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The Eleventh Circuit is the Captain Now: The Discovery of a Lost Sixteenth-Century French Royal Navy Shipwreck Sails France into Litigation

Kirsten Ehlers*

I. INTRODUCTION

X marks the spot! The quest of uncovering historic shipwrecks that were lost at sea and recovering their treasures seemed like an exciting movie script until a sixteenth-century shipwreck was discovered off the coast of Cape Canaveral, Florida, in 2016.[1] That finding later caught the attention of the Republic of France (France) when Global Marine Exploration, Inc. (GME) attempted to salvage the shipwreck France believed to be its sovereign property.[2] That ship was the flagship of the 1565 Royal Navy of France Fleet, *la Trinité*.[3]

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1. Glob. Marine Expl., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 348 F. Supp. 3d 1221, 1223 (M.D. Fla. 2018).

2. *Id.* at 1224.

3. *Id.* at 1242. In April of 1562, Jean Ribault was commissioned to command a fleet of French Royal Navy ships set to sail to Fort Caroline near present-day Jacksonville, Florida, to provide supplies to the fort to aid in the French colonization of the southeast coast of North America. The flagship of this seven-ship fleet was *la Trinité*. The Register of Artillery from May 1565 states that aboard *la Trinité* was,

> State of the artillery pieces both of bronze and iron, powder, cannonballs and every other type of munitions and utensils dependent of the said artillery which will be leased and delivered by the treasurer and general guard of the Navy's artillery and munitions in Normandy according to the decree and order of My

In the United States District Court for the Northern District of Florida, GME sued France for monetary damages, unjust enrichment, misappropriation of GME's trade secrets, and for France's interference with GME's rights and relations.[4] France moved to dismiss the case for lack of subject matter jurisdiction, but was met with opposition from GME when it argued that under the "commercial activity" exception of the Foreign Sovereign Immunities Act (FSIA),[5] a foreign state is not immune from suit in the United States for claims based upon commercial activity it carried out within the United States.[6] The district court agreed with France and granted its motion to dismiss for lack of subject matter jurisdiction.[7]

GME appealed to the United States Court of Appeals for the Eleventh Circuit.[8] In *Global Marine Exploration, Inc. v. Republic of France*,[9] the Eleventh Circuit ultimately reversed and remanded the district court's decision to dismiss the case for lack of subject matter jurisdiction. The Eleventh Circuit held that because France had made plans for the exhibition of artifacts,[10] directed and coordinated recovery efforts, and

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> Lord the Admiral in the hands of J[e]an Ribault ordinary captain in the Navy, chief and conductor of the ships the King sends presently to the country of New France.

Id. at 1229 (citing Doc. No. 81-22, at 6-7 (CM/ECF page numbers) (John deBry Translation)). By the time *la Trinité* had set sail to Fort Caroline, Spain had already conquered and colonized the Caribbean, Central America, and South America. When information reached Spain regarding France's attempts at colonizing the southeastern region of North America, Spain dispatched its ships captained by Pedro Menéndez de Aviles to drive out the French. On October 15, 1565, Menéndez reported that though the Spanish ships were safe, the French ships encountered a severe hurricane that would not have allowed them to return to Fort Caroline. On September 28, 1565, local Timucua Indians reported to Menéndez that three of the French ships were struck by a hurricane and sunk to the ocean floor, but many of the Frenchmen survived. Jean Ribault and seventy of his seamen surrendered to Menéndez and all but five of the seamen were executed. By January 19, 1566, the sinking of the Ribault French Royal Navy Fleet had reached the French Court. France abandoned its attempt to colonize and capture the southeastern region of North America and Spain rapidly took control of the area. Spanish colonization led to the establishment of St. Augustine. *Glob. Marine Expl., Inc.*, 348 F. Supp. 3d at 1228–34.

4. Glob. Marine Expl., Inc. v. Republic of Fr., 500 F. Supp. 3d 1296, 1299 (N.D. Fla. 2020).

5. 28 U.S.C. § 1602; 28 U.S.C. § 1605(a)(2).

6. *Glob. Marine Expl., Inc.*, 500 F. Supp. 3d at 1299–1300.

7. *Id.* at 1304.

