AVOIDING THE “NATURE-PURPOSE” DISTINCTION:
REDEFINING AN INTERNATIONAL COMMERCIAL
ACT OF STATE

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1. INTRODUCTION

In 1988, the Third Circuit, in deciding an international racketeering claim which involved the awarding of military procurement contracts, declined to apply the so-called “commercial exception” to the act of state doctrine in denying the defendant’s contention that the case was not adjudicable.\(^1\) Although the court recognized the existence of the “commercial exception” to the act of state doctrine, it held the exception to be inapplicable to the case at hand.\(^2\) In declining to apply the exception here, the court claimed that “the decision to award a defense contract to one bidder or another is by its very nature governmental” and therefore not commercial.\(^3\) In recognizing the existence of the “commercial exception,” the court defined “commercial” by the statutory scheme announced in the Foreign Sovereign Immunities Act of 1976 (“FSIA”).\(^4\) The FSIA instructs courts to define an activity’s commercial character with attention “not to the purpose of the act but to its nature.”\(^5\) However, the

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\(^2\) See id. at 1059 (“We also agree with the district court that the so-called ‘commercial’ exception to the act of state doctrine . . . has no application to this case.”).

\(^3\) Id.


\(^5\) Environmental Tectonics, 847 F.2d at 1059 (emphasis added).
court invoked the act of state doctrine, not foreign sovereign immunity, to reach this decision. By referring to the FSIA’s definition of commercial to determine what constitutes a “commercial activity” under the act of state doctrine, the court juxtaposed two similar, yet distinct, doctrines of international law in a manner inconsistent with their purposes.

A detailed investigation of foreign sovereign immunity and the act of state doctrine reveals that this merging of the two doctrines is a tempting but incorrect application of international principles. A better reasoned approach was announced by the Ninth Circuit in IAM v. OPEC\(^6\) in 1981. The court held that “[w]hile the FSIA ignores the underlying purpose of a state's action, the act of state doctrine does not.”\(^7\) According to this approach, the two doctrines “address different concerns and apply in different circumstances.”\(^8\) Consequently, both doctrines are best served by allowing each to stand on independent legs.

Section two of this Comment examines the different origins of foreign sovereign immunity and the act of state doctrine. The third section scrutinizes the policy implications of a merging of the two doctrines as announced in Environmental Tectonics, and compares that approach to the one announced in IAM. Finally, the fourth section investigates the distinct historical application and legislative intent served by the two doctrines. This Comment will show that upon close examination, the “commercial exception” to the act of state doctrine is a much narrower rule than the “commercial exception” to foreign sovereign immunity under the FSIA. As a result, the FSIA’s mechanical “nature-purpose” distinction is improper, inappropriate, and unworkable when applied to an act of state.

2. THE ORIGINS OF FOREIGN SOVEREIGN IMMUNITY, THE ACT OF STATE DOCTRINE, AND THE “COMMERCIAL EXCEPTIONS” TO BOTH

From the beginning, foreign sovereign immunity and the act of state doctrine were never inextricably bound. Although a party may invoke both at certain times, and often does when a

\(^6\) International Ass’n of Machinists & Aerospace Workers, (IAM) v. OPEC, 649 F.2d 1354 (9th Cir. 1981).

\(^7\) Id. at 1360.

\(^8\) Id.
foreign state finds itself as a defendant in a civil action, each rule has its own underpinnings and distinct purposes. Stated briefly, foreign sovereign immunity, codified most recently as the FSIA, grants immunity to foreign states for most of their official or governmental actions. The act of state doctrine, a purely judge-made rule, operates as an issue preclusion device, preventing federal and state courts from sitting in judgement on the official actions of foreign states. This initial section examines both the legal and political origins of these doctrines, as well as their respective "commercial activity" exceptions.

2.1. The Origins of the FSIA: From Absolute to Restrictive Immunity

The foreign sovereign immunity doctrine in the United States was born of nineteenth century precepts which sought to uphold the honor and dignity of a sovereign and its agents. Today's more modern approach acknowledges the nation-state's involvement and accountability as a player in the international marketplace. Schooner Exch. v. McFaddon, was an early Supreme Court case, in which the Court made its initial endorsement of sovereign immunity. In that case, Chief Justice Marshall stated that "[t]he jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself." This unanimous decision saw the Court extend sovereign immunity to hold a French warship immune from the jurisdiction of U.S. courts. The Court declared that the "implied license" by which the ship entered port may be seen as "containing an exemption from the jurisdiction of the sovereign." The Court determined that denial of this immunity would improperly curtail the foreign state's power and dignity. Although often seen as the beginning of the period of "absolute immunity," the narrow facts of this case did not address the

9 11 U.S. (7 Cranch) 116 (1812).
10 Id. at 136.
12 Schooner Exch., 11 U.S. (7 Cranch) at 144.
question of how broadly to apply this doctrine.\(^{14}\)

Not until *Berizzi Bros. v. Steamship Pesaro*\(^{15}\) did the Supreme Court fully embrace the concept of "absolute immunity." In this case, the Court accepted the Italian government's contention that a libel action brought against a vessel owned by Italy, but used in merchant trade, must nevertheless be dismissed on the basis of sovereign immunity.\(^{16}\) Here, the Court announced the "absolute doctrine," holding that international law bars one state's courts from adjudicating over the person or property of a foreign state.\(^{17}\) This "absolute doctrine," which applied *Schooner's* theoretical underpinnings, stressed a highly personal theory of government in which the preservation of a foreign sovereign authority's dignity was a common reason to extend immunity.\(^{18}\) Eventually, these notions of personal sovereign authority fell into disfavor and the importance of absolute immunity declined. Due to these changes, the era of absolute immunity was short-lived.

