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FOREIGN SOVEREIGNS AS FRIENDS OF THE COURT

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***290 INTRODUCTION**

IN 2013, the U.S. Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.* considered whether the Alien Tort Statute ("ATS") provides a cause of action for foreign nationals to seek redress for violations of the law of nations that occur outside the United States. [1] At oral argument, the Justices focused on positions that foreign governments advanced in amicus briefs. [2] Justice Sotomayor noted that the European Commission brief offered "a fairly simple set of rules" that "makes sense," and pressed the plaintiffs to explain why the Court should not adopt the Commission's view. [3] Later, the plaintiffs argued that "[t]he trend in the world today is towards universal justice for people . . . and corporations that violate" human rights norms, and Chief Justice Roberts shot back, "Well, the United Kingdom and the Netherlands don't think so." [4] The plaintiffs' counsel also cited a Dutch decision permitting recovery in circumstances similar to *Kiobel*, [5] prompting Justice Scalia to retort that he would "rather listen to the Dutch government than . . . one Dutch judge." [6]

The Justices' attention to foreign governments' briefs in *Kiobel* illustrates the Supreme Court's important but underappreciated practice of relying on the positions of foreign sovereign amici.

This Article presents the first systematic study of foreign sovereigns' filings as amici in the Supreme Court, [7] and it shows that such filings do ***291** and should have important influence on the Court's jurisprudence. These conclusions stem from an original analysis of the briefings, oral arguments, and opinions in every Supreme Court merits case since 1978 involving a foreign sovereign amicus.

Although the first foreign sovereign amicus brief was filed in 1919, foreign sovereign briefs increased in importance in 1978 when the Court instigated a shift from foreign sovereigns communicating with the Court primarily via diplomatic notes (transmitted to the U.S. executive branch and passed on to the Court) to the modern practice of foreign sovereign amicus briefs. In effect, this change disaggregated the U.S. government vis-à-vis foreign sovereigns, making clear that they should communicate not just with their traditional interlocutors in the executive branch but also directly with the U.S. judiciary. Although Professor Anne-Marie Slaughter and others have highlighted the disaggregation of states in a globalized world, study of foreign sovereign amici complicates the picture of "[h]orizontal government networks" that "link[] . . . counterpart national officials across borders," such as judge-to-judge interactions. [8] This Article's focus on diagonal channels between foreign executive ***292** branches and the U.S. judiciary shows transnational governmental communications to be more complex and multifaceted than previously appreciated.

The breadth of international communicators is impressive. Between 1978 and 2013, forty-six foreign countries, plus the European Community/European Union and the Council of Europe, filed amicus briefs in the Supreme Court. The single most frequent filer since 1978 has been the United Kingdom, followed by the European Union, Canada, and Mexico; but a variety of countries including Argentina, Haiti, Japan, and Liberia have also filed.

Foreign sovereigns now file in many cases involving classic foreign relations law questions, such as the extraterritorial reach of U.S. statutes, foreign sovereign immunity, the ATS, and foreign affairs preemption. [9] But they have also filed in cases about the constitutionality of capital punishment under the Eighth Amendment. Across this range of cases, foreign sovereigns tend to make arguments about one or more of four types of issues: "international facts," [10] treaty law, customary international law ("CIL"), and foreign law (that is, the domestic law of the foreign sovereigns). The most prevalent issues, each addressed in 54% of briefs, are international facts and treaties. [11] CIL and foreign law are not far behind, however, each appearing in 44% of briefs. [12]

Foreign sovereign amicus briefs receive substantial attention from the Supreme Court, a result that is striking in light of the perception that the current Court is ambivalent or even hostile to foreign and international law concerns. [13] In his recent book *The Court and the World*, Justice ***293** Breyer acknowledges that the Court relies on briefs by foreign sovereigns and finds them to be "helpful." [14] This view is not unique to Justice Breyer. Justices across the spectrum cite foreign sovereign briefs in their opinions and question advocates about them at oral argument. [15]

Scholars who study the effects of amicus briefs typically rely on citation in opinions to gauge influence, [16] and on that metric, foreign sovereign briefs appear highly relevant to the Court. In merits cases since 1978 with at least one foreign sovereign amicus brief, an opinion in the case cited one or more foreign sovereign amicus briefs 46% of the time. [17] As explored in more detail in Part III, the citation rates for foreign sovereign amici compare favorably to citation rates for frequent institutional litigants. Even more surprisingly, in one ten-year period, the Court cited foreign sovereign amicus briefs at a higher rate than amicus briefs by the United States. [18] The frequency with which the Court discusses foreign sovereign amicus briefs at oral argument confirms the Justices' attention to such briefs. In 51% of merits cases with a foreign sovereign amicus brief since 1978, [19] at least one foreign sovereign amicus brief was referenced at oral argument, and in several cases, the Court granted foreign sovereign amici argument time. [20]

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***294** The Supreme Court's treatment of particular types of arguments by foreign sovereign amici is part of a larger story about how the Court approaches foreign relations cases. In recent years, scholars have devoted substantial attention to how the Court treats the U.S. government in foreign relations cases, and in particular they have attempted to systematize and explain the deference the Court gives to the United States. [21] In light of the intense focus on deference to the United States, the lack of attention to the role of foreign sovereign amici in the very same cases is surprising, especially because some of the rationales for deference to the United States apply with similar force to foreign sovereigns. In particular, the status of the U.S. executive branch as a lawmaker with respect to both treaties and CIL simultaneously justifies deference to foreign sovereigns, who make international law in the same manner as the United States. Similarly, the expertise of the executive branch about the content of international law and the likely effects of the Court's decision may be equally applicable to foreign sovereigns, particularly if the question at issue is not the likely impact on the United States, but rather the likely response of foreign countries to a specific outcome. And finally, both the United States and foreign sovereigns may be able to control or at least influence the reaction to a decision by the Court. [22]

These rationales for deference play out in different combinations and to differing degrees with respect to foreign sovereigns' arguments about "international facts," treaties, CIL, and foreign law.

"International facts" or "international effects" involve nonlegal representations about, for example, the current or future consequences of a ***295** statute or judicial decision. [23] In considering "international facts," the Supreme Court routinely relies on representations by both the United States and foreign sovereigns. Its approach to these issues rests on the sovereigns' expertise and the Court's comparative inexpertise. On some issues-- such as the overall impact of a particular outcome on U.S. foreign relations-- the United States will have greater expertise than any foreign sovereign, but on other questions--such as the likely reaction of a foreign country to a particular outcome--the foreign government itself may well have greater expertise to provide to the Court.

When interpreting treaties, the Court begins with the treaty text, but explicitly gives weight to the views of *both* the United States and foreign sovereigns that are party to the treaty. [24] In one case, Justice Scalia dissented on the ground that the Court failed to afford sufficient weight to the views of foreign sovereigns. [25] Scholars have explained the Court's deference to the U.S. government's views on treaties as a form of *Chevron* deference. [26] Although *Chevron* may provide a useful analogy to describe the magnitude of deference the Court affords to U.S. government views in treaty interpretation cases, it is unsatisfying as an explanation for the *origin* of the deference to the United States because it fails to account for the similar weight the Court gives to the views of foreign sovereign treaty parties. Rather, contract-based analogies for treaty interpretation that draw on the U.S. government and foreign sovereigns' expertise and status as treaty makers better account for the importance the Court places on the views of both the United States and foreign sovereigns.

Similarly, with regard to CIL, the status of the United States and foreign sovereigns as makers of such law, and relatedly as experts on the law they help to make, justifies giving significant weight to their views about the content and limits of CIL. The Court in fact appears to pay careful attention to the foreign sovereigns' arguments about CIL, including in ATS cases, where it has specifically reserved the question of ***296** whether victims must exhaust local remedies before bringing an ATS claim--an argument repeatedly advanced by foreign sovereign amici. [27]

Finally, foreign sovereign amici deserve *greater* deference than the U.S. government when they argue about the content of their own domestic law, that is, about foreign law. Foreign law can be relevant to a range of issues before the Court, including the extent to which extraterritorial application of U.S. law would conflict with foreign states' laws and how foreign states have implemented treaties. Both comparative expertise and the role of foreign sovereigns as lawmakers in their own systems suggest that foreign sovereign amici are a superior source of information on their own domestic law than either the U.S. executive branch or the Court itself.

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In short, courts should afford the least weight to foreign sovereign amici's views on U.S. law (a very rare topic of their briefs), and the most weight on issues of foreign law. For international facts, CIL, and treaties, courts should generally treat foreign sovereign amici's views similarly to those of the U.S. government, though the absolute amount of deference should depend on contextual factors, including whether the United States and foreign sovereigns agree or disagree.

Importantly, the Court's choice to afford deference to a foreign sovereign on a specific issue generally will not resolve the ultimate question in the case. Rather, the Court may, for example, accept the view of a foreign sovereign that extraterritorial application of a U.S. statute will interfere with the foreign sovereign's domestic enforcement abilities, but still determine that the U.S. law applies extraterritorially because Congress clearly intended that it do so.

In considering amicus briefs, the Court should not accept the views of foreign sovereign amici uncritically. Rather, it should take particular care to guard against two especially important concerns with foreign sovereigns' representations, namely, (1) that a brief's representations about international law may reflect the position of a single country or region, rather than an international consensus; and (2) that a brief gives an exaggerated impression of the foreign sovereign's commitment to an issue and therefore of the foreign relations implications of the case. To protect against these possibilities, the Court should interrogate counsel for the parties and the United States, as well as counsel for the foreign sovereigns in cases where they participate in oral argument, about the ***297** representativeness and depth of commitment of the foreign sovereign amici's views. To evaluate the strength of a foreign sovereign's commitment on an issue, the Court may wish to ask whether the foreign sovereign's litigation position is consistent with views it has expressed in earlier briefs or other official documents. Foreign sovereigns can also assist the Court by volunteering such information in their briefs.

This Article proceeds in four parts. Part I introduces the little-known history of foreign sovereign amicus briefs. Part II then provides a descriptive account of foreign sovereigns' participation as amici in Supreme Court merits cases, including by categorizing the types of arguments that foreign sovereigns make to the Court. Part III evaluates the Court's attention to foreign sovereign amicus briefs by examining the frequency with which the Justices cite such briefs and discuss them at oral argument, particularly in comparison to amicus briefs in general and briefs by the United States. Building on the categorization of the briefs in Part II, Part IV analyzes the justifications for deference to both the United States and foreign sovereigns and argues that in particular circumstances foreign sovereigns should receive deference comparable to or exceeding that afforded to the United States. This Part then proposes a spectrum of deference for the issues that foreign sovereign amici address and explores how deference on those issues should change in future cases if the U.S. government and foreign sovereign amici disagree. Part IV closes by offering several cautions regarding reliance on foreign sovereign amici and proposing ways for the Court to mitigate potential risks going forward.

I. THE HISTORY OF FOREIGN SOVEREIGN AMICI

The first amicus brief in the Supreme Court was filed in 1821, [28] but the role of foreign sovereigns as amici developed more recently. Historically, a foreign sovereign that wished to communicate its views on a case before a U.S. court, including the Supreme Court, would send a diplomatic note to the U.S. Department of State, which would in turn transmit the note to the relevant court. [29]

***298** Some particularly enterprising states filed amicus briefs directly with the courts. Counsel for the British Embassy in Washington filed a brief with the Supreme Court as early as 1919 and was permitted to participate in oral argument. [30] In another case in 1928, the Court specifically denoted counsel for the British Embassy as amicus curiae. [31] In 1952, foreign sovereigns began to file briefs in the name of their governments, as opposed to an embassy. [32] Denmark, Norway, and the United Kingdom filed amicus briefs in support of certiorari in a shipping-related case, *Lauritzen v. Larsen*, and Denmark filed an amicus brief on the merits. [33]

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In the decades that followed, foreign sovereigns, including Greece, Liberia, Panama, and the United Kingdom, filed briefs in a number of other shipping cases. [34] Foreign sovereigns also filed briefs in cases involving issues such as the Panama Canal, [35] interpretation of the Warsaw Convention, [36] and U.S. antitrust laws. [37] Nonetheless, foreign sovereign participation as amicus curiae was fairly limited.

***299** In 1978, the Supreme Court instigated a shift from the prior diplomatic note practice toward foreign sovereigns filing amicus briefs directly with U.S. courts. The Digest of United States Practice in International Law, published by the State Department, [38] chronicles the Supreme Court's action and the response of the Departments of Justice and State. [39] In *Zenith Radio Corp. v. United States*, [40] a case about foreign trade, the European Commission and Japan transmitted diplomatic notes to the State Department, which submitted them to the Supreme Court, via the Solicitor General. [41] According to Solicitor General Wade H. McCree, the Japanese diplomatic note

> became a subject of concern in questioning by the Justices during the oral argument . . . and I believe that the fact that the note was provided to the Court by us [the United States] as a litigant in the case tended to confuse the presentation of the issues in a way that did not improve the prospect that the final decision would be favorable to the interests of the Government of Japan. [42]

The confusion is understandable: Japan's diplomatic note supported the interests of Zenith Radio (the petitioner), but it was transmitted to the Court by the United States (the respondent). Following *Zenith*, the Supreme Court Clerk wrote to the Solicitor General "stating that the procedure of transmitting diplomatic notes to the Court is not authorized by the Court's rules," and "foreign governments ordinarily should make their presentations to the Supreme Court in a way authorized by the Court's rules." [43] The Solicitor General therefore "recommend[ed]" that the State Department "request foreign governments to communicate their views to the judicial branch through the more effective method preferred by that branch--the filing of formal briefs." [44]

***300** The State Department subsequently transmitted a circular diplomatic note to the Chiefs of Mission in Washington, D.C., in August 1978. [45] The note explained the correspondence from the Supreme Court Clerk and stated that the Court prefers that foreign governments file amicus briefs. [46] The diplomatic note cited the Supreme Court rule permitting "any person to file a brief as *amicus curiae* with the consent of the parties to the case, or by motion in the absence of consent," and offered an assurance that "[t]he United States will consent to such a filing in any case in which it is a party." [47] The State Department declared that it would "no longer transmit diplomatic notes" from foreign sovereigns to the Supreme Court or the Courts of Appeals. [48]

In this way, the Court initiated a shift from foreign sovereigns communicating with the Court via the executive branch to communicating directly to the Court. But who exactly made this decision? The letter from the Supreme Court Clerk to the Solicitor General does not clarify whether the Justices or the Clerk's Office determined to request cessation of the prior diplomatic note practice. [49]

The motivations for the shift are also somewhat unclear. The Solicitor General's account suggests that the Clerk's letter was motivated by discomfort with the procedural irregularity of diplomatic note submission under the Court's rules. [50] One could imagine that the Court might have been concerned that the special transmission of diplomatic notes via the U.S. government unfairly advantaged foreign sovereigns by allowing filing without the gatekeeping functions of notice to and consent from the parties that the Court's rules require for amicus briefs. [51] The special ***301** transmission route might also have tended to make the foreign sovereigns' views appear more authoritative to law clerks or Justices. And

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diplomatic notes could be prepared and transmitted to the Court without the cost involved in hiring counsel to draft an amicus brief. On the other hand, the Solicitor General's letter suggests that the Court had the opposite concern, namely, that the views of foreign sovereigns transmitted by the U.S. government, whose interests were sometimes adverse to the foreign sovereign, were presented "in a way that did not improve the prospect that the final decision would be favorable to the interests of the [foreign sovereign]." [52]

The Supreme Court's initiation of the shift to amicus briefs also raises a constitutional question: Was the Court's action a usurpation of the powers of the executive branch? The diplomatic note practice stemmed from the executive branch's authority over foreign relations and particularly the President's constitutional authority to receive ambassadors. [53] By directing foreign sovereigns to communicate with the Court directly, the Court's action disaggregated the U.S. government vis-à-vis foreign sovereigns. [54] Although the Court has repeatedly stated that the United States must *speak* with "one voice" in foreign relations [55] --the President's voice--its acceptance of foreign sovereign amicus briefs makes clear that there are multiple *listeners* in the U.S. government. [56] In the end, the Departments of Justice and State acquiesced in the change. [57] The State Department noted in later communications that the shift to amicus briefs reflected "a growing consensus within the U.S. government ***302** that from a standpoint of international, as well as domestic, law, there was no reason why foreign governments should not in most case[s] present their views . . . to the courts in the United States directly rather than through the diplomatic channel." [58]

Since the shift from diplomatic notes in 1978, foreign sovereign amici have been governed by the general substantive and procedural guidance the Supreme Court Rules provide for amici. Rule 37.1 cautions that while an amicus brief "that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court," a brief "that does not serve this purpose burdens the Court, and its filing is not favored." [59] The Rules specify that an amicus brief at the merits stage "may be filed if accompanied by the written consent of all parties." [60] If any party withholds its consent, then the potential amicus may file a motion seeking the Court's leave to file the brief, [61] and the Court routinely approves such requests. [62] In practice, the Court has established an open-door policy for amici, so long as they comply with the rules regarding time for filing. [63]

II. ASSESSING FOREIGN SOVEREIGN AMICUS PARTICIPATION

This Article's analysis and conclusions are based on my review of every foreign sovereign amicus brief filed at the merits stage in Supreme Court cases from the 1978 Term through the 2013 Term--a total of sixty-eight briefs. [64] This period captures all briefs filed after the 1978 shift ***303** from foreign sovereigns expressing their views through a mixture of diplomatic notes and amicus briefs to solely filing amicus briefs. My research is the first effort to comprehensively identify and analyze foreign sovereign amicus briefs, and it provides insights into who files, when they file, why they file, and how they influence the Court. [65]

Section II.A addresses the filing patterns and postures of foreign sovereign amici, including the types of cases in which they file. Section II.B identifies four principal types of issues about which foreign sovereigns argue in their amicus briefs: "international facts," treaty law, CIL, and foreign law. [66] It provides examples of each along with an assessment of the frequency with which arguments about each issue occur.

A. When and How Foreign Sovereigns File

Foreign sovereigns' participation as amici curiae before the Supreme Court has increased in recent years. [67] Foreign sovereigns appear to have a longstanding interest in certain questions, such as extraterritorial application ***304** of U.S.

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law, but with respect to other issues, their participation may be the result of recruitment by the parties they support, particularly if such parties are represented by experienced Supreme Court practitioners, who often coordinate amici support for their clients. [68]

Foreign sovereigns participate as amici in a diverse range of postures. Although foreign sovereigns file briefs both at the petition for certiorari stage and at the merits stage, [69] this Article focuses on merits filings. Merits briefs address substantive legal questions, as opposed to the narrow issue of whether the Court should grant review, and therefore allow for a more nuanced assessment of the foreign sovereign amici's impact on the Court's jurisprudence.

At the merits stage, foreign sovereigns file in support of both petitioners and respondents, but they have filed more than twice as often in support of petitioners. [70] They also occasionally file in support of neither party. [71]

Foreign sovereigns often file individually, but sometimes they file in pairs or small groups. [72] Sometimes large numbers of foreign sovereigns file a single brief. This happens most often when the European Commission ***305** or Council of Europe file on behalf of their members. Some cases draw exceptionally high numbers of foreign sovereign amici. In *Medellin v. Texas*, [73] which involved the Vienna Convention on Consular Relations, the European Union, the Council of Europe (which filed on behalf of its forty-seven member states), Liechtenstein, Norway, and Switzerland joined a single brief. [74] *Roper v. Simmons*, [75] which addressed the death penalty for juvenile offenders, also drew high participation, with a single brief signed by the European Union, Canada, the Council of Europe (which at the time had forty-five member states), Iceland, Liechtenstein, Mexico, New Zealand, Norway, and Switzerland. [76]

When multiple foreign sovereigns file separate briefs in a case, they usually file in support of the same side. [77] In a few cases, however, foreign sovereigns have taken divergent positions. For example, when *Kiobel v. Royal Dutch Petroleum Co.* was reargued on the question of the extraterritorial reach of the ATS, Argentina filed a brief supporting ATS causes of action for torts occurring abroad, [78] while the European Commission, the Netherlands, and the United Kingdom filed in support of neither party and argued for extraterritorial application only in limited circumstances. [79]

***306** Foreign sovereigns' positions vis-à-vis the United States also vary. Sometimes they file on the same side as the U.S. government, [80] and sometimes opposite the U.S. government. [81] The position of foreign sovereigns relative to the United States does not depend on whether the United States is a party in the case or an amicus. Foreign sovereigns have filed in opposition to the United States in both circumstances. [82]

Since 1978, forty-six different foreign countries, plus the European Community/European Union and the Council of Europe, have filed or signed amicus briefs in merits cases. This number includes a wide variety of countries, such as Argentina, Australia, Colombia, Guinea, Japan, Jordan, Liberia, Mexico, Saudi Arabia, and Taiwan. As shown in Figure 1 below, [83] however, the most frequent filers are Western European countries, along with Canada and Mexico. [84] The single most frequent filer has been the United Kingdom, which has filed thirteen briefs on the merits since 1978. [85] As a general matter, countries that have substantial trading relationships with the United States or that are geographically ***307** proximate to the United States are especially likely to file briefs, though these characteristics are not perfect predictors. For example, neither China nor South Korea--both top U.S. trading partners--has filed amicus briefs. [86]

Since 1978, foreign sovereigns have filed briefs in many of the foreign-relations-related cases that the Supreme Court has decided. [87] The types of cases in which foreign sovereigns file can be grouped into several categories as shown in the following chart and explained in more detail Figure 2 [88]:

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Figure 1: Merits Briefs by Top Filing Countries Since 1978

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***308 Figure 2: Cases in Which Foreign Sovereign Amici File**

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1. Extraterritorial Application of U.S. Law. A number of briefs have focused on and opposed the extraterritorial reach of U.S. statutes, including antitrust and securities laws.[89]

2. Foreign Sovereign Immunity. Foreign sovereigns have also weighed in on the Foreign Sovereign Immunities Act and head-of-state ***309** immunity, including in *Verlinden B.V. v. Central Bank of Nigeria*,[90] *Republic of Austria v. Altmann*,[91] and *Samantar v. Yousuf*.[92]

3. Alien Tort Statute. Foreign sovereigns have shown substantial interest in the scope of the ATS. In the Supreme Court's first ATS case, *Sosa v. Alvarez-Machain*, Australia, Switzerland, and the United Kingdom filed a joint brief, and the European Commission also filed a brief.[93] More recently in *Kiobel*, foreign sovereigns filed briefs both on whether the ATS permits corporate liability and on the ATS's extraterritorial reach.[94]

4. Consular Rights. In the last decade, consular rights have emerged as a major focus of foreign sovereigns' attention. In cases such as *Sanchez-Llamas v. Oregon*[95] and *Medellin*, foreign sovereigns have uniformly filed in favor of criminal defendants whose rights under the Vienna Convention on Consular Relations were violated by U.S. officials who failed to apprise the defendant of his or her right to consular notification.[96]

5. Treaty Interpretation. Foreign sovereigns also file in cases involving interpretation of both multilateral and bilateral treaties. For example, in *Air France v. Saks*, France filed a brief on the meaning of "accident" in the Warsaw Convention, a multilateral treaty that governs the liability ***310** of airlines for injuries to passengers.[97] Other foreign sovereigns have filed briefs about bilateral treaties. Liberia, for example, has filed a number of briefs related to the United States-Liberia Friendship, Commerce, and Navigation Treaty, including in *Argentine Republic v. Amerada Hess Shipping Corp*.[98]

6. Foreign Affairs Preemption. In several recent preemption cases with international implications, foreign sovereigns have argued uniformly in favor of preemption of state laws. For example, in *Crosby v. National Foreign Trade Council*,[99] the European Community supported preemption of a Massachusetts law that restricted the ability of state agencies to make purchases from companies doing business with Burma.[100] Similarly, in *American Insurance Ass'n v. Garamendi*, Germany and Switzerland supported preemption of California's Holocaust Victim Insurance Relief Act.[101]

7. International Procedure. Foreign sovereigns have filed in four cases involving procedural questions arising in cross-border litigation. These cases address issues such as the optional nature of the Hague Evidence Convention procedures for discovery when the court has personal jurisdiction over a foreign defendant,[102] whether service of process on a foreign defendant's domestic subsidiary complies with the Hague Service Convention,[103] and the power of a district court to issue a preliminary injunction freezing property outside the United States.[104]

8. Taxation. For a period of time in the 1980s and early 1990s, state taxation schemes triggered significant foreign sovereign protests.[105] California ***311** alone sparked three Supreme Court cases and numerous foreign sovereign briefs opposing its imposition of "worldwide taxation" on companies operating in the state.[106]

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9. Capital Punishment. In addition to the traditional foreign relations questions that have attracted foreign sovereigns' attention, the Supreme Court has suggested that the views of other countries on the death penalty are relevant to the Court's "cruel and unusual punishment" inquiry under the Eighth Amendment, and foreign countries have accepted the invitation to provide their perspectives. The European Union filed a brief in *Atkins v. Virginia* opposing the execution of mentally retarded individuals, [107] and in *Roper*, fifty-one countries signed a brief by the European Union opposing the application of the death penalty to individuals ***312** who were under eighteen years old when they committed the death-eligible crime. [108]

B. What Foreign Sovereigns File: The Arguments They Make

While the types of cases in which foreign sovereigns file are subject to outside influences, such as the nature of the disputes that prompt cases and the Court's decision to hear a particular case, foreign sovereigns control the types of arguments they make in their briefs. The vast majority of foreign sovereign amicus briefs make arguments about one or more of four types of issues-- "international facts," treaty law, CIL, and foreign law. [109] The following Sections explain and provide examples of each type of argument as well as a preview of the impact the arguments have on the Court, a topic addressed fully in Part IV, below.