8. Glob. Marine Expl., Inc. v. Republic of Fr., 33 F.4th 1312 (11th Cir. 2022).

9. *Id.*

10. GME recovered three bronze cannons during its recovery and salvage efforts. The photographs of the cannons showed distinctive French markings that dated back to the sixteenth-century. The head of the Artillery Department in Paris, France, opined that GME's findings were consistent with the information provided in the artillery register of *la*

secured funding for the project, its activities were "commercial" under the FSIA.[11] The court also held that GME's claims were "based upon" France's commercial activities.[12] In reversing, the Eleventh Circuit disagreed with the approach taken by the United States Court of Appeals for the Second Circuit which cited patrimony laws[13] as a rationale for classifying a foreign state's activities as sovereign rather than commercial in nature.[14]

In doing so, the Eleventh Circuit broadened the scope of the commercial activity exception to the FSIA. The resulting circuit split between the Eleventh Circuit and the Second Circuit on the scope of the commercial activities exception renders uncertain precisely when a foreign sovereign is subject to suit in the United States, a matter of significant importance to foreign business relations as well as stability in the federal law.

II. FACTUAL BACKGROUND

Global Marine Exploration, Inc. was an American company based out of Florida that located and excavated historical shipwreck sites.[15] In 2014 and 2015, GME entered into several authorization agreements with the Florida Department of State Division of Historical Resources (FDOS) that allowed GME to conduct salvage activities off the coast of Cape Canaveral, Florida. Under these agreements, GME was granted an easement and various permits for salvage exploration on Florida-owned lands and navigable waters. GME conducted prolonged expensive research where it surveyed, reported, and identified shipwreck sites.

Trinité. GME also recovered a stone monument with markings of the Arms of France. The markings on the monument were similar to those that were known to have been placed at the River of May by Jean Ribault in 1562 as a French territorial marker. *Glob. Marine Expl., Inc.*, 348 F. Supp. 3d at 1233–34.

11. *Glob. Marine Expl., Inc.*, 33 F.4th at 1321–22.

12. *Id.* at 1325.

13. At common law, the term "patrimony" "is a phrase for one's inheritance, whether by law or by will—those things that one receives from one's ancestors. Heirlooms are part of one's patrimony." *Patrimony*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION. Items that are considered cultural patrimony are "objects having ongoing historical, traditional, or cultural importance . . . . " 1 Cohen's Handbook of Federal Indian Law § 20.02 (2019). Cultural patrimony items may include items that are "central to the preservation of a group culture . . . . " The Foundation for Natural Resources and Energy Law Annual and Special Institutes (formerly Rocky Mountain Mineral Law Foundation Annual and Special Institutes), 2012-2 RMMLF PROC 3.

14. *Glob. Marine Expl., Inc.*, 33 F.4th at 1323; Barnet v. Ministry of Culture & Sports of the Hellenic Republic, 961 F.3d 193 (2d Cir. 2020).

15. *Glob. Marine Expl., Inc.* 33 F.4th at 1314.

Pursuant to the agreements, the 1565 flagship of the Royal Navy of France Fleet, *la Trinité*, was discovered on the ocean floor.[16]

GME undertook the project of excavating *la Trinité*. GME had investment-backed expectations and assurances that it would be fully compensated for the millions of dollars' worth of effort it expended in mapping, excavating, and recovering the historical shipwreck.[17] GME also expected FDOS to protect the confidentiality of the coordinate information it shared with FDOS which included various photos and videos of the shipwreck's location. However, during the recovery process of *la Trinité*, GME learned that FDOS had been collaborating and negotiating with France without GME's involvement. This led to an *in rem* admiralty action (*GME I*) in which the district court found that *la Trinité* was the sovereign property of France and dismissed the case for lack of subject matter jurisdiction.[18]

After *GME I*, France and FDOS entered a "Declaration of Intent Between the State of Florida and the Republic of France on the Shipwrecks of Jean Ribault's Fleet" (Declaration of Intent).[19] The Declaration of Intent authorized France to supervise the recovery efforts of *la Trinité*. FDOS and France also developed a Florida-France steering committee to implement the agreement. The Florida-France steering committee was tasked with protecting the shipwreck sites, recovering them, presenting any findings to the public in the form of exhibitions, promoting the cultural history shared between France and the United States, and overseeing the resources and organizations to be used in fulfilling the Declaration of Intent objectives.[20]

