



SCHOOL OF LAW

UNIVERSITY of CALIFORNIA • IRVINE

Legal Studies Research Paper Series No. 2014-10

***FOREIGN STATE IMMUNITY AND THE RIGHT
TO COURT ACCESS***

Christopher Whytock

cwhytock@law.uci.edu

University of California, Irvine ~ School of Law

The paper can be downloaded free of charge from SSRN at:

FOREIGN STATE IMMUNITY AND THE RIGHT TO COURT ACCESS

CHRISTOPHER A. WHYTOCK*

INTRODUCTION	2034
I. THE FOREIGN STATE IMMUNITY DOCTRINE.....	2038
A. <i>Origins</i>	2038
B. <i>Evolution</i>	2041
C. <i>Justifications</i>	2044
1. Formal Justifications	2044
2. Functional Justifications.....	2046
II. THE RIGHT TO COURT ACCESS.....	2048
A. <i>Public International Law Doctrines</i>	2049
B. <i>Private International Law Doctrines</i>	2050
C. <i>Domestic Constitutions</i>	2052
D. <i>Court Access as International Legal Right</i>	2055
III. THE IMPACT OF FOREIGN STATE IMMUNITY ON COURT ACCESS	2059
A. <i>Limits on Forum State, Third State, and Foreign State Court Access</i>	2060
1. Court Access in the Forum State	2060
2. Court Access in Third States	2061
3. Court Access in the Foreign State	2061
B. <i>Empirical Analysis</i>	2063
1. The U.S. Statutory Framework for Foreign State Immunity	2063

* Professor of Law and Political Science, University of California, Irvine School of Law. Thanks to Adam Chilton for collaboration on the dataset used for this Article's analysis. For helpful comments on drafts of this Article, I thank Funmi Arewa, Sameer Ashar, Deepa Badrinarayana, Curtis Bradley, Annie Bunting, Jennifer Chacón, Trey Childress, Catherine Fisk, Jonathan Glater, Nienke Grossman, David Kaye, Sarah Lawsky, Evan Lee, Stephen Lee, Carrie Menkel-Meadow, Tim Meyer, Julian Davis Mortenson, Susannah Pollvogt, Katie Porter, Michael Ramsey, Michael Robinson-Dorn, Kenneth Stahl, Shauhin Talesh, John Tasioulas, Christina Tsou, and Robert Wai, as well as participants at the ASIL-ESIL Rechtskulturen Workshop at the Lauterpacht Centre for International Law, University of Cambridge; the 2012 American Society of International Law Midyear Meeting, University of Georgia; the 2012 International Conference on Law and Society; and faculty workshops at UC Hastings College of Law and the University of California, Irvine School of Law. Thanks also to Reed Bernet, Christina Chen, Yimeng Dou, Andrea LaFountain, Sabyll Landrum, Mallory Sepler-King, Minyoung Shin, Phil Syers, Sirena Wu, and the staff of the University of California, Irvine Law Library for excellent research assistance, and Andrew Campbell, Sara Galloway, and Dianna Sahhar for valuable logistical support.

2. The FSIA Dataset	2065
3. Impact on Court Access in the United States	2069
4. The Likelihood of Meaningful Court Access in the Foreign State.....	2073
IV. MITIGATING THE TENSION BETWEEN FOREIGN STATE IMMUNITY AND COURT ACCESS: A PROPOSAL	2077
A. <i>The Status Quo</i>	2077
B. <i>A Proportionality Approach</i>	2082
1. Proposal	2082
2. Objections.....	2085
C. <i>A Strategy for Change</i>	2089
CONCLUSION.....	2092

INTRODUCTION

There is a growing tension between the foreign state immunity doctrine and the right to court access.¹ According to the foreign state immunity doctrine, a state generally is immune from suit in another state's courts.² For example, the doctrine ordinarily would protect France (or any of its political subdivisions, agencies, or instrumentalities) from suit in the courts of the United States.³ The foreign state immunity doctrine emerged in the early nineteenth century and is widely acknowledged to be a rule of customary international law.⁴ It is typically justified on either the formal ground that, because states are equal and independent sovereigns, one state cannot sit in judgment of another – as

¹ This Article uses the term “state” in the international legal sense; that is, to refer to a “country” such as the United States or Kenya rather than a U.S. state such as California or Utah. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) (“Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”); BARRY E. CARTER ET AL., INTERNATIONAL LAW 444 (5th ed. 2007) (“A ‘state’ in international law is what we often refer to as a nation or country (such as the United States of America or Japan) and is not one of the 50 U.S. states (such as California).”).

² United Nations Convention on Jurisdictional Immunities of States and Their Property art. 5, G.A. Res. 59/38, U.N. Doc. A/RES/59/38, at 3 (Dec. 16, 2004) [hereinafter UN Convention] (“A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention.”). “State immunity” is sometimes called “sovereign immunity.” See, e.g., SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 302 (2d ed. 2012) (using “state” and “sovereign” immunity interchangeably).

³ See 28 U.S.C. § 1603 (2006) (defining “foreign state” as including “a political subdivision of a foreign state or an agency or instrumentality of a foreign state”); *id.* § 1604 (providing that “a foreign state shall be immune from the jurisdiction of the courts of the United States” except as otherwise provided).

⁴ See *infra* Part I.

expressed by the maxim *par in parem non habet imperium*⁵ – or on the functional ground that the doctrine facilitates foreign relations.⁶

But in the mid-twentieth century, a competing principle began to emerge: the right to court access.⁷ According to this right, a person is entitled to access to a fair hearing by an independent and impartial court for the determination of a legal claim.⁸ Court access plays an important role in protecting rights, compensating for injuries, implementing the rule of law, and facilitating the peaceful and just resolution of disputes.⁹ As a result, the right to court access is widely accepted.¹⁰ It is expressed in the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights, regional agreements such as the 1950 European Convention on Human Rights and the 1969 American Convention on Human Rights, and a growing number of domestic constitutions.¹¹ Even if its precise contours are not entirely settled, the right to court access is increasingly recognized in both international and domestic law.¹²

The problem is that the foreign state immunity doctrine can prohibit what the right to court access requires: if a plaintiff sues a foreign state defendant in a particular court, and the foreign state is immune from suit, then the court will dismiss the plaintiff's claim, denying her court access.¹³ Simply put, foreign state immunity can “den[y] . . . a legal remedy in respect of what may be a valid legal claim; as such, immunity is open to objection.”¹⁴

⁵ See HAZEL FOX, *THE LAW OF STATE IMMUNITY* 57 (2d ed. 2008) (defining “the maxim *par in parem non habet imperium* [as] one sovereign State is not subject to the jurisdiction of another State”).

⁶ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 5, intro. note (1987) (justifying the doctrine as “necessary for the effective conduct of international intercourse and the maintenance of friendly relations”).

⁷ See generally ACCESS TO JUSTICE AS A HUMAN RIGHT (Francesco Francioni ed., 2007) (documenting the emergence of an international and domestic right of individuals to court access).

⁸ See, e.g., Francesco Francioni, *The Rights of Access to Justice Under Customary International Law*, in ACCESS TO JUSTICE AS A HUMAN RIGHT, *supra* note 7, at 1, 1 (defining court access as “the possibility for the individual to bring a claim before a court and have a court adjudicate it” and, more specifically, the right to have a claim “heard and adjudicated in accordance with substantive standards of fairness and justice”).

⁹ See *infra* Part II.

¹⁰ See *infra* Part II.

¹¹ See *infra* notes 90, 133-35, and Figure 1.

¹² See Francioni, *supra* note 8, at 50 (arguing that foreign state immunity and court access “both reflect norms of customary international law”).

¹³ See, e.g., *Saudi Arabia v. Nelson*, 507 U.S. 349, 363 (1993) (dismissing a suit against Saudi Arabia on foreign state immunity grounds).

¹⁴ 1 OPPENHEIM'S INTERNATIONAL LAW § 109, at 342 (Robert Jennings & Arthur Watts eds., 9th ed. 1996).

To be clear, this is not merely an international legal problem. Even though the foreign state immunity doctrine is a doctrine of international law, its impact on court access is domestic. The doctrine can prohibit lawsuits from proceeding in domestic courts, even if the forum state has compelling reasons to permit a suit to proceed, and even if the plaintiff would have no alternative recourse. For example, an Italian court allowed Italian plaintiffs to bring claims against Germany for war crimes committed against them during the Second World War.¹⁵ Germany then sued Italy in the International Court of Justice (ICJ), arguing that the foreign state immunity doctrine prohibited Italy from allowing the suit to proceed.¹⁶ In a 2012 decision, the ICJ ruled in Germany's favor, finding that Italy had violated international law by allowing access to its courts for the plaintiffs' claims against Germany and ordering Italy to ensure that the decisions of its courts infringing on Germany's immunity "cease to have effect."¹⁷

So far, international and regional courts have done more to exacerbate than to mitigate the tension between the foreign state immunity doctrine and the right to court access. Most notably, the ICJ's decision in *Germany v. Italy*¹⁸ and the European Court of Human Rights' (ECHR) 2001 decision in *Al-Adsani v. United Kingdom*¹⁹ categorically prioritized foreign state immunity over the right to court access, thus failing to shed light on how the two doctrines might be reconciled and confirming that the foreign state immunity doctrine is indeed a serious barrier to court access.²⁰

This Article uses a combination of doctrinal and empirical analysis to elucidate the tension between the foreign state immunity doctrine and the right to court access, and it proposes a strategy for mitigating that tension. Part I lays the foundation for the Article's analysis by explaining the foreign state immunity doctrine, and its origins, evolution, and justifications.

Part II examines the right to court access. It shows that the right is expressed in a wide variety of public and private international law doctrines as well as a

¹⁵ Jurisdictional Immunities of the State (Ger. v. It.), Judgment, paras. 27-29 (Feb. 3, 2012), available at <http://www.icj-cij.org/docket/files/143/16883.pdf> (describing how the Italian Court of Cassation allowed a claim against Germany on the ground that foreign state immunity does not apply when "the act complained of constitutes an international crime").

¹⁶ *Id.* para. 1 (explaining that Germany brought a suit alleging that Italy "failed to respect the jurisdictional immunity which . . . Germany enjoys under international law").

¹⁷ *Id.* para. 139.

¹⁸ *Id.* (holding that the foreign state immunity doctrine did not allow a claim in an Italian court against Germany).

¹⁹ *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, 103 ("The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State.").

²⁰ See *infra* Part IV.A (critiquing these decisions from a court access perspective and explaining why their prioritization of foreign state immunity is categorical).

growing number of domestic constitutions, and it identifies international legal instruments that contain an express right to court access. Although some scholars argue that there is a general international legal right to court access, Part II's central point is more modest: the right to court access, whether or not it has become a legally binding rule of international law, is widely accepted and increasingly legalized. Therefore, one important criterion for normative evaluation of the foreign state immunity doctrine is its impact on court access.

Part III responds to this normative concern by systematically assessing the impact of the foreign state immunity doctrine on court access. If a plaintiff sues a defendant in a particular court, and the court dismisses the suit on foreign state-immunity grounds, the plaintiff is denied access to that court. But beyond this truism, the court access consequences of foreign state immunity are poorly understood. For example, some commentators suggest that the doctrine does no more than deny access to a particular court;²¹ but this Article's analysis demonstrates that this view underestimates the doctrine's court access consequences because the doctrine can preclude court access in all states other than the foreign state itself.²² Other commentators suggest that, when granted, foreign state immunity precludes court access altogether;²³ but this Article shows that this view *overestimates* the doctrine's court access consequences because another state, perhaps including the foreign state itself, may provide a suitable alternative forum.²⁴

Part III uncovers the court access consequences of the foreign state immunity doctrine. First, it shows that when the foreign state immunity doctrine applies, court access may be denied not only in the forum state, but also in third states and the foreign state, thus potentially precluding court access altogether.²⁵ Second, it uses statistical analysis of an original dataset of more than 350 foreign state immunity decisions by U.S. district court judges to shed light on how the court access consequences of the foreign state immunity doctrine play out in real-world litigation. The results confirm that the impact of foreign state immunity on court access is real, not merely theoretical. U.S. district courts frequently deny court access on foreign state immunity grounds; both foreign nationals and U.S. nationals, and both individuals and businesses, are affected; and the likelihood of meaningful court access in the foreign state is often low when court access is denied in the United States.²⁶

²¹ See, e.g., FOX, *supra* note 5, at 74 (arguing that the doctrine “does not confer impunity; the underlying accountability or substantive responsibility for the matters alleged in a claim remain; immunity merely bars the adjudication of that claim in a particular court”).

²² See *infra* Part III.

²³ See, e.g., OPPENHEIM'S INTERNATIONAL LAW, *supra* note 14, § 109, at 342 (“The grant of immunity from suit amounts in effect to a denial of a legal remedy in respect of what may be a valid legal claim; as such, immunity is open to objection.”).

²⁴ See *infra* Part III.

²⁵ See *infra* Part III.A.

²⁶ See *infra* Part III.B.

In light of Part III's findings, Part IV develops a strategy for mitigating the impact of the foreign state immunity doctrine on court access. It critically evaluates both the status quo and various previously proposed alternatives to the status quo, such as the elimination or radical curtailment of the foreign state immunity doctrine. It then argues in favor of a more balanced solution: a proportionality approach. Under this approach, foreign state immunity should not be granted if its impact on the claimant's ability to obtain court access would be disproportionate to the benefits of immunity for relations between the forum state and the foreign state. This solution has the advantage of taking seriously both the functional justifications for the foreign state immunity doctrine and the importance of court access. Given the stickiness of customary international law, a long-term evolutionary strategy would be needed to implement this or similar solutions, supported by advocacy efforts aimed at promoting the right to court access and advancing its legalization.

I. THE FOREIGN STATE IMMUNITY DOCTRINE

According to the foreign state immunity doctrine, a state generally is immune from suit in another state's courts.²⁷ To lay the foundations for this Article's doctrinal, empirical, and normative analysis, this Part explains the doctrine's origins, evolution, and justifications.

A. *Origins*

As early as the sixteenth century, international legal scholars recognized the personal immunity of individual sovereigns, such as kings and queens, as well as the immunity of ambassadors.²⁸ But it was not until the nineteenth century, after the appearance of the modern nation-state, that the foreign state immunity doctrine emerged, recognizing the immunity of states as distinct entities.²⁹

²⁷ See UN Convention, *supra* note 2, art. 5 ("A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention."). Foreign state immunity is the immunity of a state as a distinct entity and is different from head of state immunity, diplomatic immunity, consular immunity, and foreign official immunity. See MURPHY, *supra* note 2, at 295-302 (distinguishing these different types of immunity). This Article addresses only foreign state immunity.

²⁸ See GAMAL MOURSİ BADR, STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW 9 (1984) (describing sixteenth-, seventeenth-, and eighteenth-century writers – including Gentili, Grotius, Bynkershoek, and Vattel – who acknowledged this form of immunity).

²⁹ See *id.* ("[T]he rules of state immunity . . . have derived mainly from the judicial practice of individual nations since the nineteenth century."); MALCOM N. SHAW, INTERNATIONAL LAW 698 (6th ed. 2008) (linking the emergence of foreign state immunity to the replacement of the personal sovereign with the abstract concept of the state). Although sometimes confused, the law governing the immunity of individual sovereigns, ambassadors, and other foreign officials is distinct from the law governing the immunity of foreign states. See Ian Sinclair, *The Law of Sovereign Immunity: Recent Developments*, 167 RECUEIL DES COURS 113, 197-99 (1980) (Neth.) (clarifying the distinction between personal

Domestic courts played the leading role in the development of the foreign state immunity doctrine.³⁰ *The Schooner Exchange v. McFaddon*, a case decided by the U.S. Supreme Court in 1812, is widely cited as the seminal statement of the doctrine.³¹ The claimants alleged that in December 1810 French naval forces had illegally taken their ship, the *Exchange*, during a voyage from the United States to Spain.³² In July 1811, the ship – now armed and under French command – entered the port of Philadelphia, apparently to take refuge from severe weather.³³ The claimants then filed a libel claim against the ship in the district court in Philadelphia, which ordered the ship arrested and detained pending the determination of its rightful owners.³⁴ As requested in a suggestion filed with the court by the executive branch of the United States, the district court dismissed the claim on the ground that “a public armed vessel of a foreign sovereign, in amity with our government, is not subject to the ordinary judicial tribunals of the country, so far as regards the question of title, by which such sovereign claims to hold the vessel.”³⁵ The court of appeals reversed.³⁶

The Supreme Court reversed the court of appeals and affirmed the district court’s decision, holding that as a “public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace,” the *Exchange* should be “exempt from the jurisdiction of the country.”³⁷ As the Supreme Court put it, the issue was “whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States.”³⁸ The Court, in an opinion written by Chief Justice Marshall, held that the claim was barred.³⁹

Chief Justice Marshall’s reasoning required him to resolve a tension between two attributes of state sovereignty: the exclusive territorial jurisdiction of states and the legal equality of states.⁴⁰ On the one hand, Chief Justice

sovereign immunity and state immunity).

³⁰ See BADR, *supra* note 28, at 9 (“[M]unicipal [that is, domestic] courts took the lead in creating the rules of state immunity.”).

³¹ *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); see, e.g., BADR, *supra* note 28, at 9-10 (explaining that *The Schooner Exchange* was the first decision to articulate the doctrine); Sinclair, *supra* note 29, at 122 (“Chief Justice Marshall in *The Schooner Exchange v. McFaddon* is regularly cited as the first judicial expression of the doctrine of absolute immunity.”).

³² *The Schooner Exch.*, 11 U.S. at 117.

³³ *Id.* at 118.

³⁴ *Id.* at 117.

³⁵ *Id.* at 120.

³⁶ *Id.*

³⁷ *Id.* at 147.

³⁸ *Id.* at 135.

³⁹ *Id.* at 147.

⁴⁰ See Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT’L L. 741, 745 (2003) (“The doctrine of foreign

Marshall explained, “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. . . . Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction”⁴¹ Under this principle, a U.S. court would have jurisdiction over the vessel because the vessel was within U.S. territory. On the other hand, because of the “perfect equality and absolute independence of sovereigns,” “[o]ne sovereign . . . [is] in no respect amenable to another” and is “bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another.”⁴² This principle would suggest that a U.S. court could not assert jurisdiction over the vessel.

The Court reconciled these two aspects of sovereignty using a theory of consent. A state may, by express or implied consent, agree to limit the exercise of its territorial jurisdiction.⁴³ In fact, states have consented to certain such limitations by exempting from jurisdiction personal sovereigns, foreign ministers, foreign troops granted free passage, and, most important for this case, foreign ships of war.⁴⁴ Specifically, the Court held that “national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.”⁴⁵ Emphasizing that the basis of immunity is the territorial state’s consent, the Court stated that “[w]ithout doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals.”⁴⁶

Beyond the observation that states have given their implied consent to such limitations on their territorial jurisdiction, the Court suggested two reasons why states have done so: to protect their sovereign equality and independence and to foster mutually beneficial international relations.⁴⁷ The Court also

state immunity was born out of tension between two important international law norms – sovereign equality and exclusive territorial jurisdiction.” (footnote omitted)).

⁴¹ *The Schooner Exch.*, 11 U.S. at 136.

⁴² *Id.* at 137.