1. "International Facts"

"International facts" are assessments of foreign relations interests, often with a "predictive component." [110] They may be understood as a species of "legislative facts," defined by Professor Kenneth Culp Davis as facts that "inform[] a court's legislative judgment on questions of law and policy." [111] Put differently, legislative facts are "generalized claim[s] about the state of the world used 'in the law-interpreting and law- ***313** making functions of appellate courts."' [112] Foreign sovereign amici make international fact claims about, for example, the effect of the Court's decision if it rules for one party or the other, the impact of the existing law or judgment the Court is reviewing, and the likely reaction to a particular outcome in the case. [113] International facts are tied with treaties as the most frequent topic in foreign sovereign briefs, appearing in 54% of foreign sovereign amicus briefs (37 of 68) filed on the merits since 1978.

The foreign sovereign briefs in *Morrison v. National Australia Bank* exemplify "international fact" arguments. [114] In *Morrison*, the Court considered the extraterritorial reach of U.S. securities laws. [115] Australia, France, and the United Kingdom each filed a brief objecting to extraterritorial application of Section 10(b) of the Securities Exchange Act on the ground that application of U.S. law in instances where foreign plaintiffs sue foreign defendants for actions related to securities traded on non-U.S. exchanges would interfere with the foreign sovereigns' ability to regulate their own securities markets. [116] For example, the United Kingdom argued that extraterritorial application of the "Rule 10b-5 private right of action risks undermining . . . global regulatory cooperation," threatens the "effectiveness of any action by a foreign regulator," and "may impede open capital markets" because it "raises the cost of doing business in the U.S. and could deter corporations from operating within the U.S. or participating in U.S. financial markets." [117] France further ***314** warned that "French courts would almost certainly refuse to enforce" a U.S. judgment in a securities fraud case that involved an "opt out" class action because "the 'opt out' mechanism violates French constitutional principles and public policy." [118]

After extensive discussion of the foreign sovereign briefs by counsel at oral argument, [119] the Court ultimately held that Section 10(b) of the Securities Exchange Act does not provide a cause of action in cases where "foreign plaintiffs su[e] foreign and American defendants for misconduct in connection with securities traded on foreign exchanges." [120] In his

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opinion for the Court, Justice Scalia referenced the three foreign sovereign amicus briefs, noting that "[t]hey all complain of the interference with foreign securities regulation that application of § 10(b) abroad would produce, and urge the adoption of a clear test that will avoid that consequence." [121] He concluded that the Court's test--"whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange-- meets that requirement." [122]

2. International Law

Foreign sovereigns often weigh in on international law, including both treaty law and CIL.

a. Treaty Interpretation

Foreign sovereigns frequently file briefs regarding the content or proper interpretation of bilateral and multilateral treaties to which the United States and the foreign sovereign amicus are party. Treaty-based arguments are tied with international facts in frequency, appearing in 54% of foreign sovereign amicus briefs (37 of 68) filed on the merits since 1978.

In some cases, the Court has sided with the foreign sovereigns' interpretation of the treaty at issue. For example, in *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*, the Court considered whether and how the Hague Evidence Convention ***315** applies when a litigant seeks discovery from a foreign party over whom the U.S. court has jurisdiction. [123] The court of appeals held that the Convention does not apply where the court has jurisdiction over the foreign litigant, [124] but the Supreme Court, citing amicus briefs by Germany, France, and the United Kingdom, held that the Convention applies even when a court has jurisdiction over the party and that the Convention's evidence-gathering procedures are available, regardless of the court's jurisdiction over the litigant. [125]

In other cases, foreign sovereign amicus briefs address interpretation of treaties, but the Court ultimately resolves the case based on procedural issues or questions specific to U.S. law. For example, in *Sanchez-Llamas*, the Court considered whether judicial relief is available for violations of the Vienna Convention on Consular Relations requirement that "when a national of one country is detained by authorities in another, the authorities must notify the consular officers of the detainee's home country if the detainee so requests." [126] Numerous foreign sovereigns filed briefs arguing, contrary to the position of the United States, that the consular notification provision of the Vienna Convention creates individually enforceable rights. [127] The Court found it "unnecessary to resolve . . . whether the Vienna Convention grants individuals enforceable rights," because it concluded that the plaintiffs were not entitled in any event to the relief they requested (that is, to have incriminating evidence suppressed because of the consular notification violation). [128]

***316** *b. Customary International Law*

Foreign sovereigns argued about CIL in 44% of the foreign sovereign amicus briefs (30 of 68) filed on the merits since 1978, including in a number of high-profile cases.

In the Supreme Court's first ATS case, *Sosa*, the European Commission filed a brief in support of neither party. In other words, it filed as a true "friend of the court." [129] The Commission argued that the conduct that can give rise to an ATS claim and the "actors who may be subject to liability for a tort in violation of the law of nations" must be determined based on CIL, and so must the U.S. exercise of its "jurisdiction to prescribe." [130] In particular, the Commission argued that any exercise of universal jurisdiction as a basis for suit under the ATS must abide by the CIL requirement that the claimant first exhaust the remedies available in the claimant's domestic legal system, unless "local redress is unavailable or obviously futile." [131] The Justices discussed the Commission's proposed exhaustion requirement at oral argument, [132]

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and in the opinion for the Court, Justice Souter summarized the exhaustion argument and noted that the Court "would certainly consider this requirement in an appropriate case." [133]

Foreign sovereigns also weighed in on CIL in the Court's most recent ATS case, *Kiobel.* When the Court initially heard the case, the United Kingdom and the Netherlands argued that "no liability exists for corporations" under CIL, and thus that corporations could not be liable under the ATS. [134] At oral argument, Justice Kennedy, as well as counsel for both petitioners and respondents, specifically mentioned the United ***317** Kingdom-Netherlands brief and its argument that CIL does not provide for liability for corporations. [135]

When the Court ordered reargument in *Kiobel* on whether ATS causes of action can arise for law of nations violations that occur "within the territory of a sovereign other than the United States," [136] foreign sovereigns again filed briefs on CIL, specifically CIL related to jurisdiction. [137] The European Commission argued that "[t]o comply with the law of nations, the ATS must derive both its substantive claims and its jurisdictional limits from customary international law." [138] The Commission argued that ATS suits are permissible under international law for violation of the small set of norms identified in *Sosa* if they comply with one of the bases for jurisdiction recognized under international law, [139] namely, that the perpetrator of the tort is a U.S. citizen (the nationality principle), [140] the tort threatens U.S. national security (the protective principle), [141] or the tort is recognized as giving rise to universal civil jurisdiction. [142] The Commission also reiterated its *Sosa* argument that "international law requires exhaustion of local and international remedies or, alternatively, the claimant's demonstration that such remedies are unavailable or their pursuit is futile." [143]

The foreign sovereigns' arguments had an impact on the Justices. At oral argument, the Justices extensively discussed the Commission's brief and the similar arguments made by the United Kingdom-Netherlands brief. [144] The majority opinion by Chief Justice Roberts adopted a stricter rule against extraterritorial application than the foreign sovereigns had ***318** advocated, [145] but Justice Breyer's concurrence in the judgment for four Justices adopted a position he described as "analogous to, and consistent with, the approaches of a number of other nations." [146] Justice Breyer specifically cited the United Kingdom-Netherlands and European Commission briefs to support the proposition that the United States could exercise jurisdiction in a case brought by a foreign plaintiff against a U.S. national defendant based on unlawful conduct abroad. [147]

3. Foreign Law

Foreign sovereign amici also provide the Court with information regarding the amici's domestic law--law that is, vis-à-vis the U.S. Supreme Court, foreign law. Amicus briefs discuss foreign law for various reasons, including to explain how U.S. law applied extraterritorially would interfere with the foreign sovereign's law, [148] to demonstrate parties' post-ratification understanding of treaties, [149] and to show how U.S. laws are or are not unusual as compared to foreign countries' laws. [150] Of the 68 foreign sovereign amicus briefs filed on the merits since 1978, 30 (44%) addressed the foreign sovereign's domestic law.

JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure provides a useful illustration of foreign law arguments. [151] The Court considered "whether a corporation organized under the laws of the British Virgin Islands is a 'citize[n] or subjec[t] of a foreign state' for the purposes" of diversity jurisdiction under 28 U.S.C. § 1332(a)(2). [152] In an amicus brief, the United Kingdom extensively explained that under its domestic laws, a company incorporated in a British Overseas Territory, like the British Virgin Islands ("BVI"), is a subject of the United Kingdom. [153] It argued that "although the meaning of the phrase 'citizens or subjects of a foreign state"' in the diversity jurisdiction statute "is a question of U.S. law,

the question whether a BVI corporation is in fact a 'citizen' or 'subject' ***319** of the United Kingdom is one that must be answered with reference to the law of the United Kingdom," a subject on which "[t]he views of the United Kingdom . . . are entitled to deference."[154] At oral argument, both counsel and the Court referred to the United Kingdom brief,[155] and the Justices repeatedly grilled the respondent's counsel--who argued against U.K. citizenship for BVI companies--about the fact that his position contradicted the views of the United Kingdom.[156] The Court ultimately cited the United Kingdom brief and held that "the United Kingdom's retention and exercise of authority over the BVI renders BVI citizens, both natural and juridic, 'citizens or subjects' of the United Kingdom under 28 U.S.C. § 1332(a)."[157]

III. THE SUPREME COURT'S ATTENTION TO FOREIGN SOVEREIGN AMICI

The Court pays substantial attention to foreign sovereign amici in considering merits cases. It often cites foreign sovereign amici in opinions and discusses their briefs at oral argument.[158] The Court's attention to foreign sovereigns is itself important, and it also provides some evidence-- though imperfect--of the influence foreign sovereign amici have on the Court.[159]

1. Citation Rates. Justices across the spectrum cite foreign sovereign briefs in their opinions, albeit in different contexts.[160] Perhaps unsurprisingly given his receptivity to international and foreign law,[161] Justice Breyer routinely cites foreign sovereign amici in both majority and separate ***320** opinions.[162] Justice Kennedy has also cited foreign sovereign briefs, including recently in a preemption case about an Arizona law on unlawful aliens and controversially in a case on the Eighth Amendment.[163] Justices who have taken more conservative positions on international law, however, also cite foreign sovereign briefs. In his majority opinion in *Morrison v. National Australia Bank*, Justice Scalia cited briefs by Australia, France, and the United Kingdom to support the conclusion that Congress did not intend for a provision of U.S. securities law to apply extraterritorially.[164]

Scholarly efforts to gauge the impact of amicus briefs in general often focus on the frequency with which Justices cite amicus briefs in their opinions,[165] and on this metric, foreign sovereign briefs appear highly relevant to the Justices' consideration of cases in which such briefs are filed.[166] In 18 of the 39 merits cases since 1978 where at least one foreign sovereign filed an amicus brief, one or more of the briefs is cited in ***321** an opinion in the case, a rate of 46%. In 15 of these 18 cases, the majority opinion cites a foreign sovereign amicus brief.[167]

The rate of citation to foreign sovereign amicus briefs compares favorably to the rate of citation of amici in general. Professors Joseph D. Kearney and Thomas W. Merrill studied amici from 1946 through 1995, and concluded that "the total number of references to amici is substantial, and . . . has been increasing over time."[168] For the last decade they considered (1986-1995), the Supreme Court referred (in some opinion in the case) to an amicus in "just under 37% of the cases with amicus filers."[169] In the same time period, my research identified 11 cases in which at least one foreign sovereign filed an amicus brief, and in 6 of the 11 cases, the Court's opinion cited at least one of the foreign sovereign amicus briefs--a rate of 55%.

The citation rates for foreign sovereigns are also impressive as compared to institutional litigants that Kearney and Merrill studied. Kearney and Merrill report that from 1986 to 1995, the Court cited 9 of the 185 briefs (4.86%) filed by the ACLU and 7 of the 72 briefs (9.72%) filed by the AFL-CIO.[170] In the same period, the Court cited 4 of the 6 amicus briefs (66.67%) that the United Kingdom either filed or signed,[171] and it cited 10 of 21 amicus briefs (48%) filed by any foreign sovereign.

Perhaps most surprising is a comparison to citation rates for the United States as amicus curiae in the same period. Many scholars have noted ***322** the preeminent position of the United States as an amicus, [172] and Kearney and Merrill argue that "the Solicitor General's office is in a class by itself in terms of its influence as an amicus filer." [173] They further note, however, that from 1986 to 1995, the Court cited the Solicitor General in 155 of 330 cases in which he filed an amicus brief, or 46.97% of such cases. [174] As noted above, in the same period, the Court cited the United Kingdom's amicus brief in 4 of the 6 cases in which it filed--a citation rate of 66.67% [175] --and cited at least one foreign sovereign amicus brief in 6 of the 11 cases in which foreign sovereigns filed--a rate of 55%. [176]

Important caveats deserve mention. First, the number of foreign sovereign amicus briefs is rather small in absolute terms and quite small in comparison to the number of briefs filed by the United States, the ACLU, or the AFL-CIO, as reflected in Kearney and Merrill's study. The citation percentages for the foreign sovereign sample and the even smaller sample of U.K. briefs are offered simply to put into perspective the objectively high rates at which the small number of briefs filed by foreign sovereigns draw the Court's attention. It may very well be the case that the Justices are interested in foreign sovereign briefs *because* they are relatively rare. [177]

Second, the citation rates from Kearney and Merrill, along with the rates for foreign sovereign amici, discussed above capture a particular ***323** moment in time (1986-1995) and are subject to change. Some studies indicate that the rate of citation to the Solicitor General's briefs has increased over time and may have continued to do so after the end of Kearney and Merrill's data in 1995. [178] The pace of citations to foreign sovereign amici as a group or to any particular foreign sovereign amicus may not have kept pace with citations to the Solicitor General as citations to the latter have continued to increase.

Moreover, the United States has outperformed foreign sovereign amici in a head-to-head comparison of citation rates in cases where both the United States and foreign sovereigns filed as amici since 1978. My research identified twenty-nine such cases. Although the Court cited a foreign sovereign brief and did *not* cite the U.S. amicus brief in several cases, [179] overall the Court cited the United States in 21 of 29 cases (72%) and cited a foreign sovereign amicus in 13 of 29 (45%).

Finally, although scholars typically reach for citations as a way to gauge amicus impact, [180] citations may be a poor proxy for amicus briefs' influence, both as a general matter and with respect to foreign sovereign amici. Citation of foreign sovereign briefs in opinions may overstate the influence of the briefs if they are included as mere throwaway cites. [181] On the other hand, Justices and their clerks often read and rely on amicus briefs even if the opinions ultimately do not cite the briefs, which suggests that counting citations may understate the briefs' impact. [182] ***324** Moreover, only a subset of Justices write opinions in each case, and each opinion is often joined by multiple Justices. Relying on citations as a proxy for a brief's influence may not fully capture the views of the Justices who join, but do not author, particular opinions. For all of these reasons, it is difficult, if not impossible, to determine whether citations overstate or understate the impact of amicus briefs in general and foreign sovereign amicus briefs in particular.

2. Oral Argument. Discussion of foreign sovereign briefs at oral argument provides an additional measure of the Court's attention to foreign sovereign amici and may be a somewhat better proxy than citations for a brief's influence. Justices speak for themselves at oral argument. For example, if a Justice asks a question that specifically references a foreign sovereign amicus brief, it is fair to infer the Justice has at least considered the brief. [183] Or if a Justice asks a question and the advocate responds by pointing the Justice to a foreign sovereign amicus brief for the answer, it is reasonable to assume that the Justice will at least consider the brief. [184]

In cases where foreign sovereigns file amicus briefs on the merits, the Justices and litigants frequently discuss the briefs at oral argument. [185] In twenty of the thirty-nine merits cases since 1978 that drew at least one foreign sovereign amicus

brief, one or more of the briefs were mentioned at oral argument. [186] In some instances, the briefs have prompted ***325** lengthy discussions, with Justices asking litigants to address particular arguments made by foreign sovereign amici. [187] In other arguments, counsel or Justices have referred specifically to the foreign sovereigns and to their interests in the case, as reflected in amicus briefs, even if they do not mention the briefs. [188]

In a few cases, the Court has granted foreign sovereign amici oral argument time. [189] Such a move is highly unusual, and the U.S. government is typically the only amicus that receives oral argument time. As with citations to foreign sovereign briefs, Justices across the political spectrum discuss foreign sovereign briefs at oral argument. [190]

IV. SOVEREIGNS AND DEFERENCE

In recent years, foreign relations scholars have focused on the deference the Supreme Court traditionally affords to the briefs of one sovereign in foreign-relations-related cases: the U.S. government. Given the amount of scholarship devoted to trying to systematize and explain the nature of the Court's deference to the United States, the paucity of attention to foreign sovereigns' roles in the very same cases is surprising.

This Part examines the explanations that the Court and scholars have given for deference to the U.S. government, and argues that-- in specific situations--the same rationales apply with similar force to the views of foreign sovereigns who file as amici before the Court. It further argues that this recognition explains and justifies the Court's surprising practice ***326** of relying on the views of foreign sovereigns in a variety of circumstances. This Article's study of the foreign sovereign amicus briefs also shows that the Court relies on foreign sovereigns for another issue, separate from those on which it defers to the U.S. government, namely, the content of foreign law. Critically assessing the rationales for deference to the United States provides insight into how the Court treats foreign sovereigns' views, and conversely, focusing on the Court's treatment of foreign sovereigns provides new insights into the reasoning undergirding the Court's deference to the U.S. government. This Part also provides guidance on how the Court should approach possible divergences between U.S. and foreign sovereign views in future cases, [191] and suggests steps the Court, scholars, and litigants can take to mitigate possible risks of relying on foreign sovereign amici going forward.

A. Justifications for Deference

Deference is "not a well-defined concept but rather an umbrella that has been used to cover a variety of judicial approaches." [192] To encompass the range of ways deference operates in foreign relations, I employ a broad conception of deference "to include any situation in which a second decisionmaker [the Court] is influenced by the judgment of some initial decisionmaker [a sovereign] rather than examining an issue entirely de novo." [193] This Section provides an overview of several justifications that scholars have offered for the Court's deference to the U.S. government and proposes one other. [194]

As an initial matter, some justifications for deference apply only to the U.S. executive branch, not to foreign sovereigns. Political question deference rests on the constitutional allocation of powers between coordinate ***327** branches of the U.S. federal government. [195] The U.S. Constitution does not enshrine a role in the U.S. federal structure for foreign sovereigns, and thus foreign sovereign amici are not eligible for political question deference. Moreover, my research did not reveal foreign sovereign filings in any Supreme Court case dealing with the political question doctrine. [196] The absence of foreign sovereign amici in political question cases may in fact rest on the U.S.-government-specific nature of the deference that the Court applies in such cases: Foreign sovereigns (and their Supreme Court advocates) that understand the constitutional underpinnings of the deference to the U.S. government may avoid filing in political question cases for that reason.

