No. _____

In The
Supreme Court of the United States

OBB PERSONENVERKEHR AG,

Petitioner,

v.

CAROL P. SACHS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JUAN C. BASOMBRIO
Counsel of Record
DORSEY & WHITNEY LLP
600 Anton Boulevard
Suite 2000
Costa Mesa, California 92626
Telephone: (714) 800-1400
E-Mail: basombrio.juan@dorsey.com

STEVEN J. WELLS
DORSEY & WHITNEY LLP
50 South Sixth Street
Suite 1500
Minneapolis, Minnesota 55402
Telephone: (612) 340-2600
E-Mail: wells.steve@dorsey.com

Counsel for Petitioner
OBB Personenverkehr AG

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* ("FSIA"), broadly provides sovereign immunity to foreign states and their instrumentalities, subject to limited statutory exceptions. The first clause of the commercial activity exception provides, *inter alia*, that United States courts have subject matter jurisdiction over claims that are "based upon a commercial activity carried on in the United States by the foreign state." *Id.* § 1605(a)(2).

The questions presented by this Petition are:

1. Whether, for purposes of determining when an entity is an "agent" of a "foreign state" under the first clause of the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2), the express definition of "agency" in the FSIA, the factors set forth in *First National City Bank v. Banco para el Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611 (1983), or common law principles of agency, control.

2. Whether, under the first clause of the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2), a tort claim for personal injuries suffered in connection with travel outside of the United States is "based upon" the allegedly tortious conduct occurring outside of the United States or the preceding sale of the ticket in the United States for the travel entirely outside the United States.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner-defendant is OBB Personenverkehr AG ("OBB"), an instrumentality of a foreign state, the Republic of Austria. Pursuant to Supreme Court Rule 29.6, OBB states, as follows: OBB's stock is wholly held by OBB Holding Group, a joint-stock company organized under Austrian law and created by the Republic of Austria pursuant to the Austrian Federal Railways Act. The sole shareholder of OBB Holding Group is the Austrian Federal Ministry of Transport, Innovation and Technology, an organ of the Republic of Austria.

Respondent-plaintiff is Carol P. Sachs ("Sachs"), a California resident. Sachs brought an action against OBB, OBB Holding Group, and the Republic of Austria based upon personal injuries she incurred at a train station in Innsbruck, Austria. OBB and the Republic of Austria moved to dismiss the complaint for lack of subject matter jurisdiction under the FSIA. Sachs did not oppose the Republic's motion which was granted. The district court, over Sachs's objection, granted OBB's motion to dismiss. Sachs appealed only the dismissal of OBB. Sachs voluntarily dismissed her claims against OBB Holding Group, whom she had never served with process, in the district court. Neither the Republic of Austria nor OBB Holding Group was a party to the appeal to the Ninth Circuit; neither is a party to this Petition.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner OBB Personenverkehr AG submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court's opinion is unreported and reproduced at Appendix ("App.") at 101. The opinion was issued by Vaughn R. Walker, judge presiding, U.S. District Court for the Northern District of California.

The panel opinion is reported at 695 F.3d 1021, and reproduced at App. at 67. The panel consisted of Judges Bea, Gould and Tallman. Judge Tallman authored the majority opinion, and Judge Gould authored a dissent.

The order for rehearing *en banc* is reported at 705 F.3d 1112. The *en banc* opinion is reported at 737 F.3d 584, and reproduced at App. at 1. The *en banc* panel included Chief Judge Kozinski, and Judges Reinhardt, O'Scannlain, Silverman, Graber, Wardlaw, Fisher, Gould, Berzon, Rawlinson and Hurwitz. Judge Gould authored the *en banc* opinion. Dissents were authored by Judge O'Scannlain (in which Chief Judge

Kozinzki and Judge Rawlison joined) and by Chief Judge Kozinzki.[1]

The Ninth Circuit's order staying mandate pending this petition for certiorari, issued by Judge Gould, is unreported and reproduced at App. at 100.

JURISDICTION

The Ninth Circuit filed the panel opinion on September 13, 2012. App. at 67. The Ninth Circuit granted Sachs's petition for rehearing *en banc* on January 25, 2013. The *en banc* court filed its opinion on December 6, 2013. *Id.* at 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq*. ("FSIA"), and, in particular, the first clause of the commercial activity exception to foreign sovereign immunity, which provides:

[1] This case presents a close split of judicial views. The district judge and five circuit judges were of the view that OBB has immunity, and eight circuit judges were of the view that the commercial activity exception applied.

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; . . .

28 U.S.C. § 1605(a)(2).

"Foreign state" is a defined term under the FSIA:

> For purposes of this chapter –
>
> (a) A "foreign state," except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity –
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

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

28 U.S.C. § 1603(a)(1)-(2).

The Appendix reproduces the relevant statutes.

STATEMENT OF THE CASE

A. Introduction

Respondent purchased a Eurail pass from a Massachusetts-based internet ticket seller. After being injured in a train platform accident in Austria in connection with rail travel *entirely outside the U.S.*, Respondent attempted to sue Petitioner, the rail instrumentality of the Republic of Austria, in U.S. District Court, although the FSIA broadly affords sovereign immunity to foreign states and their instrumentalities except under limited exceptions. The Ninth Circuit, in an *en banc* opinion (over two dissents including one by the Chief Judge) reversing the appellate panel and district court, invoked the first clause of the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2), and allowed Respondent's suit, holding that the ticket seller, which had no contractual relationship with Petitioner, was nevertheless Petitioner's "agent" when it sold the Eurail pass and, thus, Petitioner had conducted "commercial activity" in the U.S. sufficient to subject it to jurisdiction. The Ninth Circuit refused to apply

the FSIA's definition of an "agency" of a "foreign state" – under which the ticket seller's activities would not be imputed to Petitioner – and applied common law agency principles that have no basis in the FSIA, and are at odds with *First National City Bank v. Banco para el Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611 (1983). The Ninth Circuit's decision dramatically expands subject matter jurisdiction over claims against foreign states and overrides the express limitations of the FSIA.

The Ninth Circuit also erred by holding that Respondent's claims were "based upon" commercial activity in the U.S. – *i.e.,* the sale of the Eurail pass – rather than the allegedly tortious acts that occurred on a train platform in Austria. That holding misapplies and is directly contrary to *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993); it, too, dramatically expands the basis for subject matter jurisdiction over claims against foreign sovereigns.

B. Overview of FSIA

Under the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" unless the claim falls within certain narrow statutory exceptions. 28 U.S.C. § 1604. These exceptions are set forth in Sections 1605 and 1607.

The first clause of the "commercial activity" exception provides that a foreign state shall not enjoy sovereign immunity where "the action is based upon

a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2).

Thus, the first clause of the commercial activity exception only applies to: (1) "commercial activity"; (2) "carried on in the United States by the foreign state"; and (3) claims "based upon" that commercial activity. The latter two limitations are at issue here.

With respect to the second limitation, Section 1603(a) provides that "[a] 'foreign state,' except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." Section 1603(b) provides that "[a]n 'agency or instrumentality of a foreign state' means any entity – (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country." Thus, Sections 1604(a) and (b) define the term "foreign state" for purposes of all FSIA provisions, with one exception (Section 1608) not at issue here.

With respect to the third limitation, the FSIA does not define the phrase "based upon."

C. Overview of Facts

1. OBB

OBB operates the passenger rail service within Austria, is an instrumentality of the Republic of Austria, and has no offices or operations in the U.S.

2. The Rail Pass Experts

Sachs bought her Eurail pass online from Rail Pass Experts ("RPE"), a Massachusetts-based internet ticket seller. OBB has no contractual relation with RPE. RPE may be a sub-agent of The Eurail Group, an entity incorporated and based in Luxemburg, whose members include 30 rail carriers including OBB. The Eurail pass purchased by Sachs was for travel entirely in Europe and did not provide for transportation from or to the U.S.

3. The Injury

In 2007, as Sachs attempted to board a train in Innsbruck, Austria bound for Prague, she fell between the tracks and her legs were crushed by the train, requiring amputation. Sachs claims that OBB caused her injuries by negligently designing the boarding platforms and moving the train. OBB disagrees and contends that Sachs attempted to board a moving train.

4. Procedural History

Sachs filed a personal injury suit against OBB in U.S. District Court for the Northern District of California, alleging claims for negligence, strict liability for design defect, strict liability for failure to warn about design defect, breach of implied warranty of merchantability, and breach of implied warranty of fitness. OBB brought a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1), (2) and (6), contending, *inter alia*, that the court lacked subject matter jurisdiction under the FSIA. Sachs opposed the motion, contending that her claims satisfied the FSIA commercial activity exception.

a. District Court Decision

The district court granted OBB's motion to dismiss. "The FSIA makes clear . . . that the relevant commercial activity must be undertaken 'by the foreign state.' 28 U.S.C. § 1605(a)(2)." App. at 105. Since Sachs sought to "imput[e] the actions of an alleged 'sub-agent' ([RPE]) to a principal (OBB) via an alleged 'agent' (Eurail Group)," the court followed *Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009) (*per curiam*), *cert. denied*, 120 S.Ct. 3497 (2010) (incorporating the *Bancec* factors). App. at 106-108. Applying *Bancec*, the district court held that "[t]he mere fact that OBB has authorized the Eurail Group to sell and distribute rail passes for travel over its railways, and that such a pass was sold by a third party travel agent to plaintiff is simply insufficient to establish

the day-to-day involvement or 'principal-agent' relationship necessary to defeat the presumption of separate juridical status." *Id.* at 108-109. Sachs's "unwieldy theory of subject matter jurisdiction would seem to ensnare all thirty members of the Eurail Group." *Id.* at 109. "The court finds the connection between OBB and [RPE] too attenuated to establish subject matter jurisdiction." *Id*.

b. Ninth Circuit Panel Decision

The panel affirmed, holding that "Sachs'[s] argument for jurisdiction is scattershot but is premised upon the fact that the sale of the Eurail pass by [RPE] is a commercial activity that should be imputed to OBB . . . But OBB denies that it was commercial activity *by the state* because any connection between [RPE] and OBB is so attenuated." App. at 72.

"We previously grappled with the question of which acts could be attributed to a foreign state under the FSIA in [*Holy See*]." App. at 73. *Holy See* applied *Bancec* to the FSIA jurisdictional analysis, joining the Fifth and D.C. Circuits. 557 F.3d at 1079-1080. *Bancec* had considered when acts of a foreign state may be attributed to its agent. 462 U.S. at 620. This Court held that the FSIA has a "presumption of separate juridical status" for agents of foreign states that may be overcome when (1) "a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created" or

(2) recognizing the presumption "would work fraud or injustice." *Id.* at 624 and 629.

The panel held that "Sachs's allegations do not withstand [*Bancec*] scrutiny." App. at 76. Sachs could not show day-to-day control by OBB over RPE. At best, Sachs could allege that "OBB, as a part-owner along with thirty other owners, wielded some degree of control over Eurail Group and was aware that Eurail Group used U.S. sales agents like [RPE]." *Id.* at 76-77. But OBB was not even aware that the RPE existed. *Id.* at 77. Nor was OBB "involved in Eurail Group's affairs to this high degree." *Id.* "Eurail Group has its own independent management." *Id.* "The connection between OBB and [RPE] is not close enough under the first prong of the *Bancec* standard." *Id.* The second prong also cannot be met. "OBB itself engages in no commercial activity in the United States, presumably in part to retain immunity from suit in American courts. Any injustice that results is no greater than in the mine-run of cases – jurisdiction over a foreign state is, after all, ordinarily not available." *Id.* The panel viewed the facts as "a far cry" from those in *Bancec*. *Id.*

c. Decision Upon Rehearing *En Banc*

The *en banc* majority reversed, holding that RPE's commercial acts in the U.S. could be imputed to OBB, and Sachs's claims were based upon that commercial activity.

First, the Ninth Circuit broadly held: "[a] foreign-state owned common carrier, such as a railway or airline, engages in commercial activity in the United States when it sells tickets in the United States through a travel agent regardless of whether the travel agent is a direct agent or subagent of the common carrier." App. at 4.

Rather than applying the FSIA's express and limited definition of an "agency" of a "foreign state" to determine if the acts of RPE could be attributed to OBB, the Ninth Circuit resorted to "broad agency principles" and "traditional agency principles." App. at 15. "As long as the agent or subagent acts with actual authority, those acts can be imputed to the foreign state." *Id.* Relying simply on the fact that OBB honored the Eurail pass, it held that the commercial acts of RPE could be attributed to OBB. *Id.* at 18-19. "Because we conclude RPE acted as an authorized agent of OBB, we impute RPE's sale of the Eurail pass in the United States to OBB." *Id.* at 19-20.

The Ninth Circuit rejected OBB's contention that common-law principles of agency are inapplicable under the plain language of the FSIA unless the alleged agent first meets the statutory definition of "agency" of a foreign state under Section 1603(b) of the FSIA. App. at 21-22.

To justify its decision not to apply the FSIA definition, the Ninth Circuit relied on "common sense" and its "belief" of what Congress had intended:

"Common sense . . . tells us that an agent that carries on commercial activity for a foreign sovereign in the United States does not need to be an agency or instrumentality of a foreign state under § 1603(b)." App. at 23. Similarly, "we believe that Congress contemplated that the sale of tickets by travel agents within the United States for passage on foreign-sovereign owned common carriers would constitute 'commercial activity carried on in the United States by the foreign state.' " *Id.* at 26-27.

Second, the Ninth Circuit held that Sachs's claims were "based upon" the subject commercial activity. Because "the sale of the Eurail pass is an essential fact that Sachs must prove to establish her passenger-carrier relationship with OBB, a nexus exists between an element of Sachs's negligence claim and the commercial activity in the United States." App. at 35. "Because the sale of the Eurail pass in the United States forms an essential element of each of Sachs's claims, we conclude that Sachs's claims are 'based upon a commercial activity carried on in the United States' by OBB." *Id.* at 40.

In dissent, Judge O'Scannlain (joined by Chief Judge Kozinski and Judge Rawlinson) disagreed with the majority, stating that their common law test was far too broad and disregarded the FSIA definition of "agency." Applying the presumption of consistent usage to the term "foreign state" and finding that *Bancec* "fits the statutory text well," he concluded that RPE's acts could not be imputed to OBB. App. at 47, 51-52 and 55-57.

Chief Judge Kozinski wrote a separate dissent focusing on the "based upon" requirement, finding the majority's holding in conflict with this Court's decision in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). This Court had observed that the phrase "based upon" "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." App. at 62 (quoting *Nelson*, 507 U.S. at 357). This Court also clarified that it was not "suggest[ing] that the first clause of § 1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state." *Id.* (citing *id.* at 358 n. 4). Judge Kozinski stated that "[s]ome of our cases have misread this holding – that a claim *can* be based upon commercial activity even if proving that activity won't establish *every* element of the claim – for an endorsement of the converse proposition – that a claim *is* based upon commercial activity so long as proving that activity will establish at least *one* element of the claim." *Id.* at 63. He concluded that the majority's "broad interpretation" of the "based upon" requirement "runs contrary to our 'background rule that foreign states are immune from suit,' subject only to 'narrow exceptions.'" *Id.* (citations omitted).

Stay of mandate was granted by Judge Gould.

———♦———

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT HAS DISREGARDED THE FSIA STATUTORY LIMITATIONS AND THIS COURT'S DECISION IN *BANCEC* AND BROADLY EXPANDED SUBJECT MATTER JURISDICTION UNDER THE COMMERCIAL ACTIVITY EXCEPTION OF THE FSIA, CREATING A CIRCUIT SPLIT, AND UNCERTAINTY AND CONFUSION IN THE LAW

Relying on general common law principles, the Ninth Circuit has held, broadly, that "[a] foreign-state owned common carrier, such as a railway or airline, engages in commercial activity in the United States when it sells tickets in the United States through a travel agent regardless of whether the travel agent is a direct agent or subagent of the common carrier." App. at 4. Under this holding, the sale of a travel ticket in the U.S. is sufficient to establish commercial activity in the U.S., *regardless of whether travel occurs entirely outside of the U.S.*

The Ninth Circuit should have applied the FSIA definitions of a "foreign state" and "agency," which are designed to limit application of the subject exception to commercial activity in the United States "by the foreign state." In the alternative, the Ninth Circuit should have applied *Bancec* to determine whether RPE's acts could be imputed to OBB. Had the Ninth Circuit applied the FSIA definition or *Bancec*, it would have concluded that RPE's acts cannot be imputed to OBB and the subject exception does not

apply. The *en banc* decision is in conflict with relevant decisions of this Court and other Circuits.

A. The Ninth Circuit's Holding Establishes a Precedent Divorced from the Statutory Text of the FSIA, Which This Court Should Correct

Passage of the FSIA followed ten years of academic and legislative efforts to create a consistent framework for determination of immunity when foreign states are sued. *See* HR Rep. No. 94-1487, p. 9 (1976), U.S. Code Cong & Admin. News 1976, p. 6607. "Congress responded to the inconsistent application of sovereign immunity by enacting the FSIA in 1976." *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010). "Congress sought to remedy these problems by enacting the FSIA, *a comprehensive statute* containing a set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Rep. of Austria v. Altmann*, 541 U.S. 677, 691 (2004) (emphasis added) (citing *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983)).

Thus, the FSIA is the "*sole basis* for obtaining jurisdiction over a foreign state in our courts." *Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (emphasis added); *Nelson*, 507 U.S. at 355 ("Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court

lacks subject-matter jurisdiction over a claim against a foreign state."). By applying common law agency principles, the Ninth Circuit contradicts this Court's holding that the FSIA is the "*sole basis*" for obtaining jurisdiction over a foreign state. The Ninth Circuit's opinion is also contrary to its prior rulings and creates Circuit splits.[2]

When analyzing the FSIA, "we begin with the text of the statute." *Limtiaco v. Camacho*, 549 U.S. 483, 488 (2007). Under the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" unless the case falls within certain narrow statutory exceptions. 28 U.S.C. § 1604.

The only exceptions to immunity under the FSIA are set forth in Sections 1605 and 1607. Courts have consistently held that these exceptions are interpreted *narrowly*. *E.g.*, *McKesson Corp. v. Islamic Rep. of Iran*, 672 F.3d 1066, 1075 (D.C. Cir. 2012) ("FSIA established a broad grant of immunity for foreign

---

[2] *See, e.g., Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1055 (9th Cir. 2009) ("states are immune from the jurisdiction of United States courts, subject only to specific exceptions . . . sole basis for obtaining jurisdiction over a foreign state in federal court is the existence of an exception to the FSIA."); *FG Hemisphere Assoc., LLC v. République du Congo*, 455 F.3d 575, 584 (5th Cir. 2006) ("FSIA sets forth the sole and exclusive standards used by courts in the United States to resolve sovereign immunity issues."); *Cabiri v. Gov't of Rep. of Ghana*, 165 F.3d 193, 196 (2d Cir. 1999) (FSIA is "sole source for subject matter jurisdiction over any action against a foreign state.").

sovereigns that can only be abrogated by one of the statute's narrowly drawn exceptions."); *Garb v. Rep. of Poland*, 440 F.3d 579, 587 (2d Cir. 2006) (interpreted commercial activity exception "narrowly"); *Frovola v. Union of Soviet Soc. Republics,* 761 F.2d 370, 377 (7th Cir. 1985) (waiver exception construed "narrowly"). The Ninth Circuit has concurred. *See Af-Cap, Inc. v. Chevron Overseas Ltd.*, 475 F.3d 1080, 1088 (9th Cir. 2007) (construed waiver exception narrowly).

However, the *en banc* opinion parts with settled law and holds that "Congress intended the commercial-activity exception *to be read broadly*," invoking traditional agency principles. App. at 15 ("Under traditional agency principles, the foreign state may engage in commerce in the United States indirectly by acting through its agents or subagents. As long as the agent or subagent acts with actual authority, those acts can be imputed to the foreign state.") (citation omitted).

The commercial activity exception applies where "the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). It imposes three limitations: (1) there must be "commercial activity"; (2) "carried on in the United States by the foreign state"; and (3) the lawsuit must be "based upon" that commercial activity.

With respect to the second limitation, Congress has mandated that the Section 1603 definitions apply to *all provisions* in the FSIA except only Section 1608 (a service of process clause). Subsection (a) states that

"[a] 'foreign state,' except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." Subsection (b) then provides that "[a]n 'agency or instrumentality of a foreign state' means any entity – (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country."

Thus, to determine whether the acts of RPE were acts "by the foreign state," the Ninth Circuit should have looked to the definitions of "foreign state" and "agency" to decide if RPE is an agent of OBB. This Court instructed in *Samantar* that the definition of "foreign state" in the FSIA "*specifically delimits* what counts as an 'agency or instrumentality.'" 560 U.S. at 314 (citing Section 1603(b)) (emphasis added).[3] The Ninth Circuit's invocation of common law to determine whether an agent's acts can be imputed to the

[3] The issue in *Samantar* was whether a government official was a "foreign state" under the FSIA. This Court held that, although such an interpretation was literally possible, that is not what the FSIA definition provides. This Court also rejected efforts to look outside of the FSIA to justify such a reading. 650 U.S. at 314-326; *accord, Dole Food Co. v. Patrickson*, 538 U.S. 468, 476-477 (2003) (analyzing FSIA definition to determine whether subject entity was instrumentality of foreign state).

foreign state conflicts with *Samantar* and other precedents that apply FSIA definitions to make the instrumentality or agency determination. *E.g., In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 96 F.3d 932, 941 (7th Cir. 1996); *State Bank of India v. NLRB*, 808 F.2d 526, 535 (7th Cir. 1986); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1106 (5th Cir. 1985); *Alejandre v. Telefonica Larga Distancia, de Puerto Rico, Inc.,* 183 F.3d 1277, 1283 (11th Cir. 1999).

If the Ninth Circuit had applied the definition in the FSIA, it would have necessarily concluded that the acts of RPE cannot be imputed to OBB. In its quest to avoid this result, it ignored the plain language of the FSIA, and opened the flood gates to litigation with a vague common law agency test that reinstates the pre-codification uncertainty the FSIA was intended to avoid.

As Judge O'Scannlain's dissent noted, the *en banc* opinion is contrary to the canon of consistent usage, wherein "identical words used in different parts of the same act are intended to have the same meaning." *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1990); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008) (courts must "ensure that the statutory scheme is coherent and consistent.").

B. The Ninth Circuit's Common Law Agency Test Is Contrary to FSIA Precedents and Inserts Uncertainty into the Law, Warranting Review by This Court

The Ninth Circuit based its decision not to apply the FSIA's definition of "agency" and to adopt a vague common law agency test on "common sense" and the majority's "belief" as to congressional intent. These justifications conflict with settled law that the provisions of the FSIA are the "sole basis" for asserting jurisdiction over claims against foreign states and instrumentalities.

The Ninth Circuit stated that "*[c]ommon sense* . . . tells us that an agent that carries on commercial activity for a foreign sovereign in the United States does not need to be an agency or instrumentality of a foreign state under § 1603(b)." App. at 23 (emphasis added). This "common sense"-based departure from the FSIA express definition violates the Congressional mandate that Sections 1604(a) and (b) establish the definition of "foreign state" for purposes of *all provisions* in the FSIA except Section 1608. Because Congress has announced the only exception, the Ninth Circuit was required to apply the definition to its analysis. *See Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295 (1970) ("This conclusion is required because Congress itself set forth the only exceptions to the statute, and those exceptions do not include this situation.").