In the place of absolute immunity came the more modern view of "restrictive" sovereign immunity. According to this view, the public or sovereign acts of a governmental authority enjoy immunity, but its private acts do not.\(^{19}\) In 1952, the U.S. State Department officially adopted this view of immunity, stating that "[a]ccording to the . . . restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with

\(^{14}\) See Donoghue, *supra* note 11, at 496 n.25. Although some courts cite *Schooner Exchange* as an endorsement of "absolute immunity" for foreign states, "the opinion concludes that [a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction [of that state]." *Id.* (citing Schooner Exch., 11 U.S. (7 Cranch) at 145) (alterations in original). Even this early decision saw the possible difficulties of foreign commercial immunity.

\(^{15}\) 271 U.S. 562 (1926).

\(^{16}\) See Note, *supra* note 13, at 1087.

\(^{17}\) See *id*.

\(^{18}\) See Victory Transp. Inc. v. Comisaria Gen. de Abastecimientos y Transportes, 336 F.2d 354, 357 (2d Cir. 1964) ("The doctrine originated in an era of personal sovereignty, when kings could theoretically do no wrong and when the exercise of authority by one sovereign over another indicated hostility or superiority.").

\(^{19}\) See H.R. REP. NO. 94-1487, at 14 (1976) ("[S]overeign immunity of foreign states should be 'restricted' to cases involving acts of a foreign state which are sovereign or governmental in nature . . . .").
respect to private acts (jure gestionis)." With this statement, the State Department shied away from "dignity" concerns and began inquiring into the nature of a sovereign's acts for the purpose of determining whether or not immunity for a given case is appropriate. At this point, however, courts had not yet begun to make that determination themselves. Instead, judicial deference to executive suggestions of immunity was routine practice.

In 1976, this acquiescence to the executive came to an end with the enactment of the Foreign Sovereign Immunities Act. This statute called for independent determinations of sovereign immunity by the courts. Much like the State Department's approach, courts were to distinguish a government's sovereign act from a merely private act conducted by a government or a government's agent. Unlike the executive approach, the Act specifically delineated various exceptions under which immunity would not attach. Presumably, when a governmental act fell under one of the enumerated exceptions, that act became fully adjudicable.

By enacting these exceptions, Congress codified

20 Letter from Jack B. Tate, Acting Legal Adviser to the Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 Dep't St. Bull. at 984 (1952).

21 See Donoghue, supra note 11, at 497. "By the time the U.S. State Department adopted the restrictive theory . . . , the enormous expansion in international commerce meant that most foreign state immunity cases concerned trading activities and contractual obligations, not royalty and their ships, diminishing the persuasiveness of 'dignity' as a rationale for foreign state immunity." Id. (footnotes omitted).


24 See 28 U.S.C. § 1602 (1994) ("Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter."). In addition, the statute's legislative history stresses that one important purpose of the FSIA "is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations." H.R. REP. NO. 94-1487, at 7 (1976).

25 See Brittenham, supra note 22, at 1455-58.


27 See Brittenham, supra note 22, at 1442 ("[T]he plaintiff's cause of action must fall within one of the Act's enumerated exceptions.").
"restrictive" view, denying immunity in certain instances. One such important statutory exception is the "commercial activity" exception.

2.2. "Nature" v. "Purpose"

Since the enactment of the FSIA, courts have held that foreign activities which are essentially commercial are considered "private" acts and do not carry the same sovereign interests as public acts. Therefore, immunity does not attach to these types of commercial activities. The FSIA states that a commercial activity is "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." Although at times it has been difficult to make this distinction, the Supreme Court has held that the FSIA mandates discerning an action's nature without regard to its purpose.

By stressing the activity's nature over its stated purpose, the Act's definition of "commercial activity" seeks to establish uniformity in foreign immunity law. According to the Supreme Court, "[w]hen it enacted the FSIA, Congress expressly

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28 See Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 610-11 (1992) (noting that foreign sovereigns are immune from U.S. jurisdiction "unless one of several statutorily defined exceptions applies").

29 See 28 U.S.C. § 1605(a)(2) (1994). A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . .

Id.

30 See Republic of Argentina, 504 U.S. at 614. "[A] foreign state engaging in 'commercial' activities 'do[es] not exercise powers peculiar to sovereigns'; [sic] rather, it 'exercise[s] only those powers that can also be exercised by private citizens.' Id. (alterations in original) (citation omitted).


