Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception

Joan E. Donoghue

Follow this and additional works at: http://digitalcommons.law.yale.edu/yjil

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.yale.edu/yjil/vol17/iss2/3

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Journal of International Law by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act:
A Functional Approach to the Commercial Activity Exception

Joan E. Donoghue†

I. INTRODUCTION ................................................ 490

II. FROM THE SCHOONER EXCHANGE TO THE FSIA: NINETEENTH-CENTURY THEORY AND TWENTIETH-CENTURY LAW ........................................ 495

III. APPLICATION OF THE FSIA'S COMMERCIAL ACTIVITY EXCEPTION ................ 499
    A. The Private Person Test .................................... 500
       1. Identification of the Relevant Activity .................. 501
       2. Can a Private Person Engage in the Activity? .......... 505
    B. The Sovereignty Approach .................................... 512
    C. Consideration of Purpose .................................... 514

IV. RETHINKING THE COMMERCIAL ACTIVITY EXCEPTION: A FUNCTIONAL APPROACH ...... 517
    A. Diplomatic Immunity Compared ............................ 519
    B. Foreign State Immunity: Balancing Competing United States Interests .......... 520
       1. Individuation of Each Cause of Action ................. 523
       2. Determining Personal Jurisdiction Before Immunity .... 524
       3. Experience-Based Exceptions to Immunity ............ 527
       4. Undue Interference in the Functions of the Foreign State ........ 531
          a. Advancing the Functional Standard Through a Default Clause .... 532
          b. Commercial Tort Cases .................................. 535
       5. An Incremental Approach to Reforming Foreign State Immunity Law .......... 537

V. CONCLUSION ................................................ 538

† J.D., Boalt Hall School of Law, University of California, Berkeley, 1981. Visiting Professor of Law, Boalt Hall School of Law, University of California, Berkeley. The author wishes to thank Bryan Ford, Gates Garrity-Rokous, David Jones, Steve McCaffrey, James O'Brien, Margaret Pickering, Timothy Ramish, Jonathan Schwartz, Les Shammas, and Carlos Vásquez for their comments on earlier versions of this article. Thanks are also due to Thomas Peckham for his able research assistance. The views expressed in this article are those of the author (who currently is on leave from the U.S. Department of State), and are not necessarily those of the Department of State or the U.S. government.

489
I. INTRODUCTION

Foreign state immunity has long been the subject of international debate. In recent decades Communist governments generally supported an absolute theory, under which a state enjoys complete immunity from the adjudicatory jurisdiction of other states, while Western governments promoted a restrictive theory, under which a state is immune from suit arising from its "sovereign" or "governmental" acts, but not from its "commercial" or "private" acts. The difference between the absolute and restrictive theories conformed to the contrasting relationship between commerce and the state in the two systems. This East-West debate is now drawing to a close, as the countries of Eastern Europe and the former Soviet Union, whose state-trading interests made them strong supporters of the absolute theory, move steadily toward market economies.2

The Foreign Sovereign Immunities Act (FSIA or Act), enacted in 1976,3 codifies the U.S. version of the restrictive theory. At the core of the FSIA lies the commercial activity exception, which requires courts to deny immunity for the "commercial" activities of a state, while preserving immunity for "sovereign" activities.4 The FSIA, however, provides little guidance about how to

---

1. United States law refers to this doctrine as foreign sovereign immunity, but the doctrine more commonly is known as foreign state immunity, the phrase this article employs. See Sompong Sucharitkul, Development and Prospects of the Doctrine of State Immunity: Some Aspects of Codification and Progressive Development, 29 NETH. IN'T L. REV. 252, 257-58 (1982).

2. The United Nations International Law Commission also has recently rejected the absolute theory in draft articles on the jurisdictional immunities of states adopted in 1991. See Draft Articles on Jurisdictional Immunities of States and Their Property, Report of the International Law Commission to the General Assembly, U.N. GAOR, 46th Sess., Supp. No. 10, U.N. Doc. A/46/10 (1991) [hereinafter 1991 I.L.C. Report]. The draft articles include exceptions to immunity when the foreign state consents to jurisdiction (Articles 7-9), and for commercial transactions (Article 10), certain employment contracts (Article 11), certain torts (Article 12), certain real, intellectual and industrial property (Articles 13-14), membership in corporations (Article 15), and certain arbitral agreements and awards (Article 17). The Report makes a slight gesture towards the absolute theory by describing the exceptions to immunity as proceedings in which "the state cannot invoke immunity," implying that states have relinquished their "right" to invoke immunity. See, e.g., id. art. 10, at 70 (commentary). The Commission, however, failed to agree upon a rationale for these exceptions, and instead "decided to operate on a pragmatic basis, taking into account the situations involved and the practice of States." Id. art. 10, at 68-69 (commentary).


4. See Republic of Arg. v. Weltover, Inc., 60 U.S.L.W. 4510, 4511 (U.S. June 12, 1992) (stating that commercial activity exception is "[t]he most significant of the FSIA's exceptions"). Courts and commentators frequently define the restrictive theory solely in terms of the commercial activity exception. See, e.g., Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480, 487 (1983) ("immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts"). Similarly, Congress explicitly mentioned only the commercial activity exception in the FSIA's statement of purpose: "Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned . . . ." 28 U.S.C. § 1602 (1988). The FSIA contains a second important exception to immunity, the noncommercial tort exception, which does not depend upon whether the foreign government's activity is "sovereign" or "private." See infra notes 228-236 and accompanying text; see generally JOSEPH W. DELLAFENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS § 6.20 (1988) (discussing noncommercial tort exception). The Act also retains
distinguish commercial from sovereign activities. The Act simply defines a "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act," directs a court to determine the "commercial character" of an activity by reference to its "nature" and not its "purpose," and denies immunity in any case involving a commercial activity with the requisite nexus to the United States.


6. Id. Of the states enacting a foreign state immunity statute since 1976, only Canada has applied a terse definition of "commercial activity" similar to that found in the FSIA. See infra note 191 and accompanying text; see generally Peter Trooboff, Foreign State Immunity: Emerging Consensus on Principles, 1986-V Recueil Des Cours 235, 308-10 (reviewing different statutory approaches to foreign state immunity). Courts have condemned extensively the FSIA's commercial activity exception. See infra note 19. The American Bar Association supported an amendment to the commercial activity exception in 1988, but the Executive Branch opposed the legislation and it was not enacted. See infra note 101.

7. 28 U.S.C. § 1605(a)(2) (1988); see infra note 55 (quoting provision). The problems created by the FSIA's nexus requirement generally lie beyond the scope of this article, but certain aspects are addressed infra notes 55, 182-187 and accompanying text.

8. As Professor James Crawford has noted, "[i]t is confidently asserted what sovereign immunity is not . . . sovereign immunity is not absolute. . . . But what is clear is that we lack a rationale . . . for this state of affairs." James Crawford, International Law and Foreign Sovereigns: Distinguishing Immune Transactions, 1983 BRIT. Y.B. INT'L L. 75, 75. Professor Crawford rejected the "governmental" versus "commercial" rationale for restrictive immunity, id. at 76-77, 114, and criticized the "nature"/"purpose" distinction on which the U.S. commercial activity exception depends. Id. at 96. He proposed instead a set of specific rules for enumerated categories of cases, id. at 114, and the Australian Law Reform Commission, of which he was Commissioner in Charge, adopted this approach when drafting the Foreign States Immunities Act, 1985, No. 196 (Austl.), reprinted in 25 I.L.M. 715 (1986) (hereinafter Australian Immunity Act). See infra note 185.

9. See, e.g., IAN BROWNLEE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 333 (4th ed. 1990) (noting conflicting decisions by national courts and arguing that restrictive theory is "substantially flawed," and concluding that "a satisfactory mode of application of the principle of restrictive immunity has yet to be developed"); Hersch Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States 28 BRIT. Y.B. INT'L L. 220, 228-32 (1951) (advancing "unorthodox" view that international law does not mandate foreign state immunity, dismissing suggestions that "equality," "independence," or "dignity" of foreign states requires provision of immunity, and rejecting purported distinction between acts jure gestionis [private acts] and jure imperii [public acts]); Ian Sinclair, The Law of Sovereign Immunity, Recent Developments, 1980-II Recueil Des Cours 113, 214 (concluding that no asserted rationale for foreign state immunity "affords a fully satisfactory intellectual justification for the theory"); Michael Singer, Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe, 26 Harv. INT'L L.J. 1, 2 (1985) (arguing that existing approaches to foreign state immunity necessarily lead to inconsistent results because a national court's distinction between private acts and public acts derives from "its particular view as to the ap-
and several commentators have proposed new approaches to the problem.\(^{10}\) For example, an assimilationist approach, first advanced by Hersch Lauterpacht, proposes that foreign states be "assimilated" to the position of the forum state in its own court, thereby abolishing foreign state immunity except for some narrow exceptions.\(^{11}\) A second approach suggests reversing the presumption of immunity underlying existing law and beginning from an "assumption of non-immunity, qualified by reference to the functional need . . . to protect the sovereign rights of foreign States operating or present in the territory."\(^{12}\) A third approach advocates replacing the present law of foreign state immunity with an analysis of the forum and foreign states' jurisdiction to prescribe, recommending that where this analysis yields "indeterminate" results, courts should resort to the act of state doctrine.\(^{13}\) A fourth approach, developed by Professor Ian Brownlie and endorsed by the Institute of International Law, concludes that restrictive immunity is primarily an immunity \textit{ratione materiae} (by reason of the material), which "affects the essential competence of the local courts in relation to the particular subject-matter."\(^{14}\) This approach requires courts to balance criteria indicative of forum state competence against criteria indicative of forum state incompetence. Each of these proposals departs significantly from the notions of foreign state immunity contained in existing statutes, conventions, and case law, which accept that foreign states are immune subject to specified exceptions.\(^{15}\)

These various approaches put the present restrictive theory under a microscope, making its defects painfully clear. Despite the potential benefits of the radical surgery recommended by some commentators, however, political realities leave the ultimate adoption of their proposals unlikely.\(^{16}\) Rather than embracing any of these sweeping doctrinal shifts, or deferring the search for

---


\(^{12}\) The exceptions include: 1) legislative acts of a foreign state; 2) a foreign state's executive and administrative acts in its own territory; 3) contracts made by a foreign state that occur outside the jurisdiction of the forum state under rules of private international law; and 4) actions in violation of the international law of diplomatic immunity. Lauterpacht, \textit{supra} note 9, at 226, 236-39; \textit{see also} supra note 9, at 90-91 (endorsing Lauterpacht's "assimilative" theory of foreign state immunity, while arguing that Lauterpacht's four exceptions are not grounded in immunity doctrine, but rather are examples of lack of forum state jurisdiction).


\(^{14}\) See infra notes 155-157 and accompanying text.
substantive coherence and consistency (as another commentator has proposed), this article advocates a middle course, urging practical, feasible reforms to the present system within the existing paradigm of immunity qualified by exceptions. Congress should abandon the FSIA's current distinction between "commercial" and "sovereign" activities, and instead should revise the commercial activity exception to adopt a functional approach to identifying commercial activities.

A functional approach finds its roots in the related doctrine of diplomatic immunity, which developed as a corollary of a monarch's personal prerogatives but now exists as a functional doctrine that balances the interests of sending and receiving states and accords immunity to the extent necessary to permit diplomacy. The rules of diplomatic immunity are almost universally accepted, stand firmly rooted in reciprocity, and are relatively clear and predictable. This article argues that the commercial activity exception should be reconceived in a similar fashion, as a doctrine that prevents undue interference in the functions of a foreign state. Existing exceptions to foreign state immunity should be replaced with specific functional rules that give effect to the interests advanced by U.S. adherence to restrictive immunity: consistency with international law, fairness to plaintiffs who would have access to U.S. courts in the absence of immunity, and protection of the interest of the United States as a potential defendant in a foreign court. For cases that fall outside the proposed rules, a revised statute should expressly direct courts to base their decisions on a weighing of these same interests.

Part I of this article reviews the evolution of the doctrine of foreign state immunity. It concludes that the FSIA's commercial activity exception principally rests upon outmoded nineteenth century notions of absolute immunity and sovereignty. Rather than embodying a coherent restrictive theory, the Act simply restricts application of the absolute theory to "sovereign" activities. Part III then surveys judicial opinions applying the commercial activity exception, and concludes that U.S. foreign state immunity law has begun to disintegrate, as evidenced by several significant decisions that disregard the statute's inadequate definition of "commercial activity."

Part IV therefore suggests that Congress discard the commercial/sovereign distinction and revise the commercial activity exception of the FSIA in four ways. First, the Act should require courts to identify each cause of action with precision before classifying a challenged act as commercial. Second, the Act

---

17. After a careful survey of national statutes, national court decisions, and international codification projects, Professor Trooboff recommends that we avoid these conceptual and political debates with a convention dealing only with the procedural aspects of foreign state immunity. Trooboff, supra note 6, at 235, 407-13. A procedural convention might be a useful first step in the international codification of foreign state immunity, but would not diminish the importance of revising the substance of U.S. foreign state immunity law.
should require courts to decide whether they possess personal jurisdiction over
the foreign state defendant before determining whether that state is immune.
Third, Congress should replace the single commercial activity exception with
an enumeration of specific exceptions drawn from other states' restrictive
immunity statutes and current caselaw under the FSIA. Finally, for cases that
fall outside these enumerated criteria, the statute should also deny immunity
if: 1) a U.S. court has personal jurisdiction over the defendant; 2) the exercise
of such jurisdiction is not inconsistent with international law; and 3) adjudica-
tion will not unduly interfere with the functions of the foreign government.
Courts must consider several factors to determine what constitutes undue
interference with foreign government functions. These include the extent and
significance of the U.S. interest in exercising jurisdiction, whether the court
would be required to adjudicate the content, conduct, and precise implementa-
tion of government policies or only the modalities of their implementation,
and the reciprocity implications of the exercise of jurisdiction, taking into account
U.S. assertions of immunity in foreign courts and U.S. law governing the
immunity of the United States in its own courts.¹⁸

United States courts have criticized the FSIA repeatedly for failing to
provide them with adequate guidance as to how to determine the immunity of
various transactions.¹⁹ A more coherent and detailed FSIA would respond to

¹⁸. Some of the specific proposals made here could be accomplished judicially, e.g., the recom-
mandations that courts identify each cause of action precisely before engaging in immunity analysis,
and that courts decide personal jurisdiction before making the immunity determination. Courts could avoid
reciting the sterile distinction between "commercial" and "sovereign" acts and could give greater emphasis
to the functional implications of their decisions, even under the existing commercial activity exception,
by considering whether a particular decision is consistent with international law, promotes fairness to
plaintiffs, and respects potential reciprocity implications. The enumerated exceptions proposed here as a
replacement for the existing commercial activity exception would, however, require legislative enactment.

A Supreme Court case decided as this article was going to press strongly suggests that the courts are
unlikely to correct the deficiencies of the FSIA's commercial activity exception. In Republic of Arg. v.
Weltover, Inc., 60 U.S.L.W. 4510, 4511 (U.S. June 12, 1992), the Supreme Court held that Argentina
and its central bank were not immune from a suit seeking to compel the bank to honor obligations under
bonds that it had unilaterally rescheduled to meet Argentina's foreign debt burden. The Court squarely
embraced the "sovereign"/"commercial" distinction, endorsed the private person test as the means for
divining the "nature" of an activity, and reined in lower court forays into consideration of "purpose." Id.
at 4511-12; see infra notes 102-105, 149-150 and accompanying text (discussing Weltover). The Court's
denial of immunity was correct, but its private person analysis will prove inadequate in more complex
cases. See infra notes 149-152 and accompanying text. The Court has also granted certiorari in a second
case in which it is asked to interpret the commercial activity exception. See Nelson v. Saudi Arabia, 923
F.2d 1528 (11th Cir. 1991), cert. granted, 60 U.S.L.W. 3827 (U.S. June 9, 1992) (No. 91-522) (presenting
argument by safety engineer alleging torture and detention by Saudi Arabia for reporting safety violations,
that Saudi government is not immune because alleged acts derived from his recruitment, a commercial
activity, in United States); see infra note 182 (discussing Nelson).