GME sued France in April 2020 in the United States District Court for the Northern District of Florida alleging four claims: (1) an *in personam* lien award; (2) unjust enrichment; (3) misappropriation of GME's trade secret information; and (4) interference with its rights and relations.[21] France then moved to dismiss the complaint under Rule 12 of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction, asserting that GME had failed to establish the commercial activity exception under the FSIA applied to France.[22]

The FSIA generally prevents suits from being brought against foreign states in the United States when the activities carried out by the foreign

16. *Id.* at 1315–16.
17. *Id.* at 1315.
18. *Id.* at 1315–16.
19. *Id.* at 1316.
20. *Id.*
21. *Id.*
22. *Id.*

state are "sovereign" in nature.[23] However, the commercial activity exception to the FSIA permits a suit to be brought if the foreign state participates in activities that a private person could facilitate rather than performs an activity that is reserved exclusively to a government or a sovereign entity.[24] The claims brought by the plaintiff must also be based upon those commercial activities.[25]

GME argued that without its services, the historic shipwreck would not have been discovered.[26] GME also argued that because France had sent missions to Florida to manage the project and provided scientific expertise while the excavation work was ongoing, France's activities were commercial in nature and were the foundation for GME's claims. France, in response, argued its involvement in the excavation project did not bring it within the commercial activity exception to the FSIA because its involvement was an entirely governmental function regarding its own sovereign military property.[27]

For the exception to apply, GME needed to prove that France participated in commercial activity within the United States and that its claims were based upon France's commercial activity. The district court granted France's motion to dismiss for lack of subject matter jurisdiction.[28] The court reasoned that the type of actions carried out by France were not the type that a private party would engage in—such as trade, traffic, or commerce—and so did not satisfy the requirements of the commercial activity exception.[29]

The district court concluded that because *la Trinité* was France's military property, France had not entered the market or behaved in the same manner a private person would.[30] According to the court, private actors do sometimes engage in marine exploration, but France's preservation and recovery efforts alone did not qualify as commercial activity. Additionally, the district court found that even if France had engaged in commercial activities, GME's claims were not based upon those activities.[31]

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23. 28 U.S.C. § 1604.

24. Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 614 (1992). *See also* 28 U.S.C. § 1605(a)(2); 28 U.S.C. § 1603(d).

25. 28 U.S.C. § 1605(a)(2).

26. *Glob. Marine Expl., Inc.*, 33 F.4th at 1316.

27. *Id.* at 1316–17.

28. *Id.* at 1317.

29. *Id.* (quoting *Glob. Marine Expl., Inc.* F. Supp. 3d at 1301; *see also Republic of Arg.*, 504 U.S. at 614.)

30. *Glob. Marine Expl., Inc.*, 33 F.4th at 1317.

31. *Id.*

GME appealed to the United States Court of Appeals for the Eleventh Circuit.[32] GME argued the district court erred in dismissing its complaint because the commercial activity exception to the FSIA did apply to France's activities and GME's claims against France were based upon France's commercial activities.[33] France argued that when it collaborated with FDOS in conducting preservation and recovery efforts of *la Trinité*, it acted under French patrimony laws for the benefit of the public in an effort to commemorate historical events which bared no resemblance to commercial activity.[34]

The Eleventh Circuit reversed the district court's decision.[35] The court held that France's activities were sufficient to come within the commercial activity exception to the FSIA, and that GME's action against France was based upon France's commercial activity within the United States. The case was remanded for further proceedings.[36]

III. LEGAL BACKGROUND

In *Global Marine Exploration, Inc. v. Republic of France*, the issues before the United States Court of Appeals for the Eleventh Circuit were whether France's activities qualified as commercial activities under the FSIA and whether GME's action against France was based upon France's commercial activities.[37] The Eleventh Circuit relied on precedent from the Supreme Court of the United States and its own prior decisions to interpret the scope of the commercial activity exception.[38]

A. Anchoring the Foreign Sovereign Immunities Act

In 1976, the United States Congress enacted the FSIA.[39] The FSIA is the basis for a foreign state to obtain immunity from litigation in the United States, but also serves as the avenue in which a United States federal court may gain subject matter jurisdiction over a foreign state if its activity falls within an exception.[40] The FSIA states that by granting sovereign immunity to foreign states in most circumstances, the interest

32. *Id.*

33. *Id.* at 1317–18.

34. Response Brief of Appellee Republic of Fr. at 18–19, Glob. Marine Expl., Inc. v. Republic of Fr., F.4th 1312 (11th Cir. 2022) No. 20-14728.