32 See Republic of Argentina, 504 U.S. at 617.

acknowledged 'the importance of developing a uniform body of law' concerning the amenability of a foreign sovereign to suit in United States courts." 34 In order to insure consistency, the Act relies on an activity’s nature to discourage forum-shopping, which could lead to the embarrassing result of a state court ruling contrary to established federal foreign policy. 35

More importantly, the Act’s definition of “commercial activity” makes its application more effective. Congress’ focus on the “nature” rather than the “purpose” of an activity, prevents a foreign government from always claiming a “public” purpose to each of its commercial transactions. Presumably, every time a “government enters the marketplace to buy or sell goods, its purpose ultimately is not to earn profits; in some sense, its motivation is the public good. Consequently, if the purpose of an activity defined in full whether the activity was sovereign or commercial, all governmental activities would be sovereign." 36 However, by stressing the activity’s “nature,” Congress opted for a more objective standard to determine an activity’s “commerciality,” thus avoiding what would otherwise amount to a troublesome inquiry into a foreign state’s motivation. 37

Later cases have sought to further disambiguate this definition of “commercial activity.” Most notably, the “private person” test has emerged as the dominant application of the FSIA’s “nature” standard. 38 According to this standard, a court considers whether or not the relevant activity is commercial by asking whether a

34 Id. (quoting H.R. REP. NO. 94-1487, at 32 (1976)).
35 See id. “[M]atters bearing on the Nation’s foreign relations ‘should not be left to divergent and perhaps parochial state interpretations.’” Id. (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964)).
36 De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1393 (5th Cir. 1985) (holding that purpose may sometimes be referred to in order to disambiguate an activity’s nature). But see Republic of Argentina, 504 U.S. at 616-17 (restricting the De Sanchez holding). Although Republic of Argentina severely limits the applicability of De Sanchez, the above dicta remains a well-established underpinning of the FSIA’s definition of a commercial activity.
37 See Saudi Arabia v. Nelson, 507 U.S. 349, 360-61 (1993). “[T]he question is not whether the foreign government is acting with a profit motive . . . . Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in ‘trade and traffic or commerce.’” Republic of Argentina, 504 U.S. at 614.
private person can engage in the activity. By referring to the basic "private" - "public" distinction, courts have returned to the "restrictive immunity" theoretical roots of the FSIA to disambiguate the commercial exception. Thus, the commercial exception is essentially a codification of the "restrictive" view's contention that when a foreign sovereign acts as a private actor in the marketplace, it cannot escape liability via immunity. In short, the commercial exception is a method of insuring the accountability of sovereigns engaged in international commerce who would otherwise not be subject to suit in U.S. courts.

2.3. The Act of State Doctrine

Unlike foreign sovereign immunity, the act of state doctrine has never been codified. The doctrine is a purely judge-made rule that has been the subject of much controversy and uncertainty since its inception in the 1897 case of Underhill v. Hernandez. That decision, which has become the basis for the doctrine's modern application, stated:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Modern commentators have re-phrased the doctrine to read as follows:

In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of

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39 See id.
40 See Republic of Argentina, 504 U.S. at 612-13 ("The meaning of 'commercial' is the meaning generally attached to that term under the restrictive theory at the time the statute was enacted.").
41 168 U.S. 250 (1897).
42 Id. at 252.
a taking by a foreign state of property within its own territory, or from sitting in judgement on other acts of a governmental character done by a foreign state within its own territory and applicable there.\textsuperscript{43}

Under either statement, the main purpose of the act of state doctrine is to prevent American courts from adjudicating those acts of a foreign government purely sovereign in nature.\textsuperscript{44} It is an issue preclusion device that will shield a foreign government’s activity from being examined in American courts.\textsuperscript{45} However, such issue preclusion does not necessarily entail dismissal of an entire action.\textsuperscript{46}

Various rationales have been suggested for the act of state doctrine. To the extent that the doctrine was developed to avoid disrespect to foreign governments, the rule is related, in some part, to the rules of foreign sovereign immunity.\textsuperscript{47} The core concern of modern application, however, is not international comity, but the constitutional issues of preserving the separation of powers between the judiciary and the executive branches of the federal government.\textsuperscript{48} Since primary authority for conducting foreign affairs is vested in the executive branch, judicial “engage-

\textsuperscript{43} RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443(1) (1986) [hereinafter RESTATEMENT].

\textsuperscript{44} See W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int’l, 493 U.S. 400, 406 (1990) (stating that “[t]he act of state doctrine is not some vague doctrine of abstention but a ‘principle of decision’ binding on federal and state courts alike”).

\textsuperscript{45} See Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1057-58 (3d Cir. 1988) (holding that “the courts of this country will refrain from judging the validity of a foreign state’s governmental acts in regard to matters within that country’s borders”), aff’d, 493 U.S. 400 (1990); Harold Hongju Koh, Transnational Public Law Litigation, 100 YALE L.J. 2347, 2366 n.106 (1991) (“[T]he Act of State doctrine is not a general rule of abstention in cases that may embarrass foreign governments, but a federal choice-of-law rule that applies only when the validity of a foreign sovereign act is at issue.”).