¹⁹. The courts have been critical of the FSIA in general. See, e.g., Gibbons v. Udaras na Gaeltachta,
549 F. Supp. 1094, 1105 (S.D.N.Y. 1982) (describing FSIA as "statutory labyrinth" with "bizarre structure
and ... many deliberately vague provisions"). A number of decisions also specifically criticize the
commercial activity exception. See, e.g., Weltover, Inc. v. Republic of Arg., 941 F.2d 145, 149 (2d Cir.
1991) (stating exception contains "amorphous standards" of "Olympian generality"), aff'd, 60 U.S.L.W.
4510 (U.S. June 12, 1992); Millen Indus., Inc. v. Coordination Council for N. Am. Affairs, 855 F.2d
879, 884 (D.C. Cir. 1988) (stating exception "does not further distinguish between" nature and purpose);
Foreign Sovereign Immunities Act

these judicial pleas for clarification, and thereby would increase the predictability of decisions, allowing private parties and foreign states to take U.S. foreign state immunity law into account when planning their activities. Greater predictability would also lessen the likelihood that implementation of the FSIA would give rise to foreign policy problems. Finally, a well-articulated domestic foreign state immunity law would enhance the credibility of the United States in the developing North-South debate over foreign state immunity.20

II. FROM The Schooner Exchange TO THE FSIA: NINETEENTH-CENTURY THEORY AND TWENTIETH-CENTURY LAW

Courts traditionally trace the U.S. doctrine of foreign state immunity to The Schooner Exchange v. M'Fadden,21 in which the Supreme Court held a French warship immune from the jurisdiction of U.S. courts. Chief Justice Marshall began the Court's analysis by stating that "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation, not imposed by itself."22 Despite this "perfect equality and absolute independence of sovereigns,"23 he identified three categories of cases in which the law understood every sovereign to waive its exclusive territorial jurisdiction in favor of immunity: cases involving foreign sovereigns traveling abroad, their ambassadors, and their troops.24 Chief


20. The 1991 I.L.C. Report presaged this debate. The draft articles provide that, in determining whether a transaction is "commercial," a court should refer "primarily to the nature of the contract or transaction, but its purpose should also be taken into account if, in the practice of the State which is a party to it, that purpose is relevant to determining the non-commercial character of the contract or transaction." 1991 I.L.C. Report, supra note 2, art. 2(C), at 13. The Commission explained that:

This two-pronged approach . . . is designed to provide an adequate safeguard and protection for developing countries, especially in their endeavours to promote national economic development. Defendant States should be given an opportunity to prove that, in their practice, a given contract or transaction should be treated as non-commercial because its purpose is clearly public and supported by raison d'Etat . . . .

Id. at 30 (commentary). Such a provision would create great uncertainty about whether or not a particular transaction would be immune, thereby undercutting one of the principal benefits of the international codification of foreign state immunity law.

21. 11 U.S. (7 Cranch) 116 (1812).
22. Id. at 136.
23. Id. at 137.
24. Id. at 137-40.

495
Justice Marshall concluded that the implied license underlying these grants of personal immunity applied equally to a friendly foreign warship in U.S. waters.25

In the course of the next century British and U.S. courts moved toward an absolute theory of foreign state immunity.26 This theory evolved at a time "when most States were ruled by personal sovereigns who, in a very real sense, personified the State."27 Indeed, the early state immunity cases in British and U.S. courts involved either individual foreign sovereigns traveling abroad or foreign public ships.28 The nineteenth-century Anglo-American notion of foreign state immunity became highly personalized, and courts often cited the need to preserve the dignity of the foreign sovereign as one reason to extend immunity.29 Positivist views also dominated international legal theory during this period; these perspectives asserted that all limitations on state power derived from the will of the state, a position permitting no external limitations upon its sovereignty.30

British and U.S. commentators increasingly criticized the absolute theory throughout the first half of the twentieth century.31 The notion of absolute

25. Id. at 143. Some courts cite The Schooner Exchange as embracing the absolute theory of state immunity. See DELLAPENNA, supra note 4, at 3 n.12 (citing cases). However, Chief Justice Marshall's opinion does not support that view: 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]." 11 U.S. (7 Cranch) at 145.

26. Nineteenth-century continental Europe, on the other hand, developed the restrictive theory. Commentators have thoroughly considered both the continental approach and the movement towards the absolute theory in the United States and England. See, e.g., ELEANOR ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS 3-53 (1932); BADR, supra note 9, at 9-62; Sinclair, supra note 9, at 121-96.


28. BADR, supra note 9, at 17.

29. See Victory Transp., Inc. v. Comisaria General 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."); De Haber v. Queen of Portugal, 117 Eng. Rep. 1246, 1259 (Q.B. 1851) ("To cite a foreign potentate in a municipal court . . . is contrary to the law of nations, and an insult which he is entitled to resent."); see also WILLIAM HALL, A TREATISE ON INTERNATIONAL LAW 178 (7th ed. 1917) ("When states were identified with their sovereigns, and the relations of states were in great measure personal relations of individuals, considerations of courtesy were naturally prominent.").

30. See CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 20-21 (1960); John Humphrey, On the Foundations of International Law, 39 AM. J. INT'L L. 231, 233 (1945). This "absolute sovereignty" of states was reconciled with customary international legal norms through the fiction of implied consent. In The Schooner Exchange, for example, Chief Justice Marshall held that all exemptions from territorial jurisdiction "must be derived from the consent of the sovereign of the territory . . . . This consent may be implied or expressed." 11 U.S. (7 Cranch) at 143.

31. See, e.g., CHARLES HYDE, INTERNATIONAL LAW 448 (1922); Charles Fairman, Some Disputed Applications of the Principle of State Immunity, 22 AM. J. INT'L L. 566, 588-89 (1928); Bernard Fensterwald, Jr., Sovereign Immunity and Soviet State Trading, 63 HARV. L. REV. 614, 640 (1950); Lauterpacht, supra note 9, at 220-37. However, commentators also noted the incoherence of restrictive foreign state immunity, and cited this as one reason to preserve absolute immunity. See, e.g., G. Fitzmaurice, State Immunity From Proceedings in Foreign Courts, 14 BRIT. Y.B. INT'L L. 101, 123 (1933) (noting extreme difficulty of drawing any satisfactory theoretical distinction between one class of state acts and another).
Foreign Sovereign Immunities Act

sovereignty also declined in importance, and by the end of the Second World War commentators generally agreed that state sovereignty was a relative notion limited by the sovereignty of other states. This newer concept of relative sovereignty undermined any force sovereignty may once have possessed as a rationale for absolute immunity. By the time the U.S. State Department adopted the restrictive theory in the 1952 Tate Letter, 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.

The State Department, however, did not suggest any objection to the rationale of absolute immunity, but simply restricted such immunity to "sovereign or public acts . . . of a state." Congress took the same approach when enacting the FSIA in 1976:

The bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis).

The nineteenth-century absolute theory thus forms the basis of contemporary U.S. law of foreign state immunity, from which the FSIA carves a number of exceptions. Discussion of foreign state immunity still sounds much like it

32. See, e.g., El Salvador v. Nicaragua, 11 AM. J. INT'L L. 674, 718 (Cent. Am. Ct. of Just., 1917) ("The function of sovereignty in a state is neither unrestricted or unlimited. It extends as far as the sovereign rights of other states.").


34. Letter from Jack Tate, Acting Legal Adviser to the Secretary of State, to Acting Attorney General Philip Perlman (May 19, 1952), reprinted in 26 DEP'T ST. BULL. 984 (1952) [hereinafter Tate Letter].

35. The Tate Letter demonstrated that these changes impelled the U.S. move to the restrictive theory: The reasons which obviously motivate state trading countries in adhering to the [absolute] theory with perhaps increasing rigidity are most persuasive that the United States should change its policy . . . . [T]he Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts.

Id. at 985. The Tate Letter also noted, as reasons for the shift in policy, declining international support for the absolute theory, the U.S. practice of not claiming immunity overseas for its own merchant ships, and the fact that the U.S. government subjected itself to suit in U.S. courts. Id.

36. See, e.g., Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary, 94th Cong., 2d Sess. 27 (1976) [hereinafter 1976 Hearings] (stating that "purpose of sovereign immunity in modern international law is not to protect the sensitivities of 19th-century monarchs") (testimony of Monroe Leigh, State Department Legal Adviser).

37. Tate Letter, supra note 34, at 984.

38. HOUSE REPORT, supra note 4, at 6605.
did in 1812: "The doctrine is 'commonly said to derive from the maxim par
in parem non habet imperium [an equal has no dominion over an equal], which
in turn is grounded in the principles of the independence, the sovereign
equality and the dignity of States.'"39 As Professor Brierly cogently stated,
however, "sovereignty is not a metaphysical concept, nor is it a part of the
essence of statehood; it is merely a term which designates an aggregate of
particular and very extensive claims that states habitually make for themselves
in their relations with other states."40 "Sovereignty," therefore, is at best a
shorthand, and its invocation no longer forms a viable means for a court to
determine whether a foreign state should be immune in a particular case.41

International law currently incorporates a number of other norms that
structure international relations by defining boundaries between national and
international authorities, usually under the rubrics of jurisdiction and compe-
tence.42 Foreign state immunity, for example, may limit a state's potential
responses to the grievances of its nationals against another state.43 These
structural norms, however, lack well-defined and internationally accepted
content. Without this content, they tell a court that a border exists between the
authority of one state and another, but they do not tell it where the border lies.
This imprecision may be tolerable or even desirable in the realm of state-to-
state political relations. Foreign state immunity, however, sits at the intersec-
tion of public and private international law, is interpreted and applied largely
by national courts, and directly affects both states and private individuals.
Because sovereignty itself represents a concept encompassing a wide variety
of potentially conflicting rights and obligations, judicial consistency and legal

39. Sinclair, supra note 9, at 121.
41. As Professor Higgins has suggested, "[w]ith the emergence of the restrictive doctrine, the concepts
which had previously been used to justify the absolute doctrine, such as the equality and independence of
sovereigns . . . , their dignity, and the comity of nations, [are] no longer illuminating." Higgins, supra
note 9, at 271.
42. See DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES 117 (1987) (*Jurisdiction doctrine,
with its discussions of the limits to assertions of national jurisdiction, the authority of the [International
Court of Justice], and of claims to sovereign immunity and extraterritoriality, seems to structure internation-
al life by defining the boundaries of various authorities. *).
43. Other norms bear on such a case, including noninterference in the internal affairs of another state,
recognition of a state's prima facie jurisdiction over its territory and population, exhaustion of local
remedies, limitation of jurisdiction of international adjudication to states that consent to such jurisdiction,
and the rules of private international law. See BROWNIE, supra note 9, at 287-88 (identifying these "princi-
pal corollaries" of sovereignty and equality of states); see also Crawford, supra note 8, at 78-85 (arguing
that no clear rule has emerged to allocate jurisdiction between forum state and defendant state). Jurists often
explain these additional concepts in terms of the sovereignty, equality, or independence of states. Professor
Brierly, however, suggests this explanation proceeds in the wrong order, arguing instead that it is the
totality of these concepts that gives content to the notion of sovereignty. BRIERLY, supra note 40, at 47.
Professor Brownlie has noted further that reference to *"the principles of immunity, of equality of States,
and of par in parem non habet jurisdictionem [an equal has no jurisdiction over an equal] is completely
useless, since each of these principles simply begs the [sovereignty] question." Brownlie, supra note 10,
at 46.
predictability will not result from immunity decisions based upon the maxim
that the sovereignty of one state extends no further than the sovereignty of
another.

III. APPLICATION OF THE FSIA’S COMMERCIAL ACTIVITY EXCEPTION

Two principal purposes supported Congressional enactment of the FSIA:
to codify the restrictive theory of foreign state immunity and to shift immunity
determinations from the Executive Branch to the courts.\textsuperscript{44} The Act makes
foreign states\textsuperscript{45} immune from the jurisdiction of U.S. courts unless one of
eight exceptions applies.\textsuperscript{46} Section 1605(a) denies immunity to a foreign state
in a case which involves: 1) a state that has waived immunity; 2) an action
based on a "commercial activity" with a specified nexus to the United States;
3) rights in property taken in violation of international law; 4) rights in immov-
able property located in the United States or property located in the United
States acquired by gift or succession; 5) certain "noncommercial torts"; and
6) enforcement or confirmation of arbitral awards.\textsuperscript{47} The Act also denies
immunity with respect to various counterclaims\textsuperscript{48} and suits in admiralty.\textsuperscript{49}

Unfortunately, the FSIA supplies a tautological definition of "commercial
activity" as "either a regular course of commercial conduct or a particular
commercial transaction or act."\textsuperscript{50} The admonishment that 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" forms the only other guidance in the Act on the meaning of
"commercial activity."\textsuperscript{51} Courts use two approaches when applying the com-
mercial activity exception, occasionally in tandem. First, courts consider

\textsuperscript{44} HOUSE REPORT, supra note 4, at 6605-06. The Act also advanced two other purposes: it provided
a statutory procedure for a court to establish personal jurisdiction over a foreign state, rendering unnec-
essary litigants’ pre-FSIA practice of seizing and attaching foreign government property to obtain jurisdiction,
and it permitted execution of judgments under prescribed circumstances. \textit{Id.} at 6606.

\textsuperscript{45} The Act defines "foreign state" to include political subdivisions, agencies, and other state instru-

\textsuperscript{46} 28 U.S.C. § 1604 (1988). Federal district courts possess original jurisdiction over any claim for
relief, provided the foreign state is not immune, § 1330(a), and may exercise jurisdiction over the foreign
state following proper service of process under special rules for foreign states. § 1608. Section 1441(d)
of the Act also permits foreign states to remove cases against them from state to federal courts.


\textsuperscript{49} 28 U.S.C. § 1605(b)-(d) (1988). The Act also provides immunity for the property of foreign states
from attachment or execution unless covered by one of the Act’s exceptions (which are more limited than
those applying to immunity from jurisdiction), §§ 1610-1611, and distinguishes between execution against
the property of agencies or instrumentalities and the property of the foreign state itself. § 1610(b).


\textsuperscript{51} \textit{Id.} United States courts occasionally determined immunity by referring to an activity’s purpose
before the promulgation of the FSIA in 1976. \textit{See, e.g.,} Kingdom of Roumania v. Guaranty Trust Co.,
250 F. 341 (2d Cir.), \textit{cert. denied}, 246 U.S. 663 (1918) (foreign state immune because army boots
purchased for military purposes).
whether the activity should be considered "commercial" because a private person can engage in it. Second, courts consider whether the activity should be considered "sovereign," and therefore cannot be "commercial." A survey of cases employing these approaches demonstrates that, whether used alone or together, they fail to provide a sound basis for determining whether a foreign state should be immune.

A. The Private Person Test

Most courts apply the "private person test," articulated by Judge Kaufman of the Second Circuit in Texas Trading & Milling Corp. v. Federal Republic of Nigeria, to determine whether the "nature" of an activity is commercial. Under this analysis a court first must identify the "relevant" activity in the case. The court then considers whether the activity is commercial by asking whether it is an activity in which a private person can engage. Finally, the court applies the FSIA's minimum contacts standard.


53. Texas Trading, 647 F.2d at 308.
54. Id. at 309-10.
55. Id. at 314. Under the Act, a foreign state is not immune in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2) (1988). A district court has statutory subject matter jurisdiction under § 1330(a) of the Act if a litigant meets one of these standards. Texas Trading, 647 F.2d at 308. Judge Kaufman concluded that a court could exercise personal jurisdiction under the Act only if it possessed subject matter jurisdiction and there had been proper service of process. Id. Thus, under the current test, both competence (subject matter jurisdiction) and personal jurisdiction depend on whether the foreign state is immune. This fusion of normally distinct issues has led to considerable criticism. See id. at 306; DELLAFFENNA, supra note 4, at 9; see generally infra notes 181-183 and accompanying text.

The complaint in *Texas Trading* alleged that the Nigerian government entered into and then breached agreements to purchase cement. Judge Kaufman concluded that the relevant activity could be either the aggregated cement purchases or each individual contract or letter of credit. He determined that a private person can engage in either activity, and therefore denied immunity. Unfortunately, both the first and the second steps in this test are flawed, and cases applying the *Texas Trading* test reach conflicting and unpredictable results.