Similarly, *Chevron* deference rests on an actual or implied delegation from Congress of lawmaking authority to an executive branch agency, including, for example, in the context of a foreign affairs statute.[197] Although Congress has been prolific in its delegations to agencies, Congress does not, and likely could not, delegate authority to foreign sovereigns to administer U.S. statutes. Thus, foreign sovereigns also are not eligible for *Chevron* deference because they do not act pursuant to express or implied congressional delegations.

Other justifications offered for deference, however, are not necessarily limited to the U.S. government.

1. Lawmaker. The Court affords deference to the executive where the executive acts as a lawmaker, though the bounds of that power are unclear. ***328** [198] Commentators frequently cite head-of-state immunity, where courts defer absolutely to suggestions of immunity filed by the executive branch, as an example of executive branch lawmaking.[199] The executive also acts as a lawmaker with respect to CIL. CIL develops through "general and consistent practice of states followed by them from a sense of legal obligation" ("*opinio juris*").[200] The U.S. government's practice and expressions regarding legal obligations can contribute to CIL.[201]

But as important as the United States is to CIL, other sovereigns' actions and expressions can similarly influence the development of CIL. The United States is just one among many sovereign CIL lawmakers. If the Court's deference to the executive on questions of CIL is based on its status as a lawmaker, then the same rationale justifies giving weight to the views of other sovereigns, that is, to other CIL lawmakers.

As explored in more detail below,[202] consideration of the views of multiple CIL lawmakers may pose interesting challenges if the lawmakers disagree over the content of the law they have made.[203]

***329** *2. Expertise.* The most frequent justification for deference is the executive branch's expertise with respect to foreign relations issues as both an absolute matter and relative to the Court's comparative lack of expertise. Expertise-based deference can be understood as "the general respect given by the courts to the executive branch's views based upon its status as an able and knowledgeable representative of United States interests."[204]

Expertise-based deference is analogous to conceptions of deference in the administrative law context. In administrative law, *Skidmore* deference describes the weak deference the Court gives to agencies' legal interpretations when they are not entitled to *Chevron* deference.[205] Whereas *Chevron* deference rests on a delegation of authority from Congress to an executive branch agency, *Skidmore* applies in instances where there is no delegation, but the Court nonetheless chooses to defer in some fashion to the executive agency.[206] The authority a court gives to ***330** an agency's views pursuant to *Skidmore* depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[207] Similar factors affect courts' review of agency factual findings and policy decisions.[208] Only federal agencies (not private parties or private amici) are entitled to deference, suggesting that the identity of the speaker (and not just the speaker's expertise) is key to the Court's view of the authority of the speaker's arguments.[209]

Similar interests appear to drive the Court's expertise-based deference in foreign relations cases. For example, on issues of "international facts," the Court "often defer[s]" to the U.S. government.[210] The U.S. government is well situated to address international fact issues before ***331** the Court. It has both expertise and access to information the Court otherwise could not obtain.[211] The State Department can provide information on the views of foreign states and their

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likely reactions to the Court's decisions, and the intelligence community may be able to provide additional information regarding foreign relations impacts. [212]

Experience and expertise may be characteristics of foreign sovereigns as well, depending on the question at issue. In particular, where the question is not the substance of U.S. interests, but rather the likely reaction of foreign sovereigns to the Court's decisions, then foreign sovereigns may be as or more "able and knowledgeable" than the U.S. government. Foreign sovereigns can explain to the Court how their government or citizens will react to different outcomes in a particular case, and foreign sovereign briefs often provide the Court with specific information about impacts on the foreign sovereign, such as interference with antitrust amnesty programs. [213] Similarly, foreign sovereigns are comparatively *more* expert on the content of their own domestic law than is the U.S. government and thus are a better source of information for the Court. The U.S. government has no monopoly on expertise, and affording expertise deference to foreign sovereigns on issues about which they are particularly expert follows from the Court's desire to take advantage of the best information available in making its decisions.

3. Control. An additional reason supporting the Court's deference to the U.S. government and foreign sovereigns, particularly on issues of international fact, is that the sovereigns are sometimes in a position to control or at least substantially influence international facts. The U.S. executive ***332** branch, for example, might represent to the Court that it would coordinate any prosecution with its foreign counterparts to ensure that there would be no negative foreign policy consequences. Or a foreign government might represent that if the Court holds that a particular U.S. law applies extraterritorially, courts in the foreign state will refuse to enforce U.S. judgments against the foreign state's nationals, or the government will refuse to comply with discovery requests in cases involving extraterritorial actions.

The ability to control or influence reactions to a decision of the Court is separate and in addition to expertise about likely effects, and in some circumstances, control may provide an additional justification for the Court's deference to representations by the executive branch or foreign sovereigns.

The next Sections analyze how these rationales for deference apply to "international facts," treaties, CIL, and foreign law.

B. Deference on "International Facts"

U.S. courts generally defer to the executive branch's representations with respect to international facts, particularly regarding predictive issues. [214] The same is true in the adjacent and sometimes overlapping area of national security facts, [215] "yet the practice of fact deference is not widely recognized or studied." [216] Even as scholars have made some progress in analyzing fact deference to the U.S. government, they have not recognized that the expertise-based reasons cited to justify such deference apply in certain circumstances to foreign sovereigns' representations about international facts. The cross application of the justifications for deference is implicit in how the Court often treats foreign sovereign representations of international facts and makes sense of why the Court does and should continue to rely on such representations in particular circumstances.

***333** The U.S. government has asserted international facts in a variety of situations, and the Court has often accepted its representations. For example, in *Department of the Navy v. Egan*, the Supreme Court deferred to the executive branch's decision to deny a security clearance. [217] The Court explained that the grant of a security clearance depends on predictions about the holder's behavior, and "[p]redictive judgment of this kind must be made by those with the necessary expertise." [218] Citing its traditional deference to the executive in foreign policy, the Court further asserted that "it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence." [219]

More recently, in *Munaf v. Geren*, the Supreme Court deferred to the executive branch's determination that U.S. citizens who committed crimes in Iraq would not be tortured by Iraqi officials if they were transferred to Iraqi custody. [220] The United States explained that its determination was "based on 'the Executive's assessment of the foreign country's legal system and . . . the Executive['s] ability . . . to obtain foreign assurances it considers reliable.'" [221] The Court concluded that it

> is not suited to second-guess . . . determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area. In contrast, the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is. [222]

The Court has also suggested that, even when the executive's views regarding interpretation of foreign affairs statutes, like the Foreign Sovereign Immunities Act and the ATS, are not entitled to deference, its views about the foreign relations *effects* of decisions under such statutes are entitled to respect. In *Sosa v. Alvarez-Machain*, the Supreme Court ***334** explained that "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the [ATS] case's impact on foreign policy." [223] Similarly, in *Republic of Austria v. Altmann*, the Court explained that although the U.S. government's views about the interpretation of the Foreign Sovereign Immunities Act "merit no special deference," the State Department's "opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct . . . might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." [224]

Like the U.S. government, foreign sovereigns have argued about international facts, and the Court has relied on their representations. For example, in *Arizona v. United States*, [225] Mexico, joined by a number of Central and South American countries, filed a brief explaining the harms caused by an Arizona statute (SB 1070) dealing with unlawful aliens. [226] The foreign sovereign amici argued that "SB 1070 has already caused long-term harm to Mexico-U.S. relations." [227] Mexico explained that "in direct response to" SB 1070, the "Mexican Senate postponed review of a cooperation agreement regarding emergency management, all Mexican border-state governors refused to attend the 2010 Mexico-U.S. Border Governor Conference, . . . and Mexico issued a travel warning for Arizona." [228] The brief also highlighted the actions of private parties in response ***335** to the law, including refusal to engage in bilateral trade and cancellation of student exchange programs. [229] In holding that federal law preempted several provisions of the Arizona statute, Justice Kennedy, writing for a majority, relied on foreign sovereign representations regarding the Arizona statute's effect on "trade, investment, tourism, and diplomatic relations." [230]

The Court has also relied on international facts arguments by foreign sovereigns in extraterritoriality cases. [231] For example, in *F. Hoffman-La Roche Ltd. v. Empagran*, the Court accepted arguments by foreign sovereigns that extraterritorial enforcement of U.S. antitrust law would undermine their ability to enforce their own antitrust laws. [232] Justice Breyer, writing for the majority, accepted German and Canadian arguments that "permitting independently injured foreign plaintiffs to pursue private treble-damages remedies would undermine foreign nations' own antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty." [233] For these reasons, among others, the Court declined to apply U.S. antitrust law "[w]here foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects." [234]

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The Supreme Court has not provided significant explanation for why it defers on international facts provided by foreign sovereigns, but it has offered somewhat more explanation when it has deferred to the U.S. government on such facts. The reasons the Court has given in the U.S. government context apply equally to the foreign sovereigns. [235]

***336** The Court primarily cites the executive branch's greater expertise on the international facts or, relatedly, the Court's comparatively weaker competence vis-à-vis the executive. In *Munaf*, the Court emphasized both, declaring the "political branches . . . well-suited to consider . . . whether there is a serious prospect of torture at the hands of an ally," and the Court "not suited to second-guess such determinations." [236] *Egan* also highlighted that in the context of a "[p]redictive judgment," determinations "must be made by those with the necessary expertise"--the executive branch--free from second-guessing by "an outside nonexpert body"--the Court. [237]

A comparative institutional expertise rationale is particularly persuasive in the context of "predictive factfinding" because "[s]pecialized judgment lies at the heart of questions such as whether disclosure of a particular secret would be harmful to national security" or whether a particular judicial outcome would result in foreign relations problems. [238] Most of the international facts relevant to foreign relations cases involve such predictive judgments, paradigmatically, the likely response of foreign nations to U.S. actions, laws, or judgments.

For many of the international facts that foreign sovereigns discuss, the foreign sovereigns' expertise equals or exceeds that of the U.S. government. Foreign sovereigns file briefs to explain how U.S. policies or laws impact *their* citizens and *their* government and, in some instances, how *their* government will react to particular outcomes. Although the State Department and intelligence community have extensive information-gathering capabilities, [239] foreign governments' access to information about and expertise to assess their own reaction or the reactions of others in their countries to U.S. actions gives them a comparative advantage over even the executive branch. Moreover, to the extent that foreign sovereign briefs touch on issues over which the foreign sovereign has control, such as declining to enforce U.S. judgments or the suspension of ***337** treaty negotiations, the foreign sovereign can take the guesswork out of assessing its likely actions by communicating directly to the Court.

Importantly, deference to either the U.S. government or foreign sovereigns on international facts is not necessarily dispositive of the underlying *legal* question in a case. Often international fact issues involve background facts that are legally relevant, but not legally dispositive. [240] For example, a foreign sovereign's assertion that it will refuse to comply with discovery requests issued in cases enforcing a statute extraterritorially does not answer the legal question of whether Congress intended for the statute to apply extraterritorially. Acceptance of the foreign sovereign's claims with respect to the subsidiary issue of its own reaction to extraterritorial application comports with the Court's pattern of deferring to the institution with the comparatively greater expertise in the predictive judgment at issue, but does not resolve the underlying legal questions in the case. In other words, "[f]act deference, even when warranted, does not require a judge to abandon independent judgment in the evaluation of the legal consequences of those facts." [241]

C. Deference on International Law

The Supreme Court's practices regarding deference to the U.S. government's interpretations of international law are unclear and unsettled. What is clear is that the executive typically receives *some* deference, though the amount of deference and reasons for it vary based on the type of international law at issue. [242] As explained below, the amount of deference ***338** the Court does and should give to foreign sovereigns' views of international law similarly varies based on the source of the law.

1. Deference on Treaty Interpretation

The Supreme Court has explained its approach to treaty interpretation as follows:

> The interpretation of a treaty, like the interpretation of a statute, begins with its text. Because a treaty ratified by the United States is "an agreement among sovereign powers," we have also considered as "aids to its interpretation" the negotiation and drafting history of the treaty as well as "the postratification understanding" of signatory nations. [243]

With respect to the views of the U.S. government, the Court regularly invokes a "well-established canon of deference" that "the Executive Branch's interpretation of a treaty 'is entitled to great weight.'" [244] More specifically, the Court has explained that "[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." [245]

In interpreting treaties, the Court does not give weight only to the views of the U.S. government. In a longstanding line of cases, the Court has explicitly considered and given weight to the views of other countries that are parties to the treaty. The Court has explained that it "find[s] the opinions of our sister signatories to be entitled to considerable ***339** weight." [246] As Chief Justice Burger explained in *Sumitomo Shoji America, Inc. v. Avagliano*, a case involving a bilateral treaty between the United States and Japan, the Court's "role is limited to giving effect to the intent of the Treaty parties. When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." [247] To determine the treaty parties' intent, Chief Justice Burger surveyed the positions of both the U.S. and Japanese governments, and concluded that the U.S. government's view "and the identical position of the Government of Japan" were "entitled to great weight." [248] The Court has explained that it looks to "the postratification understanding of the contracting parties" in interpreting treaties "[b]ecause a treaty ratified by the United States is not only the law of this land, but also an agreement among sovereign powers." [249]

The Court's treatment of "sister signatories" in treaty interpretation is exemplified by its 2010 opinion in *Abbott v. Abbott*. [250] There, the Court, in an opinion by Justice Kennedy, considered whether a *ne exeat* right was a "right of custody" under the Hague Convention on the Civil Aspects of International Child Abduction. [251] The Court described its "inquiry" into the meaning of the treaty as "shaped by the text of the Convention; the views of the United States Department of State; decisions addressing the meaning of 'rights of custody' in courts of other contracting states; and the purposes of the Convention." [252] The Court repeated its typical mantra that "the Executive Branch's interpretation of a treaty 'is entitled to great weight,'" [253] and in the very next paragraph, it explained that its interpretation of the treaty "is further informed by the views of other contracting states," which are "entitled to considerable ***340** weight." [254] The Court then canvassed the views that courts in countries such as the United Kingdom, Israel, Austria, South Africa, and Germany had taken of the treaty provision at issue. [255]

In one case--*Olympic Airways v. Husain*--Justice Scalia, joined by Justice O'Connor, dissented on the ground that the majority failed to give sufficient weight to other parties' interpretation of the Warsaw Convention. [256] Justice Scalia explained,

> We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties. Moreover, it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty

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> consistently. . . . Finally, even if we disagree, we surely owe the conclusions reached by appellate courts of other signatories the courtesy of respectful consideration. [257]

After surveying interpretations of the treaty given by British and Australian courts, Justice Scalia concluded that because their reasoning "is no less compelling than the [U.S. Supreme] Court's," he would follow the interpretations put forth by the foreign courts. [258]

What explains the Court's deference to the U.S. government and, relatedly, to foreign sovereigns? Commentators have noted that "it is not entirely clear from the Court's opinions . . . why it accords the executive ***341** branch this deference." [259] The prevailing academic argument in recent years has been that the "great weight" the Court gives to executive branch treaty interpretations is best understood as a species of the *Chevron* deference that courts afford to administrative agencies. [260] Bradley has argued in favor of the *Chevron* deference origin story on the grounds that courts "presume[] that the United States treatymakers have delegated interpretive power to the executive branch because of its special expertise in foreign affairs. The formal basis for the presumption would be the President's constitutional role in the treaty process, something that goes beyond the President's usual 'take care' responsibilities." [261] Professors Eric Posner and Cass Sunstein have gone further and argued that "in the domain of foreign relations," *Chevron* deference "should apply even if the executive is not exercising delegated authority to make rules or conduct adjudications" because "considerations of constitutional structure argue strongly in favor of deference to the executive." [262] Endorsing the delegation-based origin story, Posner and Sunstein argue that "when a treaty is ambiguous, some institution--either the executive or the judiciary--has to interpret it, and hence some kind of presumed delegation is unavoidable. A presumed delegation to the executive seems both more natural and better than a delegation to the federal courts." [263]

Focusing on the Court's treatment of the views of foreign sovereign treaty parties--"sister signatories," as the Court calls them--reveals a challenge to the *Chevron* delegation origin story. [264] If the rationale for ***342** deference to the U.S. government in treaty interpretation matters is a delegation by the Constitution or the "treatymakers" in the U.S. system (that is, the President and the Senate) to the executive branch, then why does the Court also afford "considerable weight" to the views of foreign sovereign treaty parties? The advocates of the *Chevron* deference origin story do not grapple with the role that foreign sovereigns' treaty interpretations play in the Court's jurisprudence. And if they did, they surely would not and likely could not support an argument that either the Constitution or the President and the Senate together delegated authority to interpret supreme federal law to foreign sovereigns.

Although the justifications offered in its opinions are parsimonious, the Court has suggested an explanation for deference that better accounts for the important role it has given to foreign sovereigns' interpretations of treaties. [265] Specifically, the Court has invoked an analogy between treaties and contracts. [266] The Court has described its "responsibility to ***343** give the specific words of the treaty a meaning consistent with the *shared expectations of the contracting parties*." [267] Similarly, as noted above, *Sumitomo Shoji* describes the Court's role as "limited to giving effect to the intent of the Treaty parties," and avows that the Court "must" defer to an agreed interpretation by treaty parties that "follows from the clear treaty language . . . absent extraordinarily strong contrary evidence." [268] This contractual approach to treaty interpretation clearly situates the Court's deference to the views not just of the U.S. government, but also other treaty parties, within a framework of interpretation. The goal of implementing the treaty parties' shared intent explains why, "[t]o the extent the Court attends to the executive's views, it regularly looks to the views of both negotiating partners as evidence of negotiating intent and of post-ratification performance." [269]

Three related points about the Court's treatment of foreign sovereigns merit consideration. First, the Court gives "considerable weight" to the views of other treaty parties *even in cases in which no foreign sovereign files*. In *Abbott*, the child abduction case described above, for example, no foreign sovereigns filed briefs, but the Court nonetheless surveyed how the treaty had been interpreted by the United Kingdom, Israel, Austria, South Africa, and Germany, among others. [270] Thus the Court treats foreign sovereign interpretations as, in essence, not waivable: The Court will consider (at least some) foreign sovereigns' views, whether the foreign sovereigns provide them directly to the Court or not. The Court's consideration of foreign sovereigns' interpretations in cases in which no foreign sovereign files as an amicus shows that the Court's treatment of the views of foreign sovereigns about treaties cannot be dismissed as mere courtesy to amici. Nonetheless, the Court's repeated citations to foreign sovereign amici when they file briefs on treaty interpretation shows that the Court finds such briefs to be useful resources. [271]

***344** Second, the Court's deference to foreign sovereigns in treaty interpretation does not extend to all sovereigns; it should apply only to treaty parties. By analogy to contract law, the Court is interested only in the views of those who are, in some sense, part of the bargain--that is, party to the treaty. [272] The Court's interest in the views of parties extends even to circumstances when the United States is absent, either because it chooses not to file or because it is not party to the relevant treaty. For example, the Court in *Roper v. Simmons* cited, among other sources, a brief filed by the European Union and other sovereigns for the proposition that the Convention on the Rights of the Child, which the United States has not ratified, prohibits capital punishment for juveniles. [273] Although the Court's citation to any foreign or international law source in considering the meaning of the Eighth Amendment was controversial, the mere fact of relying on a foreign sovereign brief for the content of a treaty to which the foreign sovereign amici are party is not. [274]

Third, the Court's precedents clarify that the Court gives weight to the views of the U.S. government and other treaty parties, but the question remains what weight is "great weight"? The *Chevron* analogy may have greater power when used to explain the mechanisms and magnitude of the deference the Court affords, rather than the origin of the deference. As Bradley explains, in treaty cases, as in the *Chevron* context, "courts do not defer [to the United States] if they find that the plain language of the treaty clearly resolves the issue, or if the executive branch's interpretation is unreasonable." [275] The same is true with respect to interpretations advanced by foreign sovereign amici. For example, in *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*, the Court rejected an interpretation of the Hague Evidence Convention that the petitioners and France advocated because the ***345** Court determined that "it [was] foreclosed by the plain language of the Convention." [276]

In practice, however, the "great weight" the Court gives to the executive's interpretation of treaties appears to be less than that it affords to executive agencies with respect to statutes. Professors Derek Jinks and Neal Katyal have argued that "[t]his 'deference' is . . . limited and decidedly more modest than *Chevron* deference," [277] and the Court's recent cases suggest a trend in this direction. [278] For example, in *BG Group, PLC v. Argentina*, the Court expressed "respect [for] the Government's views about the proper interpretation of treaties," but disagreed with the Solicitor General's interpretation of a treaty on arbitral awards. [279] However it is described, the deference on treaty interpretation appears to be less than with respect to international facts, where the Court has unquestioningly accepted assertions by both the U.S. government and foreign sovereigns. [280]

***346** *2. Deference on Customary International Law*

The status of CIL in the United States has prompted vigorous and "increasingly nuanced" debates among scholars since the late 1990s. [281] Scholars disagree about whether U.S. courts apply CIL directly, as federal common law, or as some combination, such as federal common law based on international law. [282]

Scholars from all sides of this debate, however, agree that in practice U.S. courts do and should give deference to the views of the U.S. government on CIL. [283] For example, Professor Ingrid Wuerth recently argued that in ATS and head-of-state immunity cases, courts should defer to the executive branch in instances where the relevant CIL is still developing. [284] The Restatement (Third) of Foreign Relations Law also ***347** takes the position that as a descriptive matter, courts defer to executive branch views of CIL. [285]

Three rationales, individually or in combination, have been offered to explain courts' deference to the U.S. government with respect to CIL.

The first rests on the idea that the U.S. executive branch is a maker of CIL. In other words, when the executive branch acts internationally or with respect to international law issues, its actions and statements can contribute to establishing or amending CIL. As the Restatement notes, "The views of the United States Government . . . are . . . state practice, creating or modifying international law." [286] Executive branch statements can also help to constitute *opinio juris* if the executive states that the United States is taking a particular action because it feels legally obligated to do so or if the executive expresses a view that another state is legally required to take or refrain from taking a particular action. Scholars have echoed this rationale for deference. [287] The executive's role in making international law through its actions conveys a structural advantage vis-à-vis the other branches. Although decisions of U.S. courts may also be taken as evidence of CIL, at the time a court considers a ***348** CIL question, the executive may be the only branch of government--certainly the only political branch--to have addressed the issue. [288]

The second rationale offered for deference to the executive branch is its expertise with respect to CIL. [289] The executive's expertise flows in part from its access to information about state practice and *opinio juris*, information that may be gained through diplomatic channels or through participation in, for example, treaty negotiations. The expertise may also come from the executive's role in making CIL. For example, in considering how to react to particular incidents or how to explain U.S. actions, the executive branch draws on a wealth of knowledge and experience about how other countries are likely to respond.

