSIA common law of the subject, this seems like an implicit recognition of the continued vitality of that common law corpus. The Court also relied on "international practice at the time of the FSIA's enactment"[22] to bolster its holding as to the proper reading of the statute, even though the source most-quoted was the contemporaneous American Law Institute *Restatement* section on point.[23] All of this is suggestive that the Court has been concerned as to the content of the common law background rules that formed the basis for the FSIA's codification.[24]

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19. Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193 (2007).

20. *Id.* at 199.

21. *See* Tate Letter, *supra* note 6, at 3 ("[I]t will hereafter be the [State] Department's policy to follow the restrictive view of sovereign immunity.").

22. *Permanent Mission of India*, 551 U.S. at 200 (quoting RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 68(b) (1965)).

23. *See id.*

24. *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2289 (2010) (indicating that the Court in the *Permanent Mission of India* case examined the "relevant common law and

In *Samantar*, Justice Stevens, writing for the Court, made clear that "the doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976."[25] The Court then reviewed the developments which led up to Congress's enactment of the FSIA—including its primary objectives of codifying the restrictive view of FSI and transferring primary responsibility for resolving FSI disputes to the courts (as opposed to the Executive Branch).[26] Then, somewhat enigmatically, the Court noted that "[a]fter the enactment of the FSIA, the Act—and not the preexisting common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity."[27] That statement, of course, begged the question of whether the FSIA actually purported to codify or cover any rules as to the immunities of an individual foreign official (whether so presently or formerly employed), as distinct from a foreign state itself or an agency or instrumentality of a foreign sovereign.[28] The Court framed the issue in this manner:

> Because of this relationship between the Act and the common law that it codified, petitioner argues that we should construe the FSIA consistently with the common law regarding individual immunity, which—in petitioner's view—was coextensive with the law of state immunity and always immunized a foreign official for acts taken on behalf of the foreign state. Even reading the Act in light of Congress' purpose of codifying state sovereign immunity, however, we do not think that the Act codified the common law with respect to the immunity of individual officials.
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> The canon of construction that statutes should be interpreted consistently with the common law helps us interpret a statute that clearly covers a field formerly governed by the common law. But the canon does not help us to decide the antecedent question whether, when a statute's coverage is ambiguous, Congress intended the statute to govern a particular field—in this case, whether Congress intended the FSIA to supersede the common law of official immunity.[29]

To ask the question in this fashion was to answer it, at least for the Court. This led ineluctably to the Court's holding that the FSIA did not purport to codify the sovereign immunities of foreign officials.[30] "Although Congress clearly intended to supersede the common-law regime for claims against foreign states," the Court concluded, "we

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international practice when interpreting the Act"). For an example of relevant "pre-FSIA, common-law doctrine," see Republic of the Philippines v. Pimentel, 553 U.S. 851, 866 (2008) (citing Republic of Mexico v. Hoffman, 324 U.S. 30, 35–36 (1945)).

25. *Samantar*, 130 S. Ct. at 2284.
26. *See id.* at 2285 (quoting 28 U.S.C. § 1602 (2006)).
27. *Id.*
28. *See id.* at 2285–89.
29. *Id.* at 2289–90 (footnotes omitted).
30. *Id.* at 2290–92.

find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity."[31]

The interplay between "the common-law regime" and the FSIA's codification is thus complex, and turns on traditional indicia of congressional intent and statutory language. Both of these criteria yielded the result in *Samantar* that the FSIA simply did not purport to cover the immunities of foreign officials.[32] But the broad texture of the Court's opinion is indicative that the analysis could be applied to *any* statutory interpretation of the Act for which the pre-codification "common-law regime" might be relevant. Although *Samantar* deals only with foreign official immunity and, by implication, those of heads of state or foreign ministers,[33] nothing in the language of the Court suggests that one could not extend its analysis to other pockets of pre-codification common law foreign sovereign immunities. For these other enclaves, recourse would be had by divining congressional intent based on the text of the FSIA and, rather more controversially,[34] the legislative history of the statute.

The Court's decision in *Samantar* conclusively settles the question of whether the pre-codification common law of foreign sovereign immunities can remain applicable to contemporary FSI litigation. It can. Prior to *Samantar*, we knew this was the case for head of state immunity,[35] and now it is confirmed for all foreign officials. The next step is to determine whether the actual possession rule involving foreign sovereign claims to vessels and cargo in maritime cases was a feature of pre-FSIA doctrine.

II. THE ACTUAL POSSESSION RULE FOR SOVEREIGN IMMUNITY IN ADMIRALTY

The essence of the actual possession rule is that in order for a foreign state to assert immunity from the jurisdiction of U.S. courts in an in rem admiralty action, the res (which is the object of the maritime lien being disputed by other parties) must be in the actual

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31. *Id.* at 2292.

32. *See id.*

33. *See id.* at 2285 n.6, 2290 n.15, 2291 n.18 ("Diplomatic and consular officials could also claim the 'specialized immunities' accorded those officials, and officials qualifying as the 'head of state' could claim immunity on that basis.").

34. Justices Alito, Thomas, and Scalia each concurred (whether in whole or in part or in the judgment) because they each believed that recourse to the FSIA's legislative history was unnecessary to the result. *See id.* at 2293 (Alito, J., concurring); *id.* (Thomas, J., concurring in part and concurring in the judgment); *id.* (Scalia, J., concurring in the judgment). For the majority's response to this position, see *id.* at 2287 n.9.

35. *See, e.g., In re* Doe, 860 F.2d 40, 45 (2d Cir. 1988) ("Because the FSIA makes no mention of heads of state, their legal status remains uncertain.").

possession of the sovereign at the time of its arrest. As already mentioned, the actual possession rule is pervasive for all in rem admiralty actions involving sovereigns, not just foreign states.

Indeed, the doctrinal origins of the rule can be traced to the U.S. Supreme Court's 1869 decision in *The Davis*.[36] At issue in that case was whether a cargo of cotton, owned and consigned by the U.S. federal government and shipped onboard the *Davis*, was subject to a maritime lien for salvage—the cargo having been rescued from marine peril by another party[37]—and whether the in rem action to enforce that lien was maintainable against the United States. After reviewing some prior decisions,[38] the Court, with Justice Miller writing, concluded that "proceedings *in rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court."[39] The Court went on to elaborate upon the contours of the rule—especially what was meant by "actual" possession.

> [T]he lien can only be enforced by the courts in a proceeding which does not need a process against the United States, and which does not require that the property shall be taken out of the possession of the United States. But what shall constitute a possession which, in reference to this matter, protects the goods from the process of the court? The possession which would do this must be an actual possession, and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication. We are speaking now of a possession which can only be changed under process of the court by bringing the officer of the court into collision with the officer of the government, if the latter should choose to resist. The possession of the government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with its actual possession. This, we think, is a sufficiently liberal definition of the possession of property by the government to prevent any unseemly conflict between the court and the other departments of the government, and which is consistent with the principle which exempts the government from suit and its possession from disturbance by virtue of judicial process.[40]

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36. The Davis, 77 U.S. (10 Wall.) 15 (1869).

37. *Id.* at 15.

38. *See* The Siren, 74 U.S. (7 Wall.) 152 (1868); Briggs v. The Light Boats, 93 Mass. (11 Allen) 157 (1865); *see also* United States v. Wilder, 28 F. Cas. 601 (Story, Circuit Justice, C.C.D. Mass. 1838) (No. 16,694)).

39. *The Davis*, 77 U.S. (10 Wall.) at 20; *see also* The Fidelity, 8 F. Cas. 1189, 1191 (Waite, Circuit Justice, C.C.S.D.N.Y. 1879) (No. 4,758) ("Property does not necessarily become a part of the sovereignty because it is owned by the sovereign. To make it so it must be devoted to the public use, and must be employed in carrying on the operations of the government." (discussing *The Davis*, 77 U.S. (10 Wall.) 15)).