1. Identification of the Relevant Activity

The first step in Judge Kaufman's analysis—identification of the relevant activity—may seem straightforward in a case like *Texas Trading*. A "contract," "contract for the purchase of cement," and "breach of contract for the purchase of cement" certainly represent activities in which a private person can engage. In more complex cases, however, the immunity of the foreign state varies according to the court's identification of the relevant activity. The private person test becomes particularly problematic when courts infuse their definition of the relevant activity with the purpose of the activity, with the activities of other components of the foreign state, or with the overall operations the foreign state performed.

In *MOL, Inc. v. People's Republic of Bangladesh*, for example, the Bangladesh Ministry of Agriculture granted MOL a license to capture and export a specified quantity of rhesus monkeys at designated prices. MOL undertook to build a breeding farm and agreed that the animals would be used only "for the general benefit of all peoples of the world." After the market price of monkeys rose, Bangladesh terminated the agreement, claiming that MOL failed to construct the farm and sold monkeys to the U.S. military in violation of the agreement. MOL sought arbitration under the agreement, and Bangladesh refused. MOL then sued Bangladesh in the United States, seeking damages for Bangladesh's termination of the license agreement.

were "based on" that commercial activity because they allegedly occurred in retaliation for his reporting safety violations at the hospital where he was employed.

A separate and final step in Judge Kaufman's approach is consideration of whether the foreign state's contacts with the United States are sufficient to satisfy the due process standards of the Fifth Amendment. *Texas Trading*, 647 F.2d at 306; 313 & 313 n.36. As discussed infra note 182, it has been argued that this due process analysis is in fact part of the statutory personal jurisdiction inquiry and is not a separate test.

56. 647 F.2d at 306.
57. Id. at 308.
58. Id. at 310.
60. 572 F. Supp. at 81.
61. Id. at 81-82.
The district court determined that "the ‘nature’ of the activity in suit is the regulation of wildlife," found such regulation to be "a sovereign activity," and therefore held Bangladesh to be entitled to immunity.\textsuperscript{62} MOL argued on appeal that the activity in question concerned not the control of exports nor the regulation of wildlife, but rather a simple sales contract.\textsuperscript{63} The Ninth Circuit disagreed, holding that the case involved more than a "contract for trade of monkeys. It concerned Bangladesh’s right to regulate imports and exports, a sovereign prerogative. It concerned Bangladesh’s right to regulate its natural resources, also a uniquely sovereign function."\textsuperscript{64} Therefore, the court held, because a private person could not enter into such an agreement, Bangladesh must be immune from suit.\textsuperscript{65} By defining the relevant activity in these terms, the court of appeals examined the foreign government policy that the activity advanced, rather than the activity itself.\textsuperscript{66} As such, the court’s analysis looked at least in part to the purpose of the activity, contrary to the FSIA’s instructions.

Courts have also failed to distinguish the acts of the named defendant from the acts of other agencies or organs of the foreign state. In \textit{Callejo v. Bancomer, S.A.},\textsuperscript{67} for example, the plaintiffs sued a state-owned Mexican bank when new currency exchange controls imposed by the Mexican government significantly reduced the value of dollar-denominated certificates of deposit they had acquired from the bank. The district court dismissed the case, finding plaintiffs’ claim to be "‘based upon’ the promulgation by Mexico of exchange control regulations—a sovereign act."\textsuperscript{68} The Fifth Circuit reversed, correctly concluding that the district court’s "analysis must focus on the named defendant’s acts which are the basis of the action and not on the separate acts of other sovereign instrumentalities or agencies."\textsuperscript{69}

\begin{itemize}
  \item \textsuperscript{62} Id. at 84.
  \item \textsuperscript{63} 736 F.2d at 1328-29.
  \item \textsuperscript{64} Id. at 1329 (citations omitted).
  \item \textsuperscript{65} Id.
  \item \textsuperscript{66} One of the drafters of the FSIA wrote that the MOL "decision sets back the law 30 years." Mark B. Feldman, \textit{The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder’s View}, 35 INT’L & COMP. L.Q. 302, 309 (1986).
  \item \textsuperscript{67} 764 F.2d 1101 (5th Cir. 1985).
  \item \textsuperscript{68} The unreported district court opinion was summarized by the court of appeals. Id. at 1107.
  \item \textsuperscript{69} Id. at 1108 (quoting Braka v. Bancomer, S.A., 589 F. Supp. 1465, 1469 (S.D.N.Y. 1984) (reviewing breach of contract and securities action against Mexican bank)). The Fifth Circuit also criticized a second unreported district court opinion, Frankel v. Banco Nacional de Mexico, No. 82-6457 (S.D.N.Y. May 31, 1983), which found a Mexican bank immune because its actions were taken to comply with the new currency control regulations. \textit{Callejo}, 764 F.2d at 1108-09. However, the Fifth Circuit dismissed the complaint in \textit{Callejo} on the basis of the act of state doctrine, despite its finding that the Mexican defendant was not immune. The court noted that the act of state doctrine can apply even when the foreign state is not a party to the suit "and even if the suit is not based specifically on a sovereign act." Id. at 1113. The court held that "sovereign acts taken by Mexico to preserve its foreign exchange reserves" justified applying the act of state doctrine to dismiss the case. Id. at 1126.
  \item In its classic formulation, the act of state doctrine provides: "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
\end{itemize}
Other decisions simply fail to articulate a relevant activity at all, basing the immunity determination instead on the general characteristics and activities of a defendant state enterprise. In State Bank of India v. NLRB, for example, defendant State Bank, an instrumentality of the Indian government, argued that the FSIA barred the National Labor Relations Board (NLRB) from ordering it to bargain with a union. The Seventh Circuit rejected this argument without defining the relevant activity, because "the commercial operations of the State Bank bring it outside the scope of the FSIA." The district court in Goethe House, N.Y., German Cultural Center v. NLRB applied similar reasoning to hold that the NLRB could not conduct a representation election for Goethe House's seven non-German employees. The court conferred immunity upon Goethe House, a government-owned entity that promotes German culture and German cultural foreign policy, because it constituted a "conceded arm of a foreign state that is not involved in commercial activi-

on the acts of the government of another done within its own territory." Underhill v. Hernandez, 168 U.S. 250, 252 (1897). The doctrine can be distinguished from foreign state immunity in at least two notable respects. First, foreign state immunity is, in the first instance, an immunity in personam that applies only when a state or state instrumentality is a defendant; the act of state doctrine is not so limited. Second, courts apply foreign state immunity to the extraterritorial acts of the foreign state, while the territorial scope of the act of state doctrine has yet to be definitively established. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 & cmts. a-b (1987) [hereinafter RESTATEMENT (THIRD)] (emphasis added). As the Supreme Court recently noted, [The] Court's description of the jurisprudential foundation for the act of state doctrine has undergone some evolution over the years. We once viewed the doctrine as an expression of international law, resting upon the "highest considerations of international comity and expediency." Oetjen v. Central Leather Co., 246 U.S. 297, 303-304 (1918). We have more recently described it, however, as a consequence of domestic separation of powers, reflecting "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder" the conduct of foreign affairs. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964). Kirkpatrick Co. v. Environmental Tectonics Corp., 493 U.S. 400, 404 (1990). The Kirkpatrick Court noted several possible exceptions to the doctrine, including an exception for "commercial transactions, since neither modern international comity nor the current position of our Executive Branch accorded sovereign immunity to such acts." Id. at 404-05 (citations omitted). A possible commercial activity exception to the act of state doctrine further undermines suggestions that the act of state doctrine should supplant immunity analysis. See RICHARD FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 139-69 (1964). There exists no reason to suppose that any such exception would be more coherent or easy to apply than restrictive foreign state immunity; indeed, some commentators argue that the act of state doctrine should be abandoned. See e.g., Michael J. Bazyler, Abolishing the Act of State Doctrine, 134 U. PA. L. REV. 325 (1986); Malvina Halberstam, Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law, 79 AM. J. INT'L L. 68 (1985).

70. 808 F.2d 526 (7th Cir. 1986).
71. Id. at 535; see also Weltower, Inc. v. Republic of Arg., 753 F. Supp. 1201, 1206 n.7 (S.D.N.Y. 1991) (denying immunity to Argentine Central Bank on grounds that bank was not responsible for fiscal policy), aff'd, 941 F.2d 145 (2d Cir. 1991), aff'd, 60 U.S.L.W. 4510 (U.S. June 12, 1992). The court distinguished the case before it from De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385 (5th Cir. 1985), in which the Fifth Circuit granted immunity to a Nicaraguan bank responsible for the control of Nicaragua's foreign exchange in a suit alleging that the bank failed to honor a check.
The court found that, in contrast, the effort to unionize employees in State Bank of India arose in a "context clearly 'commercial' in totality."

Other courts have rejected this open-ended approach in favor of an analysis that breaks down complex fact situations into the particular elements of each cause of action, recognizing that the question whether an activity is commercial may be answered differently for different causes of action. Arango v. Guzman Travel Advisors Corporation, for example, involved a suit by vacationers who purchased a travel package from a state-owned airline. Immigration officials, aided by agents of the airline, denied the vacationers entry into the country on the grounds that they were undesirable aliens. The Fifth Circuit found the claim against the airline for non-performance of the vacation package to be based on commercial activity, but held the airline immune from tort claims alleging injury from the events at the border. Arango demonstrates that when courts "isolate those specific acts of the named defendant that form the basis of the plaintiff's suit," they can identify "the particular conduct giving rise to the claim in question."

Focus on the precise activity underlying each cause of action could have led to more sound results in the preceding cases. In other situations, however, such an inquiry would go too far. Thus, in cases involving attempts to unionize (such as occurred in State Bank of India and Goethe House), the relevant activity would be the same, regardless of the nationality of the affected employees or the kinds of functions performed by the employees or the foreign state entity employer. Similarly, the relevant activity in any case alleging breach of contract would be a "breach of contract." Since a private person can breach a contract, this would in effect create a per se rule against immunity for any alleged breach of contract. Such a per se rule conflicts with the legislative intent underlying the commercial activity exception and has been rejected by several courts.

The drafters of the FSIA must have intended some aspects of a contract be "relevant" to a court's classification of an activity as commercial. The question is, which aspects? The policy goals advanced by the contract (e.g., the regulation of natural resources)? Whether a specific state undertaking (e.g., an export license) can be performed only by a state? The functions performed by the state entity employer? The context in which the activity occurred? The purpose and effect of the activity? The nature and effect of the activity on the parties involved?

73. 685 F. Supp. at 430.
74. Id. at 430 n.4.
75. 621 F.2d 1371 (5th Cir. 1980).
76. Id. at 1378-80.
77. De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1391 (5th Cir. 1985).
78. Arango, 621 F.2d at 1379.
79. In MOL, Inc. v. People's Rep. of Bangl., 572 F. Supp. 79 (D. Or. 1983), aff'd, 736 F.2d 1326 (9th Cir. 1984), for example, the district court might have identified the relevant activity as the alleged breach of contract by Bangladesh. The courts in the Mexican bank cases could have identified the relevant activity as the breach of the terms of the certificates of deposit.
80. See infra notes 83-93 and accompanying text.
Foreign Sovereign Immunities Act

by the defendant entity (e.g., diplomatic activities or banking)? Beyond breach of contract cases a court's task becomes even less clear. How, for example, should a court define the relevant activity in a libel case against a state-owned newspaper, or in a case in which a foreign state-owned oil well spills and causes damage in the United States?

The commercial activity exception, as currently articulated, fails to provide an answer to these questions because no single rule could apply to all causes of action. No foreign government entity should be immune from an action alleging breach of contract to paint its building, for example, regardless of the functions that entity performs. The different functions performed by a government-owned corporation and an embassy, however, may require more differentiated immunity rules for cases based on breach of an employment contract. The FSIA should require courts to identify precisely the elements of each cause of action, and should include specific rules enumerating categories of relevant aspects of transactions, to enable courts to determine immunity quickly and predictably in the majority of cases. Beyond those specific rules, however, the statute must expressly refer a court back to the interests underlying the commercial activity exception when assessing aspects of an activity relevant to the immunity determination, to make decisions on more difficult transactions consistent and predictable.

2. Can a Private Person Engage in the Activity?

The Texas Trading test also produces confusion in its second step, which requires a court to determine whether a private person "could" engage in the activity identified. Does this test focus on juridical modality or form, by asking whether the legal nature of the activity makes it one in which a private person can or cannot engage (e.g., a contract versus a unilateral administrative act by a state)? Or does this test focus on subject matter, by asking whether the content of the activity, whatever its form, is such that a private person can engage in it (e.g., a contract for sale of cement versus a contract in which a state waives taxation)? The Texas Trading court's private person test fails clearly to distinguish between modality and content, leading to contradictory results.

Earlier formulations of the private person test focused on the "juridical nature" of the foreign state's activity. Under that approach the foreign state enjoyed no immunity if the activity was one in which a private person had the legal capacity to engage (e.g., making a contract). This test possessed the

81. See, e.g., Claim Against the Empire of Iran, 16 BVerfGE 27, 62, reprinted in 45 I.L.R. 57, 80 (1963) (F.R.G.), in which the German federal constitutional court stated: "[O]ne should rather refer to the nature of the State transaction or the resulting legal relationships, and not to the motive or purpose of the State activity. It thus depends on whether the foreign State has acted in the exercise of its sovereign
not inconsiderable advantage of steering courts away from the ultimate government purpose of an activity. Apart from keeping courts from considering an activity's ultimate purpose, however, the juridical nature variant of the private person test contained major flaws. Foreign states would never enjoy immunity in cases alleging breach of contract, for example, thereby creating an overbroad per se rule. Moreover, a private person's legal capacity to engage in a particular activity varies among legal systems, and it is unclear whether a court is to look to the forum legal system or to that of the foreign state defendant to determine immunity. 82

The recent trend in U.S. courts, on the other hand, has been to focus on the subject matter of the activity in question. Both the district court and the court of appeals in Practical Concepts, Inc. (PCI) v. Republic of Bolivia, 83 for example, followed this approach, but reached different conclusions on the question of immunity. PCI alleged that Bolivia breached a technical assistance contract funded by the U.S. Agency for International Development (AID). The contract included commitments by Bolivia to exempt PCI and its employees from income tax and customs duties, to provide visas and travel documents, to expedite such documents as automobile registration and driver's licenses, and to permit access to U.S. embassy commissaries. However, Bolivia terminated the agreement when it learned that AID would discontinue its funding of the project. PCI sued, alleging unlawful breach of contract. 84 PCI had argued that a contract for the purchase of goods and services is a per se commercial activity, relying on a suggestion to that effect in Texas Trading. 85 The district court rejected such a per se rule, concluding that Congress had decided that courts "would have a great deal of latitude in determining what is a "commercial activity."" 86 The court found that Bolivia's agreement with PCI contained "numerous terms which only a sovereign state could perform, and which no private firm or individual going into the market place [sic] could ever offer." 87 The court reasoned that the commercial activity exception holds

82. See infra notes 120-121, 142-148 and accompanying text (discussing Gregorian v. Izvestia, 871 F.2d 1515 (9th Cir.), cert. denied, 493 U.S. 891 (1989)).
84. Bolivia failed to respond to the suit, and the district court entered a default judgment that PCI sought to execute. Bolivia then moved to set aside the default judgment, asserting, inter alia, that it was immune from suit. 613 F. Supp. at 865.
85. Id. at 869. The Second Circuit's decision in Texas Trading noted that the legislative history of the FSIA "seems to conclude that a contract or series of contracts for the purchase of goods would be per se a 'commercial activity.'" Texas Trading & Milling Corp. v. Federal Rep. of Nig., 647 F.2d 300, 309 (2d Cir. 1981) (citing HOUSE REPORT, supra note 4, at 6615), cert. denied, 454 U.S. 1148 (1982).
86. 613 F. Supp. at 869 (quoting HOUSE REPORT, supra note 4, at 6615).
87. 613 F. Supp. at 869.
"states who do business in the manner of private parties . . . to the same legal rules as private parties," but noted that "[b]y granting special legal advantages to PCI Bolivia was acting in a manner very much unlike a private business participant." The court held that Bolivia was therefore immune, and dismissed the suit.