⁴³ *See id.* at 136 (asserting that a state’s exclusive and absolute territorial jurisdiction “is susceptible of no limitation not imposed by itself,” that “[a]ll exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself,” and that “[t]his consent may be either express or implied”).

⁴⁴ *See id.* at 137-40 (describing three instances – those involving foreign ministers, foreign troops, and the foreign sovereign himself – in which the territorial state consents to waive jurisdiction when a foreign entity enters the territory’s jurisdiction).

⁴⁵ *Id.* at 145-46.

⁴⁶ *Id.* at 146.

⁴⁷ *See id.* at 137 (“This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive [sic] the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.”); *id.* at 136 (stating

acknowledged, but did not examine, other possible reasons for consent, namely “the general inability of the judicial power to enforce its decisions in cases of this description”; and the proposition “that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, [and] that they are for diplomatic, rather than legal discussion.”⁴⁸

B. *Evolution*

Over the course of the nineteenth and twentieth centuries, the foreign state immunity doctrine evolved in three ways.⁴⁹ First, the doctrine’s scope evolved. The standard account is that the foreign state immunity doctrine was, at its origins, absolute: it provided immunity against all suits filed against a state in another state’s courts.⁵⁰ Some commentators challenge this view, arguing instead that the doctrine was initially more limited.⁵¹ Chief Justice Marshall’s reasoning in *The Schooner Exchange* provides some support for this alternative view.⁵² But regardless of disagreement about the doctrine’s original scope,

that the “mutual benefit [that] is promoted by intercourse with each other” is a reason for this consent).

⁴⁸ *Id.* at 146.

⁴⁹ For comparative overviews of the nineteenth- and early twentieth-century judicial development of the foreign state immunity doctrine, see BADR, *supra* note 28, at 9-34; Sinclair, *supra* note 29, at 122-34.

⁵⁰ See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 5, intro. note (1987) (“Until the twentieth century, sovereign immunity from the jurisdiction of foreign courts seemed to have no exceptions.”); ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 145 (2d ed. 2010) (“Originally, State immunity was absolute, and remained so into modern times . . .”). According to the doctrine of absolute immunity, “the sovereign was completely immune from foreign jurisdiction in all cases regardless of circumstances.” SHAW, *supra* note 29, at 701.

⁵¹ See, e.g., BADR, *supra* note 28, at 18-19 (arguing that “early decisions did distinguish . . . between a foreign sovereign’s public acts on the one hand and his private acts on the other, stating in no uncertain terms that the latter enjoyed no immunity from the jurisdiction of local courts” and adding that “[t]he continued citation of those early decisions in support of the absolute theory of state immunity is therefore a curious phenomenon, due perhaps to a hasty perusal of those decisions or to second hand knowledge of them”); Michael Byers, *Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT’L L. 109, 169 (1995) (arguing that absolute immunity was never an established rule and that “there was no rule regulating state immunity from jurisdiction prior to restrictive immunity becoming a rule of customary international law”); Caplan, *supra* note 40, at 753 (“[I]t is a myth that states ever enjoyed absolute immunity from foreign jurisdiction.”).

⁵² See *The Schooner Exchange*, 11 U.S. at 145 (“[T]here is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and independence of a nation.”); see also Sinclair, *supra* note 29, at 122 (stating that *The Schooner Exchange* “is regularly cited as the first judicial expression of the doctrine of absolute immunity,” but

there seems to be general agreement that the absolute doctrine prevailed in the early twentieth century, and that states thereafter increasingly rejected it in favor of the so-called restrictive doctrine of foreign state immunity.⁵³ According to the restrictive doctrine, a state is immune against claims arising out of its public or sovereign acts (*jure imperii*), but not its private or commercial acts (*jure gestionis*).⁵⁴ The United States, for example, officially adopted the restrictive doctrine in 1952.⁵⁵ Today, the restrictive approach predominates.⁵⁶

Second, it is generally acknowledged that foreign state immunity has become a rule of customary international law, primarily through the gradual accumulation of state practice in the form of domestic court decisions and domestic legislation.⁵⁷ There is a view, held by some scholars and at least implicitly reflected in the decisions of the U.S. Supreme Court, that foreign state immunity is not a rule of international law, but rather a product of comity granted by a state in its discretion to a foreign state.⁵⁸ For example, Sir Hersch

arguing that “[i]t may be doubted whether the judgment necessarily carries with it this implication”).

⁵³ See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 5, intro. note (1987) (“The restrictive principle of immunity spread rapidly after the Second World War . . .”).

⁵⁴ See IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 327-28 (7th ed. 2008) (explaining that the restrictive doctrine distinguishes “between acts of government, *jure imperii*, and acts of a commercial nature, *jure gestionis*, denying immunity from jurisdiction in the latter case”).

⁵⁵ See Jack B. Tate, *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 DEP’T ST. BULL. 984, 985 (1952) (“[I]t will hereafter be the Department’s policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.”).

⁵⁶ ANTONIO CASSESE, INTERNATIONAL LAW 100 (2d ed. 2005) (“At present almost all States embrace the doctrine of restrictive immunity. It would seem that only China and some Latin American States still cling to the old doctrine of absolute immunity.” (citation omitted)); SHAW, *supra* note 29, at 707 (“The majority of states now have tended to accept the restrictive immunity doctrine . . .”).

⁵⁷ See FOX, *supra* note 5, at 13 (“That immunity is a rule of law is generally acknowledged by States.”); *id.* at 20 (“[T]he identification of the customary international rule [of immunity] has largely taken place in the practice of States within their national legal orders.”). *Oppenheim’s International Law* makes a similar observation:

[T]he practice of states over a long period has established that foreign states enjoy a degree of immunity from the jurisdiction of the courts of another state. This practice has consisted primarily of the application of the internal laws of states by judicial decisions [Despite certain variations across states], state practice is sufficiently established and generally consistent to allow the conclusion that . . . customary international law admits a general rule, to which there are important exceptions, that foreign states cannot be sued.

OPPENHEIM’S INTERNATIONAL LAW, *supra* note 14, § 109, at 342-43 (footnotes omitted).

⁵⁸ See, e.g., *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003) (stating that foreign state immunity is “a gesture of comity between the United States and other sovereigns”);

Lauterpacht argued that “there is . . . no rule of international law which obliges states to grant jurisdictional immunity to other states” – although he acknowledged that the view was “unorthodox” and “at variance with the view almost uniformly expressed in textbooks.”⁵⁹ Today, the view that foreign state immunity is a rule of customary international law – having been adopted by the International Law Commission and the International Court of Justice – is the dominant, if not uncontested, view.⁶⁰

Third, although there so far is no generally applicable treaty in force governing foreign state immunity,⁶¹ there has been a move toward codification – domestically, regionally, and internationally.⁶² Domestic codifications include the U.S. Foreign Sovereign Immunities Act of 1976, the United Kingdom State Immunity Act of 1978, the Canadian State Immunity Act of 1982, and the Australian Foreign States Immunities Act of 1985.⁶³ Regionally, the European Convention on State Immunity was opened for signature in 1972 and has been ratified by eight member states of the Council of Europe.⁶⁴ And

Richard Garnett, *Should Foreign State Immunity Be Abolished?*, 20 AUSTL. Y.B. INT’L L. 175, 175 (1999) (“[I]t is now almost impossible to speak of a ‘customary international law’ of foreign state immunity given the divergences in state practice.”); *see also* *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 135-36 (1812) (deriving immunity from consent of forum state and determining issue of immunity to “conform to those principles of national and municipal law by which it ought to be regulated”). The U.S. Congress, however, has acknowledged the international legal status of the foreign state immunity doctrine. *See* 28 U.S.C. § 1602 (2006) (“Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.”).

⁵⁹ H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT’L L. 220, 228 (1951).

⁶⁰ *See Report of the International Law Commission to the General Assembly*, [1980] 2 Y.B. Int’l L. Comm’n 137, at 147, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 2) (stating that the foreign state immunity doctrine has been “adopted as a general rule of customary international law solidly rooted in the current practice of States”); *Jurisdictional Immunities of the State*, *supra* note 15, para. 56 (confirming the International Law Commission’s conclusion that foreign state immunity is a rule of customary international law); *id.* para. 106 (“State immunity, where it exists, is a right of the foreign State.”); FOX, *supra* note 5, at 18 (“The practice of civil law courts and common law jurisdictions other than the United States has been totally opposed to such a reduction of immunity as ‘a gesture of comity.’”).

⁶¹ *See* ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 80 (1994) (“[F]or the moment there is no treaty of universal application.”).

⁶² For an analysis of codification efforts, see Sinclair, *supra* note 29, at 134-45; *id.* at 243-56.

⁶³ BROWNLEE, *supra* note 54, at 328-30; *see also Foreign State Immunities Act 1985* (Cth) (Austl.); *State Immunity Act, R.S.C. 1985 c. S-18* (Can.); *State Immunity Act, 1978, c. 33, §§ 1-23* (Eng.); *Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11* (1976).

⁶⁴ *See* European Convention on State Immunity, *opened for signature* May 16, 1972, E.T.S. No. 074. The ratifying states are Austria, Belgium, Cyprus, Germany, Luxembourg,

in 2004, the United Nations General Assembly adopted the United Nations Convention on Jurisdictional Immunities of States and Their Property, which was drafted by the International Law Commission (UN Convention).⁶⁵ Fourteen states have ratified the UN Convention, but it has not yet entered into force.⁶⁶ Nevertheless, it is widely viewed as reflecting the customary international law of foreign state immunity.⁶⁷

The UN Convention states the general principle that “[a] State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State.”⁶⁸ A state is to give effect to this general principle “by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State . . . is respected.”⁶⁹ Reflecting the restrictive approach to foreign state immunity, the UN Convention provides that states may not invoke immunity in certain types of suits, including those arising out of commercial transactions.⁷⁰

C. *Justifications*

As noted by one international law expert, “[T]he grounds advanced in support of [the foreign state immunity] doctrine are many and varied, and . . . there is no unanimity of view on what is [its] true rationale”⁷¹ Nevertheless, the justifications advanced for the doctrine fall into two basic categories: formal and functional.

1. Formal Justifications

According to formal justifications, the foreign state immunity doctrine is derived logically from other legal principles. For example, the doctrine is often

the Netherlands, Switzerland, and the United Kingdom. *Id.*

⁶⁵ UN Convention, *supra* note 2, at 1.

⁶⁶ *United Nations Convention on Jurisdictional Immunities of States and Their Property*, UN TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=III-13&chapter=3&lang=en (last visited Sept. 19, 2013).

⁶⁷ See FOX, *supra* note 5, at 4 (arguing that the UN Convention “would seem to establish an international standard – a source of customary law and an agreed framework for international law making . . . for the treatment of immunity by individual national legal systems and their courts”).

⁶⁸ UN Convention, *supra* note 2, art. 5.

⁶⁹ *Id.* art. 6.

⁷⁰ See *id.* art. 10 (“If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.”); *id.* art. 11-17 (setting forth additional exceptions relating to, among other things, employment contracts, intellectual property, and ships).

⁷¹ Sinclair, *supra* note 29, at 197 (emphasis omitted).

said to follow from two attributes of state sovereignty: legal equality and independence.⁷² Specifically, the principles of equality and independence are said to preclude one state from exercising authority over another, including through its courts.⁷³ This justification is expressed in the maxim *par in parem non habet imperium* – “[a]n equal has no dominion over an equal.”⁷⁴ Closely related justifications are that foreign state immunity is required to protect the dignity of states, which would be offended if they were subject to suit in domestic courts,⁷⁵ or to abide by the international legal principle of nonintervention in the internal affairs of states.⁷⁶

The foreign state immunity doctrine is also formally justified by reference to other types of immunity. For example, foreign state immunity is said to follow by analogy from the immunity of a state from suit in its own courts⁷⁷ or from

⁷² See generally OPPENHEIM’S INTERNATIONAL LAW, *supra* note 14, § 109, at 341-42 (describing the justifications of foreign state immunity as deduced “from the principle of equality [and] also from the principles of independence”).

⁷³ See BADR, *supra* note 28, at 89 (“The origin of the absolute theory of state immunity is usually traced to the maxim *par in parem non habet imperium*. It has been convincingly shown that law-trained minds are acutely vulnerable to maxims, especially those in Latin.”); J. L. BRIERLY, THE LAW OF NATIONS 243 (6th ed. 1963) (arguing that the foreign state immunity doctrine is “a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State” (quoting *The Parlement Belge*, (1880) 5 P.D. 197, 197 (Eng.)) (internal quotation marks omitted)); FOX, *supra* note 5, at 57-59 (“Independence provides a justification for the absolute rule of immunity.”); Sompong Sucharitkul, *Immunities of Foreign States Before National Authorities*, 149 RECUEIL DES COURS 87, 117 (1976) (Neth.) (arguing that the concept of sovereignty, which includes notions of independence, equality, and dignity of states, provides “a firm international legal basis” for immunity); *id.* at 119 (“Ce principe primordial du droit international public qui proclame toute les nations également souveraines, indépendentes, et par suite sans juridiction les unes à l’égard des autres, puisque la juridiction suppose la subordination et non point la parfait égalité.” (quoting *Tribunal de Première [Tribunal of First Instance] Antwerpen*, Nov. 11, 1876, PAS. 1877, III, 28 (Belg.) (internal quotation marks omitted), translated in Erik Suy, *Immunity of States Before Belgian Courts and Tribunals*, 27 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 660, 665 (1967) (Ger.)).

⁷⁴ BLACK’S LAW DICTIONARY 1004 (5th ed. 1979).

⁷⁵ See BADR, *supra* note 28, at 79 (observing that “[t]raditionally, the sovereignty or the admittedly vague notion of the ‘dignity’ of the foreign state have been invoked” to explain foreign state immunity); Sucharitkul, *supra* note 73, at 119 (describing the link made between foreign state immunity and “the international comity which induces every sovereign State to respect the . . . dignity of every other sovereign state” (quoting *The Parlement Belge*, 5 P.D. at 197) (internal quotation marks omitted)).

⁷⁶ See BROWNIE, *supra* note 54, at 325 (stating that the doctrine of sovereign immunity comports with the accepted rule that states do “not purport to exercise jurisdiction over the internal affairs of any other independent state”).

⁷⁷ See FOX, *supra* note 5, at 59 (clarifying that foreign state immunity “has been justified

the doctrine of diplomatic immunity: “If ambassadors [have] diplomatic immunities in their capacity as representatives of foreign States . . . , *a fortiori* the States . . . they represent should be entitled to no lesser degree of immunities.”⁷⁸

2. Functional Justifications

Functional justifications for the foreign state immunity doctrine rest on the doctrine’s intended practical consequences. Implicit in these justifications is the attitude that regardless of formal justifications, “[t]here seems little point in rules of State immunity unless they are supported by convincing reasons of policy.”⁷⁹

The overarching functional justification for the foreign state immunity doctrine is that it facilitates the conduct of relations between the forum state and the foreign state.⁸⁰ This justification can be traced to the U.S. Supreme Court’s opinion in *The Schooner Exchange*, which linked the doctrine to the “mutual benefit” of states that “is promoted by intercourse with each other.”⁸¹

by analogy, either by reference to its immune position under its own home law, or by reference to the protected position of the forum State under its national laws”); Suchartikul, *supra* note 73, at 115 (describing foreign state immunity as “a direct inheritance” of the “archaic practice” of domestic state immunity).

⁷⁸ See Suchartikul, *supra* note 73, at 116 (“The precedent of diplomatic immunities may be said to have given an added reason for State immunities.”).

⁷⁹ FOX, *supra* note 5, at 55.

⁸⁰ See Andreas F. Lowenfeld, *Claims Against Foreign States – A Proposal for Reform of United States Law*, 44 N.Y.U. L. REV. 901, 913 (1969) (“[T]he grant of sovereign immunity is designed to facilitate relations between foreign states by relieving the sovereign from the indignity of being subjected to a domestic adjudication.”); see also *Report of the International Law Commission to the General Assembly*, *supra* note 60, at 156 (“[C]onsiderations of friendly and co-operative international relations have sometimes been advanced as subsidiary or additional reasons for recognition of State immunity.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW ch. 5, pt. A, intro. note (1987) (explaining that the doctrine has been justified as “necessary for the effective conduct of international intercourse and the maintenance of friendly relations”); ERNEST K. BANKAS, *THE STATE IMMUNITY CONTROVERSY IN INTERNATIONAL LAW* 41 (2005) (stating that the foreign state immunity doctrine “is consonant with the quest for promoting peaceful and mutual intercourse among states”); FOX, *supra* note 5, at 751 (arguing that the foreign state immunity doctrine serves “as a holding device by which confrontation between States is avoided”); Joan E. Donoghue, *Taking the “Sovereign” out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 YALE J. INT’L L. 489, 521 (1992) (arguing that the foreign state immunity doctrine mitigates “the foreign policy risk of the exercise of U.S. jurisdiction” over a foreign state); Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 21 EUR. J. INT’L L. 853, 853-54 (explaining that one justification for sovereign immunity is “the indispensable importance of upholding sovereign immunity for maintaining good and peaceful relations among states”).

⁸¹ *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

There are various reasons why the foreign state immunity doctrine may facilitate the conduct of foreign relations. These reasons are sometimes advanced as subsidiary functional justifications for the doctrine. For example, the foreign state immunity doctrine is said to protect the governmental functions of the foreign state from interference by the forum state's courts, thus avoiding objections or retaliation by the foreign state that could disrupt relations between the two states.⁸² In particular, the doctrine is said to avoid the occasion for the enforcement of a forum state judgment against the foreign state, which can be an especially acute form of interference.⁸³ If the forum state avoids interference with a foreign state's governmental functions, the foreign state may reciprocate by avoiding interference with the forum state's governmental functions. The doctrine is also said to avoid judicial branch decisions that may be at odds with executive branch foreign policy.⁸⁴ But essentially the functional justifications for the foreign state immunity doctrine boil down to the doctrine's supposed positive effect on relations between the forum state and the foreign state.⁸⁵

⁸² See *Victory Transp. Inc. v. Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964) (observing the "interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts"); BROWNLIE, *supra* note 54, at 326 (explaining that one rationale for the foreign state immunity doctrine is "the functional need to leave [states] unencumbered in the pursuit of their mission"); FOX, *supra* note 5, at 42 ("Immunity can be seen as a useful device . . . insulating the power to administer and to operate the public service of one State from interference by another State and its courts."); *id.* at 58 ("Inherent in the recognition of the foreign State's independence is an acknowledgement that it alone is responsible for the determination of its policy and conduct of its public administration, and that courts should refrain from hampering the foreign State in the achievement of these purposes."); Donoghue, *supra* note 80, at 518 (positing that acceptance of foreign state immunity results from the "conviction that a court of one state should not be permitted to exercise jurisdiction over another state if this would unduly interfere with the functions of that state").

⁸³ See CASSESE, *supra* note 56, at 109 ("As execution is more penetrating hence more intrusive into foreign sovereignty than jurisdiction, a tendency can be discerned in the case law to be more generous with foreign States as far as immunity from execution is concerned."); FOX, *supra* note 5, at 56 (acknowledging the "impossibility, short of invasion or war, of forcing a State to do what a court may order" and referring to this as "the outstanding reason for the retention of immunity" and explaining that "the political consequences to the friendly relations of the forum State with the foreign State may discourage the forum State's support for such enforcement"); Sucharitkul, *supra* note 73, at 121 ("Difficulties or impossibility of execution of judgments against foreign States have been advanced as an argument for the local courts to abstain from exercising jurisdiction.").