40. *The Davis*, 77 U.S. (10 Wall.) at 21. For a very recent decision exploring the actual possession requirement, see Aqua Log, Inc. v. Georgia, 594 F.3d 1330, 1335–37

Clearly the Court was trying to harmonize earlier decisions[41] that appeared to categorically bar in rem admiralty actions involving a res (a vessel or cargo) under claim by the federal government, with a more "liberal" rule that permitted such arrests and actions to proceed when the actual possession of the government over the property was not being "disturb[ed]" or "invaded." On that ultimate question, the Court in *The Davis* held that the consignment of cotton that formed the res of the in rem admiralty action had not been taken from the actual possession of the United States, inasmuch as "the master of the vessel . . . was in no sense an officer of the government. He was acting for himself, under a contract which placed the property in his possession and exclusive control for the voyage. . . . The marshal served his writ and obtained possession without interfering with that of any officer or agent of the government."[42]

The Davis is thus the *locus classicus* of the actual possession rule for assertions of sovereign immunity in admiralty.[43] Nothing in that decision spoke to the immunities of foreign states, but, by the same token, nothing precluded its application in that context to that specific species of sovereignty. The actual possession rule was recently confirmed in another situation: where the Eleventh Amendment immunities of states of the Union in maritime actions are involved.[44]

In *California v. Deep Sea Research, Inc.*, the question presented was whether California could resist the jurisdiction of federal courts to adjudicate title to a sunken shipwreck known as the *Brother Jonathan* that was situated on its submerged lands but was not otherwise in its actual possession.[45] California denied the applicability of the actual possession rule, as enunciated in *The Davis*, to this different sovereign immunity context.[46] But this argument was rejected in no uncertain terms by Justice O'Connor, writing for a unanimous Court:

(11th Cir. 2010) ("[A] [sovereign] must exert some element of physical control over the *res* to satisfy the possession requirement.").

41. *See The Siren*, 74 U.S. (7 Wall.) at 159 (stating that lien for salvage services may only be enforced by a proceeding in rem where the process of the court can be enforced without disturbing the possession of the government); *see also Briggs*, 93 Mass. (11 Allen) at 179–86 (citing additional cases). By implication, the Court in *The Davis* acknowledged the authority of some English admiralty cases where the Crown had consented to suit for in rem salvage claims. *See The Davis*, 77 U.S. (10 Wall.) at 20 (citing Marquis of Huntly, (1835) 166 Eng. Rep. 397 (Admlty); 3 Hagg. 246 (Eng.)).

42. *The Davis*, 77 U.S. (10 Wall.) at 21–22.

43. *See Aqua Log, Inc.*, 594 F.3d at 1334 n.6 ("*The DAVIS* appears to be the first Supreme Court case holding a government could not claim immunity because of a lack of possession.").

44. *See* California v. Deep Sea Research, Inc., 523 U.S. 491 (1998).

45. *See id.* at 494–501.

46. *Id.* at 496–97.

> In considering whether the Eleventh Amendment applies where the State asserts a claim in admiralty to a *res* not in its possession, this Court's decisions in cases involving the sovereign immunity of the Federal Government in *in rem* admiralty actions provide guidance, for this Court has recognized a correlation between sovereign immunity principles applicable to States and the Federal Government . . . In one such case, *The Davis*, the Court explained that "proceedings *in rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court." 77 U.S. at 20. The possession referred to was "an actual possession, and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication." *Id.* at 21; see also *The Siren*, [74 U.S.] 7 Wall. 152, 159 (1868) (describing "exemption of the government from a direct proceeding *in rem* against the vessel whilst in its custody").
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> While this Court's decision in *The Davis* was issued over a century ago, its fundamental premise remains valid in *in rem* admiralty actions, in light of the federal courts' constitutionally established jurisdiction in that area and the fact that a requirement that a State possess the disputed *res* in such cases is "consistent with the principle which exempts the [State] from suit and its possession from disturbance by virtue of judicial process." *The Davis*, supra, at 21. Based on longstanding precedent respecting the federal courts' assumption of *in rem* admiralty jurisdiction over vessels that are not in the possession of a sovereign, we conclude that the Eleventh Amendment does not bar federal jurisdiction over the Brother Jonathan . . . .[47]

The *Deep Sea Research* Court thus made clear that the actual possession rule for in rem admiralty suits involving the U.S. federal government was equally applicable to actions against states of the Union under the Eleventh Amendment.[48] Even more significantly, *Deep Sea Research* unqualifiedly rejected a sovereign's argument that constructive possession—based on a prior legal claim or other assertion of dominion or regulatory authority—could suffice for immunity.[49] Justice O'Connor went even further and made the following observation: "The Court's jurisprudence respecting the sovereign immunity of *foreign governments* has likewise turned on the sovereign's possession of the *res* at issue."[50] Other, even more

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47. *Id.* at 506–08 (some citations omitted).

48. *See id.* at 507–08.

49. *See id.* at 507; *see also* FREDERICK POLLOCK & ROBERT SAMUEL WRIGHT, POSSESSION IN THE COMMON LAW 27 (1888) ("'[A]ctual possession' as opposed to 'constructive possession' is . . . an ambiguous term . . . [i]t is most commonly used to signify physical control, with or without possession in law.").

50. *Deep Sea Research, Inc.*, 523 U.S. at 507 (emphasis added) (citing *The Pesaro*, 255 U.S. 216, 219 (1921), for the proposition that a federal court's in rem jurisdiction is not barred by the mere suggestion of a foreign government's ownership of a vessel).

recent decisions have focused on the essential unity of the actual possession doctrine as relevant to all forms of sovereign immunity.[51]

For applications of the actual possession rule in federal common law cases related to the immunities of foreign states and their property, one would have to turn first to a series of lower court opinions decided in the late nineteenth and early twentieth centuries. In *Long v. The Tampico*,[52] a federal district court in 1883 allowed a salvage proceeding in rem when it was apparent that the subject vessels "at the time of the salvage service neither formed part of the public service of Mexico, nor were as yet the property or in the possession of that government."[53] The burden was on the foreign sovereign to demonstrate that the res was in the actual possession of officials or employees of the foreign state, and this Mexico could not prove.[54]

A more difficult scenario was presented in *The Johnson Lighterage Co. No. 24*.[55] This 1916 decision of a U.S. district court concerned a salvage claim to property owned by the Russian government, and was decided before the United States entered World War I (Russia already being a belligerent).[56] "As the cargo consisted of munitions of war," the district court found, "it will, of course, be presumed that it was destined for the public use of the Russian government."[57] But, just because the sovereign-claimed property satisfied the "public use" requirement that was also a consistent feature of FSI common law,[58] did not mean that it also passed the actual possession test. The *Johnson Lighterage* Court acknowledged that the actual possession caveat was "an exception to [the public use] rule, although it is probably not strictly such . . . ."[59] Nor did it matter

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51. *See* Aqua Log, Inc. v. Georgia, 594 F.3d 1330, 1335 n.8 (11th Cir. 2010) ("Federal district and circuit courts have likewise held a foreign government cannot claim sovereign immunity with respect to a vessel not in its possession.").

52. Long v. The Tampico, 16 F. 491 (S.D.N.Y. 1883).

53. *Id.* at 501; *see also id.* at 495 (quoting The Davis, 77 U.S. (10 Wall.) 15 (1869)).

54. *Id.* at 500 ("In claiming exemption from the ordinary process of the court, the burden of proof is clearly upon the claimant to prove, by competent evidence, all the facts necessary to sustain this defense. If Mr. Obregon was in fact an officer or authorized representative of the Mexican government, or if the terms of any contract between him and that government were such as made the vessels the property of the Mexican government before delivery and acceptance at Vera Cruz, I cannot doubt that these facts would have been made to appear. In the absence of proof of either of those facts, every intendment is to the contrary.").

55. The Johnson Lighterage Co. No. 24, 231 F. 365 (D.N.J. 1916).

56. *See id.* at 365–66.

57. *Id.* at 366.

58. *See, e.g.*, The Siren, 74 U.S. (7 Wall.) 152, 154 (1868) (stating the public policy reasons for extending the exemption from judicial process to the property of the United States); The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 134–35 (1812) (finding immunity for the public armed vessel of a sovereign).

59. *The Johnson Lighterage Co. No. 24*, 231 F. at 366.

to the analysis, the district court held, that the lighterage vessel upon which the Russian munitions were being carried was not really a common carrier (as in *The Davis* and *Long v. The Tampico*).

> He was none the less a bailee for hire. The Johnson Lighterage Company, while it may not be strictly a common carrier[,] . . . was no more an officer of the Russian government than were the master of the vessel in the *Davis* Case and the captains in the *Tampico* Case. The Johnson Company contracted to deliver the goods on its own responsibility; the Russian government had not chartered the vessel upon which the munitions were loaded, nor, for that matter, any vessel of the Johnson Company. The latter was acting for itself under a contract which, necessarily, during the time of the transportation, placed the property in its possession and control. The Russian government, doubtless, could direct to what vessel or vessels the cargo was to be delivered; but this fact in no respect took the property out of the possession and control of the Lighterage Company during the time of transportation.[60]

The district court concluded that:

> In the absence of treaty provisions, I know of no principle which, in a case such as this, would afford a foreign government greater immunity from judicial process than that which is enjoyed by our own government. The immunity granted to friendly foreign governments rests upon international comity; but the underlying principle upon which the immunity is granted is, nevertheless, the same in both cases, namely, that the exercise of jurisdiction is inconsistent with the independence of sovereign authority and public policy.[61]

In *The Attualita*,[62] the Fourth Circuit was confronted with a scenario similar to that presented in *Johnson Lighterage*. *The Attualita* involved an admiralty claim (arising in collision) to a vessel that had been requisitioned by the Italian government (also a belligerent in the First World War) to carry military supplies and was thus clearly being employed for a public purpose.[63] The United States, through the Departments of Justice and State, relayed the Italian government's suggestion of immunity for the vessel, without itself taking a position in the matter.[64] The court of appeals denied

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60. *Id.* at 367–68.