Similarly, the Ninth Circuit stated that "*we believe* that Congress contemplated that the sale of tickets by travel agents within the United States for passage on foreign-sovereign owned common carriers would constitute 'commercial activity carried on in the United States by the foreign state.' 28 U.S.C. § 1605(a)(2)." App. at 26-27. The court offered no basis for this belief. Rather, it reasoned that "[t]he position that OBB advances would negate the possibility of commercial activity by a state-owned railway or airline within the United States through a travel agent. *We cannot believe* that this is what Congress intended." App. at 25 (emphasis added). "*There is no reason to think* that Congress intended such a chaotic result." App. at 27 (emphasis added). The court's concerns lack merit. For example, if a foreign carrier undertakes to transport a passenger from or to the U.S., the carrier would have engaged in commercial activity "in" the U.S. and be subject to suit here. Where, as here, transportation was provided *entirely outside of the U.S.*, there is no reason to bring the foreign carrier into U.S. court. The "chaos" has been created by the Ninth Circuit opening the door to litigation on a vague common law test.

Another justification of the *en banc* opinion is that the FSIA allegedly is not in "derogation" of common law principles like agency law:

> "To abrogate common-law principles of agency, the FSIA must speak directly to the question addressed by the common law. Because the FSIA codified our common law of

> sovereign immunity, *we begin with the presumption that the statute maintains common-law principles.* That Congress defined the term 'agency or instrumentality of a foreign state' *does not convince us that Congress intended to displace common-law agency principles* under the statute for purposes of assessing commercial activity within the United States."

App. at 23-24 (citations omitted; emphasis added).

However, the conclusion that the FSIA is not in derogation of the common law was disputed in a dissent in another recent Ninth Circuit case, *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1044 (9th Cir. 2010) (Gould, dissent, joined by Chief Judge Kozinski), which dissent reached the exact opposite conclusion:

> "When the FSIA establishes a comprehensive system for finding exceptions to sovereign immunity in its specified categories, thus outlining when sovereign immunity should be considered to have been waived permitting suit against foreign nations in the United States, *these statutory exceptions to sovereign immunity, being in derogation of common law, must be strictly construed, not expansively construed.* If we give a strict construction to § 1605(a)(3), I think we logically would say that it is intended to cover violations of international law by the nation whose sovereignty is waived. But the majority, saying it covers violations of international law by anyone, is giving this provision, in

> derogation of the common law concept of sovereign immunity, *an expansively unreasonable construction.*"

616 F.3d at 1044 (Gould, dissenting) (emphasis added). The *en banc* opinion invokes the derogation argument also to reach an expansively unreasonable construction.

Further, the *en banc* opinion creates a clear split with the Seventh Circuit which has held that since FSIA "exceptions *are in derogation of the common law, we must not read them broadly.* Statutes in derogation of the common law are *narrowly construed*." *Haven v. Polska*, 215 F.3d 727, 731 (7th Cir. 2000) (emphasis added).

By going outside of the FSIA, the *en banc* opinion also disregards Congress's intent: "The central premise of the FSIA is that 'decisions on claims by foreign states to sovereign immunity are best made by the judiciary *on the basis of a statutory regime which incorporates standards recognized under international law.'" Cassirer*, 616 F.3d at 1041 (emphasis added) (Gould, dissent; Kozinski concurring) (citing H.R.Rep. No. 94-1487, at p. 14 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613).

Further, the *en banc* opinion tried to distinguish between invocation of immunity and application of an exception. App. at 21-23. This is an artificial distinction because these are simply two steps in the same immunity determination, and the FSIA definitions apply to Sections 1604 and 1605. As noted by Judge

O'Scannlain, "[t]he majority . . . treats the meaning of 'foreign state' for the purposes of § 1604 and the meaning of 'foreign state' for the purposes of § 1605 as separate inquiries. *See* Op. at 595 (contrasting the status required to claim sovereign immunity and the status required for activity to be attributable under the commercial-activity exception). In light of the presumption of consistent usage and Supreme Court precedent applying it to the FSIA, I cannot accept the majority's assumption that the interpretation of this term differs so greatly between provisions."). App. at 49.

Finally, this Court and lower courts have rejected attempts to create jurisdiction against foreign states by turning to extraneous sources where there is none under the FSIA. *See Amerada Hess*, 488 U.S. at 433-438; *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 246 (2d Cir. 2003); *Carpenter v. Rep. of Chile*, 610 F.3d 776, 778-779 (2d Cir. 2010). The Ninth Circuit also has created a Circuit split by using extraneous common law agency principles to shoehorn jurisdiction where there is none under the FSIA.

The *en banc* opinion creates confusion in the law which this Court should correct. It does not even clarify what "common law principles" it applies, opening the door to application of common law principles as diverse as the law of the 50 States. Thus, whether a foreign state is entitled to sovereign immunity *could differ from state to state, and judge to judge.* By concluding that "[a]s long as the agent or subagent acts with actual authority, those acts can be

imputed to the foreign state," App. at 15, the opinion re-wrote the FSIA, since the agency definition and subject exception *contain no reference* to the concept of authority.

In sum, the Ninth Circuit has ignored this Court's admonition that the FSIA is a "*comprehensive statute*," *Altmann*, 541 U.S. at 691, and improperly reached outside of the FSIA to create jurisdiction. There was no need to do so because the FSIA defines the term "agency." "It is a proper part of the judicial function to make law as a necessary by-product of the process of deciding actual cases and controversies. But to reach out so blatantly and unnecessarily to make new law in a case of this kind is unabashed judicial activism." *Florida v. Wells*, 495 U.S. 1, 13 (1990) (Stevens, concurring).[4]

C. This Court Should Clarify Whether the FSIA Definitions or *Bancec* Governs the Analysis Whether the Acts of an Alleged Agent May Be Imputed to a Foreign State

Some Circuits invoke *Bancec* to determine whether acts of an alleged agent may be imputed to a

---

[4] As Judge O'Scannlain's notes, *Barkanic v. Gen. Admin. of Civil Aviation of the Peoples Rep. of China*, 822 F.2d 11 (2d Cir. 1987) and *Kirkham v. Societe Air France*, 429 F.3d 288 (D.C. Cir. 2005), did not "analyze when the acts of agents can be attributed to a foreign state," App. at 57, and, there, travel originated or ended in the U.S.

foreign state. Creating a split, the Ninth Circuit declined to apply *Bancec* contradicting its prior decision, *Holy See, supra*. The district court and panel applied *Bancec*, like Judge O'Scannlain's dissent. This Court should clarify whether the FSIA definition or one of these views should prevail.

This Court in *Bancec* recognized a presumption of separate juridical status for alleged agents of foreign states, and held that the presumption would be negated (1) "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created" or (2) where recognizing the presumption "would work fraud or injustice." 462 U.S. at 629-634.

The Ninth Circuit refused to follow *Holy See*, App. at 20-21, which held that "*Bancec* provides a workable standard for deciding" the question whether "a particular individual or corporation is an agent of a foreign state," 557 F.3d at 1079. It has created a split with the Fifth and D.C. Circuits. *See Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533-534 (5th Cir. 1992) ("Although *Bancec*'s description of the basis for disregarding the separate juridical status of foreign agencies occurred in a discussion of substantive liability, its principles have been applied to FSIA jurisdictional issues. Hence, where . . . jurisdiction depends on an allegation that the particular defendant was an agent of the sovereign, the plaintiff bears the burden of proving this relationship."); *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 847-848 (D.C. Cir. 2000) (same).

Rather, the district court's ruling was consistent with the Fifth and D.C. Circuits. Applying *Bancec*, it held that "[t]he mere fact that OBB has authorized the Eurail Group to sell and distribute rail passes for travel over its railways" made a "connection between OBB and the Rail Pass Experts *too attenuated* to establish subject matter jurisdiction." App. at 108-109 (emphasis added).

The appeals panel affirmed also following *Bancec* as applied by *Holy See*, which held that Doe's allegations were insufficient to overcome the presumption of the Holy See's separateness. 557 F.3d at 1079. Doe had not alleged "day-to-day, routine involvement" by the Holy See in its alleged agents' operations to establish a principal-agent relationship. *Id*. Doe also had "not alleged that the Holy See . . . inappropriately used the separate status of the corporations to its own benefit, as in *Bancec*, or that the Holy See created the corporations for the purpose of evading liability for its own wrongs." *Id.* at 1080. The appellate panel here also held that Sachs's "allegations do not withstand this scrutiny." App. at 76.

This Court should articulate the applicable test. The Ninth Circuit has displayed a recent tendency to use agency analysis as the basis for subjecting foreign corporations, and now, foreign states to jurisdiction. It did so in *Daimler AG v. Bauman*, 571 U.S. ___, 134 S.Ct. 746 (2014), and was reversed. There, the Ninth Circuit premised jurisdiction on ascertaining the "importance" of an agent's actions gauged by a principal's "hypothetical readiness to perform those

services if [the agent] did not exist" – a standard that "will always yield a pro-jurisdiction answer." 134 S.Ct. at 749.

The *en banc* opinion's agency formulation also is stacked for a "pro-jurisdiction answer." Because foreign states invariably act through agents, any commercial activity in the U.S. by an alleged agent of a foreign state loosely defined under common law may create jurisdiction over the state. The Ninth Circuit has adopted a liberal test that (1) "where a common carrier authorizes a travel intermediary to 'issue tickets on its behalf and to collect and hold customer payment, the intermediary acts as the [carrier's] agent,'" and (2) "as to third parties, an action taken by a subagent carries the legal consequences for the principal that would follow were the action instead taken by the appointing agent." App. at 18 (citations omitted).

The FSIA's language does not compel any "agency" standard beyond that provided in its express and limited definition. The Ninth Circuit's invocation of vague common law principles disregards this Court's holding that the FSIA "specifically delimits what counts as an agency." *Samantar*, 560 U.S. at 314-315. If courts must look outside the FSIA, it would be helpful to have this Court clarify whether *Bancec* is the applicable test. *Bancec*, as applied here, would give deference to the presumption in favor of immunity, but is a test that still is not grounded in the plain text of the FSIA definition.

II. THE NINTH CIRCUIT HAS MISREAD THIS COURT'S PRECEDENT REGARDING THE FSIA'S REQUIREMENT THAT CLAIMS MUST BE "BASED UPON" COMMERCIAL ACTIVITY BY THE FOREIGN STATE, FURTHER EXPANDING JURISDICTION BEYOND THE LIMITS OF THE FSIA, AS IDENTIFIED BY JUDGE KOZINSKI IN DISSENT

With respect to the third limitation, the FSIA does not define the meaning of the term "based upon" in 28 U.S.C. § 1605(a)(2), but this Court twenty years ago adopted a pragmatic approach to that analysis. Under that approach, courts must identify the gravamen of the action and the specific commercial acts that the claims are "based upon" in order to determine whether the exception applies. *See Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). The *en banc* opinion misreads *Nelson* and creates a broad test that merely requires a nexus between any act in the subject course of events and any element of a claim under U.S. law. *Nelson* recognized the perils of such an overly permissive reading of the "based upon" requirement. This Court should correct the erroneous *en banc* opinion.

As Judge Kozinski observed in dissent, the Ninth Circuit's holding that Sachs's claim is "based upon" commercial activity in the U.S. "conflict[s] with Supreme Court precedent." App. at 62.

As held in *Nelson*, the "based upon" phrase "is read most naturally to mean those elements of a

claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 507 U.S. at 357 (citing with approval *Callejo v. Bancomer, S.A.,* 764 F.2d 1101, 1109 (5th Cir. 1985) (focus should be on the "gravamen of the complaint")); *accord, Kensington Int'l Ltd. v. Itoua,* 505 F.3d 147, 156 (2d Cir. 2007) (under the "based upon" language, the "'degree of closeness' must exist between the commercial activity and the gravamen of the plaintiff's complaint.").

However, this Court clarified that "[w]e do not mean to suggest that the first clause of §1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state, and we do not address the case where a claim consists of both commercial and sovereign elements." *Nelson,* 507 U.S. at 358 n. 4. As Judge Kozinski notes, the Ninth Circuit misreads this clarification – "that a claim *can* be based upon commercial activity even if providing that activity won't establish *every* element of the claim – for an endorsement of the converse proposition – that a claim *is* based upon commercial activity so long as proving that activity will establish at least *one* element of the claim." App. at 63 (emphasis in original).

First, the Ninth Circuit's opinion is contrary to *Nelson*'s holding that the focus should be on the theory of the case or gravamen of the complaint. In *Nelson*, an American was recruited in the U.S. to work for a state hospital in Saudi Arabia. After complaining of conditions there, he was arrested and harmed. When he returned to the U.S., he sued Saudi Arabia. This Court held that the claim was not "based

upon" the commercial activity in the U.S., but the torts that occurred in Saudi Arabia, and thus the commercial activity exception was not satisfied:

> "We begin our analysis by identifying the particular conduct on which the Nelsons' action is 'based' for purposes of the Act."

Nelson, 507 U.S. at 356-357.

> "In this case, the Nelsons have alleged that petitioners recruited Scott Nelson for work at the hospital, signed an employment contract with him, and subsequently employed him. *While these activities led to the conduct that eventually injured the Nelsons, they are not the basis for the Nelsons' suit. Even taking each of the Nelsons' allegations about Scott Nelson's recruitment and employment as true, those facts alone entitle the Nelsons to nothing under their theory of the case.* The Nelsons have not, after all, alleged breach of contract, *see supra,* at 1476, but personal injuries caused by petitioners' intentional wrongs and by petitioners' negligent failure to warn Scott Nelson that they might commit those wrongs. *Those torts, and not the arguably commercial activities that preceded their commission, form the basis for the Nelsons' suit.*"

Nelson, 507 U.S. at 358 (emphasis added).

Similarly, Sachs's claims are "based upon" the alleged tortious acts of OBB in Austria, and not on the sale of the rail pass in the U.S. The commercial

activity in the U.S., without more, entitles Sachs to nothing. The Ninth Circuit has done away with the "based upon" requirement by holding that it suffices that one element of any claim be based on any fact occurring in the U.S.; here, the ticket sale by RPE unrelated to OBB.[5]

It is noteworthy that the FSIA contains a tortious act exception. 28 U.S.C. § 1605(a)(5). However, Congress created jurisdiction only over torts occurring in the United States. *See Amerada Hess*, 488 U.S. at 439, 440-441; *Frovola,* 761 F.2d at 379. Thus, Congress indicated that acts involving torts occurring entirely overseas (like this case) would not be grounds for jurisdiction under the FSIA. The Ninth Circuit runs afoul of the FSIA for it attempts to create tort jurisdiction where Congress has said there is none.

And second, the *en banc* opinion "invites plaintiffs' lawyers to manufacture jurisdiction through artful pleading" (737 F.3d at 612, Chief Judge Kozinski dissent) – a practice which this Court warned about in *Nelson*:

> "In addition to the intentionally tortious conduct, the Nelsons claim a separate basis

[5] In contrast, in *Terenkian v. Rep. of Iran*, 694 F.3d 1122 (9th Cir. 2012), the Ninth Circuit had held that under *Nelson*, "where a plaintiff's claim was based on activities [outside of the U.S.] (and sounded in tort rather than contract), the plaintiff could not abrogate the foreign nation's sovereign immunity under the first clause of the FSIA by pointing to preliminary commercial activities in the United States."). *Id.* at 1132-1133.

> for recovery in petitioners' failure to warn Scott Nelson of the hidden dangers associated with his employment. The Nelsons allege that, at the time petitioners recruited Scott Nelson and thereafter, they failed to warn him of the possibility of severe retaliatory action if he attempted to disclose any safety hazards he might discover on the job. *See supra,* at 1476. In other words, petitioners bore a duty to warn of their own propensity for tortious conduct. *But this is merely a semantic ploy. For aught we can see, a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it. To give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity.*"

Nelson, 507 U.S. at 363 (emphasis added).

By holding that the "based upon" limitation of the commercial activity exception is satisfied merely by establishing that "an element" of a claim (here, the ticket sale) occurred in the United States, the Ninth Circuit contravenes this Court's admonition in *Nelson*. Here, the claims are "based upon" allegedly tortious conduct that occurred entirely outside of the United States. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 758 (2004) ("[i]t will virtually always be possible to assert that the negligent . . . activity that injured the plaintiff

[abroad] was the consequence of faulty training, selection or supervision . . . in the United States").

As Chief Judge Kozinzki observed, since "plaintiff's claim arises from events that transpired entirely in Austria, it isn't 'based upon' commercial activity carried on in the United States." App. at 62. "Our case illustrates the expansive sweep of the majority's approach. Plaintiff had a train ticket to travel from Austria to the Czech Republic. She was injured due to defendant's alleged negligence when she tried to board. The injury and any negligence occurred in Austria. But, because plaintiff happened to buy her ticket online from a vendor in Massachusetts, a federal court in California now asserts power to hale the Austrian government before it and make it defend against a claim based on facts that occurred in Austria. This makes as much sense as forcing Mrs. Palsgraf to litigate her case in Vienna." App. at 65. In the age of the internet, these concerns apply broadly because one can purchase, online, a ticket for a variety of services and functions entirely overseas.

In sum, although *Nelson* focused on the "theory" and "gravamen" of the case, the *en banc* opinion focuses on whether any "element" of a legal claim has a nexus to the United States, holding that the mere sale of a ticket confers jurisdiction. Other Circuits are in conflict. *See, e.g., Transatlantic Shiffahrtskontor GMBH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384, 390 (2d Cir. 2000) (term implies a "causal relation"); *Gen. Elec. Capital Corp. v. Grossman,* 991 F.2d 1376, 1382-1384 (8th Cir. 1993) (enquiry is where commercial activity "primarily"

took place). Therefore, this Court should clarify further the "based upon" requirement.

III. THE IMMEDIATE FOREIGN POLICY IMPLICATIONS AND RADICAL EXPANSION OF FEDERAL JURISDICTION FOR FOREIGN STATES COUNSELS IMMEDIATE REVIEW

> "By reason of its authority over foreign commerce and foreign relations, Congress has the *undisputed power* to decide, as a matter of federal law, *whether and under what circumstances foreign nations should be amenable to suit in the United States.* Actions against foreign sovereigns in our courts *raise sensitive issues concerning the foreign relations of the United States*, and the primacy of federal concerns is evident."

Verlinden, 461 U.S. at 493 (emphasis added).

As noted, passage of the FSIA followed ten years of academic and legislative efforts to create a consistent jurisdictional framework. The commercial activity exception is the FSIA's "*most significant . . .* exception" to foreign sovereign immunity. *Rep. of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992) (emphasis added).

Thus, the Ninth Circuit's radical expansion of jurisdiction warrants certiorari because it may have serious foreign policy implications. "In interpreting the FSIA, we are mindful that judicial resolution of

cases bearing significantly on sensitive foreign policy matters, like the case before us, might have serious foreign policy implications which courts are ill-equipped to anticipate or handle." *Sampson v. Fed. Rep. of Germany,* 250 F.3d 1145, 1155-1156 (7th Cir. 2001); J.H. Trotter, *Narrow Construction of the FSIA Commercial Activity Exception: Saudi Arabia v. Nelson,* 33 Va. J. Int'l L. 717, 733-734 (1993) ("As exceptions undergo judicial expansion . . . the strains on foreign policy intensify."). "Clear boundaries for the foreign sovereign immunity exceptions are crucial to the FSIA's role of balancing stable international commerce against the effective execution of foreign policy. A vague policy of expansive jurisdiction could appear unduly arbitrary and invite reciprocal scrutiny of U.S. law enforcement by foreign courts." *Id.* at 733.

When U.S. courts take an expansive approach to jurisdiction, there is also the risk of the assertion of retaliatory jurisdiction. *See* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 15 (1987) (several countries have enacted "retaliatory jurisdictional laws" in which their courts may exercise jurisdiction over persons "in circumstances where the courts of the foreigner's home state would have asserted jurisdiction").

Recently in *Daimler AG v. Bauman,* 134 S.Ct. 746 (2014), this Court held that "[t]he Ninth Circuit . . . paid little heed to the risk to international comity its expansive view of general jurisdiction posed." *Id.*

at 763. While *Daimler* dealt with personal jurisdiction over foreign private entities, the same concern applies here, *again*, with respect to the *en banc* opinion in the context of foreign states. The role of the FSIA as a jurisdictional gatekeeper is underscored by the fact that Due Process limitations on personal jurisdiction may not apply to foreign states. *See, e.g., Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 694 (7th Cir. 2012); *Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Rep.*, 582 F.3d 393, 398-400 (2d Cir. 2009); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95-100 (D.C. Cir. 2002).

If left standing after *Daimler*, the *en banc* opinion makes jurisdiction over foreign states broader than that over foreign private entities. This result is contrary to the FSIA's presumption of immunity. "A primary purpose of the FSIA is to make it difficult for private litigants to bring foreign governments into court, thereby avoiding affronting them." *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 207 (3d Cir. 2003).

Other nations "do not share the uninhibited approach to personal jurisdiction advanced by the [Ninth Circuit] Court of Appeals. . . . " *Daimler*, 134 S.Ct. at 763. "In the European Union . . . a corporation may generally be sued in the nation in which it is 'domiciled,' a term defined to refer only to the location of the corporation's 'statutory seat,' 'central administration,' or 'principal place of business.' ") *Id.* A broad assertion of jurisdiction can harm our dealings with foreign states. "The Solicitor General informs . . .

that 'foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments.'" *Id.* at 763.

The *en banc* opinion is far-reaching. Even it recognizes that "there are many national airlines and railroads worldwide that may market and sell tickets through agents or subagents in the U.S.," and that "throughout the world many foreign states own and operate legally independent passenger railways and airlines, which may qualify for sovereign immunity as an 'agent or instrumentality of a foreign state. . . . '" App. at 26 and n. 8-9. The *en banc* opinion will impact operations of instrumentalities of countries across the globe.

IV. THIS CASE, IN ITS CURRENT POSTURE, IS A GOOD VEHICLE FOR RESOLVING THESE IMPORTANT ISSUES

The legal issues presented here are cleanly framed. As Judge O'Scannlain observed, the "analytical task in this case is made easier by the limited nature of the parties' arguments." App. at 44. "[T]he only exception relevant to this appeal is the first clause of the commercial-activity provision" of the FSIA. *Id.* There were two distinct holdings: (1) what it means for activity to be "carried on in the United States *by the foreign state*"; and (2) what it means that the plaintiff's suit must be "based upon" that

activity. Both holdings are dispositive and create conflicts with this Court's and other Circuits' precedents.

The facts herein allow this Court to explore the limits of the first clause of the commercial activity exception in a manner that more complicated facts would not allow. OBB has been dragged into a U.S. court on the basis of an alleged sub-agent's actions, where OBB had no contractual relationship with, exercised no control over, nor had any management interest in, the sub-agent. As to the "based upon" requirement, this case presents the extreme situation where the alleged tort occurred entirely on foreign soil, with the purchase of a rail pass online being the only claimed nexus to the United States.

This Court has the benefit of the issues presented having been fully vetted, with majority and dissenting opinions by both the original and *en banc* panels.