⁸⁴ See *Victory Transp. Inc.*, 336 F.2d at 357 ("[S]overeign immunity has been retained . . . to avoid possible embarrassment to those responsible for the conduct of the nation's foreign relations.").

⁸⁵ Cf. Caplan, *supra* note 40, at 777 ("[T]he sole raison d'être for state immunity under customary international law is so that states can perform their public functions effectively

II. THE RIGHT TO COURT ACCESS

According to the right to court access, a person generally is entitled to access to a fair hearing by an independent and impartial court for the determination of a legal claim.⁸⁶ The right to court access is based on the premise that courts play an important role in protecting rights, compensating for injuries, implementing the rule of law, and facilitating the peaceful and just resolution of disputes.⁸⁷ As the U.S. Supreme Court has put it, the “right to sue and defend in the courts” is a “fundamental principle[]” in organized societies, one that is “conservative of all other rights” and “lies at the foundation of orderly government.”⁸⁸

Although some scholars argue that there is an international legal right to court access,⁸⁹ this Part’s central argument is more modest: the right to court access, whether or not it has become a legally binding rule of international law, is widely accepted and increasingly legalized.⁹⁰ Therefore, one important

and ensure that international relations are conducted in an orderly fashion.”).

⁸⁶ See Francioni, *supra* note 8, at 3 (describing access to justice as “the right to seek a remedy before a court of law or a tribunal which is constituted by law and which can guarantee independence and impartiality in the application of the law”). Francioni uses the term “access to justice” to refer to this right. As Francioni acknowledges, however, this term is often understood as entailing not only formal court access, but also “legal aid for the needy, in the absence of which judicial remedies would be available only to those who dispose of the financial resources necessary to meet the, often prohibitive, cost of lawyers and the administration of justice.” *Id.* at 1. In this sense, “access to justice” is a broader concept than “court access.” Moreover, if courts are not available and fair for a claimant, court access may not be sufficient for justice; and, conversely, if alternative forms of dispute resolution are available and fair, courts may not be necessary for justice. *Id.* at 3-5. Therefore, this Article uses the narrower and more precise term “court access.”

⁸⁷ See *id.* at 1 (“In international law, as in any domestic legal system, respect and protection of human rights can be guaranteed only by the availability of effective judicial remedies.”).

⁸⁸ *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907); see also David D. Caron, *The Independence and Impartiality of Legal Systems*, 5 *WORLD ARB. & MEDIATION REV.* 255, 256 (2011) (“[T]he right to an independent and impartial judiciary to decide claims of persons has been a critical component not only as the particular right in issue, but also as the avenue by which all other rights are protected.”); cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”).

⁸⁹ See, e.g., Francioni, *supra* note 8, at 42 (“[A]ccess to justice is a right recognized under general international law”); Elena Sciso, *Italian Judges’ Point of View on Foreign States’ Immunity*, 44 *VAND. J. TRANSNAT’L L.* 1201, 1212 (2011) (endorsing the Italian position that there is a fundamental human right of access to justice “recognized by international customary law as well as by universal and regional agreements on the issue”); Jan Wouters et al., *Belgian Court of Cassation*, 105 *AM. J. INT’L L.* 560, 567 (2011) (acknowledging the view that the individual right of court access is customary international law).

⁹⁰ See, e.g., Charter of Fundamental Rights of the European Union art. 47, Dec. 18, 2000,

criterion for normatively evaluating the foreign state immunity doctrine should be its impact on court access. To establish this point, this Part surveys public and private international law doctrines that express the right to court access, it empirically documents the spread of the right to court access in domestic constitutions, and it analyzes a variety of international legal instruments under which court access is a legal right.

A. *Public International Law Doctrines*

First, the right to court access is expressed in a variety of public international law doctrines. For example, it is expressed in the customary international law duty of a state to provide basic justice to foreigners injured within its territory.⁹¹ A “denial of justice” occurs when a state violates that duty.⁹² As one exhaustive study concludes, even if the precise scope of the concept of denial of justice is not entirely settled, it clearly includes a state’s refusal to allow foreigners to establish their rights before the state’s ordinary courts.⁹³ More specifically, “[d]enial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment.”⁹⁴

The right to court access is also implicit in the customary international law of diplomatic protection.⁹⁵ Diplomatic protection is defined as follows:

2000 O.J. (C 364) 1, 20 (providing the right to a “fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law”); Organization of American States, American Convention on Human Rights art. 8(1), Nov. 22, 1969, 1144 U.N.T.S. 143, 147 (“Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law.”).

⁹¹ See JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 1 (2005) (arguing that the duty of states “to provide decent justice to foreigners” is “one of [international law’s] oldest principles”); see also Francioni, *supra* note 8, at 9 (describing the denial-of-justice principle as a precursor to a more general right to court access, while emphasizing that the right entailed in the concept of denial of justice is limited to the courts of “the state in whose territory the alien has suffered the alleged injury” and does not provide a right to court access in a third state).

⁹² See PAULSSON, *supra* note 91, at 62 (defining the customary international law concept of “denial of justice” as a state’s “administ[r]ation [of] justice to aliens in a fundamentally unfair manner”).

⁹³ *Id.* at 65 (referencing a study by Vattel, who proposed that not allowing foreigners to establish rights before the ordinary courts comprised a denial of justice).

⁹⁴ Harvard Research in Int’l Law, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT’L L. SUPP. 131, 134 (1929); see also BROWNLIE, *supra* note 54, at 529 (referring to the Harvard study as probably “the best guide” to the concept’s meaning).

⁹⁵ See generally Report of the International Law Commission, 58th Sess., May 1—June

[T]he invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.⁹⁶

As a general rule, a state may not present an international claim for its national's injury unless the national has exhausted the other state's local remedies.⁹⁷ Exhaustion, however, is not required if it would be futile – for example, if “[t]here are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress.”⁹⁸ Among other things, exhaustion is typically said to be futile if the local court would have no jurisdiction over the dispute in question or if “the local courts are notoriously lacking in independence.”⁹⁹ Thus, the doctrine of diplomatic protection implicitly assumes that the state against which a claim is made should provide court access for that claim, and if it does not, exhaustion is not required.

B. *Private International Law Doctrines*

In addition to being expressed in public international law doctrines such as denial of justice and diplomatic protection, the right to court access is expressed in private international law doctrines.¹⁰⁰ For example, under the doctrine of jurisdiction by necessity (*forum necessitatis*), “a court has exceptional jurisdiction if justice so demands, even absent the usual requirements, because no other forum is available to the plaintiff.”¹⁰¹ The doctrine not only operates to provide court access that might not otherwise be available, but also is sometimes justified as permitted, or even required, by a legal right to court access or the international law prohibition of denial of justice.¹⁰²

9, July 3—Aug. 11, 2006, U.N. Doc. A/61/10; GAOR 61st Sess., Supp. No. 10 (2006) (adopting the International Law Commission's Draft Articles on Diplomatic Protection).

⁹⁶ *Id.* art. 1.

⁹⁷ *Id.* art. 14(1) (“A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.”).

⁹⁸ *Id.* art. 15(a); *see also* BROWNLIE, *supra* note 54, at 495 (describing “certain circumstances [in which] recourse to local remedies is excused”); PAULSSON, *supra* note 91, at 114 (stating that exhaustion is not required if there are no effective local remedies to exhaust).

⁹⁹ Report of the International Law Commission, *supra* note 95, at 79.

¹⁰⁰ *See generally* J. J. Fawcett, *General Report*, in DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW 1 (J. J. Fawcett ed., 1995).

¹⁰¹ Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003, 1053-54 (2006).

¹⁰² ARNAUD NUYTS, GENERAL REPORT, STUDY ON RESIDUAL JURISDICTION (2007),

In the United States, the doctrine's status is debated.¹⁰³ If it exists at all, it would seem to exist as a factor for courts to weigh at the reasonableness stage of the jurisdictional due process inquiry, with the lack of an available alternative forum favoring jurisdiction.¹⁰⁴ In other jurisdictions, the doctrine of jurisdiction by necessity is recognized and, when applicable, it authorizes (but does not require) a court to assert jurisdiction.¹⁰⁵

According to one survey of the doctrine, jurisdiction by necessity is typically subject to two conditions. First, "there must be some kind of obstacle preventing the plaintiff from obtaining justice abroad."¹⁰⁶ The obstacle may be legal (such as lack of jurisdiction or lack of a guarantee of a fair trial in other courts) or factual (such as a threat to the plaintiff's safety or disproportionate costs of bringing suit in a legally available forum).¹⁰⁷ Second, there must be a

available at http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf (commenting that the jurisdiction by necessity principle is, in some states, based on the right to a fair trial and the prohibition of denial of justice); see also Benedetta Ubertazzi, *Intellectual Property Rights and Exclusive (Subject Matter) Jurisdiction: Between Private and Public International Law*, 15 MARQ. INTELL. PROP. L. REV. 357, 388 (2011) ("In general, the exercise of jurisdiction by necessity is conditioned upon two requirements: (1) the case must have some connection to the forum State, and (2) it must be unreasonable to bring proceedings abroad."). For more on denial of justice, see *supra* Part II.A.

¹⁰³ See PETER HAY ET AL., CONFLICT OF LAWS § 6.6, at 402 (5th ed. 2010) ("The boundaries of this necessity doctrine, and whether it really exists, are the subject of some considerable debate.").

¹⁰⁴ See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (enumerating "the plaintiff's interest in obtaining convenient and effective relief" as among the factors that "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required" (internal quotation marks omitted)). As one group of scholars put it:

[I]t remains difficult to discern whether jurisdiction by necessity is an independent doctrine. It seems to be at least equally plausible that . . . the plaintiff's inability to reasonably carry out the litigation in another forum is a factor in the overall 'reasonableness' of asserting jurisdiction. If it is an independent doctrine, it is one applied only sparingly . . .

HAY ET AL., *supra* note 103, § 6.6, at 404.

¹⁰⁵ See Fawcett, *supra* note 100, at 8 (providing a comparative overview of forum by necessity in the Netherlands, Switzerland, Scandinavia, and Finland); see also NUYTS, *supra* note 102, at 66 tbl.L (listing jurisdiction by necessity as a recognized ground of jurisdiction in some European Union member states, including Austria, Belgium, Estonia, France, Germany, Luxembourg, Netherlands, Poland, Portugal, and Romania); Ubertazzi, *supra* note 102, at 387-88 (listing jurisdiction by necessity as a recognized ground for jurisdiction in Argentina, Austria, Belgium, Canada, Costa Rica, Estonia, Finland, Germany, Iceland, Japan, Lithuania, Luxembourg, Mexico, the Netherlands, Poland, Portugal, Romania, Russia, South Africa, Spain, Switzerland, Turkey, and the United Kingdom).

¹⁰⁶ NUYTS, *supra* note 102, at 64.

¹⁰⁷ *Id.* at 65 ("[T]he forum necessitatis can be relied upon in two kinds of circumstances. Firstly, when there is a legal obstacle . . . [and] [s]econdly, the plaintiff can also show that he is confronted with factual obstacles.").

connection between the forum and the suit.¹⁰⁸ In some states, a specific connection is required: the plaintiff must be a national or habitual resident of the forum state.¹⁰⁹ In most of the states surveyed, however, forum nationality or habitual residence is sufficient, but not necessary, to satisfy the condition that there be a connection between the suit and the forum.¹¹⁰

Although the forum non conveniens doctrine provides a basis for denying court access in a specific forum, it too expresses an overarching concern with court access. The forum non conveniens doctrine is a common law doctrine that gives a court the discretion “to decline jurisdiction on the basis that the appropriate forum for trial is abroad or that the local forum is inappropriate.”¹¹¹ Typically, dismissal is not permitted on forum non conveniens grounds unless there is an adequate alternative forum in which the plaintiff may pursue the claim.¹¹² For example, according to the U.S. version of the doctrine, before dismissing a suit on forum non conveniens grounds, “the court must determine whether there exists an alternative forum.”¹¹³ Although the doctrine may permit denial of court access in a particular forum, the alternative forum requirement embodies the principle that a forum non conveniens dismissal should not deny the plaintiff court access altogether.¹¹⁴

C. Domestic Constitutions

The right to court access is also widely recognized in domestic legal systems.¹¹⁵ A major cross-national study concluded that the commitment to

¹⁰⁸ *Id.* (“The second traditional condition of the forum necessitatis is that there must be some kind of connection with the forum.”).

¹⁰⁹ *See id.* at 66 (explaining that Austria requires such a connection).

¹¹⁰ *Id.* (“There is a general consensus that the required connection exists at least when the plaintiff is domiciled or habitually resident in the forum State.”).

¹¹¹ Fawcett, *supra* note 100, at 10. Jurisdictions with a forum non conveniens doctrine include Great Britain, New Zealand, Canada, Israel, and the United States. *Id.*

¹¹² *See id.* at 14-15 (“It is an essential requirement for declining jurisdiction on the basis of *forum non conveniens* in Britain, other Commonwealth States, and the United States that there is an alternative forum abroad.”).

¹¹³ Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981).

¹¹⁴ *See* Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1454-62 (2011) (arguing that the alternative forum requirement is “[t]o ensure that the plaintiff will have court access somewhere and that the dismissal will not entirely deny the plaintiff access to justice” but observing that in practice the adequacy standard applied to a putative alternative forum is very lenient and therefore might not effectively ensure such access).

¹¹⁵ *See* Ubertazzi, *supra* note 102, at 408 (observing that “[t]he fundamental right of access to courts is domestically established” in states including Austria, Finland, Germany, Italy, Spain, the Netherlands, Australia, Brazil, Canada, Columbia, Japan, Mexico, Russia, South Africa, Switzerland, and Turkey); *cf.* FOX, *supra* note 5, at 159 (“The rules of natural justice in common law and the concept of denial of justice in civil law have long been recognized as securing a litigant’s fair hearing of a complaint.”).

access to justice increased in a series of three waves.¹¹⁶ In the first wave, states made efforts to deliver legal services to the poor.¹¹⁷ In the second wave, efforts were made “to extend representation to ‘diffuse interests’ such as those of consumers and environmentalists.”¹¹⁸ And in the third wave, there was “a shift in focus to dispute-processing institutions in general, rather than simply on institutions of legal representation.”¹¹⁹ More recently, a comparative analysis of domestic constitutions in Europe revealed a “trend towards ever more detailed espousal of the access to justice concept in national constitutions” as well as “on the supranational level of the European Union.”¹²⁰

Globally, the percentage of constitutions providing court access rights has increased since the Second World War. As Figure 1 shows, the percentage has increased overall between 1946 and 2006.¹²¹ Although the percentage dropped from 68% in 1946 and 1956 to 62% in 1976, it thereafter climbed steeply, reaching 86% in 2006.¹²² As of 2006, court access provisions were the eleventh most common constitutional provision in the world,¹²³ contained in so many constitutions that they can be said to form part of a “generic, global practice of rights constitutionalism.”¹²⁴

¹¹⁶ Mauro Cappelletti & Bryant Garth, *Access to Justice and the Welfare State: An Introduction*, in ACCESS TO JUSTICE AND THE WELFARE STATE 1 (Mauro Cappelletti ed., 1981).

¹¹⁷ *Id.* at 4.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

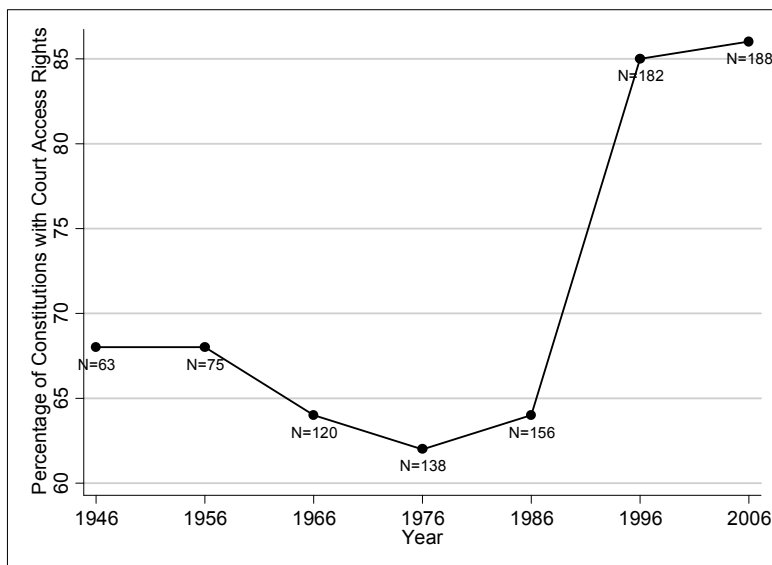
¹²⁰ Eva Storskrubb & Jacques Ziller, *Access to Justice in European Comparative Law*, in ACCESS TO JUSTICE AS A HUMAN RIGHT, *supra* note 7, at 177, 187.

¹²¹ David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 773-75 tbl.1 (2012).

¹²² *Id.*

¹²³ *Id.* at 774.

¹²⁴ *Id.* at 773.

Figure 1. Percentage of Constitutions with Court Access Rights, 1946-2006¹²⁵

For example, under Section 34 of the South African Constitution, “[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”¹²⁶ Under Article 32 of the Japanese Constitution, “[n]o person shall be denied the right of access to the courts”¹²⁷; and under Article 17, “[e]very person may sue for redress as provided by law from the State or a public entity, in case he has suffered damage through illegal act of any public official.”¹²⁸

Although the precise constitutional language varies from state to state, these provisions share the basic principle that persons generally have a right to court access for the determination of legal claims. Moreover, beyond illustrating the spread of court access rights in domestic law, the increase in the number of constitutions containing court access rights may have international legal significance: the trend might be considered evidence suggesting that the right

¹²⁵ Figure 1 plots the percentage of the world’s constitutions with court access rights over time. At each point, the figure also indicates the number of constitutions in the world in the specified year. For example, N=63 for 1946 indicates that there were sixty-three constitutions in 1946. For the source of the data represented in Figure 1, see *id.* at 773-75 tbl.1.

¹²⁶ S. AFR. CONST., 1996.

¹²⁷ NIHONOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 32.