61. *Id.* at 368 (citing, among other authorities, *The Schooner Exchange*, 11 U.S. (7 Cranch) 116, *The Siren*, 74 U.S. (7 Wall.) 152 and *Long v. The Tampico*, 16 F. 491 (S.D.N.Y. 1883)).

62. The Attualita, 238 F. 909 (4th Cir. 1916).

63. *See id.* at 909 ("[T]he vessel had been requisitioned by the Italian government; that is to say, the Italian government had required the owners to navigate the ship to and from such ports, and to carry such cargo, as the government, during the period of the requisition, should direct. For the use of the ship the government paid its owners at certain fixed rates. The owners paid all the wages of the captain and crew and the other expenses of the ship, which was navigated by the captain and crew employed by the owners.").

64. *See id.*; *see also* Maru Nav. Co. v. Societa Commerciale Italiana di Navigation, 271 F. 97, 98 (D. Md. 1921) (declining to consider as evidence affidavits by

immunity, framing its decision partly on the actual possession rule but also wider considerations of comity.

> There are many reasons which suggest the inexpediency and the impolicy of creating a class of vessels for which no one is in any way responsible. For actions of the public armed ships of a sovereign, and of those, whether armed or not, which are in the actual possession, custody, and control of the nation itself, and are operated by it, the nation would be morally responsible, although without her consent not answerable legally in her own or other courts. For the torts and contracts of an ordinary vessel, it and its owners are liable. But the ship in this case, and there are now apparently thousands like it, is operated by its owners, and for its actions no government is responsible, at law or in morals.
>
> The persons in charge of the navigation of the ship remain the servants of the owners and are paid by them. The immunity granted to . . . its vessels of war, and under some circumstances to other property in its possession and control, can be safely accorded, because the limited numbers and the ordinarily responsible character of the . . . agents in charge of the property in question and the dignity and honor of the sovereignty in whose services they are, make abuse of such immunity rare. There will be no such guaranty for the conduct of the thousands of persons privately employed upon ships which at the time happen by contract or requisition to be under charter to sovereign governments.[65]

The clear holding of this sequence of cases is that vessels under charter by, or requisition to, a foreign state will not be considered as within that sovereign's actual possession. On the other hand, vessels that were—at the time of the admiralty arrest—actually being operated by the employees or officers of a foreign State, were held to satisfy the actual possession rule, and the in rem libels were thus dismissed on sovereign immunity grounds.[66] But that does not put an end to the factual permutations presented in these cases. In *The Maipo*,[67] the Chilean government asserted immunity for a vessel "owned by the government of the Republic of Chile, being a transport

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the Italian consul and ambassador stating that the vessel was immune because neither suggestion came from the State Department); The Luigi, 230 F. 493, 495 (E.D. Pa. 1916) ("[B]y suggestion of the United States attorney, at the instance of the Attorney General, and by the affidavits of the royal Italian consul and the master of the Luigi, that, when the Luigi arrived at the port of Philadelphia she was and now is under requisition by the Italian government, and is now engaged in the business of that government for the carriage of a cargo . . . for public use. . . .").

65. *The Attualita*, 238 F. at 911.

66. *See* The Carlo Poma, 259 F. 369, 369 (2d Cir. 1919) (involving a vessel "owned by the government of the Kingdom of Italy, being registered in the name of the Italian State Railways, a branch of said government, and in the possession of the government of the Kingdom of Italy, in the person of a master employed and paid by said government, and wholly manned and operated by a crew employed and paid by said government, which said steamship is to transport back to Italy a cargo belonging to the government of the Kingdom of Italy"), *vacated*, 255 U.S. 219 (1921); The Pampa, 245 F. 137 (E.D.N.Y. 1917) (finding immunity for Argentine naval transport).

67. The Maipo, 252 F. 627 (S.D.N.Y. 1918).

in its navy, and in the possession of the government of the Republic of Chile in the person of a duly commissioned officer of its navy, the master of said steamship, and wholly manned and operated by a crew employed and paid by said government, which said steamship is to carry back to Chile a cargo belonging to the Chilean government."[68] Somewhat peculiarly, Chile then "chartered the MAIPO to one Sierra, as the result of public bidding."[69] The district court recognized what was afoot:

> [T]he Chilean government intended that all of the acts of [the charterers] should be regarded as acts representing and on behalf of his government. It is further plain that the Chilean government intended that at all times this vessel, which it owned, should remain in its possession; and it is not unlikely that this course was taken for the very purpose of keeping the vessel immune in foreign ports. Even though the vessel was chartered by a private person for hire, and that private person contracted for freights for his personal profit, it might be argued with much force that, nevertheless, the vessel was used for a governmental purpose in so far as it enabled Chilean shippers to export their products to the United States and to bring back from here to Chile commodities needed by the people there.[70]

The district court was thus compelled to hold that "our courts have required, not only that the property shall be owned by, but also in the possession of, the [sovereign]. But, when ownership and possession are both present, the *res* is immune . . . ."[71]

The federal common law of FSI bearing on the actual possession rule, at least prior to the end of World War I, appears to be fairly consistent. While these cases tended to focus on the modalities of actual possession—especially as reflected through various maritime transactions (agency agreements, charter parties, and similar arrangements)—they remained faithful to the rule's purpose as an antidote to strictly focusing on the public or private nature of the res that is the subject of the maritime action. This doctrine would be further elaborated in a quartet of Supreme Court cases decided over the next thirty years: *The Pesaro* (1921),[72] *Berizzi Bros. Co. v. Steamship Pesaro* (1926),[73] *The Navemar* (1938),[74] and *Republic of Mexico v. Hoffman* (1945).[75]

The Pesaro was essentially decided on procedural grounds, but, by implication, has some bearing on the application of the actual possession rule. According to Justice Van Devanter, writing for the

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68. *Id.* at 628.
69. *Id.*
70. *Id.* at 629.
71. *Id.* at 630 (citing The Davis, 77 U.S. (10 Wall.) 15 (1869)).
72. The Pesaro, 255 U.S. 216 (1921).
73. Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926).
74. The Navemar, 303 U.S. 68 (1938).
75. Republic of Mexico v. Hoffman, 324 U.S. 30 (1945).

Court, "The Pesaro, an Italian steamship which carried a shipment of olive oil from Genoa to New York, was sued *in rem* in admiralty in the District Court to enforce a claim for damage to that part of her cargo, the libel alleging that she was 'a general ship engaged in the common carriage of merchandise by water, for hire.'"[76] The Italian ambassador made a suggestion of immunity, alleging, among other things, that the vessel was in the actual possession of Italy at the time of its arrest.[77] This suggestion was relayed by the State Department to the district court, but the United States rejected the merits of Italy's sovereign immunity assertion.[78] The Court held that this mode of presenting a suggestion of immunity was improper; if the suggestion was to have any standing it must be made with the express endorsement of the Executive Branch.[79] This holding will be discussed in more detail below in the context of the deference afforded to executive branch positions in FSI litigation involving common law doctrines. But, for present purposes, what is of interest is how the Supreme Court disposed of the immunity issue in the absence of any proper suggestion of immunity.

> Apart from that suggestion, there was nothing pointing to an absence of jurisdiction. On the contrary, what was said in the libel pointed plainly to its presence. . . . With the suggestion eliminated, as it should have been, there obviously was no basis for holding that the ship was not subject to the court's process.[80]

In short, the Court believed the position of the libelant—that the *Pesaro* was a mere common-carrier owned, but not operated, by the Italian government—rather than that of the Italian ambassador, who maintained that the vessel was within the Italian government's actual possession. The previous decrees which granted immunity to the vessel were thus reversed.

In *The Pesaro*'s sequel, a 1926 decision of the Supreme Court styled *Berizzi Bros. Co. v. Steamship Pesaro*, the same vessel but another libelant was involved in a later transaction. On this occasion, the Supreme Court was satisfied that Italy's suggestion of immunity

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76. *The Pesaro*, 255 U.S. at 216–17.

77. *See id.* at 217.

78. *See id.* at 218–19; The Pesaro, 277 F. 473, 480 n.3 (S.D.N.Y. 1921) (quoting the State Department position as "government-owned merchant vessels or vessels under requisition of governments whose flag they fly employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war").