\textsuperscript{46} See Callejo v. Bancomer, 764 F.2d 1101, 1113 (5th Cir. 1985) (noting that under the act of state doctrine, “courts exercise jurisdiction but decline to decide certain issues”).

\textsuperscript{47} See RESTATEMENT, supra note 43, § 443 cmt. a.

\textsuperscript{48} See United States v. Noriega, 746 F. Supp. 1506, 1523 (S.D. Fla. 1990) (“More recent interpretations of the doctrine instead emphasize the separation of powers rationale—more specifically, the need to preclude judicial encroachment in the field of foreign policy and international diplomacy.”), aff’d, 117 F.3d 1206 (11th Cir. 1997).
ment in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.\textsuperscript{49} Therefore, U.S. courts must decline to adjudicate foreign actions that may impede or prevent the political branches of government from conducting foreign affairs. Modern jurisprudence favors resolving this type of dispute through the political process, despite the fact that some litigants may have no other available domestic forum in which to settle their otherwise meritorious claims.\textsuperscript{50} According to the act of state doctrine, judicial inquiry into these claims might frustrate the conduct of national foreign policy.\textsuperscript{51}

However, according respect to the government's system of checks and balances remains merely an underpinning of the doctrine, and does not constitute a comprehensive guideline for its application. The Supreme Court made this point clear in 1990, when it reviewed its first act of state case in almost fifteen years.\textsuperscript{52} \textit{W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l}\textsuperscript{53} presented the Court an opportunity to examine the weight that should be accorded such "separation" concerns in act of state cases.\textsuperscript{54} According to that decision:

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50 See Environmental Tectonics, 847 F.2d at 1058. The doctrine's "application in effect means that 'on occasion individual litigants may have to forgo decisions on the merits of their claims because the involvement of the courts in such a decision might frustrate the conduct of the Nation's foreign policy.'" Id. (quoting First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 769 (1972)).

51 See id.

52 See Koh, supra note 45, at 2366 n.106.


54 See id. at 405. It is worthwhile to note here that this case came to the Court on appeal from the Third Circuit. The Court did not affirm this case on the grounds presented in the lower case. Instead, the Court resisted the chance to examine the applicability of the commercial exception by stating:

The parties have argued at length about the applicability of these possible exceptions, and, more generally, about whether the purpose of the act of state doctrine would be furthered by its application in this case. We find it unnecessary, however, to pursue those inquiries, since the factual predicate for application of the act of state doctrine does not exist.

\textit{Id.}

Thus, the jurisdictional split between the Third and Ninth Circuits'
Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.\

Conversely, where the validity of a foreign government’s action within its own borders is not in question, the act has no application. Courts have since cited this case as setting forth a clearer doctrine.

2.4. The Commercial Activity Exception to the Act of State Doctrine

The Restatement’s definition of an act of state specifically provides that American courts will not adjudicate matters based on activities by foreign sovereigns “of a governmental character.” This language reflects the current judicial trend of only applying the act of state doctrine to those actions which are considered “sovereign.” Where an act is not imbued with sovereign character, the threat of disrupting foreign relations is less imposing and the courts will usually decide to adjudicate the claim. Put simply, where a government is not acting as a government, its actions are not acts of state at all, and the rule is not available to preclude judicial inquiry.

different approaches to the applicability of the act of state doctrine’s commercial exception remains unresolved.

55 Id. at 409.
56 See id. at 409-10.
57 See Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 707 n.8 (9th Cir. 1992).
Since the Kirkpatrick case, some courts have even gone as far as articulating a two-step test for application of the doctrine. See Eckert Int’l, Inc. v. Sovereign Democratic Republic of Fiji, 834 F. Supp. 167, 171 (E.D. Va. 1993) (“First, the act undertaken by the foreign state must be public, and second, the act must be completed within the sovereign’s territory.”), aff’d, 32 F.3d 77 (4th Cir. 1994).
58 RESTATEMENT, supra note 43, § 443(1).
When a government engages in a purely commercial act, some court decisions have held that such an act is not protected by the doctrine. This so-called "commercial exception" to the act of state doctrine was first announced in the Supreme Court plurality opinion in *Alfred Dunhill of London, Inc. v. Republic of Cuba.*[^59] In this case, the Court held that the act of state doctrine does not protect "the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities."[^60] Although never announced by a majority of the Supreme Court, the commercial activity exception to the act of state doctrine has never been rebuffed by any appellate circuit, and has, in fact, been mentioned as dicta by most appellate circuits.[^61] Moreover, Congress' passing of the FSIA, in part, relied upon the existence of the commercial exception.[^62] Thus, for the purposes of this Comment, it will be assumed that the commercial exception, if not an ultimate legal reality, is at the very least a doctrine with considerable vitality in federal courts today.