¹²⁸ *Id.* art. 17.

to court access is emerging as a general principle of law, which is one recognized type of international law.¹²⁹

D. *Court Access as International Legal Right*

The right to court access also is increasingly expressed in international legal instruments.¹³⁰ Unsurprisingly, this development is relatively recent. The right to court access is an individual right, but international law traditionally preoccupied itself with relationships between states.¹³¹ It was not until after the

¹²⁹ Along with treaties and customary international law, general principles of law are a type of international law. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. Specifically, general principles of law are principles of law common to the world's major legal systems. *See id.* (referring to "the general principles of law recognized by civilized nations"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 reporter's note 7 (1987) ("It has become clear that this phrase refers to general principles of law common to the major legal systems of the world."). Thus, determining whether a putative general principle of law exists involves an exercise in comparative legal analysis. *See* MARK WESTON JANIS, INTERNATIONAL LAW 59 (5th ed. 2008) (referring to the "search for general principles of law as an exercise in comparative law"). *But see* BROWNLIE, *supra* note 54, at 16 ("It would be incorrect to assume that tribunals have in practice adopted a mechanical system of borrowing from domestic law after a census of domestic systems."). Such an inquiry into the existence of a general principle of court access would require much more extensive analysis than simply counting relevant constitutional provisions. Among other things, careful qualitative analysis of each of those provisions would be necessary. The global constitutional data summarized above, however, provides one source of preliminary evidence suggesting that the right to court access is common to the world's major legal systems and thus may have acquired the status of a general principle of law. In their discussion of general principles of law, the reporters of the *Restatement (Third) of Foreign Relations Law* stated that "it is plausible to conclude that a rule against torture is part of international law, since such a principle is common to all major legal systems." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 reporter's note 7 (1987). The percentage of constitutions with a prohibition of torture was 37% in 1946, 37% in 1956, 41% in 1966, 45% in 1976, 56% in 1986, 80% in 1996, and 84% in 2006 – lower in all years than the percentage with a right to court access. Law & Versteeg, *supra* note 121, at 773-75 & tbl.1. Thus, it would seem equally plausible that the right to court access is a general principle that is part of international law – at least from the perspective of comparative constitutional law. As a procedural principle, the right to court access is arguably an especially appropriate matter to be addressed from the perspective of general principles of law. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. 1 (1987) (explaining that general principles of law include "rules relating to the administration of justice" and "rules of fair procedure generally"); SHAW, *supra* note 29, at 100 (observing that "[t]he most fertile fields" for general principles of law have included procedural problems).

¹³⁰ For a survey of one fundamental attribute of court access rights – the concept of impartial and independent courts – in human rights instruments, see Caron, *supra* note 88, at 256.

¹³¹ *See* CASSESE, *supra* note 56, at 71 (referring to states as traditional subjects of international law); *see also* McElhinney v. Ireland, 2001-XI Eur. Ct. H.R. 37, 51

Second World War that international law began systematically addressing individual rights, such as the right to court access.¹³²

Some international legal instruments give individuals the right to court access for alleged violations of specified rights. For example, the Universal Declaration of Human Rights provides that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”¹³³ The International Covenant on Civil and Political Rights provides that each state party undertakes to ensure that any person claiming a remedy for alleged violations of his rights under the covenant “shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.”¹³⁴

The African Charter on Human and Peoples’ Rights provides that “[e]very individual shall have the right to have his cause heard” and that this right comprises, among other things, “[t]he right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, [regulations] and customs in force.”¹³⁵ The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters provides that state parties shall ensure that individuals “have access to a review procedure before a court of law and/or another independent and impartial body established by law” to challenge state decisions covered by the convention.¹³⁶

(Loucaides, J., dissenting) (“The international law immunities originated at a time when individual rights were practically non-existent and when States needed greater protection from possible harassment through abusive judicial proceedings.”).

¹³² See SHAW, *supra* note 29, at 45-46 (outlining the post-World War II extension of international law to include individuals within its scope, after a period in which states alone were said to be the subjects of international law); Francioni, *supra* note 8, at 5-6 (linking the emergence of individual court access rights to “the progressive development of human rights” that followed the “orthodox positivist view” that “international law is a system of law governing inter-state relations, in which only states have ‘rights’, and obligations”).

¹³³ Universal Declaration of Human Rights art. 8, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). The declaration was adopted by forty-eight votes, with eight abstentions. U.N. GAOR, 3d Sess., 183d plen. mtg. at 933, U.N. Doc. A/PV.183 (Dec. 10, 1948).

¹³⁴ International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171. The covenant has 167 state parties. *Status Table for International Covenant on Civil and Political Rights*, UN TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Sept. 16, 2013).

¹³⁵ African Charter on Human and Peoples’ Rights art. 7, June 27, 1981, 1520 U.N.T.S. 217. The charter has fifty-three state parties. *Legal Instruments*, AFR. COMM’N ON HUM. & PEOPLES’ RIGHTS, <http://www.achpr.org/instruments> (last visited Sept. 16, 2013).

¹³⁶ Convention on Access to Information, Public Participation in Decision-Making and

Article 47 of the Charter of Fundamental Rights of the European Union provides that “[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article” and that “[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law” and “shall have the possibility of being advised, defended and represented.”¹³⁷ Article 47 further states that “[l]egal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”¹³⁸

Other international agreements recognize a more general right to court access. For example, Article 6 of the European Convention on Human Rights provides that “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”¹³⁹ As the European Court of Human Rights has held:

[Article 6] secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the “right to a court,” of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 . . . as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing.¹⁴⁰

Access to Justice in Environmental Matters art. 9, June 25, 1998, 2161 U.N.T.S. 447. The convention has forty-six state parties. *Status Table for Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, UN TREATY COLLECTION, http://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTS_ONLINE&tabid=2&mtdsg_no=XXVII-13&chapter=27&lang=en#Participants (last visited Sept. 16, 2013).

¹³⁷ Charter of Fundamental Rights of the European Union, *supra* note 90, art. 47.

¹³⁸ *Id.* According to Francioni:

[I]t is consistent with the nature of the Charter as an instrument binding upon the European Union, rather than as a general bill of rights, that this Article creates a right of access to justice only for the situations where the rights and freedoms guaranteed in the Charter have been violated by the European Union’s institutions.

Francioni, *supra* note 8, at 32.

¹³⁹ Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221, 228. This convention is commonly referred to as the European Convention on Human Rights. The convention has forty-seven state parties. *Status Table for Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL OF EUR., <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG> (last visited Sept. 16, 2013).

¹⁴⁰ *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) at 18 (1975).

Similarly, Article 8 of the American Convention on Human Rights states that “[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”¹⁴¹

Other international agreements embody a commitment of states to ensure effective court access. Article 67(4) of the Treaty on the Functioning of the European Union provides that “[t]he Union shall facilitate access to justice,”¹⁴² and Article 81(2) states that the European Parliament and the Council shall adopt measures to ensure “effective access to justice.”¹⁴³ In 1980, “[d]esiring to facilitate international access to justice,” the Hague Conference on Private International Law concluded the Convention on International Access to Justice, which provides that “[n]ationals of any Contracting State and persons habitually resident in any Contracting State shall be entitled to legal aid for court proceedings in civil and commercial matters in each Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.”¹⁴⁴

These international instruments have a double legal significance. First, insofar as they constitute legally binding treaties, they impose court access obligations on their respective state parties.¹⁴⁵ Second, these agreements may provide evidence that the right to court access is emerging as a rule of customary international law, binding even on states that are not parties to them.¹⁴⁶ Indeed, some scholars have concluded that the right to court access is already guaranteed by customary international law.¹⁴⁷ The precise scope of the

¹⁴¹ American Convention on Human Rights, *supra* note 90, art. 8(1). The convention has twenty-five state parties. *Status Table for American Convention on Human Rights*, ORG. OF AM. STATES, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited Sept. 16, 2013).

¹⁴² Consolidated Version of the Treaty on the Functioning of the European Union art. 67(4), Mar. 30, 2010, 2010 O.J. (C 83) 47, 73.

¹⁴³ *Id.* art. 81(2).

¹⁴⁴ Convention on International Access to Justice art. 1, Oct. 25, 1980, 1510 U.N.T.S. 375, 376. The convention entered into force in 1988 and has twenty-six state parties. *Status Table for Convention on International Access to Justice*, UN TREATY COLLECTION, <http://treaties.un.org/Pages/showDetails.aspx?objid=08000002800c732c> (last visited Sept. 16, 2013).

¹⁴⁵ See Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 339 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

¹⁴⁶ See SHAW, *supra* note 29, at 96 (“[A] provision in a treaty may constitute the basis of a rule which, when coupled with the *opinio juris*, can lead to the creation of a binding custom governing all states, not just those party to the original treaty . . .”).

¹⁴⁷ See, e.g., Francioni, *supra* note 8, at 42 (“[A]ccess to justice is a right recognized under general international law . . .”); Sciso, *supra* note 89, at 1212 (endorsing the Italian

right, however, remains uncertain. For example, while it generally is understood that the right is not absolute, it is unclear what restrictions permissibly may be placed on it¹⁴⁸ and under what circumstances a non-national of a state has a right to court access there.¹⁴⁹

As one recent study concludes, court access “has come a long way towards its recognition as a true enforceable right under international law.”¹⁵⁰ Even if the right to court access has yet to become part of customary international law, the basic principle that persons generally are entitled to have access to a fair hearing by an independent and impartial court for the determination of a legal claim is widely accepted and increasingly legalized.¹⁵¹ The right to court access therefore provides an important normative lens for evaluating the consequences of the foreign state immunity doctrine. That is the task of the next Part of this Article.

III. THE IMPACT OF FOREIGN STATE IMMUNITY ON COURT ACCESS

Part II argued that one important criterion for normative evaluation of the foreign state immunity doctrine is its impact on court access. At one level that impact is obvious: if a plaintiff sues a defendant in a particular court, and the court dismisses the suit on foreign state immunity grounds, the plaintiff is denied access to that court.

But beyond this truism, the court access consequences of foreign state immunity are poorly understood. For example, some commentators suggest that the doctrine does no more than deny access to a particular court,¹⁵² but this

position that there is a fundamental human right of access to justice “recognized by international customary law as well as by universal and regional agreements on the issue”); Wouters et al., *supra* note 89, at 567 (reporting on view that the individual right of court access is customary international law).

¹⁴⁸ See Francioni, *supra* note 8, at 33-54 (discussing issues regarding the scope of potentially permissible restrictions on the right to court access).

¹⁴⁹ For example: Does such a right extend beyond that provided by the right against denial of justice? Does it extend to situations where there could be jurisdiction by necessity? Compare *id.* at 41 (concluding that a state is obligated to make a system of effective remedies available “to all persons subject to its jurisdiction and under its control”), with Rory Stephen Brown, *Access to Justice for Victims of Torture*, in ACCESS TO JUSTICE AS A HUMAN RIGHT, *supra* note 7, at 205, 216 (“[W]here no realistic alternative remedial avenues exist, the denial of hearings on the merits to torture victims in third county actions is a violation of the right of access to justice” (emphasis omitted)).

¹⁵⁰ Francioni, *supra* note 8, at 54.

¹⁵¹ Cf. Caron, *supra* note 88, at 256 (“Throughout the history of human rights instruments, the right to an independent and impartial judiciary to decide claims of persons has been a critical component not only as the particular right in issue, but also as the avenue by which all other rights are protected.”).

¹⁵² See, e.g., FOX, *supra* note 5, at 74 (arguing that the doctrine “does not confer impunity; the underlying accountability or substantive responsibility for the matters alleged in a claim remain; immunity merely bars the adjudication of that claim in a particular

view underestimates the doctrine's court access consequences because the doctrine can preclude access to all courts other than those of the foreign state itself. Other commentators suggest that, when granted, foreign state immunity precludes court access altogether;¹⁵³ but this view overestimates the doctrine's court access consequences because another state, perhaps including the foreign state itself, may provide a suitable alternative forum.

The goal of this Part is to elucidate the court access consequences of the foreign state immunity doctrine. First, it identifies three ways that the doctrine can limit court access. Second, it uses empirical analysis to shed light on how the court access consequences of the foreign state immunity doctrine play out in real-world litigation.

A. *Limits on Forum State, Third State and Foreign State Court Access*

Technically, the foreign state immunity doctrine governs relationships between states: a foreign state has a right not to be sued in the forum state, and the forum state has an obligation not to allow a suit against the foreign state to proceed.¹⁵⁴ But the doctrine has important implications for individual court access. Specifically, the foreign state immunity doctrine can limit (and potentially preclude) court access in at least three distinct ways: (1) it can bar court access in the original forum state; (2) it can bar court access in all other states except the foreign state; and (3) it can operate to leave only the foreign state's own courts as an option, even when the foreign state does not offer meaningful court access. As a result, the foreign state immunity doctrine can have the ultimate effect of denying a claimant meaningful court access altogether.

1. Court Access in the Forum State

If a claimant sues a foreign state in another state's court, and the court dismisses the suit on immunity grounds, then the claimant obviously is denied access to that court. Immunity is therefore a "most problematic" impediment to court access since "by definition, [it] entail[s] exemptions of foreign states and their organs from the operation of judicial remedies in the forum state."¹⁵⁵

court").

¹⁵³ See, e.g., OPPENHEIM'S INTERNATIONAL LAW, *supra* note 14, § 109, at 342 ("The grant of immunity from suit amounts in effect to a denial of a legal remedy in respect of what may be a valid legal claim; as such, immunity is open to objection.").

¹⁵⁴ See Jurisdictional Immunities of the State, *supra* note 15, para. 106; UN Convention, *supra* note 2, art. 6 ("A State shall give effect to State immunity . . . by refraining from exercising jurisdiction . . . against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State . . . is respected.").

¹⁵⁵ Francioni, *supra* note 8, at 47.

2. Court Access in Third States

If foreign state immunity is a rule of customary international law (as is generally accepted),¹⁵⁶ it is binding on all states, not just a particular forum state.¹⁵⁷ Therefore, absent an applicable exception, the doctrine will generally deny a claimant court access not only in the forum state, but also in all other states except the foreign state itself.¹⁵⁸

A comparison with other court access doctrines highlights the breadth of the foreign state immunity doctrine's impact on court access. If a court in a particular state dismisses a suit for lack of personal jurisdiction, court access is denied in that state, but there may be one or more other states that would have jurisdiction and allow court access. Similarly, if a court in a particular state dismisses a suit based on the forum non conveniens doctrine, court access is denied in that state, but there may be one or more other states that would allow court access. Moreover, unlike the foreign state immunity doctrine, the doctrines of personal jurisdiction and forum non conveniens call for consideration of court access concerns in individual cases.¹⁵⁹ The reasonableness factors that are part of U.S. personal jurisdiction doctrine include the plaintiff's interest in obtaining relief, and a court may not dismiss a suit on forum non conveniens grounds unless there is an adequate and available alternative forum.¹⁶⁰

3. Court Access in the Foreign State

In addition, the foreign state – potentially the only state in which court access is not barred by the foreign state immunity doctrine – might not offer

¹⁵⁶ See *supra* Part I.B.

¹⁵⁷ See CASSESE, *supra* note 56, at 157 (observing that rules of customary international law “are normally binding upon all members of the world community”).

¹⁵⁸ This is generally, but not always, the case. For example, most of the exceptions to immunity contained in the Foreign Sovereign Immunities Act apply only if there are connections between the underlying activity and the forum state. See, e.g., 28 U.S.C. § 1605(a)(2) (2006) (requiring both commercial activity and a nexus with U.S. territory for an exception). Likewise, the UN Convention contains exceptions that apply where the forum state has jurisdiction under “the applicable rules of private international law.” UN Convention, *supra* note 2, art. 10(1). Thus, in some cases where a plaintiff selects a forum that lacks the connections necessary for jurisdiction, the forum must dismiss the suit, but it is possible that the plaintiff may be able to identify another forum other than the foreign state itself which does possess the requisite connections or otherwise has jurisdiction under the rules of private international law. In such cases, there may be a potential alternative to the foreign state's own courts.

¹⁵⁹ See generally Whytock & Roberston, *supra* note 114, at 1445-72.

¹⁶⁰ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981) (requiring an adequate alternative forum before dismissal on forum non conveniens grounds); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (holding that “the plaintiff's interest in obtaining convenient and effective relief” is among the factors to be considered when determining the reasonableness of asserting personal jurisdiction).

meaningful court access. This can occur for several reasons. In some cases, the foreign state might not be an appropriate forum (or the most appropriate forum) for the suit based on ordinary private international law considerations such as the claimant's nationality, the place of the alleged wrongful conduct, the place of the alleged injury, and the location of evidence.¹⁶¹ By itself, this ordinarily will not preclude court access altogether; but it can increase the costs of litigation, in some cases to the extent that pursuing the claim in the foreign state will be cost prohibitive.

In addition, many states have domestic rules of immunity.¹⁶² Depending on the foreign state, those rules may preclude suit against it in its own courts. Even where domestic immunity rules do not preclude suit, the foreign state may have other court access doctrines that could have this effect.¹⁶³

Even if the foreign state would otherwise be an appropriate forum (from a private-international-law perspective) and its domestic law of immunity and court access would allow a suit to be heard in its courts, other factors may prevent the claimant from having meaningful court access there. For example, the foreign state may lack rule of law or its courts may lack judicial independence or impartiality – characteristics that are always important, but especially so in suits against a state in its own courts.¹⁶⁴ Finally, in some cases, the foreign state might lack a demonstrated commitment to protecting the physical integrity rights of its critics, thus raising doubts about the ability of the claimant and her lawyer to safely pursue her claim there.

In summary, when the foreign state immunity doctrine applies, court access may be denied not only in the forum state, but also in third states and the foreign state. In theory, then, a claimant may be left without meaningful court access anywhere.

¹⁶¹ For example, under the U.S. forum non conveniens doctrine, the factors considered to determine the most appropriate forum include the “local interest in having localized controversies decided at home.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

¹⁶² For a discussion of domestic immunity doctrines, see Stefan A. Riesenfeld, *Sovereign Immunity in Perspective*, 19 VAND. J. TRANSNAT'L L. 1, 12-14 (1986).

¹⁶³ For a comparative survey of such court access doctrines, see Fawcett, *supra* note 100.

¹⁶⁴ Several international legal instruments consider judicial independence and impartiality to be necessary for meaningful court access. *See, e.g.*, Charter of Fundamental Rights of the European Union, *supra* note 90, art. 47 (providing right to a “fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law”); American Convention on Human Rights, *supra* note 90, art. 8(1) (“Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law”); Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 139, art. 6 (providing right to a “fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”).

B. *Empirical Analysis*

But beyond theory, how does the foreign state immunity doctrine affect court access in real-world litigation? To shed light on this question, this Section uses empirical analysis of foreign state immunity decisions by U.S. district court judges under the Foreign Sovereign Immunities Act of 1976 (FSIA), which is the U.S. codification of the foreign state immunity doctrine.¹⁶⁵ Specifically, to shed light on the foreign state immunity doctrine's impact on court access in the original forum state, this Section examines how often U.S. district court judges deny court access on foreign state immunity grounds, and which types of parties are affected. And to shed light on the likelihood of alternative court access in the foreign state itself, this Section assesses judicial independence, rule of law, and the protection of physical integrity rights in the foreign state in cases where U.S. court access is denied on foreign state immunity grounds.

The results show that the foreign state immunity doctrine's impact on court access is real, not merely theoretical. U.S. district courts frequently deny court access on foreign state immunity grounds, affecting not only non-U.S. nationals and individuals, but also U.S. nationals and businesses. Moreover, the prospects for meaningful court access in the foreign state are often dim when court access is denied in the United States.

1. The U.S. Statutory Framework for Foreign State Immunity

The FSIA is the United States' codification of the foreign state immunity doctrine. It is the sole basis for obtaining jurisdiction in a U.S. court over a foreign state or a political subdivision, agency, or instrumentality of a foreign state.¹⁶⁶ Under § 1604 of the FSIA, a foreign state is immune from suit in U.S.

¹⁶⁵ See 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602-1611 (2006).

¹⁶⁶ See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989) (“[T]he FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court . . .”). Section 1603(a) provides that the term “foreign state” includes “a political subdivision of a foreign state or an agency or instrumentality of a foreign state.” 28 U.S.C. § 1603(a). Section 1603(b) provides the following definition for an “agency or instrumentality of a foreign state”:

[A]ny entity—(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

Id. § 1603(b).