The D.C. Circuit reversed, concluding that the activity at issue in the suit was commercial. The court of appeals agreed with the district court's rejection of a per se rule for contracts and echoed approval of the private person test. The court held that Congress concluded that foreign states could be subject to suits on contracts "of the same character as a contract which might be made by a private person" . . . [However,] Congress did not intend that the 'character' of a contract would turn on its subsidiary rather than its central prescriptions. The tax exemptions and documents to facilitate entry granted by Bolivia were "auxiliary to the basic exchange:" since the "essence" of the Bolivia-PCI contract was the exchange of money for advice, the court found the contract to be "commercial." The two opinions in Practical Concepts thus agreed that the subject matter of a contract is dispositive under the private person test, but they differed in their assessment of the quantum of "sovereign" subject matter necessary to transform an otherwise commercial activity into one for which the foreign state is immune.

The D.C. Circuit gave subject matter even greater primacy in Millen Industries, Inc. v. Coordination Council for North American Affairs (CCNAA). Millen, a U.S. shoe box manufacturer, alleged that CCNAA agreed to allow it to locate a manufacturing plant in Taiwan under the favorable conditions provided to qualified investors by Taiwanese law, including duty-free import of raw materials and "easy access" through Taiwanese customs. Millen further alleged that it began operations in Taiwan in reliance on these promises, but that Taiwan subsequently obstructed its importation of machinery and canceled all duty-free importation of raw materials. Millen brought an action based on claims of breach of contract, detrimental reliance, misrepresentation, and conversion. The district court dismissed Millen's

88. Id. at 870.
89. Id. at 872.
90. 811 F.2d at 1545.
91. Id. at 1550.
92. Id.
93. Id. The district court in Tifa, Ltd. v. Republic of Ghana, 692 F. Supp. 393 (D.N.J. 1988), took a similar approach. The court held that Ghana was not immune from allegations based on its express and implied promises to pay for equipment and goods to be used in a pesticide project, even though the parties conditioned the contract upon government waiver of import duties and the cash margin generally required by the Bank of Ghana. The court concluded that "[a]lthough standing alone the exemption from import duties and waiver of the mandatory cash margin appear to be governmental activities, these acts were ancillary to the alleged promise." Id. at 401.
94. 855 F.2d 879 (D.C. Cir. 1988). The Taiwan Relations Act, 22 U.S.C. §§ 3301, 3303 (1988), grants both CCNAA and Taiwan the same immunities as those generally accorded foreign states.
complaint, holding that the act of state doctrine barred consideration of the case. The court of appeals reversed and remanded for consideration of whether the district court had jurisdiction. In so doing, it resolved the question the Practical Concepts decision left open: "whether a foreign state would be entitled to sovereign immunity in an action based on an incidental (performance-facilitating) contract term that only a government could offer and perform." The court held that "when a transaction partakes of both commercial and sovereign elements, jurisdiction under the FSIA will turn on which element the cause of action is based on. Even if a transaction is partly commercial, jurisdiction will not obtain if the cause of action is based on a sovereign activity." The court found that the transaction between Millen and CCNAA involved both sovereign and commercial elements. In such a situation, "to the extent that the causes of action are based on promises, breaches of promises, and other allegedly actionable conduct involving extending duty-free status and/or the benefits of Taiwanese law, these would plainly be sovereign aspects of the transaction over which we lack jurisdiction." The Millen court’s exclusive focus on the subject matter of the activity in question gives no weight to the legal form of a foreign state’s undertaking—i.e., whether it was contained in a contract (as in Practical Concepts) or was expressed as a unilateral statement by the foreign state of the benefits that its law extends to investors. Taken alone, the simple failure of one state to waive a provision of its law for the benefit of an investor would not be legally actionable. On the other hand, a plaintiff’s allegation that a foreign state failed to honor a contractual undertaking to provide a tax or customs duties exemption is legally cognizable precisely because it is included in a contract. Taken to its extreme, as occurred in Millen, the subject matter version of the private person test tends to result in a per se rule granting immunity any time the activity giving rise to a cause of action is one normally

95. Millen, 855 F.2d at 881 (noting district court dismissed contract claim “because it alleged promises relating directly to ‘uniquely sovereign’ import-export activity and, therefore, was barred by the act of state doctrine”); see supra note 69 (discussing act of state doctrine).
96. Practical Concepts, 811 F.2d at 1548 n.9 (emphasis in original); see also id. at 1550 n.15.
97. Millen, 855 F.2d at 885.
98. “Promotion of investment is ordinarily a commercial activity; private parties commonly act as public relations agents. On the other hand, the ‘right to regulate imports and exports [is] a sovereign prerogative.’” Id. (citations omitted) (quoting MOL, Inc. v. People’s Rep. of Bangl., 736 F.2d 1326, 1329 (9th Cir. 1984)).
99. Millen, 855 F.2d at 885.
100. In Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094 (S.D.N.Y. 1982), for example, the district court concluded that an entity owned by the Irish government did not engage in commercial activity when it “merely apprised” the plaintiffs of special tax incentives available under Irish law. The court declined to consider the “difficult question,” not presented by the case, of the result that would follow if the defendant instrumentality “had been given its own de facto law-making power in order to offer prospective investors special tax incentives.” Id. at 1110 n.6.
engaged in only by states, regardless of whether it is contained in a contract.\textsuperscript{101}

In contrast to recent lower court decisions such as \textit{Practical Concepts and Millen}, the Supreme Court's decision in \textit{Republic of Argentina v. Weltover, Inc.} emphasized the form of the transaction in question, and not its subject matter.\textsuperscript{102} The Court held that Argentina and its central bank were not immune from a suit seeking to compel the bank to honor obligations under bonds that it had unilaterally rescheduled to meet Argentina's foreign debt burden. It defined the "nature" of an activity as "the outward form of the conduct that the foreign state performs or agrees to perform."\textsuperscript{103} According to the Court, 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" . . . . Thus, a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a "commercial" activity, because private companies can similarly use sales contracts to acquire goods . . . .\textsuperscript{104}

The Court denied immunity because "there [was] nothing about the issuance of these [instruments] (except perhaps its purpose) that is not analogous to a private commercial transaction."\textsuperscript{105} This conclusion is unexceptional with

\textsuperscript{101} The American Bar Association (ABA) developed a proposed amendment to the FSIA in 1988 that also disregarded the legal form of a forum state's undertaking, but to the opposite effect of the approach in \textit{Millen}. The ABA sought to persuade Congress to amend the definition of commercial activity set forth in § 1603(d) of the Act by appending the statement: "A determination of whether an activity is commercial in character shall not be affected by the fact that the activity involves acts or undertakings requiring the exercise of governmental authority. Any such undertakings included in a commercial activity shall be considered to be commercial in character." H.R. 3763, 100th Cong., 1st Sess. (1987). A spokesperson for the ABA explained that the amendment was intended to correct the results in \textit{MOL} and \textit{Millen} and to "ensure[] that the same rule of non-immunity applies to all undertakings made in a commercial agreement." \textit{Foreign Sovereign Immunity Act Amendments: Hearing on H.R. 3763 Before the Senate Comm. on the Judiciary, 100th Cong., 2nd Sess. 81-82, 86-90 (1988) (testimony and statement of Mark Feldman). The Executive Branch opposed the amendment because it would withdraw immunity from all governmental acts associated with a commercial activity, without regard to the legal form of the act or its relationship to the particular cause of action:

\textsuperscript{102} A foreign state undertakes in a commercial contract to perform certain acts requiring the exercise of sovereign authority, the plaintiff should be able to enforce those provisions of the contract. The term 'included in a commercial activity,' however, is extremely broad and would appear to include governmental undertakings not given for consideration or not intended by the parties to be binding, but somehow associated with a commercial activity.

\textit{Id.} at 35-36 (testimony of Elizabeth G. Verville, Deputy Legal Advisor, State Department) (emphasis in original).

\textsuperscript{103} \textit{Id.} at 4512. The Court defined the purpose of an activity as "the reason why the foreign state engages in the activity," and specifically rejected Argentina's argument that immunity should turn on whether the foreign government is acting with a profit motive or "with the aim of fulfilling uniquely sovereign objectives." \textit{Id.} (emphasis in original).

\textsuperscript{104} \textit{Id.} (emphasis in original) (citations omitted).

\textsuperscript{105} \textit{Id.} The Court left open the possibility that, even for other cases arising out of the issuance of bonds, the form of the instrument might not be dispositive. Argentina had argued that the Second Circuit opinion created a per se rule denying immunity for actions based on debt instruments. The Court concluded,
respect to the issuance of bonds in *Weltover*. Unfortunately, however, the Court’s private person test does not suggest what features might transform a transaction that is otherwise "commercial" in form into a "sovereign" activity. As noted earlier, whether or not a foreign government’s activity is "analogous to a private commercial transaction" often depends entirely on how a court defines the relevant activity. In cases more complicated than *Weltover*, therefore, courts are still left with a private person test that is unduly formalistic and easily manipulated.

Cases based on the alleged breach of employment contracts illustrate the shortcomings of the private person test. In *Segni v. Commercial Office of Spain*, for example, the Commercial Office hired Segni, an Argentine national, to market Spanish wines in the midwestern United States. Segni sued the Commercial Office for breach of contract following his termination, and the Commercial Office asserted immunity. The district court denied the claim of immunity and the Seventh Circuit affirmed. The court of appeals defined the relevant activity as a contract to provide product marketing services, and held that immunity should be denied because a private person can engage in such an activity. The court principally relied on the Act’s legislative history to support this holding. It cited the House Report, which stated that "employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States, . . . [is] public or governmental. . . in nature," and which also provided that employment of "laborers, clerical staff or public relations or marketing agents" is a "commercial activity."

These examples in the House Report helped the Seventh Circuit reach its decision in *Segni*, despite the FSIA’s vague definition of "commercial activity." If one hypothesizes slightly different facts, however, the private person test could lead to a result inconsistent with the House Report. Suppose, for example, that a secretary employed in the United States by a foreign government sues for breach of an employment contract. Under *Segni*, a court would define
the relevant activity as a contract for the purchase of secretarial services. The foreign state would enjoy no immunity, because the juridical form at issue would still be a contract, and the subject matter—the purchase of secretarial services—may be performed by a private person, a result consistent with the House Report. But what if the foreign state fires the ambassador’s personal secretary for espionage? To avoid forum state interference in the diplomatic functions of the foreign state, immunity would appear warranted. Under the private person test, however, neither the juridical form nor the subject matter of the contract would change and a court could deny immunity. The difference between immunity from a suit brought by a member of a nation’s diplomatic corps terminated because of suspected espionage and immunity from a similar suit brought by a third country national employed in a commercial office stems from the functions performed by these employees and the entities where they work. For a court to consider these factors, however, it must skate dangerously close to considering purpose.

The simple private person test embraced by the Supreme Court in *Weltover* is therefore inadequate to address all breach of contract cases. The inadequacy of the private person test becomes even clearer when we move beyond contractual relationships. For example, the definition of the relevant activity seems entirely arbitrary in cases involving allegations of "trade libel" against a foreign state. One could fairly describe the activity supporting the cause of action either as "making libelous statements in connection with a commercial activity" or as "stating a foreign government’s official position." Since the result of the private person test flows automatically from the definition selected, this range of plausible definitions effectively means that the current FSIA provides courts no guidance.

This criticism also applies to cases considering whether a foreign state can claim immunity from an action to compel it to bargain with a union. For example, Canada’s Federal Court of Appeals in 1989 applied a definition of commercial activity borrowed from the FSIA (and also relied heavily on the Act’s legislative history) to hold that the U.S. Navy was not immune from the jurisdiction of the Canadian Labour Relations Board; the Board sought to hold union certification proceedings regarding Canadian maintenance workers employed at a U.S. Navy base in Newfoundland. The court stated that it

113. Moreover, the legislative history of the FSIA points in two contrary directions, indicating that a foreign state would be immune from suit on employment contracts with civil servants, but not immune on contracts with clerical staff. See id.

114. See, e.g., *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir.), cert. denied, 493 U.S. 891 (1989); see also infra notes 142-148 and accompanying text (discussing *Gregorian*).

found no rational basis for distinguishing between contracts for the purchase of goods or service and contracts of employment . . . . If, as in my view he is, a supplier of electricity or groceries . . . is entitled to sue the U.S. for breach of contract in a Canadian court, there seems no reason why a Canadian civilian employee there should not have a like entitlement.116

In the court's view, the Labour Board's exercise of jurisdiction related to commercial activity, and consequently the United States could not claim immunity. Although the court noted it was "disturbed by this result," it found it could not distinguish employment on the military base from any other employment relationship without looking beyond the "nature" of the employment to its broad purpose—to serve U.S. defense requirements.117

B. The Sovereignty Approach

When courts applying the private person test conclude that immunity may be warranted, they frequently bolster this conclusion by stating that the immune activity is "sovereign" or "governmental." This approach does not overcome the inadequacies of the private person test, as it leads to a confusion of legal form with content and to an inevitable consideration of the purpose of the activity. The Ninth Circuit in MOL Inc. v. People's Republic of Bangladesh, for example, dismissed the case because it found that Bangladesh's right to regulate exports was a sovereign prerogative.118 Likewise the D.C. Circuit in Millen Industries, Inc. v. Coordination Council for North American Affairs held in part that, despite the presence of commercial elements in the transaction under consideration, it lacked jurisdiction over causes of action based on breaches of promises to extend duty-free status or other benefits of Taiwanese law, because "these would plainly be sovereign aspects of the transaction."119

Other courts have resorted to a stark evocation of "sovereignty" to justify a finding of immunity. The Ninth Circuit took this approach in Gregorian v. Izvestia, in which a U.S. citizen sued Izvestia, then the official newspaper of the Soviet government, claiming, inter alia, that an article in the paper had harmed plaintiff's business and therefore constituted trade libel.120 The Ninth Circuit held that the Soviet defendants were immune because "Izvestia's writing and publishing of articles reporting or commenting on events constitute 'sovereign or governmental' activities."121 A similar approach supported the

117. Id. at 10.
118. 736 F.2d 1326, 1329 (9th Cir. 1984).
119. 855 F.2d 879, 885 (D.C. Cir. 1988).
120. 871 F.2d 1515 (9th Cir.), cert. denied, 493 U.S. 891 (1989).
121. 871 F.2d at 1522 (quoting Statement of Interest of United States); see infra notes 142-148 and accompanying text.
Foreign Sovereign Immunities Act

holding of the district court in In re Sedco, Inc., which involved a claim of immunity by Petroleos Mexicanos (PEMEX), an agency of the Mexican government, from actions brought against it after one of its exploratory wells in the Gulf of Mexico blew, causing substantial damage in the United States. The court rejected the plaintiffs' claim that the commercial activity exception gave it jurisdiction after finding that the well was exploratory, was located in Mexican territorial waters, and was drilled pursuant to the Mexican government's long-range planning and policymakers. The court held that the commercial activity exception was not applicable "because the nature of Pemex's act in determining the extent of Mexico's natural resources was uniquely sovereign." 

"Sovereignty," not the private person test, also formed the basis of the Canadian Supreme Court's recent opinion reversing the decision of the Canadian Federal Court of Appeals in United States v. Public Service Alliance of Canada. Three of five justices of the Court concluded that some aspects of employment at the base were "sovereign," while others were "commercial." A "bare employment contract," the Court found, was "for the most part commercial," but it held that the case before it involved "the structuring of work of the base" which was "sovereign in nature." The Court was unwilling to apply the private person test outside "the trading context in which it was developed." By contrast, the two dissenting justices held that immunity depended on whether a private person could hire workers for the tasks these workers performed. Because a private person can hire maintenance workers, the case was "in the nature of a commercial activity." 