### 2.5. Foreign Sovereign Immunity and the Act of State Doctrine Contrasted

Both the act of state doctrine and foreign sovereign immunity are rooted in considerations of respect for independent authorities, state equality, and the perceived limitations on the domestic

[^60]: *Id.* at 695.
[^62]: *See H.R. REP. NO. 94-1487, at 20 n.1 (1976).*

The committee has found it unnecessary to address the act of state doctrine in this legislation [the FSIA] since decisions such as that in the *Dunhill* case demonstrate that our courts already have considerable guidance enabling them to reject improper assertions of the act of state doctrine. For example, it appears that the doctrine would not apply to the cases covered by H.R. 11315, whose touchstone is a concept of "commercial activity" involving significant jurisdictional contacts with this country.

*Id.*
judiciary to sit in judgment on the actions of another state.  

Although, the recent "restrictive" view of immunity and the FSIA have allowed greater judicial examination of foreign actions, these actions (as a result of the statute's language) are necessarily limited to activities carried out in or related to the United States.  

The act of state doctrine, on the other hand, characteristically encompasses activities of foreign states in their own territories.  

The FSIA addresses the allowable jurisdiction of the courts, while the act of state doctrine addresses "the permissible scope of inquiry by courts into particular issues presented."  

Sovereign immunity and the act of state doctrine may be raised in the same case, and often are in instances where the foreign state (or its agent) is itself a party to an action. However, the two rules remain distinct. In short, the FSIA deals with the capacity of a foreign state to be sued for its actions, while the act of state doctrine operates as an issue preclusion device. Of the two rules, only sovereign immunity will necessarily render an action non-adjudicable. Where the act of state doctrine prevents consideration of the validity of a government's action, the underlying claim may still be properly decided if it can otherwise proceed.

Against this backdrop lie the commercial exceptions to each of these rules. When examined in light of their respective origins, both commercial exceptions can be seen as requiring separate characterizations. The FSIA's commercial exception operates as a method of combating blanket immunity and pursuing fairness in the international marketplace by making all commercial actors (private or governmental) accountable. In contrast, the act of

63 See RESTATEMENT, supra note 43, § 443 reporters' note 11 (contrasting the act of state doctrine and sovereign immunity).
64 See id.
65 See id.
66 Id.

A conclusion that the act of state doctrine is applicable to the case, however, does not divest this Court of subject matter jurisdiction over the action; instead, the act of state doctrine operates as a super choice-of-law rule, requiring a court to apply the law of the foreign state as the rule of decision when faced with challenges to the official acts of a sovereign government.

Id.
state's commercial exception is better thought of as an exemption. For the purposes of the act of state doctrine, a foreign government’s commercial activities are not acts of state at all. In this distinction lie the reasons why the FSIA’s commercial activity definition should not be read into the act of state’s commercial exception.

3. ISSUE PRECLUSION V. JURISDICTION

As mentioned above, foreign sovereign immunity and the act of state doctrine are two distinct rules, with the former concerning amenability to suit and the latter dealing with the appropriateness of a court sitting in judgment of a foreign government’s acts. However, while the FSIA has codified an approach to its commercial exception, the act of state doctrine’s commercial exception remains unresolved. One obstacle to this exception’s evolution is unquestionably the elusive definition of what constitutes a “commercial activity.” Unlike the FSIA’s “nature” definition, the act of state doctrine’s commercial exception has no statutory scheme of its own on which to rely. Nevertheless, upon examination of the principles underlying the act of state doctrine and the checkered past of the FSIA’s “nature-purpose” distinction, it appears that relying on the FSIA’s definition of “commercial activity” for guidance would result in unwanted ramifications.

3.1. The Comparative Narrowness of the Act of State’s Commercial Exception

According to some courts, the commercial exceptions to the two doctrines should be uniform so as to “effectuate the legislative intent that the FSIA not be undermined by improper assertion of the act of state defense.” According to this line of reasoning, the act of state defense should not be available as a “back door” to a sovereign party who has already been denied foreign sovereign immunity pursuant to the FSIA’s commercial exception. This

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68 See supra Part 2.5.
70 See Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 705 (1976) (stating that “the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label ‘Act of State’ than if it is given the label ‘sovereign
reasoning is a severe criticism of the Ninth Circuit’s approach to the act of state doctrine espoused in LAM, as demonstrating how two different standards may weaken the FSIA.71

Although a well reasoned position, this argument only addresses those cases where the government, which committed the purported “act of state,” is also a party to the action at hand. However, the act of state doctrine is not limited to such instances.72 Indeed, “[w]hen determining whether the act of state doctrine limits adjudication in American courts, we look not only to the acts of the named defendants, ‘but [to] any governmental acts whose validity would be called into question by adjudication of the suit.’”73

Because the act of state doctrine is an issue preclusion device,74 primary attention should be paid to the action rather than the actor. Thus, the doctrine is often invoked in cases where the named government is not a party at all. The acts of foreign governments may be at issue far more frequently under the act of state doctrine than they would under foreign sovereign immunity when governments themselves are directly involved in controversies.75

As a result of this greater frequency, a court’s potential

71 See Michael J. Bazyler, Abolishing the Act of State Doctrine, 134 U. PA. L. REV. 325, 353 (1986) (arguing that “under the court’s analysis, what the foreign sovereign cannot get through the ‘front door’ of the FSIA, it obtains through the ‘back door’ of the act of state doctrine”).