35. *Glob. Marine Expl., Inc.*, 33 F.4th at 1325.

36. *Id.*

37. *Glob. Marine Expl., Inc.* 33 F.4th at 1315.

38. *Id.* at 1318–19.

39. 28 U.S.C. § 1602.

40. *Glob. Marine Expl., Inc.* 500 F. Supp. 3d at 1300 (quoting Guevara v. Republic of Peru, 468 F.3d 1289, 1294 (11th Cir. 2006)).

of justice is served and the rights of both the foreign states and United States litigants are protected. The general rule under the FSIA is that a foreign state may not be forced to defend itself in United States jurisdictions.[41]

The premise of the FSIA is that claim decisions regarding a foreign state are best made by the judiciary when it complies with the standards of international law, and when it enforces a restrictive theory of preventing sovereign states from litigating against each other.[42] The restrictive theory of sovereign immunity was implemented in the United States by the Department of State in 1952. This concept of sovereign immunity has been recognized and accepted internationally. The immunity is applied when a foreign state's acts are sovereign or governmental in nature rather than acts that a private person or private firm could normally perform.[43] However, an exception to the general rule applies when a foreign state participates in commercial activity within the United States and the action brought against the foreign state is based upon those commercial activities. Under the FSIA, a "foreign state" includes a political subdivision, an agency, or an instrumentality. The "United States" for purposes of the statute includes "all territory and waters, continental or insular, subject to the jurisdiction of the United States."[44]

1. Navigating the Exception

Although sovereign immunity is recognized as common international law practice, the FSIA recognizes several exceptions. The exception at issue in *Global Marine* was the commercial activity exception.[45] For the exception to apply, a foreign state's activities must be commercial in nature and the claim must be based upon those commercial activities.

Commercial activity is defined by the FSIA as "either a regular course of commercial conduct or a particular commercial transaction or act."[46] The FSIA requires the character of the activity to "be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[47] The FSIA further defines a commercial activity within the United States by a foreign state

41. 28 U.S.C. § 1602.
42. H.R. REP. NO. 94-1487, at 14 (1976).
43. *Id.*
44. 28 U.S.C. § 1603(a), (c). *See also* H.R. REP. NO. 94–1487, at 15 (1976).
45. *Glob. Marine Expl., Inc.*, 33 F.4th at 1312.
46. 28 U.S.C. § 1603(d).
47. *Id.*

to include when a foreign state has "substantial contact with the United States."[48]

In the 1976 United States House of Representative report, Congress explicitly gave federal courts "a great deal of latitude" in interpreting the definition of commercial activity.[49] Congress wrote that it would be "un-wise" to attempt to give a precise definition to the term even if it were practicable.[50] However, as examples of what sufficed, Congress pointed to activities such as employment or engagement of laborers, "investment in a security of an American corporation," or transactions involving imports and exports.[51] Congress did not provide guidance or examples of activities that would be insufficient to fall within the scope of the interpretation of the definition.

B. Keeping Precedent on the Radar

1. Commercial Activity

a. The Supreme Court of the United States

The Supreme Court recognized that Congress had left commercial activity largely undefined.[52] Even so, the Eleventh Circuit found two Supreme Court cases to be particularly important to its analysis of whether France's activities had been "commercial" in terms of the FSIA.

In *Republic of Argentina v. Weltover, Inc.*,[53] the Supreme Court interpreted commercial activity existed when a foreign government acted in a manner that a private player would act in a market rather than as a regulator of a market.[54] Argentine businesses regularly used United States dollars to conduct their transactions because Argentina's currency was not often accepted in the international market. In 1981, Argentina and its central bank developed a foreign exchange insurance contract program to address the difficulty Argentine borrowers encountered when they used Argentina's currency to engage in foreign transactions. To solve the problem and stabilize the economy, domestic Argentine borrowers were sold bonds in United States dollars to repay debts. However, the program failed when Argentina lacked sufficient funds to repay bondholders when their bonds matured. In *Weltover*, the Court

48. 28 U.S.C. § 1603(e).
49. H.R. REP. NO. 94-1487, at 16 (1976).
50. *Id.*
51. *Id.* at 16–17.
52. *Weltover, Inc.* 504 U.S. at 612.
53. *Id.*
54. *Id.* at 614.

