The Taming of the Shrew: May the Act of State Doctrine and the Foreign Sovereign Immunity Act Eat and Drink as Friends?

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THE TAMING OF THE SHREW: MAY THE ACT OF STATE DOCTRINE AND FOREIGN SOVEREIGN IMMUNITY EAT AND DRINK AS FRIENDS?

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I. INTRODUCTION

Vilified as the resurrection of federal common law, an erosion of the separation of powers, an ad hoc judicial fray into the sphere of foreign policy, and an abdication of the Judiciary's obligation to develop international law, the modern act of state doctrine has acquired the status of a doctrinal bogeyman. The doctrine's amorphous theoretical underpinnings result in inconsistent applications, causing the "airy castle" to materialize in unexpected ways. Most controversial has been the discussion, initiated in Alfred Dunhill of London, Incorporated v. Republic of Cuba and unresolved to date, of whether the restrictive view of foreign sovereign immunity requires a commercial exception to the act of state doctrine.

Following the Supreme Court's recent admonition to reflect upon the act of state doctrine's nature before discussing its possible exceptions, we examine the core principles of territoriality embodied in both the act of state doctrine and the commercial exception to foreign sovereign immunity. We conclude that distinct territorial concerns render the act of state doctrine wholly consistent with the commercial activities exception to foreign sovereign immunity and

1. See Louis Henkin, The Foreign Affairs Powers of the Federal Courts, 64 Colum. L. Rev. 809, 806, 814-17 (1964) (noting the modern act of state doctrine is a creature of federal common law and criticizing the post-Bris Supreme Court for not conducting a more serious inquiry into the authority for judicial promulgation of federal law that lies neither compelled by the Constitution nor derived from a statutory regime).

2. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 461-63 (1964) (White, J., dissenting) (criticizing the majority for abandoning the judiciary's shared competence for matters affecting foreign relations); Michael Bazyler, Abolishing the Act of State Doctrine, 134 U. Pa. L. Rev. 325, 328, 375 (1986) (making a similar argument); Henkin, supra note 1, at 812 (describing the Sabbatino majority's struggle to avoid a formulation that would result in the loss of judicial independence).

3. See Sabbatino, 376 U.S. at 462-63 (White, J., dissenting) (criticizing the majority for failing to give adequate consideration to the Executive's policy regarding the legality of Cuban expropriations); Henkin, supra note 1, at 822, 826 (recognizing that the Sabbatino Court's holding requires courts independently to review the needs of U.S. foreign policy and doubting that the bench possesses the institutional competence necessary for the task); Jonathan M. Wright, Note, An Evaluation of the Commercial Activities Exception to the Act of State Doctrine, 1 U. Dayton L. Rev. 1265 (1994) (noting that, under Sabbatino, courts must make independent predictions about the effect of litigation on foreign affairs, even if the Executive believes the proceedings will have no adverse effect on United States interests).

4. See Sabbatino, 376 U.S. at 450-56 (White, J., dissenting) (expressing dismay at the Court's decision to place the ascertainment of international law beyond the competence of federal courts); Chinua Achebe, The Act of State Doctrine and the Foreign Sovereign Immunities Act of 1976: Can They Coexist?, 13 Mem. J. Int'l L. & Trade 247, 255 (1983) (noting the act of state doctrine is thought to impair the development of international law); Bazyler, supra note 2, at 520, 561 (arguing the act of state doctrine arrested the development of international law in United States courts); James H. Lengel, The Duty of Federal Courts to Apply International Law, 1982 B.Y.U. L. Rev. 61, 73-77 (arguing the act of state doctrine undermines the bench's ability to apply and develop international law).


make a separate commercial exception to the act of state doctrine unnecessary.

Part II of this Article briefly traces the evolution of the act of state doctrine and foreign sovereign immunity. Part III summarizes the current split of authority regarding the need for a commercial exception to the act of state doctrine and evaluates the strength of the opposing arguments. Finally, Part IV suggests the failure of either side to appreciate the central role of territoriality in both doctrines has unnecessarily fuelled the debate, explains how recent case law has established the doctrines' compatible territorial limitations, and concludes that this element—rather than business activity—supplies the proper theoretical basis on which to secure harmony between the act of state doctrine and the restrictive view of foreign sovereign immunity.