The two approaches taken to the issue in Public Service Alliance underscore the inadequacy of the U.S. and Canadian definitions of commercial activity. Both the majority's "sovereignty" approach and the dissent's (and the lower court's) private person test found ample support in caselaw. Both approaches, however, divert courts from what would appear to be a more salient question than either the "sovereignty" or the private person analogy: to what extent

---

123. No. 21,641 at 566. Two years later, the district court vacated its earlier opinion, reasoning that a trial was needed to determine whether the well was exploratory or for production. 610 F. Supp. at 306.
125. No. 21,641 at 3-4.
126. Id.
127. Id. at 5.
128. Id. at 6 (Sopinka and Cory, JJ., dissenting).
129. Id. at 7 (Sopinka and Cory, JJ., dissenting). The dissent thus followed the private person test applied by the lower court. See supra notes 115-116 and accompanying text (discussing Canada Labour Code)
would the denial of immunity interfere with the foreign state's functions? The answer to this question may depend on a number of factors, including the functions performed by the particular foreign state entity, the functions performed by the particular employees, and the ways that the particular proposed actions of forum state authorities would (or would not) interfere with the foreign state's functions. The revisions to the FSIA proposed in Part III below would enumerate exceptions that would adopt this functional approach and specifically consider these factors.\footnotemark[130]

C. Consideration of Purpose

The ban on consideration of purpose contained in section 1603(d) of the FSIA represents the only guidance contained in the Act on classifying activities as commercial, and courts generally recite this statutory standard.\footnotemark[131] Recently, however, several decisions have strayed from the Act and have considered purpose when classifying an activity. Purpose often enters immunity analysis when a court identifies the relevant activity so broadly as to embrace the purpose of the activity. This occurred in MOL, for example, where both the district court and the Ninth Circuit defined the relevant activity not as breach of an agreement but rather as regulation of a natural resource.\footnotemark[132]

Other courts have simply rejected the express requirement contained in section 1603(d) that they look to the nature of an activity and not to its purpose. The first court to do so was the Fifth Circuit in De Sanchez v. Banco Central de Nicaragua.\footnotemark[133] The plaintiff in De Sanchez purchased a certificate of deposit in 1978 from Banco Nacional de Nicaragua, dated to mature in 1982. She sought early redemption of her certificate when the Somoza regime approached collapse in 1979. However, Nicaragua suffered from an acute shortage of foreign exchange, and even a letter from President Somoza to Banco Nacional (written two weeks before he fled the country) failed to produce the redemption. Banco Central ultimately issued a check, but by the time the plaintiff attempted to cash it in the United States the Sandinista government was in control and Banco Central had issued stop-payment orders on all its checks.\footnotemark[134]

On review, the Fifth Circuit initially considered whether the commercial activity exception applied.\footnotemark[135] The court identified the relevant activity as

\footnotetext[130]{See infra notes 204-208 and accompanying text.}
\footnotetext[131]{28 U.S.C. § 1603(d) (1988); see supra text accompanying note 50-51 (quoting provision).}
\footnotetext[132]{MOL, Inc. v. People's Rep. of Bangi. , 572 F. Supp. 79, 84 (D. Or. 1983), aff'd, 736 F.2d 1326, 1329 (9th Cir. 1984); see supra notes 59-66 and accompanying text (discussing MOL).}
\footnotetext[133]{770 F.2d 1385 (5th Cir. 1985).}
\footnotetext[134]{Id. at 1388.}
\footnotetext[135]{The court began its analysis by criticizing the FSIA for providing "distressingly little guidance." Id. at 1392.}
Banco Central’s failure to honor the check issued to Mrs. de Sanchez, and considered whether that activity was commercial. Noting that "the same activity can often be characterized in a number of ways," the court characterized Banco Central’s failure to honor the check as a "sovereign" activity: the court concluded that the bank did not enter the marketplace as a commercial actor selling dollars, but rather acted pursuant to its official government role as regulator of foreign currency reserves and the sale of foreign exchange. While it recognized that this conclusion was based in part on consideration of the "purpose" of the bank’s activity, the court concluded that it could not properly analyze the activity any other way. If it looked only to the transaction’s nature, the court stated, it would have reached a conclusion contrary to policies it considered to underlie the FSIA, thereby touching sharply on "national nerves." To avoid this result the court read the nature/purpose distinction out of the FSIA under the guise of statutory interpretation: "we do not interpret [section 1603(d)] . . . to bar us totally from considering the purposes of different types of activities." The court pointed out that Congress itself employed a "purpose" test in the examples contained in the House Report, which included as "commercial" any activity normally engaged in for profit. Following De Sanchez, the district court in Gregorian v. Izvestia explicitly rejected the nature/purpose distinction. The plaintiff in Gregorian exported medical and laboratory equipment to the Soviet Union for approximately ten years. After a series of contract disputes, the Soviet government revoked the accreditation certificate that permitted the company to operate in Moscow. Several days later Izvestia, then the newspaper of the Presidium of the Supreme Soviet of the U.S.S.R., published an article about Gregorian entitled

136. Id. The court stated: "Banco Central’s issuance of the check could be characterized either as a sale of foreign currency or as the regulation and supervision of Nicaragua’s foreign exchange reserves. The former is a commercial activity: Private banks often sell foreign currency to one another . . . . The regulation and supervision of a nation’s foreign exchange reserves, however, is a sovereign activity." Id. (citations omitted).

137. Id. at 1393-94.

138. The court noted:

[W]e do not believe that an absolute separation is always possible between the ontology and the teleology of an act. Often, the essence of an act is defined by its purpose—gift-giving, for example. Unless we can inquire into the purposes of such acts, we cannot determine their nature. 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 . . . acts are commercial because they are generally engaged in for profit. Id. at 1393.

139. Id. at 1394.

140. Id. at 1393.

141. Id.; see also Segni v. Commercial Office of Spain, 835 F.2d 160, 164 (7th Cir. 1987) (relying on De Sanchez to conclude that nature and purpose are not totally discrete, and determining that FSIA permitted courts to look to purpose if they did so "only so far as necessary to define nature").

"Duplicitous Negotiator: A Story about a U.S. Firm and an Abuse of Trust." Gregorian sued Izvestia and several other Soviet government entities alleging breach of contract and libel.143

When the Soviet defendants failed to respond, the district court entered a default judgment, finding jurisdiction pursuant to the commercial activity exception, and two Soviet defendants then moved to set aside the default judgment.144 Gregorian claimed that the defendants placed the statements about him in Izvestia to avoid their contractual obligations, and that therefore the statements constituted commercial activity, leading the court to conclude that it was "impossible" to apply the nature/purpose distinction to the case before it.145 The court also rejected the private person test because it was "perplexed as to what political and economic system's criteria to apply."146 Having thrown up its hands at the nature/purpose distinction and the private person test, the court based its conclusion that libel did not fall within the commercial activity exception on the fact that the "noncommercial tort exception" of the FSIA requires a court to confer immunity upon foreign states from libel claims.147 Noting that the U.S. government itself is immune from libel claims, and criticizing the "jumbled draftsmanship" of the commercial activity exception, the court concluded that Congress could not have intended the commercial activity exception to create a loophole in the noncommercial tort exception by permitting libel claims that were related to commercial activity.148

As De Sanchez and Gregorian demonstrate, frustration with the nature/purpose test has prompted courts to disregard the FSIA's express injunction against consideration of purpose. In Republic of Argentina v. Weltover, Inc.,149 the Supreme Court closed the door on these efforts to circumvent the statute by rejecting Argentina's argument (based on De Sanchez) that the Court needed to inquire into the purpose of Argentina's activities in order to determine their nature: "However difficult it may be in some cases

143. Id. at 1226.
144. Id. at 1232-34.
145. Id. at 1232.
146. Id. The court noted that the media in the West were typically privately owned, while the Soviet Constitution provided that the means of communication were the property of the state. Since the two systems permitted private parties to pursue different activities, the court declined to apply the private person test.
147. 28 U.S.C. § 1605(a)(5) (1988) provides that foreign states are not immune in any case not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to . . . any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.
149. 60 U.S.L.W. 4510 (U.S. June 12, 1992).
to separate 'purpose' . . . from 'nature' . . . , the statute unmistakably commands that to be done."

The courts' tendency to skirt the FSIA's "purpose" limit is symptomatic of the inadequacies of existing law. As this survey of decisions demonstrates, the FSIA's commercial activity exception is insufficiently specific and its application is confusing and difficult to predict. The only legislative guidance given to U.S. courts—that they look at the nature and not the purpose of an activity—defies logical application. The surrogate for the nature/purpose distinction, the private person test, depends almost entirely on the way a court defines the "relevant activity" it is asked to classify. Because there exist no clear standards for determining the relevant aspects of a transaction, the private person test can be easily manipulated. The nature/purpose distinction leaves the courts with the choice of either adhering to the statute and reaching results that they find "disturbing," or disregarding specific statutory language. Neither option presents a satisfactory method of developing sound U.S. foreign state immunity law. Weltover makes clear that the courts will not untangle the commercial activity exception. We must look instead to Congress.

IV. RETHINKING THE COMMERCIAL ACTIVITY EXCEPTION: A FUNCTIONAL APPROACH

If the nineteenth-century doctrinal premises of foreign state immunity exist only as anachronisms, and if the statutory nature/purpose test remains a meaningless mantra, one might ask whether the doctrine of foreign state immunity should be jettisoned entirely. Some commentators have suggested this approach. Even these critics, however, recognize the need to protect certain activities of one state from interference by the courts of another state, and

150. Id. at 4512 (citations omitted).
151. As Sir Hersch Lauterpacht noted over 40 years ago, "the distinction between acts jure gestionis and acts jure imperii cannot be placed on a sound logical basis. In a real sense all acts jure gestionis are acts jure imperii, for the state always acts as a public person. It cannot act otherwise."
Lauterpacht, supra note 9, at 224.
153. See, e.g., BADR, supra note 9, at 135 (arguing that "public acts of foreign states, objectively defined, lie ab initio beyond the jurisdiction of local courts and do not, therefore, raise a proper issue of immunity"); FALK, supra note 69, at 139-69 (urging that doctrine of foreign state immunity be discarded, as interests it serves better addressed by act of state doctrine); see also Singer, supra note 9, at 59. For further discussion of the act of state doctrine, see supra note 69.

Badr and Falk here confront what Sir Ian Sinclair has called "the borderland between sovereign immunity and the act of State doctrine." SINCLAIR, supra note 9, at 213. When foreign state immunity was absolute and was invoked by a personal sovereign, it made sense to conceive of the doctrine as an immunity ratione personae. But now that the doctrine is restricted, it necessarily has a component that is ratione materiae. Sinclair explains, "[I]munity applies ratione personae to identify the category of persons . . . by whom it may prima facie be claimable; and ratione materiae to identify whether substantively it may properly be claimed." Id. at 199.

517
simply argue that other doctrines could provide such protection.\textsuperscript{154} Moreover, the fact that all states apparently embrace the doctrine of foreign state immunity counsels against abolition.\textsuperscript{155} States disagree about the scope of the doctrine, but agree that international law limits the freedom of one state to exercise adjudicatory jurisdiction over another.\textsuperscript{156} Foreign state immunity therefore should not be eliminated; rather, the restrictive theory of foreign state immunity must be revised. A reformed approach to restrictive foreign state immunity would remove the contradictions in the FSIA and would meet greater acceptance among governments than a new doctrine, however conceptually sound.\textsuperscript{157}

The universal acceptance of foreign state immunity demonstrates widespread recognition of the need to restrain the authority of domestic courts. Such acceptance appears to result not from shared conceptions of "soverignity," but rather from a common—and more pragmatic—conviction that a court of one state should not be permitted to exercise jurisdiction over another state if this would unduly interfere with the functions of that state. Foreign state immunity doctrine has contained such a functional dimension since the U.S. Supreme Court’s decision in The Schooner Exchange v. M’Fadden,\textsuperscript{158} but

\textsuperscript{154} Badr accepts this point, but believes that "any true act jure imperii of a foreign state would not meet the requirement of minimum jurisdictional contacts with the country of the forum and would therefore lie squarely outside the jurisdiction of the local courts." BADR, supra note 9, at 97. However, a number of the difficult cases discussed above in which immunity appears to be warranted, e.g., the libel claim in Gregorian v. Izvestia, 871 F.2d 1515 (9th Cir.), cert. denied, 493 U.S. 891 (1989), and cases that could arise out of employment of foreign diplomats in the United States, would encounter no jurisdictional obstacle under private international law.


\textsuperscript{156} No government commenting on the International Law Commission's Draft Articles has suggested otherwise, and governments commonly refer to the international law standard to justify their efforts to restrict foreign state immunity. The drafters of the FSIA, for example, portrayed the Act as a codification of the restrictive theory of foreign state immunity "as presently recognized in international law." HOUSE REPORT, supra note 4, at 600; see also Oliver J. Lissitzyn, Sovereign Immunity as a Norm of International Law, in TRANSNATIONAL LAW IN A CHANGING SOCIETY 188, 194 (Wolfgang Friedmann et al. eds., 1972).

\textsuperscript{157} As Professor Crawford has noted, foreign state immunity is
a well-established technique of deference . . . with which courts and States are reasonably familiar, and one whose outright abolition would undoubtedly cause serious concern to many States . . . . [C]ertainly [the doctrine] is better developed and more certain than the vague, conflicting and disputable act of State and non-justiciability rules with which the United States Supreme Court and English House of Lords have been grappling in recent years. CRAWFORD, supra note 8, at 81. Similarly, Professor Brownlie applies the foreign state immunity rubric to his recommendation of competence-based rules, relying upon the fact that all states appear to embrace the doctrine of foreign state immunity. Unfortunately, however, Professor Brownlie has not explained how a court would determine whether a particular transaction is "commercial," reasoning that "[d]efinitions tend to be obvious, as far as they go, without providing any real assistance in the characterisation of the more difficult sets of facts." Brownlie, supra note 10, at 72.

\textsuperscript{158} Chief Justice Marshall concluded that all sovereigns consent to a relaxation in their absolute jurisdiction over their territories, because their "mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require." The Schooner Exch.
Foreign Sovereign Immunities Act

the vagaries of "sovereignty" and the formalism of the private person test have obfuscated its importance in recent U.S. court decisions.

A. Diplomatic Immunity Compared

Notions of diplomatic immunity, from which Chief Justice Marshall derived the immunity of the state itself, are unequivocally premised on functional necessity. While the stated rationale for diplomatic immunity has been refined considerably in recent years, the doctrine has existed from "time immemorial."\(^9\) The earliest rationale for diplomatic immunity, now uniformly rejected, was the fiction of extraterritoriality: receiving state jurisdiction must be limited because the ambassador and embassy premises were, as a legal matter, on foreign territory.\(^{160}\) A second theory, that of "representative character," regarded the ambassador as the personal representative of the foreign sovereign; any insult to the ambassador was thus a slight to the personal dignity of the sovereign.\(^{161}\) Like extraterritoriality, the "representative character" theory is no longer considered adequate to explain the rules of diplomatic immunity.\(^{162}\)

The modern rationale for diplomatic immunity, as reflected in the 1961 Vienna Convention on Diplomatic Relations,\(^{163}\) is the notion of "functional necessity," whereby receiving states accord immunity when necessary to avoid interference with the functions of the diplomatic mission of a foreign state.\(^{164}\)
This doctrine thus balances the competing interests of the receiving state and the sending state. Full criminal immunity for diplomatic personnel reflects an international consensus that diplomatic functions of all states would be at risk if diplomats faced real or trumped-up charges by a receiving state. On the other hand, the narrow exceptions to immunity from civil jurisdiction, such as the exception for certain local real property transactions, permit the receiving state to exercise jurisdiction in cases in which local interests are significant and risks of interference in the functions of the sending state are minimal, so that a private action against the foreign diplomat would not seriously threaten the diplomatic system.

The functional approach to diplomatic immunity reflected in the Vienna Convention enjoys almost universal acceptance. The common understanding of the functions of a diplomatic mission, specifically enumerated in the Convention, facilitates this harmony. The Convention's rather clearly and comprehensively specified rules make the outcome of immunity questions more predictable, and reciprocity concerns act as a major constraint on the activities of both receiving and sending states, stabilizing the system. The success of these diplomatic immunity rules suggests that an expressly functional approach would work effectively in foreign state immunity law.

B. Foreign State Immunity: Balancing Competing United States Interests

There exists no agreed list of government functions comparable to the Vienna Convention's list of diplomatic functions. Instead, contemporary notions of foreign state immunity have evolved against a backdrop of widely varying political and economic roles for government, both in theory and in practice. When it abandoned the absolute theory of foreign state immunity, the United States adopted an approach that:

[sought] to accommodate the interests of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts.