From a procedural posture, OBB has not litigated the merits. The importance of resolving these issues now is reflected in the right of foreign states to interlocutory appeals of a denial of a motion to dismiss based on the FSIA. *See, e.g., Blue Ridge Investments, L.L.C. v. Republic of Argentina,* 735 F.3d 72, 80-81 (2d Cir. 2013) ("the general rule [is] that the denial of foreign sovereign immunity is immediately appealable").

Moreover, there is nothing to further develop. The opinion is dispositive and not open to change on remand.

Finally, this Court recently granted certiorari in another case involving the FSIA, *Rep. of Argentina v. NML Capital, Ltd.*, 134 S.Ct. 895 (2014). However, it involves the limited issue of post-judgment discovery in aid of execution, and not the broader provisions which govern whether a lawsuit may be initiated, at issue here.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

JUAN C. BASOMBRIO
Counsel of Record
DORSEY & WHITNEY LLP
600 Anton Boulevard
Suite 2000
Costa Mesa, California 92626
Telephone: (714) 800-1400
Facsimile: (714) 800-1499

STEVEN J. WELLS
DORSEY & WHITNEY LLP
50 South Sixth Street
Suite 1500
Minneapolis, Minnesota 55402
Telephone: (612) 340-2600
Facsimile: (612) 340-2868

Counsel for Petitioner OBB Personenverkehr AG

March 5, 2014

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAROL P. SACHS, *Plaintiff-Appellant,* v. REPUBLIC OF AUSTRIA; OBB HOLDING GROUP; OBB PERSONENVERKEHR AG, *Defendants-Appellees*.	No. 11-15458 D.C. No. 3:08-cv-01840-VRW OPINION

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted En Banc
March 21, 2013 – San Francisco, California

Filed December 6, 2013

Before: Alex Kozinski, Chief Judge, Stephen Reinhardt, Diarmuid F. O'Scannlain, Barry G. Silverman, Susan P. Graber, Kim McLane Wardlaw, Raymond C. Fisher, Ronald M. Gould, Marsha S. Berzon, Johnnie B. Rawlinson, and Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Gould;
Dissent by Judge O'Scannlain;
Dissent by Chief Judge Kozinski

SUMMARY*

Foreign Sovereign Immunities Act

Reversing the district court's dismissal of an action for lack of subject matter jurisdiction, the en banc court held that a foreign-state owned common carrier engages in commercial activity in the United States, and thus is not immune from suit under the Foreign Sovereign Immunities Act, when it sells tickets in the United States through a travel agent, regardless of whether the travel agent is a direct agent or subagent of the common carrier.

Agreeing with the Second and D.C. Circuits, the en banc court held that the sale of a Eurail pass to the plaintiff could be imputed to the defendant for purposes of establishing that it carried on commercial activity in the United States. In addition, the sale created "substantial contact" with the United States. The en banc court also held that the plaintiff's claims, which arose from a fall when she attempted to board a train in Austria, were "based upon" the defendant's commercial activity in the United States because the plaintiff showed a nexus between her claims and the sale of the Eurail pass. The en banc

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

court held, therefore, that the FSIA's commercial-activity exception applied.

Dissenting, Judge O'Scannlain, joined by Chief Judge Kozinski and Judge Rawlinson, wrote that the commercial-activity exception did not apply because the sale of the Eurail pass was not attributable to the defendant, and so the plaintiff failed to allege commercial activity "by the foreign state."

Dissenting, Chief Judge Kozinski agreed with Judge O'Scannlain that a foreign sovereign does not engage in commercial activity in the United States when a subagent over which it exercises no direct control sells tickets for passage on a common carrier wholly owned by that sovereign. Chief Judge Kozinski wrote that he would affirm the district court on the ground that the plaintiff's claim arose from events that transpired entirely in Austria, and thus was not "based upon" commercial activity carried on in the United States.

COUNSEL

Geoffrey Becker, Becker & Becker, Lafayette, California, for Plaintiff-Appellant.

Juan C. Basombrio, Dorsey & Whitney LLP, Irvine, California, for Defendant-Appellee.

OPINION

GOULD, Circuit Judge:

We must decide whether a resident of the United States has a domestic forum in which to bring a claim against a foreign common carrier, operated by a foreign sovereign entity, that sells tickets through a third-party agent or subagent in the United States. Carol P. Sachs filed a complaint against OBB Personenverkehr AG (OBB) in the United States District Court for the Northern District of California. Sachs sought damages for traumatic injuries that she sustained while trying to board an OBB train in Innsbruck, Austria.

The district court granted OBB's motion to dismiss for lack of subject-matter jurisdiction, concluding that OBB, as an instrumentality of the Republic of Austria, was immune from suit under the Foreign Sovereign Immunities Act of 1976 (FSIA). On appeal, Sachs argues that under the first clause of the FSIA's commercial-activity exception, the district court has subject-matter jurisdiction over her claims. We agree. A foreign-state owned common carrier, such as a railway or airline, engages in commercial activity in the United States when it sells tickets in the United States through a travel agent regardless of whether the travel agent is a direct agent or subagent of the common carrier. Under the FSIA, federal courts of the United States will have subject-matter jurisdiction over actions against a foreign sovereign common carrier that engages in commercial activity of this

kind as long as the plaintiff's claims are based upon that activity.

I

OBB Personenverkehr AG is a separate legal entity wholly owned by OBB Holding Group, a joint-stock company created by the Republic of Austria. OBB Holding Group is wholly owned by the Austrian Federal Ministry of Transport, Innovation, and Technology. OBB's main function is to operate passenger rail service within Austria. Like many of its counterparts in other European countries, OBB is a member of the Eurail Group, which is an association organized under Luxemburg law. According to OBB, Eurail Group is responsible for marketing and selling rail passes. Eurail passes are marketed to non-European residents, as they cannot be used by residents of Europe and nearby countries.

In early March 2007, Sachs purchased a four-day Eurail pass from the Rail Pass Experts (RPE) for travel in Austria and the Czech Republic. RPE is located in Massachusetts, but Sachs bought the Eurail pass online through the RPE website. Sachs's Eurail pass listed various disclaimers, including that "the issuing office is merely the intermediary of the carriers in Europe and assumes no liability resulting from the transport." The Eurail pass also stated that it is "non-transferable and only valid upon presentation of a passport or a valid travel document replacing the passport."

In late April 2007, Sachs arrived in Innsbruck, Austria, and presented her Eurail pass to OBB to purchase a couchette reservation for her trip from Innsbruck to Prague. Although Sachs would have been able to board the train to sit in an unassigned seat with the Eurail pass that she bought from RPE, she paid the €30.90 fee to upgrade her pass and reserve a couchette bed. The Eurail pass required customers to pay separately for upgrades of this kind.

When Sachs tried to board the train, she fell between the tracks. Her legs were crushed by the moving train. As a result of these injuries, both of Sachs's legs were amputated above the knee. Sachs alleges that OBB caused her injuries by negligently moving the train while she attempted to board. OBB disputes this allegation, claiming that the train was already moving when Sachs tried to board.

Sachs filed suit against OBB in the United States District Court for the Northern District of California.[1] Her complaint asserts claims for negligence; strict liability for a design defect; strict liability for failure to warn about a design defect; breach of implied warranty of merchantability; and breach of implied warranty of fitness. To support these claims, Sachs alleges (a) that she purchased the Eurail pass

[1] Sachs's complaint also named the Republic of Austria and the OBB Holding Group as defendants. The Republic of Austria was dismissed from the lawsuit when Sachs did not oppose the Republic of Austria's motion to dismiss. OBB Holding Group was not properly served and is not a party to this litigation.

through OBB's agent Eurail and the American-based company RPE; (b) that through the Eurail pass OBB agreed to provide railway transportation to Sachs during her April 2007 visit to Austria; and (c) that OBB, as a common carrier, owed her a duty of "utmost care."

OBB filed a motion to dismiss on June 21, 2010, arguing that it was entitled to sovereign immunity under the FSIA. In the alternative, OBB also argued that Sachs's complaint should be dismissed for *forum non conveniens,* lack of personal jurisdiction, and international comity. After a hearing and supplemental briefing on the motion, the district court granted OBB's motion to dismiss for lack of subject-matter jurisdiction on foreign-sovereign-immunity grounds. *Sachs v. Republic of Austria,* No. C 08-1840 VRW, 2011 WL 816854, at *4 (N.D. Cal. Jan. 28, 2011) (unpublished). The district court concluded that Sachs had not shown a connection between OBB and RPE sufficient to create a principal-agent relationship. As a result, the district court found that RPE's commercial activity in the United States could not be imputed to OBB. Sachs timely appealed.

A divided three judge panel of this court affirmed. *Sachs v. Republic of Austria,* 695 F.3d 1021, 1029 (9th Cir. 2012). The majority of judges agreed on result but not reasoning. Relying on our previous decision in *Doe v. Holy See,* 557 F.3d 1066 (9th Cir. 2009) (per curiam), the majority opinion concluded that RPE's sale of the Eurail pass could not be imputed to OBB for purposes of establishing jurisdiction

under the FSIA's commercial-activity exception. *Sachs,* 695 F.3d at 1025-26. The concurrence agreed that the district court properly dismissed the case for lack of subject-matter jurisdiction, but it argued that *Holy See* was inapposite because that case addressed a different exception under the FSIA. Instead, the concurrence argued that Sachs's claim failed under *Sun v. Taiwan,* 201 F.3d 1105 (9th Cir. 2000), because Sachs did not allege facts sufficient to show that her claims were "based upon" the sale of the Eurail pass in the United States. *Sachs,* 695 F.3d at 1029-30 (quoting 28 U.S.C. § 1605(a)(2)). The dissent explained that both *Holy See* and *Sun* were distinguishable from Sachs's case and that the plain language of the FSIA permits jurisdiction over OBB. *Id.* at 1032-33.

We ordered rehearing en banc to clarify whether the first clause of the FSIA commercial-activity exception applies to a foreign sovereign when a person purchases a ticket in the United States from a travel agency for passage on a commercial common carrier owned by that foreign state.

II

We review *de novo* the district court's determination of immunity under the FSIA. *Embassy of the Arab Republic of Egypt v. Lasheen,* 603 F.3d 1166, 1170 (9th Cir. 2010). A defendant asserting foreign sovereign immunity "may make either a facial or factual challenge to the district court's subject matter

jurisdiction." *Terenkian v. Republic of Iraq,* 694 F.3d 1122, 1131 (9th Cir. 2012), *cert. denied,* 2013 WL 1723794 (U.S. Oct. 7, 2013) (No. 12-1261). A facial challenge argues only that the facts as alleged in the complaint are insufficient to state a claim. *Id.* A factual challenge disputes the truth of the allegations that would otherwise be sufficient to invoke federal jurisdiction. *Id.*

OBB's challenge is factual. OBB submitted documentary evidence and a declaration to prove OBB's status as an agency or instrumentality of the Austrian government and to dispute the truth of Sachs's allegations that RPE sold the ticket as an authorized agent of OBB. Sachs submitted her own declaration and evidence to support her claim of jurisdiction under the FSIA's commercial-activity exception. When the district court relies on such evidence for its decision, we generally treat the jurisdictional attack as factual. *See Holy See,* 557 F.3d at 1073. For such a factual challenge, we must determine (1) whether Sachs has carried her burden to prove, by offering evidence, that the commercial-activity exception to foreign sovereign immunities applies and (2) whether OBB has carried its burden to prove, by showing a preponderance of evidence, that the exception is not applicable. *See Terenkian,* 694 F.3d at 1131-32.

III

The doctrine of foreign sovereign immunity has its roots in the common law, tracing back to the Supreme Court's decision in *Schooner Exchange v. McFaddon,* 11 U.S. 116 (1812), which extended "virtually absolute immunity to foreign sovereigns as 'a matter of grace and comity.'" *Samantar v. Yousuf,* 560 U.S. 305, 311 (2010) (quoting *Verlinden B.V. v. Cent. Bank of Nigeria,* 461 U.S. 480, 486 (1983)). After *Schooner Exchange,* federal courts routinely deferred to the State Department on whether to assume jurisdiction over an action against a foreign sovereign or its instrumentality. *Republic of Austria v. Altmann,* 541 U.S. 677, 689 (2004).[2] In 1952, the State Department adopted a "restrictive" theory of sovereign immunity. *Samantar,* 560 U.S. at 312. The restrictive theory of sovereign immunity recognizes that sovereigns are immune "with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." *Altmann,* 541 U.S. at 690 (internal quotation marks omitted). This shift was based on the philosophy that where foreign sovereigns engage in commercial dealings there is "a much smaller risk of affronting their sovereignty."

[2] Under this practice, the State Department would usually file a suggestion of immunity in the court at the request of the foreign state and the district court would grant immunity on that basis. *Peterson v. Islamic Republic of Iran,* 627 F.3d 1117, 1126 (9th Cir. 2010). In the absence of suggestion from the State Department, the district court would determine jurisdiction based on the established policy of the State Department. *Id.*

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 703 (1976) (plurality).

In 1976, Congress codified the State Department's restrictive theory of sovereign immunity in the FSIA, which established a comprehensive "set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities" and shifted the primary responsibility for determining immunity to the federal courts. *Altmann,* 541 U.S. at 691 (quoting *Verlinden B.V.,* 461 U.S. at 488). The FSIA establishes a presumption of immunity for foreign states but carves out specified exceptions to that grant of immunity. *Id.* The FSIA exceptions are "the sole basis for obtaining jurisdiction over a foreign state in [U.S.] courts." *Peterson,* 627 F.3d at 1122 (quoting *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 434 (1989)).

The exception relevant to this appeal is the first clause of the commercial-activity provision, which provides that a foreign state is amenable to suit where the plaintiff's action is "based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2).[3] This clause has

[3] "Courts have construed this commercial activity provision to have three independent clauses, and have used different criteria for each of the three separate clauses to assess a claimed exception." *Terenkian,* 694 F.3d at 1127. We review only the first of these clauses here, and we use the term "commercial-activity exception" to refer only to that clause.

two parts: (1) the foreign sovereign must have carried on commercial activity within the United States; and (2) the claim must be based upon that activity.

As for the first part, commercial activity occurs when a foreign state acts as a private player within the market or exercises powers that can also be exercised by private citizens. *Terenkian,* 694 F.3d at 1132. Commercial activity can be "either a regular course of commercial conduct or a particular commercial transaction or act." *Id.* (quoting 28 U.S.C. § 1603(d)). "In determining whether an act or activity is commercial, we must look to its nature, not its purpose." *Siderman de Blake v. Republic of Arg.,* 965 F.2d 699, 708 (9th Cir. 1992). To be "'carried on in the United States'" there must be "substantial contact" between the commercial act and this country. *Terenkian,* 694 F.3d at 1132 (quoting 28 U.S.C. § 1603(e)).

As for the second part, "based upon" means "those elements of a claim that, if proven, would entitle a plaintiff to relief." *Id.* (quoting *Saudi Arabia v. Nelson,* 507 U.S. 349, 357 (1993)). That is, the commercial activity that occurs within the United States must be connected with the conduct that gives rise to the plaintiff's cause of action. *Id.* at 1132-33; *see also Am. W. Airlines, Inc., v. GPA Grp. Ltd.,* 877 F.2d 793, 796 (9th Cir. 1989).

IV

Two main issues are raised on appeal: (1) whether the sale of the Eurail pass, as the underlying commercial activity,[4] can be imputed to OBB for purposes of establishing that OBB carried on commercial activity in the United States; and, if so, (2) whether Sachs's claims are "based upon" that commercial activity as required by the commercial-activity exception. The parties agree that OBB is an agency or instrumentality of the Republic of Austria and that it qualifies as a foreign state for purposes of the FSIA. They also agree that the sale of a Eurail pass constitutes a commercial activity under the FSIA. We must first determine if there is a relationship between OBB and RPE sufficient to impute RPE's commercial act within the United States to OBB. If we conclude such a relationship exists, then we must determine if there is a nexus between Sachs's claims and the underlying commercial activity sufficient to show that the claims of Sachs are "based upon" the commercial activity.

---

[4] The district court concluded, based on the agreement of the parties, that "the only relevant commercial activity within the United States was plaintiff's March 2007 purchase of a Eurail pass from the Rail Pass Experts." We consider only the relevant conduct as defined by the district court. *See Schoenberg v. Exportadora de Sal, S.A. de C.V.,* 930 F.2d 777, 781 (9th Cir. 1991) (accepting the district court's definition of relevant conduct when not clearly erroneous).

A

The first clause of the commercial-activity exception gives United States courts subject-matter jurisdiction over any case against a foreign state or its instrumentality "in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). To apply this exception to Sachs's claims against OBB, there must be a sufficient connection between OBB and RPE's sale of a Eurail pass within the United States to support the conclusion that OBB "carried on" commercial activity within the United States. *Id.* We conclude that there is.

The plain text of the FSIA indicates that the first clause of the commercial-activity exception encompasses situations in which a foreign state carries on commerce through the acts of an independent agent in the United States. The FSIA defines "commercial activity carried on in the United States by a foreign state" as "commercial activity carried on by such state and having substantial contact with the United States." *Id.* § 1603(e). This definition requires two elements to establish that a foreign state carried on commercial activity in the United States: (1) that the foreign state carries on commercial activity and (2) that commercial activity has "substantial contact" with the United States. *See Nelson,* 507 U.S. at 356 (establishing that jurisdiction requires a plaintiff's action to be "'based upon' some 'commercial activity' by [a foreign state] that had 'substantial contact' with the United States").

1

The FSIA's legislative history shows that Congress intended the commercial-activity exception to be read broadly to "include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction or act having a 'substantial contact' with the United States." H.R. Rep. No. 94-1487, at 17 (1976). Notably, neither the statute nor the legislative history defines how the commercial activity within the United States must be "carried on" but both suggest that "the 'carried on by' requirement can be interpreted in light of broad agency principles." *Mar. Int'l Nominees Establishment v. Republic of Guinea,* 693 F.2d 1094, 1105 (D.C. Cir. 1983). Under traditional agency principles, the foreign state may engage in commerce in the United States indirectly by acting through its agents or subagents. *See Phaneuf v. Republic of Indon.,* 106 F.3d 302, 307-08 (9th Cir. 1997) (establishing that a foreign state can conduct commercial activity through its agents). As long as the agent or subagent acts with actual authority, those acts can be imputed to the foreign state. *Id.*

The Second Circuit and the D.C. Circuit have both applied this principle of imputing the acts of a subagent to a foreign state under the first clause of the commercial-activity exception.[5] Both have applied

[5] The dissent of Judge O'Scannlain virtually ignores (and the dissent of Chief Judge Kozinski entirely ignores) the two cases that are most like this one, *Kirkham v. Société Air France,*

(Continued on following page)

429 F.3d 288, 290, 293 (D.C. Cir. 2005), and *Barkanic v. General Administration of Civil Aviation of the Peoples Republic of China,* 822 F.2d 11 (2d Cir. 1987), by arguing that those considered decisions of the D.C. Circuit in *Kirkham* and the Second Circuit in *Barkanic* "do not analyze when the acts of agents can be attributed to a foreign state." Judge O'Scannlain Dissent at 49. We agree that the issue was not explicitly raised in those opinions, as noted in the dissent on the three-judge panel, but we do not agree with the argument by the dissent of Judge O'Scannlain on this en banc panel aimed at discrediting the force of these cases for us. Further, the dissent of Judge O'Scannlain does not acknowledge that its view, if adopted, would create a circuit split with those decisions of the D.C. Circuit and Second Circuit. At the time our prior three-judge panel had decided this case, the jurisdictional argument on which the dissent of Judge O'Scannlain relies had not even been raised by the Republic of Austria in its briefing or in its oral argument. Because the issue is jurisdictional, we have considered the Republic of Austria's new contentions about agency even though they were not previously presented. *Infra* note 7. Whether or not in *Barkanic* the government of the People's Republic of China conceded agency from the sale of its ticket by a travel agent in the United States, and whether or not in *Kirkham* the government of France conceded agency from the sale of its ticket by a travel agent in the United States, is beside the point. Because the issue is jurisdictional, these other circuits, like us, had an independent duty to assess jurisdiction. If the sale by the travel agent was not sufficient for jurisdictional purposes, then the district courts would have been without jurisdiction and the circuit courts should not have proceeded to render decision accepting that the district courts had jurisdiction over the foreign common carriers by virtue of the commercial-activity exception, and the sale in the United States by the travel agency. Thus the position of the dissent of Judge O'Scannlain creates a conflict with the two other United States Courts of Appeals that have considered parallel cases where a travel agent in the United States sold a ticket for passage on a common carrier owned by a foreign government. We do not disagree that there could be "many instances in which Americans

(Continued on following page)

the commercial-activity exception where the commercial act in the United States was that of a travel agent acting for the foreign sovereign. In *Barkanic v. General Administration of Civil Aviation of the Peoples Republic of China* (CAAC), the Second Circuit concluded that the first clause of the commercial-activity exception applied to the Chinese airline CAAC based on the sale of a plane ticket in the United States by a third-party agent. 822 F.2d 11, 13 (2d Cir. 1987). CAAC had entered into an agreement with Pan American World Airways whereby Pan American would act as a general sales agent for CAAC in the United States. *Id.* at 12. The tickets in question were not purchased directly through Pan American but through Pan American's agent, Vanslycke & Reeside Travel, Inc. *Id.* Similarly, in *Kirkham v. Société Air France,* the D.C. Circuit applied the commercial-activity exception to a suit against Air France which was based on the sale of airline tickets through a D.C. travel agency for travel in France. 429 F.3d 288, 290, 293 (D.C. Cir. 2005).

---

who wish to sue foreign sovereigns can only do so overseas," Judge O'Scannlain Dissent at 50, but there is no reason to think that Congress intended that result when a foreign common carrier sells tickets targeting Americans through agents in the United States. The dissent of Judge O'Scannlain notes that the general rule requiring suit of foreign sovereigns only overseas is a result Congress intended "in many instances," *id.,* but the dissent of Judge O'Scannlain fails to give credence to the plain meaning of the language Congress inserted excepting the situation when the foreign sovereign has engaged in commercial activity in the United States from which a claim springs.

Because Congress passed the FSIA to promote uniformity in the treatment of foreign sovereign immunity, and because we think that Congress intended to permit suit in the United States against foreign sovereign common carriers that sell tickets in the United States through agents, we see no compelling reason to create a split with our sister circuits. *See Kelton Arms Condo. Owners Ass'n. v. Homestead Ins. Co.,* 346 F.3d 1190, 1192 (9th Cir. 2003) (When a law is "best applied uniformly, . . . we decline to create a circuit split unless there is a compelling reason to do so.").

Sachs's claim is no different in substance, for purposes of assessing sovereign immunity, from those analyzed by our sister circuits. Like the travel agents in *Kirkham* and *Barkanic,* RPE is a subagent of OBB through Eurail Group. Under traditional theories of agency, RPE's act of selling the Eurail pass to Sachs within the United States can be imputed to OBB as the principal. Where a common carrier authorizes a travel intermediary to "issue tickets on its behalf and to collect and hold customer payment, the intermediary acts as the [carrier's] agent." Restatement (Third) of Agency § 3.14 cmt. c (2006). Here, Eurail Group markets and sells rail passes for transportation on OBB's rail lines, making Eurail Group an agent of OBB. Eurail Group enlists subagents, like RPE, to sell and market its passes worldwide. Eurail Group's use of these subagents establishes a legal relationship between OBB (the principal) and RPE (the subagent): "As to third parties, an action taken by a

subagent carries the legal consequences for the principal that would follow were the action instead taken by the appointing agent." Restatement (Third) of Agency § 3.15 cmt. d (2006). OBB admits as much in describing the relationship between OBB and RPE: "you have the operator, you have a separate legal entity, then you have a marketing arm, then you have a general agent."