II. Conduct vs. Status

Since the earliest days of the Republic, United States courts have crafted rules to facilitate the expansion of intercourse between nations. To this end, they used comity and the act of state doctrine to develop standards for recognition of foreign sovereign acts. Similarly, foreign sovereign immunity evolved as a means of according respect to the status of foreign governments.

7. See, e.g., Gay B. Born & David Wright, International Civil Litigation in United States Courts 713 (2d ed. 1992) (noting the Dunhill plurality's commercial exception to the act of state doctrine has received a mixed reaction in the lower federal courts and citing conflicting precedents); Bazyler, supra note 2, at 370-71 (stating the federal courts have split, sometimes internally, regarding the existence of a commercial exception to the act of state doctrine); Stephen J. Leacock, The Commercial Activity Exception to the Act of State Doctrine Revisited: Evolution of a Concept, 13 N.C.J. INT'L L. & CO. R. 1, 16 (1988) (recognizing the unsettled status of the proposed commercial exception to the act of state doctrine); Wright, supra note 3, at 1286-87 n.199 (recognizing the existence of controversy regarding the proposed commercial exception to the act of state doctrine and citing conflicting precedents); Zimmerman, supra note 5, at 558 (noting the lower federal courts have mirrored the Supreme Court's difference of opinion concerning the existence of a commercial exception to the act of state doctrine) Compare John P. Hannan, II, Comment, Foreign Sovereign Immunity and the Act of State Doctrine: The Need for a Commercial Exception to the Commercial Exception, 17 U.S.F. L. Rev. 763, 777 (1983) (arguing the lower federal courts have not embraced the proposed commercial exception) and Jeffrey J. Clark, Recent Case, 14 SUPREME COURT TRANSCRIPT L.J. 183, 189 n.23 (1990) (stating the lower courts have not fully accepted a commercial exception to the act of state doctrine) with John E. Kaluk, Characterizing Nationalizations for Purposes of the Foreign Sovereign Immunities Act and the Act of State Doctrine, 15 N.C. J. INT'L & COMMERCE 391, 395 & 19 (1989) (noting that some federal courts have adopted a commercial exception to the act of state doctrine) and Caitlin McCormick, The Commercial Exception to Foreign Sovereign Immunity and the Act of State Doctrine, 16 LAW & POL'Y INT'L Bus. 477, 511 (1984) (discussing support for the commercial exception in the lower courts).

8. In discussing the restrictive view of foreign sovereign immunity, this article refers only to the commercial activity exception to foreign sovereign immunity, and not to other exceptions promulgated by the Foreign Sovereign Immunities Act of 1976, because state responsibility for commercial activities constitutes the restrictive view's core principle. Compare 28 U.S.C. § 1605(a), 1607 (1994) (distinguishing between exceptions to immunity under the FSIA) with 28 U.S.C. § 1602 (1994) (describing the restrictive view of foreign sovereign immunity, stating that International law does not provide immunity for a state's commercial acts, and requiring United States courts to adhere to this approach) and Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 30 (testimony of Bruno A. Rizik, describing the restrictive view of sovereign immunity in these terms), 67 (testimony of Michael H. Cordo, same), 80-81 (testimony of Cecil J. Omlstead, same) (1976) [hereinafter 1976 Hearings].

9. See W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l, 493 U.S. 400, 404-06 (1990) (Scalia, J.) (declining, on behalf of a unanimous Court, to address the parties' extensive arguments regarding possible exceptions to the act of state doctrine because the transaction fell outside its scope, which embodies a narrower set of principles than the "vague doctrine" applied by lower courts); Lynn E. Paregian, Comment, Defining the "Public Act" Requirement in the Act of State Doctrine, 58 U. Chi. L. Rev. 1168, 1168 (1991) (noting the drawbacks of discussing the act of state doctrine's exceptions before understanding its scope).

10. See, e.g., Part B. Stephen III et al., International Business and Economics 125 (1993) (describing the role of United States courts in shaping the rules that govern international commerce, including the Supreme Court's early recognition of foreign sovereign immunity as a means of facilitating the rise of a legal framework regulating the interaction of nations).

11. See, e.g., Kirkpatrick, 493 U.S. at 406 (describing the act of state doctrine as a prohibition against judicial inquiry into the validity of certain acts committed by foreign sovereigns); Hilton v. Guyot, 159 U.S. 113, 164 (1895) (describing comity as "the recognition which one nation allows in its territory to the legislative, executive or judicial acts of another"); Republic of Philippines v. Waringhouse Elec. Corp., 43 F.3d 65, 75 (3d Cir. 1994) (quoting Hilton, 159 U.S. at 164).