165. There are currently over 156 parties to the Vienna Convention. See Department of State, Treaties in Force 310 (1992); see also Philip R. Trimble, International Law, World Order, and Critical Legal Studies, 42 Stan. L. Rev. 811, 836 (1990) (noting universality of diplomatic law may derive not only from comparable functions performed by diplomatic missions throughout world, but also from existence of “subculture of diplomats, with similar training, outlook, and interests.”).

166. See Vienna Convention, supra note 160, art. 3.

Foreign Sovereign Immunities Act

The interests on one side of this balance—those of private individuals and entities that do business with foreign governments—explain why the United States abandoned absolute immunity. This set of interests is often described as "fairness to plaintiffs," a phrase that offers a sense of ideological neutrality, suggesting merely that those dealing with foreign states deserve their day in court. In allowing suits against foreign states, however, the restrictive theory advances more than the interests of individual U.S. plaintiffs. The elimination of immunity promotes the security of contract and minimizes disruption in the normal rules of the marketplace, and thus furthers more broadly the interests of the U.S. economic and political system.

What of the other side of the balance? How should courts weigh the interest in permitting actions against foreign governments against the need to protect from interference those functions of foreign governments that the court in Victory Transport called "political acts." Although we usually speak in terms of balancing the interests of U.S. plaintiffs against those of foreign governments, the FSIA also balances the U.S. interest in permitting U.S. plaintiffs to sue against other interests of the United States government. Two important considerations modulate the U.S. desire to permit normal operation of market mechanisms, including the eventual resort to litigation. The first is reciprocity: how would U.S. exercise of jurisdiction affect the United States as a putative defendant in foreign courts? The second is the foreign policy risk of the exercise of U.S. jurisdiction. This risk increases if the United States applies rules of foreign state immunity that conflict with international law, or that lack the predictability necessary to enable both foreign states and private actors to take them into account in planning their activities.

Courts applying the FSIA seemingly have lost sight of these justifications underlying the restrictive theory. Current law pits the U.S. interest in exercising jurisdiction against the foreign state's interest in "sovereignty," a concept that fails to assist courts to develop immunity standards. The present commer-

168. The Legal Adviser to the State Department testified to Congress that the "general purpose" of the FSIA was to "assure that American citizens are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions or who otherwise act as a private person would." 1976 Hearings, supra note 27, at 24 (testimony of Monroe Leigh, Legal Adviser, State Department). See also The I Congreso del Partido, [1980] 1 Lloyd's Rep. 23 (Eng. C.A.), aff'd, [1981] 2 All E.R. 1064, 1070 (H.L.) ("It is necessary in the interest of justice to individuals having transactions with states to allow them to bring such transactions before the court."). noted in 76 Am. J. Int'l L. 402 (1982).


170. The reciprocity implications of limiting foreign state immunity were among the reasons for the State Department's move to the restrictive theory, including the practice of not claiming immunity for U.S. merchant ships abroad and of subjecting the U.S. government to the jurisdiction of federal courts. See 26 Dep't. St. Bull. 984, 985 (1952).

171. The State Department has recently found it necessary to participate in an increasing number of FSIA cases on these grounds. See generally Carolyn J. Brock, The Foreign Sovereign Immunities Act: Defining a Role for the Executive, 30 Va. J. Int'l L. 795 (1990) (discussing reasons for Executive Branch intervention in FSIA cases, including Gregorian, Practical Concepts, and Millen).
cial activity exception invites no judicial inquiry into the reciprocity implications of an exercise of jurisdiction or into a decision's potential inconsistency with international law. Moreover, because the Act leaves all difficult decisions to the courts, it fails to produce predictable results and thus increases the likelihood that actions against foreign states will have adverse foreign policy consequences.

A fluid notion of commercial activity may have seemed desirable to Congress when it attempted the first national codification of restrictive immunity. However, following fifteen years of experience under the Act, the enactment of statutes by a number of other states that also follow a restrictive theory of immunity, and several international efforts to codify the restrictive theory, we now have sufficient experience to overhaul the FSIA.

Any revision of the FSIA must begin with the recognition that no formula can easily replace the FSIA’s nature/purpose distinction. The vexing problem of distinguishing commercial activities from immune transactions will exist so long as the United States wishes to permit its courts to exercise jurisdiction over some, but not all, activities of foreign states. We can, however, improve the operation of the commercial activity exception by revising the FSIA in four ways. First, a court should begin its assessment with an "individuation" analysis, whereby it identifies the precise causes of action at issue, to lay the basis for the court's consideration of personal jurisdiction and determination of immunity. Second, the Act should pare back the situations in which U.S. courts must confront the commercial/sovereign distinction, by requiring a court to determine whether it can exercise personal jurisdiction over the foreign state before considering whether an activity of that state is "commercial." Third, in lieu of the existing single definition of commercial activity, the statute should enumerate specific exceptions to immunity, based upon those incorporated in other restrictive immunity statutes, international codifications, and cases that have arisen under the FSIA. Finally, the Act should expressly direct courts to consider the functional interests balanced by the FSIA in cases that fall outside of the enumerated exceptions, rather than leaving them to flounder with the commercial/sovereign distinction.

1. Individuation of Each Cause of Action

Under the prevailing "private person test," a court defines the relevant activity and then asks whether a private person could engage in that activity.

Foreign Sovereign Immunities Act

Because there exist no guidelines directing a court to the "relevant" aspect of an activity, and because designation of an aspect as "relevant" can be dispositive of a case, the private person test offers no real standards for the immunity determination. As a first step towards filling this gap, a revised FSIA should expressly require courts to begin their immunity analysis by "isolat[ing] those specific acts of the named defendant that form the basis of the plaintiff's suit." This inquiry, which Professor Crawford calls "individuation," would improve a court's analysis of minimum contacts to determine personal jurisdiction and would provide a foundation for the determination of immunity under either the proposed enumerated exceptions or those cases falling outside this enumeration.

In re Sedco, Inc. provides an example of the consequences of courts' current failure to individuate the causes of action before considering immunity. In Sedco, the district court failed to describe the plaintiffs' cause of action, and simply concluded that immunity was warranted because "the nature of Pemex' act in determining the extent of Mexico's natural resources was uniquely sovereign." If the court had first considered what causes of action were before it, and had determined, for example, that plaintiffs alleged that Pemex used faulty equipment, drilled in negligent manner, or made negligent judgments in its selection of a drill site, it would have been hard-pressed to define the cause of action as "determining the extent of . . . natural resources."

Proper individuation also would avoid the type of error evidenced by the district court's decision in Callejo v. Bancomer, S.A., where the district court classified the activities of another foreign state entity instead of limiting itself to the activities of the named defendant. Further, individuation would require courts to separate actionable from unactionable causes of action, such as the claim of breach of contract and the claim of tortious injury from the refusal to permit entry in Arango v. Guzman Travel Advisors Corp. Finally, individuation would keep a court's analysis on the right level, neither considering the policies implemented by a particular transaction (such as the management of natural resources in MOL, Inc. v. People's Republic of Bangladesh), nor assessing, in a breach of contract case, the type of consideration

---

173. De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1391 (5th Cir. 1985); see supra notes 75-79 and accompanying text (discussing De Sanchez).
174. Crawford, supra note 8, at 94.
176. 543 F. Supp. at 566.
177. 764 F.2d 1101 (5th Cir. 1985) (summarizing unreported district court opinion).
178. 621 F.2d 1371 (5th Cir. 1980); see supra notes 75-76 and accompanying text (discussing Arango).
179. 572 F. Supp. 79 (D. Or. 1983), aff'd, 736 F.2d 1326 (9th Cir. 1984); see supra notes 59-66 and accompanying text (discussing MOL).
given by a foreign state (such as the "exercises of sovereign authority" in
Millen Industries, Inc. v. Coordination Council for North American Af-
fairs\(^\text{180}\)).

2. Determining Personal Jurisdiction Before Immunity

The FSIA’s existing commercial activity exception fuses the questions of
immunity and personal jurisdiction. Courts considering claims under the FSIA
generally first assess whether a foreign state is immune and then determine
whether the defendant state has sufficient contacts with the United States
to meet one of the FSIA’s three standards for personal jurisdiction.\(^\text{181}\)
This approach leads to two problems. First, courts have found the Act’s three
separate tests confusing.\(^\text{182}\) Second, by deciding immunity before determining

\(^{180}\) 855 F.2d 879 (D.C. Cir. 1988); see supra notes 94-99 and accompanying text (discussing Millen).

\(^{181}\) This approach was developed by the Second Circuit in Texas Trading & Milling Corp. v. Federal
Rep. of Nig., 647 F.2d 300, 308 (2d Cir. 1981); see supra notes 52-58 and accompanying text (discussing Texas Trading). The three tests are: 1) Is the action "based upon a commercial activity carried on in the
United States by [a] foreign state?" 2) Is the action based upon an "act performed in the United States in
connection with a commercial activity of [a] foreign state elsewhere?" 3) Is the action based upon an act
outside the territory of the United States, in connection with a commercial activity of the foreign state
elsewhere, yet "cause[d] a direct effect in the United States?" 28 U.S.C. § 1605(a)(2); see supra note 55
(quoting § 1605); see also 28 U.S.C. § 1603(e) (defining "commercial activity carried on in the United
States" as "commercial activity . . . having substantial contact with the United States.").

\(^{182}\) See generally DELLAPENNA, supra note 4, §§ 3.8-.10; Trooboff, supra note 6, at 335-351. The
district court’s decision in Weltover, Inc. v. Republic of Arg., 753 F. Supp. 1201 (S.D.N.Y. 1991), aff’d,
941 F.2d 145 (2d Cir. 1991), aff’d, 60 U.S.L.W. 4510 (U.S. June 12, 1992), illustrates one difficulty
courts face in attempting to apply the FSIA’s minimum contacts requirement. Relying on Texas Trading,
the court first held that failure to make payment on bonds that called for payment in New York constituted
a "direct effect" in the United States, thereby establishing jurisdiction under the third ("direct effects")
clause of § 1605(a)(2). The court then held that the contacts possessed by Argentina and its Central Bank
with the United States were sufficient to establish personal jurisdiction under the Due Process Clause,
because the defendants promised to pay in New York, maintained consulates engaged in commercial activity
throughout the United States, and maintained bank accounts in the United States. 753 F. Supp. at 1207.

As Professor Carlos Vdzquez has pointed out, this two-step approach improperly bifurcates the inquiry:
"The courts should be interpreting the direct-effect clause in light of the due process clause’s minimum
contact requirements and should find the commercial-activities exception satisfied only if the forum-related
activities on which the action is based are sufficient in themselves to satisfy due process." Carlos M.
Vdzquez, The Relationship between the FSIA’s Commercial-Activities Exception and the Due-Process
avoided this problem by identifying the cause of action as a breach of obligations on bonds with which
embassy and consulate transactions have nothing to do. See Weltover, 60 U.S.L.W. at 4513 (assuming
without deciding that foreign state is "person" for purposes of Due Process Clause, and holding that
Argentina, by issuing instruments denominated in dollars and payable in New York, and by appointing
a financial agent in New York, possessed minimum contacts sufficient to satisfy constitutional test).

Nelson v. Saudi Arabia, 923 F.2d 1528 (11th Cir. 1991), cert. granted, 60 U.S.L.W. 3827 (U.S.
June 9, 1992) (No. 91-522), illustrates the confusion over the first clause of section 1605(a)(2). There,
the court of appeals held that Nelson’s cause of action for damages suffered during alleged detention and
torture in Saudi Arabia were "based on" his recruitment and employment in the United States. 923 F.2d
at 1533-34. Cf. Stena Rederi A/B v. Comision de Contratos del Comite Ejecutivo General del Sindicato
Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C., 923 F.2d 380, 387-88 (5th
Cir. 1991) ("The only relevant acts for purposes of jurisdiction under the FSIA are those acts that form
the basis of the plaintiff’s complaint . . . ."); America W. Airlines, Inc. v. GPA Group, Ltd., 877 F.2d
personal jurisdiction, courts may unnecessarily reach complex immunity questions. A revised FSIA should therefore clarify the standards for determining personal jurisdiction. Once those standards are clarified, the Act should also direct courts to decide personal jurisdiction before considering immunity.\footnote{183}

The enumeration of specific exceptions offers a partial solution to the existing confusion over the meaning of the FSIA's minimum contacts standards. As is done in foreign statutes,\footnote{184} Congress should specify for certain kinds of cases (e.g. those relating to employment contracts, membership in corporations, intellectual property, or taxes) what contacts with the United States are sufficient to establish personal jurisdiction. For important categories of cases, however, (including cases for breach of contract, for supply of goods or services or financing agreements), foreign statutes prescribe no such special rules, relying instead on the otherwise applicable rules of the relevant court.\footnote{185} Moreover, it would not be possible to articulate specific rules to govern cases decided under the default clause.\footnote{186} Thus, Congress will still need to provide generally applicable standards for determining personal jurisdiction. It could take up Peter Trooboff's suggestion to clarify its apparent

---

\footnote{183}{Ultimately, the wisdom of this proposal depends on the relative clarity of a revised commercial activity exception and of any new minimum contacts standard. If the commercial activity exception is revised but the existing minimum contacts standards are retained, for example, inquiry into immunity should probably continue to precede a minimum contacts analysis.}

\footnote{184}{Some of the enumerated exceptions in Australia's statute, for example, specify a particular nexus to the forum state. See, e.g., Australian Immunity Act, supra note 8, § 12(1) (contracts of employment made or to be performed in Australia), § 15 (registration or protection of invention or trademarks, or use of a trade name "in Australia"), § 16 (membership in bodies incorporated in Australia), § 20 (obligations imposed by Australian tax law).}


\footnote{186}{See infra part IV.B.4.a.}
intention to apply more restrictive minimum contacts rules to foreign states than those applicable to other foreign defendants. Alternatively, Congress might adopt Professor Dellapenna's recommendation that the minimum contacts standards for foreign states be premised on the rules of private international law. The choice between these two options illustrates that elaboration of a minimum contacts rule, like the immunity determination, requires a careful balancing of competing U.S. interests, which is best performed in a legislative setting.

In addition to clarifying the minimum contacts standards, Congress should direct courts to determine whether they have personal jurisdiction before considering immunity. This change would bring U.S. law into conformity with international trends. More important, personal jurisdiction analysis is likely to remain more familiar to U.S. courts than immunity determinations, particularly if the FSIA’s minimum contacts standards are clarified. An amendment that requires a court to determine personal jurisdiction before reaching the question of immunity may therefore avoid needless immunity determinations.

3. Experience-Based Exceptions to Immunity

Courts should turn to the question of immunity only after they have properly individuated the causes of action and established that they have personal jurisdiction. As the earlier discussion of cases demonstrated, the FSIA currently fails to provide a workable definition of commercial activity, leading to unpredictable results. A revised FSIA should enumerate types of transactions that constitute commercial activities in order to clarify the immunity determination.

Of the states codifying the restrictive theory of foreign state immunity since 1976, only Canada has copied the oblique definition of commercial activity.
Foreign Sovereign Immunities Act

found in the FSIA. States instead generally identify "specific categories or classes of cases that have arisen in practice and fashion rules for each such category[,] taking into account the reasons for according immunity or for asserting jurisdiction in that specific context." These statutes eschew inquiry into the nature of activities and avoid the question whether the private person test speaks to the subject matter of an activity or to its judicial form. Thus, statutes containing enumerated exceptions reflect legislative determinations that, in some cases, a court should look first to the form of a transaction (e.g., a contract for goods or services) to determine whether to grant immunity, whereas in other cases the identities of the plaintiff and the foreign state defendant might be dispositive (e.g., specific rules for different kinds of employment contracts). Unlike the FSIA’s commercial activity exception, such statutes promote predictability and embody the results of legislative consideration of reciprocity and consistency with international law.

The Australian Immunity Act provides a workable model for any revisions to the FSIA. That statute, like the FSIA, recognizes that foreign states are immune subject to specific exceptions. Several provisions parallel exceptions found in the FSIA, but others detail specific exceptions that the Act addresses only generally under the commercial activity exception.