79. *See The Pesaro*, 255 U.S. at 219 ("The terms and form of the suggestion show that the Ambassador did not intend thereby to put himself or the Italian government in the attitude of a suitor, but only to present a respectful suggestion and invite the court to give effect to it. He called it a 'suggestion,' and we think it was nothing more. In these circumstances the libelants' objection that, to be entertained, the suggestion should come through official channels of the United States was well taken.").

80. *Id.* at 218–19.

was properly made and so dealt directly with the merits of the immunity question.[81] It was now stipulated by all parties that the *Pesaro* was actually possessed by Italy at the time of its arrest and engaged in public service even though it was on an exclusively commercial venture.[82] With the finding of Italy's actual possession of the vessel, the Court went on to conclude:

> [W]e think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans, and operates ships in the carrying trade, they are public ships in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace of any less a public purpose than the maintenance and training of a naval force.[83]

Obviously, this specific holding of the *Berizzi Bros.* Court was overruled by subsequent developments, not the least of which was the United States' adoption of the restrictive view of FSI in the 1952 Tate Letter and subsequent case law.[84] But that sea-change in foreign sovereign immunity doctrine did not affect either *The Pesaro*'s or *Berizzi Bros.*'s underlying holdings concerning the vitality of the threshold actual possession rule.[85]

The 1938 decision in *The Navemar* involved conflicting claims of ownership to a Spanish merchant vessel.[86] The libelants asserted their title.[87] The Spanish Ambassador filed a suggestion of immunity arguing that the Republic of Spain (this in the midst of the Spanish Civil War, so it is unclear which regime is being referred to) had made a "decree of attachment" over the vessel which was endorsed on the ship's register.[88] There is even a faint whiff in the Court's recitation of the facts that there was a mutiny aboard the vessel

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81. *See* Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562, 570 (1926).

82. *Id.* ("At the hearing it was stipulated that the vessel, when arrested, was owned, possessed, and controlled by the Italian government, was not connected with its naval or military forces, was employed in the carriage of merchandise for hire between Italian ports and ports in other countries including the port of New York, and was so employed in the service and interest of the whole Italian nation, as distinguished from any individual member thereof, private or official, and that the Italian government never had consented that the vessel be seized or proceeded against by judicial process.").

83. *Id.* at 574.

84. The holding was specifically repudiated in *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 n.1 (1945). Justice Frankfurter was especially critical of this holding. *See id.* at 38–42 (Frankfurter, J., concurring).

85. For other cases where a foreign sovereign's actual possession of a res was confirmed, see the cases cited in *Ervin v. Quintanilla*, 99 F.2d 935, 939 (5th Cir. 1938).

86. *See* The Navemar, 303 U.S. 68, 70 (1938).

87. *See id.* at 70.

88. *Id. at* 72.

between the different crew factions competing for control.[89] The Executive Branch declined to support Spain's suggestion of immunity.[90] The district court found that the decree of attachment and the endorsements to the *Navemar*'s register did not effect a change in ownership or possession in favor of the Spanish government and that the vessel was not, in any event, used for a public purpose.[91] The court of appeals summarily reversed and granted immunity to Spain.[92]

The Supreme Court then reversed and denied immunity in the following terms:

> The District Court concluded, rightly we think, that the evidence at hand did not support the claim of the suggestion that the Navemar had been in the possession of the Spanish government. The decree of attachment, without more, did not operate to change the possession which, before the decree, was admittedly in petitioner. To accomplish that result, since the decree was *in invitum*, actual possession by some act of physical dominion or control in behalf of the Spanish government was needful, or at least some recognition on the part of the ship's officers that they were controlling the vessel and crew in behalf of their government. Both were lacking, as was support for any contention that the vessel was in fact employed in public service.[93]

The Navemar Court's terse discussion nevertheless established two important points. The first is the continued vitality of the actual possession rule as the doctrinal twin of the requisite that maritime property must be employed for "public service" before immunity will be granted. Indeed, the Court implies that actual possession rule was gaining wider international recognition.[94] The second material holding in *The Navemar* is the notion that essential to a foreign sovereign's assertion of actual possession is "physical dominion or control," or, absent that, "recognition" by the vessel's officers or crew that they were controlling the ship "in behalf of the government."[95] As other decisions have indicated, a foreign sovereign's "physical dominion or control" must be lawful and cannot have been the result

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89. *See id.* at 70 ("The libel alleged that petitioner was owner of the vessel, which was within the territorial jurisdiction of the court; and that while she was in petitioner's possession the individual respondents, acting as a committee of the crew, had wrongfully and forcibly seized, and had since retained possession of the vessel.").

90. *See id.* at 71.

91. *See id.* at 72–73.

92. *See id.* at 73–74.

93. *Id.* at 75–76 (footnote omitted) (citing The Davis, 77 U.S. (10 Wall.) 15 (1869), Berizzi Bros. Co. v. S.S. Pesaro (*Pesaro II*), 271 U.S. 562 (1926), The Carlo Poma, 259 F. 369 (2d Cir. 1919), The Attualita, 238 F. 909 (4th Cir. 1916) and Long v. The Tampico, 16 F. 491 (S.D.N.Y. 1883)).

94. *See id.* at 76 n.1 (citing two British admiralty decisions, *The Jupiter*, [1924] P. 236, 241, 244 (Eng.) and *The Cristina*, [1938] 59 Lloyd's List L.R. 43, 50 (Eng.), where actual possession by a foreign sovereign had been found).

95. *See id.* at 75–76.

of "an act of rapine or spoliation."[96] These considerations are, presumably, tested at the moment the ship, or its cargo, is arrested and placed in the jurisdiction of a U.S. court.[97]

In the 1945 decision of *Republic of Mexico v. Hoffman*, the final decision in this Supreme Court quartet of cases, the problem was plainly stated as "whether title of the vessel without possession in the Mexican government is sufficient to call for judicial recognition of the asserted immunity."[98] The case arose from a collision, and the victim vessel's owner brought a libel in rem.[99] The Supreme Court noted that "[t]he decisions of the two courts below that the vessel was not in the possession or service of the Mexican government are supported by evidence and call for no extended review here."[100] So, at stake in *Hoffman* was nothing less than the continued vitality of the actual possession rule itself, which the Mexican government sought to overturn through its submissions.[101]

The *Hoffman* Court resoundingly reaffirmed the continued vigor of the actual possession rule.[102] Relying on the combined authority of *The Davis* and *The Navemar*,[103] the *Hoffman* Court also looked for other grounds to deny immunity in this case. One, of course, was the Executive Branch's position in declining to support Mexico's assertion in the absence of actual possession of the vessel.[104] Another consideration was the growing international acceptance of the actual

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96. *See* Ervin v. Quintanilla, 99 F.2d 935, 939 (5th Cir. 1938) (citing Berg v. British & African Steam Nav. Co., 243 U.S. 124 (1917), The Apollon, 22 U.S. (9 Wheat.) 362 (1824) and The Santissima Trinidad, 20 U.S. (7 Wheat.) 283 (1822)) ("[I]mmunity from jurisdiction will be denied a foreign sovereign where the possession relied on was taken or is being maintained in breach of our laws."); *see also* JOSEPH W. DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS 26 (2d ed. 2003).

97. *See The Navemar*, 303 U.S. at 75 ("[T]he vessel, when arrested, was owned, possessed and controlled by a foreign government . . . .").

98. Republic of Mexico v. Hoffman, 324 U.S. 30, 33; *see also id.* at 31 ("The question is whether, in the absence of the adoption of any guiding policy by the Executive branch of the government the federal courts should recognize the immunity from a suit in rem in admiralty of a merchant vessel solely because it is owned though not possessed by a friendly foreign government.").

99. *See id.* at 31.

100. *Id.* at 33 (indicating that the vessel was under charter from the Mexican government to a private, commercial operation).

101. *See id.* at 33–34 ("The principal contention of petitioner is that our courts should recognize the title of the Mexican government as a ground for immunity from suit even though the vessel was not in the possession and public service of that government.").

102. *See id.* at 38.

103. *See id.* at 37–38 (citing other cases, including The Ljubica Matkovic, 49 F. Supp. 936 (S.D.N.Y. 1943), The Katingo Hadjipateras, 40 F. Supp. 546 (S.D.N.Y. 1941) and The Uxmal, 40 F. Supp. 258, 260 (D. Mass. 1941)).

104. *See id.* at 31–33, 35–37 (noting the State Department's argument that historically, the immunity is limited to actual possession by a foreign government).

possession rule.[105] But, the Court also observed that "[w]hether this distinction between possession and title may be thought to depend upon the aggravation of the indignity where the interference with the vessel ousts the possession of a foreign state, it is plain that the distinction is supported by the overwhelming weight of authority."[106] This statement is axiomatic of one rationale for the actual possession rule—that a function of foreign sovereign immunity doctrine is to remove friction in international relations that can arise in the course of domestic litigation.[107]

The *Hoffman* Court may have felt obliged to make this comment in view of Justice Frankfurter's concurrence in the decision. He expressed some skepticism about the formalisms surrounding the actual possession rule.