12. See Alfred Dunhill of London, 435 U.S. at 705 n.18 (1976) (the plurality and dissenting justices apparently agreeing that foreign sovereign immunity preserves respect for the status of foreign governments); The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 136-38 (1812) (grounding foreign sovereign immunity in the need to protect sovereign dignity); Leacock, supra note 7, at 13 (recognizing that foreign sovereign immunity is based upon respect for the dignity of nations).
A. Foreign Sovereign Acts

Comity protects decisions of a foreign sovereign that cannot be completed within the sovereign’s realm. In such cases, a foreign sovereign will request the assistance of United States courts, which is forthcoming absent some infringement upon United States public policy. However, comity is not a uniform concept and remains a matter within the competence of state law.

A different standard applies to conduct that a foreign sovereign has brought to complete fruition within its own territory. In this situation, United States courts generally will not question the validity of the sovereign’s completed domestic acts, but will apply them as a rule of decision. This “act of state” doctrine protects the integrity of a foreign sovereign’s purely domestic conduct by immunizing it against a U.S. court’s public policy analysis.
doing so, the doctrine embodies the practical recognition that (1) foreign sovereigns have a reasonable expectation of dominion over wholly domestic affairs, and (2) the application of U.S. public policy norms to such activity would have little effect beyond complicating the Executive's management of foreign policy. Unlike comity, the act of state doctrine is a rule of federal common law which theoretically should enjoy uniform application. Ironically, it is the doctrine's introduction into federal law that has contributed to the fluidity of its contours.

Initially, courts viewed the act of state doctrine as a manifestation of either comity or international law. After Brie, the doctrine's theoretical source assumed fundamental importance. If the doctrine sprung from comity, the federal bench would lose control over the development of a uniform rule. While international law might have provided a logical segue into federal jurisprudence, the act of state doctrine never achieved acceptance as customary international law. Determined to find a predicate for federal authority, the Supreme Court in Banco Nacional de Cuba v. Sabbatino ultimately settled on the imprecise concept of nonmandatory "constitutional underpinnings."

According to the Court, the Constitution vests the Executive with primary authority for the conduct of foreign affairs. As a result, the Executive enjoys a heightened institutional competence in the development of legal standards for unsettled matters of international importance, such as the level of compensation due upon expropriation. In such affairs, the Judiciary must not hinder or

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19. See Allied Bank, 757 F.2d at 521 (quoting Tabacarclm, 392 F.2d at 715) (stands for the proposition that it would be an affront and a largely pointless exercise for United States courts to attempt to nullify a foreign sovereign's completed domestic conduct); Banacit, 826 F. Supp. at 705 (making a similar argument); Knight, supra note 5, at 62 (noting the act of state doctrine applies when judicial re-examination of foreign acts would (1) offend the foreign sovereign, (2) frustrate the Executive's management of foreign affairs, and (3) provide no effective basis for relief); McCormick, supra note 7, at 497-98 (quoting Tabacarclm, 392 F.2d at 715) (arguing the act of state doctrine rests on the realization that judicial meddling in a foreign sovereign's completed domestic conduct would offend the foreign sovereign and have little practical effect); Zaitseff & Kuts, supra note 14, at 452 (same). See also F. & H.R. Forman-Normani International v. Transco Energy Co., 862 F.2d 281, 287 (7th Cir. 1989) (describing the act of state doctrine in terms of the foreign state's overwhelming interest in its domestic conduct and the United States' correspondingly lower interest), cert. denied, 497 U.S. 1038 (1990); Tuschlach Co. v. Rockwell Intl Corp., 766 F.2d 1333, 1338 (9th Cir. 1985) (same); Barks, 762 F.2d at 275; Eckert Int'l Inc. v. Government of Sovereign Democratic Republic of Fiji, 376 F. Supp. 167, 172 (E.D. Va. 1993) (quoting Goldedari, 610 F. Supp. at 117-18) (noting that foreign sovereigns have a reasonable expectation of unquestioned dominion over conduct that can be completed within their borders), aff'd, 922 F.2d 77 (4th Cir. 1990).

20. 376 U.S. 358, 424-28 (1964); Gruton, supra note 18, at 530-31; Zaitseff & Kuts, supra note 14, at 450.