The Supreme Court has held that “a subsidiary of an instrumentality is not itself entitled to instrumentality status.” *Dole Food Co. v. Patrickson*, 538 U.S. 468, 473 (2003). For a comprehensive analysis of the FSIA, see JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* (2d ed. 2003).

courts unless an exception specified in the FSIA applies.¹⁶⁷ Under § 1330, if an exception does apply, the FSIA provides both federal subject matter jurisdiction over the suit and (if service is made in accordance with the FSIA) personal jurisdiction over the foreign state defendant.¹⁶⁸ The FSIA's exceptions to immunity include, among others, waiver of immunity by the foreign state;¹⁶⁹ certain suits based on commercial activity of the foreign state;¹⁷⁰ certain suits based on torts occurring in the United States committed by a foreign state or its official or employee while acting within the scope of his or her office or employment;¹⁷¹ actions to enforce arbitration agreements and arbitral awards;¹⁷² and suits for money damages against a foreign state designated by the United States as a state sponsor of terrorism based on terrorism-related personal injury or death.¹⁷³

The FSIA's principal exception to immunity is the commercial activity exception, which is the hallmark of the restrictive doctrine of foreign state immunity.¹⁷⁴ Under § 1605(a)(2),

¹⁶⁷ See 28 U.S.C. § 1604 ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.").

¹⁶⁸ See *id.* § 1330(a) ("The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement."); *id.* § 1330(b) ("Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title."); see also *Argentine Republic*, 488 U.S. at 434 ("Sections 1604 and 1330(a) work in tandem: § 1604 bars federal and state courts from exercising jurisdiction when a foreign state *is* entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is *not* entitled to immunity."). The service provisions of the FSIA are contained in § 1608.

¹⁶⁹ 28 U.S.C. § 1605(a)(1).

¹⁷⁰ *Id.* § 1605(a)(2).

¹⁷¹ *Id.* § 1605(a)(5).

¹⁷² *Id.* § 1605(a)(6).

¹⁷³ *Id.* § 1605(a)(7). The FSIA also governs the immunity of foreign state property from attachment and execution. Specifically, § 1609 provides that the property of a foreign state is "immune from attachment[,] arrest and execution" unless an exception applies. *Id.* § 1609. The relevant exceptions are specified in § 1610. For example, property is not immune if it "is or was used for the commercial activity upon which the claim is based." *Id.* § 1610(a)(2).

¹⁷⁴ See GEORGE A. BERMANN, *TRANSNATIONAL LITIGATION* 132 (2003) (stating that "[b]y any measure," the commercial activity exception is the FSIA's "principal exception" to immunity).

[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based [1] upon a commercial *activity carried on in the United States* by the foreign state; or [2] upon an *act performed in the United States* in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act *causes a direct effect in the United States*.¹⁷⁵

Each of these three clauses requires that two conditions be satisfied: the foreign state's activity must be "commercial" and there must be some territorial nexus to the United States. Regarding the first condition, the FSIA provides that "[a] 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act."¹⁷⁶ It does not define the term "commercial" other than to specify that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."¹⁷⁷ The Supreme Court, however, has concluded that a state engages in "commercial activity" within the meaning of the FSIA when it "acts, not as regulator of a market, but in the manner of a private player within it."¹⁷⁸ Of course, confusion can arise in specific cases about the commercial character of a foreign state's activity; however, the Supreme Court's clarification provides useful guidance for the lower courts.¹⁷⁹

2. The FSIA Dataset

The statistical estimates presented in this Section are based on analysis of an original dataset of over 350 randomly selected U.S. district court decisions available in the *Lexis* online database, in which the court determined whether

¹⁷⁵ 28 U.S.C. § 1605(a)(2) (emphasis and clause numbering added). The Supreme Court has held that for a claim to be "based upon a commercial activity," "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case" must be based upon such activity. *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993).

¹⁷⁶ 28 U.S.C. § 1603(d).

¹⁷⁷ *Id.*

¹⁷⁸ *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). As the Court further explained:

[T]he question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce."

Id.

¹⁷⁹ See Working Grp. of the Am. Bar Ass'n, *Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT'L L. 489, 552 (2002) (suggesting that there is no need for statutory clarification of the term given the Supreme Court's guidance).

to grant immunity under the FSIA (FSIA Dataset).¹⁸⁰ The *Lexis* database includes all decisions that are published in the *Federal Supplement* as well as many (but not all) decisions that are not.¹⁸¹ Decisions published in the *Federal Supplement* are not necessarily representative of those that are not.¹⁸² Because the FSIA Dataset's sample is drawn from a database containing all decisions published in the *Federal Supplement* but only a portion of those that are not, the decisions in the FSIA Dataset may not be representative of the overall population of the U.S. district courts' foreign state immunity decisions. Therefore, estimates for each group of decisions (those that are published in the *Federal Supplement* and those that are not) are reported below for purposes of comparison and to facilitate interpretation of the results.

¹⁸⁰ Random selection was used to reduce the risk of selection bias. See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 110 (2002) (describing random selection as "the only selection mechanism in large-n studies that automatically guarantees the absence of selection bias" (emphasis omitted)). I used the following search query in the *Lexis* DIST (U.S. District Court Cases, Combined) database on May 11, 2011: "FOREIGN SOVEREIGN IMMUNITIES ACT" OR (("28 USC" OR "28 USCA") W/2 (1330 OR 1602 OR 1603 OR 1605 OR 1605A OR 1606 OR 1607 OR 1608 OR 1609 OR 1610 OR 1611))." The search produced 2104 decisions. I then randomly sorted the decisions and allocated them among a group of five coders. The coders reviewed the decisions in the random order in two steps. First, they screened each decision to determine whether it contained an actual decision whether to grant immunity under the FSIA. Opinions that did not include such a decision were discarded. Second, decisions that did include a decision whether to grant immunity under the FSIA were coded to create a wide range of variables. I then reviewed the accuracy of the coding, making corrections where necessary.

Of 1235 decisions screened, 381 (30.9%) contained FSIA immunity decisions. On this basis, I estimate that there are approximately 650 ($0.309 * 2104$) U.S. district court decisions available in *Lexis* in which the court determines whether to grant immunity under the FSIA, and that the FSIA Dataset therefore includes well over half of all such decisions.

Because foreign states have a right to remove suits filed against them in state courts to the federal courts, I did not include state court decisions in the dataset. See 28 U.S.C. § 1441(d) (2006 & Supp. V 2011) ("Any civil action brought in a State court against a foreign state . . . may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending."). A search for the term "Foreign Sovereign Immunities Act" in the STCTS (State Court Cases, Combined) database on March 6, 2012 generated only eighty-three hits.

¹⁸¹ Specifically, 62.2% of the opinions in the dataset were published in the *Federal Supplement*, while the others were not. It is highly unlikely that using *Westlaw* as a source of decisions would significantly change any of the results of the analysis. See Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 WIS. L. REV. 107, 134 (finding *Lexis* and *Westlaw* highly consistent in cases they report in an analysis of a dataset related to summary judgment in district courts).

¹⁸² See Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 781 (2009) (explaining that published court decisions are not necessarily representative of court decisions in general).

Each decision in the FSIA Dataset was coded to create a variety of variables describing the decision and the parties:

- *Immunity Granted* was coded as 1 (Yes) if the U.S. district court granted immunity and 0 (No) if it denied immunity.
- *Federal Supplement* was coded as 1 (Yes) if the decision was reported in the *Federal Supplement* and 0 (No) otherwise.
- *Plaintiff's Nationality* was coded as 1 (United States) if there was a U.S. plaintiff and 0 (Foreign) otherwise.
- *Type of Plaintiff* was coded as 1 (Business Entity) if the plaintiff was a business entity and 0 (Individual) if the plaintiff was an individual.

In addition, to estimate the likelihood that a foreign state's courts will offer meaningful court access if the U.S. court dismisses the suit on immunity grounds, each decision in the FSIA Dataset was coded using several leading indicators of judicial independence, rule of law, and protection of physical integrity rights in the foreign state:

- The *CIRI Judicial Independence Indicator* is from the Cingranelli-Richards (CIRI) Human Rights Database, and for most states is available between 1981 and 2010.¹⁸³ Judicial independence is rated on a three-point scale, ranging from 0 (not independent) to 1 (partially independent) to 2 (generally independent).¹⁸⁴ The ratings are based on assessments of judicial independence in the U.S. State Department's annual Country Reports on Human Rights Practices.¹⁸⁵
- The *World Bank Rule-of-Law Indicator*, published since 1996, is one of the World Bank's Worldwide Governance Indicators.¹⁸⁶ Rule of law is rated on a scale of -2.5 (worst) to 2.5 (best).¹⁸⁷ The rating is

¹⁸³ The CIRI database was created by David L. Cingranelli and David L. Richards. For more information on the database, see CIRI HUM. RIGHTS DATA PROJECT (Aug. 12, 2013), <http://www.humanrightsdata.org/index.asp>.

¹⁸⁴ DAVID L. CINGRANELLI & DAVID L. RICHARDS, CIRI HUM. RIGHTS DATA PROJECT, THE CINGRANELLI-RICHARDS (CIRI) HUMAN RIGHTS DATA PROJECT CODING MANUAL VERSION 2008.3.13, at 95-96 (2008), available at http://www.humanrightsdata.org/documentation/ciri_coding_guide.pdf (explaining the coding system and describing the characteristics of each rating).

¹⁸⁵ For a detailed explanation of the Judicial Independence indicator, see *id.* at 95-101.

¹⁸⁶ *World Governance Indicators*, WORLD BANK GRP., <http://info.worldbank.org/governance/wgi/index.aspx#doc-methodology> (last updated 2013) (providing a basic overview of the Worldwide Governance Indicators).

¹⁸⁷ *Id.* As the World Bank explains: "The WGI compile and summarize information from 31 existing data sources that report the views and experiences of citizens, entrepreneurs, and experts in the public, private and NGO sectors from around the world, on the quality of various aspects of governance." *Id.* For details on the methodology, see Daniel Kaufmann et al., *The Worldwide Governance Indicators: Methodology and Analytical Issues* (World Bank Grp., Policy Research Working Paper No. 5430, Sept. 2010), available at <http://ssrn.com/abstract=1682130>. Annual data are available beginning with 2002, and prior thereto available for 1996, 1998, and 2000. *Id.* tbl.1. For years 1997, 1999, and 2001, data

based on an aggregation of a large number of existing data sources and is designed to capture “perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.”¹⁸⁸

- The *Freedom House Rule-of-Law Rating* is only available since 2005.¹⁸⁹ The rating ranges from 0 (worst) to 16 (best).¹⁹⁰ The rating is based on the opinions of regional experts and scholars.¹⁹¹
- The *CIRI Physical Integrity Rights Indicator* (like the CIRI Judicial Independence Indicator) is from the Cingranelli-Richards Human Rights Database. The indicator is an additive index rating a state’s respect for the rights against torture, extrajudicial killing, political imprisonment, and disappearance.¹⁹² The rating “ranges from 0 (no government respect for these four rights) to 8 (full government respect for these four rights).”¹⁹³ Although this indicator does not directly assess court access rights, a low rating for a state raises the possibility that a plaintiff (or her lawyer) would place her physical integrity rights at risk by pursuing a claim against the state there.¹⁹⁴

for years 1996, 1998, and 2000, respectively, were used.

¹⁸⁸ Kaufmann et al., *supra* note 187, at 2, 4.

¹⁸⁹ *Freedom in the World: Aggregate and Subcategory Scores*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-world-aggregate-and-subcategory-scores> (last visited Sept. 13, 2013). Although the subcategory scores have been included for many years as factors in Freedom House’s more general political rights and civil liberties ratings, they have only been reported separately for individual states since 2005. *Id.*

¹⁹⁰ See *Methodology*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-world-2011/methodology> (last visited Sept. 13, 2013).

¹⁹¹ *Id.* (“[S]urvey findings are reached after a multilayered process of analysis and evaluation by a team of regional experts and scholars. Although there is an element of subjectivity inherent in the survey findings, the ratings process emphasizes intellectual rigor and balanced and unbiased judgments.”). Specifically, the Rule-of-Law subcategory rating is based on regional expert responses to the following questions:

1. Is there an independent judiciary?
2. Does the rule of law prevail in civil and criminal matters? Are police under direct civilian control?
3. Is there protection from political terror, unjustified imprisonment, exile, or torture, whether by groups that support or oppose the system? Is there freedom from war and insurgencies?
4. Do laws, policies, and practices guarantee equal treatment of various segments of the population?

Checklist Questions, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-world-2012/checklist-questions> (last visited Sept. 13, 2013).

¹⁹² See DAVID L. CINGRANELLI & DAVID L. RICHARDS, CIRI HUM. RIGHTS DATA PROJECT, SHORT VARIABLE DESCRIPTIONS FOR INDICATORS IN THE CINGRANELLI-RICHARDS (CIRI) HUMAN RIGHTS DATABASE (2008), available at http://www.humanrightsdata.org/documentation/ciri_variables_short_descriptions.pdf.

¹⁹³ *Id.*

¹⁹⁴ Cf. Joel H. Samuels, *When Is an Alternative Forum Available? Rethinking the*

3. Impact on Court Access in the United States

First, what light does the FSIA Dataset shed on the foreign state immunity doctrine's impact on court access in the forum state (here, the United States)? As Table 1 indicates, in their foreign state immunity decisions available in *Lexis*, U.S. district court judges deny court access on immunity grounds at an estimated rate of 47.5% [42.5, 52.5].¹⁹⁵ In other words, in almost half of these decisions, the plaintiff is denied U.S. court access.

Table 1. U.S. District Court Decisions Denying Court Access on Foreign State Immunity Grounds (Decisions Published and Not Published in Federal Supplement Compared)¹⁹⁶

<i>Decision Published in Federal Supplement</i>	<i>Total Number of Decisions in FSIA Dataset</i>	<i>Number of Decisions in FSIA Dataset Denying Court Access on Immunity Grounds</i>	<i>Estimated Percentage of Decisions Denying Court Access on Immunity Grounds</i>
Yes	237	103	43.5% [37.3, 49.8]
No	144	78	54.2% [46.0, 62.1]
Overall	381	181	47.5% [42.5, 52.5]

For two reasons, the data presented in Table 1 may underestimate the overall impact of the FSIA on court access. First, as Table 1 indicates, the U.S. district courts are an estimated 10.7% more likely to grant immunity (and thus deny court access) in decisions that are not published in the *Federal Supplement* than in decisions that are published.¹⁹⁷ Although many decisions not published

Forum Non Conveniens Analysis, 85 IND. L.J. 1059, 1094-95 (2010) (arguing that as part of the adequate alternative forum inquiry when deciding whether to dismiss a suit on forum non conveniens grounds, courts should consider “whether the plaintiff might face political or social persecution in [the alternative forum] if forced to travel there to litigate the case”).

¹⁹⁵ The figures reported in brackets are the lower and upper bounds of the estimate's ninety-five percent confidence interval. Statistical estimates are inferences about an overall “population” of interest (here, the published foreign state immunity decisions of U.S. district court judges) based on a subset or “sample” drawn from the population of interest (here, a randomly drawn sample of foreign state immunity decisions of U.S. district court judges available in the *Lexis* online database). All such inferences are uncertain. See Epstein & King, *supra* note 180, at 37 (“[N]o matter how perfect the research design, no matter how much data we collect, and no matter how much time, effort, and research resources we expend, we will never be able to make causal inferences with certainty.”). A ninety-five percent confidence interval communicates the extent of this uncertainty by indicating that the true population mean “will be captured within the stated confidence interval in 95 of 100 applications of the same sampling procedure.” *Id.* at 50 n.145.

¹⁹⁶ Table 1 presents estimated overall rates of denial of court access on foreign state immunity grounds in the U.S. district courts, and compares those rates in decisions published and not published in the *Federal Supplement*. Pearson chi-squared = 4.1176; p = 0.042.

¹⁹⁷ The p-value of 0.042 indicates that, given the characteristics of the population, the

in the *Federal Supplement* are available from *Lexis*, many are not. Therefore, it is likely that the overall immunity rate is greater than the 47.5% estimate in Table 1. If that is correct, then Table 1 would understate the rate at which immunity is granted (and court access denied) in the overall population of U.S. district court decisions.¹⁹⁸

Second, the problem of case selection effects should be taken into account when interpreting decision rates such as those presented in Table 1 (and Tables 2 and 3 below).¹⁹⁹ Some plaintiffs with meritorious substantive claims against a foreign state may not file a suit at all because they anticipate that their suit will be dismissed on foreign state immunity grounds.²⁰⁰ If these suits were filed notwithstanding a high likelihood of dismissal on immunity grounds, the immunity rate would presumably be even higher. Thus, the broader impact of the foreign state immunity doctrine on court access is likely stronger than an analysis of court decisions can reveal. On the other hand, in some cases a foreign state defendant might not raise the immunity defense if the defendant perceives that there is a low likelihood that immunity will be granted. If the defense nevertheless was raised in these cases, the immunity rate would presumably be lower. Insofar as the marginal additional cost of adding a

probability of obtaining the Pearson chi-squared statistic of 4.1176 solely by chance is 4.2%. ROBERT M. LAWLESS ET AL., *EMPIRICAL METHODS IN LAW* 252 (2010). Thus, using the conventional 5% level of statistical significance, we can reject the null hypothesis that publication is not associated with the rate at which judges deny court access on foreign state immunity grounds.

¹⁹⁸ Prior research on judges' publication decisions finds that, other things being equal, a sample of only published decisions disproportionately "overlooks more mundane applications of law" and "addresses complex or difficult issues while neglecting straightforward ones." Lizotte, *supra* note 181, at 146. If this is correct, then Table 1 would suggest that judges view grants of immunity as more routine than denials of immunity. In addition, a small percentage of decisions in the FSIA Dataset were reversed on appeal (6.6% overall) or vacated on rehearing (1.8%). These percentages are higher for decisions denying immunity (8.0% reversed, 2.0% vacated) than for decisions granting immunity (5.0% reversed, 1.7% vacated). Thus, the impact of immunity on court access after taking appeals into account may be greater than the impact suggested by Table 1.

¹⁹⁹ See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 138-40 (2002) (explaining case-selection effects, the theory that examining the win rate of decisions will "reveal[] little about the underlying, variegated mass of disputes and cases" because parties will often settle when the dispute is not a close call, and the resulting need to consider case strength when interpreting decision rates).