OBB argues that even if an agency relationship exists between it and RPE, RPE still lacked actual authority to sell the Eurail pass. We disagree. RPE's authority to sell the Eurail pass derives from the original authority that OBB granted to Eurail Group to market and sell passes for transportation on its rail lines. Indeed, Andreas Fuchs, a member of the Board of Management of OBB, conceded in his declaration that this Eurail pass entitled Sachs to board the train in Innsbruck. Moreover, RPE's actual authority to sell the Eurail pass can be inferred from OBB's sale of the couchette bed upgrade to Sachs. Sachs could purchase the couchette upgrade only if she had a valid Eurail pass. Otherwise, she would have been required to purchase an entirely new ticket, not just an upgrade. If RPE had impermissibly sold the Eurail pass to Sachs, OBB would have had no duty to honor the pass. But it did. It cannot now sensibly argue that the sale of that pass by RPE in the United States was unauthorized.[6] Because we

[6] We also agree with Sachs that even if we were to conclude that the sale was originally unauthorized, this ratification of the

(Continued on following page)

conclude RPE acted as an authorized agent of OBB, we impute RPE's sale of the Eurail pass in the United States to OBB. *See Phaneuf,* 106 F.3d at 307-08 ("[A]n agent's deed which is based on the actual authority of the foreign state constitutes activity 'of the foreign state.'") (quoting 28 U.S.C. § 1605(a)(2)).

Our case law is not to the contrary. In *Holy See*, we considered what acts performed by the Holy See's domestic corporations could be attributed to the Holy See for purposes of the non-commercial torts exception under 28 U.S.C. § 1605(a)(5). *Holy See,* 557 F.3d at 1076-78. In that context, we found it appropriate to adopt the standard articulated by the Supreme Court in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611 (1983). *Id.* Drawing on common-law corporate principles, the Supreme Court in *Bancec* adopted and applied a presumption of separate juridical status that can be overcome only when (1) "'a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created,'" or (2) "when recognizing the separate status of a corporation 'would work fraud or injustice.'" *Holy See,* 557 F.3d at 1077-78 (quoting *Bancec,* 462 U.S. at 629).

Both *Bancec* and *Holy See* are distinguishable because they determined agency in the context of assessing responsibility of corporate affiliates. In

---

pass by OBB gives it the "effect as if originally authorized." *Rayonier, Inc. v. Polson,* 400 F.2d 909, 915 (9th Cir. 1968).

contrast, Sachs's allegations are not based on a corporate relationship between OBB and RPE, but rather on principles of agency. Unlike Cuba and its official bank, Bancec, or the Holy See and its domestic corporations, OBB and RPE are "entirely distinct" entities. *See Arriba Ltd. v. Petroleos Mexicanos,* 962 F.2d 528, 535 (5th Cir. 1992). "There is neither common ownership nor any similar legal relationship between these entities." *Id.* Thus *Bancec*'s definition of agency for purposes of piercing the corporate veil is inapposite – "[o]ne cannot pierce a non-existent corporate veil." *Id.* The day-to-day control inquiry under *Bancec* makes no sense here where the question is "whether a particular type of agency relationship is sufficient under the commercial activity exception." *Dale v. Colagiovanni,* 443 F.3d 425, 429 (5th Cir. 2006) (distinguishing *Bancec* from the inquiry of whether an individual agent had authority to bind the foreign state); *see also Phaneuf,* 106 F.3d at 307 n.3 (distinguishing the "alter ego" analysis).

OBB contends that common-law principles of agency are inapplicable under the plain language of the FSIA unless the purported agent first meets the statutory definition of "agency or instrumentality of a foreign state" under § 1603(b).[7] Section 1603(b)

[7] OBB did not initially brief this argument before our court. We do not consider it waived, however, because it goes to our independent duty to determine subject-matter jurisdiction. *See Lasheen,* 603 F.3d at 1171 n.3 ("[C]hallenges to subject-matter jurisdiction cannot be waived. . . ."). Also, after oral argument we ordered supplemental briefing on this issue.

defines an "agency or instrumentality of a foreign state" as any entity:

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

28 U.S.C. § 1603(b). OBB argues that this definition of agency applies throughout the FSIA to limit who could be considered an agent of a foreign state. Under this theory, the court can consider common-law definitions of agency only after the statutory definition of agency is met. OBB contends that because RPE cannot meet the definition of agency under § 1603(b), RPE's sale of the Eurail pass cannot be imputed to OBB and no jurisdiction exists under the FSIA. We reject this contention.

The plain text of the FSIA does not support OBB's proposed framework for determining whether RPE is an agent of OBB. Section 1603(b) defines what type of entity can be considered a foreign state for purposes of claiming sovereign immunity. If an entity cannot show that it meets that definition then it is not entitled to sovereign immunity. Whether an

entity meets the definition of an "agency or instrumentality of a foreign state" to claim immunity is a "completely different question" from whether the acts of an agent can be imputed to a foreign state for the purpose of applying the commercial-activity exception. *Gates v. Victor Fine Foods,* 54 F.3d 1457, 1460 n.1 (9th Cir. 1995) (quoting *Hester Int'l Corp. v. Fed. Republic of Nigeria,* 879 F.2d 170, 176 n.5 (5th Cir. 1989)).

Common sense also tells us that an agent that carries on commercial activity for a foreign sovereign in the United States does not need to be an agency or instrumentality of a foreign state under § 1603(b). Foreign sovereigns invariably must act through agents, and if they engage in commercial activity in the United States it will necessarily be through an agent, whether that agent is its own employee or a separate company in an agency or subagency relationship.

Further, it is a well-established canon of statutory interpretation that "when a statute covers an issue previously governed by the common law, we interpret the statute with the presumption that Congress intended to retain the substance of the common law." *Samantar,* 560 U.S. at 320 n.13. To abrogate common-law principles of agency, the FSIA "must speak directly to the question addressed by the common law." *United States v. Bestfoods,* 524 U.S. 51, 63 (1998) (quoting *United States v. Texas,* 507 U.S. 529, 534 (1993)). Because the FSIA codified our common law of sovereign immunity, *Samantar,* 560 U.S. at 311, we

begin with the presumption that the statute maintains common-law principles. That Congress defined the term "agency or instrumentality of a foreign state" does not convince us that Congress intended to displace common-law agency principles under the statute for purposes of assessing commercial activity within the United States.

OBB asks us to read this definition to apply not only to the phrasal term "agency or instrumentality of a foreign state" but also to the individual terms "agency" and "agent." OBB's advocated reading strains the plain language of the FSIA, renders the bulk of the phrase superfluous, and ignores that § 1603(b) defines a singular phrasal term wherein all words are important. Each word within the defined term does not hold the same meaning individually that it has when placed alongside the other terms in the defined phrase. The three elements listed in § 1603(b) define only what constitutes an "agency or instrumentality of a foreign state." *See Samantar,* 560 U.S. at 314 (describing this as a single term). They do not give meaning to the word "agency" or "agent" if used alone. If we were to adopt OBB's preferred reading, then § 1605A's references to an "agent" of a foreign state "acting within the scope of his or her . . . agency" becomes illogical. We will not "construe the statute in a manner that is strained and, at the same time, would render a statutory term superfluous." *Dole Food Co. v. Patrickson,* 538 U.S. 468, 476-77 (2003).

The position that OBB advances would negate the possibility of commercial activity by a state-owned railway or airline within the United States through a travel agent. We cannot believe that this is what Congress intended. Throughout the world many foreign states own and operate legally independent passenger railways and airlines, which may qualify for sovereign immunity as an "agency or instrumentality of a foreign state" under 28 U.S.C. § 1603(b).[8] Foreign states are also heavily involved in the airline industry.[9] Given the prevalence of these rail lines and

---

[8] For instance, Canada, India, Israel, Korea, and Thailand each provides passenger services through state-owned railways. *See* Via Rail Canada, Inc., http://www.viarail.ca/en/about-via-rail (last visited November 15, 2013); Indian Railways, http://www.indianrailways.gov.in/# (last visited November 15, 2013); Israel Railways, http://www.rail.co.il/EN/About/Pages/about.aspx (last visited November 15, 2013); Korail Korean Railroad, http://www.korail.com/en/ (last visited November 15, 2013); State Railway of Thailand, http://www.railway.co.th/home/srt/about/history.asp?lenguage=Eng (last visited November 15, 2013).

[9] According to an unofficial 2008 compilation by the United Nations's International Civil Aviation Organization the following airlines, and many others, are 51 to 100 percent government owned: Aeroflot Russian Airlines, Air Botswana, Air Burundi, Air China, Air India, Air Jamaica, Air Madagascar, Air Malawi, Air Tanzania, Air Zimbabwe, Bahamasair, Belavia Belarusian Airlines, Bulgaria Air, Cameroon Airlines, Cayman Airways, Croatia Airlines, CSA Czech Airlines, Cubana de Aviación, Druk Air (Royal Bhutan Airlines), Egyptair, Emirates Airlines, Eritrean Airlines, Ethiopian Airlines, Finnair, Garuda Indonesia, Ghana International Airlines, Lao Airlines, Libyan Arab Airlines, LOT Polish Airlines, Malaysia Airlines, Myanma Airways (Myanmar), Orbi Georgian Airways, Pakistan International Airlines, Polynesian Airlines (Samoa), Royal Nepal

(Continued on following page)

airlines worldwide,[10] we believe that Congress contemplated that the sale of tickets by travel agents within the United States for passage on foreign-sovereign owned common carriers would constitute

---

Airlines, Rwanda Air Express, Saudi Arabian Airlines, Singapore Airlines, South African Airways, TAP Portugal, and Vietnam Airlines. List of Government-owned and Privatized Airlines (unofficial preliminary compilation), Int'l Civil Aviation Org., (July 4, 2008), *available at* http://www.icao.int/sustainability/Documents/PrivatizedAirlines.pdf.

[10] We observe the existence of these foreign-state owned railways and airlines as legislative, rather than adjudicative, facts because of their relevance to our "legal reasoning" and interpretation of the "lawmaking process." Fed. R. Evid. 201(a), advisory note to 1972 amendments; *see also* Kenneth Culp Davis, *Judicial Notice,* 55 Colum. L. Rev. 945, 952 (1955) (explaining that a court may "resort to legislative facts, whether or not those facts have been developed on the record"). Even if we were to view the existence of state-owned railroads and airlines as adjudicative facts, it would still be correct to recognize their existence as a matter of judicial notice. We may take judicial notice of an adjudicative fact "that is not subject to reasonable dispute" because it is either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). There might be dispute about whether any particular airline or railroad is state owned. Ownership may have changed; government carriers may have been privatized. There might also be a problem of where to draw the line on percentage of ownership required for the presumption of immunity. But whatever the detail as to particular carriers, it cannot reasonably be disputed that there are many national airlines and railroads worldwide that may market and sell tickets through agents or subagents in the United States. The existence of a state-owned carrier can be shown by reference to government websites and papers of the governments and reviewing agencies.

"commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2).

Adopting the OBB position would mean that scores of state-owned railroads and airlines worldwide could sell their tickets for foreign travel through travel agents in the United States and then claim sovereign immunity thereafter because the travel agents selling their tickets do not meet the definition of a state instrumentality under § 1603(b). Such immunity would extend not only to torts but to contract liability stemming from the actions of their common law agents in the United States. That result would mean that American citizens who buy tickets through authorized domestic agents on airlines or railroads owned by foreign governmental entities could find their reservations not honored and their payments retained. The only recourse against the contract-breaching carrier would be to sue abroad, even though the contract was entered into in the United States. There is no reason to think Congress intended such a chaotic result.

We likewise find no support for OBB's suggested interpretation in the FSIA's legislative history. OBB contends that the legislative history confirms its interpretation because it says that the term "foreign state" applies consistently throughout the FSIA. According to OBB, because the term "foreign state"

has a consistent definition throughout the statute,[11] "the definition of an 'agency' in Subsection 1603(b) limits who is an agent for purposes of Section 1605(a)(2)." We do not see the connection. That Congress intended the terms defined in § 1603 to apply consistently throughout the FSIA does not mean that Congress intended for those defined terms to displace principles of common law. Indeed, the Supreme Court has looked to common-law corporate principles to determine the proper interpretation of § 1603(b). *See Dole Food Co.,* 538 U.S. at 474 (relying on a "basic tenet of American corporate law" to hold that "only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement" under § 1603(b)); *see also Samantar,* 560 U.S. at 320 (examining "relevant common law and international practice" to interpret the FSIA).[12]

---

[11] Section 1608 employs a different definition of "foreign state." *See* 28 U.S.C. § 1603(a).

[12] In addition to asking us first to adopt what we think is a strained reading of the statute, OBB asks us next to preserve the *Bancec* presumption of separate juridical status to be applied after we determine agency under § 1603(b). That is, OBB argues that the definition of "agency" under § 1603(b) did not fully abrogate common-law principles of agency but preserved the common law as a second requirement for establishing agency. Under that analysis, we would first determine whether an entity met the elements enumerated in § 1603(b) and, if so, we would determine whether that entity met *Bancec*'s standard for overcoming the presumption of separate juridical status.

This analytical framework is untenable. We know of no principle of statutory construction, and OBB cites to none, that

(Continued on following page)

Moreover, none of the cases relied on by OBB applied this strained reading of the FSIA. The main case on which OBB relies is the Supreme Court's decision in *Samantar,* which held that individual officials are not included within the meaning of "agency or instrumentality of a foreign state." 560 U.S. at 316. OBB points to a passage in the opinion that states that § 1603(b) "specifically delimits what counts as an 'agency or instrumentality.'" *Id.* at 314 (quoting 28 U.S.C. § 1603(b)). That is true, but *Samantar* makes this statement while interpreting what or who constitutes a foreign state under the meaning of § 1603(b). *Id.* at 314-16. That is the opposite question from the one we are presented with here. The other cases cited by OBB are equally unavailing and either do not address the issue or support a statutory construction contrary to that proposed by OBB. *See, e.g., Gates,* 54 F.3d at 1460 n.1 (distinguishing the analysis for determining whether a defendant is an agent or instrumentality of a foreign state from the analysis for determining whether to impute the acts of an agency to the government). OBB has not convinced us that its reading of the

---

supports reading a statute to create a hierarchical system that first requires application of a statutory definition and then allows consideration of the common-law definition for the same term. It seems that OBB would like to construct a gantlet through which no claimant could run, a barrier no claimant could surmount. The plain language of the FSIA does not support such a framework, as explained above.

FSIA is proper.[13] We conclude that RPE's sale of the Eurail pass in the United States can be imputed to OBB.

---

[13] The dissent of Judge O'Scannlain cites the "Presumption of Consistent Usage" canon, which stands for the proposition that a "word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012). In the statute, there are different phrasings of "agency or instrumentality of a foreign state", 28 U.S.C. § 1603(b), and "agent of that foreign state . . . acting within the scope of his or her . . . agency," *id.* § 1605A(c), and the commercial-activity exception, *id.* § 1605(a)(2), which does not include the word "agency." We do not have text from one part of the statute interpreted differently from the same text in another part of the statute. While not applying correctly the maxim of consistent usage, the dissent of Judge O'Scannlain also ignores other statutory construction principles pointing in the direction that an "agent" for purposes of satisfying the commercial-activity exception is not the same as an "agency or instrumentality of a foreign state" for purposes of invoking sovereign immunity. Some of these other principles are: the surplusage canon ("every word and every provision is to be given effect"), the harmonious reading canon ("the provisions of a text should be interpreted in a way that renders them compatible, not contradictory"), the associated words canon ("associated words bear on one another's meaning (*noscitur a sociis*)"), and the prior construction canon ("If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort . . . they are to be understood according to that construction"). *See* SCALIA & GARNER, 174, 181, 195, 322. All of these canons suggest that "agency or instrumentality of a foreign state" must be interpreted as an entire phrase, and that the definitions within § 1603(b) do not supplant or implicate the common law definition of agency which can be taken into account in assessing § 1605(a)(2).

2

Although imputing the sale of the pass by RPE to OBB is essential to showing that the "commercial activity was carried on in the United States," we must still determine if that sale creates "substantial contact" with the United States. 28 U.S.C. § 1603(e). We conclude that it does.

"Substantial contact" is not clearly defined in the FSIA or by our circuit or our sister circuits. *See Shapiro v. Republic of Bol.,* 930 F.2d 1013, 1019 (2d Cir. 1991). It is generally agreed that it sets a higher standard for contact than the minimum contacts standard for due process. *See id.*; *Mar. Int'l Nominees Establishment,* 693 F.2d at 1109 (explaining that the substantial contact requirement makes "clear that the immunity determination under the first clause diverges from the 'minimum contacts' due process inquiry"). Under this standard, we have concluded that merely executing contracts for the sale of crude oil in the United States, by itself, is not a substantial contact. *Terenkian,* 694 F.3d at 1137. In *Terenkian,* we found relevant that no activity related to the formation of the contracts other than that their execution occurred within the United States. *Id.* at 1126, 1137. In a different context, we have concluded that there was substantial contact where a foreign state, through its agent in the United States, advertised to and solicited customers in the United States, causing numerous Americans to stay in the foreign state's hotel. *Siderman de Blake,* 965 F.2d at 709. Although in some situations the formation of a contract within

the United States may not be sufficient to establish substantial contact, in other situations the advertisement to and solicitation of customers in the United States is enough. The context of the commercial activity helps to determine whether the substantial-contact requirement is met.

In the common-carrier context, we also look to factors such as the marketing, selling, and arranging of foreign travel in the United States to determine whether substantial contact exists. *See Schoenberg,* 930 F.2d at 781-82 (concluding that substantial contact exists where the trip was arranged and started in California); *see also Santos v. Compagnie Nationale Air Fr.,* 934 F.2d 890, 894 (7th Cir. 1991) (cataloguing cases); *Sugarman v. Aeromexico, Inc.,* 626 F.2d 270, 272-73 (3d Cir. 1980). Where a ticket for travel on a foreign common carrier is bought and paid for in the United States, we conclude that the substantial contact requirement is satisfied. *See Barkanic,* 822 F.2d at 14. The sale and marketing of Eurail passes within the United States is sufficient to meet the substantial-contact element and to show that OBB carried on commercial activity in the United States. It remains for us to determine whether the claims of Sachs are "based upon" this commercial activity.

B

"[T]he phrase 'based upon' in § 1605(a)(2) 'is read most naturally to mean those elements of a claim

that, if proven, would entitle a plaintiff to relief under [his or her] theory of the case.'" *Lasheen,* 603 F.3d at 1170-71 (quoting *Nelson,* 507 U.S. at 357); *see also Santos,* 934 F.2d at 893 ("An action is based upon the elements that prove the claim, no more and no less."). The "based upon" language demands "more than a mere connection with, or relation to, commercial activity." *Nelson,* 507 U.S. at 358. But it is not necessary that the entire claim be based upon the commercial activity of OBB. Sachs's claims will be "based upon" the commercial activity if "*an element* of [her] claim consists in conduct that occurred in commercial activity carried on in the United States." *Sun,* 201 F.3d at 1109 (quoting *Sugimoto v. Exportadora De Sal,* 19 F.3d 1309, 1311 (9th Cir. 1994)); *see also Terenkian,* 694 F.3d at 1132.

To establish that her action is "based upon" OBB's commercial activity, Sachs must show a nexus between her claims and the sale of the Eurail pass. *See Sun,* 201 F.3d at 1109. We look to Sachs's theory of the case to determine if she meets this burden. *See id.* at 1110; *see also Nelson,* 507 U.S. at 357 (considering Nelson's theory of the case to determine jurisdiction). Sachs's complaint asserts five claims for relief: negligence; strict liability for a design defect; strict liability for failure to warn for a design defect; breach of implied warranty of merchantability; and breach of implied warranty of fitness. "A court must analyze each claim and determine if it is 'based upon' commercial activity. . . ." *Lasheen,* 603 F.3d at 1172. We begin with Sachs's negligence claim.

To show negligence, Sachs must establish that OBB owed her a duty of care. Under Sachs's theory of the case, OBB owed her a duty of care because her purchase of the Eurail pass established a common-carrier/passenger relationship. It is well established that common carriers owe a duty of utmost care to their passengers. *See Andrews v. United Airlines Inc.,* 24 F.3d 39, 40 (9th Cir. 1994) (applying California law);[14] *see also* Restatement (Third) of Torts § 40(b)

---

[14] Some courts have said that "as a general matter, state substantive law is controlling in FSIA cases." *E.g., Barkanic v. General Administration of Civil Aviation of the People's Republic of China,* 923 F.2d 957, 959 (2d Cir. 1991) (citing *Bancec,* 462 U.S. at 622 n.11). The Supreme Court in *Bancec* stated in pertinent part: "Section 1606 provides that '[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity . . . , the foreign state shall be liable in the same manner and to the same extent as a private individual in like circumstances.' Thus, where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." *Bancec,* 462 U.S. at 622 n.11 (quoting 28 U.S.C. § 1606). So we think it is a permissible view of Supreme Court precedent to look to California law to determine the elements of Sachs's claims.

However, it may also be permissible to view the above cases as suggesting there be a choice-of-law decision, either based on the forum's choice of law principles, or some other rule. We have held that, with no choice-of-law provision expressed in the FSIA, we should use the choice-of-law principles of the federal common law, which leads us to the Second Restatement of Conflicts. *See Schoenberg,* 930 F.2d at 782. The Second Restatement factors for the "more significant relationship" test include: the needs of the interstate and international systems; the relevant policies of the forum; the relevant policies of other interested states; the protection of justified expectations; the policies underlying a field of law; ideas on certainty, predictability, and uniformity of

(Continued on following page)

(2012) ("Special relationships giving rise to the duty [of reasonable care] . . . include a common carrier with its passengers."). And the basis for that duty of care is established when a foreign state or its agent sells a ticket or otherwise makes travel arrangements for passage abroad. *See Santos,* 934 F.2d at 893-94.

Here, buying the Eurail pass from RPE was the start of Sachs's tragic misadventure, and buying the pass in the United States helped to define the scope of duty owed by common carrier OBB to the pass purchaser and traveler, Sachs. Because the sale of the Eurail pass is an essential fact that Sachs must prove to establish her passenger-carrier relationship with OBB, a nexus exists between an element of Sachs's negligence claim and the commercial activity in the United States. *See Kirkham,* 429 F.3d at 292 ("[S]o long as the alleged commercial activity establishes a fact without which the plaintiff will lose, the commercial activity exception applies. . . ."). Without the pass, Sachs could not have boarded, or tried to board, the OBB train in Innsbruck. Moreover, the Eurail pass

---

result; and ease in determination and application of applicable law. *Id.* at 783; *see* Restatement (Second) of Conflicts § 6(2) (1971). Even if we should make a separate conflicts analysis under the Restatement, that conflicts analysis supports the same conclusion that California law applies to Sachs's claims. Although Sachs was injured in Austria, the purchase of the common carrier ticket occurred in California. California has a strong interest in providing compensation to its residents under its law when those residents buy a common carrier ticket in California and then travel abroad on state-owned transportation.

created an exclusive relationship between OBB and Sachs. No one could use this pass but Sachs. The Eurail pass bore her name, said that it was non-transferrable, and required that she present a valid passport to use it. Thus, the sale of the Eurail pass in the United States is "necessary to the 'duty of care' element of [Sachs's] negligence claim." *Id.* To demand more at the jurisdictional phase is to require a plaintiff to prove the merits of her claim, "expanding the category of jurisdictional facts to include actions and events other than the actual commercial activity which triggers the exception." *Id.* at 293.