72 See Callejo v. Bancomer, S.A., 764 F.2d 1101, 1113 (5th Cir. 1985). [Where] the defendant is a private party, not an instrumentality of a foreign state, and even if the suit is not based specifically on a sovereign act, we nevertheless decline to decide the merits of the case if in doing so we would need to judge the validity of the public acts of a sovereign state performed within its own territory.

73 Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines, 965 F.2d 1375, 1387-88 (5th Cir. 1992) (citing Callejo, 764 F.2d at 1113) (alteration in original).

74 See Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1380 (5th Cir. 1980) (“[T]he act of state doctrine does not simply relieve the foreign government of liability for its acts, but operates as an issue preclusion device, foreclosing judicial inquiry into the validity or propriety of such acts in litigation between any set of parties.”).

75 See Bazyler, supra note 71, at 354-55 (“[V]irtually every international dispute may involve a foreign sovereign in some respect.”).
opportunities to sit in judgment on a foreign state's actions are not limited to situations where that state is a party. In such cases, immunity is never invoked. To safeguard against inappropriate adjudication, the act of state doctrine traditionally takes measure of the possible embarrassment and hindrance posed to national foreign policy. The doctrine's commercial exception is merely one way of framing this balancing test. In other words, when an action is deemed "commercial" and exempted from the act of state doctrine, the court presumably has already taken into account the traditional balance of interests crucial to deeming a governmental action not an act of state. In contrast, when dealing with the statutory scheme announced by the FSIA, this balancing of interests may be avoided by the Act's rigid statutory criteria. Although focusing only on an activity's "nature" may be appropriate under the FSIA when trying to prevent a sovereign from unfairly availing itself of the international market, completely ignoring an activity's "purpose" may be inappropriate when deciding whether or not to preclude an issue.

76 See RESTATEMENT, supra note 43, § 443 reporters' note 6. One of the justifications set forth in the Dunhill opinion's adoption of a commercial exception to the act of state doctrine is the fact that "in commercial dealings, as contrasted with matters such as expropriation, there is a broad international consensus as to the applicable rules of law, so that a decision against the validity of the foreign act would be unlikely to 'touch sharply on the nerves' of members of the international community." Id. (citation omitted). Section 443 also lists the exception's similarity to the commercial activity exception to the doctrine of sovereign immunity as the other justification offered by the Dunhill majority. See id. However, that section correctly notes that this is the very analogy to which the four dissenters would not acquiesce, resulting in no majority opinion. See id. Consequently, this "uniformity" argument appears to be the weaker of the two reasonings. See id.


In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens. Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on "national nerves." Id.

78 See Sage Int'l, Ltd. v. Cadillac Gage Co., 534 F. Supp. 896, 907-08 (E.D. Mich. 1981) ("[T]he Act of State Doctrine commands a balancing process that may, in contrast, be avoided in the sovereign immunity context under the mechanical criteria established by the FSIA.").

79 See International Ass'n of Machinists & Aerospace Workers, (IAM) v. OPEC, 649 F.2d 1354, 1360 (9th Cir. 1981) ("The act of state doctrine is not
Since act of state concerns, in theory, pose a greater threat of frustrating national foreign policy than sovereign immunity issues do, the use of the FSIA’s mechanical “nature” definition of “commerciality” to determine the applicability of the act of state doctrine is not a strong enough “lock” on the doctrine’s troublesome “back door.” The act of state doctrine requires flexibility to meet its objectives of protecting the separation of powers and preventing judicial interference in foreign policy. This flexibility is better served by a narrower commercial exception. Such an exception should take into consideration a government’s purposes, along with all the facts necessary to complete the balancing of interests required by act of state jurisprudence. The FSIA’s “nature” definition is simply too broad for the act of state doctrine to effectively balance sovereign interests.

3.2. The “Nature-Purpose” Distinction Is Not Trouble-free

The FSIA’s reliance on an activity’s “nature” to determine its commercial character is a problematic standard that has been sharply criticized by commentators and courts alike. While seemingly a simple standard to apply, commentators have continuously warned against the troublesome results that may arise from such an application.80 Long before the FSIA’s enactment, critics noted that a “nature-purpose” distinction led some literal-thinking European courts to hold that “... purchases of bullets or shoes for the army, the erection of fortifications for defense, or the rental of a house for an embassy are private acts.”81 Indeed, more than one commentator has noted the circular logic displayed by § 1603(b) of the FSIA.82

Courts have also expressed frustration with the FSIA’s...
ambiguous formulation. In 1993, the Supreme Court referred to the definition of “commercial” offered in § 1603(b), stating that the Act is “too ‘obtuse’ to be of much help,” and that “[i]f this is a definition, it is one distinguished only by its diffidence; as we observed in our most recent case on the subject, it ‘leaves the critical term “commercial” largely undefined.’”