held when Argentina issued bonds in an effort to stabilize its currency, its actions were commercial in nature because bonds could be held by private parties and could be traded in the international market by individuals.[55] Argentina's motives and objectives when it participated in the market were not relevant, it was only relevant that it did participate.[56] The Court emphasized the purpose of Argentina's actions was not to be considered in determining if its actions were commercial in nature or not.[57] Thus, the commercial activities exception did apply and federal courts did have subject matter jurisdiction over claims against Argentina arising out of those activities.[58]

In contrast in *Saudi Arabia v. Nelson*,[59] the Supreme Court held the Saudi Arabian government's alleged brutal and torturous treatment of the plaintiff was not commercial activity.[60] The respondent was a United States citizen who was employed at a Saudi Arabian hospital when he reported safety issues in the hospital. In retaliation for the report, the Saudi Arabian government allegedly tortured him. The Court held those activities were not commercial in nature and were instead an exercise of police power that was peculiarly sovereign in nature.[61] The Court went on to explain in *Nelson* that acts of legislation, deportation, or denial of justice cannot be performed by private actors and can only be performed by states, and so do not evince commercial activities.[62] Thus, in *Nelson,* the commercial activities exception did not apply, and the courts lacked subject matter jurisdiction over the claims.

b. The Eleventh Circuit

The Eleventh Circuit decided several cases applying *Weltover* and *Nelson* that were significant to its decision in *Global Marine*. In *Honduras Aircraft Registry, Ltd. v. Government of Honduras*,[63] the Eleventh Circuit grappled with Honduras's decision to upgrade and modernize its various aeronautics programs to comply with international aviation laws.[64] In contracting with the Honduran government to achieve its goal, the plaintiffs set up a database for the registration of Honduras's

55. *Id.* at 615.
56. *Id.* at 617.
57. *Id.* at 609, 617.
58. *Id.* at 620.
59. 507 U.S. 349 (1993).
60. *Id.* at 351.
61. *Id.* at 367.
62. *Id.* at 352–53, 361.
63. 129 F.3d 543 (11th Cir. 1997).
64. *Id.* at 545.

aircrafts, wrote regulations, and trained government personnel. Honduras breached its contract with the plaintiffs. The court held when Honduras contracted to receive technical work and services from the plaintiffs, regardless of the connection between the plaintiff and the registration of aircraft under the Honduran flag, it entered the market as a private player.[65] The assistance and upgrades Honduras received to its aeronautics program were services for which any party could contract, sovereign or not.[66] Thus, the commercial activities exception did apply, and the federal courts did have subject matter jurisdiction over Honduras.[67] The case was remanded to the United States District Court for the Southern District of Florida.[68]

Similarly in *Guevara v. Republic of Peru*,[69] the Eleventh Circuit considered whether an award offered by a foreign state in return for information about a fugitive constituted commercial activity.[70] In deciding that Peru's monetary offer in exchange for information about locating a wanted fugitive fell within the commercial activity exception, the court explained that Peru did not use sovereign powers to capture or search for the fugitive.[71] Instead, Peru entered the market and negotiated for an exchange of money similar to the type of negotiations that may occur among private parties.[72]

The Eleventh Circuit warned that when considering if an activity is commercial or not, a "motive test" is inappropriate.[73] The contemplation of a foreign state's motive is too similar to the examination of purpose which is contrary to the Supreme Court's holding in *Weltover* that "unmistakably commands" courts to consider the nature of a transaction rather than its purpose.[74] The commercial activity exception did apply to Peru and the case was remanded to the United States District Court for the Southern District of Florida.[75]

In contrast to its rulings in *Honduras Aircraft* and *Guevara*, the Eleventh Circuit held the commercial activity exception did not apply in *Odyssey Marine Exploration, Inc., v. Unidentified Shipwrecked Vessel*.[76]

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65. *Id.* at 548.
66. *Id.* at 547.
67. *Id.* at 549.
68. *Id.* at 550.
69. 468 F.3d 1289 (11th Cir. 2006).
70. *Id.* at 1292.
71. *Id.* at 1299.
72. *Id.*
73. *Id.* at 1302.
74. *Id.*
75. *Id.* at 1306.
76. 657 F.3d 1159 (11th Cir. 2011).