The Australian Immunity Act defines a commercial transaction as:

[A] commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged [including] (a) a contract for the supply of goods or services; (b) an agreement for a loan or some other transaction for or in respect of the provision of finance; and (c) a guarantee or indemnity in respect of a financial obligation, but does not include a contract of employment or a bill of exchange.

191. See Canadian Immunity Act, supra note 185, § 3; cf. Australian Immunity Act, supra note 8; Singapore Immunity Act, supra note 185, § 4; South African Immunities Act, supra note 185, § 3; U.K. Immunity Act, supra note 185, § 2.

192. LAW REFORM COMM’N REPORT, supra note 185, ¶ 52.

193. Id. ¶¶ 64-65. In drafting Australia’s statute, the Australian Law Reform Commission considered the respective merits of other formulations, including the FSIA and the U.K. Immunity Act. In choosing to model Australia’s statute after the U.K. Immunity Act the Commission rejected the “hallowed” nature/purpose distinction. It found that “[i]t is not possible to classify the ‘nature’ of the transaction without reference to its purpose. The nature of an activity is not some abstract human idea (certainly not for legal purposes) . . . . The classifications ‘governmental’ and ‘commercial’ are themselves purposive.” Id. ¶ 49.


195. These include denial of immunity in cases in which the foreign state has waived its immunity, id. § 10; in certain tort cases, id. § 13; with respect to certain real property transactions, gifts and succession, id. § 14; and with respect to arbitration agreements and arbitral awards, id. § 17. Cf. 28 U.S.C. §§ 1605(a)(1)-(6) (1988).

196. These include contracts of employment, Australian Immunity Act, supra note 8, § 12; bankruptcy proceedings, id. § 14(3); intellectual property, id. § 15; membership in corporations and similar associations, id. § 16; bills of exchange, id. § 19; taxes, id. § 20; and “commercial transactions,” id. § 11. The Australian Immunity Act, like the FSIA, also governs service of process on foreign states, id. §§ 23-26, and accords immunity from execution subject to certain exceptions, id. §§ 30-35.

197. Id. § 11(3). The U.K. Immunity Act, unlike the Australian Immunity Act, denies immunity in proceedings relating to contracts for the supply of goods and services, financing transactions, guarantee
A court assessing immunity under the Australian Act thus would deny immunity in cases like *MOL, Inc. v. People's Republic of Bangladesh*\(^{198}\) and *Practical Concepts, Inc. v. Republic of Bolivia*,\(^{199}\) even if the contract in question included terms "that only a government could offer and perform."\(^{200}\) It would also deny immunity with respect to the issuance of public debt in *Republic of Argentina v. Weltover, Inc.*\(^{201}\)

The Australian Immunity Act excludes employment contracts from the definition of "commercial transactions" by addressing them separately. In drafting the provision for employment contracts, the Law Reform Commission considered

the range of factors which are relevant to assessing the competing interests of foreign and forum state. These include where the contract is made, where it is to be performed and where it is breached; whether the employee is a national of Australia, or of the foreign state; whether the employee is permanently or ordinarily resident in Australia, and perhaps whether the work to be performed is 'governmental' or whether the aspect of the employment contract in dispute is of a 'governmental' or 'commercial' nature. To illustrate this last point it is arguable that the foreign state's interest in exclusive jurisdiction is greater where the employee is a head of diplomatic mission than where the work is of an ordinary clerical nature.\(^{202}\)

and indemnity transactions, and "any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority." U.K. Immunity Act, *supra* note 185, § 2(3)(c) (emphasis added). The Law Reform Commission deleted this last phrase from the Australian statute, noting that it had been criticized as impossible to define, and concluded that the effect of this deletion was likely to be slight given the breadth of the enumerated transactions. *Law Reform Comm’n Report, supra* note 185, ¶ 92 (citing Ian M. Sinclair, *The European Convention on State Immunity*, 22 Int’l & Comp. L.Q. 254, 278 (1973)).

188. 572 F. Supp. 79 (D. Or. 1983), aff’d, 736 F.2d 1326 (9th Cir. 1984); *see supra* notes 59-66 and accompanying text (discussing *MOL*).


200. 811 F.2d at 1548 n.9.

201. 60 U.S.L.W. 4510 (U.S. June 12, 1992); *see supra* notes 102-105 (discussing Weltover).

The ABA in 1985 supported an amendment to the commercial activity exception to provide that "commercial activity" includes "any promise to pay made by a foreign state, any debt security issued by a foreign state, and any guarantee by a foreign state of a promise to pay made by another party." *See S. 1071, 99th Cong., 1st Sess. (1985); H.R. 3137, 99th Cong., 1st Sess. (1985). *See also* Mark B. Feldman, *Amending the Foreign Sovereign Immunities Act: The ABA Position*, 20 INT’L LAW. 1289, 1290-91 (1986). The Executive Branch opposed the amendment, see *Arbitral Awards: Hearing on H.R. 3106, 3137, H.R. 4342, and H.R. 4592 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2nd Sess. 73, 77 (1985) (testimony and statement of Elizabeth G. Verville, Acting Legal Adviser, State Department), and the measure was ultimately unsuccessful. More recently, the Executive Branch indicated that "the issuance of . . . debt instruments, like the issuance of promissory notes, mortgages, and commercial paper, is by its nature a commercial activity," but stopped short of endorsing a blanket rule that the issuance of public debt is per se commercial, noting that transactions between two central banks might not constitute commercial activity. Brief for the United States as Amicus Curiae Supporting Respondents at 13 & n.9, Republic of Arg. v. Weltover, Inc., 60 U.S.L.W. 4510 (U.S. June 12, 1992) (No. 91-763). Some foreign statutes address this possibility by excluding agreements between states from statutory exceptions for "commercial transactions." *See, e.g.*, Australian Immunity Act, *supra* note 8, § 11(2)(a)(i).

Foreign Sovereign Immunities Act

The statute adopts a general rule that a foreign state is not immune in an action based on an employment contract made in Australia or to be performed in whole or in part in Australia. This rule does not apply if the plaintiff is a national of the foreign state but not a permanent resident of Australia, or if the plaintiff is a habitual resident of the foreign state. The statute also does not apply to diplomatic and consular personnel, with the exception of support staff who are citizens or permanent residents of Australia.\(^{203}\)

The Australian Immunity Act’s employment contracts provision thus minimizes potential interference with the foreign state’s functions by demarcating protected and unprotected categories. As the Law Reform Commission explained, the forum state’s interest in exercising jurisdiction is greatest in cases that involve the least sensitive categories of employees, those "who are also, perhaps, most in need of protection."\(^{204}\) The detail contained in the employment contracts provision of the Australian Immunity Act therefore constitutes a marked improvement over the FSIA, and such enumeration should be included in any revision of the Act.\(^{205}\) Specific rules that also reflect the respective interests of the forum and foreign states could be developed to address unionization disputes like those in State Bank of India v. NLRB,\(^ {206}\) Goethe House, N.Y., German Cultural Center v. NLRB,\(^ {207}\) and Public Service Alliance.\(^ {208}\) As with the U.K. and Australian statutes, a revised commercial activity exception should also contain detailed provisions addressing immunity for other specified causes of action, such as those relating to intellec-

\(^{203}\) Id. ¶ 100 (discussing diplomatic and consular employees).

\(^{204}\) Id.

\(^{205}\) By contrast, the private person test fails to offer courts any real guidance to a court considering an action against a foreign state for breach of an employment contract. If a court applies the juridical relationship variant of the private person test, it will deny immunity in all such cases. If a court applies the subject matter variant, however, the outcome will be dictated by the court’s definition of the relevant activity, an exercise for which the statute offers no guidance. See supra notes 106-112 and accompanying text (discussing Segni v. Commercial Office of Spain, 835 F.2d 160 (7th Cir. 1987)).

An amendment to the FSIA therefore could also take account of the fact that the exercise of jurisdiction may not itself interfere unduly with the foreign state’s functions, but that a particular remedy might. For example, the Australian Immunity Act limits the remedy available in employment cases by excluding reinstatement orders. Australian Immunity Act, supra note 8, § 29(2). Such an amendment would be especially appropriate in areas with potentially extensive internal ramifications for the foreign state, e.g., unionization disputes.

\(^{206}\) 808 F.2d 526 (7th Cir. 1986); see supra notes 70-71 and accompanying text (discussing State Bank of India).

\(^{207}\) 685 F. Supp. 427 (S.D.N.Y. 1988), rev’d, 869 F.2d 75 (2d Cir. 1989); see supra notes 72-74 and accompanying text (discussing Goethe House).

\(^{208}\) United States v. Public Serv. Alliance of Can., No. 21,641 (Can.) (May 21, 1992) (on file with author); see supra notes 116-117, 124-130 and accompanying text (discussing Public Service Alliance). The Australian Immunity Act addresses this issue because it applies not only to actions for breach of an employment contract, but also to "any proceeding concerning the employment of a person under a contract of employment." Australian Immunity Act, supra note 8, § 29. The Law Reform Commission explained that the provision was intended to apply "to all relations between the employer and employee." LAW REFORM COMM’N REPORT, supra note 185, ¶ 99. The employee should be able to sue the employer "over any rights or duties imposed by law on an employer or employee in respect of the employment relationship, including pension rights arising under such a contract."
tual property, membership in corporations and like associations, and taxes.

Unlike the Australian statute, however, a revised FSIA should group all such exceptions together in a single section. This structure would recognize the common functional underpinnings of the various exceptions, balance the U.S. interest in exercising jurisdiction against its interest in according immunity, and consider the need to be consistent with international law and the importance of producing predictable judicial decisions. The enumerated exceptions would give effect to this balancing in such diverse situations as contracts for the sale of goods and the unionization of foreign state employees. For cases that were not anticipated in the enumeration, the enumerated exceptions might also provide guidance to courts by analogy, which would assist in the application of the default clause discussed below.

209. Both the Australian and the U.K. statutes deny immunity in cases concerning infringement protection and disputed ownership of copyrights, patents, trademarks, and inventions in the forum state. Australian Immunity Act, supra note 8, § 15; U.K. Immunity Act, supra note 185, § 7. The Australian statute, however, recognizes immunity in cases involving the possession or use of intellectual property outside a "commercial transaction." LAW REFORM COMM’N REPORT, supra note 185, ¶ 103.

210. Both statutes contain provisions denying a foreign state immunity for actions relating to its membership in a corporation, unincorporated body, or partnership that has members other than foreign states and that is constituted in or controlled from the host country. Australian Immunity Act, supra note 8, § 16; U.K. Immunity Act, supra note 185, § 8.

211. The U.K. statute denies immunity from liability in proceedings regarding certain specified taxes, including customs duties, value added taxes, excise taxes, and agricultural levies. U.K. Immunity Act, supra note 185, § 11. The Australian statute goes further: if an Australian tax statute applies to an activity engaged in by a foreign state, the foreign state cannot obtain immunity from a suit to collect the tax. Australian Immunity Act, supra note 8, § 20. See LAW REFORM COMM’N REPORT, supra note 185, ¶ 112 (noting that "question is properly one of the scope of Australian taxation legislation, not of foreign state immunity").

212. See supra notes 167-172 and accompanying text.

213. By contrast, the default clause of the U.K. Immunity Act and its progeny appears within the "commercial transaction" exception. See Australian Immunity Act, supra note 8, § 11(3) (stating "commercial transaction" means a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged, but does not include a contract of employment or a bill of exchange.); U.K. Immunity Act, supra note 185, § 3(3)(e) (denying immunity for "any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character)" (emphasis added). Such a structure limits a court's consideration of "like transactions" to those listed in the definition of "commercial transaction," at the exclusion of the other enumerated exceptions of those statutes.
4. Undue Interference in the Functions of the Foreign State

Legislative enumeration of exceptions to immunity would improve the predictability of U.S. court decisions, and would increase the likelihood that those decisions will strike the intended balance among competing U.S. interests. It is impossible, however, to foresee all categories of cases in which questions of foreign state immunity might arise. A revised FSIA should therefore direct a court to apply a functional approach to the immunity determination if it concludes that the enumerated categories do not apply to the case at hand.\footnote{214}

The FSIA could simply extend immunity in all cases that fall outside the enumerated exceptions. This would increase predictability and greatly reduce the risk of results that conflict with international law or with U.S. reciprocity interests. Such an immunity rule, however, would deny private parties access to U.S. courts—the very interest that caused Congress to adopt the restrictive theory in the FSIA. At the other extreme, the Act could be amended to extend the jurisdiction of U.S. courts to all cases outside the enumerated exceptions if the court would have jurisdiction in an action against a private defendant. This option would give primacy to the U.S. interests in protecting U.S. plaintiffs and permitting cases to proceed in U.S. courts, but would greatly curtail judicial consideration of international law and reciprocity and would reverse the FSIA's stated presumption of immunity. Despite the fact that such extreme rules might produce consistent, predictable results, then, neither is satisfactory. A revised FSIA therefore must include a default provision defining the statutory standard applicable to cases falling outside the enumerated categories.

Other statutes offer no more guidance than the present FSIA for such cases.\footnote{215} This lack of additional guidance may be warranted, because the number of cases falling outside the enumerated exceptions is likely to be small and a generally applicable formula that would improve on the nature/purpose distinction has eluded commentators, courts, and legislators.\footnote{216} The unanticipated and novel cases falling outside the enumerated categories, however, will be most difficult for courts to assess. A revised FSIA could improve considerably on the default clauses of foreign statutes in two ways. First, the Act should expressly require a court to balance the interests advanced by the commercial activity exception through a default clause that applies if no


215. \textit{See supra} note 213.

216. \textit{See supra} note 2 and accompanying text.
enumerated category applies to the cause of action. Second, the Act should expressly address some of the most difficult commercial activity cases—tort cases with an alleged nexus to a commercial activity.

a. Advancing the Functional Standard Through a Default Clause

A default clause incorporated in the new commercial activity exception would provide courts with a standard to guide their judgment on whether a particular activity is commercial. Rather than relying on the commercial/sovereign distinction or the private person test, this determination must direct courts to balance the various, and sometimes competing, interests underlying the commercial activity exception. In particular, the default clause should provide that a foreign state shall not be immune with respect to any cause of action 1) that satisfies the applicable minimum contacts standard, 2) as to which the exercise of jurisdiction would not be inconsistent with international law, and 3) that it is based on an activity that, although not encompassed within the enumerated exceptions, should be classified as a commercial activity, giving consideration to whether the exercise of jurisdiction would unduly interfere with the functions of the foreign state. In order to decide whether interference is "undue," a court must consider whether the exercise of jurisdiction demands review of the content or conduct of foreign government policies, for which immunity is appropriate, or over the modalities by which the foreign state has implemented those policies. If a cause of action arises out of a modality, the court should balance the extent and significance of the U.S. interest in exercising jurisdiction against the implications to reciprocity, taking into account U.S. law governing actions against the U.S. government in domestic courts, and assertions of immunity by the U.S. government in foreign courts.\(^\text{218}\)

\(^{217}\) While U.S. courts must construe statutes to be consistent with international law, Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804), few statutes define the authority of the U.S. government by express reference to international law. (One such statute is the "Pelly Amendment," 22 U.S.C. § 1978(a) (1988), which authorizes the imposition of trade sanctions on foreign governments that have acted in ways inconsistent with stated conservation standards "to the extent . . . sanctioned by the General Agreement on Tariffs and Trade.") An express reference to the international law standard would be particularly appropriate in a revised FSIA, where a court's decision could place the United States in violation of international law.

\(^{218}\) While courts would address most contract cases through the enumerated exceptions, many commercial tort cases would need to be resolved under the default commercial activity exception. This exception also would apply in many cases in which the foreign state is subject to administrative proceedings in the forum state, as occurs in cases involving unionization or the application of U.S. environmental law to foreign state instrumentalities. The FSIA currently does not expressly address what law applies to immunity determinations by U.S. agencies, or how those agencies should obtain jurisdiction over foreign states. Any amendment to the Act should clarify that the same immunity standards apply in all U.S agency proceedings. See 1991 I.I.L Resolution, supra note 14, art. II(C) (noting immunity criteria extend to all "organs of the forum state," not just courts). A revision of the FSIA should also clarify rules governing service of process in administrative proceedings.
Several aspects of this proposal deserve comment. First, this proposal would permit a suit to proceed if the exercise of jurisdiction is "not inconsistent with international law." The use of this awkward phrase is deliberate. The doctrine of foreign state immunity in international law currently is in a state of flux. There exists no widely accepted international agreement on the subject, and state practice remains sporadic and difficult to compile. Thus, neither a plaintiff nor a court should be required to demonstrate affirmatively that international law permits the exercise of jurisdiction in a particular case. On the other hand, if a court concludes that international law would bar U.S. jurisdiction, the revised statute should require it to dismiss the case.