²⁰⁰ See *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Admin. Law & Gov't Relations of the H. Comm. on the Judiciary*, 94th Cong. 33 (1976) [hereinafter *Hearing on H.R. 11315*] (statement of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice) (explaining that because of the foreign sovereign immunity barrier prior to the FSIA, "I would imagine that quite a number of potential litigants simply do not go to court. Once an effective remedy for bringing an in personam action against a foreign state is provided, there is a likelihood, in my judgment, that there might be more suits").

foreign state immunity defense to an overall defense strategy is relatively low, however, any offsetting effect of this tendency would seem to be minimal. In addition, to the extent the stakes are similar for both parties and they are able to accurately determine their respective probabilities of winning, case selection effects may create a general tendency toward fifty-percent win rates.²⁰¹ This possibility, however, does not alter the basic conclusion that in many cases, plaintiffs are denied U.S. court access on foreign state immunity grounds.²⁰²

Both U.S. citizens and foreign citizens frequently lose U.S. court access on foreign state immunity grounds. As Table 2 indicates, although court access is denied on foreign state immunity grounds slightly more often when there is a U.S. plaintiff than otherwise, the difference is not statistically significant.²⁰³ Insofar as this finding may suggest that there is not systematic discrimination against non-U.S. citizens in foreign state immunity decisionmaking by the U.S. district courts, this finding may be a welcome one. To some, however, the rate at which U.S. citizens are denied access to U.S. courts would be special cause for alarm. For example, as Mathias Reimann argues, “Denial of court access [based on foreign state immunity] is especially serious when it occurs in the [plaintiff’s] home country. In such a case, the very government that demands loyalty from, and thus owes protection to, the plaintiff, refuses to assist him in the vindication of his . . . rights.”²⁰⁴

²⁰¹ See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 17-20 (1984) (developing this fifty-percent hypothesis); Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 499-501 (1996) (questioning the fifty-percent hypothesis and arguing that the fifty-percent plaintiff win rate is not a “central tendency, either in theory or in fact”).

²⁰² Moreover, it is possible that in some cases, if court access had not been denied on foreign state immunity grounds, it would have been denied on other grounds – such as failure to state a claim upon which relief can be granted, lack of personal jurisdiction, or forum non conveniens. In such cases, the foreign state immunity doctrine should not be viewed as solely responsible for a denial of court access. The dataset cannot answer this counter-factual question. The dataset, however, does provide some clues: in 15.8% of the cases in the dataset in which immunity was granted, the court also dismissed on alternative grounds, and in 15.7% of the cases in the dataset in which immunity was not granted, the suit was dismissed on other grounds.

²⁰³ Pearson chi-squared = 0.1229; p = 0.726.

²⁰⁴ Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Prinz v. Federal Republic of Germany*, 16 MICH. J. INT’L L. 403, 419 (1995); see also *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 490 (1983) (observing that the House Report on the FSIA “expresses the desire to ensure ‘[U.S.] citizens . . . access to the courts’” (emphasis omitted)).

Table 2. U.S. District Court Decisions Denying Court Access on Foreign State Immunity Grounds (U.S. and Foreign Plaintiffs Compared)²⁰⁵

<i>U.S. Plaintiff</i>	<i>Total Number of Decisions in FSIA Dataset</i>	<i>Number of Decisions in FSIA Dataset Denying Court Access on Immunity Grounds</i>	<i>Estimated Percentage of Decisions Denying Court Access on Immunity Grounds</i>
Yes	294	141	48.0% [42.3, 53.7]
No	83	38	45.8% [35.5, 56.5]
Overall	377	179	47.5% [42.5, 52.5]

One might expect that the commercial activity exception would make it uncommon for business plaintiffs to be denied court access on foreign state immunity grounds. As Table 3 indicates, however, this is not the case. The estimated rate at which U.S. district courts deny court access to individual plaintiffs on immunity grounds is 53.5% [46.6, 60.3], and the estimated rate for business entity plaintiffs is 42.5% [35.4, 50.0]. The estimated rate for U.S. businesses specifically is 45.2% [36.8, 53.9].

Table 3. U.S. District Court Decisions Denying Court Access on Foreign State Immunity Grounds (Individual and Business Entity Plaintiffs Compared)²⁰⁶

<i>Type of Plaintiff</i>	<i>Total Number of Decisions in FSIA Dataset</i>	<i>Number of Decisions in FSIA Dataset Denying Court Access on Immunity Grounds</i>	<i>Estimated Percentage of Decisions Denying Court Access on Immunity Grounds</i>
Individual	198	106	53.5% [46.6, 60.3]
Business Entity	174	74	42.5% [35.4, 50.0]
Total	372	180	48.4% [43.4, 53.5]

In summary, U.S. district court judges frequently deny court access on foreign state immunity grounds. Both U.S. and non-U.S. parties, and both individuals and businesses, are affected. Because the estimated dismissal rate is higher in decisions that are not published in the *Federal Supplement* than

²⁰⁵ Table 2 compares estimated rates of denial of court access on foreign state immunity grounds in the U.S. district courts when there is a U.S. plaintiff (Yes) and when there is not (No). Data for the nationality of the parties are unavailable for a significant number of cases. Therefore, the overall “Total Number of Decisions in FSIA Dataset” is lower than 381 in Table 2. Pearson chi-squared = 0.1229; p = 0.726.

²⁰⁶ Table 3 compares estimated rates of denial of court access on foreign state immunity grounds in the U.S. district courts for individual and business entity plaintiffs. Data for the type of plaintiff are unavailable for a significant number of cases. Therefore, the overall “Total Number of Decisions in FSIA Dataset” is lower than 381 in Table 3. Pearson chi-squared = 4.4925; p = 0.034.

those that are, and because *Lexis* does not include many decisions that are not published in the *Federal Supplement*, the overall dismissal rate is likely higher than the estimates above suggest. Therefore, this analysis probably underestimates the impact of the foreign state immunity doctrine on U.S. court access.

4. The Likelihood of Meaningful Court Access in the Foreign State

As discussed above, if the foreign state immunity doctrine is a rule of customary international law, then absent an applicable exception, the doctrine will ordinarily preclude court access not only in the forum state, but in all states other than the foreign state itself.²⁰⁷ But how often will the foreign state be likely to provide meaningful court access? To help answer this question, this Section analyzes the indicators of judicial independence, rule of law, and physical integrity rights discussed above for the foreign state in each decision in the FSIA Dataset denying U.S. court access on immunity grounds.

The results are summarized in Table 4. The mean and median scores for the indicators are all roughly in the middle of their respective ranges. The indicators thus suggest that in the typical case the foreign state will offer partial judicial independence, an intermediate level of rule of law, and partial respect for physical integrity rights. From this perspective, in the typical case, the outlook for meaningful court access in the foreign state is neither especially promising nor especially bleak.

²⁰⁷ See *supra* Part III.A.2.

Table 4. Foreign State's Judicial Independence, Rule-of-Law, and Physical Integrity Rights Ratings When U.S. Court Access Is Denied on Foreign State Immunity Grounds²⁰⁸

<i>Indicator</i>	<i>Range</i>	<i>No. of Decisions</i>	<i>Mean</i>	<i>Median</i>	<i>Worst 25th Percentile</i>
CIRI Judicial Independence Indicator	From 0 (not independent) to 1 (partially independent) to 2 (generally independent)	162	1.19	1	0
World Bank Rule-of-Law Indicator	From -2.5 (worst) to 2.5 (best)	108	.24	0	-0.60
Freedom House Rule-of-Law Rating	From 0 (worst) to 15 (best)	55	8.76	9	4
CIRI Physical Integrity Rights Indicator	From 0 (no government respect for physical integrity rights) to 8 (full government respect for those rights)	159	4.70	5	3

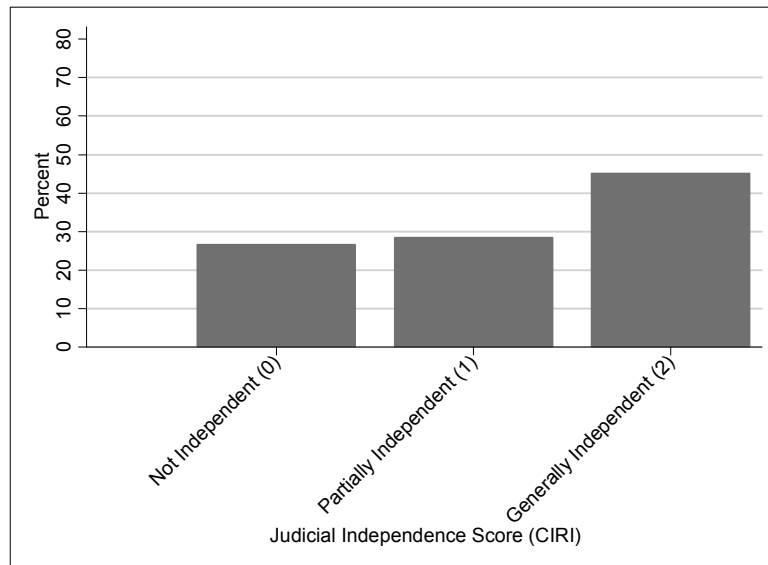
The indicators suggest that in 25% of cases, however, the foreign state will offer only low levels of rule of law and low respect for physical integrity rights. Moreover, a closer look at the *CIRI Judicial Independence Indicator* suggests that in many cases the foreign state likely will be unable to offer meaningful court access. As Figure 2 shows, in an estimated 26.5% of cases the foreign state has a rating of 0 (not independent) – which indicates that “there are active and widespread constraints on the judiciary. These typically involve limitations of judicial independence including active government interference in the decision of cases or widespread corruption and judicial intimidation from either inside or outside government.”²⁰⁹ Even in the estimated 28.4% of cases with a rating of 1 (partially independent), “[j]udges rule against the government in some, but not all potential cases, at times

²⁰⁸ Table 4 presents various judicial independence, rule of law, and physical integrity rights indicators for the foreign state in cases in the FSIA Dataset in which a U.S. district court denied court access on foreign state immunity grounds. A total of 181 decisions in the dataset denied U.S. court access on immunity grounds. Due to the temporal and geographical limitations of the indicators, the indicators are not available for all such decisions. The number of decisions for which each indicator is available is indicated in the No. of Decisions column.

²⁰⁹ CINGRANELLI & RICHARDS, *supra* note 184, at 96.

avoiding government-related cases or giving in to government pressure to rule in the government's favor."²¹⁰

Figure 2. Foreign State's CIRI Judicial Independence Indicator When U.S. Court Access Is Denied on Foreign State Immunity Grounds²¹¹



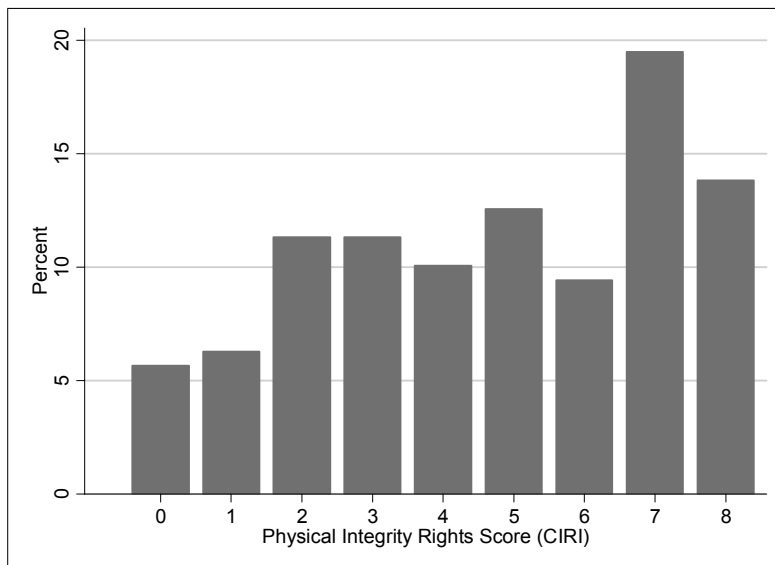
Varied types of plaintiffs are involved in cases in which court access is denied on foreign state immunity grounds and the foreign state is “not independent.” In an estimated 51.1% of these cases, the plaintiffs are individuals, and in an estimated 48.8% the plaintiffs are business entities. An estimated 76.7% involve a U.S. plaintiff and 23.3% involve only non-U.S. plaintiffs. The data thus suggest that the impact of the foreign state immunity doctrine on court access is spread across a variety of types of parties.

In addition, as Figure 3 shows, in a significant number of cases, the *CIRI Physical Integrity Rights Indicator* suggests that the foreign state has very low respect for the rights against torture, extrajudicial killing, political imprisonment, and disappearance – which is far from reassuring for a plaintiff contemplating a suit against the foreign state there.

²¹⁰ *Id.*

²¹¹ Figure 2 shows the distribution of U.S. district court decisions in the FSIA Dataset denying court access on foreign state immunity grounds according to the foreign state's CIRI Judicial Independence Indicator. The indicator ranges from Not Independent (0) to Generally Independent (2).

Figure 3. Foreign State's CIRI Physical Integrity Rights Indicator When U.S. Court Access Is Denied on Foreign State Immunity Grounds²¹²



These results do offer encouragement for many plaintiffs denied court access on foreign state immunity grounds. As Figure 2 shows, in many cases the *CIRI Judicial Independence Indicator* suggests that the foreign state's courts are likely to provide fair and independent adjudication of the plaintiff's claim (assuming the foreign state's own immunity and court access doctrines do not bar the suit). Moreover, Figure 2 suggests that, on average, the lower a foreign state's judicial independence indicator, the less likely U.S. district court judges are to deny court access on immunity grounds.²¹³

Nevertheless, it appears that in many cases in which a U.S. court denies court access on foreign state immunity grounds, the foreign state lacks robust judicial independence or rule of law according to a variety of measures, and may therefore fail to provide a meaningful alternative forum for the plaintiff's claim against the foreign state. In such circumstances, a decision to deny U.S. court access may be tantamount to a decision to deny meaningful court access

²¹² Figure 3 shows the distribution of U.S. district court decisions in the FSIA Dataset denying court access on foreign state immunity grounds according to the foreign state's CIRI Physical Integrity Rights Indicator. The indicator ranges from 0 (no respect for physical integrity rights) to 8 (full respect for physical integrity rights).

²¹³ Further statistical analysis is consistent with this inference: the estimated immunity rates are 58.9% when the courts are Generally Independent (2), 46.0% when the courts are Partially Independent (1), and 37.4% when the courts are Not Independent (0). Pearson chi-squared = 11.2145; $p = 0.004$.

altogether. Even when these indicators are favorable, the foreign state's own immunity doctrine or other court access doctrines may nevertheless bar the suit there.

This Section's empirical analysis is only a first step toward understanding the foreign state immunity doctrine's impact on court access in real-world litigation. In particular, cross-national variation in judicial implementation of the foreign state immunity doctrine means that the doctrine's impact on court access may likewise vary cross-nationally. Comparative empirical research would be needed to understand that variation. Moreover, scholars could gain a more complete understanding of the doctrine's impact on court access by not only examining immunity decisions, but also tracing postdismissal developments in each case to determine ultimate outcomes, whether through litigation or diplomacy. This Part's analysis provides a point of departure for such research, as well as a strong indication that the foreign state immunity doctrine does have an important real-world impact on court access.

IV. MITIGATING THE TENSION BETWEEN FOREIGN STATE IMMUNITY AND COURT ACCESS: A PROPOSAL

This Article has argued that the right to court access is widely recognized and increasingly legalized.²¹⁴ But it also has provided evidence that the foreign state immunity doctrine imposes serious barriers to court access that may, in some cases, preclude meaningful court access altogether.²¹⁵ Can this tension between foreign state immunity and the right to court access be mitigated? This Part argues that recent regional and international court decisions effectively prioritize immunity over court access, thus exacerbating rather than mitigating this tension. It then proposes an alternative proportionality approach designed to mitigate the tension between the foreign state immunity doctrine and the right to court access. Specifically, foreign state immunity should not be granted if its impact on the claimant's ability to obtain court access would be disproportionate to the benefits of immunity for relations between the forum state and the foreign state. Otherwise, the foreign state immunity doctrine, including recognized exceptions to immunity, would apply normally. Although the proportionality approach is subject to significant objections, it has the major advantage of taking seriously both the foreign state immunity doctrine's functional justifications and the importance of court access.

A. *The Status Quo*

Recent international and regional court decisions indicate that, unless there is an applicable exception to foreign state immunity recognized by status quo customary international law, the forum state is required to grant immunity regardless of the court access consequences in a particular case – even if the

²¹⁴ See *supra* Part II.

²¹⁵ See *supra* Part III.

result is that the claimant will not have meaningful court access anywhere. In this sense, these decisions suggest that the customary international law of foreign state immunity categorically prevails over the right to court access.

For example, the ICJ prioritized foreign state immunity over the right to court access in *Germany v. Italy*.²¹⁶ In that case, Italy allowed a suit in its courts to proceed against Germany for alleged violations of jus cogens norms of international law, notwithstanding Germany's assertion of foreign state immunity.²¹⁷ Among other things, Italy argued that international law does not provide immunity for violations of jus cogens norms.²¹⁸ The ICJ rejected the argument, finding that customary international law recognized no such exception, and that there was in any event no conflict between foreign state immunity, which is a procedural rule, and jus cogens norms, which are substantive.²¹⁹

The ICJ did not explicitly discuss court access rights in its opinion, even though Italy raised the issue in its counter-memorial and Germany addressed it

²¹⁶ Jurisdictional Immunities of the State, *supra* note 15, para. 136 (upholding Germany's claim to sovereign immunity when sued in Italian national courts for alleged human rights violations); see also Ingrid Wuerth, *International Law in Domestic Courts and the Jurisdictional Immunities of the State Case*, 13 MELB. J. INT'L L. 1, 1 (2012) (observing that sovereign immunity "has come under pressure generated by the logic and normative underpinnings of international human rights law, which demands accountability for egregious violations of human dignity" but that the ICJ in *Germany v. Italy* nevertheless "reaffirmed, in strong and certain terms, the immunity of states from human rights claims made in foreign national courts").

²¹⁷ See Jurisdictional Immunities of the State, *supra* note 15, paras. 27-29 (delineating the procedural history of the case in Italian courts, which permitted the suit to proceed against Germany in spite of its sovereign immunity defense, based on the Court of Appeal of Florence's conclusion that "jurisdictional immunity is not absolute and cannot be invoked by a State in the face of acts by that State which constitute crimes under international law"). Jus cogens norms, sometimes called peremptory norms, are rules of international law that are "accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." MURPHY, *supra* note 2, at 96.

²¹⁸ Jurisdictional Immunities of the State, *supra* note 15, para. 92 (explaining Italy's argument that international law does not provide foreign state immunity against suits alleging violations of jus cogens norms). For examples of scholarship advocating a jus cogens exception to foreign state immunity, see Adam C. Belsky et al., *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CALIF. L. REV. 365, 389-92 (1989); Brown, *supra* note 149, at 227 (arguing that states should not "be shielded by immunity rules from civil liability for torture"); Reimann, *supra* note 204, at 419.

²¹⁹ Jurisdictional Immunities of the State, *supra* note 15, paras. 91, 93, 97 ("[U]nder customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. . . . The rules of State immunity are procedural in character. . . .").

in its reply.²²⁰ The ICJ, however, did acknowledge Italy's argument that immunity should be denied "because all other attempts to secure compensation for the various groups of victims involved in the Italian proceedings had failed."²²¹ The ICJ rejected this argument, explaining that it could "find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress."²²² According to this reasoning, unless status quo international law provides an applicable exception to immunity under the facts of the case, immunity will be granted and the suit dismissed – regardless of the impact on court access.