Odyssey was a shipwreck recovery business that discovered a Spanish Navy shipwreck in international waters and filed an admiralty action to claim ownership over the vessel and its cargo. Instead of relying on the commercial activity exception, Odyssey argued for an exception to the FSIA's immunity to arrest. Generally, property of a foreign state that is within the United States is immune from attachment, arrest, and execution.[77] The court declined Odyssey's request and concluded that regardless of the immunity from attachment, arrest, and execution in the FSIA, the Spanish Navy vessel was not engaged in commercial activity.[78] The court continued and reasoned that at the time the Spanish Navy vessel sank, it was acting as a sovereign by transporting Spanish goods at a time of threatened war.[79] In rejecting Odyssey's arguments, the Eleventh Circuit held the commercial activity exception did not apply.[80] As a result, federal courts did not have subject matter jurisdiction over the claims.[81]

c. The Second Circuit

The United States Court of Appeals for the Second Circuit took a different approach in applying the commercial activity exception. In *Barnet v. Ministry of Culture & Sports of the Hellenic Republic*,[82] the Second Circuit relied on Greece's obedience to Greek patrimony laws to allow Greece to escape litigation.[83] The Ministry of Culture of Greece emailed an auction house in New York City, New York, in 2018 asserting ownership over a bronze horse figurine dated from the Geometric Period, circa the eighth-century B.C. In the email to the auction house, Greece referenced several Greek laws as justifications for declaring ownership over the figurine and requested the auction house pull it from auction. In holding that the nationalization of property is a strictly sovereign act and does not fall within the exception of the FSIA, the Second Circuit declined subject matter jurisdiction over the claims.[84]

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77. *Id.* at 1175–76.

78. *Id.* at 1176.

79. *Id.* at 1177.

80. *Id.* at 1166, 1176–79.

81. *Id.* at 1183–84.

82. 961 F.3d 193 (2d Cir. 2020).

83. *Id.* at 195.

84. *Id.* at 195–96. *See also* Nomos (2002:3028) Gia tin prostasia ton Archaiotiton kai Politistikis KlironomiAs sti Genikf [On the Protection of Antiquities and Cultural Heritage in General], [Legal Gazette] 2002, Art. 1(3) (Greece); Nomos (1932:5351) O nomos Arxaiotitwn [On Antiquities], [Legal Gazette] 1932, Art. 1 (Greece). Translations and discussion of Greek patrimony laws found at: Kimberly L. Alderman and Chelsey S. Dahm, Casenote, *National Treasure: A Comparative Analysis of Domestic Laws Criminalizing*

The Second Circuit looked to the United States Court of Appeals for the Ninth Circuit to support its reason for declining subject matter jurisdiction.[85] The Ninth Circuit made a similar holding to *Barnet* in *Hilao v. Estate of Marcos*.[86] The Ninth Circuit stated the Philippines acted "under a statutory mandate to recover property allegedly stolen from the treasury."[87] This exercise, the Ninth Circuit said, was one "of police power [that] is a governmental rather than commercial activity."[88]

2. Based Upon Commercial Activity

The second requirement of the commercial activity exception of the FSIA is that the claims brought against the foreign sovereign are based upon its engagement in commercial activity within the United States.[89]

To determine if a claim is based upon a foreign sovereign's commercial activity, courts evaluate the "particular conduct" at the core of the suit.[90] In *Devengoechea v. Bolivarian Republic of Venezuela*,[91] the Eleventh Circuit considered whether Venezuela's failure to pay or return artifacts belonging to the former nineteenth-century Venezuelan president, Simón Bolívar, to the plaintiff was the type of conduct that injured the plaintiff.[92] In deciding that Venezuela's failure to return the artifacts did injure the plaintiff, the plaintiff's action was based upon Venezuela's commercial activity.[93] As the court described in *Nelson*, the only reasonable interpretation of "based upon" is that it "calls for something more than a mere connection with, or relation to, commercial activity."[94]

Illicit Excavation and Exportation of Archeological Objects, 65 MERCER L. REV. 431, 444 n.89 (2014); Silvia Beltrametti, *Museum Strategies: Leasing Antiquities*, 36 COLUM. J.L & ARTS 203, n.5 (2013);

On the Protection of Antiquities and Cultural Heritage in General, European University Institute,

https://www.eui.eu/Projects/InternationalArtHeritageLaw/Documents/NationalLegislation/Greece/3028eng.pdf [https://perma.cc/KD7Z-837L] (last visited Jan. 3, 2023).