> I appreciate that the disposition of the present case turns on the want of possession by the Republic of Mexico. My difficulty is that "possession" is too tenuous a distinction on the basis of which to differentiate between foreign government-owned vessels engaged merely in trade that are immune from suit and those that are not. Possession, actual or constructive, is a legal concept full of pitfalls. Even where only private interests are involved the determination of possession, as bankruptcy cases, for instance, abundantly prove, engenders much confusion and conflict. Ascertainment of what constitutes possession or where it is, is too subtle and precarious a task for transfer to a field in which international interests and susceptibilities are involved.
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> If the Republic of Mexico now saw fit to put one junior naval officer on merchantmen which it owns but are operated by a private agency under arrangements giving that Government a financial interest in the venture, it would, I should suppose, be embarrassing to find that Mexico herself did not intend to be in possession of such ships. And, certainly, the terms of the financial arrangement by which the commercial enterprise before the Court is carried on can readily be varied without much change in substance to manifest a relation to the ship by Mexico which could not easily be deemed to disclose a want of possession by Mexico.[108]

Despite the apparent formalism of the actual possession rule—and the ease with which it could be evaded if a sovereign so desired—Justice Frankfurter did not propose an alternative doctrine.[109]

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105. *See id.* at 37 n.2 (canvassing British authorities, including The Arantzazu Mendi, [1939] A.C. 256 (H.L.), 263 (Eng.) and Compañía Naviera Vascongado v. S.S. Cristina, [1938] A.C. 485 (H.L.) (Eng.)).

106. *Id.* at 38 (citing Sullivan v. State of São Paulo, 122 F.2d 355, 360 (2d Cir. 1941) (Hand, J.)).

107. *See id.* at 35 ("[I]t is a guiding principle in determining whether a court should exercise or surrender its jurisdiction . . . that the courts should not so act to embarrass the executive arm in its conduct of foreign relations.").

108. *Id.* at 39–40 (Frankfurter, J., concurring).

109. *See id.* at 41–42 (noting only that courts should not disclaim jurisdiction over foreign sovereign-owned vessels unless the Executive or Congress so commands).

Instead, he urged a broader perspective on questions of foreign sovereign immunity and called upon the Executive Branch to clarify the United States' position in these situations.[110] In light of recent developments indicating a trend towards a restrictive view of FSI—especially in denying immunity to state-owned shipping lines and operations[111]—such elucidation was sorely needed, according to Justice Frankfurter.[112]

Little change in the contours of the actual possession rule occurred in the period after the Second World War and the enactment of the FSIA in 1976. There were few recorded cases implicating the rule because Justice Frankfurter's prophecy was fulfilled. By virtue of the 1952 Tate Letter, the U.S. State Department routinely denied any suggestions of immunity in cases where a vessel or cargo owned by a foreign sovereign was engaged in commerce.[113] Inasmuch as the "public service" prong[114] for FSI determinations was not satisfied, there was no recourse to examine the foreign sovereign's actual possession. Indeed, in the period from 1945 to 1976, the actual possession rule was scarcely discussed, much less questioned.[115] This is how things stood in 1976, the year in which the FSIA was adopted.

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110. *See id.* ("[R]esponsibility for the conduct of our foreign relations will be placed where power lies.").

111. *See id.* at 41 (quoting *S.S. Cristina*, [1938] A.C. at 521–22) ("[T]here has been a very large development of State-owned commercial ships since the Great War, and the question whether immunity should continue to be given to ordinary trading ships has become acute."); *see also* Stefan A. Riesenfeld, *Sovereign Immunity of Foreign Vessels in Anglo-American Law: The Evolution of a Legal Doctrine*, 25 MINN. L. REV. 1, 50–51 (1940) (discussing the Supreme Court's holding in the *The Navemar*).

112. *See Hoffman*, 324 U.S. at 40–41 ("[*Pesaro*'s] implications in the light of the important developments in the international scene that twenty years have brought call for its reconsideration.").

113. *See* Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977, 1977 DIGEST, 1017, 1047, 1051, 1053–54, 1060–61 (listing instances in which the State Department declined to make a suggestion of immunity because the vessel or cargo was being used for commercial purposes). *But see id.* at 1073 (citing Deep, Deep Ocean Prods., Inc. v. Union of Soviet Socialist Republics, 493 F.2d 1223 (1st Cir. 1974); Spacil v. Crowe, 489 F.2d 614 (5th Cir. 1974)) (providing instances in which the State Department did recognize immunity for a vessel engaged in a "public function").

114. *See* The Navemar, 303 U.S. 68, 75–76 (1939) (suggesting that immunity depends on whether the ship's officers were controlling the vessel and crew on behalf of the government); Long v. The Tampico, 16 F. 491, 501 (S.D.N.Y. 1883) (suggesting that immunity depends on whether the possessor was a government official); *see also supra* Part II (outlining the actual possession or "public use" requirement).

115. One exception was a handful of Eleventh Amendment cases that ruled that states of the Union need not be in actual possession of a res in an in rem admiralty action in federal court in order to raise sovereign immunity. *See* Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to Be the "Seabird", 19 F.3d 1136, 1141 (7th Cir. 1994) (distinguishing *The Davis* because it "did not involve salvaged state property where a salvor sought a salvage award from a state"); Marx v. Gov't of Guam, 866 F.2d 294, 299 n.5 (9th Cir. 1989) (explaining that *The Navemar* did not make possession an independent requirement). These cases were overruled by the Supreme Court's

III. THE FSIA AND THE ACTUAL POSSESSION RULE

The events leading up to, and the legislative history of, the 1976 Foreign Sovereign Immunities Act in its general respects are well documented.[116] They need not be restated here. But it is worth noting how the admiralty provisions of the statute—sections 1605(b) and (c)[117]—were developed.[118] The fundamental premise of the admiralty provisions of the FSIA was that for maritime liens brought against property under an ostensible claim by a foreign state (whether a vessel or cargo), the proceedings should be in personam and not in rem.[119] Despite proceeding in personam, there are still some significant in rem implications for FSIA admiralty actions. For example, they can only be commenced if the res is within the jurisdiction of a U.S. court and recovery is limited to the value of the vessel or cargo.[120] Congress seemed concerned that traditional admiralty in rem proceedings—arresting foreign vessels in U.S. ports—posed the risk of distraining foreign state property and created too much international friction.[121] Whether this was the main congressional motivation for the admiralty provisions of the FSIA, or rather, whether the main anxiety was that foreign state property

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unanimous decision in *California v. Deep Sea Research, Inc.* 523 U.S. 491 (1998). *See also* Fla. Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 710 n.7 (1982) (White, J., concurring & dissenting) ("Only when a vessel is not in the sovereign's possession, is there controversy over the proper means by which the foreign government may assert its ownership.").

116. *See, e.g.*, George Kahale III & Matias A. Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211 (1979); Jeffrey Martin, Note, *Sovereign Immunity: Limits of Judicial Control: The Foreign Sovereign Immunities Act of 1976*, 18 HARV. INT'L L.J. 429 (1977).

117. 28 U.S.C. § 1605(b)–(c) (1976).

118. *See, e.g.*, William R. Dorsey III, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. MAR. L. & COM. 257 (1997); Steven L. Roberts & James B. Warren, *The Foreign Sovereign Immunities Act: Where Did Our Remedies Go?*, 3 MAR. L. 155 (1978); C. Taylor Simpson, *The Restrictive Theory of Sovereign Immunity under the Foreign Sovereign Immunities Act: The Perspective of a Maritime Lien Holder*, 19 TUL. MAR. L.J. 37 (1994); Russell Pope, Note, *Maritime Arrest Under the Foreign Sovereign Immunities Act: An Anachronism*, 62 TEX. L. REV. 511 (1983).

119. *See* 28 U.S.C. § 1605(b) ("Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved.").

120. *See id.* ("A court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose.").

121. *See* H.R. REP. NO. 94-1487, at 21–22 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6626 [hereinafter FSIA 1976 Legislative History] ("[A]ttachments can give rise to serious friction in United States foreign relations.").

should be treated the same as that of the federal government,[122] is immaterial.

As enacted in 1976, the FSIA directed that an admiralty arrest made with the knowledge that a vessel or cargo belonged to a foreign state invalidated the entire proceeding, and the claimant forfeited all maritime liens against the foreign government.[123] But that was the nub of the problem. How would a claimant necessarily know that a vessel or cargo was directly owned by a foreign government or more indirectly by an "agency or instrumentality"[124] of a foreign sovereign? The 1976 legislative history for the FSIA offered this counsel for those conducting due diligence prior to an admiralty arrest.