The tension between foreign state immunity and the right to court access was addressed more directly by the European Court of Human Rights (ECHR) in a series of cases decided in 2001: *Al-Adsani v. United Kingdom*, *Fogarty v. United Kingdom*, and *McElhinney v. Ireland*.²²³ In each of these cases, the ECHR held that a forum state's grant of immunity to a foreign state defendant did not violate the applicant's right to court access under Article Six of the European Convention on Human Rights.²²⁴

²²⁰ See Counter-Memorial of Italy, Case Concerning Jurisdictional Immunities of the State (Ger. v. It.) 73-80 (Dec. 22, 2009), available at www.icj-cij.org/docket/files/143/16648.pdf (arguing that there is an "irreducible contradiction" between an individual's right to access justice and the idea of sovereign immunity, detailing the history of the right of access to justice in international and Italian law, arguing that the right is a part of human rights law, and concluding that "the implication of the immunity principle cannot be impunity"); Reply of Federal Republic of Germany, Case Concerning Jurisdictional Immunities of the State 36-38 (Oct. 5, 2010), available at <http://www.icj-cij.org/docket/files/143/16650.pdf> (responding to Italy's right of access arguments by asserting that this right must be interpreted in harmony with existing international law, including foreign state immunity).

²²¹ Jurisdictional Immunities of the State, *supra* note 15, para. 98.

²²² *Id.* para. 101.

²²³ *Fogarty v. United Kingdom*, 2001-XI Eur. Ct. H.R. 157, 167 ("[T]he United Kingdom cannot be said to have exceeded the margin of appreciation allowed to States in limiting an individual's access to a court."); *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, 98-99 (holding that the right of court access provided by Article Six of the European Convention of Human Rights is subject to certain limitations, provided that those limitations "do not restrict or reduce the access . . . to such an extent that the very essence of the right is impaired"); *McElhinney v. Ireland*, 2001-XI Eur. Ct. H.R. 37, 47 (upholding the Irish court's decision to bar the claimant's suit against the British Secretary of State for Northern Ireland on foreign state immunity grounds, notwithstanding the claimant's assertion of his right to court access under Article Six of the European Convention of Human Rights).

²²⁴ *Fogarty*, 2001-XI Eur. Ct. H.R. at 167; *Al-Adsani*, 2001-XI Eur. Ct. H.R. at 103 ("[T]he application by the English courts of the provisions of the 1978 Act to uphold Kuwait's claim to immunity cannot be said to have amounted to an unjustified restriction on the applicant's access to a court."); *McElhinney*, 2001-XI Eur. Ct. H.R. at 47 ("In these circumstances, the decisions of the Irish courts upholding the United Kingdom's claim to immunity cannot be said to have exceeded the margin of appreciation allowed to States in

The ECHR's basic reasoning in the three cases was the same.²²⁵ First, the ECHR acknowledged that "Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court."²²⁶ But the ECHR also observed that the right is not absolute, and that limitations may be permitted "since the right of access by its very nature calls for regulation by the State."²²⁷ The ECHR then set forth a standard for determining whether given limitations are permitted:

[The Court] must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.²²⁸

Applying the "legitimate aim" element, the Court noted that the foreign state immunity doctrine "is a concept of international law, developed out of the principle *par in parem non habet imperium*."²²⁹ On that ground alone, the ECHR concluded that the grant of immunity "pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty."²³⁰ This step in the ECHR's analysis prioritizes immunity over court access: a forum state's denial of court access *automatically* satisfies the legitimate aim element if the denial is based on the status quo customary international law of foreign state immunity – regardless of the forum state's actual aims and regardless of whether the grant of immunity would in fact promote comity and good relations in the particular case.

Next, applying the "proportionality" element of the standard, the ECHR began by asserting that "[t]he Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity."²³¹ This step in the ECHR's reasoning further prioritizes immunity over court access by requiring that any lack of harmony between the two principles be resolved by

limiting an individual's access to a court."); *see also supra* Part II.D (describing the right to court access under the European Convention on Human Rights).

²²⁵ While the citations below are to *Al-Adsani*, 2001-XI Eur. Ct. H.R. at 99-100, the same reasoning is found in *Fogarty*, 2001-XI Eur. Ct. H.R. at 166-67, and *McElhinney*, 2001-XI Eur. Ct. H.R. at 46-47.

²²⁶ *Al-Adsani*, 2001-XI Eur. Ct. H.R. at 99.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 100 ("[A]ccount is to be taken of 'any relevant rules of international law applicable in the relations between the parties.'" (quoting Vienna Convention on the Law of Treaties, *supra* note 145, art. 31(3)(c), at 12-13)).

using interpretive methods to conform Article 6's right to court access to the status quo customary international law of state immunity, not vice versa. Indeed, according to the ECHR, "[i]t follows that measures taken by a High Contracting Party [to the Convention] which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1."²³² By reaching this conclusion "in principle," the ECHR avoids any inquiry into whether there is actually a "reasonable relationship of proportionality between the means employed and the aim sought to be achieved" in a particular case.²³³ Under this approach, if international law provides for immunity, immunity *automatically* trumps the right to court access – regardless of the facts of the case. Thus, notwithstanding the ECHR's use of the term "proportionality," this is not a real proportionality test, because it considers any limitation on court access based on the customary international law of immunity to be proportionate ipso facto.

In the end, the ECHR's response to the tension between foreign state immunity and court access boils down to this: if international law provides for immunity under the facts of the case, then there is no right to court access. The approach both takes for granted the benefits of immunity and fails to inquire into the costs of denying court access in a particular case. As a result, notwithstanding the ECHR's references to the concepts of "legitimate aim" and "proportionality," the ECHR's approach effectively prioritizes the foreign state immunity doctrine over the right to court access.²³⁴ Thus, according to both the ECHR's decisions in *Al-Adsani*, *Fogarty*, and *McElhinney*, as well as the ICJ's decision in *Germany v. Italy*, the status quo customary international law of foreign state immunity categorically prevails over the right to court access.

²³² *Id.* at 100.

²³³ *Id.* at 99-100.

²³⁴ Others have offered similar critiques of the *Al-Adsani*, *Fogarty*, and *McElhinney* decisions. See, e.g., Richard Garnett, *State Immunity Triumphs in the European Court of Human Rights*, 118 L.Q. REV. 367, 371 (2002) (arguing that the ECHR left no scope in its analysis "to examine the competing interests by reference to the facts of the case, for example, the foreign State's concern for its sovereignty or security if the matter proceeds, as opposed to the individual's likelihood of redress by alternative means if it does not"); Emmanuel Voyiakis, *Access to Court v. State Immunity*, 52 INT'L & COMP. L.Q. 297, 311-12 (2003) (arguing that the ECHR's analysis "seemed to 'rig' the conflict [between immunity and court access] at its very outset" and that it "never took up the task of weighing the State parties' claim to comply with international law against the applicants' right of access to court"). But see Siobhán McInerney-Lankford, *Fragmentation of International Law Redux: The Case of Strasbourg*, 32 OXFORD J. LEGAL STUD. 609, 614 (2012) (arguing that in the *Al Adsani*, *Fogarty*, and *McElhinney* decisions, the European Court "reject[ed] any presumptive primacy of state immunity over rights").

B. *A Proportionality Approach*

A fundamental problem with the ICJ and ECHR's categorical approach is that it can require immunity regardless of whether immunity would advance the foreign state immunity doctrine's underlying foreign relations function, and regardless of the impact on court access. This Section proposes an alternative – a genuine proportionality approach – that assesses both the foreign relations benefits and the court access costs of immunity on a case-by-case basis. While subject to significant objections, which will be addressed below, the proportionality approach has a major advantage over the status quo: it takes seriously not only the core functional justification for the foreign state immunity doctrine, but also the importance of court access.

1. Proposal

Under the proportionality approach, foreign state immunity should not be granted if doing so would have an impact on the claimant's ability to obtain court access that would be disproportionate to the benefits of immunity for relations between the forum state and the foreign state. Otherwise, the foreign state immunity doctrine, including recognized exceptions to immunity, would apply normally.²³⁵

Importantly, this approach would require a genuine case-specific factual basis for determining the foreign relations benefits and court access consequences of a grant of immunity. If these determinations were instead based on general assumptions about the potential effects of litigation on foreign relations or the potential effects of immunity on court access, then the approach would be unable to identify the cases in which court access consequences would be disproportionate to foreign relations benefits.²³⁶

Two presumptions might be useful to facilitate the analysis. If the foreign state will provide the claimant with a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law, there is a rebuttable presumption that a grant of immunity will not have a disproportionate impact on the claimant's ability to obtain court access. Otherwise, there is a rebuttable presumption that a grant of immunity will have a disproportionate impact on the claimant's ability to obtain court access.²³⁷

²³⁵ Cf. Francioni, *supra* note 8, at 50 (“A more satisfactory approach to reconciling immunities and access to justice is to recognize that both reflect norms of customary international law which need to be reconciled through a pragmatic approach and a careful balancing of the competing interests in the concrete cases.”).

²³⁶ This is one of the problems with the European Court of Human Rights' approach to the “legitimate aim” element of its proportionality test, which automatically finds the element satisfied if immunity is called for by the foreign state immunity doctrine. *See supra* Part IV.A (delineating and assessing the court's approach).

²³⁷ The standard used to trigger the first presumption is based on the language used in international agreements expressing the right to court access. *See, e.g.*, American

The first presumption would apply in situations where the claimant is likely to obtain meaningful court access in the foreign state's own courts.²³⁸ In these situations, the impact of immunity on court access ordinarily should be relatively low, so absent evidence to the contrary, that impact should not be expected to be disproportionate to the foreign relations benefits of immunity. The second presumption would apply in situations where the claimant is unlikely to obtain meaningful court access in the foreign state's own courts.²³⁹ In these situations, access to the forum state's courts should not be denied on immunity grounds unless there are compelling foreign relations reasons to grant immunity. In general, the greater the gravity of the wrongs alleged by the claimant, the more compelling those reasons would need to be to rebut the presumption.²⁴⁰

Convention on Human Rights, *supra* note 90, art. 8(1) ("Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law . . ."); Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 139, art. 6 (providing the right to a "fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"); Charter of Fundamental Rights of the European Union, *supra* note 90, art. 47 (providing the right to a "fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law"); *cf.* Convention on Choice of Court Agreements art. 9(e), concluded June 30, 2005, available at <http://www.hcch.net/upload/conventions/txt37en.pdf> (referring to "fundamental principles of procedural fairness").

²³⁸ This presumption finds support in the principle of exhaustion of remedies. Under the law of state responsibility, before a state's claim on behalf of one of its nationals is admissible, the national ordinarily must have exhausted the legal remedies available in the state alleged to have caused the injury. *See* BROWNIE, *supra* note 54, at 492 ("A claim will not be admissible on the international plane unless the individual alien or corporation concerned has exhausted the legal remedies available to him in the state which is alleged to be the author of injury.").

²³⁹ This presumption finds support in the principle of excuse of exhaustion of remedies based on futility. *See id.* at 495 ("In certain circumstances recourse to local remedies is excused. . . . The best test appears to be that an effective remedy must be available 'as a matter of reasonable possibility.' . . . [A] fair number of writers and arbitral awards have been willing to presume ineffectiveness of remedies from the circumstances, for example on the basis of evidence that the courts were subservient to the executive." (citations omitted)). It also finds support in the principle of jurisdiction by necessity (sometimes referred to as forum necessitatis or forum conveniens). Fawcett, *supra* note 100, at 6 (observing that under the principle of jurisdiction by necessity, "a court tak[es] jurisdiction on the ground that the local forum is the appropriate forum (or an appropriate forum) for trial or that the forum abroad is inappropriate"); *see also* HAY ET AL., *supra* note 103, § 6.6, at 402 (explaining that jurisdiction by necessity, where it exists, provides for jurisdiction where "no reasonable alternative forum exists and the connection of the parties and events makes the chosen forum a fair one").

²⁴⁰ *See* Brown, *supra* note 149, at 218 ("[T]he right of access gains importance in a directly proportionate relationship to the importance of the right(s) allegedly violated and the gravity of the alleged violation." (emphasis omitted)); Francioni, *supra* note 8, at 50

A proportionality approach, while not reflected in the ICJ and ECHR's understanding of the status quo international law of immunity, is not a radical proposal.²⁴¹ As one expert on foreign state immunity notes, "[I]f there is no remedy [in the foreign state] for the individual plaintiff, it surely becomes the more imperative for the forum State's courts to provide one."²⁴² Thus, "proof of the availability of some alternative method of settlement may influence the municipal court in its refusal to exercise jurisdiction over the foreign State, [even though] it has no competence to make its decision dependent on that State's acceptance of such an alternative method."²⁴³ As another expert argues, "[B]alancing the rights of the litigating parties in respect of the issue in a given case would produce a better result" than the current approach to foreign state immunity.²⁴⁴ In particular, there would seem to be no point in denying court access based on the foreign state immunity doctrine unless doing so would significantly advance the doctrine's underlying foreign relations function.²⁴⁵

(arguing for a balancing approach that includes consideration of "the nature of the injury for which judicial protection is sought" so as to ensure such protection for "certain human rights norms, such as those prohibiting torture, genocide, slavery, and arbitrary killing").

²⁴¹ See, e.g., *Arthur J S Hall & Co. v. Simons*, [2002] 1 A.C. 615 (H.L.) 710 (appeal taken from Eng.) (citing *Rees v. Sinclair*, [1974] 1 NZLR 180, 187) (arguing that "[a]ny immunity from suit is a derogation from a person's fundamental right of access to the court which has to be justified" and that "the protection of the immunity should not be given any wider application than is absolutely necessary in the interests of the administration of justice"); *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, 115 (Loucaides, J., dissenting) ("Any form of blanket immunity, whether based on international law or national law, which is applied by a court in order to block completely the judicial determination of a civil right without balancing the competing interests, namely those connected with the particular immunity and those relating to the nature of the specific claim which is the subject matter of the relevant proceedings, is a disproportionate limitation on [the right to court access] and for that reason it amounts to a violation of that [right].").

²⁴² FOX, *supra* note 5, at 59.

²⁴³ *Id.* at 146.

²⁴⁴ BANKAS, *supra* note 80, at 364; see also Philippa Webb, *Regional Challenges to the Law of State Immunity 2* (Eur. Soc'y of Int'l Law, Conference Paper No. 6, 2012), available at <http://ssrn.com/abstract=2193750> ("[T]he law on state immunity . . . must . . . develop in a way that balances respect for sovereignty with commercial accountability and the desire to end impunity.").

²⁴⁵ See *Hearing on H.R. 11315*, *supra* note 245, at 62-63 (statement of Michael H. Cardozo, Attorney, Washington, D.C.) (arguing that scope of foreign state immunity "depends on the extent to which a nation feels that its good relations with other countries will be enhanced by the grant of immunity"); Michael H. Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 HARV. L. REV. 608, 614 (1954) (arguing that whether immunity should be granted depends on whether "the interests of foreign relations [will] be furthered by relieving [the foreign state] from responding in court"); cf. FOX, *supra* note 5, at 55 ("There seems little point in rules of State immunity unless they are supported by convincing reasons of policy."); Sucharitkul, *supra* note 73, at 120-21 (arguing that "[f]unctional immunities are self-restrictive in the sense that the functional criterion operates

2. Objections

Nevertheless, there are several significant objections to the proportionality approach. First, it is not necessarily appropriate for courts to make assessments about the foreign relations consequences of lawsuits.²⁴⁶ According to this objection, courts are not well equipped institutionally to make such assessments, and by doing so they risk intruding on the foreign relations functions of the executive branch of government.²⁴⁷ In response to this objection, courts could defer to executive branch assessments of the foreign relations benefits of immunity in particular cases. But there are potential disadvantages to executive involvement in foreign state immunity decisionmaking. For example, as the U.S. experience prior to the FSIA suggests, placing the executive branch in charge of foreign state immunity decisionmaking can complicate its efforts to perform its diplomatic functions.²⁴⁸

to limit the extent of . . . immunities” and that “[t]he concept of functional necessities delineates areas where immunities are recognised from those where the doctrine of immunity does not apply”).

²⁴⁶ Moreover, there is a risk that by making immunity decisions turn in part on foreign relations consequences, a moral hazard might be created by giving actual or potential foreign state defendants an incentive to disrupt or threaten to disrupt relations with the forum state in the event of litigation against it. While this may be a genuine risk, it would seem unlikely that foreign states would frequently use disruption of foreign relations as a litigation-avoidance strategy.

²⁴⁷ Cf. *Hearing on H.R. 11315, supra* note 245, at 64 (statement by Michael H. Cardozo, Attorney, Washington, D.C.) (“[T]o lose the flexibility [in the conduct of foreign relations] by an act of Congress . . . disables the Secretary of State from making emergency decisions [and] could embroil us in considerable difficulty and embarrassment.”).

²⁴⁸ See *id.* at 31 (statement of Monroe Leigh, Legal Adviser, Department of State) (supporting the FSIA because the practice then in place “caused foreign relations problems for the executive branch” and the FSIA would remedy the situation by “depoliticiz[ing] the area of sovereign immunity by placing the responsibility for determining questions of sovereign immunity in the courts”). This was the U.S. State Department’s principal argument in favor of the FSIA, which transferred immunity decisionmaking in the United States from the executive branch to the judicial branch. See *supra* Part III.B.1 (providing an overview of the FSIA). In contrast, however, the State Department now urges that it be given a leading role in the distinct field of foreign-official immunity and that courts defer to its determinations in that context. See Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT’L L. 915, 918 (2011) (“The State Department asserts that it has complete control over foreign official immunity determinations in U.S. courts . . .”). The drawbacks of executive involvement might at least be partly mitigated by limiting judicial deference to genuine case-specific executive branch findings regarding the likely foreign relations consequences of a lawsuit (as opposed to more general suggestions of immunity). Another method – one that would avoid some of the disadvantages of the executive deference route – would be to establish *ex ante* categories of foreign state activity that, if subject to adjudication in another state’s courts, would likely have an adverse effect on foreign relations. For example, in

This first objection should be kept in perspective, however. Courts already assess foreign relations matters in other doctrinal contexts,²⁴⁹ and it is not clear that they are necessarily incapable of doing so adequately in the context of foreign state immunity decisionmaking.²⁵⁰ Moreover, in some – and perhaps many – cases, the plaintiff’s suit may be subject to dismissal based on ordinary principles of jurisdiction or *forum non conveniens*.²⁵¹ In those cases, the determination necessary for the proportionality approach could be made without assessing the potential adverse foreign relations consequences of allowing the suit to proceed in the forum state: the foreign state immunity doctrine would be unnecessary to avoid such consequences because the suit would be dismissed on other grounds.²⁵² This first objection therefore has the

Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, the U.S. Court of Appeals for the Second Circuit argued that the doctrine should only apply to five categories:

[There are] strictly political or public acts about which sovereigns have traditionally been quite sensitive to which the doctrine should be limited: (1) internal administrative acts, such as expulsion of an alien, (2) legislative acts, such as nationalization, (3) acts concerning the armed forces, (4) acts concerning diplomatic activity, (5) public loans.

336 F.2d 354, 360 (2d Cir. 1964). According to the court, the foreign state immunity doctrine does not require “sacrificing the interests of private litigants to international comity in other than these limited categories.” *Id.* The use of *ex ante* categories, however, is likely to be a less accurate method than case-by-case analysis of foreign relations implications.

²⁴⁹ See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004) (“Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.”); *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 115 (1987) (finding that the Court should “consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the [U.S. federal or state] court”); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-28 (1964) (recognizing that the “vitality [of the act of state doctrine] depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs”); *Baker v. Carr*, 369 U.S. 186, 211-12 (1962) (discussing the significance of foreign relations considerations to judicial application of the political question doctrine).

²⁵⁰ See *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, 115 (Loucaides, J., dissenting) (“The courts should be in a position to weigh the competing interests in favour of upholding an immunity or allowing a judicial determination of a civil right, after looking into the subject matter of the proceedings.”).