85. *Barnet*, 961 F.3d at 202.

86. 94 F.3d 539 (9th Cir. 1996).

87. *Id.* at 546.

88. *Barnet*, 961 F.3d at 202 (quoting *Hilao*, at 546).

89. 28 U.S.C. § 1605(a)(2).

90. *Glob. Marine Expl., Inc.*, 33 F.4th at 1324 (quoting Devengoechea v. Bolivarian Republic of Venez., 889 F.3d 1213, 1222 (11th Cir. 2018)).

91. 889 F.3d 1213 (11th Cir. 2018).

92. *Id.* at 1222.

93. *Id.* at 1223.

94. *Id.* at 1222. *See Nelson*, 507 U.S. at 356–58.

IV. COURT'S RATIONALE

Global Marine Exploration, Inc. v. Republic of France was decided by the United States Court of Appeals for the Eleventh Circuit on May 5, 2022, in an opinion authored by Circuit Judge Lagoa.[95] The Eleventh Circuit reviewed the district court's factual findings for clear error and legal conclusions *de novo*.[96] Following this opinion, the case was reversed and remanded because the commercial activity exception to the FSIA applied to France, and GME's claims were based upon France's commercial activity within the United States.[97]

GME argued the district court erred in finding that France's activities were not commercial in nature because France affected the archaeological salvage of *la Trinité* by negotiating with Florida, directing and participating in the recovery efforts, providing funding for the project, and arranging for the exhibition of the excavated artifacts.[98] The Eleventh Circuit agreed with GME and referred to the Declaration of Intent set forth by France and FDOS.[99] The Declaration of Intent provided that for France to conduct the project, it would identify, evaluate, mobilize, and oversee both private and public organizations. The court agreed that fundraising and contracting with businesses or organizations to excavate shipwreck sites while overseeing the project are commercial in nature and are the type of negotiations that could be carried out among private parties.[100]

The Eleventh Circuit reasoned that the district court's analysis of France's activities was purpose—not nature—oriented and was a narrow reading of the facts.[101] France argued its activities were required by its patrimony laws and relied on the United States District Court for the Second Circuit's decision in *Barnet v. Ministry of Culture & Sports of the Hellenic Republic*.[102] In *Barnet*, the Second Circuit concluded the commercial activity exception did not apply to a claim by Greece for ownership of an ancient horse figurine under Greek patrimony laws.[103] The ancient horse figurine had been set to be auctioned in the United

95. Glob. Marine Expl., Inc. v. Republic of Fr., 33 F.4th 1312 (11th Cir. 2022).

96. *Id.* at 1317.

97. *Id.* at 1325.

98. *Id.* at 1321–22.

99. *Id.*

100. *Id.* (quoting *Guevara* 468 F.3d at 1299; *see also* Hond. Aircraft Registry v. Hond., 129 F.3d 543, 547 (11th Cir. 1997)).

101. *Glob. Marine Expl., Inc.*, 33 F.4th at 1322.

102. *Barnet*, 961 F.3d 193.

103. *Id.* at 195.

States when Greece, via email, notified the auction house that the artifact was the property of Greece.[104]

The Eleventh Circuit held *Barnet* was not persuasive.[105] If the Eleventh Circuit were to consider France's patrimony laws as France's reasoning for pursuing the recovery of *la Trinité*, it would have acted contrary to the Supreme Court's instruction in *Republic of Argentina v. Weltover, Inc.*[106] *Weltover* commands the consideration of the nature of a transaction rather than the purpose or motive of the transaction to determine commercial activity.[107] Contemplation of France's patrimony laws would also be contrary to the Eleventh Circuit's motive test warning in *Guevara v. Republic of Peru*.[108]

Additionally, France relied on *Odyssey Marine Exploration, Inc., v. Unidentified Shipwrecked Vessel*, arguing that because the Eleventh Circuit held a commercial activity exception did not exist in conjunction with immunity to arrest, there should not be a commercial activity exception here either.[109] The Eleventh Circuit distinguished *Odyssey* because *Odyssey* required the court to look back in time on the history of a Spanish Navy ship, rather than present-day circumstances.[110] Meanwhile, GME asked the court to consider the damages caused by France's current activities in pursuing recovery efforts of *la Trinité*. Unlike in *Odyssey*, GME's claims do not involve the military activities that France was pursuing in 1565 when *la Trinité* and other French Royal Navy ships sank.[111] Thus, the court held France had been engaged in commercial activities.[112]