Sachs's purchase of the couchette reservation upgrade in Innsbruck does not change our conclusion. The passenger-carrier relationship had already been established, and the couchette purchase did not change this relationship or OBB's duty in any way; it rather upgraded the means of her transit in Austria. OBB acknowledges that Sachs could have boarded the train from Innsbruck to Prague with just her Eurail pass, so the couchette reservation merely constitutes an upgrade to her existing pass, not a new transaction. The situation is similar to a person who buys a coach-class airline ticket but pays an additional fee for a first-class upgrade before boarding the plane. The latter is not a new transaction that changes the duty of care owed by the airline to the passenger. Similarly, Sachs's purchase of the upgrade changed nothing about the duty of care OBB owed her. Because the sale of the Eurail pass in the United States forms the basis of an element of Sachs's

negligence claim, she satisfies the "based upon" requirement for that claim.

OBB contends that this conclusion is inconsistent with our decision in *Sun v. Taiwan.* We disagree. In *Sun,* we considered whether the appellants could bring a wrongful death action against Taiwan under the commercial-activity exception after their son drowned during a cultural tour of Taiwan. 201 F.3d at 1106. The Suns alleged that Taiwan was negligent by failing to warn their son of the swimming hazards and failing to exercise reasonable supervision. *Id.* at 1109. We concluded that Taiwan had engaged in commercial activity in the United States by promoting and managing applications for the program, but that this activity did not form the basis of Sun's negligence claims. *Id.* at 1110. We explained that "[t]he promotion and application process in the United States was not conduct involved in proving any of the elements of the Suns' action." *Id.*[15] Sachs's negligence claim is different from that considered in *Sun* because OBB's conduct in the United States – the sale of the Eurail pass – is essential to proving the duty-of-care element of Sachs's negligence claim.

Similarly, our conclusion is consistent with the Supreme Court's decision in *Saudi Arabia v. Nelson,*

---

[15] The Suns later claimed that the organization of the trip in the United States established a duty of care, but because that was a new issue on appeal, we did not decide it. *Sun,* 201 F.3d at 1110 & n.2.

which analyzed the "based upon" requirement of the commercial-activity exception. The Supreme Court concluded that Nelson's action "alleging personal injury resulting from unlawful detention and torture by the Saudi Government [was] not 'based upon a commercial activity' within the meaning of [the FSIA]." *Nelson,* 507 U.S. at 351. To reach this conclusion, the Court rejected Nelson's argument that the defendant's act of recruiting and signing a contract with Nelson in the United States was the relevant commercial activity that formed the basis of Nelson's tort claims. *Id.* at 358. Although those acts within the United States preceded the torts alleged by Nelson, they were not relevant to proving Nelson's claims. *Id.* In contrast, Sachs's negligence claim requires her to show that OBB owed her a duty of care as a passenger on its train – a duty based upon the sale of the Eurail pass within the United States.

For similar reasons, we conclude that Sachs's breach-of-implied-warranty claims and strict-liability claims are "based upon" the sale of the Eurail pass.[16] Products-liability claims and breach-of-implied-warranty claims are variations on a theme: attributing liability based on the sale of a product into the

[16] We review Sachs's claims only to the extent necessary to determine whether jurisdiction exists under the FSIA. Whether Sachs has properly pleaded these claims is not before us. *See Kirkham,* 429 F.3d at 293 (explaining that the jurisdictional inquiry under the FSIA is distinct from the Rule 12(b)(6) analysis).

market. *See Greenman v. Yuba Power Prods. Inc.,* 377 P.2d 897, 900-901 (Cal. 1963) (discussing implied warranties and strict liability for design defects); *see also* Dan B. Dobbs et al., *The Law of Torts* § 448 (2d ed. 2011) ("To a large extent, the law of implied warranty gradually merged with strict tort liability."). A transaction between a seller and a consumer is a necessary prerequisite to proving either type of claim. *See* Restatement (Second) of Torts § 402A (1965) (establishing liability for those who sell products to consumers); West's Ann. Cal. Com. Code § 2314(1) ("[A] warranty that the goods shall be merchantable is implied in a contract for their sale. . . ."); West's Ann. Cal. Com. Code § 2315 (establishing an implied warranty that the goods shall be fit for a particular purpose at the time of contracting). Here, the sale relevant to proving these claims is the sale of the Eurail pass to Sachs in the United States.[17] As we explained above, Sachs's purchase of the couchette upgrade does not change our conclusion because her

[17] The dissent of Judge O'Scannlain does not contest that if the ticket sale of the Eurail pass to Sachs in the United States was commercial activity of OBB, then the negligence claim is based on that conduct in the sense that one of the elements of negligence is the creation of the duty of the common carrier. But the dissent of Judge O'Scannlain argues that strict liability stands on a different footing because that claim does not require privity of contract. This misses the point. Under the standard formulation for strict liability for harm to a consumer, there must be a sale of the product. *See* Restatement (Second) of Torts § 402A (1965). Here, the sale by RPE was in the United States, and there is jurisdiction on the strict liability claim.

existing Eurail pass was a necessary precedent to the upgrade. Because the sale of the Eurail pass in the United States forms an essential element of each of Sachs's claims, we conclude that Sachs's claims are "based upon a commercial activity carried on in the United States" by OBB.[18] 28 U.S.C. § 1605(a)(2).

---

[18] Chief Judge Kozinski, though he joins Judge O'Scannlain's dissenting analysis, launches his own independent theory to take agency out of the case. Thus, Chief Judge Kozinski's dissent argues that even if the Eurail pass tickets here sold by OBB's agent had been sold directly by Austria "from a kiosk in Times Square," Chief Judge Kozinski Dissent at 53, nonetheless, Sachs's claims would not be based upon commercial activity in the United States. To reach this conclusion, Chief Judge Kozinski would simply overrule all prior case law in the Ninth Circuit which had held that it was sufficient if an element of the claim was supported by the domestic commercial activity. Chief Judge Kozinski, in his separate dissent, does not persuasively rebut the reasoning of our precedents holding, or the Supreme Court's prior opinion in *Nelson,* 507 U.S. at 358 n.4, leaving open, that commercial activity in the United States, supporting an element of a claim, was sufficient for jurisdictional purposes.

Further, the cases that Chief Judge Kozinski relies upon do not have the type of nexus to the United States that would be created, using his hypothetical example, by Austria itself selling its Eurail pass tickets from a kiosk in Times Square. *Sosa* concerned a Mexican physician's suit against the United States under the Federal Tort Claims Act, after he was seized by Mexican nationals in Mexico at the behest of the U.S. Drug Enforcement Agency. *See Sosa v. Alvarez-Machain,* 542 U.S. 692, 697-98 (2004). *Sosa* did not involve the FSIA. *Kiobel* concerned the alleged complicity of foreign corporations with the Nigerian government for atrocities committed in Nigeria against Nigerian citizens, in violation of international law norms. *See Kiobel v. Royal Dutch Petroleum Co.,* 133 S. Ct. 1659, 1662-63 (2013).

(Continued on following page)

V

We hold that the first clause of the FSIA commercial-activity exception applies to a common carrier owned by a foreign state that acts through a domestic agent to sell tickets to United States citizens or residents for passage on the foreign common carrier's transportation system. Sachs has met her burden of proving that the first clause of the commercial-activity exception applies. The district court erred in concluding that it lacked subject-matter jurisdiction over Sachs's claims. We reverse and remand for further proceedings consistent with this

---

Kiobel was an Alien Tort Statute case, and did not involve the FSIA. *Morrison* concerned securities transactions that neither occurred in the United States nor involved securities listed on U.S. exchanges. *See Morrison v. Nat'l Australia Bank Ltd.,* 130 S. Ct. 2869, 2884 (2010). *Morrison* did not involve the FSIA.

Cases like *Sosa, Kiobel*, and *Morrison,* while they caution against opening U.S. courts or applying U.S. laws to foreign activities of foreign entities, do not engage with the commercial-activity exception of the FSIA, and do not properly bear on whether that exception can be satisfied by a foreign country selling common carrier tickets through a kiosk in Times Square, Chief Judge Kozinski's hypothetical, or on the practice of foreign sovereign airlines or rail systems selling tickets in the United States through travel agents within the United States. Congress enacted the commercial-activity exception so that foreign sovereigns, if they engaged in commercial activity in the United States, could be called into account in our courts.

opinion, including consideration of the other claims raised by OBB in its motion to dismiss.[19]

REVERSED and REMANDED.

O'SCANNLAIN, Circuit Judge, dissenting, with whom KOZINSKI, Chief Judge, and RAWLINSON, Circuit Judge, join:

Because I am not persuaded that an instrumentality of the Republic of Austria may be subjected to the jurisdiction of the United States Courts on the basis of the facts alleged in this case, I must respectfully dissent from the decision of the en banc court to the contrary.

I

The Foreign Sovereign Immunities Act of 1976 (FSIA) is "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 434 (1989). Under the FSIA, a foreign state is presumptively "immune from the jurisdiction of the courts of the United States" unless the plaintiff can show that his action falls within a specified statutory exception.

---

[19] Whether Sachs can successfully pursue her claims depends on a great many issues that are not presently before us. We express no view on those issues.

28 U.S.C. § 1604; *see also Terenkian v. Republic of Iraq,* 694 F.3d 1122, 1127 (9th Cir. 2012).

Exceptions to sovereign immunity must be interpreted narrowly. Courts should guard against overly broad readings because expanding federal jurisdiction in this area can have serious foreign policy consequences. *See Sampson v. Federal Republic of Germany,* 250 F.3d 1145, 1155-56 (7th Cir. 2001) ("In interpreting the FSIA, we are mindful that judicial resolution of cases bearing significantly on sensitive foreign policy matters, like the case before us, might have serious foreign policy implications which courts are ill-equipped to anticipate or handle.") (internal quotation marks omitted); *see also* J.H. Trotter, *Narrow Construction of the FSIA Commercial Activity Exception: Saudi Arabia v. Nelson,* 33 Va. J. Int'l L. 717, 733-34 (1993) ("As [the FSIA] exceptions undergo judicial expansion . . . the strains on foreign policy intensify."). Indeed, we have expressly recognized the restricted nature of these exceptions. *Peterson v. Islamic Republic of Iran,* 627 F.3d 1117, 1125 (9th Cir. 2010) (describing the FSIA's exceptions as "narrow"); *see also McKesson Corp. v. Islamic Republic of Iran,* 672 F.3d 1066, 1075 (D.C. Cir. 2012) (describing the FSIA's exceptions as "narrowly drawn").

By expanding the commercial-activity exception to encompass the facts in this case, the court, regrettably, claims jurisdiction that is denied to us by statute.

II

Carol P. Sachs, who lives in California, purchased a Eurail pass online from Rail Pass Experts (RPE), an entity located in Massachusetts. A Eurail pass enabled her to ride railways in Austria and the Czech Republic. RPE gained authority to sell Eurail passes from the Eurail Group. OBB Personenverkehr AG (OBB), a railway wholly owned by the Austrian government, is one of many Eurail Group members. OBB and Eurail are separate entities with distinct managements, employees, and purposes. While in Austria, Sachs attempted to board a moving train operated by OBB. She fell between the platform and the train such that she landed on the tracks, suffering severe bodily injuries. Sachs has sued OBB for negligence, strict liability, and breach of implied warranties.

Our analytical task in this case is made easier by the limited nature of the parties' arguments. Sachs does not contest that OBB is an instrumentality of the Republic of Austria and therefore entitled to foreign sovereign immunity under the FSIA. The majority correctly notes that "[t]he [only] exception relevant to this appeal is the first clause of the commercial-activity provision."[1] Slip Op. at 10. The

[1] "A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). Like

(Continued on following page)

commercial-activity exception can helpfully be divided into three requirements: (1) the activity must be commercial rather than sovereign, (2) the activity must be "carried on in the United States by the foreign state," and (3) the plaintiff's suit must be "based upon" that activity. 28 U.S.C. § 1605(a)(2).

The parties do not dispute that the only relevant commercial activity in the United States was Sachs' purchase of a Eurail pass from RPE. *See* Slip Op. at 11 n.4. OBB does not contest that the sale of the Eurail pass was commercial, rather than sovereign, activity. The first requirement is therefore satisfied. It is the two other requirements that are disputed.

III

To repeat, the commercial-activity exception applies only if the activity in question was "carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2).[2] Although the sale of the ticket by RPE clearly occurred in the United States, OBB disputes that *it* "carried on" that activity. Rather, OBB argues that the sale is attributable exclusively to RPE. *See Phaneuf v. Republic of Indonesia,* 106 F.3d 302, 306

---

the majority, I use the phrase "commercial-activity exception" to refer to the first clause of § 1605(a)(2). *See* Slip Op. at 10 n.3.

[2] Congress defined "commercial activity carried on in the United States by a foreign state" to mean "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e).

(9th Cir. 1997) ("Defendants should be permitted to argue . . . that they did not act: that there was no commercial activity *of the foreign state.*") (internal quotation marks omitted).

To determine whether the activity is attributable to OBB, it is necessary to consider the meaning of "foreign state." Because foreign states are not natural persons, they necessarily act through agents. *See* Slip Op. at 20. The question is what principle limits the extent to which another entity's activity can be attributed to a foreign state for purposes of the FSIA.

Relying on *Phaneuf,* the majority rules that the activity of any authorized agent can be imputed to a foreign sovereign. *See* Slip Op. at 17 ("Because we conclude RPE acted as an authorized agent of OBB, we impute RPE's sale of the Eurail pass in the United States to OBB.") (citing *Phaneuf,* 106 F.3d at 307-08).[3] Thus, it effectively reads "activity carried on . . . by a foreign state" and "activity carried on by such state" to mean activity carried on by the authorized agents

[3] While *Phaneuf* held that an agent must have acted with actual authority in order for its actions to be attributed to a foreign state, *Phaneuf,* 106 F.3d at 308, it did not hold that actual authority was sufficient to allow for such attribution in all circumstances. The actions at issue in *Phaneuf* were taken by members of Indonesia's National Defense Security Council, rather than a corporate entity with whom Indonesia had only a loose relationship, so the closeness of the connection between the foreign state and the alleged agent was not at issue. *See id.* at 304, 307.

of a foreign state. This necessarily equates a foreign state and its authorized agents.

With respect, I suggest that such a reading is inconsistent with other provisions of the FSIA. Rather, "foreign state" must be interpreted more narrowly. The approach we adopted in *Doe v. Holy See,* 557 F.3d 1066 (9th Cir. 2009), correctly interpreted "foreign state" and provides a framework with which to analyze this case. Under this narrower reading, "activity carried on . . . by a foreign state" cannot include activity carried on by RPE.

A

The term "foreign state," of course, is used repeatedly in the FSIA, not just in the commercial-activity exception. The meaning of "foreign state" remains constant throughout the statute, and textual evidence from other provisions demonstrates that "foreign state" cannot be so broad as to include all authorized agents of a foreign state.

1

Courts generally presume that a term is used consistently throughout a statute. *See Powerex Corp. v. Reliant Energy Services, Inc.,* 551 U.S. 224, 232 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning."); Antonin Scalia & Bryan A. Garner,

Reading Law 170 (2012) (discussing the presumption of consistent usage).[4] Here, far from indicating that different uses of "foreign state" have different meanings, the FSIA suggests that the definition remains constant throughout the statute (with the express exception of § 1608, which is not relevant here). *See* 28 U.S.C. § 1603(a) ("*For purposes of this chapter* – (a) A 'foreign state,' except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)."") (emphasis added).

Confirming this analysis, the Supreme Court has interpreted the term "foreign state" consistently. In *Samantar v. Yousuf,* 560 U.S. 305 (2010), the Court interpreted "foreign state" as it was used in § 1604, which grants immunity to "foreign state[s]." 28 U.S.C. § 1604. In doing so, the Court expressly relied on the meaning of "foreign state" in an exception to immunity found in § 1605(a)(5). *See Samantar,* 560 U.S. at 317-18. Such approach is sensible only if "foreign state" has the same meaning in both provisions.

[4] The majority misinterprets this analysis as applying the presumption of consistent usage to distinct phrases, "agency or instrumentality of a foreign state" in § 1603(b), "agent of that foreign state [ ] acting within the scope of his or her . . . agency" in § 1605A(c), and the commercial-activity exception in § 1605(a)(2). Slip Op. at 26 n.13. In reality, I apply the presumption of consistent usage to the term "foreign state," not to each phrase as a whole. Such application is consistent with *Samantar v. Yousuf,* 560 U.S. 305, 317-18 & n.11 (2010) (interpreting "foreign state" in § 1604 in light of the use of "foreign state" in § 1605A and § 1605(a)(5)).

Clearly, Supreme Court precedent indicates that "foreign state" has the same meaning when providing an exception to immunity as it does when granting immunity.

The majority, by contrast, treats the meaning of "foreign state" for the purposes of § 1604 and the meaning of "foreign state" for the purposes of § 1605 as separate inquiries. *See* Slip Op. at 20 (contrasting the status required to claim sovereign immunity and the status required for activity to be attributable under the commercial-activity exception). In light of the presumption of consistent usage and Supreme Court precedent applying it to the FSIA, I cannot accept the majority's assumption that the interpretation of this term differs so greatly between provisions.

2

Given that the meaning of "foreign state" is consistent, we can turn to analyzing the meaning of that term in other provisions of the FSIA. Textual evidence from § 1605A, which also uses "foreign state," indicates that the term does not embrace all authorized agents.

Section 1605A(c) creates a cause of action against "[a] foreign state that is or was a state sponsor of terrorism . . . and any official, employee, or *agent of that foreign state while acting within the scope of his or her office, employment, or agency.*" 28 U.S.C. § 1605A(c) (emphasis added). In *Samantar,* the Supreme Court tells us that "the creation of a cause of

action against both the 'foreign state' and 'any official, employee, or agent' thereof reinforces the idea that 'foreign state' does not by definition include foreign officials." *Samantar,* 560 U.S. at 318 n.11 (citation omitted). Relying on § 1605A(c) and a similar provision in § 1605(a)(5), the Court invoked the rule against superfluity: "If the term 'foreign state' by definition includes an individual acting within the scope of his office, the phrase 'or of any official or employee . . . ' in 28 U.S.C. § 1605(a)(5) would be unnecessary." *Id.* at 318 (citing *Dole Food Co. v. Patrickson,* 538 U.S. 468, 476-77 (2003) ("[W]e should not construe the statute in a manner that is strained and, at the same time, would render a statutory term superfluous.")).

Just as the inclusion of "official" in § 1605(a)(5) and § 1605A(c) would be superfluous were "foreign state" to include officials, the inclusion of "agent" in § 1605A(a)[5] and § 1605A(c) would be superfluous if "foreign state" included all agents acting in the scope of their agencies (that is, authorized agents). And just

---

[5] Section 1605A(a) uses similar language to create a specific exception to immunity for:

> any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by [specified acts] if such act . . . is engaged in by *an official, employee, or agent* of such foreign state while acting within the scope of his or her office, employment, or agency.

28 U.S.C. § 1605A(a)(1) (emphasis added).

as the avoidance of superfluity in another provision informed *Samantar*'s interpretation of "foreign state" in § 1604, it similarly affects the meaning of "foreign state" in § 1605(a)(2). Therefore, by the same logic that the Supreme Court used in *Samantar,* the commercial-activity exception's use of "foreign state" does not include all authorized agents.

B

Because the majority's approach is inconsistent with the text of the statute, another approach is required. Our opinion in *Holy See* provides the proper standard for attributing the actions of third parties to foreign states. In determining whether acts taken by the Archdiocese of Portland, the Catholic Bishop of Chicago, and the Order of the Friar Servants could be imputed to the Holy See for determining jurisdiction under the FSIA, the *Holy See* court relied on *First National City Bank v. Banco Para El Comercio Exterior de Cuba ("Bancec"),* 462 U.S. 611 (1983). *Bancec* created a presumption of separate status for liability purposes. *Id.* at 626-27. This presumption could be overcome "in two instances: when 'a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created,'[6] or when

[6] As will be discussed below, the Court used the term "agent" in a different sense than the majority does. Courts have interpreted this prong of the *Bancec* standard to refer to an "alter ego" analysis. *See, e.g., Holy See,* 557 F.3d at 1080 (comparing the *Bancec* standard to an "'alter ego' or 'piercing the

(Continued on following page)

recognizing the separate status of a corporation 'would work fraud or injustice.'" *Holy See,* 557 F.3d at 1077-78 (quoting *Bancec,* 462 U.S. at 629).

While *Bancec* dealt with questions of substantive liability rather than jurisdiction, *Holy See* decided that the standard announced in *Bancec* applied to jurisdictional questions as well. *See Holy See,* 557 F.3d at 1079. Thus, a determination of whether to attribute the actions of another entity to a foreign state for jurisdictional purposes begins with a presumption against such attribution. That presumption can be rebutted if the other entity is the alter ego of the foreign state or if failure to attribute the entity's actions to the foreign state "would work fraud or injustice." *Id.* at 1077-78. Other circuits have applied *Bancec* to jurisdictional issues as well. *See Transamerica Leasing, Inc. v. La Republica de Venezuela,* 200 F.3d 843, 848 (D.C. Cir. 2000); *Arriba Ltd. v. Petroleos Mexicanos,* 962 F.2d 528, 533 (5th Cir. 1992).

The standard from *Holy See* fits the statutory text well. *Holy See* counsels in favor of reading "activity . . . by a foreign state" to mean activity by a foreign state, its alter ego, or an entity the recognition of

---

corporate veil'" standard); *Transamerica Leasing, Inc. v. La Republica de Venezuela,* 200 F.3d 843, 848 (D.C. Cir. 2000) (noting that "in the case cited by the Supreme Court to illustrate the agency exception, various corporations were allegedly operated as a 'single enterprise.'").

whose separateness would work fraud or injustice.[7] Incorporation of the *Bancec* standard has the considerable benefits of not rendering any statutory terms superfluous and being capable of consistent application throughout the FSIA. An interpretation of "foreign state" that includes a foreign state's alter ego would not make any words in § 1605A superfluous. *See supra* Part III.A.2.

The majority purports to distinguish *Holy See* on the ground that *Bancec* and *Holy See*, unlike this case, arose in the context "of corporate affiliates." Slip Op. at 18 (distinguishing "a corporate relationship" from "principles of agency"). Even assuming the validity of this distinction, the majority draws the wrong conclusion. That *Holy See* applies a stringent alter ego test to the activity of corporate affiliates does not suggest that we should apply a more lenient authorized agent standard to the activity of non-affiliate entities. If anything, the lack of an affiliate relationship supports application of a more stringent test because a corporate affiliate is more likely to have a close and substantial relationship with its foreign state than another entity is. That is borne out in this case: OBB may not have even been aware that RPE existed before this lawsuit. Thus, the majority's "authorized agent" standard creates an anomaly in our case law because it retains the *Holy See* standard

[7] How (or whether) this standard would apply to the actions of an individual agent, rather than entity agent, need not be addressed in this case. RPE is an entity, not an individual.

for affiliates but creates a much looser test for non-affiliate entities that will often have fewer ties to the foreign state.