> If, however, the vessel or its cargo is arrested or attached, the plaintiff will lose his *in personam* remedy and the foreign state will be entitled to immunity—except in the case where the plaintiff was unaware that the vessel or cargo of a foreign state was involved. This would be a rare case because the flag of the vessel, the circumstances giving rise to the maritime lien, or the information contained in ship registries kept in ports throughout the United States should make known the ownership of the vessel in question, if not the cargo. By contrast, evidence that a party had relied on a standard registry of ships, which did not reveal a foreign state's interest in a vessel, would be prima facie evidence of the party's unawareness that a vessel of a foreign state was involved. More generally, a party could seek to establish its lack of awareness of the foreign state's ownership by submitting affidavits from itself and from its counsel. If, however, the vessel or cargo is mistakenly arrested, such arrest or attachment must, under section 1609, be immediately dissolved when the foreign state brings to the court's attention its interest in the vessel or cargo and, hence, its right to immunity from arrest.[125]

This advice may have offered only cold comfort to those claimants contemplating an admiralty arrest under uncertain conditions. But even the original form of section 1605(b) provided some protection to the claimant.

> A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state,

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122. *See* DELLAPENNA, *supra* note 96, at 211–13; *see also* FSIA 1976 Legislative History, *supra* note 121, at 21 ("The elimination of attachment as a vehicle for commencing a lawsuit will ease the conduct of foreign relations . . . and help eliminate the necessity or for determinations of claims of sovereign immunity.").

123. *See* 28 U.S.C. § 1605(b) ("[B]ut such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice.").

124. *See* 28 U.S.C. § 1603(a)–(b) (1976) ("A 'foreign state' . . . includes a political subdivision of a foreign state or agency or instrumentality of a foreign state. . . .").

125. FSIA 1976 Legislative History, *supra* note 121, at 21–22.

> which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—
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> "(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, *having possession of the vessel or cargo against which the maritime lien is asserted* . . . .[126]

The "having possession" language in section 1605(b)—both as originally enacted in 1976 and in the current version of the Act—was Congress's attempt at codification of the actual possession rule. If there is no "person" or "agent" of the foreign state or instrumentality having "possession of the vessel or cargo" at issue, then the assumption is that an in rem proceeding can continue without fear of the specter of a later claim by a foreign sovereign. Implicit is Congress's concern that it is the act of ousting the possession of a foreign sovereign or its agent that is calculated to give offense and cause international tensions. If there is no sovereign in possession—and we know from the preexisting "common-law regime"[127] on this subject that the standard is actual possession—then the statutory command to convert to an in personam proceeding is simply not triggered.[128] In any event, there is nothing from the legislative history suggesting that Congress desired in the original 1976 enactment to displace the background rule of actual possession. Indeed, the statutory text's invocation of a possession requirement speaks to precisely the opposite intent—to codify the actual possession rule.[129]

If further clarification of this intent was needed, it was forthcoming in a 1988 amendment to the FSIA.[130] Among the amendment's provisions was one which moderated the consequences of an erroneous arrest of a foreign state vessel. Instead of entirely forfeiting a claim because of such an arrest, the in rem libelant was made answerable for "any damages" sustained as a result of the arrest if the libelant had either "actual or constructive knowledge that the vessel or cargo of a foreign state was involved."[131] In addition, the legislative history of the 1988 amendment makes clear that "the traditional *in rem* procedure . . . remains the legal procedure except when the ship is owned by a foreign state . . . ."[132]

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126. 28 U.S.C. § 1605(b) (emphasis added).
127. Samantar v. Yousuf, 130 S. Ct. 2278, 2292 (2010).
128. *See* 28 U.S.C. § 1605(b).
129. *See* FSIA 1976 Legislative History, *supra* note 121, at 21.
130. Act of Nov. 9, 1988, Pub. L. No. 100-640 § 1, 102 Stat. 3333 (1988).
131. 28 U.S.C. § 1605(b).
132. H.R. REP. NO. 100-823, at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4511, 4512 [hereinafter FSIA 1988 Legislative History]. Admittedly, this snippet of legislative history could have been made clearer had Congress expressly said that the foreign State must *both* own *and* possess the vessel or cargo, in order to receive immunity under the Act. But, when read in context with the other provisions added by

This statement, combined with the statutory language of section 1605(b), which looks to the status of actual possession for the res that is the object of the maritime lien, essentially replicates the pre-1976 common law requisites for a foreign sovereign to assert immunity in admiralty cases.[133] Then there is FSIA section 1605(c), which is a procedural savings clause. Once the required notice is given, "the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained."[134] Taken altogether, the FSIA left in place the common law requirements that, in order for a foreign sovereign to assert immunity, there must be a substantive claim of ownership that includes the notion that the res must have been for "public use" and not for commercial purposes. Additionally, there must be actual possession on the part of the sovereign.

Somewhat surprisingly, the status of the actual possession rule after the FSIA remains unclear, even with nearly twenty-five years of judicial experience under the 1988 amendments. Exemplary of this confusion are the recent decisions in the case of *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel.*[135] At issue in that case was the Kingdom of Spain's assertion of sovereign immunity to a cargo of silver and gold coins popularly known as the "Black Swan treasure"[136]—allegedly contained within the sunken Spanish vessel, the *Nuestra Señora de las Mercedes.*[137] Whether the *Mercedes* was engaged in a strictly military, non-commercial activity

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the 1988 amendments (including § 1605(c)), Congress's intent to codify the actual possession rule is manifest.

133. One qualm that might be raised is that the FSIA § 1605(b) requires that "notice of the suit [be] given . . . to the person, or his agent, having possession of the vessel or cargo," 28 U.S.C. § 1605(b) (1988), but does not expressly require that this be the foreign state. But such an objection begs the relevant question: Is the vessel or cargo actually possessed by a foreign sovereign? Another possible objection to the reading propounded here is that section 1605(b)(1) is a notice provision that is a condition precedent to maintaining an admiralty suit against a foreign state; it is not a limit on immunity. But the most natural reading of the provision is as a recognition that actual possession of the res is a requisite for a foreign sovereign to assert immunity, and to demand conversion of the proceeding to an in personam footing.

134. 28 U.S.C. § 1605(c) (1988).

135. Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel, 675 F. Supp. 2d 1126 (M.D. Fla. 2009), *aff'd*, No. 10–10269, 2011 WL 4373964 (11th Cir. Sept. 21, 2011).

136. *Id.* at 1130 n.3.

137. *See id.* at 1130 (explaining that Odyssey discovered a small bronze block within the sunken vessel).

at the time of its sinking was hotly disputed in the litigation; thus, there was a substantial issue of its "public use" before the court.[138]

But one matter was uncontroverted by the parties in the Black Swan litigation: the res was not in the actual possession of Spain at the institution of the in rem arrest. Rather, the treasure was recovered—after a substantial search by the salvor—on the seabed under 1100 meters of water, one hundred miles west of the Straits of Gibraltar in international waters.[139] Spain was thus compelled to argue that the actual possession requirement had no validity in FSI litigation, inasmuch as the FSIA had not codified its terms.[140] The district court, expressly adopting a report and recommendation of a magistrate judge, agreed with Spain.

> Odyssey next maintains that Spain is not entitled to immunity because it did not have actual possession of the *res* at the time of arrest (presumably in the physical sense—a remarkable feat given the depths of the wreck and the size of the debris field). . . . To support this theory, Odyssey seizes upon the Supreme Court's language in *California v. Deep Sea Research, Inc.*, 523 U.S. at 506-508, in which the Court held California did not have Eleventh Amendment immunity where it did not have "actual possession" of the res in an *in rem* admiralty case. That case, which did not involve the FSIA but rather the Eleventh Amendment and the Abandoned Shipwreck Act, has no application here, particularly when the Supreme Court has repeatedly stated the FSIA "provides the sole basis for obtaining jurisdiction over a foreign state." *Nelson*, 507 U.S. at 355 (quoting *Amerada Hess Shipping Corp.*, 488 U.S. at 443).
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> When evaluating jurisdiction, the Court "start[s] from the settled proposition that the subject-matter jurisdiction of the lower federal courts is determined by Congress 'in the exact degrees and character which to Congress may seem proper for the public good.'" *Amerada Hess Shipping Corp.*, 488 U.S. at 433 (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)). "Claims of foreign states to immunity should [ ] be decided by courts . . . in conformity with the principles set forth in [the FSIA]." 28 U.S.C. § 1602. When Congress enacted the FSIA, it did not include an actual possession requirement in the language of the statute. Rather, it simply stated that "the property in the United States *of a foreign state* shall be immune . . . ." 28 U.S.C. § 1609 (emphasis added). No section of the FSIA imposes the possessory requirement Odyssey advances, and I refuse to read one into the statute.[141]

On appeal, the Eleventh Circuit substantially agreed with the district court's reasoning, holding that the FSIA does not contain a

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138. *See id.* at 1138, 1141 (discussing the military nature of the ship and dismissing Odyssey's argument that Spain had conceded some portions of the cargo as non-sovereign); *see also Odyssey*, 2011 WL 4374964, at *11–13 (holding that Spain's shipment of private consignments of silver was consistent with its mercantilist policies and this was not a commercial activity within the meaning of the FSIA).