Faced with the FSIA’s “nature—purpose” distinction, some courts have been even more blatant in discarding the statute, stating that “courts faced with the question whether a particular act or series of acts constitutes commercial activity have ignored this circular definition and have, consistent with the intent of Congress, defined the concept on an evolving, case-by-case basis.”

One court even went as far as to suggest that an activity’s purpose is vital to understanding its nature.

We do not interpret this provision [§ 1603(d)], however, to bar us totally from considering the purposes of different types of activities. Indeed, we do not believe that an absolute separation is always possible between the ontology and the teleology of an act. . . . Indeed, commercial acts themselves are defined largely by reference to their purpose. What makes these acts commercial is not some ethereal essence inhering in the conduct itself; instead, as Congress recognized, acts are commercial because they are generally engaged in for profit.

Unfortunately for these frustrated courts, the Supreme Court disallowed courts from referring to purpose to disambiguate an activity’s nature in 1992, stating that “[h]owever difficult it may be in some cases to separate ‘purpose’ . . . from ‘nature’ . . ., the statute unmistakably commands that to be done.”

Nevertheless, the Court cannot do away with the inadequacies

84 Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines, 965 F.2d 1375, 1384 (5th Cir. 1992).
85 De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1393 (5th Cir. 1985).
of existing law. As this brief sampling demonstrates, “the FSIA’s commercial activity exception is insufficiently specific and its application is confusing and difficult to predict.” Reading such a quagmire into another commercial exception would not only frustrate the use of that law, but the resulting influx of even more unguided, inconsistent applications of the “nature” definition would provide commentators still more fodder to fire at the faulty definition.

4. LEGAL HISTORY DOES NOT FAVOR USING THE FSIA DEFINITION

Finally, the legal history of the commercial exception to the act of state doctrine usually favors lending at least some weight to an activity’s purpose to determine whether or not it is a commercial act. Both past precedent and legislative history suggest that the FSIA definition of a “commercial” activity should not be read into the act of state doctrine.

4.1. Past Precedent and Application of the Commercial Exception to Act of State

Since the inception of the act of state doctrine in *Dunhill* to its most recent applications, courts have consistently looked at an activity’s purpose when deciding whether or not to apply the act of state’s commercial exception. In one recent case, the Southern District of New York stated that:

[W]hile the nationalization of oil property in *Hunt* was accompanied by political statements suggesting reprisal against the United States as the motive and indicating that the nationalization was a public act, the seizure of Galadari’s property was not accompanied by any such political statements. Non-public or commercial acts do not fall within the ambit of the Act of State Doctrine.\(^{88}\)

Here, the court not only looked to the activity’s motive, but also

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\(^{87}\) Donoghue, *supra* note 11, at 517.

\(^{88}\) Drexel Burnham Lambert Group Inc. v. Committee of Receivers for Galadari, 810 F. Supp. 1375, 1391 n.23 (S.D.N.Y. 1993) (emphasis added) (citation omitted), rev’d on other grounds, 12 F.3d 317 (2d Cir. 1993).
went as far as to afford great weight to a government’s statements as evidence of that motive. Had this case been decided under the FSIA “nature” definition of “commercial,” the sovereign foreign defendants may have escaped liability for its confiscation of the plaintiff’s investment when it assumed control of a foreign bank.

In a different case, the Second Circuit was called upon to decide whether to adjudicate an action which would have mandated scrutinizing the Mexican government’s issuance of exchange controls. The plaintiffs claimed that Mexico’s new exchange controls prevented the non-sovereign defendant from performing its contractual obligations to its American creditor. To decide the case on its merits, the court would have had to “sit in judgment” on this governmental action. In deciding otherwise, the court held that “[t]his action, taken by the Mexican government for the purpose of saving its national economy from the brink of monetary disaster, surely represents the ‘exercise [of] powers peculiar to sovereigns.’”

In National Am. Corp. v. Federal Republic of Nigeria, another case out of New York’s Southern District, the court not only examined the motive behind a defendant’s act, but actively inquired into several pieces of evidence which provided circum-

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89 See Hunt v. Mobil Oil Corp., 550 F.2d 68, 73 (2d Cir. 1977) for an even earlier use of a government’s statements of purpose to determine an activity’s commercial/sovereign status. That decision noted that:

[U]pon the seizure of Hunt’s property on June 11, 1973 President al-Qadhafi announced “[W]e proclaim loudly that this United States needs to be given a big hard blow in the Arab area on its cold, insolent face. . . . The time has come for the Arab peoples to confront the United States, the time has come for the U.S. interests to be threatened earnestly and seriously in the Arab area, regardless of the cost.” . . . We conclude that the political act complained of here was clearly within the act of state doctrine and that since the disputed pleadings inevitably call for a judgment on the sovereign acts of Libya the claim is non-justiciable.

Id. (alteration in original).