²⁵¹ For an overview of these and other court access doctrines of private international law, see generally Fawcett, *supra* note 100, at 3-70.

²⁵² See Donoghue, *supra* note 80, at 524-26 (1992) (arguing that before a court reaches the issue of immunity, it should determine whether it has personal jurisdiction); R. Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 NETH. INT’L L. REV. 265, 271-72 (1982) (asserting that immunity is an exception to jurisdiction and arguing that “[i]f there is no jurisdiction, then there is no need to establish immunity” because “competence is the *sine qua non* of immunity”); see also BADR, *supra* note 28, at 80 (“[R]ecognition of jurisdictional immunity [is not required] for foreign states as a means of respecting their

most force in cases where the forum state has jurisdiction and would be unable to decline its authority to exercise it based on other doctrines, but less force in other cases.

A second objection is that even in cases in which a grant of immunity would not advance the foreign state immunity doctrine's underlying functions, there may be formal justifications for granting immunity.²⁵³ Critics have questioned the doctrine's formal justifications, however. For example, *Oppenheim's International Law* concludes that it is "doubtful" that the justifications of sovereign equality, independence, and dignity of states provide a "satisfactory basis" for the foreign state immunity doctrine:

There is no obvious impairment of the rights of equality, or independence, or dignity of a state if it is subjected to ordinary judicial processes within the territory of a foreign state – in particular if that state, as appears to be the tendency in countries under the rule of law, submits to the jurisdiction of its own courts in respect of claims brought against it.²⁵⁴

The doctrine may have been justified in an earlier "era of personal sovereignty, when kings could theoretically do no wrong and when the exercise by one sovereign over another indicated hostility or superiority" – but

sovereignty or upholding their dignity. Governmental acts which constitute a true exercise of sovereignty . . . cannot have any extra-territorial effects. Their force is, by their very nature, limited to the territory of the state itself and it is with that state alone that they have substantial contact. Lack of nexus would result in denying jurisdiction with regard to them to the courts of other states as a matter of primary lack of jurisdiction and not as a matter of immunity from jurisdiction."); Garnett, *supra* note 58, at 186 (arguing that private international law rules would bar most objectionable claims against foreign states, and that immunity rules are therefore largely superfluous). In the current Foreign Sovereign Immunities Act, specifications of the requisite connections to U.S. territory are "scattered throughout the substantive immunity provisions." DELLAPENNA, *supra* note 166, at 171. Moreover, it is not yet settled whether foreign states enjoy the protections of the U.S. Constitution's Due Process Clause for purposes of personal jurisdiction. *Id.* at 182. This may make it difficult for U.S. courts to separate the immunity inquiry from the jurisdictional inquiry.

²⁵³ See *supra* Part I.C.1 (discussing the doctrine's formal justifications).

²⁵⁴ OPPENHEIM'S INTERNATIONAL LAW, *supra* note 14, § 109, at 342; see also FOX, *supra* note 5, at 62 (arguing that "[i]f [equality] means equality with the forum State when the latter is placed in the position of defendant State in municipal proceedings brought in another State, it would seem more an argument against discrimination" than for immunity); *id.* at 63 ("It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it" (quoting *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379 (H.L.) 418 (appeal taken from Eng.) (Lord Denning, dissenting) (internal quotation marks omitted)); Lauterpacht, *supra* note 59, at 231 (rejecting the argument that foreign state immunity is necessary to protect the dignity of the foreign state).

that era, so the argument goes, has passed.²⁵⁵ We are now in an era of legal accountability of states, and such accountability is inconsistent with immunity.²⁵⁶ As Eli Lauterpacht subtly puts it, “exemption from legal process is not congenial to the climate of the modern State.”²⁵⁷

Moreover, because these formal justifications were developed in the state-centric era of international law, before legalization of the right to court access, those justifications lack a theory for why immunity should trump court access.²⁵⁸ Absent such a theory, the formal justifications are weak when they confront the right to court access. Nevertheless, formal justifications continue to be invoked, including by the ICJ.²⁵⁹ Objections based on formal justifications therefore have significant influence even if they are not particularly convincing on the merits.

A third objection to the proportionality approach is based on a critique of balancing and proportionality tests in general.²⁶⁰ According to this critique, balancing leads to a “complete erosion” of individual rights because “[i]t overlooks the idea that human rights are not merely quantities of freedom but protect some basic status of people as moral agents.”²⁶¹ From this perspective, balancing court access against foreign-relations benefits risks trivializing the right of court access.²⁶²

²⁵⁵ *Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 357 (2d Cir. 1964).

²⁵⁶ See George A. Bermann, *Immunity and Accountability: Is the Balance Shifting?*, 99 AM. SOC'Y INT'L L. PROC. 227, 227 (2005) (arguing that “[t]he accountability of states and state actors on the international scene is on a forward march” but that greater accountability probably cannot be achieved “unless the contours of the immunities to which they are subject are seriously thought through”); cf. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 631 (5th ed. 2007) (explaining that one critique of immunity at the domestic level is that it is inconsistent with the central maxim that “no one, not even the government, is above the law”).

²⁵⁷ E. Lauterpacht, Fellow, Trinity College, *The Codification of the Law of Diplomatic Immunity*, Address Before the Grotius Society (Feb. 3, 1954), in 40 *TRANSACTIONS GROTIUS SOC'Y* 65, 71 (1954).

²⁵⁸ Cf. Bermann, *supra* note 256, at 235 (“At a period in which in enlightened communities the securing of the rights of the individual, in all their aspects, against the state has become a matter of special and significant effort, there is no longer a disposition to tolerate the injustice which may arise whenever the state – our own state or a foreign state – screens itself behind the shield of immunity in order to defeat a legitimate claim.”).

²⁵⁹ See *Jurisdictional Immunities of the State*, *supra* note 15, para. 57 (finding the derivation of foreign state immunity from the principle of sovereign equality).

²⁶⁰ See generally AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (2012) (investigating defenses and critiques of proportionality tests in constitutional-rights adjudication).

²⁶¹ Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 *INT'L J. CONST. L.* 468, 490 (2009).

²⁶² Others, however, argue that proportionality and balancing “are the most sophisticated means to solve the very complex and intricate collision of human rights with competing

The alternatives to some form of balancing, however, are likely to be undesirable, unrealistic, or both. As discussed above, the ICJ's and the ECHR's approaches categorically prioritize the customary international law of foreign state immunity over the right to court access.²⁶³ At the other end of the spectrum, some scholars argue that the foreign state immunity doctrine should be abolished in order to protect the right to court access.²⁶⁴ But in some cases, a grant of immunity may genuinely advance the foreign state immunity doctrine's core justifying function of facilitating foreign relations, without imposing substantial court access costs (for example, if a third state or the foreign state would provide meaningful court access).²⁶⁵ In such cases, foreign state immunity would seem less objectionable. In any event, even though some scholars question the foreign state immunity doctrine's status as a rule of customary international law,²⁶⁶ its status as such is so widely accepted that its abolition would seem highly unlikely any time in the foreseeable future.

C. *A Strategy for Change*

The proportionality approach has the important attraction of seeking to preserve the core foreign relations function of the foreign state immunity doctrine while taking seriously the importance of court access. But even if the objections against it are adequately addressed, the prospects for its adoption

principles" and that "[r]ights adjudication must necessarily rely on balancing." Matthias Klatt & Moritz Meister, *Proportionality – A Benefit to Human Rights?: Remarks on the I-CON Controversy*, 10 INT'L J. CONST. L. 687, 708 (2012).

²⁶³ See *supra* Part IV.A.

²⁶⁴ See, e.g., BANKAS, *supra* note 80, at 364 ("In order to promote a balance of justice, it is submitted *de lege ferenda* that the doctrine of restrictive immunity be forsaken or abandoned entirely . . ."); RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 139-45, 169 (1964) (presenting arguments against foreign state immunity and concluding that it lacks "an adequate functional justification"); Garnett, *supra* note 58, at 190 ("[F]oreign state immunity should be abolished."); Lauterpacht, *supra* note 59, at 237 (arguing for "the abolition, subject to specified safeguards and exceptions, of the rule of immunity of foreign states"); Sciso, *supra* note 89, at 1201, 1214-15 (defending the Italian position that the foreign state immunity doctrine does not apply to alleged violations of jus cogens rules of international law). See generally *Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 357 (2d Cir. 1964) ("[T]he wisdom of retaining the [foreign state immunity] doctrine has been cogently questioned."); FOX, *supra* note 5, at 737-39 (discussing calls for the "total abolition" of foreign state immunity).

²⁶⁵ See *supra* Part I.C.2 (discussing the doctrine's functional justifications); cf. David P. Stewart, *Immunity and Accountability: More Continuity than Change?*, 99 AM. SOC'Y INT'L L. PROC. 227, 228 (2005) (describing critiques of immunity, then suggesting that "[i]t is worth remembering that there is a point and a purpose to immunity," namely "functionality and reciprocity").

²⁶⁶ See *supra* Part I.B (discussing the status of the foreign state immunity doctrine as customary international law).

are dim in the short term. As discussed above, the ECHR and the ICJ have indicated that unless status quo customary international law permits a denial of foreign state immunity, immunity must be granted – regardless of the court access consequences. And the process of customary international legal change is ordinarily slow and difficult.²⁶⁷

Customary international law is based on widespread state practice out of a sense of legal obligation.²⁶⁸ Once a rule of customary international law is established, it generally is binding on all states.²⁶⁹ For a different rule of customary international law to emerge, states would have to engage in a different practice; yet the necessary new state practice may be legally barred by the established rule of customary international law. This paradox explains the “stickiness” of customary international law.²⁷⁰ In the case of foreign state immunity, this stickiness is reinforced by the recent decisions of the ICJ and the ECHR which, by prioritizing immunity over court access, make it especially unlikely that national courts will deviate from that approach – at least not on a widespread basis.²⁷¹ And if these recent decisions make it unlikely that state practice will change, it is also unlikely that in later decisions the ICJ or the ECHR will find that the foreign state immunity doctrine has changed.²⁷²

Therefore, although the proportionality approach (or another alternative to the status quo customary international law of foreign state immunity) may be worth pursuing, a longer term strategy is needed. One such strategy would aim

²⁶⁷ See Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 245 (2010) (explaining that it is hard to change established rules of customary international law).

²⁶⁸ CASSESE, *supra* note 56, at 156 (“[C]ustom is made up of two elements: general practice . . . and the conviction that such practice reflects, or amounts to, law . . .”).

²⁶⁹ A widely recognized exception to this general rule is that a state that persistently objects to a rule of customary international law before the rule is established is not bound by that rule. *See id.* at 162-63 (discussing this exception but concluding that “custom at present no longer maintains its original ‘consensual’ features”).

²⁷⁰ See Bradley & Gulati, *supra* note 267, at 245 (borrowing the term from contract theory). *See generally* Suzanne Katzenstein, *International Adjudication and Custom Breaking by Domestic Courts*, 62 DUKE L.J. 671 (2012).

²⁷¹ See Roger O’Keefe, *State Immunity and Human Rights: Heads and Walls, Hearts and Minds*, 44 VAND. J. TRANSNAT’L L. 999, 1017 (2011) (describing this barrier to changing the foreign state immunity doctrine).

²⁷² *See id.* (describing this as a “customary international legal feedback loop”); *see also* Katzenstein, *supra* note 270, at 696 (“[T]he ICJ’s invalidation of the Italian deviation may have the substantive effect of entrenching the existing sovereign immunity rule.”). *But see* Sangeeta Shah, *Jurisdictional Immunities of the State: Germany v. Italy*, 12 HUM. RTS. L. REV. 555, 555 (2012) (expressing the pessimistic view that the ICJ “appears to have hammered the final nail in the coffin on the possibility that a state can be sued for serious violations of international human rights and international humanitarian law in the national courts of another state” (footnote omitted)).

to change customary international law through changing state practice. As Shaw puts it, “[b]ehaviour contrary to a custom contains within itself the seeds of a new rule.”²⁷³ Such behavior, however, will not help establish the state practice and *opinio juris* needed for a new rule unless other states endorse or at least acquiesce in the new practice.²⁷⁴ Therefore, for this strategy to succeed, national courts would need to identify opportunities to apply the new approach where the foreign state would provide such endorsement or acquiescence.²⁷⁵ If the new practice is increasingly accepted over time, a new rule of customary international law may emerge.²⁷⁶ If the legalization of the right to court access continues to advance, states may be more likely to engage or acquiesce in the new practice out of a sense of legal obligation. This would be an ambitious strategy. Deviations from the absolute theory of foreign state immunity, however, ultimately led to the prevailing view that customary international law now recognizes the restrictive theory instead, thus suggesting that this strategy is plausible over the long term.²⁷⁷

Another strategy would aim to override customary international law by treaty.²⁷⁸ In the most recent attempts to codify the customary international law of foreign state immunity in treaty form, the drafters decided not to pursue incorporating an exception for serious human rights violations because of concerns that doing so would preclude agreement on an overall text.²⁷⁹ Thus, it

²⁷³ SHAW, *supra* note 29, at 91.

²⁷⁴ See HIGGINS, *supra* note 61, at 22 (“A new norm cannot emerge without both practice and *opinio juris*; and an existing norm does not die without the great majority of states engaging in both a contrary practice and withdrawing their *opinio juris*.”); Bradley & Gulati, *supra* note 267, at 212 (“The only way for nations to change a rule of [customary international law] . . . is to violate the rule and hope that other nations accept the new practice.”).

²⁷⁵ Cf. Katzenstein, *supra* note 270, at 673-74 (arguing that among the requirements for “custom breaking” to lead to customary international legal change, courts must overcome or circumvent political opposition and survive or avoid judicial review).

²⁷⁶ See CASSESE, *supra* note 56, at 157 (“If [a new practice] does not encounter strong and consistent opposition from other States but is increasingly accepted, or acquiesced in, a customary rule gradually crystallizes.”).

²⁷⁷ See *supra* Part I.B (describing the shift from absolute to restrictive immunity). *But see* Bradley & Gulati, *supra* note 267, at 232 (arguing that it makes more sense to understand the shift not as a result of custom-breaking and acquiescence, but rather as the withdrawal of an increasing number of states from the customary rule of absolute immunity and their parallel new practice of restrictive immunity).

²⁷⁸ See Bradley & Gulati, *supra* note 267, at 211 (“It is accepted that a [customary international law] rule can be overridden by a later-in-time treaty, but only as between the parties to the treaty.”).

²⁷⁹ See Gerhard Hafner, *Accountability and Immunity: The United Nations Convention on Jurisdictional Immunity of States and Their Property and the Accountability of States*, 99 AM. SOC’Y INT’L L. PROC. 237, 242 (2005) (stating that “[t]he ILC discussed this issue, but was unable to recognize a generally accepted position in this regard” and that “it became clear during the negotiations that the inclusion of such a restriction on immunity in the

seems that in the short term, the treaty strategy would be unlikely to succeed. If the right to court access continues to develop and be embraced by states, individuals, and advocacy organizations over time, however, the political preconditions for the treaty strategy may develop.²⁸⁰

This suggests a complementary strategy: advocacy aimed not so much at the foreign state immunity doctrine as such, but rather at promoting the right to court access and advancing its legalization. The more firmly that customary international law establishes the right to court access, the more difficult it will be for courts to avoid working through the tension between foreign state immunity and the right to court access. In *Germany v. Italy*, the ICJ argued that there was no conflict between jus cogens norms and the foreign state immunity doctrine because the former is substantive and the latter is procedural.²⁸¹ But if court access becomes a recognized right under customary international law, then this formalistic logic would fail because court access and immunity are both procedural. Moreover, treaty interpretation methods, such as those used by the ECHR in the *Al-Adsani* line of cases to conform the European Convention to foreign state immunity, could not be used to prioritize immunity because, like immunity, the source of the right to court access would be customary international law.

CONCLUSION

The foreign state immunity doctrine is well established as a doctrine of customary international law.²⁸² Meanwhile, the right to court access has become widely accepted and is increasingly legalized.²⁸³ Therefore, one important factor to consider when normatively evaluating the foreign state immunity doctrine is its impact on court access.

Using a combination of doctrinal analysis and empirical analysis, this Article has demonstrated that the foreign state immunity doctrine has a serious impact on court access. U.S. courts frequently dismiss suits on foreign state

Convention would have precluded any possibility of achieving a broadly acceptable text"). Indeed, in its recent *Germany v. Italy* opinion, the ICJ noted that the relevant working group decided not to take up the matter of a human rights exception because "it did not seem to be ripe enough for the Working Group to engage in a codification exercise over it" and the ICJ on that basis considered that "at the time of adoption of the United Nations Convention in 2004, States did not consider that customary international law limited immunity in the manner now suggested by Italy." Jurisdictional Immunities of the State, *supra* note 15, para. 89 (quoting Report of the Chairman of the Working Group on the Convention on Jurisdictional Immunities of States and Their Property, Int'l Law Comm'n, 54th Sess., para. 47, U.N. Doc. A/C.6/54/L.12) (internal quotation marks omitted).

²⁸⁰ Cf. *Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 357 (2d Cir. 1964) (observing that "[g]rowing concern for individual rights and public morality" led to erosion of absolute theory of foreign state immunity).

²⁸¹ Jurisdictional Immunities of the State, *supra* note 15, para. 93.

²⁸² See *supra* Part I.B.

²⁸³ See *supra* Part II.

immunity grounds. They often do so even when the foreign state's courts are unlikely to provide meaningful court access. In such cases, the foreign state immunity doctrine may deny a claimant court access altogether.

To mitigate the tension between the foreign state immunity doctrine and the right to court access, this Article has proposed a proportionality approach. According to this approach, foreign state immunity should not be granted if doing so would have an impact on the claimant's ability to obtain court access that would be disproportionate to the benefits of immunity for relations between the forum state and the foreign state. Otherwise, the foreign state immunity doctrine, including recognized exceptions to immunity, would apply normally. This approach is subject to significant objections. But the proposal's wager is that its disadvantages are outweighed by an important advantage: unlike the status quo approach, and unlike proposals to eliminate the foreign state immunity doctrine altogether, the proportionality approach takes seriously both the doctrine's underlying foreign relations function and the right to court access.

As this Article has acknowledged, the short-term prospects for changing the foreign state immunity doctrine are not encouraging. Therefore, a longer term strategy is needed – one aimed at changing the status quo customary international law of foreign state immunity or overriding it by treaty, and aimed at promoting the acceptance and legalization of the right to court access.

In his separate opinion in *Germany v. Italy*, Judge Kenneth Keith noted that issues of immunity “have changed over time and no doubt will continue to change, in the direction of a narrowing of immunity.”²⁸⁴ And as Hazel Fox has argued, the foreign state immunity doctrine may be entering a “post-modern phase, where immunity may be rendered unnecessary or detached from the State.”²⁸⁵ As the doctrine develops – as it moves toward its post-modern phase – it should take into account its court access consequences and find ways to continue to perform its core foreign relations function while minimizing its impact on court access.

²⁸⁴ Jurisdictional Immunities of the State (Ger. v. It.), para. 3 (Feb. 3, 2012) (separate opinion of Judge Keith), available at <http://www.icj-cij.org/docket/files/143/16887.pdf>.

²⁸⁵ FOX, *supra* note 5, at 2.