139. *See Odyssey*, 675 F. Supp. 2d at 1130.

140. *See id.* at 1140–41 (explaining that Congress did not include an actual possession requirement in the language of FSIA).

141. *Id.* (some citations omitted).

possession requirement.[142] The appeals court distinguished the authorities of *The Navemar*, *Deep Sea Research* and *Aqua Log*, and ruled that "we look only to the FSIA to determine if any possession requirement exists."[143] As for the language concerning actual possession in FSIA section 1605(b), the Eleventh Circuit brushed that aside by observing that "[section] 1605 does not apply . . . whereas immunity is granted here under § 1609. Regardless, an examination of § 1605(b) shows it does not impose a possession requirement."[144]

There are two problematic aspects to the rulings reflected in these passages. The first is rather obvious; the court may have been relying on the wrong provision of the FSIA.[145] Section 1609 is a categorical prohibition on the use of "attachment arrest and execution" as against the "property in the United States of a foreign state."[146] In addition to the garbled language[147] (is an "attachment arrest" the same as an admiralty arrest?) there is also the question of whether this provision is meant to trump the more specific procedure outlined in section 1605(b) for the enforcement of maritime liens. As previously noted, FSIA section 1605(b) *does* contain a codification of the actual possession requirement.[148] So, the district court's and the court of appeals's key assumption as to the relevant, operative provision of the FSIA in admiralty disputes seems to have been quite mistaken.

But the second doctrinal misstep evident in the *Odyssey Marine* holdings was even more astonishing: its apparent rejection of any pre-FSIA common law doctrine. The breezy distinction of the relevance of the actual possession rule in Eleventh Amendment cases (as in the Supreme Court's *Deep Sea Research* opinion) is particularly open to criticism—especially in light of the Eleventh Circuit's earlier decision in *Aqua Log, Inc. v. Georgia*,[149] which noted the essential applicability of the actual possession rule for all species of sovereign immunity.[150] But, rather curiously, the Eleventh Circuit apparently

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142. *See Odyssey*, 2011 WL 4374964, at *13–14.

143. *Id.* at *14 (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 433, 443 (1989)); *see also id.* at *14 (distinguishing *The Navemar* as having been decided prior to the enactment of the FSIA).

144. *Id.* at *14 n.13.

145. *See id.* at 1139–40 (specifying section 1609 as the pertinent section).

146. 28 U.S.C. § 1609 (2010).

147. *See Odyssey*, 675 F. Supp. 2d at 1139 n.16 (quoting Stena Rederi AB v. Comision de Contratos del Comité Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la República Mexicana, S.C., 923 F.2d 380, 385 (5th Cir. 1991)) ("No commas punctuate this provision. As one court remarked, the FSIA 'is hardly a model of statutory clarity.'").

148. *See also supra* text accompanying notes 126–34.

149. Aqua Log, Inc. v. Georgia, 594 F.3d 1330 (11th Cir. 2010).

150. *See id.* at 1334–35 (discussing the prominence of the possession requirement in Supreme Court decisions).

ignored[151] its own precedent in *Aqua Log* by assuming that the actual possession rule was confined only to Eleventh Amendment and federal immunity cases. Also open to disapproval is the district court's and the Eleventh Circuit's failure to make allowance for the possibility that the FSIA should be read consistently with the pre-enactment common law. The Supreme Court's statement in *Argentine Republic v. Amerada Hess Shipping Corp.*,[152] that the FSIA is the exclusive means of obtaining jurisdiction over a foreign sovereign defendant, still leaves in play the role of the pre-FSIA "common-law regime." That, after all, is the fundamental teaching of *Samantar*.[153]

Ultimately, the question of whether the actual possession rule continues to apply in contemporary FSI litigation turns on congressional intent. The text of FSIA section 1605(b) strongly counsels in favor of a positive response. Congress clearly expected that the way to determine whether an in rem mechanism would proceed in an instance where the sovereign status of a res was unclear was whether the vessel or cargo was in the actual possession of the foreign sovereign or its agent. If it was, then all the safeguards of section 1605(b) come into play for the foreign state, including the conversion of the proceeding onto an in personam footing.[154] But if actual possession is lacking, all the traditional remedies of the in rem admiralty arrest are applicable, as Congress intended when it amended the FSIA in 1988 by adding section 1605(c).[155] This approach offers the best means of privileging Congress's freedom in making codifying decisions in the FSIA while, at the same time, being mindful that Congress is assumed to legislate with background common law principles in mind.[156] Even inasmuch as the FSIA codified the actual possession principle at section 1606(b), the pre-FSIA "common-law regime" remains relevant as a touchstone for construction of that provision.

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151. *See* 28 U.S.C. § 1605(b) (2006).

152. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 433 (1989).

153. Samantar v. Yousuf, 130 S. Ct. 2278, 2290–92 (2010).

154. *See* 28 U.S.C. § 1605(b) (1976).

155. *See* 1988 Legislative History, *supra* note 132, at 4512 ("H.R. 1149 would substitute the award of damages for losses resulting from the wrongful arrest of a vessel owned by a foreign state, instead of barring the entire claim, and would allow the claim to proceed under in personam jurisdiction . . . ."); *see also* 28 U.S.C. § 1605(c).

156. *See Samantar*, 130 S. Ct. at 2289 n.13 (citing Astoria Fed. Sav. & Loan Ass'n. v. Solimino, 501 U.S. 104, 108 (1991); Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)) ("Congress is understood to legislate against a background of common-law . . . principles, and when a statute covers an issue previously governed by the common law, we interpret the statute with the presumption that Congress intended to retain the substance of the common law. . . . Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." (citations and internal quotation marks omitted)).

IV. COMPLICATIONS: EXECUTIVE BRANCH DEFERENCE AND COLLECTIVE PROCEEDINGS

The continued vitality of the actual possession rule leaves open some broader issues of practice and procedure in contemporary FSI litigation. One of these is the extent to which courts should grant deference to the positions of the Executive Branch on the scope and application of the actual possession rule—as it has asserted in cases concerning other common law residuum of foreign sovereign immunities. Not surprisingly, this issue was anticipated in *Samantar*, where the Supreme Court noted that, under the pre-FSIA common law, if the State Department affirmatively made a "suggestion of immunity" on behalf of a foreign sovereign, "the district court surrendered its jurisdiction."[157] But, if no such direct suggestion was made, federal courts were free to independently evaluate the foreign sovereign's immunity request and to determine "whether the ground of immunity is one which it is the established policy of the [State Department] to recognize."[158]

The origin of the Executive Branch's absolute deference position on FSI common law issues is none other than the Supreme Court's 1943 decision in *Ex parte Republic of Peru*.[159] There, the Court flatly indicated that "[u]pon recognition and allowance of the claim [to immunity] by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel and remit the libelant to the relief obtainable through diplomatic negotiations."[160] But without such an unambiguous expression of immunity, it was incumbent on a court "to decide for itself whether all the requisites for such immunity existed—whether the vessel when seized was [the foreign sovereign's], and was of a character entitling it to the immunity."[161]

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157. *Id.* at 2284 (citing Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945) and *Ex parte* Republic of Peru, 318 U.S. 578, 581 (1943)).

158. *Id.* (quoting *Hoffman*, 324 U.S. at 36).

159. *Ex parte Republic of Peru*, 318 U.S. 578; *see* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 134–44 (1999) (tracing the development of the absolute deference position from the nineteenth century through *Ex Parte Republic of Peru* and *Hoffman*). *But see* A.H. Feller, *Procedures in Cases Involving Immunity of Foreign States in Courts of the United States*, 25 AM. J. INT'L L. 83, 84 (1931) (noting that the Executive was the primary source of authority regarding which diplomatic officials were protected by diplomatic immunity).

160. *Ex parte Republic of Peru*, 318 U.S. at 588; *see also* The Navemar, 303 U.S. 68, 74 (1938) ("If the claim is recognized and allowed by the Executive Branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction.").

161. *Ex parte Republic of Peru*, 318 U.S. at 587–88 (citing *Ex parte* Muir, 254 U.S. 522 (1921) and The Pesaro, 255 U.S. 216 (1921)).