90 See Braka v. Bancomer, S.N.C., 762 F.2d 222, 224 (2d Cir. 1985) (affirming the dismissal on act of state grounds of claims involving the Mexican government).

91 See id. at 223.

92 Id. at 225 (quoting Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 704 (1976)) (alteration in original).

substantial proof of that motive. In that case, Nigeria asserted the act of state doctrine to prevent the court from examining the repudiation of several of that country's debts incurred as a result of the government's dealings in cement contracts. In that case, the court noted that "the very act of forming a settlement committee, paying for cement and processing demurrage documents, signifies an intent, espoused by the sovereign, to meet its commercial obligations." The court went on to apply the commercial exception and did not preclude the claim.

In addition, commentators have operated under the assumption that an examination of a sovereign's motive can often determine whether or not an activity is "commercial." One proposed example clearly demonstrates a situation where "purpose" may not only be relevant but also dispositive.

For instance, if state X cancels a long-term supply contract with a seller in the United States on the ground that the seller had supplied defective merchandise, a decision by a court in the United States in favor of the seller would probably not violate internationally shared expectations; in contrast, termination of the same contract because X had broken relations with the United States or had banned all "capitalist enterprises" might well involve the kind of issue not appropriate for decision by the judiciary.

According to this reasoning, the activity's purpose bears strongly on its character. On one hand, ending the contract is a purely commercial decision based on the merits or liabilities of continuing the contractual relationship. On the other hand, repudiation based on a political decision or a fundamental change in a country's economic system would be inappropriate for adjudication. It is immaterial that, from the seller's stance, the repudiation in either case remains the same. In contrast, some

94 See id. at 641 ("[D]efendants claimed that the cement purchase was intended for use in governmental works and military installations.").
95 Id.
96 See id.
97 RESTATEMENT, supra note 43, § 443 reporters' note 6.
commentators have adopted the stance that a similar contractual situation under the FSIA would render exactly the opposite result. 98 One such hypothetical, proposed during legislative hearings on the FSIA stated that “this would mean, for example, that a foreign state’s purchase of grain from a private dealer would always be regarded as commercial, even if the grain were to serve some important government purpose, such as replenishing government stores or feeding an army.” 99 In light of the decisions and the traditional formulation above, past precedent clearly favors incorporating an activity’s purpose in the act of state’s commercial exception.

4.2. Legislative History

Finally, even the legislative history of the FSIA plainly preferred that Act not to be read into the act of state doctrine. The FSIA was enacted to codify only the doctrine of sovereign immunity. 100 Furthermore, committee hearings explicitly stressed the point that the FSIA does not propose to effect changes in the act of state doctrine. 101 During one of these hearings, Monroe Leigh, then the Legal Adviser to the State Department, stated that, “in this particular bill, we have been careful . . . to make it clear that the bill applies only to the defense of sovereign immunity and does not extend to the act of state doctrine.” 102 Although this statement does not explicitly mention the FSIA’s “nature” definition of “commerciality,” such a definition follows from the fact that the enactment of the Act came after the Dunhill decision, and that Congress had every opportunity to speak to the FSIA’s effects on the act of state doctrine. Furthermore, during the legislative evolution of the FSIA, the Dunhill decision and the

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98 See id. § 453 reporters’ note 2 (noting the importance of an activity’s nature under the restrictive theory of immunity).

99 Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations, 94th Cong. 27 (1976) [hereinafter Hearings] (statement of Monroe Leigh, Legal Adviser, Department of State).

100 See Chas. T. Main Int’l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800, 813 (1st Cir. 1981) (stating that “[i]n principal part, FSIA simply codifies contemporary concepts concerning the scope of sovereign immunity, and entrusts to the courts the determination of immunity in individual cases”).

101 See Hearings, supra note 99, at 34.

102 Id. (emphasis added).
commercial exception were explicitly referred to, yet never altered. In the face of this legislative history, application of the FSIA’s definition of “commercial activity” to the act of state doctrine would appear contrary to congressional intent.

5. CONCLUSION

In examining the act of state doctrine, the FSIA, and their respective commercial exceptions, this Comment has sought to show that the view adopted by the Second and Third Circuits of applying the FSIA’s definition of “commercial activity” to the act of state doctrine is not the best reasoned approach. In trying to establish uniformity, each rule’s origins can at best be described as somewhat related in certain instances, and at worst, completely independent. Also, scrutinizing certain policy implications of this “merging” of doctrines shows that both doctrines may suffer as a result. Finally, a brief look at the historical application of the act of state’s commercial exception reveals clear evidence of a historical aversion to utilizing the FSIA’s “nature” approach. In sum, although merging the two doctrines appears on its face to be a worthwhile “tightening” of U.S. international law, such an approach involves the danger of weakening one doctrine, and the possible muddling of another. Allowing both rules to stand on their own will allow future applications to approach a better understanding of both rules and their respective exceptions.

103 See H.R. REP. NO. 94-1487, at 6-11 (1976) for a plain congressional endorsement of the independence of the act of state doctrine, the Dunhill decision, and the commercial exception from the FSIA.