But the majority's distinction between the corporate affiliate context and the agency context is problematic for another reason as well: courts applying the *Bancec* standard have spoken expressly in terms of agency. In *Bancec* itself, the Court described the alter ego analysis as relevant because such extensive control creates "a relationship of principal and agent." *Bancec,* 462 U.S. at 629; *see also Holy See,* 557 F.3d at 1079 ("[I]n applying the jurisdictional provisions of the FSIA, courts will routinely have to decide whether a particular individual or corporation is an agent of a foreign state."). Thus, at least in certain circumstances, we have held that the *Bancec* standard is the method for determining whether another entity is an agent of a foreign state. The majority, therefore, cannot distinguish *Holy See* on the ground that it applies to the actions of corporate affiliates rather than agents.

Of particular importance here is that the meaning of "agent" or "agency" varies in different legal contexts. *See Holy See,* 557 F.3d at 1080 ("'Agent' can have more than one legal meaning."). In *Holy See*, the court contrasted the typical common law agency analysis with the first prong of the *Bancec* standard. *See id.* ("The *Bancec* standard is in fact most similar to the 'alter ego' or 'piercing the corporate veil' standards . . . ").

The plaintiff in *Holy See* alleged a traditional agency relationship as the basis for attributing the actions of others to the Holy See. *See id.* ("Doe does directly allege in his complaint that the corporations are 'agents' of the Holy See."); Pl.-Appellee/Cross-Appellant John V. Doe's Principal and Resp. Br., 2007 WL 923313, II.C.1 ("Appellants Catholic Bishop, Archdiocese and Order, were the agents of Appellant Holy See, acting in furtherance of the purposes of the the [sic] Holy See, doing the kind of acts they were engaged to perform, and were motivated, at least in part, to further the purposes of the Holy See."). Nonetheless, the *Holy See* court ruled that it could not "infer from the use of the word 'agent' that Doe [wa]s alleging the type of day-to-day control that *Bancec* . . . require[s] to overcome the presumption of separate juridical status." *Holy See,* 557 F.3d at 1080. If a common law agency relationship were all that is required for the imputation of an agent's actions to the foreign state, surely the court would have treated Doe's allegation differently in *Holy See*. Thus, it is clear that the sort of agency relationship that *Bancec* and *Holy See* required for the imputation of actions to the foreign state (an alter ego relationship, for example) differs significantly from the all-authorized-agents standard adopted by the majority.

C

Sachs simply cannot show that RPE's actions are attributable to OBB under the *Bancec* standard. The first method of rebutting the presumption of

separateness, the alter ego analysis, certainly cannot apply on these facts. Far from being the alter ego of OBB, RPE and Eurail are independent companies with different managements from OBB. RPE may be a subagent of Eurail, but Eurail is controlled by a group of railways, not OBB alone. The second method of rebutting the presumption of separateness – whether recognizing separate existences would work fraud or injustice – certainly does not suggest that the actions of RPE should be attributed to OBB. In *Bancec,* the Court found such equitable prong applicable because Bancec was attempting to recover money that would directly benefit the Cuban government while simultaneously arguing that its claim should not be subject to a set-off that would have applied if the Cuban government sued directly. *Bancec,* 462 U.S. at 631-32. Here, OBB has not behaved in a comparable way. OBB has not, for example, inconsistently characterized RPE's actions to its advantage; it has consistently asserted that RPE's actions cannot be attributed to it.

If there is any "injustice" at all from failing to impute RPE's actions to OBB, it stems from Sachs' inability to sue OBB in American courts. This, however, is not the sort of injustice that validates treating RPE as if it were OBB. The inability to sue in American courts is a natural result of recognizing foreign sovereign immunity, the general rule and policy of the FSIA. *See Sachs v. Republic of Austria,* 695 F.3d 1021, 1026 (9th Cir. 2012) ("Any injustice that results is no greater than the mine-run of cases – jurisdiction

over a foreign state is, after all, ordinarily not available.").

D

The majority relies on *Barkanic v. General Administration of Civil Aviation of the People's Republic of China,* 822 F.2d 11 (2d Cir. 1987), and *Kirkham v. Societe Air France,* 429 F.3d 288 (D.C. Cir. 2005). These cases do not analyze when the acts of agents can be attributed to a foreign state. As acknowledged by the majority, *see* Slip Op. at 14 n.5a, the parties in *Barkanic* and *Kirkham* did not dispute that the relevant actions constituted activity of the foreign state. *See Barkanic,* 822 F.2d at 13 (assuming without discussion that a ticket sale by Pan American was attributable to the defendant); *Kirkham,* 429 F.3d at 291-92 (noting that the "sole question" before the court related to the "based upon" prong of the commercial-activity exception). Although those courts "had an independent duty to assess jurisdiction," *see* Slip Op. at 14 n.5b, their decisions "do[ ] not stand for the proposition that no defect existed." *Arizona Christian School Tuition Organization v. Winn,* 131 S. Ct. 1436, 1448 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.").

The majority makes much of the possibility that, if its reading were rejected, federal courts would not be able to exercise jurisdiction over foreign states

based on the actions of travel agents. Slip Op. at 21-24. The majority's concern seems to stem from the idea that the lack of federal jurisdiction would leave plaintiffs to sue abroad, a result the majority describes as too "chaotic" for Congress to have intended. Slip Op. at 24. But, the general rule for the FSIA is that foreign states are immune from suit; there will be many instances in which Americans who wish to sue foreign sovereigns can only do so overseas. This is a result Congress clearly intended in many instances, so it is hard to see why the same result in this situation should strike the majority as so "chaotic."

Because Sachs has not shown that RPE and OBB have a relationship that rebuts the *Bancec* presumption of separate status, I would affirm the district court's dismissal for lack of jurisdiction.

IV

Even if the sale of the Eurail pass by RPE were "commercial activity carried on . . . by the foreign state," sovereign immunity would still, at a minimum, bar Sachs' strict liability claims because they are not "based upon" the sale of the pass, as would be required for the commercial-activity exception to apply. 28 U.S.C. § 1605(a)(2). Assuming the majority's interpretation of this requirement is correct, I agree that Sachs' negligence and implied warranty claims would be "based upon" the sale of the Eurail pass had the sale been attributable to OBB. The Supreme Court has clarified that the commercial activity in

question, here the sale of the Eurail pass, must be an "element [ ] of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Saudi Arabia v. Nelson,* 507 U.S. 349, 357 (1993). The majority understands this to mean that a claim is based upon commercial activity if that activity will establish *one* element of the claim. But still, a mere connection between the claim and the commercial activity is insufficient. *Sun v. Taiwan,* 201 F.3d 1105, 1110 (9th Cir. 2000) (citing *Nelson,* 507 U.S. at 362).

The majority believes that Sachs' negligence claim is "based upon" the sale of the Eurail pass because the sale evidences that OBB, as a common carrier, owed a duty of care to Sachs, a passenger. Slip Op. at 29-31. This strikes me as a proper application of the majority's rule; however, the majority also concludes that Sachs' other claims are "based upon" the sale of the Eurail pass because the sale was the transaction necessary for an implied warranty claim or strict liability claim. Slip Op. at 33.

This theory inappropriately lumps together Sachs' strict liability claims and implied warranty claims. While the majority is correct that both types of claims center on "attributing liability based on the sale of a product into the market," Slip Op. at 33, there is a crucial difference between them. Strict liability claims do not require proof that the plaintiff entered a transaction with the defendant. *Greenman v. Yuba Power Products, Inc.,* 377 P.2d 897 (Cal. 1963), which the majority relies on to explain California law on strict liability, discusses "the abandonment of

the requirement of a contract between" the manufacturer and the plaintiff. *Id.* at 901; *see also* Restatement (Third) of Torts: Products Liability § 1 cmt a (1998) ("Strict liability in tort for defectively manufactured products merges the concept of implied warranty, in which negligence is not required, with the tort concept of negligence, in which contractual privity is not required.").

While the majority claims that Sachs' strict liability claim requires her to prove that OBB was a "seller," Slip Op. at 33, California cases suggest that a strict liability plaintiff need not prove that the defendant is a seller. *See Price v. Shell Oil Co.,* 466 P.2d 722, 726 (Cal. 1970) ("[W]e can perceive no substantial difference between *sellers* of personal property and *non-sellers,* such as bailors and lessors. In each instance, the seller or non-seller places [an article] on the market, knowing that it is to be used without inspection for defects.") (second alteration in original) (internal quotation marks omitted); *Greenman,* 377 P.2d at 901 ("To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.") Under California law, it appears that OBB's provision of train service and Sachs' use of it are sufficient to subject OBB to strict liability. Therefore, Sachs has not established that she must prove that

OBB was a "seller" in order to prevail on her strict liability claim.

Because contractual privity is not an element of Sachs' strict liability claims, they are not "based upon" the sale by RPE, the only relevant commercial activity. Sachs, therefore, may not invoke the commercial-activity exception to overcome OBB's sovereign immunity. Even if RPE's sale of the Eurail pass to Sachs were attributable to OBB, the majority should affirm the district court insofar as it dismissed the strict liability claims for lack of jurisdiction.

V

For the foregoing reasons, I would affirm the district court's dismissal for lack of jurisdiction. Because RPE's sale of the Eurail pass is not attributable to OBB, Sachs has not alleged commercial activity "by the foreign state." Indeed, even if the majority's theory of attribution were valid, the strict liability claims would still need to be dismissed because they are not "based upon" the sale to Sachs in the United States.

Chief Judge KOZINSKI, dissenting:

I agree with Judge O'Scannlain that a foreign sovereign doesn't engage in commercial activity in the United States when a subagent over which it exercises no direct control sells tickets for passage on a

common carrier wholly owned by that sovereign. But there is another, simpler way to affirm the district court. Because plaintiff's claim arises from events that transpired entirely in Austria, it isn't "based upon" commercial activity carried on in the United States. 28 U.S.C. § 1605(a)(2). This would be true even if Austria were itself selling train tickets from a kiosk in Times Square.

The majority holds that all of plaintiff's claims are based on domestic commercial activity, relying on our cases requiring that only "'*an element*'" of the claim consist of such activity. Maj. op. at 28 (quoting *Sun v. Taiwan,* 201 F.3d 1105, 1109 (9th Cir. 2000)). But an en banc court can overrule circuit law; in fact, that's the principal reason for taking a case en banc. *See Atonio v. Wards Cove Packing Co.,* 810 F.2d 1477, 1479 (9th Cir. 1987) (en banc). Because these earlier cases conflict with Supreme Court precedent, we should take the opportunity to sweep them aside.

The Supreme Court has addressed what it means for a claim to be "based upon" commercial activity only once. In *Saudi Arabia v. Nelson,* 507 U.S. 349 (1993), the Court observed that "the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357. *Nelson* emphasized the limited scope of its holding: "We do not mean to suggest that the first clause of § 1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state, and we do not address the case where a claim consists of both

commercial and sovereign elements." *Id.* at 358 n.4. Some of our cases have misread this holding – that a claim *can* be based upon commercial activity even if proving that activity won't establish *every* element of the claim – for an endorsement of the converse proposition – that a claim *is* based upon commercial activity so long as proving that activity will establish at least *one* element of the claim. *See, e.g., Sun,* 201 F.3d at 1109; *Sugimoto v. Exportadora De Sal, S.A. De C.V.,* 19 F.3d 1309, 1311 (9th Cir. 1994).

This broad interpretation of the "based upon" requirement runs contrary to our "background rule that foreign states are immune from suit," subject only to "narrow exceptions." *Peterson v. Islamic Republic of Iran,* 627 F.3d 1117, 1125 (9th Cir. 2010). It also invites plaintiffs' lawyers to manufacture jurisdiction through artful pleading.

An action can frequently be brought under multiple theories, as plaintiff's negligence, breach-of-contract and product-liability claims amply demonstrate. Each of these theories accords plaintiffs plenty of opportunity to find at least one element involving domestic commercial conduct. For example, the Supreme Court observed in *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004), that "'[i]t will virtually always be possible to assert that the negligent activity that injured the plaintiff [abroad] was the consequence of faulty training, selection or supervision . . . in the United States.'" *Id.* at 702 (second alteration in original) (quoting *Beattie v. United States,* 756 F.2d 91, 119 (D.C. Cir. 1984) (Scalia, J., dissenting)). *Sosa*

considered a claim under the Federal Tort Claims Act (FTCA) arising out of plaintiff's abduction in Mexico. Although the Court recognized that negligent acts or omissions during the planning stages in the United States may have contributed to the injury, this was not sufficient to overcome the FTCA's exclusion of "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k).

This mode of analysis applies with even greater force when we are dealing with suits against foreign sovereigns. Earlier this year, the Supreme Court cited "the danger of unwarranted judicial interference in the conduct of foreign policy" in holding that the Alien Tort Statute did not automatically apply to violations of the law of nations that occur within the territory of a foreign sovereign. *Kiobel v. Royal Dutch Petroleum Co.,* 133 S. Ct. 1659, 1664 (2013). Similarly, in *Morrison v. Nat'l Australia Bank Ltd.,* 130 S. Ct. 2869 (2010), the Court interpreted Section 10(b) of the Securities Exchange Act of 1934 as inapplicable to transactions that neither occurred in the United States nor involved securities listed on U.S. exchanges. *Id.* at 2886. Although the government argued that the term "in connection with the purchase or sale of any security registered on a national securities exchange" should be read more broadly, the Court reasoned that "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever

some domestic activity is involved in the case." *Id.* at 2884 (emphasis in original).

The *Nelson* Court recognized the perils of an overly permissive reading of the FSIA's "based upon" requirement when it rejected plaintiff's failure-to-warn claim as a "semantic ploy" designed to dress up what was, at its heart, an intentional tort claim based on conduct that occurred exclusively in Saudi Arabia. *Nelson,* 507 U.S. at 363. It didn't dispute that the commercial activity would prove one element of a failure-to-warn claim, but recognized that "[t]o give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity." *Id.*

Our case illustrates the expansive sweep of the majority's approach. Plaintiff had a train ticket to travel from Austria to the Czech Republic. She was injured due to defendant's alleged negligence when she tried to board. The injury and any negligence occurred in Austria. But, because plaintiff happened to buy her ticket online from a vendor in Massachusetts, a federal court in California now asserts power to hale the Austrian government before it and make it defend against a claim based on facts that occurred in Austria. This makes as much sense as forcing Mrs. Palsgraf to litigate her case in Vienna.

As the *Sosa* Court recognized with respect to the FTCA, a critical element in this analysis is proximate causation, with jurisdiction hinging on whether "the

act or omission [in the United States] was sufficiently close to the ultimate injury, and sufficiently important in producing it, to make it reasonable to follow liability back to the [domestic] behavior." *Sosa,* 542 U.S. at 703. "[U]nderstanding that California planning was a legal cause of the harm in no way eliminates the conclusion that the claim here arose from harm proximately caused by acts" abroad. *Id.* at 704. Because plaintiff hasn't shown a sufficient nexus between her purchase and the injury, we have no jurisdiction over Austria. I would affirm the district court on that basis. *See Weiser v. United States,* 959 F.2d 146, 147 (9th Cir. 1992) ("Our review is not limited to a consideration of the grounds upon which the district court decided the issues; we can affirm the district court on any grounds supported by the record.").

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAROL P. SACHS, *Plaintiff-Appellant*, v. REPUBLIC OF AUSTRIA; OBB HOLDING GROUP; OBB PERSONENVERKEHr AG, *Defendants-Appellees.*	No. 11-15458 D.C. No. 3:08-cv-01840-VRW OPINION

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Submitted June 13, 2012*
San Francisco, California

Filed September 26, 2012

Before: Ronald M. Gould, Richard C. Tallman,
and Carlos T. Bea, Circuit Judges.

Opinion by Judge Tallman;
Concurrence by Judge Bea;
Dissent by Judge Gould

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

COUNSEL

Geoffrey Becker, Becker & Becker, Lafayette, California, for appellant Carol P. Sachs.

Juan C. Basombrio, Dorsey & Whitney LLP, Costa Mesa, California, for appellees OBB Personenverkehr, AG.

OPINION

TALLMAN, Circuit Judge, announcing the judgment of the Court:

In this case we consider what acts may be attributed to a foreign state in applying the commercial activity exception to immunity under the Foreign Sovereign Immunities Act.

Carol Sachs sued Austrian-owned OBB Personenverkehr after sustaining personal injuries as a result of her attempt to board a moving train in Innsbruck. The district court ruled that the commercial activity exception to the Foreign Sovereign Immunities Act did not apply and dismissed Sachs's suit for lack of subject matter jurisdiction. Sachs appeals the district court's order. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

I

In March 2007, Sachs purchased a Eurail pass in California from Rail Pass Experts, a company based

in Massachusetts. A Eurail pass is a train ticket that allows passage on various railways of the Eurail Group, an association of thirty-one European railway transportation providers. Sachs's pass permitted travel in Austria and the Czech Republic. In April Sachs traveled to Austria, where she intended to originate her journey, and there purchased a sleeper upgrade to her ticket at a local train station. A few days later, on April 27, 2007, Sachs arrived at the Innsbruck train station and attempted to board a moving train. She fell to the tracks through a gap in the platform and suffered injuries that ultimately required the amputation of both legs above the knee.

OBB Personenverkehr ("OBB") is the Austrian national railway. OBB Holding Group ("Holding Group") owns 100% of OBB's stock. The Republic of Austria created Holding Group under Austrian railway law, and the Republic's Federal Ministry of Transport, Innovation and Technology is the sole shareholder of Holding Group. OBB is not required to pay income or corporate tax and, through its parent Holding Group, forwards all profits to the Austrian government.

The Eurail Group ("Eurail") is an association organized under Luxembourg law. OBB and thirty other European railways own Eurail. Eurail is a distinct legal entity and employs its own management and employees. Eurail is tasked with, among other things, the marketing and sale of Eurail passes.

Sachs filed a complaint in the Northern District of California against the Republic of Austria, Holding Group, and OBB. She asserted claims of negligence, design defect, failure to warn, and breach of the implied warranties of merchantability and fitness, premising federal jurisdiction on diversity. Holding Group was not served and is not a party to this case. The Republic of Austria and OBB moved to dismiss based on lack of subject matter jurisdiction. Sachs did not oppose Austria's motion and the district court granted it. The district court at first did not rule on OBB's motion, instead calling for supplemental briefing on whether the actions of Rail Pass Experts could be imputed to OBB. On January 28, 2011, the district court granted OBB's motion to dismiss after concluding that OBB was immune from suit. This appeal followed.

II

The "sole basis" by which courts in the United States may obtain jurisdiction over foreign states is the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq*. *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 434 (1989). Under the FSIA, foreign states are presumptively immune from suit in federal and state courts, subject to a number of exceptions. *Embassy of the Arab Republic of Egypt v. Lasheen,* 603 F.3d 1166, 1169 (9th Cir. 2010); *see also* 28 U.S.C. § 1604. These exceptions are found in 28 U.S.C. § 1605 and § 1607, *Verlinden B.V. v. Cent. Bank of Nigeria,* 461 U.S. 480, 488 (1983),

and "focus on actions taken by or against a foreign sovereign." *In re Republic of Phil.,* 309 F.3d 1143, 1150 (9th Cir. 2002). The exceptions include actions in which the foreign state has waived its immunity, 28 U.S.C. § 1605(a)(1), and actions involving the foreign state's successor interest in property located in the United States, *id.* § 1605(a)(4). "The two most commonly invoked exceptions to immunity, however, are those for commercial acts and for tortious acts." *Wolf v. Fed. Republic of Ger.,* 95 F.3d 536, 541 (7th Cir. 1996) (citing 28 U.S.C. § 1605(a)(2) & (a)(5)).[1]

Sachs, as the party bringing suit against a foreign state, must offer evidence that an exception to

---

[1] The commercial activity exception withdraws immunity from a foreign state in any case

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside 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.

28 U.S.C. § 1605(a)(2). The tortious act exception, for its part, deprives a foreign state of immunity in cases

> not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.

Id. § 1605(a)(5).

immunity applies. *See Joseph v. Office of Consulate Gen. of Nigeria,* 830 F.2d 1018, 1021 (9th Cir. 1987). If she does so, OBB would bear the burden of establishing by a preponderance of the evidence that the exception does not apply. *See id.* We review de novo a district court's determination regarding sovereign immunity under the FSIA. *Corzo v. Banco Cent. de Reserva del Peru,* 243 F.3d 519, 522 (9th Cir. 2001).

III

The parties agree that the only exception relevant to this appeal is the commercial activity exception, which deprives foreign sovereigns of immunity in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). There is no dispute that OBB, as an "agency or instrumentality" of Austria, *id.* § 1603(a), constitutes a "foreign state" for the purposes of the FSIA.

Sachs's argument for jurisdiction is scattershot but is premised upon the fact that the sale of the Eurail pass by Rail Pass Experts is a commercial activity that should be imputed to OBB. Both parties agree that the purchase of the Eurail pass is the only commercial activity within the United States relevant to this case. But OBB denies that it was commercial activity *by the state* because any connection between Rail Pass Experts and OBB is so attenuated.

A.

We previously grappled with the question of which acts could be attributed to a foreign state under the FSIA in *Doe v. Holy See,* 557 F.3d 1066 (9th Cir. 2009) (per curiam), *cert. denied,* 130 S. Ct. 3497 (2010). John V. Doe, the plaintiff in that case, brought vicarious liability claims, among others, against the Holy See for the actions of its subordinates, including the Archdiocese of Portland, Oregon (Archdiocese), the Catholic Bishop of Chicago (Bishop), and the Order of the Friar Servants (Order). Doe alleged that Father Ronan, a member of the Order and priest in the Archdiocese, had sexually assaulted him when he was a teenager. *Id.* at 1069. The district court held that the commercial activity exception to immunity did not apply but that the tortious act exception did, thus granting it jurisdiction. *Id.* at 1071. The Holy See countered that it retained immunity from suit because the acts of the Archdiocese, the Bishop, and the Order could not properly be imputed to it for jurisdiction purposes. *Id.* at 1076.

On appeal, we recognized that "in applying the jurisdictional provisions of the FSIA, courts will routinely have to decide whether a particular individual or corporation is an agent of a foreign state." *Id.* at 1079. We looked for guidance in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611 (1983). In *Bancec,* the Supreme Court considered the inverse situation from the one we faced in *Holy See* – that is, when the actions of a foreign state could be attributed to its

subordinate. *Id.* at 620. The Cuban government had established Bancec as an official credit union, owned all of its stock, and supplied its capital. *Id.* at 613-14. In 1960 Cuba nationalized all U.S. property in the country, including banks. Citibank had previously issued Bancec a letter of credit related to a sugar sale but, when Bancec presented the letter for payment, Citibank paid the amount sought less the value of its expropriated Cuban branches. *Id.* at 614-15. Bancec then brought suit in federal district court seeking to collect on the full value of the letter of credit and Citibank counterclaimed. *Id.* at 615.