Even more exactingly, the Supreme Court in *Hoffman* indicated that the standard to be applied was "whether the vessel when seized was that of a foreign government and was of a character and operated under conditions entitling it to the immunity in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations."[162] The *Hoffman* Court likewise emphasized the necessity that courts, through their foreign sovereign immunity decisions, not "embarrass the executive arm in its conduct of foreign affairs. . . . It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."[163]

Inasmuch as the Executive Branch recognizes the continued force of the actual possession rule in foreign sovereign immunity litigation,[164] it would be hard to fathom what embarrassment would arise from its application. The key function for courts to play in determining the contours of common law foreign sovereign immunities is, in the words of the *Hoffman* Court,[165] to decide immunity questions "in conformity to the principles" already established in U.S. practice and in accordance with customary international law.[166] In enacting the FSIA, Congress clearly had this expectation.[167]

In light of the Supreme Court's ruling in *Samantar*, we should expect that courts will not give automatic or reflexive deference to litigation positions of the Executive Branch that are not in conformity

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162. *Hoffman*, 324 U.S. at 35 (citing *Ex parte Republic of Peru*, 318 U.S. at 588).

163. *Id.* (citing *Ex parte Republic of Peru*, 318 U.S. at 588).

164. *See id.* at 36 ("Such a policy, long and consistently recognized and often certified by the State Department and for that reason acted upon by the courts even when not so certified, is that of allowing the immunity from suit of a vessel in the possession and service of a foreign government. It has been held below, as in *The Navemar*, to be decisive of the case that the vessel when seized by judicial process was not in the possession and service of the foreign government."); *see also* Brief for United States as Amici Curiae Supporting Petitioners in Part at *27–28, California v. Deep Sea Research, Inc., 523 U.S. 372 (2007) (No. 96-1400), 1997 WL 473386 (arguing continued force of actual possession rule in foreign sovereign immunity litigation).

165. *Hoffman*, 324 U.S. at 35 ("[I]t is for [the courts] to decide whether the vessel when seized was that of a foreign government and was of a character and operated under conditions entitling it to the immunity in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations.").

166. *See id.*

167. *See* 28 U.S.C. § 1602 (1976) ("Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned . . . . Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.").

with already established U.S. practice.[168] In other words, were the Executive Branch to take the position that the actual possession requirement no longer applied as a ground for refusing immunity in cases involving admiralty claims or maritime liens, courts might be justified in declining to "surrender[ ] [their] jurisdiction."[169] This is especially so since the actual possession rule is enshrined in so much of the pre-FSIA case law and that Congress saw fit to codify its terms in section 1605(b) of the statute.[170]

That leaves just one procedural nuance to consider. In *Samantar*, the Court acknowledged that there might be alternate grounds for dismissal in FSI cases involving the pre-FSIA "common-law regime."

> Even when a plaintiff names only a foreign official, it may be the case that the foreign state itself, its political subdivision, or an agency or instrumentality is a required party, because that party has "an interest relating to the subject of the action" and "disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest." Fed. Rule Civ. Proc. 19(a)(1)(B). If this is the case, and the entity is immune from suit under the FSIA, the district court may have to dismiss the suit, regardless of whether the official is immune or not under the common law. See *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008) ("[W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign").[171]

This passage—which is certainly dicta—may nonetheless have some unintended consequences. This is especially so in the context of collective proceedings in federal court—whether or not under in rem mechanisms.[172] One consequence of the *Pimentel* holding might be that a foreign sovereign could insert itself into any in rem, collective proceeding in a U.S. federal court (whether in admiralty, forfeiture or bankruptcy), file a claim, and then assert that because any adjudication would prejudice its interests, the proceeding should be terminated for lack of subject matter jurisdiction.

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168. *See* Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193, 204 (2007) (Stevens, J., dissenting) ("[T]he views of the Executive are not entitled to any special deference on this issue."); Republic of Austria v. Altmann, 541 U.S. 677, 701 (2004) ("While the United States' views on such an issue [the proper construction of the FSIA] are of considerable interest to the Court, they merit no special deference.").

169. Samantar v. Yousuf, 130 S. Ct. 2278, 2284 (2010).

170. *See* 28 U.S.C. § 1605(b) (1988) ("Whenever notice is delivered under subsection (b) (1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved.").

171. *Samantar*, 130 S. Ct. at 2292.

172. *See* Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel, No. 10–10269, 2011 WL 4374964, at *16 (11th Cir. Sept. 21, 2011) (applying *Pimentel* and principles of comity to in rem proceedings).

The Supreme Court certainly did not necessarily countenance such a result in its *Pimentel* opinion. The Court was careful, for example, to indicate that a foreign sovereign's assertion of a claim cannot be "frivolous."[173] But that is hardly a high threshold to satisfy. Perhaps a more salient ground of distinction is that in in rem collective proceedings, parties having rights to a res are obliged to file a claim.[174] This is a very different context than in *Pimentel*, which was an interpleader proceeding concerning in personam creditor claims to funds situated in a U.S. bank.[175] It seems unlikely that the Supreme Court intended that its indispensable parties holding in *Pimentel*, premised under Federal Rule of Civil Procedure 19, would have any effect in collective proceedings. Nor should it be assumed that the Supreme Court in *Samantar* and *Pimentel* was impliedly seeking to cast doubt on the continued vitality of the actual possession rule. Rather, quite the contrary is likely.

Courts should take care to protect the integrity of collective proceedings. This should especially be so for in rem admiralty arrests, which remain—as Congress indicated in the 1988 FSIA amendments—the default mechanism for adjudicating maritime liens in U.S. courts.[176] Just as it would go too far to give absolute deference to an executive branch litigation position that substantially abrogated the effect of the actual possession rule, allowing foreign states to manipulate collective proceedings—by filing claims and then seeking a termination of the entire proceeding as an indispensable, but absent, party—stretches the doctrine of foreign sovereign immunity too much. One unexpected fallout of the Supreme Court's decision in *Samantar* is that courts may have to be vigilant in preventing abuses of foreign sovereign immunity. Just because a case is presented where the pre-FSIA common law is relevant, does not mean that courts should abandon their role in definitively determining the contours of that regime.

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173. Republic of the Philippines v. Pimentel, 553 U.S. 851, 867 (2008).

174. *See* FED. R. CIV. P. C(6)(a)(i)–(ii) (Supplemental Rules) ("[A] person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest [that] . . . must describe the interest in the property that supports the person's demand for its restitution or right to defend the action.").

175. *See Pimentel*, 553 U.S. at 855 (explaining that the Philippines had been originally sued as a defendant, but that was properly dismissed because of foreign sovereign immunity).

176. *See* FSIA 1988 Legislative History, *supra* note 132, at 2 ("[A] case brought under section 1605(b) to enforce a maritime lien will proceed under the established maritime law principles of in rem suits, even though it is a suit in personam."); *see also* 28 U.S.C. § 1605(b).

V. CONCLUSION

Samantar's broad holding and emphasis on the pre-FSIA "common-law regime"[177] is likely to generate continued litigation and scholarly commentary for years to come. As this contribution indicates, there are a number of pre-FSIA, common law "pockets" of doctrine that could again become relevant in contemporary FSI litigation.[178] The actual possession rule in admiralty is just one of these.

As illustrations go, however, the actual possession rule reveals a strong tendency on the part of courts to rein in the worst excesses of assertions of sovereign immunity. When combined with the essential premise of the restrictive theory of foreign sovereign immunity—that foreign governments should not be immunized for their commercial, "nonpublic," *jure gestionis*,[179] activities—the actual possession rule embodies two key principles. The first is a strong procedural safeguard for private claimants and foreign sovereigns alike. It is a bright-line rule. The established case law requiring actual possession, and not some lesser form of constructive possession, makes it easy for judges to administer by closely examining the situation at the precise moment that the jurisdiction of a U.S. court is invoked—the time of arrest. The second principle derives from a key insight that courts and the Executive Branch share in the management of foreign relations: it is the ouster of a sovereign's actual possession of an asset that is most likely calculated to cause offense. Indeed, this is consistent with a broad purpose of sovereign immunity jurisprudence: avoiding dignitary harms to sovereigns.[180]

The actual possession rule thus integrates many of the substantive features and policies for sovereign immunity jurisprudence. As an integral part of the "common-law regime" of foreign sovereign immunity, it should continue to be recognized by courts.

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177. *Samantar*, 130 S. Ct. at 2292.

178. *See supra* Part I (identifying admiralty actions as one such pocket).

179. Tate Letter, *supra* note 6, at 1.

180. *Samantar*, 130 S. Ct. at 2285 n.6 (quoting The Schooner Exchange v. McFaddon, 11 U.S. (Wheat.) 116, 137 (1812)) (describing the proposition of U.S. courts invoking "a jurisdiction incompatible with [a foreign sovereign's] dignity"); *See Pimentel*, 553 U.S. at 866 ("Giving full effect to sovereign immunity promotes the comity and dignity interests that contributed to the development of the immunity doctrine.").