The court turned to the second prong and asked whether GME's claims had been based upon France's commercial activities.[113] The Eleventh Circuit reasoned that GME's core claims against France were caused by France's failure to compensate GME for the value of the project.[114] The court recognized it had been GME's services that led to the discovery of *la Trinité* and ultimately to the joint salvage project with FDOS and the Declaration of Intent.[115]

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104. *Id.*
105. *Glob. Marine Expl., Inc.*, 33 F.4th at 1323.
106. *Id.*
107. *Weltover, Inc.*, 504 U.S. 607.
108. *Glob. Marine Expl., Inc.*, 33 F.4th at 1323.
109. *Id.*
110. *Glob. Marine Expl., Inc.*, 33 F.4th at 1323–24.
111. *Id.* at 1324.
112. *Id.*
113. *Id.* at 1324–25.
114. *Id.*
115. *Id.* at 1325.

As a result, the court ruled GME's action was based upon France's commercial activity and was within the commercial activities exception.[116] The case was reversed and remanded for further proceedings to the United States District Court for the Northern District of Florida.[117]

V. IMPLICATIONS

A. Eleventh Circuit Sinks a Second Circuit Decision

The United States Court of Appeals for the Eleventh Circuit's decision in *Global Marine Exploration, Inc. v. Republic of France* created a circuit split.[118] It rests on the difference in approaches taken by the Eleventh Circuit in *Global Marine* and the United States Court of Appeals for the Second Circuit's approach in *Barnet v. Ministry of Culture & Sports of the Hellenic Republic*.[119]

In *Barnet*, the Second Circuit failed to correctly follow the United States Supreme Court's guidance in *Republic of Argentina v. Weltover, Inc*. to exclude the purpose or motive of a foreign state when deciding whether its actions are commercial in nature.[120] The Second Circuit deviated from Supreme Court precedent when it reasoned that, because Greece executed its patrimony laws and claimed ownership through nationalization over the figurine, Greece did not conduct commercial activity.[121] The Second Circuit stated that by following Greek patrimony laws when it emailed the auction house, Greece acted in such a way that only a sovereign state may act.[122] Regardless of the correctness of the outcome in *Barnet*, the consideration of Greek patrimony laws as a justification for Greece's claim to ownership over the figurine was a prohibited analysis of motive and purpose.

The creation of the circuit split regarding the consideration of patrimony laws is a question that may certainly make its way to the Supreme Court. If the Supreme Court were to settle the circuit split, it would follow an analysis that paralleled the Eleventh Circuit rather than the Second Circuit. In *Global Marine*, the Eleventh Circuit followed the United States Supreme Court's controlling precedent and more closely aligned its analysis with the congressional intent of the FSIA. The

116. *Id.*
117. *Id.*
118. *Id.* at 1312.
119. *See Barnet*, 961 F.3d 193.
120. *Weltover, Inc.*, 504 U.S. at 614.
121. *Barnet*, 961 F.3d at 201–202.
122. *Id.* at 202.

Eleventh Circuit did not state that it disagreed with the outcome in *Barnet*, but rather that it disagreed with the analysis. The Supreme Court would likely settle the discrepancy by holding that citing the execution of patrimony laws would almost certainly be a last-resort effort to avoid the commercial activity exception to the FSIA and would be the prohibited analysis of purpose and motive. If the Court allowed the patrimony law argument to prevail, it would be an easy loophole in the commercial activity exception for foreign states to avoid litigation in the United States.

B. Fair Seas Ahead for Corporate America

The Eleventh Circuit broadened the scope of the commercial activity exception to the FSIA in *Global Marine*. Following the decision in *Global Marine*, foreign states are more vulnerable to suit in the United States by American companies conducting international business. With the broadening of the commercial activity exception in the Eleventh Circuit, it is now easier for foreign states to be hauled into federal court. The Eleventh Circuit has opened its doors to forum shopping by setting a more relaxed precedent for suits against foreign states. Forum shopping will create a significant burden within the circuit by increasing the caseload of the district courts.

The waste of judicial resources in addition to the time, effort, and expense of litigation in the United States will be felt more often by countries around the world conducting business with American companies. The threshold for falling within the commercial activity exception has been lowered by the Eleventh Circuit, welcoming international frustration with the United States legal system.