The Court considered whether Bancec was liable on Citibank's expropriation claim; jurisdiction was not at issue in the case. *Id.* at 619-21. As we noted in *Holy See*, the Supreme Court "recognized a presumption of 'separate juridical status'" for subordinates of foreign states. 557 F.3d at 1077 (quoting *Bancec,* 462 U.S. at 624) (brackets omitted). The Court clarified that this presumption will be negated only (1) "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created" or (2) where recognizing the presumption "would work fraud or injustice." *Bancec,* 462 U.S. at 629 (internal quotation marks omitted). Relying on the second, equitable prong, the Court held Bancec liable because recognizing its separate status would permit Cuba, the true beneficiary behind the by-then-defunct bank, to enforce the bank's claim against Citibank while simultaneously avoiding jurisdiction

on the creditor's counterclaim against the Cuban government. *Id.* at 630-32.

We expressly adopted this analysis in *Holy See* and extended it to the jurisdiction phase of the FSIA, joining the Fifth and D.C. Circuits in so doing. 557 F.3d at 1078-79 ("Applying *Bancec*'s presumption – as well as the standard for overcoming that presumption – at the outset of a suit as well as at the merits phase makes good sense."). Turning to the facts of the case, we concluded that Doe's allegations were not sufficient under the *Bancec* standard to overcome the presumption of the Holy See's separate juridical status. *Id.* at 1079. Doe did not allege the required "day-to-day, routine involvement" by the Holy See in its subordinates' operations to establish the existence of a principal – agent relationship. *Id.* (citing *Flatow v. Islamic Republic of Iran,* 308 F.3d 1065 (9th Cir. 2002)). The fact that the Holy See created those entities and even regulated them was not enough. *Id.* at 1079-80. Nor was jurisdiction proper under the equitable prong. "Doe ha[d] not alleged that the Holy See . . . inappropriately used the separate status of the corporations to its own benefit, as in *Bancec,* or that the Holy See created the corporations for the purpose of evading liability for its own wrongs." *Id.* at 1080.

The lay of the land after *Holy See* is thus considerably clearer. In determining "which of the acts alleged in the complaint may legitimately be attributed to the [foreign state] for purposes of establishing jurisdiction [under the FSIA]," we first must recognize

that a foreign state has a presumption of separate juridical status. *Id.* at 1076, 1079. That presumption is overcome only if the complaint alleges "day-to-day, routine involvement" of the foreign state in the individual or corporation's affairs, *see id.* at 1079, or if maintaining the presumption would "work fraud or injustice," *see id.* at 1078-79.

B.

Sachs's allegations do not withstand this scrutiny. Rail Pass Experts' sale of the Eurail pass cannot, under *Holy See*, be imputed to OBB. Like John V. Doe, Sachs "does not allege day-to-day, routine involvement of" OBB in Eurail Group, much less Rail Pass Experts. *See id.* at 1079. She alleges that Eurail Group is owned by and represents OBB and that Rail Pass Experts was in turn an agent for Eurail Group. But these facts fall far short of what the *Bancec* standard requires. In *Flatow v. Islamic Republic of Iran,* for example, we applied the *Bancec* standard at the merits phase to determine whether the actions of a bank could be imputed to Iran. 308 F.3d at 1069, 1071. Despite the fact that Iran nationalized and fully owned the bank, as well as proposed candidates for its board of directors, we held that these allegations were insufficient to negate the presumption of separate juridical status. *Id.* at 1071-74.

The best Sachs can allege is that OBB, as a part-owner along with thirty other owners, wielded some degree of control over Eurail Group and was aware

that Eurail Group used U.S. sales agents like Rail Pass Experts. But even these facts are not nearly enough under *Holy See*. Sachs has nowhere alleged that OBB was involved in Rail Pass Experts' routine, day-to-day operations, *see Holy See,* 557 F.3d at 1079; in fact, it is not clear that OBB was even aware that Rail Pass Experts existed. Nor is it alleged that OBB was involved in Eurail Group's affairs to this high degree. Eurail Group has its own independent management. The connection between OBB and Rail Pass Experts is not close enough under the first prong of the *Bancec* standard to overcome the presumption of separate juridical status and impute the sale of the Eurail pass to OBB.

Nor would granting immunity to OBB "work fraud or injustice," *Bancec*'s second method for overcoming the presumption of separate juridical status. *See id.* at 1077-78 (quoting *Bancec,* 462 U.S. at 629). It is undisputed that OBB itself engages in no commercial activity in the United States, presumably in part to retain immunity from suit in American courts. Any injustice that results is no greater than in the mine-run of cases – jurisdiction over a foreign state is, after all, ordinarily not available. *See Verlinden,* 461 U.S. at 488. And this case is a far cry from *Bancec,* where Cuba, the real beneficiary behind a defunct bank, wanted to collect on the bank's claim against Citibank but deny jurisdiction on Citibank's counterclaim against the Cuban government. *Bancec,* 462 U.S. at 631-33; *see also Flatow,* 308 F.3d at 1072 ("[U]nlike in *Bancec,* [Bank Saderat Iran] is not

attempting to use a United States court to recover on a claim while at the same time trying to avoid being the subject of an adversary proceeding."). There is no similar sleight of hand by OBB that would trump the presumption of its separate juridical status. *See Holy See,* 557 F.3d at 1079. OBB thus engaged in no commercial activity within the United States that would strip it of its immunity to suit.

C.

The concurrence and dissent argue that the above precedent is not applicable to our case because in *Holy See* we considered the tortious act exception to immunity rather than the commercial activity exception. This distinction was not meaningful to our analysis in *Holy See*, nor should it be here.

Our opinion in *Holy See* contains expansive language regarding its applicability to FSIA cases. After deciding that the actions of the Archdiocese, the Order, and the Bishop were not attributable to the Holy See, we concluded that the plaintiff had "therefore not alleged sufficient facts to demonstrate that *any* exception to sovereign immunity applies to that cause of action." *Holy See,* 557 F.3d at 1080 (emphasis added). We also noted that "in applying the jurisdictional provisions of the FSIA, courts will routinely have to decide whether a particular individual or corporation is an agent of a foreign state," and that "*Bancec* provides a workable standard for deciding this question." *Id.* at 1079. Nowhere did we indicate

that this holding should be cabined to the tortious act exception and indeed such an interpretation would fly in the face of a plain reading of this language.

The question of which acts of a corporation or an individual may be imputed to the foreign state is preliminary to consideration of individual exceptions to immunity, as we have previously recognized: "Before turning to the question of which, if any, of the FSIA's exceptions to immunity apply, we must determine which of the acts alleged in the complaint may legitimately be attributed to the Holy See for purposes of establishing jurisdiction." *Id.* at 1076. There is nothing ambiguous in this holding. If we had wanted to restrict our analysis to the tortious act exception alone, we would have done so explicitly instead of using such sweeping language.

Nor does any of the precedent we cited in *Holy See* evince its exclusivity to the tortious act exception; if anything the caselaw suggests the opposite. *Holy See* borrowed its attribution standard directly from *Bancec*. *Id.* at 1079-80. But the Supreme Court in *Bancec* was not concerned with amenability to suit – its analysis focused on what acts could be imputed to the state for purposes of liability, which *Holy See* extended to jurisdiction, *id.* at 1077-78 – so there is no reason why its standard would apply to one exception to immunity but not the others.

Most tellingly, in *Holy See* we expressly aligned ourselves with two other circuits that had extended this same *Bancec* analysis to the jurisdiction phase

and that did so under the commercial activity exception. *Id.* at 1078; *see also Transamerica Leasing, Inc. v. La Republica de Venez.,* 200 F.3d 843, 847-48 (D.C. Cir. 2000); *Arriba Ltd. v. Petroleos Mexicanos,* 962 F.2d 528, 533-36 (5th Cir. 1992). That *Holy See* involved the tortious act exception did not seem to matter when we relied on these cases for support in adopting the *Bancec* standard for the FSIA's jurisdiction phase. *Holy See,* 557 F.3d at 1078 ("The Supreme Court in *Bancec* did not have the opportunity to consider whether the actions of a corporation may be attributed to the sovereign . . . for purposes of determining whether jurisdiction over that sovereign exists. We have not previously addressed that question either. At least two other circuits, however, faced with such a scenario, have applied *Bancec*'s substantive corporate law principles in determining whether jurisdiction exists under the FSIA." (internal footnote omitted and italics removed)). By relying on two circuits that applied *Bancec* in the context of the commercial activity exception in a tortious act exception case, *Holy See* stands for the proposition, at least implicitly, that what immunity exception may or may not apply makes no difference to which actions of a corporation can be attributed to the sovereign.

Out-of-circuit caselaw confirms that the *Bancec* standard is applicable to the FSIA's jurisdictional provisions regardless of which exception is at issue. The standard is in no way unique to tort cases. Both *Transamerica Leasing, Inc. v. La Republica de Venezuela,* 200 F.3d at 847-54, and *Arriba Ltd. v. Petroleos*

Mexicanos, 962 F.2d at 533-36, extended *Bancec* to the jurisdiction phase in cases involving the commercial activity exception. Likewise the Northern District of Illinois, *citing our decision in Holy See*, applied *Bancec* to this provision. *In re Potash Antitrust Litig.,* 686 F. Supp. 2d 816, 821-22 (N.D. Ill. 2010). Another district court decision extended *Bancec* to a case involving § 1605(a)(3), the "takings" exception, an entirely different exception to immunity. *Freund v. Republic of Fr.,* 592 F. Supp. 2d 540, 558-59 (S.D.N.Y. 2008). The dissent provides no case, in fact, that suggests that *Bancec* might apply to one of the FSIA's jurisdictional provisions but not to all. The absence of such authority is striking.

It is true, as the dissent notes, that we did not specifically consider the commercial activity exception to immunity in *Holy See,* 557 F.3d at 1076, but it is unclear why this fact should make a difference in the present case. Our decision in *Holy See* viewed the question of which exception to immunity might apply as totally separate from the issue of which acts were attributable to the foreign state. The structure of the opinion supports this interpretation. The opinion has four sub-headings in its "Analysis" section. The first two discuss the standard of review and jurisdiction over the appeal. The third is entitled "Determining Which Acts May Be Attributed to the Holy See for Jurisdictional Purposes," and in a fourth we finally address the tortious act exception. If the standard for determining which acts of a corporation were attributable to the sovereign were unique to the tortious

act exception, it would have made sense to analyze them together. Yet in our discussion of agency/attribution we did not once mention the tortious act exception of § 1605(a)(5) – or any other exception for that matter – which would be odd if we were anchoring our analysis to the text of that statutory subsection alone.

Even if *Holy See* were only applicable to certain, but not all, of the FSIA's exceptions to immunity, the commercial activity and tortious act exceptions are closely tethered by the statutory text. "The tortious activity exception provides jurisdiction over tort actions not encompassed in the commercial activity exception 'in which money damages are sought against a foreign state for . . . damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state.'" *Joseph,* 830 F.2d at 1025 (quoting § 1605(a)(5)) (alteration in original).

There is nothing in our opinion in *Holy See* to suggest that we meant to restrict its applicability to the tortious act exception. Even assuming the decision is not directly controlling, given the opinion's language, precedent, and structure there is no intelligible reason why we should not apply it in a closely analogous case. The concurrence and dissent do not even attempt to explain by what limiting factor *Bancec* would apply to the tortious act exception and not the commercial activity exception.

D.

Even were we to accept the suggestion that *Holy See* is not controlling on this case, we reject Sachs's and the dissent's contention that *Barkanic v. General Administration of Civil Aviation of the Peoples* [sic] *Republic of China,* 822 F.2d 11 (2d Cir. 1987), and *Kirkham v. Société Air France,* 429 F.3d 288 (D.C. Cir. 2005), elucidate our task. In each of these cases the court held that the commercial activity exception applied and that the foreign state was not immune from suit. But agency was undisputed in both *Kirkham* and *Barkanic* and thus neither squarely tackles the issue before us here: whether the acts of a separate entity may be attributed to the sovereign.

In *Barkanic,* the decedents purchased tickets for an internal Chinese flight on CAAC, the Chinese state airline, from a U.S. travel agency, which the court stated was "an agent for Pan American." 822 F.2d at 12. CAAC and Pan Am entered into a bilateral general sales agency agreement whereby CAAC would act as general sales agent for Pan Am in China and Pan Am would act as general sales agent for CAAC in the United States. *Id.* CAAC maintained offices and employees in New York and operated some flights out of U.S. cities. *Id.* The decedents' flight crashed, killing them, and their estates sued the airline. *Id.* The opinion focused on whether there was a sufficient nexus between the crash and CAAC's commercial activity within the United States, but the court never explicitly analyzed what qualified as "commercial activity carried on in the United States

by the foreign state." 28 U.S.C. § 1605(a)(2); *see Barkanic,* 822 F.2d at 13.

Kirkham involved a woman who injured her foot at Orly Airport in Paris, allegedly due to the negligence of an Air France employee. 429 F.3d at 290. The plaintiff purchased her tickets from a U.S. travel agency; her trip included a flight on United Airlines from Washington, D.C., to Paris and, four days later, a flight to Corsica on Air France. *Id.* The injury occurred at the airport prior to her second flight. *Id.* Again the court focused solely on whether the claim was based upon her ticket purchase without considering commercial activity, *id.* at 291-92, in this case because "Air France concede[d] the ticket sale constituted a commercial activity in the United States." *Id.* at 293.

The dissent interprets these cases to mean "that where a foreign common carrier, operated by a sovereign entity, purposefully sells tickets for use of the carrier's services overseas through a domestic sales agent, the ticket sale is commercial activity which may be imputed to the foreign common carrier." But this conclusion assumes the answer to the question we are tasked with answering: whether Rail Pass Experts is an agent of OBB at all. Agency was undisputed in *Barkanic,* 822 F.2d at 12, and *Kirkham,* 429 F.3d at 293, whereas here it is hotly contested. It is not enough to simply note that attributing the ticket sale to the airline went "without dispute between the parties and without suggestion from either the Second Circuit or the D.C. Circuit that to do so was

inconsistent with the FSIA's commercial activity exception." We do not know why agency was undisputed and we should not speculate. But we cannot allow counsel's strategic decision to forego contesting agency in *Kirkham* and *Barkanic* to foreclose OBB's ability to do so here.

IV

It is the judgment of this Court that the district court correctly dismissed this case for lack of subject matter jurisdiction.

AFFIRMED.

BEA, Circuit Judge, concurring in the judgment:

I concur in the majority's holding that the district court correctly dismissed this case for lack of subject matter jurisdiction. I write separately, however, because I agree with Judge Gould that the definition of agency in *Doe v. Holy See,* 557 F.3d 1066 (9th Cir. 2009) – a case concerning the *tortious act* exception to the Foreign Sovereign Immunities Act (FSIA) – need not be extended to the question of agency in cases concerning the *commercial activity* exception. This court's decision in *Sun v. Taiwan,* 201 F.3d 1105 (9th Cir. 2000) permits us to decide the case more narrowly, while assuming *arguendo* that an agency relationship exists between Rail Pass Experts (Experts), Eurail, and OBB Personenverkehr (OBB) which serves to impute the acts and omissions of Experts

to OBB. I would affirm the district court on the basis that Sachs fails to allege facts sufficient to give rise to jurisdiction under *Sun*.

The FSIA provides immunity to foreign states in any action "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside 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." 28 U.S.C. § 1605(a)(2). Sachs bases her claim of subject matter jurisdiction exclusively on the first clause of the commercial activity exception, so the relevant question in this appeal is whether her action "is based upon a commercial activity carried on in the United States by the foreign state."

In *Sun,* the Suns brought a wrongful death action against the Taiwanese government, a foreign sovereign, after their son drowned at a Taiwanese beach with claimed tricky tides, while on a trip sponsored by the Taiwanese government and advertised in the United States. 201 F.3d at 1106-07. This court held that the FSIA barred the Suns' tort claim because the claim was not "based on" the marketing and ticket sales for the tour, the commercial activity carried on by Taiwan in the United States. *Id.* at 1109. The court held that the commercial activity exception does not apply if (1) the claim alleges negligence that occurred entirely in a foreign country, or

(2) the claim alleges failure to warn and not negligent misrepresentation. *Id.* at 1109-10 & n.2. To allege a negligent misrepresentation claim that could confer jurisdiction, the plaintiff must show a nexus between failure to warn and commercial activity that occurred in the United States, *id.* at 1110, for example, by alleging failure to warn *on a ticket* sold in the United States or *in a United States advertisement.* Neither was alleged in *Sun,* until the Suns changed their theory of the case in their appellate brief. *Id.* The *Sun* panel noted this change, and it remanded the case to the district court for consideration of the Suns' amended negligent misrepresentation claim based on commercial activity which took place in the United States. *Id.*

Sachs does not allege facts sufficient to give rise to jurisdiction under *Sun.* Sachs's first set of claims – that OBB Personenverkehr (OBB) negligently moved the train, provided an unsafe place to board the rail car, failed to supervise boarding, negligently failed to stop the train, and breached various warranties – are all allegations of negligence that, for aught that appears, occurred entirely in Austria. Although Sachs does not state *where* these duties were violated, the only plausible reading of her complaint is that such acts and omissions took place in Austria. *See Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009) (reviewing courts must draw on common sense to determine whether a claim for relief is "plausible").

Sachs's remaining claim is based on OBB's alleged failure to warn about the gap between the

platform and the rail cars. This claim is stated broadly enough to constitute a claim of negligent misrepresentation, but the requisite nexus to an alleged act or omission in the United States is lacking. The court in *Sun* expressly distinguished a failure to warn claim from a negligent misrepresentation claim, defining the latter as an *affirmative* duty to disclose "known information concerning prospective dangers." 201 F.3d at 1110 n.2. Sachs' complaint does not allege OBB negligently misrepresented its services by breaching a duty to disclose knowledge of the dangerous train platform conditions *in the United States at the point of sale* of train tickets. Instead, she alleges that there was commercial activity in the United States – OBB's advertising and sale of Eurail passes, both directly and through its agents Eurail and Rail Pass Experts – and then *separately* alleges that she should have been warned about the gap in the platform. To qualify as a negligent misrepresentation claim sufficient to confer jurisdiction under the FSIA under *Sun,* Sachs's complaint would have to allege that OBB should have disclosed, *on the ticket delivered in the United States, in their advertisements broadcast in the United States,* or in some other manner in the United States, of the known dangers of the gap. The facts as pleaded are insufficient to invoke jurisdiction under the FSIA.

I would deny Sachs leave to amend her complaint. As noted above, the *Sun* court remanded that case to allow the district court to review whether the Suns' new claim of negligent misrepresentation was based on commercial activity in the United States

because the Suns "changed their theory of the case in their appellate briefs" from failure to warn in Taiwan, to negligent misrepresentation in the United States. 201 F.3d at 1110. Specifically, the Suns alleged they should have been warned in the advertising done by the Taiwanese government in the United States of the known danger of the treacherous tides at the Taiwanese beach. *Id.* Sachs, conversely, neither changes her theory of the case in her briefs on file to allege negligent misrepresentation in the United States of the dangerous train platform conditions in Austria, under *Sun,* nor requests leave to amend for this purpose, despite prior amendment, and multiple briefs filed in district court.[1]

GOULD, Circuit Judge, dissenting:

The majority decides that the sovereign immunity of OBB Personenverkehr ("OBB"), a national railway of Austria, defeats at the starting gate a domestic forum for a negligence claim by a United States citizen who bought a Eurail pass in the United

[1] Sachs did request leave to amend to plead facts that would show that the actions of Rail Pass Experts should be imputed to OBB. Had she requested leave to amend to allege that her claim is based on acts or omissions in the United States, this would be a much harder case. However, local rules require that a request for leave to amend must be accompanied by the proposed pleading, and Sachs proposed no amendment that would allege her claim is based on acts or omissions in the United States. N.D. Cal. R. 10-1.

States. Sachs, in California, bought a Eurail pass from Rail Pass Experts, a Massachusetts-based subagent of the Eurail Group. The Eurail Group markets and sells rail passes worldwide, including within the United States. OBB is a part-owner of the Eurail Group, and the OBB trains carry Eurail customers in Austria. The Eurail pass permitted Sachs to board an OBB train and to sit in an unoccupied seat. Sachs was seriously injured while trying to board an OBB train in Austria. I believe that, for purposes of sovereign immunity, a sensible interpretation of the FSIA permits a domestic forum in which Sachs may assert her negligence or other claims against OBB, that our Ninth Circuit precedent does not prevent this, and that we should follow the general approach of other federal circuits that have decided in similar cases that ticket sales by an agent in the United States invoked the commercial activity exception to sovereign immunity in cases involving common carriers.

I do not believe that *Doe v. Holy See,* 557 F.3d 1066 (9th Cir. 2009) controls the outcome of this appeal. In *Holy See*, the district court concluded that the FSIA's commercial activity exception to sovereign immunity did not apply to the Holy See's activity, and the district court dismissed Doe's fraud claims alleged under that exception. *Id.* at 1071. Instead, the district court concluded that the Holy See's activity fit within the FSIA's tortious activity exception to sovereign immunity, and the district court denied the Holy See's motion to dismiss all of Doe's remaining claims alleged under the tortious activity exception. *Id.*; *see* 28

U.S.C. § 1605(a)(2) (commercial activity exception), (a)(5) (tortious activity exception).

The Holy See appealed that decision, and Doe cross-appealed the district court's order dismissing his fraud claim alleged under the commercial activity exception. *Holy See,* 557 F.3d at 1071. We declined, however, to consider Doe's commercial activity-based appeal. *Id.* at 1074-75. We concluded that we did not have jurisdiction because Doe's appeal, unlike the Holy See's appeal, did not fall within the collateral order exception to the final judgment rule, and "the tort causes of action [that were relevant to the Holy See's appeal were] not inextricably intertwined with Doe's other claims." *Id.* at 1075. We said:

> In other words, here we would be asked to take up the appeal from that grant and reverse the district court's determination; we would have to reach out and engage in a lengthy disquisition on the commercial activity exception to FSIA, which we neither must nor should do. *Thus, we will not consider issues regarding the district court's grant of immunity under the commercial exception to the FSIA.*

Id. at 1076 (emphasis added).

We went on to extend the presumption in favor of separate juridical status at the liability phase, identified by the Supreme Court in *First National City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611 (1983) ("*Bancec*"), to the jurisdiction phase of the FSIA inquiry. *Holy See,* 557 F.3d at 1079.

We did this even though in an earlier case we explained that "[t]he enumerated exceptions to the FSIA provide the exclusive source of subject matter jurisdiction over civil actions brought against foreign states" and that "*[q]uestions of liability* are addressed by *Bancec,* which examines the circumstances under which a foreign entity can be held substantively liable for the foreign government's judgment debt." *Flatow v. Islamic Republic of Iran,* 308 F.3d 1065 (9th Cir. 2002) (emphasis added).[1]

Because we did not expressly consider the commercial activity exception in *Holy See*, it is not controlling. Because both *Bancec* and *Flatow* deal with separate juridical status for the purposes of liability, neither mandates the majority's approach to resolving this appeal. I would, instead, follow the decisions of the Second Circuit in *Barkanic v. General*

[1] *Flatow* also does not preclude a ruling in favor of Sachs because our inquiry there, like the Court's in *Bancec,* centered on the question of liability, and not jurisdiction, as permitted under the commercial activity exception to sovereign immunity under the FSIA. *See id.* at 1069 ("The distinction between liability and jurisdiction is crucial to our resolution of this case."). We declined to permit the appellant to levy against real property owned by Bank Saderat Iran ("BSI"), a nationalized bank, in order to satisfy a default judgment against the Republic of Iran. *Id.* at 1066. Relying on *Bancec,* we concluded that Flatow did not allege facts sufficient to overcome *Bancec*'s presumption of separate juridical status at the liability phase. *Id.* at 1074. In short, under the presumption of separate juridical status for the purposes of liability, BSI could not be held liable for the Republic of Iran's obligation to Flatow.