Second, a finding of personal jurisdiction over the defendant constitutes a finding that the cause of action bears a sufficient relationship to the United States for a U.S. court to exercise jurisdiction. That a relationship meets this test, however, does not mean that U.S. interests in exercising jurisdiction are so strong that immunity should be denied. Rather, for a court to balance the interest in exercising jurisdiction against other interests implicated by the immunity determination, it must inquire more closely into the extent and nature of the U.S. interest.

Third, this proposal would ask courts to distinguish between the content and the conduct of foreign government policies and the modalities of implementation of those policies. Professor Brownlie, in his work as Rapporteur of the Institute of International Law's project on foreign state immunity, draws this useful distinction between the content of a foreign state's policies and the modalities of implementation. Foreign state immunity cases often arise in situations of extreme national importance, such as the debt crisis in Republic of Argentina v. Weltover, Inc., the collapse of the Somoza regime and attendant run on the Nicaraguan treasury in De Sanchez v. Banco Central de Nicaragua, or the ambitious development program in Texas Trading & Milling, Inc. v. Federal Republic of Nigeria. In none of these cases, however, did the plaintiff request the district court to adjudicate the content of the foreign state's policies. Rather, in each case the plaintiff challenged conventional mechanisms or "modalities" (bonds, a check, and contracts and letters of credit, respectively) by which the defendant state implemented its policies. The proposed policy/modality distinction thus reinforces the importance of individuation, because actionable conduct normally depends upon injury from

219. Brownlie, supra note 10, at 64 (emphasis in original). Professor Brownlie concludes that the "content, conduct and precise implementation of the foreign and defence policies of foreign States are matters outside the competence of the legal system of the forum State." Id. (emphasis added). The cases discussed here demonstrate that the policy/modality distinction applies with equal force to matters of domestic policy.

221. 770 F.2d 1385 (5th Cir. 1985).
use of a particular modality rather than the policy it implements. For example, the cause of action in *Millen Industries, Inc. v. Coordination Council for North American Affairs* arose not from Taiwan's policy of waiving certain duties for foreign investors, but rather from the alleged breach of a contractual obligation to extend such treatment.\(^2\)

Fourth, the statute would require courts to consider the reciprocity implications of a decision whether to exercise jurisdiction. Congress, not the courts, is best equipped to consider general reciprocity implications of the denial of immunity, as when it develops the enumerated exceptions in the FSIA. Nonetheless, the Act should direct courts to consider reciprocity, given the important implications of any immunity decision. United States law regarding the immunity of the United States from the jurisdiction of U.S. courts provides one rough but accessible measure of reciprocity; if the United States has not waived its own immunity from suit, it follows a fortiori that the United States would oppose a foreign court's adjudication of such a claim against the United States.\(^2\)

Assessment of U.S. practice overseas is more difficult, and therefore a court may wish to obtain information from the Executive Branch in cases with uncertain reciprocity implications. While this could lead to a expanded role for the Executive Branch (apparently undermining the FSIA's objective of shifting immunity determinations from the Executive Branch to the courts),\(^2\) the proposed revisions to the FSIA generally would reduce rather than increase overall Executive Branch involvement in foreign state immunity cases.\(^2\) Moreover, the Executive Branch's views on reciprocity would address an issue peculiarly within its area of expertise, while courts would retain the final decision on immunity in individual cases.

Finally, a commercial activity exception that simply denied immunity for all cases outside the enumerated exceptions would be easier to apply than one containing the proposed default provision. The revisions proposed here are intended to reduce the need to resort to a default provision. If unexpected cases

\(^{223}\) 855 F.2d 879 (D.C. Cir. 1988). Courts often confuse the modality of implementing a policy with the policy itself. For example, the Ninth Circuit characterized the cause of action in *MOL, Inc. v. People's Rep. of Bangl.*, 736 F.2d 1326 (9th Cir. 1984), as concerning regulation of natural resources, not a contract for the sale of monkeys.

\(^{224}\) The converse, however, is not true. There may be areas where the United States would be willing to grant its own courts jurisdiction but would be unwilling to accept the jurisdiction of foreign courts.

\(^{225}\) See supra note 44 and accompanying text.

\(^{226}\) In the past few years, the Executive Branch has filed amicus curiae briefs in numerous cases, most recently in *Weltover*. See Brief for United States as Amicus Curiae Supporting Respondents, *Republic of Arg. v. Weltover, Inc.*, 60 U.S.L.W. 4510 (U.S. June 12, 1992) (No. 91-763); see generally Brock, supra note 171 (noting State Department submissions in seven post-FSIA cases). When Congress enacted the FSIA, the Legal Adviser's Office informed the Justice Department that the Department of State would no longer make any immunity determinations. It would, however, "play the same role in sovereign immunity cases that it does in other types of litigation—e.g., appearing as amicus curiae in cases of significant interest to the Government." Letter from the Legal Adviser of the Department of State (Monroe Leigh) to the Attorney General (Nov. 2, 1976), reprinted in 41 Fed. Reg. 50,883, 50,884 (1976).
do arise, the Act should expressly direct the courts to unearth and to balance the competing U.S. interests in the denial or grant of immunity. Thus, if the court has properly identified each cause of action, has determined that it has personal jurisdiction, has identified no international law bar to the exercise of jurisdiction, and has concluded that the cause of action arises out of a modality and not a policy, it would balance the extent of the U.S. interest in exercising jurisdiction against the U.S. reciprocity interest. These are the same questions that Congress should ask in crafting enumerated exceptions. To be sure, they are better answered in a legislative setting. If Congress does not wish to cut off consideration of novel cases, however, it should not leave the courts with the same inadequate guidance that has led to their resounding criticism of the current FSIA.

b. Commercial Tort Cases

A revised FSIA must also expressly address tort cases that arise in connection with an allegedly commercial activity. These cases result not from consensual transactions such as contracts or loans, but from unilateral foreign state actions, such as official statements that allegedly damage plaintiffs' business or an explosion of an allegedly commercial oil well. The FSIA's noncommercial tort exception, like the Federal Tort Claims Act (FTCA),227 preserves immunity for noncommercial torts with respect to "any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."228 Tort claims alleging a nexus to a commercial activity present difficulties because they straddle two exceptions to immunity that are usually explained separately. Unlike the commercial activity exception, the noncommercial tort exception does not concern itself with possible interference with the foreign state's functions.229 If the tort is of a kind covered by the statute,230 the forum state's prerogative to exercise

228. 28 U.S.C. § 1605(a)(2)(B) (1988). By contrast, foreign statutes and the I.L.C. draft articles generally limit the tort exception to proceedings concerning death, personal injury, and loss of or damage to tangible property. See Australian Immunity Act, supra note 8, § 13; U.K. Immunity Act, supra note 185, § 5; 1991 I.L.C. Report, supra note 2, art. 12, at 102; id. at 103 (commentary). By limiting the exception to damage to tangible property, the I.L.C. sought to exclude defamation actions and actions involving interference with contract. Id. at 104 (commentary).
229. The noncommercial tort exception does not draw any distinction between "private" and "sovereign" acts. Olsen v. Mexico, 729 F.2d 641, 645 (9th Cir.), cert. denied, 469 U.S. 917 (1984); see also LAW REFORM COMMA'N REPORT, supra note 185, at 66 (stating that tort exception should extend to torts originating in "sovereign" or "governmental" acts); but see Frolova v. U.S.S.R., 558 F. Supp. 358, 362-63 (N.D. Ill. 1983), aff'd on other grounds, 761 F.2d 370 (7th Cir. 1985) (holding tort exception does not apply to "public acts"); DELLAPENNA, supra note 4, at 182-83 (criticizing Frolova).
230. See supra note 228 and accompanying text (comparing kinds of torts covered by FSIA and other statutes).
jurisdiction with respect to torts committed in its territory is given primacy. In particular, a revised statute should clarify whether the commercial activity exception applies to torts excluded from the noncommercial tort exception. Reciprocity concerns militate in favor of granting foreign state immunity from actions alleging defamation, misrepresentation, deceit, or interference with contract, whether or not in a commercial context. The FTCA preserves U.S. government immunity for these torts regardless of whether they arise in a commercial context. If the revised FSIA made clear that foreign states retain immunity from claims based on allegations of even those tortious injuries that occur within a commercial context, the commercial activity exception and the noncommercial tort exception of the FSIA would apply to the same kinds of torts, but would continue to differ in the nexus to the United States that each required. The more generous nexus provisions applicable to commercial torts are warranted by the differing justifications for the two exceptions.

231. The FSIA's noncommercial tort exception applies only to torts "occurring in the United States." 28 U.S.C. § 1605(a)(5) (1988). The "tortious act or omission must occur within the jurisdiction of the United States." HOUSE REPORT, supra note 4, at 6619. Foreign statutes deny immunity only if the act or omission occurred in the forum state. See Australian Immunity Act, supra note 8, § 5; U.K. Immunity Act, supra note 185, § 5. The I.L.C. draft articles require an even closer link to the forum state, limiting the exception to acts or omissions occurring "in whole or in part in the territory" of the foreign state "if the author of the act or omission was present in that territory at the time of the act or omission." 1991 I.L.C. Report, supra note 2, art. 12, at 102.

232. See 1991 I.L.C. Report, supra note 2, art. 12, at 102 (commentary); Crawford, supra note 8, at 111.

233. In Gregorian v. Izvestia, 658 F. Supp. 1224 (C.D. Cal. 1987), aff'd, 871 F.2d 1515 (9th Cir.), cert. denied, 493 U.S. 891 (1989), for example, the district court rejected the plaintiffs' argument claim that the commercial activity exception denied defendant immunity from a "trade libel" claim, holding that the commercial activity exception could not "be stretched in such a way as to swallow the immunities enumerated in the sub-paragraph (a)(5)(B) [libel, slander, etc.]" 658 F. Supp. at 1233. The Ninth Circuit affirmed on sovereignty grounds, 871 F.2d at 1522, but also discussed the relationship of the commercial activity exception to tort actions excluded by the noncommercial tort exception, and concluded that it was "far more likely that Congress meant the clauses retaining immunity in section 1605(a)(5)(B) to deny jurisdiction over any claims alleging the torts listed." Id. at 1522 n.4; see supra notes 142-148 and accompanying text (discussing Gregorian). In addition to Gregorian, for example, the plaintiffs in Millen Indus., Inc. v. Coordination Council for N. Am. Affairs, 855 F.2d 879 (D.C. Cir. 1988), alleged a claim of misrepresentation which would also be barred under 28 U.S.C. § 1605(a)(5) (1988).


235. See 28 U.S.C. § 1605(a)(2); see also supra note 55 and accompanying text (quoting text of § 1605(a)(2) and discussing FSIA’s minimum contacts standard).

236. This proposal assumes Congress will retain the existing FSIA noncommercial tort exception which, in addition to preserving immunity for certain enumerated torts, accords immunity with respect to claims "based on the exercise or performance or the failure to exercise or perform a discretionary function." 28 U.S.C. § 1605(a)(5)(A) (1988). The present noncommercial tort exception, however, was drafted onto the FSIA from the FTCA, see HOUSE REPORT, supra note 4, at 6620, and is not without its own difficulties. In the context of the FTCA, the Supreme Court recently rejected a distinction between "policy oriented" immune activities and "operational" activities that would not be immune. United States v. Gaubert, 111 S. Ct. 1267 (1991). The Court, reviewing an action brought by the major shareholder of a failed thrift, held that the government was immune from allegations of negligence in the day-to-day operation of the thrift because the noncommercial tort exception preserves immunity for any exercise of discretion
The inadequacies of the FSIA’s commercial activity exception underscore the merits of proposals for fresh thinking about the limits of forum state jurisdiction over cases against foreign states. Unfortunately, the doctrinal history that provides grist for commentators’ mills makes the existing doctrine familiar, perhaps even fundamental, to governments. There may come a time for radical reconceptions, perhaps abandoning the presumption of immunity or even discarding the immunity rubric. In the meantime, however, the restrictive theory must be reoriented to its functional underpinnings.

The proposals presented here do not vanquish the problem of identifying immune transactions. Congressional direction that courts identify a cause of action precisely and decide personal jurisdiction before considering immunity may reduce the burden the FSIA now places on the immunity determination. By including a list of enumerated exceptions and a default provision directing the courts to weigh the interests implicated by the immunity determination, as well as specific guidance with respect to commercial torts, Congress would acknowledge that, as Professor Brownlie has aptly stated, foreign state immunity is “a house with many rooms” in which the formulation that best balances competing interests varies from activity to activity. It is possible to suggest certain aspects of an activity that would normally be relevant to the immunity determination, and to articulate the interests to be weighed in determining whether the foreign state should be immune. Because it has not been possible to find a single formulation that crisply states how the immunity determination should be made with respect to all activities, a set of enumerated categories, supported by a default standard, provides the best approach.

*grounded in regulatory policy.* Id. at 1275 n.7.

Earlier Supreme Court cases also suggest that the discretionary function exception can be applied broadly. See, e.g., Dalehite v. United States, 346 U.S. 15 (1953) (holding U.S. government immune from tort action arising out of explosion of fertilizer pending shipment to France as part of post-war assistance to European agriculture); see generally Harold J. Krent, Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort, 38 UCLA L. REV. 871 (1991) (summarizing Supreme Court opinions applying FTCA discretionary function exception). Moreover, courts applying the FSIA’s discretionary function exception have borrowed from FTCA jurisprudence to conclude that the exception does not extend to illegal acts. See, e.g., Liu v. Republic of China, 892 F.2d 1419, 1431 (9th Cir. 1989), cert. denied, 111 S. Ct. 27 (1990) (refusing to grant immunity on grounds that discretionary function exception is “inapplicable when an employee of a foreign government violates its own internal law”); Letelier v. Republic of Chile, 488 F. Supp. 665, 675 (D.D.C. 1980) (refusing to grant immunity on grounds that foreign country “has no ‘discretion’ to perpetrate conduct designed to result in action that is clearly contrary to the precepts of humanity as recognized in both national and international law”). The results of these cases concerning politically motivated murders have won international acceptance. For example, the I.L.C. draft articles extend the tort exception to “political assassination.” 1991 I.L.C. Report, supra note 2, art. 12; id. at 103 (commentary, citing Letelier). In other cases, however, where an activity is illegal under U.S. law but not under the foreign state’s law, or vice versa, the exclusion may be more difficult to apply.

V. CONCLUSION

Governments often confront a tension between a desire to demonstrate compliance with emerging international legal norms and an interest in shaping those norms by taking and advocating particular positions. Foreign state immunity cases heighten this tension, because a court and not a foreign ministry official must make the decision. If the judicial decisionmaker follows flawed legislation, the consequent decisions will hamper the government’s efforts to advance its vision of the international law of foreign state immunity, and will give rise to conflicts with international law. The commercial/sovereign distinction must be excised from the FSIA’s commercial activity exception to enable the United States to walk this fine line between compliance and advocacy. A more coherent U.S. view of restrictive foreign state immunity is essential for the United States to play a leadership role in the further development of the international law of foreign state immunity, including the negotiation of agreements, such as the diplomatic conference on foreign state immunity called for by the International Law Commission.

A more predictable statute also would benefit both private entities dealing with foreign states and the foreign states themselves, because both could plan transactions with more confidence about whether the transaction would be subject to U.S. jurisdiction. Increased consistency between U.S. judicial decisions and the positions on foreign state immunity that the Executive Branch advances on the international level would also facilitate U.S. foreign relations, because the State Department would need to defend troubling decisions to foreign states less frequently and would not feel compelled to participate in litigation against foreign states as often as it has in recent years.