Finally, the third rationale offered for deference is the need for the U.S. government to speak with "one voice" on CIL. [290] The Supreme Court has expressed concern because "serious and far-reaching consequences would flow from a judicial finding that international law standards had been met if that determination flew in the face of a State Department proclamation to the contrary." [291] Scholars have relied on the same rationale in arguing for deference on CIL in order to "prevent[] a decision by a U.S. court that . . . would count as evidence of a customary international norm at odds with the norm advanced by the executive branch." [292] This point is in some tension with the first argument for deference--the executive's preeminent role in making CIL--because it rests on the awkwardness that would arise if different U.S. government branches essentially made or advocated *different* CIL.

***349** The "one voice" rationale does not obviously implicate foreign sovereigns, given its focus on preserving the uniformity of U.S. expressions of CIL, but the other two rationales for deference both explain and justify the attention the Court gives to foreign sovereigns' arguments about CIL.

With respect to the lawmaker rationale, the United States cannot make CIL acting alone (much as it sometimes might wish to do so). Rather it is one CIL lawmaker, along with other countries in the world. Although CIL does sometimes take particular account of the views of specially affected states, [293] it typically requires general and uniform state practice--practice across a wide range and high number of states. And it requires consensus that the uniform practice is undertaken out of a sense of legal obligation. Giving weight to the views of the U.S. executive branch because of its role as a CIL lawmaker similarly counsels in favor of looking to the views of *other* CIL lawmakers, that is, foreign sovereigns.

The expertise rationale also supports taking seriously the views of foreign sovereigns. If part of the argument for deferring to the executive branch is its expertise *about the views of foreign sovereigns*, then the presentation of those views by the foreign sovereigns themselves should carry weight. Relatedly, if the executive's expertise is based on its experience in the international arena in learning the positions of foreign sovereigns, for example, in treaty negotiations, then giving weight to other institutions that have the same or similar experience makes sense.

The lawmaker and expertise rationales for deference explain why the Court has attended to CIL arguments made by foreign sovereigns. In the ATS context, for example, the Court has repeatedly paid heed to foreign sovereign arguments that a potential claimant, as a matter of CIL, must first exhaust local remedies unless "local redress is unavailable or obviously futile." [294] In *Sosa*, the Court discussed exhaustion at oral argument, [295] and the majority opinion cited the foreign sovereign brief and explained that the Court "would certainly consider this requirement in an ***350** appropriate case." [296] The exhaustion issue arose again in *Kiobel v. Royal Dutch Petroleum Co.* in briefs filed by the Netherlands and the United Kingdom [297] and by the European Commission, [298] which both argued that a claimant must exhaust local remedies before the United States could exercise universal jurisdiction under the ATS. Justices specifically referenced the amici's exhaustion position at oral argument, [299] and Justice Breyer's four-Justice concurrence in the judgment referred to the *Sosa* footnote on exhaustion and argued that application of an exhaustion requirement would minimize international friction. [300] The acceptance of the exhaustion requirement by the four Justices who appear to have the broadest conception of the permissible scope of the ATS is notable and suggests that there would likely be supermajority support for the European exhaustion requirement view of CIL in a future case.

Finally, like deference on international facts, deference on CIL is unlikely to be dispositive of the ultimate legal question in many cases where it is relevant. For example, in ATS cases, CIL is relevant to the first step of the inquiry where the court determines whether the alleged tort is a violation of an "international law norm." [301] But the second part of the inquiry-- whether the norm is "defined with a specificity comparable to the features of the 18th-century paradigms" [302] of "violation of safe conducts, infringement of the rights of ambassadors, and piracy" [303] --is a question of U.S. law, and one of the Court's creation. Similarly, in cases about the extraterritorial application of U.S. statutes, the Court primarily analyzes whether Congress clearly *intended* for the statute to apply extraterritorially, not, as foreign sovereigns suggest, whether ***351** extraterritorial application complies with CIL on jurisdiction. Thus, giving weight to foreign sovereigns' views of CIL typically involves subsidiary questions, not the main legal issue, which is left for the Court to resolve.

D. Deference on Foreign Law

Foreign sovereigns make arguments to the Supreme Court about their domestic laws with surprising frequency. The cases in which foreign sovereign amicus briefs address foreign law are not ones in which the foreign law applies in a choice of law analysis or provides the rule of decision for some other reason. Rather, the cases are ones in which the foreign sovereign believes that the content of its law is somehow relevant to a portion of the Court's legal or factual analysis.

Perhaps even more surprising than the frequency of such arguments is the extent to which the Court cares about and relies on arguments about the domestic law of foreign countries, typically without comment or explanation. [304] As Justice Breyer recently highlighted, "[t]he justices are not experts on the practices of other nations," [305] and to remedy this "knowledge gap," it is "helpful to receive briefs from other nations." [306]

Several examples illustrate circumstances in which the Court has relied on foreign sovereigns' representations about foreign law.

First, foreign law may be relevant to treaty interpretation as part of the post-ratification understanding and practice of treaty parties. In *Medellin v. Texas*, which involved the domestic enforceability of an International Court of Justice judgment, the Court noted the importance of the "postratification understanding of signatory nations" and relied on the fact that "neither Medellín nor his *amici* have identified a single nation that treats ICJ judgments as binding in domestic courts." [307] In *Société Nationale Industrielle Aérospatiale*, the Court considered whether the Hague Evidence Convention applied to a discovery dispute and if so, whether its procedures were the exclusive means for seeking discovery. ***352** [308] In deciding that the Convention was not exclusive, the Court cited the amicus brief filed by the United Kingdom to show that other treaty partners permit, under their domestic law, methods of discovery in addition to those provided by the treaty. [309]

Second, briefs on foreign law can help to demonstrate how extraterritorial enforcement of U.S. laws would interfere with foreign countries' laws and therefore create foreign relations tensions. [310] When used in this way, briefing about foreign law typically supports foreign sovereigns' arguments about international facts. For example, the existence and content of foreign law undergirds the sovereigns' factual claim that extraterritorial enforcement of U.S. law would cause conflict and endanger relations.

Third, foreign sovereigns have briefed and the Court has considered foreign law in determining the scope of the ATS. For example, as noted in the introduction, at oral argument in *Kiobel*, the petitioners' counsel argued on the basis of a Dutch judicial opinion that the Netherlands permits recovery by a foreign plaintiff for torts committed by a foreign defendant outside the Netherlands. [311] In response, Justice Scalia, in a reference to the brief filed by the Dutch government opposing jurisdiction in *Kiobel*, asserted that he "would rather listen to the Dutch government than one . . . Dutch judge." [312] In addition, in his concurrence in the judgment in *Kiobel*, Justice Breyer relied on foreign sovereign briefs for the proposition that "[m]any countries permit foreign plaintiffs to bring suits against their own nationals based on unlawful conduct that took place abroad." [313]

***353** Finally (and most controversially), the Court has also looked to foreign law in construing the Eighth Amendment's prohibition on cruel and unusual punishment. In *Roper*, the European Union filed a brief arguing that the "execution of persons under the age of 18 at the time of the offense is contrary to the practice of virtually all nations." [314] At oral argument, Justice Kennedy asked about practice in the European Union (though without reference to the E.U. brief) in the context of considering the meaning of "unusual" in the Eighth Amendment. [315] In his majority opinion, Justice Kennedy then noted that the "United States now stands alone in a world that has turned its face against the juvenile death penalty," [316] and that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for" the Court's holding that the execution of juveniles is unconstitutional. [317] Justice Scalia's dissent took particular exception to the majority's consideration of foreign law, arguing,

> The Court's parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. "Acknowledgment" of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*--which is surely what it parades as today. [318]

The Court has not explained or explicitly acknowledged its reliance on foreign sovereigns' briefs for the content of foreign law, but as a general matter, federal courts have substantial discretion in determining the ***354** content of foreign law. Federal Rule of Civil Procedure 44.1 states, "In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law." [319]

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The best explanation for the serious attention the Court appears to give to foreign sovereigns on questions of foreign law is simple expertise. To the extent that a foreign sovereign's brief addresses questions of that sovereign's domestic law, the Court may rightly treat the brief as the best evidence of the law of the foreign country on the grounds that the foreign sovereign is the best possible expert on its own law. [320] On questions of their own domestic law, foreign sovereigns are better positioned than the U.S. Solicitor General, even assuming that the United States includes arguments about the content of foreign law in its brief, which is often not the case. Foreign sovereign briefs are also likely a superior source on foreign law than the Court undertaking its own research. [321] For many countries, the Justices and the clerks lack the requisite language skills to comprehend foreign laws, and even if foreign legal materials are available in English, they may not have sufficient familiarity with the foreign legal system to appreciate, for example, the relative authoritativeness of various sources or the interrelationship of various governmental entities.

The Court's reliance on foreign sovereigns for matters of foreign law should be uncontroversial as a matter of relative expertise. Significant debates exist about the relevance of foreign law in some of the contexts described above, particularly with respect to the Eighth Amendment, but those debates about *when foreign law is relevant* can be separated from the more basic issue of *who is the Court's best source of information* whenever foreign law is relevant.

***355** Moreover, as is the case with other situations in which the Court has relied on foreign sovereign briefs, reliance on foreign sovereign briefs for the content of foreign law is typically not dispositive of the main legal question in the case. Although the Court may regard foreign sovereigns as authoritative on the content of their own law, the examples above make clear that foreign law is usually a subsidiary piece of the Court's broader analysis. Foreign sovereigns' briefs on foreign law can even backfire: In *Intel Corp. v. Advanced Micro Devices, Inc.*, the Court cited the European Commission brief's description of the Commission's responsibilities under E.U. law to support the conclusion that the Commission is a "tribunal" for purposes of a U.S. statute--the precise opposite of the position the Commission advocated. [322]

E. Judging Deference

The previous sections examined four primary issues on which foreign sovereigns file amicus briefs and how the Court does and should treat such foreign sovereign representations. This Section synthesizes the arguments set out in the previous sections, addressing the relationships among the various issues that foreign sovereigns discuss and exploring how deference should change if the U.S. government and foreign sovereign amici disagree.

The amount of deference that should be afforded to foreign sovereigns may be arranged on a spectrum. Based on the reasoning explored above, the ends of the spectrum are easy to identify and represent circumstances where the deference given to foreign sovereign amici and to the U.S. government diverge.

On the least deferential end of the spectrum are foreign sovereign amicus briefs solely about U.S. law. As noted above, [323] such briefs are rare, and I did not find any instance of the Court citing a brief by a foreign sovereign amicus for an issue of U.S. law. [324] The executive branch, ***356** on the other hand, routinely receives deference on foreign relations law questions that are purely matters of U.S. law, though the amount of deference is disputed. [325]

At the other end of the foreign amici deference spectrum are issues of foreign law. Foreign sovereign amici frequently address their own law, and the executive branch rarely does. For the reasons explained above, [326] foreign sovereigns deserve strong deference on questions of their own domestic law. They are a comparatively better resource on such issues than the U.S. government or the Court itself.

Between these extremes, the deference assessment is more complicated. I have argued that for international facts, CIL, and treaties, the deference afforded to foreign sovereigns should generally be pegged to the level of deference afforded

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to the U.S. government. Studying foreign sovereign amici provides insights into the relative levels of deference for international facts, CIL, and treaties and into how such deference might shift if the U.S. government and foreign sovereign amici disagree.

With respect to international facts, the Court is generally quite deferential to both the U.S. government and foreign sovereign amici. [327] This deferential approach applies most easily when the foreign sovereigns and the executive branch agree in their factual assertions. In *Morrison v. National Australia Bank*, for example, the foreign sovereigns and the United States all argued against extraterritorial application of U.S. securities law due, at least in part, to the foreign relations problems such application would provoke. [328] In such cases, the Court might view foreign sovereigns' and U.S. briefs as essentially additive, so the Justices often cite to both.

But what if the executive branch and foreign sovereigns contradict one another about the foreign relations consequences of a particular outcome? If the Court typically defers to both types of actors, how would or should it reconcile competing views?

***357** One could argue that the Court should automatically give preference to the view of the U.S. government over the contrary view of a foreign sovereign. [329] After all, the executive branch is constitutionally charged with responsibilities related to foreign relations, and the foreign sovereign has no formal role in the U.S. constitutional structure. It seems more likely, however, that the Court would instead weigh the competing expert views against one another. The Court's explanation for deference to the executive on international facts seems to rest primarily on expertise, not constitutional structure, and if that accurately captures the Court's view, then the Court should critically assess the competing positions and make a determination about which is more expert, more credible, or more persuasive in the specific circumstances at issue. [330] This form of expertise-based deference is akin to similar deference principles in the domestic administrative law context. [331]

One might instead think that the Court would regard the U.S. government as a particularly trustworthy litigant and preference its views for that reason. The United States is a repeat player, represented by experienced counsel, and has credibility to maintain before the Court. These attributes, however, may be somewhat overstated in comparison to the foreign sovereigns. Many of the foreign sovereigns are themselves repeat litigants and repeat amici before the Supreme Court, albeit not to the same extent as the United States. Moreover, foreign sovereigns have incentives to make thorough and accurate representations to the Court in order to avoid having inaccurate representations either contradicted by the U.S. government or protested through diplomatic channels by U.S. government representatives.

As an alternative to weighing the credibility of competing views of international facts, the Court could instead act in a risk-averse fashion and give greater weight to the views of whichever party argues that the ***358** Court's action will cause foreign relations harms. [332] For example, if the executive branch filed a brief asserting that extraterritorial application of a U.S. statute would not have adverse foreign policy consequences and a group of foreign sovereigns filed a brief arguing that they would take retaliatory measures against the United States if the statute were applied extraterritorially, the Court might proceed with extra caution and interrogate the counsel for the United States at oral argument about why the U.S. government believes that extraterritorial application carries no foreign policy risk. [333]

The Court has exhibited such extreme caution--beyond what the executive argued was necessary--before. In *Zschernig v. Miller*, the Court considered whether an Oregon statute governing inheritance by foreign citizens was subject to dormant foreign affairs preemption. [334] The United States, as an amicus, stated, “The government does not . . . contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations.” [335] Although no foreign sovereign filed to contradict the U.S. view, the Court asserted that the statute “has a direct impact upon foreign relations and may well adversely affect the power of the central government

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to deal with those problems," and it held the statute preempted. [336] The Court's caution in *Zschernig* is difficult to explain in light of its typical deference to the U.S. government on international ***359** facts. [337] It may stem, however, from an aversion to having the Court itself cause foreign relations difficulties. Foreign sovereign filings that argue, contrary to the U.S. government, that foreign relations harms will result from a particular outcome may embolden the Court to do a more searching inquiry into and have a less deferential approach to filings by the United States on international facts.

Turning to deference on international law, scholars generally agree that the Court is equally, if not more, deferential on CIL than on treaties. [338] This pattern is borne out by examination of its treatment of foreign sovereign amicus briefs on CIL. [339] This narrative of deference on CIL could be seriously disrupted, however, if the United States and foreign sovereigns took opposing views of CIL. What is the Court to do in such a case? One could argue that the "one voice" rationale for deference counsels that the Court should accept the U.S. view. This might be particularly true on issues where CIL is unsettled and the executive has already announced a U.S. position. Agreeing with the executive's view would preserve the one voice of the United States, while also, due to the unsettled nature of the CIL, running little risk of putting the United States in violation of CIL. On the other hand, if the CIL at issue is well settled and the United States takes a position contrary to well-settled law, foreign sovereign amici may play a useful role in providing the Court with reasoned arguments to challenge the executive's view in a circumstance where at least some scholars argue that the U.S. government is entitled to comparatively less deference. [340]

***360** In an extreme case, however, disagreement between sovereigns about the content of CIL could lead the Court to conclude that no CIL exists on the relevant issue. CIL results from general and uniform state practice undertaken out of a sense of legal obligation. [341] If the United States and foreign sovereign amici disagree about the existence of the requisite state practice or about whether uniform practice is driven by a sense of legal obligation and it cannot be established that one sovereign's view is simply an outlier, the Court might, instead of deferring to the view of one party or another, determine that the dissensus demonstrates the lack of law altogether. For this reason, CIL presents potentially the most problematic area for divergences between the United States and foreign sovereign amici and the most challenging area for the Court to resolve.

Turning to treaty cases, the absolute amount of deference the Court affords to either the executive branch or foreign sovereign treaty parties is unclear, despite the Court's repetition of "great weight" and "considerable weight." [342] The lack of clarity is driven in large part by the Court's emphasis on the text of the treaty as the starting point for its analysis. [343] The Court's treaty interpretation inquiries often seem to begin and end with the text, citing the views of the United States or other treaty parties as merely confirmatory. [344] Sometimes it rejects their views altogether. [345] The availability of a legal text subject to interpretation is a luxury the Court does not have for questions of CIL and suggests that the views of sovereigns are comparatively less important for treaties than for CIL.

Treaty interpretation cases have prompted more frequent divergences between the views of the U.S. government and foreign sovereign amici than any other issue, and in the face of divergent views, the Court typically sides with the United States. This pattern, however, does not necessarily suggest that that Court weighs the views of the United States ***361** and foreign sovereign amici differently standing alone. Rather, in several cases when the Court has sided with the United States, it has based its holding on its interpretation of the plain text of the treaty. [346] The emphasis on the treaty text may mask a preference for the views of the U.S. government over foreign sovereign treaty parties, but the true test of the comparative weight due to the U.S. government and foreign sovereigns will come in a case where the Court recognizes the treaty text to be unclear and then considers, for example, conflicting post-ratification practice.

In sum, foreign sovereign amici's views are least important with respect to questions of purely U.S. law, and most important on issues of foreign law. For the remaining categories of international facts, CIL, and treaty law, the weight afforded to foreign sovereign amici's views should generally track the weight afforded to the views of the U.S.

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government. How much deference is given to either the U.S. government's or foreign sovereigns' views in any given case should depend on contextual factors, prominently including the relationship of the entities' views to one another. Notably, the preeminent importance the Court gives to treaty text may decrease the influence of both U.S. government and foreign sovereigns' views, except to the extent that they confirm the Court's own understanding of treaty provisions.

F. Concerns and Cautions

Although this Part argues largely in favor of giving serious weight to the views of foreign sovereign amici, the Court should bear in mind several points of caution in evaluating foreign sovereigns' representations. [347]

***362** First, the identity of amicus filers undoubtedly shapes their presentation of issues to the Court, and the prevalence of certain countries and types of countries among the foreign sovereign amici may skew the views the Court receives. For example, as noted in Part II, the most frequent foreign sovereign amici are Western European countries, along with British Commonwealth countries, and more broadly, many, but not all, foreign sovereign amici are developed countries. [348] The concerns and perspectives of Western, developed countries may differ dramatically from many countries around the world.

The Court has occasionally expressed concern about the possibility of skewed perspectives due to the self-selection of foreign sovereign amici. At oral argument in *Empagran*, the Justices asked the petitioners' counsel how the Court should determine which interpretation of U.S. antitrust law is "consistent with not antagonizing our allies," [349] and the petitioners' counsel pointed the Justices toward the amicus briefs filed by "seven of our . . . most significant trading partners." [350] Justice Scalia responded that "surely there . . . are other partners who have not been ***363** heard from," [351] and questioned whether the "majority of nations in the world that don't have effective antitrust enforcement, if indeed they have any antitrust laws," would necessarily agree with the position taken by the seven allies who had filed briefs protesting the extraterritorial application of U.S. antitrust laws. [352]

The selection bias question is not unique to foreign sovereign amici. All amici who file before the Court self-select, [353] and those who file tend to have the biggest stake in the case or the legal rules on which the case turns. Nonetheless, a skew in perspective among amici filing on international law issues may be more problematic than usual biases in amici if the Court accepts the views of a particular region as a stand-in for the views of the entire world on questions of international law. This may be particularly true of CIL. Foreign sovereigns that argue about international facts and foreign law tend to make claims specific to their countries, and in treaty cases, the Court can independently assess the treaty text and the drafting history. Arguments about CIL, however, generalize about law beyond a single country and, unlike treaties, lack a text that the Court can apply. Views about the content of CIL and the point at which settled practice becomes CIL may be subject to greater variance worldwide and may also be more difficult for the Court to assess.

In evaluating foreign sovereign briefs, the Court should take steps to ensure that it understands whether and, if so, how amici's views are skewed. The quotes above from the *Empagran* argument suggest that the Court is aware of the possibility of skewed perspectives in some circumstances, but the Court's attention to this issue has been rare. [354] In cases where foreign sovereign amici file, the Court should routinely interrogate counsel for the parties and the United States at oral argument (or ***364** question the foreign sovereigns directly in cases where they participate in oral argument) about whether the foreign sovereigns' views represent a consensus, majority, minority, or outlier position. In addition, scholars and practitioners who are experts on the issues addressed by foreign sovereigns should review briefs after they are filed and, if necessary, publish disagreements with the briefs to flag outlier positions for the Court and parties.

Second, although foreign sovereigns have incentives to be trustworthy litigants, [355] the depth of commitment reflected in foreign sovereign amici's representations is a question separate from the accuracy of their representations. For example,

a foreign sovereign might be recruited by a party, perhaps a company from their country, to file a supportive brief on international law issues, even though the foreign sovereign does not feel strongly about the substance of the legal or foreign relations issues at stake. In such a circumstance, it would be a mistake for the Court to view the brief as a representation that disagreement with the foreign sovereign's view of international law would provoke serious foreign policy consequences for the United States.

To avoid this problem and more accurately gauge the strength of the foreign sovereign's view, the Court should consider some of the same factors that it uses to evaluate agency positions under the *Skidmore* framework.[356] In particular, the Court should assess the extent to which the foreign sovereign's litigation position is consistent with the positions it has taken in earlier briefs to the Court or in other official statements. Lack of consistency with earlier positions is not dispositive, but as in the administrative law context, it can bolster the credibility of the litigants' position.[357] The filing of a series of briefs over time suggests that the issue is one of longstanding importance to the foreign sovereign, rather than a one-off effort to support a particular party.