Administration of Civil Aviation of People's Republic of China, 822 F.2d 11 (2d Cir. 1987) and of the D.C. Circuit in *Kirkham v. Société Air France,* 429 F.3d 288 (D.C. Cir. 2005). The courts in *Barkanic* and *Kirkham* expressly considered the commercial activity exception to sovereign immunity under the FSIA in the context of the sale of foreign common carrier tickets in the United States by travel agents. Although there are some distinctions of fact in those cases,[2] I read them to mean in substance that where a foreign common carrier, operated by a sovereign entity, purposefully sells tickets for use of the carrier's services overseas through a domestic sales agent, the ticket sale is commercial activity which may be

---

[2] In *Kirkham,* Kirkham bought an airline ticket from a travel agent in Washington, D.C. for travel on Air France in Europe. *Kirkham,* 429 F.3d at 290. Kirkham was injured in a Paris airport while changing planes, and she sued Air France, whose majority shareholder is the Republic of France. *Id.* In *Barkanic,* Barkanic bought a ticket to fly on CAAC, an agent of the People's Republic of China, from a Pan Am-affiliated travel agent in Washington, D.C. *Barkanic,* 822 F.2d at 12. Pan Am and CAAC had previously entered into an agency agreement in which Pan Am was authorized to appoint travel agents to sell seats on CAAC flights. *Id.* Barkanic was killed when his CAAC flight crashed in China, and his survivors filed a wrongful death suit against CAAC. *Id.*

In neither case was the issue of whether the commercial activity (i.e., the sale of the airline ticket in the U.S. by a travel agent) could be imputed to the sovereign raised. Instead the sale of the ticket was attributed to both foreign carriers without dispute between the parties and without suggestion from either the Second Circuit or the D.C. Circuit that to do so was inconsistent with the FSIA's commercial activity exception.

imputed to the foreign common carrier and is sufficient to invoke the commercial activity exception to sovereign immunity under § 1605(a)(2) of the FSIA.

Barkanic and *Kirkham* are consistent with the plain language of the FSIA, which does not require the limitation to jurisdiction under the commercial activity exception relied on by the majority. Section 1605(a)(2) provides:

> 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 upon a commercial activity carried on in the United States by the foreign state;* or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside 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.

28 U.S.C. § 1605(a)(2) (emphasis added). "Commercial activity" is defined as "either a regular course of commercial conduct or a particular commercial transaction or act," *id.* at § 1603(d), and a "commercial activity carried on in the United States by a foreign state" is defined as "commercial activity carried on by such state and having substantial contact with the United States." *Id.* at § 1603(e). The legislative history notes that Congress intended the commercial activity exception to apply to "a broad spectrum of endeavor, from an individual commercial transaction

or act to a regular course of commercial conduct." H.R. Rep. 94-1487 at 6614-15.

Here OBB is a member and part owner of Eurail which targets U.S. consumers, selling thousands of passes each year for use on railways, including on OBB, throughout Europe upon one purchase of a pass. That Eurail does this through sub-agents like Rail Pass Experts[3] in the United States does not change that OBB, through Eurail, regularly engages in the type of commercial activity in the United States that Congress intended to defeat sovereign immunity under the FSIA. Indeed, a primary purpose of the Eurail entity is to market and sell in the United States and around the world Eurail passes good only for passage on OBB and other European railways. Stated another way, OBB knew that the Eurail entity, in which it was part owner, would be marketing passes to people like Sachs in the United States. It knew or should be charged with constructive knowledge that Eurail would use sub-agents like Rail Pass Experts to sell tickets to people like Sachs within the United States. *See Phaneuf v. Republic of Indonesia,* 106 F.3d 302, 307-08 (9th Cir. 1997) ("Because a foreign state acts through its agents, an agent's deed

[3] Before the district court, OBB argued that Rail Pass Experts is not an authorized agent of OBB. OBB acknowledges, however, that OBB is a member of the Eurail Group and that "Rail Pass Experts may be, presumably, a subagent of a general sales agent accredited by The Eurail group and, therefore, able to sell Eurail passes (likely at higher rates than those available from Eurail directly)."

which is based on the actual authority of the foreign state constitutes activity 'of the foreign state' [for the purpose of the commercial activity exception]."). OBB has empowered its agent, the Eurail Group, to sell passes good for travel on OBB trains, including through sub-agents like Rail Pass Experts within the United States. *See id.* Moreover, when a U.S. citizen buys a Eurail pass in the United States for passage on OBB and other railways from an agent in the United States, and then is injured through allegedly improper activity of the foreign railway carrier, like OBB in Europe, such a person should be able to have a forum for suit within the United States so far as sovereign immunity is concerned.

I also believe that Sachs' action is sufficiently "based upon" OBB's commercial activity as is required by the FSIA. 28 U.S.C. § 1605(a)(2). In *Saudi Arabia v. Nelson,* 507 U.S. 349 (1993), the Supreme Court explained that within the context of the FSIA, "the phrase ['based upon'] is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357. Indeed, "[t]he only reasonable reading of ['based upon'] calls for something more than a mere connection with, or relation to, commercial activity." *Id.* at 358.

Here, Sachs' first claim for relief is based on negligence. She alleges that OBB, as a "common carrier for hire," breached its duty of care when Sachs was injured boarding the OBB train in Innsbruck, Austria. This duty arose from the sale of the ticket for

passage on OBB trains, the commercial activity identified by Sachs. *See* Restatement (Third) of Torts § 40(b) (2012) ("Special relationships giving rise to the duty [of reasonable care] . . . include a common carrier with its passengers."). Thus, the commercial activity, on which Sachs argues that the commercial activity exception to sovereign immunity should apply here is a necessary element (i.e., establishment of the duty of reasonable care) that, if proven, would entitle Sachs to relief on a [sic] least some part of her action against OBB. *See Nelson,* 507 U.S. at 358 n.4 ("We do not mean to suggest that the first clause of § 1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state.").

A judgment in favor of Sachs is also consistent with our decision in *Sun v. Taiwan,* 201 F.3d 1105 (9th Cir. 2000). In that case, we considered whether the appellants could bring a wrongful death action against Taiwan under the commercial activity exception to sovereign immunity under the FSIA after their son drowned on a Taiwanese beach during a cultural tour of that country. Before the district court, appellants only alleged "a negligent failure to warn and failure to exercise reasonable supervision." *Id.* at 1109. We clarified that the phrase "based upon . . . requires a nexus between the action and the commercial activity." *Id.* We then reasoned that although Taiwan's operation of the tour was commercial activity within the meaning of the FSIA, *id.* at 1108-09, only "administrative promotion and application

management took place in the United States." *Id.* at 1110. Specifically, we said that the basis for the Suns' claims of negligent supervision and failure to warn claims lay in the sovereign's alleged conduct *in Taiwan,* on the Taiwanese beach, and had no nexus with the admitted commercial activity *in the United States*; namely the promotion and sales of tickets for the tour. *Id.* Because "[t]he only conduct relevant to the action was failure to take reasonable care in allowing the students to swim and failure to supervise them," all of which took place in Taiwan, we concluded that the Suns were unable to show a nexus between the action and the commercial activity *within the United States*.[4] *Id.*

Here, by contrast, Sachs' negligence action alleges that OBB breached its common-carrier duty of reasonable care in the operation of its trains, causing her physical harm. As stated above, this duty originates in the commercial activity that Sachs alleges, namely OBB's sale of the train ticket, through its participation in Eurail, which occurred *in the United States.* I would conclude that there is a sufficient

[4] The Suns then changed their theory of liability on appeal, arguing that under California law, "Taiwan was under an affirmative duty to exercise reasonable care by disclosing known information concerning prospective dangers on the tour and by not misleading prospective participants," while promoting the tour in the United States. *Id.* We then remanded the case to the district court "to review the Suns' claim first in order to determine whether, as currently cast, it is based on commercial activity that took place in the United States." *Id.*

nexus between Sachs' action and the commercial activity. *Accord Barkanic,* 822 F.2d at 13 (concluding that "there is a sufficient nexus between the airplane crash and [the sale of the airline ticket] carried on by [the sovereign] in this country").

Because I believe (1) that the Eurail Group, through ticket sales by its sub-agent Rail Pass Experts, engaged in commercial activity within the United States, and that this activity is fairly attributed to OBB as part-owner of Eurail, carrying its customers in Austria, and (2) that there is a sufficient nexus between that commercial activity and Sachs' action because the ticket sale gave rise to the common carrier duty of reasonable care allegedly breached, I would hold that Sachs has alleged facts sufficient to satisfy the commercial activity exception to sovereign immunity under the FSIA. I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAROL P. SACHS, Plaintiff-Appellant, v. REPUBLIC OF AUSTRIA; OBB HOLDING GROUP; OBB PERSONENVERKEHR AG, Defendants-Appellees.	No. 11-15458 D.C. No. 3:08-cv-01840-VRW Northern District of California, San Francisco ORDER (Filed Dec. 16, 2013)

Before: GOULD, Circuit Judge.

Appellee's Motion to Stay the Mandate Pending Petition for Certiorari is GRANTED. Fed. R. App. P. 41(d).

Therefore, it is ordered that the mandate is stayed pending the filing of the petition for writ of certiorari in the Supreme Court. The stay shall continue until final disposition by the Supreme Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CAROL P SACHS,
Plaintiff,
v
REPUBLIC OF AUSTRIA, OBB HOLDING GROUP, OBB PERSONENVERKEHR AG,
Defendants.
/

No C 08-1840 VRW
ORDER

Defendants the Republic of Austria and OBB Personenverkehr AG ("OBB") move to dismiss the above-captioned action based on, among other things, want of subject matter jurisdiction. Doc ##43 & 51. Plaintiff opposes OBB's motion, Doc #58, but does not oppose Austria's motion, Doc #60. Austria's motion to dismiss, Doc #51, therefore is GRANTED. For the reasons that follow, OBB's motion to dismiss, Doc #43, also is GRANTED.

I

This action arises out of an accident that occurred at a train station in Innsbruck, Austria on April 27, 2007, when plaintiff, while attempting to board a moving train, fell to the tracks and suffered severe injuries which resulted in the amputation of her legs above each knee. Doc ##43 at 10; 58 at 1-2.

On June 21, 2010, defendant OBB moved to dismiss the complaint based on four distinct theories: (i) the court lacks subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 USC §1602 et seq; (ii) the doctrine of forum non conveniens requires dismissal; (iii) the court lacks personal jurisdiction over OBB and (iv) international comity requires abstention. Doc #43. On October 15, 2010, plaintiff opposed the motion. Doc #58. A hearing was held on November 18, 2010. Doc #63.

On November 22, 2010, the court ordered plaintiff to file a supplemental memorandum addressing the court's subject matter jurisdiction under the FSIA. Doc #64. In particular, given that it is undisputed that plaintiff purchased her rail ticket from the Rail Pass Experts (a travel agent in Massachusetts) and not OBB, the court requested briefing on plaintiff 's theory that defendant OBB conducted commercial activity in the United States. Id at 2-4. The court also requested briefing on OBB's personal jurisdiction argument. Id at 4. Plaintiff filed a supplemental brief on December 17, 2010, Doc #66, and additional briefing on December 18, 2010, Doc #67. On December 28, 2010, plaintiff filed an ex parte motion for permission to file an exhibit that plaintiff described as "excerpts from the Eurail.com website not to exceed two pages." Doc #68. On January 3, 2011, defendant filed an opposition to plaintiff 's ex parte motion, Doc #69, and on January 13, 2011, defendant filed a supplemental brief addressing plaintiff 's additional arguments under the FSIA, Doc #70.

II

A

In analyzing OBB's motion to dismiss, the court "assume[s] [plaintiff's factual] allegations to be true and draw[s] all reasonable inferences in [her] favor." *Doe v Holy See,* 557 F3d 1066, 1073 (9th Cir 2009), quoting *Wolfe v Strankman,* 392 F3d 358, 362 (9th Cir 2004). The court need not, however, accept the "truth of legal conclusions merely because they are cast in the form of factual allegations." Id, quoting *Warren v Fox Family Worldwide, Inc*, 328 F3d 1136, 1139 (9th Cir 2003) (emphasis omitted).

B

"In 1976, to clarify the governing standards and to insulate the issue of sovereign immunity from the impact of case-by-case diplomatic pressures, Congress enacted the FSIA, 28 USC §§ 1330, 1602-1611." *Doe*, 557 F3d at 1072 (internal quotations and citation omitted). The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v Amerada Hess Shipping Corp,* 488 US 428, 443 (1989). "Under the FSIA, a foreign state[1] is presumptively immune from

[1] A foreign state "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 USC § 1603(a). An "agency or instrumentality of a foreign state" means any entity that (i) is a separate legal person, corporate or otherwise, (ii) is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or

(Continued on following page)

suit unless a specific exception applies." *Permanent Mission of India to the UN v City of New York,* 551 US 193, 197 (2007). Here, plaintiff bases her allegation[2] of subject matter jurisdiction on the first clause of section 1605(a)(2), which provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state * * * .

28 USC § 1605. The court therefore evaluates whether plaintiff can establish that this exception applies.

C

The parties agree that the only relevant commercial activity within the United States was plaintiff's March 2007 purchase of a Eurail pass from the Rail

---

other ownership interest is owned by a foreign state or political subdivision thereof and (iii) is neither a citizen of a State of the United States nor created under the laws of any third country. Plaintiff does not contest that OBB is in fact an organ of the Republic of Austria. See Doc #58.

[2] As OBB points out, after its motion addressed the three clauses of the commercial activities exception, plaintiff, in opposition, argues only that her claim is "based upon OBB's commercial activity in the United States." Doc ##61 at 6; 58 at 2-4. The court therefore limits its analysis to that exception.

Pass Experts, a corporate entity apparently located in Massachusetts. Doc ##1 at 1-2; 58 at 2. Plaintiff argues that because the purchase of the pass occurred in the United States, and her injury claim is based upon that commercial activity, the commercial activity exception applies and the court therefore has subject matter jurisdiction.

The FSIA makes clear, however, that the relevant commercial activity must be undertaken "by the foreign state." 28 USC §1605(a)(2). Plaintiff does not allege that OBB sold her a Eurail pass. Instead, plaintiff lays out the following argument:

> OBB is a member [and owner] of the Eurail Group * * * . The [Eurail Group's] website[3] says that the 'Eurail passes are available from our wide network of Sales Agents worldwide' * * * [and] confirms that the Eurail Group represents OBB * * * . OBB has authorized the Eurail Group to sell passes directly to American citizens. * * * The issuing office was the Rail Pass Experts in Massachusetts[, which] * * * was the intermediary for the carriers in Europe including the OBB.

Doc #58 at 3. In her supplemental briefing, plaintiff expands on this theory and asserts that OBB authorized Eurail Group, its agent, to sell its railway passes

[3] While it did not factor into the court's ruling, as a factual matter, plaintiff does not allege that she purchased the rail pass at issue via the internet or from the Eurail Group's website.

and that Eurail Group created a sub-agency relationship with the Rail Pass Experts, which sold the railway pass to plaintiff. Doc #66 at 3-5.

Although plaintiff cites various points of California agency law in support of her theory, the controlling authority in the Ninth Circuit on whether acts by independent entities may be imputed to a foreign government is *Doe v Holy See,* 557 F3d 1066 (9th Cir 2009). In *Doe*, the plaintiff sought to attribute the actions of various entities to the Holy See (a foreign sovereign) for purposes of establishing subject-matter jurisdiction under an exception to the FSIA. Id at 1076-77. The Ninth Circuit adopted the standard articulated in *First National City Bank v Banco Para el Comercio Exterior de Cuba ("Bancec"),* 462 US 611 (1983), to the jurisdictional context of the FSIA. The court observed that "*Bancec* provides a workable standard for deciding" the question whether "a particular individual or corporation is an agent of a foreign state." *Doe*, 557 F3d at 1079. The court confirmed that there is "a presumption in favor of separate juridical status for foreign state instrumentalities at the jurisdiction phase." Id. A plaintiff must allege sufficient facts to overcome this presumption in order to have actions by an independent entity imputed to the sovereign. Applying *Bancec* to the facts of that case, the court found that even though plaintiff had alleged the various instrumentalities were "agents" of the foreign state, "[his] complaint does not allege day-to-day, routine involvement of the [sovereign] in the affairs of the [instrumentalities]";

therefore, plaintiff's allegations were "insufficient to overcome the presumption of separate juridical status." Id at 1079-80.

Other circuits are in accord. For example, in *Transamerica Leasing, Inc v La Republica de Venezuela,* 200 F3d 843, (DC Cir 2000), the DC Circuit examined whether, for purposes of the "commercial activity" exception to the FSIA, the actions of a corporation owned by the defendant Republic of Venezuela could be attributed to the Republic. As in *Doe*, the court held that there is a presumption that a juridical entity has a separate legal status from that of the sovereign. Id at 847. The court ruled that the presumption can only be overcome where "a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created," or "where recognition of the instrumentality as an entity apart from the state would work fraud or injustice." Id at 847-48 (internal quotations omitted). The court rejected the notion that mere "apparent authority" could meet this standard, stating that "[w]e doubt * * * that a case of merely apparent authority falls within the agency exception – an exception limited by its terms to situations in which the instrumentality 'is so extensively controlled by [the sovereign] that a relationship of principal and agent is created.'" Id at 850, quoting *Bancec,* 462 US at 629. Despite the fact that the Republic of Venezuela owned a majority of the corporation's stock, appointed the Board of Directors and President, was involved in certain operations of the corporation and engaged in other activity

related to the corporation, the court concluded that the sovereign did not exercise sufficient control to allow it to be bound by the acts of the corporation for purposes of jurisdiction under the FSIA. Id at 850-55.

Plaintiff's allegations fall far short of meeting these standards. Plaintiff seeks to extend the cases above by imputing the actions of an alleged "sub-agent" (Rail Pass Experts) to a principal (OBB) via an alleged "agent" (Eurail Group). While plaintiff alludes to connections between OBB and the Eurail Group and between the Eurail Group and the Rail Pass Experts, there are no factual allegations or evidence that OBB exerted "day-to-day" control over either Eurail Group or Rail Pass Experts. According to plaintiff, OBB was merely one of many rail carriers that authorized Eurail Group to sell rail passes that would permit passengers to travel over OBB-controlled railways (along with those of the other carriers). Doc #66 at 1. Plaintiff does not dispute defendant's contention that the Eurail Group "has its own management and employees." Doc #43 at 18. Moreover, although OBB acknowledges the possibility that the Rail Pass Experts were a subagent of Eurail Group, plaintiffs have not alleged or argued that (prior to this action) OBB was even aware of the Rail Pass Experts's existence. The mere fact that OBB has authorized the Eurail Group to sell and distribute rail passes for travel over its railways, and that such a pass was sold by a third party travel agent to plaintiff is simply insufficient to establish the day-to-day involvement or "principal-agent" relationship necessary to defeat

the presumption of separate juridical status. *Holy See,* 557 F3d at 1079-80. Indeed, as the court noted in its November 22 order, plaintiff 's "unwieldy theory of subject matter jurisdiction would seem to ensnare all thirty members of the Eurail Group." Doc #64 at 4.

The court therefore finds the connection between OBB and the Rail Pass Experts too attenuated to establish subject matter jurisdiction. Because plaintiff fails to establish that the commercial activity here was in fact undertaken by "a foreign state," the commercial activity exception to sovereign immunity does not apply in this case. The court must therefore GRANT OBB's motion to dismiss. Doc #43.

III

Plaintiff also petitions the court for leave to conduct discovery on issues relating to subject matter jurisdiction, "[i]n the event the court is inclined to grant [OBB's] motion." Doc #58 at 8. OBB objects to this request, arguing that its draft answers, Doc #61-1 at 11-13, "show that the answers would not have changed anything." Doc #61 at 16. The court agrees. Plaintiff 's proposed interrogatories are not calculated to establish that the commercial activity in question was undertaken by a foreign state or that OBB exerted the "day-to-day, routine involvement" in either the Eurail Group or the Rail Pass Experts that would allow their acts to be imputed to OBB. Hence, the proposed discovery could not possibly alter the court's

conclusion that the commercial activity exception to the FSIA is inapplicable.

Moreover, "it is only if a plaintiff has alleged 'specific facts that, if proved, sustain[ ] a nexus between particularized commercial activity and the claims asserted by the plaintiff' that courts allow limited discovery to confirm those facts: discovery 'cannot supplant the pleader's duty to state those facts at the outset of the case.'" *Dames & Moore v Emirate of Dubai,* 1996 WL 671279, *6 (ND Cal Nov 14, 1996) (Smith, J), quoting *Arriba Ltd v Petroleos Mexicanos,* 962 F2d 528, 537 n17 (5th Cir 1992). Plaintiff's complaint, however, does not allege an agency relationship between OBB and the Rail Pass Experts, or that the Rail Experts is a "foreign state" under the FSIA. See Doc #1 ("Plaintiff * * * purchased the railway ticket through defendants' agent, Eurail, and the American based company, the Rail Pass Experts."). Plaintiff's request for additional discovery is DENIED.

The court also DENIES plaintiff's ex parte request to file additional excerpts from the Eurail Group website. Doc #68. Defendant correctly points out that plaintiff's request was made well past the December 17, 2010 deadline set by the court for further briefing from plaintiff. Doc #64 at 4. Moreover, the court does not see how excerpts from the Eurail Group website could possibly alter the conclusion above. Indeed, plaintiff previously submitted pages from the Eurail Group website that establish, among other things, that the Eurail Group "represents

and acts for the 30 European railway organisations [sic] that make up its membership." Doc #58 at 14. The court does not see how any additional pages from the Eurail Group website would establish that the Eurail Group is "so extensively controlled by [OBB]" – as opposed to its many other member railways – so as to permit the imputation of either the Eurail Group's acts or the acts of the Rail Pass Experts to OBB. *Transamerica Leasing,* 200 F3d at 850.

IV

For the above reasons, defendants' motions to dismiss, Doc ##43 & 51, are GRANTED. Plaintiff 's motion for leave to file additional exhibits is DENIED. The clerk is DIRECTED to terminate all motions and close the file.

IT IS SO ORDERED.

/s/ Vaughn R Walker
VAUGHN R WALKER
United States District Judge

§ 1603. Definitions

For purposes of this chapter –

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign 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.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The 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.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside 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;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –

> **(A)** any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> **(B)** any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award

made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub.L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That –

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall

be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same

action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed. Pub.L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341

(g) Limitation on discovery. –

(1) In general. – (A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning

on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset. – (A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would –

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence. – The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss. – A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction. – Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.