Foreign sovereigns can--and some already do--assist the Court by providing contextual information about the positions in their amicus briefs, including, for example, a description of prior briefs or copies of ***365** diplomatic correspondence showing a consistent position over time.[358] Moreover, the Court may wish to enlist the assistance of counsel for the United States by asking questions at oral argument regarding the U.S. government's views of and information about the foreign sovereigns' depth of commitment to the positions expressed in their briefs.

These measures, along with heightened awareness of the nature of possible complications of relying on particular foreign sovereign briefs, should help to mitigate the risk of the Court being led astray.

CONCLUSION

Foreign sovereigns have an important voice in many foreign-relations-related cases before the Supreme Court. Not only do the Justices pay significant attention to foreign sovereign amici, as evidenced by the rates at which they cite foreign sovereign briefs in opinions and discuss such briefs at oral argument, but careful examination of the Court's treatment of foreign sovereigns in particular cases shows that the Court considers and relies on foreign sovereigns' views about international facts, treaty interpretation, the content of CIL, and the foreign sovereigns' own domestic laws.

Focusing on foreign sovereign amici provides a fuller picture of how the Court resolves foreign relations cases. This Article's study of foreign sovereign amici pushes back on the misperception that the Court is hostile or ambivalent to foreign and international law,[359] and it reveals that transnational governmental networks are not just horizontal (executive-executive or judicial-judicial), but also diagonal (executive-judicial).[360]

Study of foreign amici also demonstrates that some of the explanations for deference to the U.S. government on foreign relations issues--expertise, status as a lawmaker, and control over relevant policies--apply to foreign sovereigns as well and justify treating the views of such amici similarly to the United States'. Moreover, examining the Court's treatment of foreign sovereigns in treaty interpretation cases--where it explicitly gives weight to the views of *both* the United States and foreign sovereign treaty parties--reveals that the *Chevron* deference origin story ***366** proffered to explain the Court's deference to the U.S. government cannot fully account for the Court's behavior.

By adding foreign sovereign amici to the story of foreign relations law, this Article aims not to issue a final statement on deference in foreign relations cases, but rather to spark a renewed, more nuanced discussion of the Supreme Court's foreign relations jurisprudence and the actors that shape it.

Footnotes

a1 Visiting Assistant Professor, UCLA School of Law. For helpful conversations and comments, I am grateful to Asli Bâli, Stuart Banner, Will Baude, Curt Bradley, Sam Bray, Ann Carlson, Harlan Cohen, Scott Cummings, Bill Dodge, Joe Doherty, Stephen Gardbaum, Jack Goldsmith, Robert Goldstein, Rebecca Ingber, Allison Hoffman, Harold Hongju Koh, Máximo Langer, Lynn LoPucki, Jon Michaels, Doug NeJaime, David Pozen, Kal Raustiala, Richard Re, Seana Shiffrin, Shirin Sinnar, Ganesh Sitaraman, Richard Steinberg, Peter Trooboff, Jonathan Varat, Eugene Volokh, Christopher Whytock, Steve Yeazell, and participants in the ASIL Mid-Year Research Forum, ASIL International Law in Domestic Courts Workshop, Junior Federal Courts Workshop, Southern California International Law Scholars Workshop, and faculty workshops at UC Hastings and UCLA. Thanks also to the Supreme Court practitioners who shared insights about their experiences with foreign sovereign amici; to Kevin Whitfield for excellent research assistance; and to Chase Raines and the staff of the *Virginia Law Review* for their editorial assistance.

1 133 S. Ct. 1659 (2013); Alien Tort Statute, 28 U.S.C. § 1350 (2010).

2 See Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 2165345; Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 2312825.

3 See Transcript of Oral Argument at 13, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 4486095, at *13.

4 Id. at 55.

5 Id. at 56.

6 Id.

7 The only sustained treatment of foreign sovereign amici "does not provide an exhaustive historical analysis," and instead relies only on "several... spotlights" of foreign amici participation. Stephen A. Plass, The Foreign Amici Dilemma, 1995 BYU L. Rev. 1189, 1190 (1995). It also concludes that "[f]oreign amici are... doomed to a response of indifference" from the Court--a conclusion my research challenges. Id. at 1228. Other scholars have noted the increasing frequency of foreign sovereign amicus briefs or otherwise addressed them in passing. See, e.g., Curtis A. Bradley, *Chevron* Deference and Foreign Affairs, 86 Va. L. Rev. 649, 722 n.323 (2000) (raising a question about "whether, in applying the federal common law of foreign relations, courts should defer to the views of *foreign governments* concerning the likely impact of a state's action on foreign relations"); Peter J. Spiro, The States and Immigration in an Era of Demi-Sovereignties, 35 Va. J. Int'l L. 121, 157 & n.145 (1994) (noting that in considering the "international repercussions" of decisions, courts could "consider evidence of actual concern on the part of a foreign nation regarding any particular state practice," and arguing that foreign sovereign amicus briefs have increased in recent years). Others have mentioned foreign sovereign amicus briefs in particular cases. See, e.g., Merritt B. Fox, Securities Class Actions Against Foreign Issuers, 64 Stan. L. Rev. 1173, 1178-79 & n.10, 1211 n.89, 1238-39 (2012) (citing the briefs filed by Australia, France, and the United Kingdom in *Morrison v. National Australia Bank*, 561 U.S. 247 (2010)); Ralf Michaels, *Empagran*'s Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century, *in* International Law in the U.S. Supreme Court: Continuity and Change 533, 536 (David L. Sloss et al. eds., 2011) (discussing foreign sovereign amicus briefs in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004)). One scholar has proposed altering the Supreme Court Rules to accommodate foreign sovereign amici. Stephen R. McAllister, The Supreme Court's Treatment of Sovereigns as Amici Curiae, 13 Green Bag 2d 289, 300 (2010) (proposing amending Supreme Court Rule 37.4 to permit foreign sovereigns and Indian tribes--like the United States, U.S. states, and municipalities--to file amicus briefs without filing a motion for leave to do so). For an analysis of the role that foreign sovereigns play as *plaintiffs* in U.S. courts, see Hannah L. Buxbaum, Judicial Imperialism, 73 Wash. & Lee L. Rev. _ (forthcoming 2016).

8 Anne-Marie Slaughter, A New World Order 13 (2004); see id. at 65-103 (describing judge-to-judge interactions).

9 See infra Section II.A. By way of comparison, State Department Legal Advisers or Acting Legal Advisers signed U.S. government merits briefs in twenty-eight cases from 2000 through the 2013 Supreme Court Term; foreign sovereigns filed

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as amici in twenty-two cases in the same period. Of the twenty-eight cases in which Legal Advisers signed U.S. government merits briefs, foreign sovereigns filed as amici in fourteen cases and as parties in an additional six cases.

10 See infra notes 110-13 and accompanying text.

11 Of the sixty-eight foreign sovereign amicus briefs on the merits since 1978, thirty-seven address international facts and thirty-seven address treaties.

12 Of the sixty-eight foreign sovereign amicus briefs studied, thirty address CIL and thirty address foreign law.

13 This perception may be driven largely by the Court's reluctance to engage foreign and international sources in constitutional analysis. See, e.g., Sarah K. Harding, Comparative Reasoning and Judicial Review, 28 Yale J. Int'l L. 409, 417 (2003) ("[I]t hardly needs to be stated that the U.S. Supreme Court ranges from indifferent to hostile in its reaction to foreign law."); Vicki C. Jackson, Narratives of Federalism: Of Continuities and Comparative Constitutional Experience, 51 Duke L.J. 223, 250-51 (2001) (noting that the Supreme Court "differs markedly from many other constitutional courts" because it "has only occasionally cited the decisions of foreign courts and almost never, in a majority opinion, relied on the constitutional reasoning of other nations' courts"); see also Sarah H. Cleveland, Our International Constitution, 31 Yale J. Int'l L. 1, 3 (2006) (summarizing the "sharp backlash" from some Justices to reliance on foreign and international law sources in constitutional analysis); John F. Coyle, The Case for Writing International Law into the U.S. Code, 56 B.C. L. Rev . 433, 447 (2015) (arguing that "U.S. judges have long had an ambivalent relationship with international law" and proposing reasons why this is the case).

14 Stephen Breyer, The Court and the World: American Law and the New Global Realities 97 (2015) ("We rely upon briefs filed by the parties and by other interested persons, including the executive branch, of course, but also foreign governments."); id. at 7 (highlighting the "need for courts to listen to... 'many voices,'" including "representatives of foreign governments"); id. at 113-14 (explaining that the Court relied on a brief by the European Commission in *Intel v. Advanced Micro Devices*, 542 U.S. 241 (2004)); id. at 133 ("It is... helpful to receive briefs from other nations....").

15 Justices who cited foreign sovereign amicus briefs from 1978 through the 2013 Term include Chief Justice Rehnquist and Justices Breyer, Ginsburg, Kennedy, O'Connor, Scalia, Souter, and Stevens.

16 See infra note 165 and accompanying text.

17 This occurred in eighteen of thirty-nine cases.

18 See infra notes 172-75 and accompanying text.

19 This occurred in twenty of thirty-nine cases.

20 See infra note 189.

21 See infra Part IV. For recent contributions to this debate, see Harlan Grant Cohen, Formalism and Distrust: Foreign Affairs Law in the Roberts Court, 83 Geo. Wash. L. Rev. 380, 387 (2015) (arguing that the Court's recent foreign relations cases reflect a trend from functionalism to formalism that represents an "upheaval"); Ganesh Sitaraman & Ingrid Wuerth, The Normalization of Foreign Relations Law, 128 Harv. L. Rev. 1897, 1958 (2015) (arguing that the Supreme Court is, and should be, "normalizing" foreign relations law); Curtis A. Bradley, Response, Foreign Relations Law and the Purported Shift Away from "Exceptionalism," 128 Harv. L. Rev. F. 294 (2015); Carlos M. Vázquez, Response, The Abiding Exceptionalism of Foreign Relations Doctrine, 128 Harv. L. Rev. F. 305 (2015).

22 To be sure, some justifications for deference to the United States in foreign relations cases are specific to the United States. In particular, the Court's deference to the executive branch in political question cases rests on a constitutional allocation of power to the executive as a coordinate branch--an allocation of power not shared by foreign sovereigns. And *Chevron* deference to the executive branch when its agencies implement a statute pursuant to authority delegated by Congress also cannot extend to foreign sovereigns, who do not receive such delegations. See infra notes 195-97 and accompanying text.

23 See infra note 110 and accompanying text.

24 See, e.g., Air France v. Saks, 470 U.S. 392, 404 (1985).

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25 Olympic Airways v. Husain, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting); see infra text accompanying notes 257-58.

26 Bradley, supra note 7, at 663, 701-06; *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

27 See infra notes 129-33 and accompanying text.

28 Samuel Krislov, The Amicus Curiae Brief: From Friendship to Advocacy, 72 Yale L.J. 694, 700-01 (1963). For an overview of the history of amicus curiae, see Allison Orr Larsen, The Trouble with Amicus Facts, 100 Va. L. Rev. 1757, 1765-68 (2014).

29 See Marian Nash Leich, Contemporary Practice of the United States Relating to International Law, 77 Am. J. Int'l L. 135, 136-37 (1983) (explaining the customary diplomatic note practice prior to 1978).

30 See Strathearn S.S. Co. v. Dillon, 252 U.S. 348, 351 (1920) (noting that counsel for the British Embassy participated "by special leave"); Strathearn S.S. Co. v. Dillon, 39 S. Ct. 495 (1919) (granting leave for counsel for the British Embassy to participate in oral argument); see also Ex Parte Muir, 254 U.S. 522, 524 (1921) (noting the participation of counsel for the British Embassy by leave of the Court).

31 Jackson v. S.S. Archimedes, 275 U.S. 463, 464 (1928) (noting the participation of counsel for the British Embassy as amicus curiae).

32 See McAllister, supra note 7, at 296 ("The *U.S. Reports* do not clearly indicate that a foreign government filed an amicus curiae brief in the Court prior to 1952, or at least not in a brief identifying the amicus as a foreign nation.").

33 Lauritzen v. Larsen, 345 U.S. 571, 572 (1953) (noting amicus brief for Denmark); Brief of the Royal Danish Government, as Amicus Curiae in Support of Petition, *Lauritzen*, 345 U.S. 571 (No. 226), 1952 WL 82184; Brief of Amici Curiae on Behalf of the Royal Norwegian Government, *Lauritzen*, 345 U.S. 571 (No. 226), 1952 WL 82185; Brief of the Government of the United Kingdom of Great Britain and Northern Ireland, Amicus Curiae, in Support of the Petition for Writ of Certiorari, *Lauritzen*, 345 U.S. 571 (No. 226), 1952 WL 82183.

34 Am. Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215, 216 n.* (1974) (noting amicus brief of Liberia); Windward Shipping (London) Ltd. v. Am. Radio Ass'n, 415 U.S. 104, 105 n.* (1974) (noting amicus brief of Liberia); Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 306 (1970) (noting amicus brief of Greece); Incres S.S. Co. v. Int'l Mar. Workers Union, 372 U.S. 24, 24-25 (1963) (noting amicus briefs of the United Kingdom, Panama, and Liberia); Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 355 (1959) (noting amicus briefs of Denmark and the United Kingdom).

35 Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 310 (1958) (noting amicus brief of the United Kingdom).

36 Alitalia-Linee Aeree Italiane S.p.A. v. Lisi, 390 U.S. 455, 455 (1968) (noting amicus briefs of the United Kingdom, Canada, and Italy).

37 Pfizer Inc. v. Gov't of India, 434 U.S. 308, 309 n.* (1978) (noting amicus brief of West Germany).

38 U.S. Dep't of State, Digest of United States Practice in International Law, http://www.state.gov/s/l/c8183.htm [[https://perma.cc/ZF9S-RQRQ].

39 See Communication to Courts, 1978 Digest of United States Practice in International Law, ch. 4, § 1 at 560-63.

40 437 U.S. 443 (1978).

41 Communications to Courts, supra note 39, at 561.

42 Id.

43 Id.

44 Id.

45 See id. at 560 (providing an excerpt from the text of the diplomatic note, dated August 17, 1978).

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46 Id. (quoting circular diplomatic note).

47 Id. (quoting circular diplomatic note).

48 Id. (quoting circular diplomatic note). The State Department also declined to relay foreign sovereigns' intention *not* to participate before U.S. courts. See id. at 561-62. The State Department later clarified that it did not intend to transmit diplomatic notes to federal trial courts or state courts either, but it would review such requests "on a case-by-case basis." Marian L. Nash, Contemporary Practice of the United States Relating to International Law, 73 Am. J. Int'l L. 669, 678-79 (1979). The shift in practice after 1978 was sufficiently complete by 1987 for Justice Blackmun to note that the State Department "in general does not transmit diplomatic notes from foreign governments to state or federal trial courts." Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 554 n.5 (1987) (Blackmun, J., concurring in part and dissenting in part).

49 Communication to Courts, supra note 39, at 561.

50 Id.

51 See Sup. Ct. R. 37; infra notes 59-63 and accompanying text.

52 Communication to Courts, supra note 39, at 561.

53 U.S. Const. art. II, § 3.

54 Cf. Peter J. Spiro, Globalization and the (Foreign Affairs) Constitution, 63 Ohio St. L.J. 649, 683 (2002) [hereinafter Spiro, Globalization and the (Foreign Affairs) Constitution] (arguing that foreign sovereigns in recent years have shown "increasing sophistication" about "internal U.S. governance structures," such that they "not only understand the status of courts in the United States, they are beginning to play the system directly" as plaintiffs and amici in "a broad range of cases"); Peter J. Spiro, The States and International Human Rights, 66 Fordham L. Rev. 567, 584-85 (1997) ("[A]t least within the developed world, central governments have looked beyond the veil of sovereignty to understand the political divisions of power in other states.... [T]he niceties of diplomacy no longer appear to impede such communications." (footnote omitted)).

55 See, e.g., Arizona v. United States, 132 S. Ct. 2492, 2507 (2012); Munaf v. Geren, 553 U.S. 674, 702 (2008); cf. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (referring to "the President as the sole organ of the federal government in the field of international relations").

56 See supra note 8 and accompanying text.

57 See supra notes 44-48.

58 Communication to Courts, supra note 39, at 562.

59 Sup. Ct. R. 37.1.

60 Id. R. 37.3(a).

61 Id.

62 See Paul M. Collins, Jr., Friends of the Supreme Court: Interest Groups and Judicial Decision Making 42 (2008) [hereinafter Collins, Friends of the Supreme Court] ("[T]he Court almost always grants such petitions."); Daniel A. Farber, When the Court Has a Party, How Many "Friends" Show Up? A Note on the Statistical Distribution of Amicus Brief Filings, 24 Const. Comment. 19, 23 (2007) ("[T]he Court itself does not serve a gatekeeper function; it routinely approves filing of briefs in cases where the parties themselves fail to consent.").

63 See Joseph D. Kearney & Thomas W. Merrill, The Influence of Amicus Briefs on the Supreme Court, 148 U. Pa. L. Rev. 743, 762 (2000) (noting that the Court "grant[s] nearly all motions for leave to file as amicus curiae when consent is denied by a party"); see also Collins, Friends of the Supreme Court, supra note 62, at 41 (noting that the Court allows "essentially unlimited participation" by amici).

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64 A full list of these briefs is available in an appendix on file with the Virginia Law Review Association. I used several methods to identify foreign sovereign amicus briefs. For cases from 1978 through 2000, reviewing the listing of amici in the U.S. Reports for every case the Court decided on the merits produced a complete list of every foreign sovereign amicus brief filed at the merits stage. For cases from the 2000 to 2013 Terms, the Supreme Court website includes the docket for every merits case; review of the dockets produced a complete list of foreign sovereign amicus briefs filed at both the certiorari and merits stages. Many, but not all, of the foreign sovereign amicus briefs are available in the LexisNexis and Westlaw databases of Supreme Court briefs. I am grateful to the UCLA School of Law Library staff for assistance in locating copies of additional briefs. Searching the LexisNexis and Westlaw Supreme Court briefs databases revealed additional foreign sovereign amicus briefs filed on the merits prior to 1978 and at the certiorari stage prior to 2000. Although I have reviewed many of these briefs and make occasional reference to them, see infra notes 69 and 106 and accompanying text for a discussion of briefs at certiorari stage, the analysis in the remainder of the Article is based on the foreign sovereign amicus briefs on the merits from 1978 through 2013, for which I have a complete set.

65 My research also revealed recent amicus filings by United Nations organs. See, e.g., Supplemental Brief of Amicus Curiae Navi Pillay, The United Nations High Commissioner for Human Rights in Support of Petitioners, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165332. Although outside the scope of this Article, the U.N. briefs raise interesting questions about how the Supreme Court treats intergovernmental organization amici.

66 See infra note 109 (discussing a few briefs that cannot easily be assigned to one of these four categories).

67 See supra notes 30-37 and accompanying text for the pre-1978 practice. Moreover, in the first half of the period I studied (1978-1995), foreign sovereigns filed twenty-five amicus briefs at the merits stage; in the second half of the period (1996-2013), they filed forty-three amicus briefs on the merits. See also Bradley, supra note 7, at 722 n.323 ("Foreign governments are increasingly making their views known in international litigation through, for example, the filing of *amicus curiae* briefs."); Spiro, Globalization and the (Foreign Affairs) Constitution, supra note 54, at 723 (noting that the participation of foreign sovereign amici in foreign relations cases is "becoming routine").

68 Top Supreme Court advocates have confirmed that foreign sovereign amicus briefs are often, but not always, the result of parties seeking out the support of foreign sovereigns. See, e.g., E-mail from Carter Phillips, Partner, Sidley Austin LLP, to author (Jan. 19, 2015, 12:49 PST) (on file with author); E-mail from Tom Goldstein, Partner, Goldstein & Russell, P.C., to author (Nov. 13, 2014, 12:22 PST) (on file with author). This point is further confirmed by additional Supreme Court advocates who did not wish to be identified by name. See E-mails from Leading Supreme Court Advocates (Jan. 5-6 & Feb. 2, 2015) (on file with author).

69 See, e.g., Brief of Government of Switzerland as Amicus Curiae in Support of Petitioners, Am. Ins. Ass'n v. Low, 539 U.S. 396 (2003) (No. 02-722), 2002 WL 32101009 (certiorari stage); Brief of Government of Switzerland as Amicus Curiae in Support of Petitioners, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (Nos. 02-722, 02-733), 2003 WL 721748 (merits stage).

70 My research identified 68 briefs filed on the merits in 39 cases from the 1978 Term to the 2013 Term. Of these, foreign sovereigns filed 45 briefs (66%) in support of petitioners in 26 cases, and 19 briefs (28%) in support of respondents in 13 cases. They filed 4 briefs (6%) in support of neither party in 3 cases.

71 See, e.g., Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2312825; Brief of Amicus Curiae the European Commission in Support of Neither Party, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 177036.

72 See, e.g., Brief for Amici Curiae Republic of Honduras and Other Foreign Sovereigns in Support of Petitioners at 1, Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) (Nos. 04-10566, 05-51), 2005 WL 3597807, at *1 (reflecting that the brief was joined by Peru, Uruguay, Argentina, Bolivia, Brazil, Chile, Colombia, El Salvador, and Guatemala)

73 552 U.S. 491, 499 (2008).

74 See Brief of Amici Curiae the European Union and Members of the International Community in Support of Petitioner at 2, *Medellin*, 552 U.S. 491 (No. 06-984), 2007 WL 1874804, at *2.

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75 543 U.S. 551, 546 (2005).

76 Brief of Amici Curiae the European Union and Members of the International Community in Support of Respondent at 3, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1619203, at *3. On the influence of a large number of cosigners, see Paul M. Collins, Jr., Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation, 38 Law & Soc'y Rev. 807, 812-13 (2004) [hereinafter Collins, Influence of Amicus Curiae] (discussing theories for why a large number of cosigners, as opposed to a large number of separate briefs, may affect the Court).

77 In *Medellin*, 552 U.S. 491, for example, all three foreign sovereign briefs, signed by a total of sixty-three countries, supported the petitioner. Id. at 496 n.* (noting briefs in support of the petitioner by the European Union, Mexico, and other foreign sovereigns).

78 See Brief for the Government of the Argentine Republic as Amicus Curiae in Support of Petitioners at 12, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165334, at *12.

79 Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party at 3-4, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 2165345, at *3-4; Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party at 2, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 2312825, at *2.

80 See, e.g., F. Hoffman-La Roche Ltd. v. Empagran, S.A., 542 U.S. 155, 157 & n.* (2004) (reflecting briefs of the United States, Canada, Germany, the United Kingdom, and Japan in favor of reversal); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 400, 401 n.* (2003) (reflecting briefs for the United States, Germany, and Switzerland in favor of reversal).

81 See, e.g., Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 245 (2004) (reflecting U.S. support as amicus for affirmance, and European Commission support for petitioner/reversal); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 768 & n.† (1993) (reflecting the United States as amicus urging affirmance and Canada and the United Kingdom as amici in support of reversal).

82 For examples of foreign sovereigns in opposition to the United States as amicus, see supra note 81. For examples of foreign sovereigns in opposition to the United States as a party, see United States v. Alvarez-Machain, 504 U.S. 655, 656 & n.* (1992) (reflecting briefs of Canada and Mexico in support of the respondent, while the United States was the petitioner).

83 For countries that are members of the European Union and Council of Europe, the number of briefs shown includes briefs that the countries filed or signed individually and does not include briefs they joined solely by virtue of their membership in one of the organizations. For countries such as Australia, Canada, Japan, and Mexico, the totals include briefs that each government signed along with groups like the European Union and Council of Europe because these countries are not members of such groups; they signed the briefs individually. In addition, the total for Germany includes several briefs filed by West Germany prior to German reunification.

84 The prevalence of Western European and particularly British Commonwealth countries among foreign sovereign amici raises concerns about selection bias and the potential for the Court to receive a skewed perspective on foreign relations effects or international law. Section IV.F addresses this issue in more detail.

85 This total includes only briefs that the United Kingdom signed as an individual government, not briefs it joined by virtue of its membership in the European Community, European Union, European Commission, or Council of Europe.

86 Top U.S. Trade Partners, Int'l Trade Admin., U.S Dep't of Commerce, http://www.trade.gov/mas/ian/build/groups/public/@tg_ian/documents/webcontent/tg_ian_003364.pdf[[https://perma.cc/S3HP-6V69] (ranked by 2014 exports and imports).

87 See supra note 9 and accompanying text. But see infra note 196 and accompanying text.

88 The "other" category consists of *Minneci v. Pollard*, 132 S. Ct. 617 (2012) (*Bivens* remedy against private prisons); *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure*, 536 U.S. 88 (2002) (diversity jurisdiction); *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990) (act-of-state doctrine); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (antitrust and the foreign sovereign compulsion defense).

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89 See, e.g., F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 157 n.* (2004) (noting four amicus briefs by foreign sovereigns supporting reversal of extraterritorial application of antitrust laws); Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants-Appellees at 2, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (No. 08-1191), 2010 WL 723006, at *2 (opposing extraterritorial application of U.S. securities laws).

90 461 U.S. 480, 482 & n.* (1983) (noting brief by Republic of Guinea in favor of affirmance).

91 541 U.S. 677, 680 n.* (2004) (noting briefs by Japan and Mexico urging reversal).

92 560 U.S. 305, 307 n.* (2010) (noting brief by Saudi Arabia).

93 Sosa v. Alvarez-Machain, 542 U.S. 692, 696 n.† (2004); see also Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioner, *Sosa*, 542 U.S. 692 (No. 03-339), 2004 U.S. S. Ct. Briefs LEXIS 910.

94 See, e.g., Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and The Kingdom of the Netherlands as Amici Curiae in Support of the Respondents at 6, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 405480, at *6 (corporate liability); Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party at 5-6, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 2312825, at *5-6 (extraterritoriality).

95 548 U.S. 331 (2006).

96 See *Medellin*, 552 U.S. at 496 n.* (noting briefs in support of reversal by Mexico and other foreign sovereigns); *Sanchez-Llamas*, 548 U.S. at 336 n.† (noting briefs in support of reversal by Honduras et al., and Mexico); Brief of Amici Curiae the European Union and Members of the International Community in Support of Petitioner, *Medellin*, 552 U.S. 491 (No. 06-984), 2007 WL 1874804; Brief of Amici Curiae the European Union and Members of the International Community in Support of Petitioners, *Sanchez-Llamas*, 548 U.S. 331 (Nos. 04-10566, 05-51), 2005 WL 3530558.

97 470 U.S. 392, 393 (1985).

98 488 U.S. 428, 430 n.* (1989); see also Motion for Leave to File a Brief as Amicus Curiae and Brief for the Republic of Liberia as Amicus Curiae in Support of Respondents at 11, Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) (No. 87-1372), 1987 WL 880145, at *11.

99 530 U.S. 363 (2000).

100 Brief for the European Communities and Their Member States as Amici Curiae in Support of Respondent at 4-5, *Crosby*, 530 U.S. 363 (No. 99-474), 2000 WL 177175, at *4-5.

101 539 U.S. 396, 401 & n.* (2003) (noting briefs by Germany and Switzerland urging reversal); see also infra notes 226-29 (discussing foreign sovereigns' arguments in favor of preemption in *Arizona v. United States*, 132 S. Ct. 2492 (2012)).

102 See Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 523 n.* (1987).

103 See Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 696 n.* (1988).

104 See Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc., 527 U.S. 308, 310 n.* (1999).

105 See Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 62 n.* (1993) (challenging Tennessee sales tax on shipping containers).

106 See Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 300 n.† (1994); Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd., 493 U.S. 331, 332 n.* (1990); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 161 n.* (1983). An additional category of foreign sovereign amicus filing appears to occur almost exclusively at the certiorari stage: cases involving a foreign national, either an individual or a company. For example, foreign sovereigns have filed such "citizen-support" briefs in support of nationals who are criminal defendants or who have been sentenced to death in the United States. See, e.g., Brief of the Kingdom of Saudi Arabia as Amicus Curiae in Support of Petitioner, Al-Turki v. Colorado, 559 U.S.

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1057 (2010) (No. 09-700), 2010 WL 599152; Brief for the Government of the Argentine Republic as Amicus Curiae in Support of Petitioner, Saldaño v. Texas, 530 U.S. 1212 (2000) (No. 07-7815), 2007 WL 4613656. They have also filed in support of national companies. See, e.g., Amicus Curiae Brief of the Government of Denmark in Support of Petitioners, Widex A/S v. Energy Transp. Grp., Inc., 133 S. Ct. 2010 (2013) (No. 12-1136), 2013 WL 1557882 (arguing that certiorari should be granted where Danish national companies were held to have willfully infringed patents). In the absence of a traditional ground for certiorari, see Sup. Ct. R. 10, the filing of a brief in support of certiorari by a foreign sovereign is not sufficient for the Court to grant review. Citizen-support briefs may be intended primarily as a political signal to the U.S. government, especially the executive, that the foreign sovereign is monitoring the treatment of its nationals and may impose political consequences for perceived instances of mistreatment, even if the courts do not provide relief.

107 See Brief of Amicus Curiae the European Union in Support of the Petitioner at 2, McCarver v. North Carolina, 517 U.S. 1110 (1996) (No. 00-8727), 2001 WL 648609, at *2. Although the brief's title lists it as "on petition for writ of certiorari to the Supreme Court of North Carolina," id., it was filed at the merits stage, as evidenced by the Supreme Court docket. The European Union initially filed its brief in *McCarver*, which the Court dismissed as improvidently granted. The Court granted the *McCarver* amici's motion to have their briefs considered in support of the petitioner in *Atkins v. Virginia* instead. See Docket Entry Granting Motion of Amici Filers in *McCarver v. North Carolina (*Dec. 3, 2001), Atkins v. Virginia, 536 U.S. 304 (2002) (No. 00-8452), http://www.supremecourt.gov/Search.aspx?Filame=/docketfiles/00-8452.htm [[https://perma.cc/NJ5D-5SSH].

108 See Brief of Amici Curiae the European Union and Members of the International Community in Support of Respondent at 6, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1619203, at *6.

109 A few foreign sovereign briefs cannot easily be assigned to one of the four categories. For example, such briefs may simply repeat arguments of the parties, argue based solely on U.S. domestic law, or make general appeals to "comity" without clearly articulating a basis in U.S. or international law for their arguments. See, e.g., Brief for Amicus Curiae United Mexican States in Support of Petitioner, *Altmann*, 541 U.S. 677 (No. 03-13), 2003 WL 22766741 (arguing that the Supreme Court's precedents on nonretroactivity of federal statutes should apply to the Foreign Sovereign Immunities Act); Brief Amici Curiae of the Republic of Ireland and Icarom PLC (Under Administration) in Support of Petitioners, Dole Food Co. v. Patrickson, 538 U.S. 468 (2003) (Nos. 01-593, 01-594), 2002 WL 1987396 (raising U.S. law arguments about the interpretation of the Foreign Sovereign Immunities Act). Veteran Supreme Court advocates accurately gauge that foreign sovereign briefs on purely U.S. law carry little weight with the Court, E-mails from Leading Supreme Court Advocates (Jan. 5-6, 2015), supra note 68, and the paucity of such briefs may reflect parties' resulting disinterest in recruiting foreign sovereign amici on issues other than the four categories described above.

110 Bradley, supra note 7, at 661-62; see also supra text accompanying note 23.

111 Kenneth Culp Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364, 404 (1942).

112 Larsen, supra note 28, at 1774. The Supreme Court's reliance on legislative facts provided by amici has come under increasing criticism in recent years. See Brianne J. Gorod, The Adversarial Myth: Appellate Court Extra-Record Factfinding, 61 Duke L.J. 1 (2011); Larsen, supra note 28, at 1761-62.

113 See, e.g., Brief for the European Communities and Their Member States in Support of Respondent at 7, *Crosby*, 530 U.S. 363 (No. 99-474), 2000 WL 177175, at *7 (noting that the European Union would restart proceedings against the United States in the World Trade Organization if the Court lifted the injunction then in place against a state law restricting trade with Burma); see also infra notes 226-29 and accompanying text.

114 561 U.S. 247 (2010).

115 See id. at 253.

116 Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants-Appellees at 28, *Morrison*, 561 U.S. 247 (No. 08-1191), 2010 WL 723006, at *28; Brief for the Republic of France as Amicus Curiae in Support of Respondents at 20, *Morrison*, 561 U.S. 247 (No. 08-1191), 2010 WL 723010, at *20; Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents at 24-26, *Morrison*, 561 U.S. 247 (No. 08-1191), 2010 WL 723009, at *24-26.

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117 Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents at 24-26, *Morrison*, 561 U.S. 247 (No. 08-1191), 2010 WL 723009, at *24-26.

118 Brief for the Republic of France as Amicus Curiae in Support of Respondents at 26, *Morrison*, 561 U.S. 247 (No. 08-1191), 2010 WL 723010, at *26.

119 Transcript of Oral Argument at 13-16, 22-23, 33, 41-42, 50, *Morrison*, 561 U.S. 247 (No. 08-1191), 2010 WL 1285394, at *13-16, *22-23, *33, *41-42, *50.

120 *Morrison*, 561 U.S. at 250-51.

121 Id. at 269.

122 Id. at 269-70.

123 482 U.S. 522, 524 (1987).

124 Id. at 540.

125 Id. at 541 (citing amicus briefs of Germany, France, and the United Kingdom, as well as the amicus brief of the United States). The Court, however, then rejected the foreign sovereign amici's argument that the Convention's procedures are the exclusive means for discovery in this situation. See infra note 276 and accompanying text.

126 *Sanchez-Llamas*, 548 U.S. at 338-39.

127 Brief of Amici Curiae the European Union and Members of the International Community in Support of Petitioners at 2, *Sanchez-Llamas*, 548 U.S. 331 (Nos. 04-10566, 05-51), 2005 WL 3530558, at *2; Brief Amicus Curiae of the Government of the United Mexican States in Support of Petitioner Moises Sanchez-Llamas at 21-22, *Sanchez-Llamas*, 548 U.S. 331 (No. 04-10566), 2005 WL 3543087, at *21-22; Brief for Amici Curiae Republic of Honduras and Other Foreign Sovereigns in Support of Petitioners at 9, *Sanchez-Llamas*, 548 U.S. 331 (Nos. 04-10566, 05-51), 2005 WL 3597807, at *9.

128 *Sanchez-Llamas*, 548 U.S. at 343; see also id. at 337.

129 Brief of Amicus Curiae the European Commission in Support of Neither Party, *Sosa*, 542 U.S. 692 (No. 03-339), 2004 WL 177036.

130 Id. at 4.

131 Id. at 24.

132 Transcript of Oral Argument at 16-17, 28-29, 62-65, *Sosa*, 542 U.S. 692 (Nos. 03-339, 03-485), 2004 WL 772092, at *16-17, *28-39, *62-65.

133 *Sosa*, 542 U.S. at 733 n.21. This may be an example of foreign sovereigns leading the Court astray. See William S. Dodge, International Comity in American Law, 115 Colum. L. Rev. 2071, 2110 n.243 (2015) (explaining that CIL "requires the exhaustion of local remedies in domestic courts only before a claim is brought in *an international tribunal*," not "before a claim is brought in another domestic court")

134 Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of the Respondents at 6, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 405480, at *6; see also id. at 10-11.

135 Transcript of Oral Argument at 33-34, 40-41, 45, 53, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 628670, at *33-34, *40-41, *45, *53.

136 Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012) (mem.).

137 See Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 2165345; Brief of the Governments of the Kingdom of the Netherlands and

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the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 2312825.

138 Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party at 8, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 2165345, at *8.

139 Id. at 5.

140 Id. at 11-12.

141 Id. at 12-13.

142 Id. at 14, 18-19.

143 Id. at 30.

144 Transcript of Oral Argument at 12-13, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 4486095, at *12-13.

145 *Kiobel*, 133 S. Ct. at 1669.

146 Id. at 1677 (Breyer, J., concurring in the judgment).

147 Id. at 1675-76.

148 See infra note 310 and accompanying text.

149 See infra notes 308-09 accompanying text.

150 See infra notes 314-18 and accompanying text.

151 536 U.S. 88 (2002).

152 Id. at 90 (alterations in original).

153 Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioner at 9-17, *JPMorgan Chase Bank*, 536 U.S. 88 (No. 01-651), 2002 WL 257562, at *9-17.

154 Id. at *11.

155 See Transcript of Oral Argument at 4, 13, 19-20, 25, 33, 40-43, *JPMorgan Chase Bank*, 536 U.S. 88 (No. 01-651), 2002 WL 753389, at *4, *10, *14-15, *19, *24-25, *30-31.

156 See id. at 19-20, 33, 2002 WL 753389, at *14-15, *24.

157 *JPMorgan Chase Bank*, 536 U.S. at 100. The Court cited the U.K. amicus brief multiple times, see id. at 90 n.1, 97, 99 n.4, though ultimately the Court explained that it did not need to

decide whether Traffic Stream's reading of the British Nationality Act is wrong, as the United Kingdom says it is, but only whether the status Traffic Stream claims under the Nationality Act would so operate on the law of the United States as to disqualify it from being a citizen or subject under the domestic statute before us here.

Id. at 99 (footnote omitted).

158 Cf. E-mail from Carter Phillips, Partner, Sidley Austin LLP, to author (Jan. 19, 2015, 12:22 PST) (explaining that foreign sovereigns "likely start with a bit more respect than a typical amicus").

159 See infra notes 177-82 and accompanying text.

160 See supra note 15.

161 See supra note 14 and accompanying text.

162 See, e.g., Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1675-76 (2013) (Breyer, J., concurring in the judgment) (citing European Commission and Netherlands-United Kingdom amicus briefs); Sanchez-Llamas v. Oregon, 548 U.S. 331, 393 (2006) (Breyer, J., dissenting) (citing brief of Mexico); F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 167-68 (2004) (citing amicus briefs by Canada, Germany, and Japan).

163 See, e.g., Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) (citing brief by Argentina et al.); Roper v. Simmons, 543 U.S. 551, 576 (2005) (citing brief for the European Union et al.).

164 561 U.S. 247, 269 (2010) (discussing arguments from amicus briefs filed by Australia, France, and the United Kingdom).

165 See, e.g., Collins, Friends of the Supreme Court, supra note 62, at 8 (noting that one "measure of amicus influence on the Court consists of tallying citations to amicus briefs found in the justices' opinions"); Kearney & Merrill, supra note 63, at 757 ("The only publicly visible manifestation of the impact of amici is the frequency with which their briefs are cited or quoted in the opinions of the Justices."); Ryan J. Owens & Lee Epstein, Amici Curiae During the Rehnquist Years, 89 Judicature 127, 129-30 (2005) (evaluating the impact of amicus briefs through study of citations in majority opinions); Michael E. Solimine, The Solicitor General Unbound: Amicus Curiae Activism and Deference in the Supreme Court, 45 Ariz. St. L.J. 1183, 1192 (2013) (noting that the influence of amicus briefs of the Solicitor General "may be revealed by citations to the SG's amicus brief in the Court's opinions").

166 The citation rates for foreign sovereign amici in this Part are based on the entire universe of foreign sovereign amicus briefs filed in merits cases from the 1978 through the 2013 Terms. Therefore, statistical inferences are not necessary, and I do not rely on them here. Nonetheless, the information provided in text is sufficient for anyone interested to calculate statistical significance, and many of the citation rate discrepancies between foreign sovereigns and other amici are in fact statistically significant.

167 In addition, foreign sovereign amicus briefs are cited in one concurrence in the judgment, one opinion concurring in part in dissenting in part, and four dissenting opinions. Only three cases cite a foreign sovereign amicus brief in a separate opinion, but not in the majority opinion. *Kiobel*, 133 S. Ct. at 1675-76 (Breyer, J., concurring in the judgment); *Sanchez-Llamas*, 548 U.S. at 393 (Breyer, J., dissenting); United States v. Alvarez-Machain, 504 U.S. 655, 675 n.14 (1992) (Stevens, J., dissenting).

168 Kearney & Merrill, supra note 63, at 757.

169 Id. Kearney and Merrill explain that they "examined every reference by the Court to an amicus in the case before the Court, whether the reference was in a majority, plurality, concurring, or dissenting opinion." Id. Their research revealed that the Court cited an amicus in 363 of 982 cases with amici. Id. at 758 fig.3.

170 Id. at 761 nn.51 & 53.

171 The percent is even higher if only briefs filed by the United Kingdom are counted: the Court cited four of five such briefs. The cases in which the Court cited a brief by the United Kingdom are *Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298, 337 (1994) (O'Connor, J., concurring in the judgment in part and dissenting in part); *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 798 (1993); *Itel Containers International Corp. v. Huddleston*, 507 U.S. 60, 66 (1993); and *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*, 482 U.S. 522, 541 (1987). In *Franchise Tax Board of California v. Alcan Aluminum Ltd.*, 493 U.S. 331, 333 n.* (1990), the United Kingdom filed a brief, but the Court did not cite it.

172 See, e.g., Collins, Influence of Amicus Curiae, supra note 76, at 822-23, 827; Kearney & Merrill, supra note 63, at 760 (calling the Solicitor General the "king of the citation-frequency hill"); Solimine, supra note 165, at 1192 ("[T]he SG's amicus briefs are also often considered to be influential in the shaping of doctrine by the Court as revealed in opinions.").

173 Kearney & Merrill, supra note 63, at 761.

174 Id. at 760 n.49.

175 See supra note 171 and accompanying text.

176 If counted by brief instead of by case, the Court cited 10 of 21 foreign sovereign amicus briefs (48%) filed from 1986 to 1995.

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177 See E-mail from Tom Goldstein, Partner, Goldstein & Russell, P.C., to author (Nov. 13, 2014, 12:22 PST) (explaining that foreign sovereigns' "participation is rare enough, and the process for participating presumably rigorous enough, that... the briefs get the Justices' attention"); see also E-mail from Leading Supreme Court Advocate to author (Feb. 2, 2015) (noting that "foreign sovereign amicus briefs are sufficiently rare that they likely will attract attention to the case"); E-mail from Leading Supreme Court Advocate to author (Jan. 6, 2015) (noting that "foreign sovereigns typically are quite cautious about filing briefs in the courts of another country"); E-mail from Leading Supreme Court Advocate to author (Jan. 5, 2015) ("It remains... fairly unusual for foreign sovereigns to file, so when they take the trouble to do so their briefs carry some weight.").

178 See Kearney & Merrill, supra note 63, at 760 (noting that the "frequency of the Court's citation of the Solicitor General as amicus rises each decade, roughly doubling between the first decade of our study and the most recent decade"); see also R. Reeves Anderson & Anthony J. Franze, The Court's Increasing Reliance on Amicus Curiae in the Past Term, Nat'l L.J. (Aug. 24, 2011), http://files.arnoldporter.com/arnold&porterllp_nationallawjournal_8.24.11.pdf[[https://perma.cc/R53T-AD28] (reporting that in the 2010 Term, the Justices cited amicus briefs by the Solicitor General "a remarkable 79% of the time").

179 These cases include *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure*, 536 U.S. 88 (2002); *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993); and *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

180 See supra note 165 and accompanying text.

181 Cf. Solimine, supra note 165, at 1192 n.37 ("[M]erely because an amicus brief is cited does not mean it was particularly influential, and no citation does not mean it wasn't influential.").

182 Collins, Friends of the Supreme Court, supra note 62, at 8 (noting that measuring amicus brief impact by looking to citations is a "blunt indicator" because "justices may adopt arguments or respond to amicus briefs without making a direct reference to the briefs" (citations omitted) (internal quotation marks omitted)); Owens & Epstein, supra note 165, at 129 n.17 (measuring the impact of amicus briefs by looking at citations "may well underestimate the influence of *amici*" because "Justices may adopt arguments in *amicus curiae* briefs without attribution--especially if multiple *amici* make the same argument").

183 See, e.g., Transcript of Oral Argument at 12-13, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 4486095, at *12-13 (Oct. 1, 2012) (recording Justice Sotomayor questioning the petitioners' counsel regarding an argument in the briefs filed by the European Commission and by the United Kingdom and the Netherlands).

184 During oral argument in *Morrison v. National Australia Bank*, for example, Chief Justice Roberts asked counsel for the United States, "Do you have any indication that our friends around the world are comfortable with your test?" and the U.S. government lawyer responded by pointing to amicus briefs filed by Australia, France, and the United Kingdom. Transcript of Oral Argument at 50, *Morrison*, 561 U.S. 247 (No. 08-1191), 2010 WL 1285394, at *50.

185 For cases argued in 2005 and later, the transcripts of oral argument identify individual Justices as speakers; for transcripts from 2004 and earlier, instances in which Justices speak are simply labeled "QUESTION," with no individual identification. In some instances from 2004 and earlier, the identity of the questioning Justice can be discerned by the response of the counsel, who begin responses with, for example, "That's correct, Justice O'Connor."

186 This number includes only cases in which the Court or counsel referred to the foreign sovereign amicus brief, either explicitly or by noting, for example, the foreign sovereign's "representations to the Court" or that the foreign sovereign has "told the Court" something. It does not include instances in which discussion at oral argument mentions the foreign sovereign without mentioning its brief, although some such instances are clearly based on arguments in the sovereigns' brief. See, e.g., infra note 188.

187 See, e.g., supra note 3 and accompanying text.

188 For example, at oral argument in *Republic of Austria v. Altmann*, counsel for the United States discussed the foreign relations friction that would result from retroactively applying the exceptions to foreign sovereign immunity codified in the Foreign Sovereign Immunities Act to World War II-era actions, and specifically mentioned cases against Japan. Transcript of Oral Argument at 23-24, Republic of Austria v. Altmann, 541 U.S. 677 (2004) (No. 03-13), 2004 WL 434151, at *23-24. Japan's

amicus brief in the case made the same argument. Brief for Amicus Curiae Japan in Support of Petitioners at 1-2, *Altmann*, 541 U.S. 677 (No. 03-13), 2003 WL 22753584, at *1-2.

189 See Spector v. Norwegian Cruise Line, 545 U.S. 119, 124 (2005) (the Bahamas); Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 245 (2004) (European Commission); Air France v. Saks, 470 U.S. 392, 393 (1985) (France); Strathearn S.S. Co. v. Dillon, 39 S. Ct.494, 495 (1919) (granting motion of the British Embassy to "take part in the oral argument").

190 See, e.g., Transcript of Oral Argument at 12-14, 55-56, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (No. 10-1491), 2012 WL 4486095, at *12-14, *55-56 (recording Chief Justice Roberts and Justices Scalia and Sotomayor discussing the European Commission and United Kingdom-Netherlands amicus briefs).

191 See infra Section IV.E.

192 Henry P. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 4-5 (1983); see also Peter L. Strauss, Essay, "Deference" Is Too Confusing--Let's Call Them "*Chevron* Space" and "*Skidmore* Weight," 112 Colum L. Rev. 1143, 1145 (2012) ("'[D]eference' is a highly variable, if not empty, concept [that is] sometimes used in the sense of 'obey' or 'accept,' and sometimes as 'respectfully consider.'").

193 Jonathan S. Masur & Lisa Larrimore Ouellette, Deference Mistakes, 82 U. Chi. L. Rev. 643, 652 (2015).

194 See Bradley, supra note 7, at 659-63 (identifying five categories of deference: political question deference, "executive branch lawmaking deference," "international facts deference," persuasiveness deference, and *Chevron* deference (capitalization omitted)); Derek Jinks & Neal Kumar Katyal, Disregarding Foreign Relations Law, 116 Yale L.J. 1230, 1236-38 (2007) (broadly echoing Bradley's categories).

195 See Bradley, supra note 7, at 659-60; see also Baker v. Carr, 369 U.S. 186, 217 (1962) (describing political questions as "essentially a function of the separation of powers").

196 For example, no foreign sovereigns filed in *Zivotofsky v. Clinton*, a political question case regarding the listing of "Jerusalem, Israel" as a place of birth on a U.S. passport. See Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012); Docket, *Zivotofsky*, 132 S. Ct. 1421 (No. 10-699), http://www.supremecourt.gov/search.aspx?filename=/docketfiles/10-699.htm [[https://perma.cc/V693-46FU]. Similarly, no foreign sovereigns filed in *Goldwater v. Carter*, a case about President Carter's unilateral termination of the U.S. mutual defense treaty with Taiwan in which a plurality of the Court granted, vacated, and remanded the case on the ground that the termination posed a political question. See 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring in the judgment) (plurality opinion).

197 Bradley, supra note 7, at 663. Some, including Bradley, have also argued that the Court's treatment of the U.S. government's views with respect to Article II treaties is a type of *Chevron* deference. See id. This proposition is controversial, see Jinks & Katyal, supra note 194, at 1243 (arguing that the "great weight" the courts give to the executive's views of Article II treaties is "limited and decidedly more modest than *Chevron* deference" (internal quotation marks omitted)), and Section IV.C.1 takes issue with *Chevron* as an explanation for the origin of deference in the treaty context.

198 Louis Henkin, Foreign Affairs and the United States Constitution 54 (2d ed. 1996) (explaining that "presidential 'law-making"' sometimes occurs "as a by-product of international action by the President"); id. at 54-61 (discussing uncertain content of the President's power as a lawmaker); Bradley, supra note 7, at 661 ("The Supreme Court has held that the President has independent lawmaking powers relating to foreign affairs, although it has never specified the limits on these powers.").

199 See Samantar v. Yousuf, 560 U.S. 305, 323 n.19 (2010); see also Bradley, supra note 7, at 714 ("[C]ourts defer absolutely to the views of the executive branch because this [head-of-state] immunity law is considered, in effect, a form of executive branch lawmaking."); Jinks & Katyal, supra note 194, at 1237-38 (stating that "the executive enjoys substantial deference with respect to matters that fall within its exclusive lawmaking authority," including determinations about head-of-state immunity); Ingrid Wuerth, Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department, 51 Va. J. Int'l L. 915, 930 (2011) [hereinafter Wuerth, Foreign Official Immunity] (noting that "[m]odern commentators have... often characterized... the current deference afforded the President in making determinations of head of state immunity... as executive branch lawmaking" (footnote omitted)). But see id. at 953-54 (arguing that foreign official immunity determinations should

be made by courts as a matter of federal common law, rather than by the State Department as a type of executive branch lawmaking).

200 Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (Am. Law. Inst. 1987).

201 See Bradley, supra note 7, at 708-09 ("[T]he formation and evolution of [CIL] can be influenced by executive branch statements and actions, [and] the ability of the United States to influence a change in [CIL] may depend on executive branch flexibility in interpreting the requirements of this law.").

202 See infra Section IV.E.

203 The executive also acts as a lawmaker with respect to sole executive agreements--agreements concluded between the U.S. executive branch and a foreign state or states, without the involvement of the Senate (as required for an Article II treaty) or Congress (as required for a congressional-executive agreement). See Jinks & Katyal, supra note 194, at 1243. Sole executive agreements make both international law and domestic law. See Bradley, supra note 7, at 661 (explaining that the President's "independent lawmaking powers relating to foreign affairs... include the ability to enter into at least some 'sole executive agreements' with other nations that have the force in the United States of supreme federal law"). Whether the foreign sovereign party to a sole executive agreement should receive deference similar to the U.S. government poses an interesting question. I leave fuller exploration of this issue for another day, as sole executive agreements have not been a topic of briefing by foreign sovereigns in Supreme Court cases.

204 Bradley, supra note 7, at 662. Bradley uses the label "persuasiveness deference." I have adopted the "expertise" label here because, as explained below, it better captures the importance of the identity of the speaker to the representations' persuasiveness. See infra text accompanying note 209.

205 *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); see, e.g., Jim Rossi, Respecting Deference: Conceptualizing *Skidmore* Within the Architecture of *Chevron*, 42 Wm. & Mary L. Rev. 1105, 1117 (2001) ("*Skidmore* deference is sometimes referred to as 'weak deference,' in contrast to the strong deference that has evolved post- *Chevron*. It is deference nevertheless...." (footnote omitted)). Another useful concept to describe the Court's behavior is the idea of "consultative deference," which is similar in magnitude and operation to *Skidmore* deference, but covers cases in which the Court does not explicitly invoke a deference regime. William N. Eskridge, Jr. & Lauren E. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*, 96 Geo. L.J. 1083, 1111 (2008) (explaining that in "consultative deference" cases, "the Court relies on some input from the agency," such as an amicus brief, "to shape its reasoning and influence its decision. But it does so without explicitly stating that it is deferring to the agency, and without invoking" a specific deference regime).

206 United States v. Mead Corp., 533 U.S. 218, 229 (2001) (explaining that *Chevron* deference is triggered by an express or implied delegation of authority from Congress to an agency). Some commentators take the position that *Skidmore* deference is not deference at all and instead instructs courts simply to exercise independent judgment in evaluating agency interpretations. See Kristin E. Hickman & Matthew D. Krueger, In Search of the Modern *Skidmore* Standard, 107 Colum. L. Rev. 1235, 1251-55 (2007) (providing an overview of the "independent judgment" view). This Article, however, follows the majority position of considering *Skidmore* to be a type of deference. See id. at 1255-59, 1309 (providing overview of the *Skidmore* as sliding-scale of deference model and concluding that most courts follow that conception). As illustrated more fully in the remainder of this Part, the Court in foreign relations cases appears to defer to the views of the United States and foreign sovereigns in particular circumstances based on the authority the sovereigns' identity lends to their positions, as well as the persuasiveness of their arguments.

207 *Skidmore*, 323 U.S. at 140.

208 See Rossi, supra note 205, at 1142 ("In applying *Skidmore*'s factors, courts consider factors that parallel those they consider in 'hard look' reasonableness review."); see also Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (explaining that in reviewing an agency's explanation, the Court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment" (internal quotation marks omitted)); Sitaraman & Wuerth, supra note 21, at 1966-67 (arguing that courts should review executive fact-finding in the foreign relations context pursuant to *State Farm*). The Supreme Court has explicitly equated interpretive and substantive standards of review. See Judulang v. Holder, 132 S. Ct. 476, 483 n.7 (2011) (explaining that the analysis of an

agency legal interpretation under step two of *Chevron* is the same as arbitrary and capricious review under the Administrative Procedure Act); David Zaring, Rule by Reasonableness, 63 Admin. L. Rev. 525, 529-30 (2011) (arguing that courts collapse different standards of inquiry into a reasonableness standard).

209 Hickman & Krueger, supra note 206, at 1251 ("Deference to an administrative interpretation is triggered by the interpretation's 'pedigree'-- i.e., the fact that an agency holds the view."); Strauss, supra note 192, at 1146 (explaining that in the *Skidmore* context, "agencies have the credibility of their circumstances").

210 Bradley, supra note 7, at 661-62; see also Jinks & Katyal, supra note 194, at 1238 ("The courts also defer to the executive's determination of a broad range of what Curtis Bradley has called 'international facts.' For example, courts typically defer to executive determinations of the foreign affairs interests of the United States." (footnote omitted)).

211 Republic of Austria v. Altmann, 541 U.S. 677, 702 & n.23 (2004) (citing the executive's expertise as a reason to defer on the potential effects of exercising jurisdiction over a particular foreign sovereign); cf. Boumediene v. Bush, 553 U.S. 723, 797 (2008) (highlighting the information disparity between the executive and the Court in explaining that "[u]nlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people").

212 See Robert M. Chesney, National Security Fact Deference, 95 Va. L. Rev. 1361, 1406 (2009); see also Jean Galbraith & David Zaring, Soft Law as Foreign Relations Law, 99 Cornell L. Rev. 735, 773 (2014) (noting that "functionalist justifications" typically undergird the "special deference" that courts give to the views of the executive branch in foreign relations cases including on issues such as "factual determinations" and "presidential policy judgments").

213 E-mail from Leading Supreme Court Advocate to author (Feb. 2, 2015) (on file with author) (suggesting that foreign sovereigns "more effectively than other amici" can "demonstrate that a U.S. court decision has ramifications that run beyond the parties to the particular case").

214 See supra note 210 and accompanying text. But see Bradley, supra note 7, at 722 (arguing that, in considering whether a state law was preempted in *Zschernig v. Miller*, 389 U.S. 429 (1968), it was "odd for the Court not to have deferred" to the executive's representation that the state law would not cause foreign policy problems).

215 See Chesney, supra note 212, at 1362-63; see also Ashley S. Deeks, The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference, 82 Fordham L. Rev. 827, 875-76, 876 n.227 (2013) (noting that "international facts" deference occurs in both foreign affairs and national security cases).

216 Chesney, supra note 212, at 1362.

217 484 U.S. 518, 529-30 (1988).

218 Id. at 529.

219 Id. at 529-30. For an additional example, see *Regan v. Wald*, 468 U.S. 222, 243 (1984) (deferring to the executive branch's assessment that foreign policy considerations justified restricting travel to Cuba).

220 553 U.S. 674, 700-03 (2008).

221 Id. at 702 (alteration in original) (quoting Brief for the Federal Parties at 47, *Munaf*, 553 U.S. 674 (Nos.07-394, 06-1666), 2008 WL 205089, at *47).

222 Id. (citation omitted).

223 542 U.S. 692, 733 n.21 (2004).

224 541 U.S. 677, 701-02 (2004); see also Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 385-86 (2000) ("Although we do not unquestioningly defer to the legal judgments expressed in Executive Branch statements when determining a federal Act's preemptive character, we have never questioned their competence to show the practical difficulty of pursuing a congressional goal requiring multinational agreement. We have, after all, not only recognized the limits of our own capacity to 'determin[e] precisely when foreign nations will be offended by particular acts,' but consistently acknowledged that the 'nuances' of

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'the foreign policy of the United States... are much more the province of the Executive Branch and Congress than of this Court."' (alteration in original) (citations omitted)).

225 132 S. Ct. 2492 (2012).

226 Amicus Curiae Brief of the United Mexican States in Support of Respondent, *Arizona*, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 1098267. Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, and Uruguay joined Mexico's brief. See Motion of Argentina et al. for Leave to Join the United Mexican States as Amici Curiae in Support of Respondent, *Arizona*, 132 S. Ct. 2492 (No. 11-182), 2012 WL 1114006; Motion of the Republic of Haiti for Leave to Join the United Mexican States as Amicus Curiae in Support of Respondent, *Arizona*, 132 S. Ct. 2492 (No. 11-182), 2012 WL 1114004.

227 Amicus Curiae Brief of the United Mexican States in Support of Respondent at 6, *Arizona*, 132 S. Ct. 2492 (No. 11-182), 2012 WL 1098267, at *6.

228 Id. at 6-7 (citations omitted).

229 Id. at 9.

230 *Arizona*, 132 S. Ct. at 2498.

231 See supra notes 119-22 and accompanying text (discussing reliance on foreign sovereign amici in *Morrison v. National Australia Bank*, 561 U.S. 247, 269 (2010)).

232 542 U.S. 155 (2004).

233 Id. at 168. Justice Breyer added a "see also" citation to the amicus brief of the United States, noting that the United States made the same argument with respect to its own amnesty program. Id.

234 Id. at 169; see also Breyer, supra note 14, at 107 (noting that the Court in *Empagran* "reached its conclusion with the help of briefs filed by those who understood international practice," specifically the executive branch and foreign governments).

235 Cf. Bradley, supra note 7, at 722 n.323 (noting, in the context of foreign affairs preemption, that "[a] somewhat related issue" to deference to the U.S. government on international facts "is whether, in applying the federal common law of foreign relations, courts should defer to the views of *foreign governments* concerning the likely impact of a state's action on foreign relations").

236 *Munaf*, 553 U.S. at 702.

237 *Egan*, 484 U.S. at 529-30; see also Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983) (noting the Court's lack of expertise in predicting the risk of offending a foreign nation).

238 Chesney, supra note 212, at 1409-10. Chesney is skeptical of deference on national security facts in other circumstances, including retrospective fact finding, but he recognizes the utility of expertise for *predictive* fact finding. Id. at 1409-11.

239 Cf. id. at 1405-06 (noting the executive branch's "multitude of information gathering agencies" that "bring[] vast technical and manpower resources to the task of information collection").

240 See, e.g., Samantar v. Yousuf, 560 U.S. 305, 309 (2010) (citing Brief for the United States as Amicus Curiae Supporting Affirmance at 4, *Samantar*, 560 U.S. 305 (No. 08-1555), 2010 WL 342031, for the proposition that "[t]he United States has not recognized any entity as the government of Somalia since the fall of the military regime" in the course of considering whether the Foreign Sovereign Immunities Act governs determinations of foreign official immunity).

241 Chesney, supra note 212, at 1382.

242 See Robert M. Chesney, Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations, 92 Iowa L. Rev. 1723, 1733 (2007) [[hereinafter Chesney, Disaggregating Deference] ("There is no question that a deference doctrine of some kind currently exists with respect to executive-branch treaty interpretations. But the precise nature of that doctrine, its triggering conditions, and the obligations it imposes on judges are far from clear."); Cohen, supra note 21, at 443 ("Although

the precise weight given to executive branch interpretations has remained somewhat unclear, some deference at least has been the norm."); see also Sitaraman & Wuerth, supra note 21, at 1969 (arguing that even if treaty interpretation were "normalized," the executive would receive *Skidmore* deference on treaty interpretation generally and *Chevron* deference when it acts pursuant to authority delegated by a treaty).

243 Medellin v. Texas, 552 U.S. 491, 506-07 (2008) (citations omitted) (quoting Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996)).

244 Abbott v. Abbott, 560 U.S. 1, 15 (2010) (quoting Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185 (1982)). For a historical overview of the emergence of executive deference in the treaty interpretation context, see Chesney, Disaggregating Deference, supra note 242, at 1741-51.

245 *Sumitomo Shoji*, 457 U.S. at 184-85; see Sanchez-Llamas v. Oregon, 548 U.S. 331, 355 (2006) ("[W]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." (quoting Kolvorat v. Oregon, 366 U.S. 187, 194 (1961)) (internal quotation marks omitted)); El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty.").

246 Air France v. Saks, 470 U.S. 392, 404 (1985) (quoting Benjamins v. British Eur. Airways, 572 F.2d 913, 919 (2d Cir. 1978)) (internal quotation marks omitted); see also *El Al Israel Airlines*, 525 U.S. at 176 ("The 'opinions of our sister signatories'... are 'entitled to considerable weight.'").

247 457 U.S. at 185.

248 Id. at 184 n.10.

249 Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996) (citation omitted); see also *El Al Israel Airlines*, 525 U.S. at 167 (quoting the same language).

250 560 U.S. 1 (2010).

251 Id. at 5.

252 Id. at 9-10.

253 Id. at 15 (quoting *Sumitomo Shoji*, 457 U.S. at 185).

254 Id. at 16 (quoting *El Al Israel Airlines*, 525 U.S. at 176) (internal quotation marks omitted).

255 Id. at 16-18. The Justices also focused on the views of signatory states at oral argument. See Transcript of Oral Argument at 43-48, *Abbott*, 560 U.S. 1 (No, 08-645), 2010 WL 97480, at *43-48. In questioning the respondent's counsel, Justice Scalia noted, "the purpose of a treaty is to have everybody doing the same thing, and... if it's a case of some ambiguity, we should try to go along with what seems to be the consensus... in other countries that are signatories to the treaty." Id. at 44.

256 540 U.S. 644, 658 (2004) (Scalia & O'Connor, JJ., dissenting); see also Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer, American University Washington College of Law (Jan. 13, 2005), http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument[[https://perma.cc/AVJ9-CJKG] (quoting Justice Scalia explaining that he uses foreign law in interpreting treaties because "the object of a treaty being to come up with a text that is the same for all the countries, we should defer to the views of other signatories, much as we defer to the views of agencies--that is to say if it's within [the] ball park, if it's a reasonable interpretation, though not necessarily the very best").

257 *Olympic Airways*, 540 U.S. at 660-61 (Scalia, J., dissenting).

258 Id. at 664.

259 Bradley, supra note 7, at 701-02; see also Chesney, Disaggregating Deference, supra note 242, at 1733.

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260 Bradley, supra note 7, at 663, 701-07.

261 Id. at 702-03 (footnote omitted).

262 Eric A. Posner & Cass R. Sunstein, *Chevron*izing Foreign Relations Law, 116 Yale L.J. 1170, 1203, 1205 (2007).

263 Id. at 1201 n.100.

264 Scholars have also pushed back against the *Chevron* delegation arguments on other grounds, not focused on the role of foreign sovereigns. For example, Professor Evan Criddle has argued that deference to the executive in treaty-interpretation cases is better understood as *Skidmore* deference and that such a conception "allows courts to sidestep *Chevron*'s 'delegation gap' problem." Evan Criddle, Comment, *Chevron* Deference and Treaty Interpretation, 112 Yale L.J. 1927, 1934 (2003). Professors Derek Jinks and Neal Katyal, in direct response to Posner and Sunstein, have also rejected the idea that courts do or should afford *Chevron* deference to executive interpretations of Article II treaties. They argue that "substantial judicial deference to executive interpretations of" self-executing treaties "cannot be squared with the doctrinal and institutional implications that necessarily follow from the status of these international instruments as 'law."' Jinks & Katyal, supra note 194, at 1234-35. Rather,

the courts must retain the institutional prerogative to interpret law in this zone any time cases or controversies turning on the interpretation of this law are otherwise properly presented and otherwise appropriate for judicial resolution. And this prerogative constitutes an important limit on the power of the President to interpret treaties in the course of performing or otherwise implementing U.S. treaty obligations.

Id. at 1235. In particular, they explain that the fact that an Article II treaty is "made with the approval of the Senate strongly suggests that the executive does not properly possess unfettered discretion in its interpretation." Id. at 1243. Put more generally, they argue that "the case for deference is weakest when the law in question has the status of supreme federal law and is the product of rigorous lawmaking procedures." Id. at 1261.

265 See Deborah N. Pearlstein, After Deference: Formalizing the Judicial Power for Foreign Relations Law, 159 U. Pa. L. Rev. 783, 829 (2011) (noting that the contractual approach "in which the intent that must be discerned is that of the treaty parties" is an "important theme in the Court's historical approach to treaty interpretation").

266 BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1208 (2014) ("[A] treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent."); Sullivan v. Kidd, 254 U.S. 433, 439 (1921) ("[T]reaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals, and are to be executed in the utmost good faith, with a view to making effective the purposes of the high contracting parties...."); Wright v. Henkel, 190 U.S. 40, 57 (1903) ("Treaties must receive a fair interpretation, according to the intention of the contracting parties...."); see also Curtis J. Mahoney, Note, Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties, 116 Yale L.J. 824, 826 (2007) ("The Supreme Court has long stated that treaties adopted under Article II of the Constitution are not acts of 'legislation' but rather 'contracts' between sovereign nations."). Although not all aspects of domestic contract law necessarily apply to the treaty context, the analogy's fundamental insight that a treaty is a bargain between sovereign nations is the key feature for purposes of this Article: It explains why the Court looks to the views of other treaty parties, not just to the United States. Cf. Restatement, supra note 200, pt. 3 Intro. Note ("In some respects, the international law of international agreements resembles domestic contract law,... [and] is derived in substantial part from general principles common to the contract laws of state legal systems.... But the international law of international agreements has its own character, and analogies from the contract law of any particular country are to be used with caution.").

267 Air France v. Saks, 470 U.S. 392, 399 (1985) (emphasis added).

268 *Sumitomo Shoji*, 457 U.S. at 185.

269 Pearlstein, supra note 265, at 800.

270 *Abbott*, 560 U.S. at 16-18.

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271 See, e.g., Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 540-41 (1987) (citing briefs of Germany, France, and the United Kingdom, along with the U.S. amicus brief, on the interpretation of the Hague Evidence Convention).

272 In a possible instantiation of this concern, the Court in *Société Nationale Industrielle Aérospatiale* cited three of the four foreign sovereign amicus briefs. See 482 U.S. at 541. The only brief it did not cite was filed by Switzerland, which was in the process of ratifying the Hague Evidence Convention, but was not yet a party, when it filed its brief. See Brief of Government of Switzerland as Amicus Curiae in Support of Petitioners at 2, *Société Nationale Industrielle Aérospatiale*, 482 U.S. 522 (No. 85-1695), 1986 WL 727499, at *2.

273 543 U.S. 551, 576 (2005).

274 Being a treaty party may also serve as a proxy for expertise about the negotiating history and intent of the parties, though if the Court were concerned solely about expertise, it would have to give similar deference to, for example, a law professor expert on a particular treaty. Unfortunately for the academy, it grants no such deference.

275 Bradley, supra note 7, at 703 (footnote omitted).

276 *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 529; see also Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 67-69 (1993) (determining treaty meaning based on plain text, and therefore disregarding signatory interpretations). But see id. at 84. (Blackmun, J., dissenting) (interpreting treaty contrary to the majority due to the views of signatory states).

277 Jinks & Katyal, supra note 194, at 1243.

278 See Pearlstein, supra note 265, at 785-86 (arguing that the traditional view that the Court defers to executive branch interpretations of treaties and foreign relations statutes has become "increasingly untenable" in light of "the Court's recent behavior"). A forthcoming study quantifies the Roberts Court's decreased deference to the executive on treaty interpretation. It finds that the Court has deferred in 55% to 60% of treaty interpretation cases--a marked decrease from the 90% deference level in the Rehnquist Court. See Harlan Grant Cohen, The Death of Deference and the Domestication of Treaty Law, 2015 BYU L. Rev. 106, 109-10 (forthcoming 2016), http://papers.ssrn.com/abstract=2689036 [[https://perma.cc/B83X-4D5B].

279 134 S. Ct. 1198, 1209 (2014); see Cohen, supra note 21, at 443-44 (discussing *BG Group* as evidence of the current Court's skepticism about traditional levels of deference to the executive in foreign relations cases). Interestingly, the treaty at issue in *BG Group* was a bilateral investment treaty between the United Kingdom and Argentina--a treaty to which the United States was not party. See *BG Group*, 134 S. Ct. at 1203. That fact may have prompted the Court to be less deferential to the U.S. government than it is when the United States is party to the treaty at issue.

280 See supra notes 210-12 and accompanying text; see also infra Section IV.E.

281 Wuerth, supra note 199, at 960-61; see Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815 (1997); Harold Hongju Koh, Comment., Is International Law Really State Law?, 111 Harv. L. Rev. 1824 (1998).

282 See, e.g., Bradley, supra note 7, at 708 (arguing that "customary international law is not inherently part of United States federal law, whether common law or otherwise"); Koh, supra note 281, at 1825 (defending the "hornbook rule" that "international law, as applied in the United States, must be federal law"); Ingrid Wuerth, The Alien Tort Statute and Federal Common Law: A New Approach, 85 Notre Dame L. Rev. 1931, 1956 (2010) [hereinafter Wuerth, The Alien Tort Statute] ("The ATS is best understood after *Sosa* as delegating to the courts the power to make limited federal common law based on international law....").

283 See, e.g., Bradley, supra note 7, at 707 ("The conventional view is that deference to the executive branch concerning the meaning of customary international law is covered by essentially the same rule governing treaties: Courts are to give substantial weight to the executive branch's interpretation so that the United States generally will speak with one voice in foreign affairs."); Jinks & Katyal, supra note 194, at 1243 (arguing for limited deference to the executive in the context of Article II treaties, but recognizing that with respect to CIL, "the relevant executive action is often the only action taken by one of the political branches--and thus the case for deference in this context is... much stronger"); Julian Ku & John Yoo, *Hamdan*

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v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch, 23 Const. Comment. 179, 197-98 (2006) ("In addition to giving deference to reasonable presidential interpretations of treaties, courts have generally provided an even greater level of deference to presidential interpretations of customary international law."). But see Monroe Leigh, Ed. Comment., Is the President Above Customary International Law?, 86 Am. J. Int'l L. 757, 762 (1992) (arguing that courts give "no greater deference to executive branch interpretations of customary international law than to executive branch interpretations of international agreements" and "as between the courts and the executive branch, the courts should be the final arbiters of whether an executive interpretation or reinterpretation of customary international law is reasonable").

284 Wuerth, Alien Tort Statute, supra note 282, at 1956 (arguing that in the ATS context courts should "give modest deference" to the executive branch's views on CIL, "especially when that law is still in development"); Wuerth, Foreign Official Immunity, supra note 199, at 923 (arguing, in the context of head-of-state immunity determinations, that "[e]ven if the executive branch is not entitled to resolve each immunity case itself or to set out law that is binding on the courts, it is nevertheless entitled to deference on certain discrete issues, including the preconditions for the conferral of status-based immunity and its policy regarding the desirable development of customary international law"). But see Wuerth, The Alien Tort Statute, supra note 282, at 1958 (arguing that courts should give "little deference... to the executive branch in ATS cases as to the interpretation of customary international norms that are already well developed or aspects of ATS litigation with little relationship to customary international law").

285 Restatement, supra note 200, § 112 cmt. c.

286 Id.

287 See, e.g., Bradley, supra note 7, at 708-09 (arguing for judicial deference to executive branch interpretations of international law on the ground that the executive's statements and actions influence the development of CIL); Ku & Yoo, supra note 283, at 198 (arguing that the Court has deferred to executive determinations with respect to CIL because the Court "has recognized that the President's structural position as the chief interlocutor of foreign policy on behalf of the United States gives him a unique control over the development of customary international law"); Wuerth, The Alien Tort Statute, supra note 282, at 1958 (arguing for deference "based on the executive's role in developing customary international law"); Wuerth, Foreign Official Immunity, supra note 199, at 972 (arguing that "the domestic law of [conduct-based foreign sovereign] immunity as developed by the United States may serve as evidence of the content of international law (making deference appropriate)").

288 Jinks & Katyal, supra note 194, at 1243 (noting that, with respect to CIL, "the relevant executive action is often the only action taken by one of the political branches--and thus the case for deference in this context is... much stronger" than in the treaty context).

289 See, e.g., Bradley, supra note 7, at 708 (arguing for judicial deference to executive branch interpretations of international law on the ground that "[c]ustomary international law is very fluid and amorphous, making the executive branch's expertise and access to information especially important"); Ku & Yoo, supra note 283, at 199-205 (making functional arguments for deference to the executive branch on foreign relations issues, including CIL, in light of the executive's comparative institutional competence vis-à-vis the judiciary); Wuerth, The Alien Tort Statute, supra note 282, at 1956-57 (noting that deference is appropriate based on the executive's "expertise and informational advantages").

290 See Restatement, supra note 200, § 112 cmt. c ("Courts give particular weight to the position taken by the United States Government on questions of international law because it is deemed desirable that so far as possible the United States speak with one voice on such matters." (citing Baker v. Carr, 369 U.S. 186, 217 (1972)).

291 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 432 (1964).

292 Wuerth, Foreign Official Immunity, supra note 199, at 973.

293 See North Sea Continental Shelf (Fed. Rep. of Ger./Den.; Fed. Rep. of Ger./Neth.), Judgment, 1969 I.C.J. 3, 43 (Feb. 20, 1969).

294 Brief of Amicus Curiae the European Commission in Support of Neither Party at 24, *Sosa*, 542 U.S. 692 (No. 03-339), 2004 WL 177036, at *24.

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295 Transcript of Oral Argument at 16-17, 62-65, *Sosa*, 542 U.S. 692 (Nos. 03-339, 03-485), 2004 WL 772092, at *16-17, *62-65.

296 *Sosa*, 542 U.S. at 733 n.21.

297 Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party at 33-34, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2312825, at *33-34.

298 Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party at 30-36, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 2165345, at *30-36.

299 Transcript of Oral Argument at 8, 13-14, 56-57, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 4486095, at *8, *13-14, *56-57.

300 *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring in the judgment); see also id. at 1677.

301 *Sosa*, 542 U.S. at 732. The Court also phrased this inquiry as whether the "claim based on the present-day law of nations... rest[s] on a norm of international character accepted by the civilized world." Id. at 725.

302 Id.

303 Id. at 715.

304 See E-mail from Carter Phillips, Partner, Sidley Austin LLP, to author (Jan. 19, 2015, 12:49 PST) (noting that when a case "involve[s] a question of foreign law... that nations' views are plainly helpful").

305 Breyer, supra note 14, at 163.

306 Id. at 133; see also id. (arguing that the "judicial need for information about foreign practices, rules, laws, and procedures is only likely to grow").

307 552 U.S. 491, 516 (2008) (internal quotation marks omitted).

308 *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 541.

309 See id. at 538 n.24.

310 See, e.g., Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 269 (2010) (citing U.K. brief regarding differences between U.S. and U.K. law); *Empagran*, 542 U.S. at 167-68 (citing briefs by Germany/Belgium, Canada, and Japan highlighting conflicting laws and consequent interference).

311 Transcript of Oral Argument at 55, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 4486095, at *55.

312 Id. at 56.

313 *Kiobel*, 133 S. Ct. at 1675-76 (Breyer, J., concurring in the judgment). Justice Breyer also relied on foreign sovereign briefs for the content of foreign law in his opinion concurring in part and concurring in the judgment in *Sosa*. Justice Breyer cited the European Commission's amicus brief to support the argument that universal civil jurisdiction over a limited set of norms would not threaten comity because consensus already exists for universal *criminal* jurisdiction for particular actions and "the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself." *Sosa*, 542 U.S. at 762-63 (Breyer, J., concurring in part and concurring in the judgment).

314 Brief of Amici Curiae the European Union and Members of the International Community in Support of Respondent at 8, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1619203, at *8 (capitalization omitted).

315 Transcript of Oral Argument at 14-15, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 2387647, at *11-12 ("JUSTICE KENNEDY: Let--let's focus on the word unusual.... We've seen very substantial demonstration that world opinion is--is against this, at least as interpreted by the leaders of the European Union. Does that have a bearing on what's unusual? Suppose

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it were shown that the United States were one of the very, very few countries that executed juveniles, and that's true. Does that have a bearing on whether or not it's unusual?").

316 *Roper*, 543 U.S. at 577.

317 Id. at 578. Justice Kennedy cited the E.U. amicus brief with respect to a related point, namely, the prohibition on execution of juveniles in the U.N. Convention on the Rights of the Child, "which every country in the world has ratified save for the United States and Somalia." Id. at 576.

318 Id. at 628 (Scalia, J., dissenting).

319 Fed. R. Civ. P. 44.1.

320 Cf. Breyer, supra note 14, at 92 (arguing that "our Court does, and should, listen to foreign voices, to those who understand and can illuminate relevant foreign laws and practices"). One possible risk of this approach, however, is that because the briefs represent the views of the foreign "government," they may reflect a pro-executive, rather than a perfectly neutral, perspective on contested issues in the foreign country's law. To guard against this risk, interested constituencies in foreign countries may wish to monitor their governments' representations in briefs to U.S. courts and, if necessary, consider publicizing or filing amicus briefs to air disagreements.

321 Cf. Allison Orr Larsen, Confronting Supreme Court Fact Finding, 98 Va. L. Rev. 1255, 1291-1304 (2012) (identifying risks associated with Supreme Court extrarecord research on legislative facts).

322 Compare Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258 (2004) (holding that the European Commission is a "tribunal" for purposes of 28 U.S.C. § 1782(a)), with Brief of Amicus Curiae the Commission of the European Communities Supporting Reversal at 5, *Intel*, 542 U.S. 241 (No. 02-572), 2003 WL 23138389, at *5 (arguing that the European Commission is not a "tribunal" by the terms of 28 U.S.C. § 1782).

323 See supra note 109.

324 For example, Ireland's amicus brief in *Dole Food Co. v. Patrickson* focused solely on interpretation of the Foreign Sovereign Immunities Act as a matter of U.S. law. Brief Amici Curiae of the Republic of Ireland and Icarom PLC (Under Administration) in Support of Petitioners, Dole Food Co. v. Patrickson, 538 U.S. 468 (2003) (Nos. 01-593, 01-594), 2002 WL 1987396. The Court made no mention of the brief at oral argument or in the opinions in the case. See *Dole*, 538 U.S. 468; Transcript of Oral Argument, *Dole*, 538 U.S. 468 (Nos. 01-593, 01-594), 2003 WL 221855.

325 See Sitaraman & Wuerth, supra note 21, at 1958-61 (explaining that the amount of deference courts should give the executive branch on, inter alia, interpretation of foreign-relations-related statutes is "unsettled" and arguing for *Skidmore* deference).

326 See supra Section IV.D.

327 See supra Section IV.B.

328 See supra notes 115-22 and accompanying text.

329 The U.S. government has taken this position. See Transcript of Oral Argument at 15-16, JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure, 536 U.S. 88 (2002) (No. 01-651), 2002 WL 753389, at *12. At oral argument in *JPMorgan Chase Bank*, the Court asked what the Court should do if, hypothetically, the United Kingdom and the United States expressed contrary views about U.K. sovereignty over a territory, and the counsel for the United States argued that the Court should defer to the views of the U.S. government. Id.

330 In *JPMorgan Chase Bank*, the Court specifically reserved the question of how it should resolve competing views of the United States and a foreign sovereign amicus. 536 U.S. at 100 ("Because our opinion accords with the positions taken by the Governments of the United Kingdom, the BVI, and the United States, the case presents no issue of deference that may be due to the various interested governments.").

331 See supra notes 205-13 and accompanying text.

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332 On the other hand, scholars have recently argued that the absence of foreign sovereign amicus filings supporting the executive branch's assertion of foreign relations harm should weigh against the U.S. government's credibility. See Brief of Montreux Partners, L.P. et al. as Amici Curiae in Support of Respondent at 12-13, Republic of Argentina v. NML Capital,., 134 S. Ct. 2250 (2014) (No. 12-842), 2014 WL 1319380, at *12-13 (Jack L. Goldsmith, Counsel of Record) (pointing to the lack of foreign sovereign amici as evidence that U.S. and Argentine claims about the negative reciprocal consequences of discovery orders were ill-founded); Eugene Kontorovich, No Foreign Countries Filed Amicus Briefs in Zivotofsky, The Volokh Conspiracy, Wash. Post (Nov. 3, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/03/no-foreign-countries-filed-amicus-briefs-in-zivotofsky/[[https://perma.cc/6Y65-P439] (noting the absence of foreign sovereign amici in a case about listing "Jerusalem, Israel" in passports and concluding "the Executive's assertions of negative foreign policy consequences seem fanciful... given that no foreign entity could be found to write an amicus brief").

333 Cf. Zivotofsky v. Kerry, 135 S. Ct. 2076, 2115 (2015) (Roberts, C.J., dissenting) (expressing concern about the majority subjecting a statute to "an international heckler's veto").

334 389 U.S. 429 (1968).

335 Id. at 434 (alteration in original) (quoting Brief for the United States as Amicus Curiae at 6 n.5, *Zschernig*, 389 U.S. 429 (No. 21)) (internal quotation marks omitted).

336 Id. at 441. But see id. at 460 (Harlan, J., concurring in the result) (calling the majority's conclusion "based almost entirely on speculation").

337 See Bradley, supra note 7, at 722.

338 See supra note 283.

339 The rationales for deference to the executive on CIL provide guidance for how the Court should approach foreign sovereign briefs on CIL in instances where the U.S. government does not express an opinion. In cases where the United States does not file, the lawmaker and expertise rationales for deference would justify serious consideration of the foreign sovereigns' views of CIL. The foreign sovereigns have the requisite expertise and could play a potentially useful role in apprising the Court of the state of CIL. They could therefore assist the Court in avoiding a situation where the Court, through lack of a U.S. government brief, inadvertently places the United States in violation of CIL.

340 See Wuerth, The Alien Tort Statute, supra note 282, at 1958 ("[L] ittle deference should be afforded to the executive branch in ATS cases as to the interpretation of customary international norms that are already well developed.... Nothing prevents the executive branch from advocating at the international level for a reversal of [a CIL] rule, of course, but courts cannot disregard the content of established rules of customary international law without undercutting the ATS itself.").

341 Restatement, supra note 200, § 102(2).

342 See supra note 242; see also Sitaraman & Wuerth, supra note 21, at 1958 ("For treaty interpretation, courts ostensibly give 'great weight' to the views of the executive branch--except that sometimes they do not....").

343 *Medellin*, 552 U.S. at 506 ("The interpretation of a treaty, like the interpretation of a statute, begins with its text.").

344 See, e.g., *Abbott*, 560 U.S. at 15 (reaching a holding based on the text of a treaty and then adding that the holding is "supported and informed by the State Department's view on the issue").

345 See, e.g., *BG Group*, 134 S. Ct. at 1208-09 (noting that "while we respect the Government's views about the proper interpretation of treaties," the Court "do[es] not accept the Solicitor General's view as applied to the treaty before" it).

346 See, e.g., Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 65-69 (1993) (holding, based on its interpretation of the text of a treaty, in favor of the position advocated by the United States and against that of foreign sovereign amici); United States v. Alvarez-Machain, 504 U.S. 655, 663-70 (1992) (same).

347 In addition, the Court should treat with particular care any amicus briefs by foreign sovereigns that are at war with the United States (rare as this condition may be). With respect to foreign sovereign *parties*, the Supreme Court has long held that it

is "constrained to consider any relationship, short of war, with a recognized sovereign power as embracing the privilege of resorting to United States courts." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 409-10 (1964). Stated affirmatively, the Court has explained that "only governments recognized by the United States and at peace with us are entitled to access... our courts." Pfizer Inc. v. Gov't of India, 434 U.S. 308, 319-20 (1978). Foreign sovereigns as parties and amici may warrant different treatment. While, according to the Court, resort to the judiciary as a plaintiff is a privilege, amici at least in theory provide a service to the courts by filing their views. For this reason, a blanket ban on amicus briefs by foreign sovereigns who are at war with the United States may not be justified. Nonetheless, just because warring foreign sovereigns might file amicus briefs does not mean that the Court should necessarily afford them deference. They may continue to be trustworthy on some issues but not on others, and the Court should take special care to ascertain whether their representations are credible or manipulative. The issue of unrecognized foreign sovereigns may also raise interesting issues. See Zivotofsky v. Kerry, 135 S. Ct. 2076, 2084 (2015) ("Legal consequences follow formal recognition. Recognized sovereigns may sue in United States courts...."). In the vast majority of cases, the sovereign status of an amicus that claims to be a foreign sovereign will be clear. If an amicus's status as a foreign sovereign is not clear, then, in light of the Court's recent holding that the recognition power belongs to the President alone, id. at 2096, the Court should solicit the views of the executive branch on the amicus's status. Of course, sovereign status is not a prerequisite to the filing of an amicus brief. An unrecognized foreign sovereign may still file an amicus brief, as any individual or entity might, and if so, it would be treated as any other amicus. My research revealed one example where arguably an unrecognized foreign sovereign filed a brief. See Brief of the Foreign Minister for the Republic of Somaliland, Abdillahi Mohamed Duale, as Amicus Curiae Supporting Respondents, Samantar v. Yousuf, 560 U.S. 305 (2010) (No. 08-1555), 2010 WL 342034. In this instance, however, the amicus himself made clear the nonrecognized status of the entity he represents, explaining in the brief the history of Somaliland and that it "still awaits recognition as an independent state by the international community." Id. at 1-2.

348 See supra notes 84-85 and accompanying text.

349 Transcript of Oral Argument at 13, *Empagran*, 542 U.S. 155 (No. 03-724), 2004 WL 1047902, at *10.

350 Id. at 13-14, 2004 WL 1047902, at *10.

351 Id. at 14, 2004 WL 1047902, at *10; see id. at 48, 2004 WL 1047902, at *35 (identifying Justice Scalia as the questioner in this exchange).

352 Id. at 14, 2004 WL 1047902, at *11; see also *Intel Corp*., 542 U.S. at 266 (questioning whether the European Commission's opposition to a U.S. statute regarding discovery in aid of foreign proceedings is "widely shared in the international community by" similar entities); Michaels, supra note 7, at 541-45 (criticizing the Court for relying on amicus briefs of developed countries with effective antitrust enforcement regimes, while ignoring the interests of developing countries (including the plaintiffs' home countries) that lack such regimes).

353 An arguable exception to this is the United States in instances in which the Court expressly calls for the views of the Solicitor General or "CVSGs" at the certiorari stage. In cases where the Court requests the views of the Solicitor General at the certiorari stage and then grants certiorari, the United States typically files an amicus brief on the merits as well.

354 See supra note 352 (citing limited examples of the Court's attention to the representativeness of foreign sovereign amici's views).

355 See supra pp. 357-58.

356 Skidmore, 323 U.S. at 140; see supra text accompanying note 207.

357 Consistency might be more relevant in the context of legal questions than with respect to issues of international fact. Whereas a country may have a consistent position over decades regarding interpretation of a treaty or a rule of CIL, a new position with respect to an international fact may reflect a new event or changed circumstances, rather than an actual reversal of position by the foreign sovereign.

358 See, e.g., Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents at 2 & n.3, *Morrison*, 561 U.S. 247 (No. 08-1191), 2010 WL 723009, at *2 & n.3 (noting prior briefs regarding extraterritoriality of U.S. law).

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359 See supra note 13 and accompanying text.

360 See supra note 8 and accompanying text.

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