21. Kirkpatrick, 493 U.S. at 404 (quoting Gellhorn, 246 U.S. at 303-04). See also Gellhorn, 246 U.S. at 303-04 (explaining that the act of state doctrine rests on "the highest considerations of international expediency"). Underhill, 65 F. at 580 (quoting a New York case for the proposition that the act of state doctrine embodies "established rules of international law"), aff'd, 168 U.S. 529 (1897).

22. See supra note 15 and accompanying text (establishing that comity is a matter of state law); Sabbatino, 376 U.S. at 425 (announcing the act of state doctrine is federal law and expressing fear at the prospect of constmuing its development to "divergent and... patriarchal... state interpretations").

23. See, e.g., Ferti v. Suarez-Mason, 672 F. Supp. 1531, 1544 (N.D. Cal 1987) (citing The Paquete Habana, 175 U.S. 677, 700 (1900); The Nereide, 13 U.S. (3 Cranch) 388, 423 (1815); 138 C. Wright et al., Federal Practice and Procedure § 3563, at 60-63 (2d ed. 1984) (for the propositions that: (1) customary international law is federal common law; and (2) claims based on customary international law arise under the laws of the United States for purposes of federal question jurisdiction).


25. Id. at 423 (noting the Constitution does not require the act of state doctrine, but justifying it on the basis of constitutional underpinnings that arise out of the relationship created by the Judiciary's and the Executive's respective functions). See also Henkin, supra note 1, at 514-17 (criticizing the Supreme Court for not laying a better foundation for a body of judge-made federal law that is neither required by the Constitution nor implied by statute).

26. Sabbatino, 376 U.S. at 423 (describing the Executive and Legislative Department's predominant, but not exclusive, role in matters touching upon foreign affairs).

27. Id. at 427-28 (examining the conflicting international norms regarding state responsibility for expropriations and discussing the Executive's institutional advantages in shaping the debate).
embarrass the Executive. Nor must the bench endanger the separation of powers by abdicating its independent role. With this in mind, the Court attempted the logically difficult task of drawing the act of state into federal law under the guise of deference to executive authority while avoiding destruction of the judiciary's independent status. Wrapping these conflicting principles into a compact statement, the Court held that, in the absence of a treaty or settled rules of international law, courts would not examine the validity of an existing and recognized government's expropriation completed in its own territory, even if the complainant and the Executive both alleged a breach of international law.

The Sabbatino Court's narrow holding deviates little from prior formulations of the act of state doctrine. If a foreign sovereign has completed an official act within its own territory and the act does not violate accepted principles of international law, a United States court adjudicating the resulting dispute has no legal basis—other than public policy—upon which to set aside the foreign sovereign's domestic conduct. In this situation, foreign interests and powers eclipse our own, and the prosecution of a conflict would serve little useful purpose. However, the transfer of this narrow rule to federal authority by means of an ill-defined and logically inconsistent vehicle has produced an expansive and chaotic body of law, which—at its broadest—has been interpreted to require that courts make independent decisions regarding a suit's potential to cause the Executive embarrassment in its conduct of foreign affairs.

Attempting to impose definite boundaries on the doctrine, various Supreme Court justices have proposed several exceptions to the act of state

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28. Id. at 432-33 (explaining the need to avoid judicial embarrassment of the Executive in its efforts to establish a rule of customary international law).
29. Id. at 423, 436 (noting the Judiciary's independent competence for disputes involving foreign relations and doubting the viability of the "Bernstein exception," under which the bench's application of the act of state doctrine depends on the position taken by the Executive). See also First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767-68 (1972) (providing only three votes in favor of the extremely deferential Bernstein position).
30. See Henkin, supra note 1, at 812 (describing the Sabbatino Court's struggle to enunciate a principle of deference that would not also destroy judicial independence). See also Sabbatino, 376 U.S. at 461-62 (White, J., dissenting) (accusing the majority of abandoning judicial independence). Bazyler, supra note 2, at 375 (arguing the Executive's influence over act of state cases violates the separation of powers).
31. Sabbatino, 376 U.S. at 428-29 & n.29 (acknowledging the Executive's clear policy regarding expropriations, but finding no clear rule of customary international law on the subject, and defining the act of state doctrine's scope under the circumstances).
32. See id. at 416-27 (testing the act of state doctrine's lineage and affirming its continued vitality, but updating its theoretical basis to reflect Erie concerns). Leasco, supra note 7, at 4 (noting the Sabbatino Court's approval of prior act of state formulations and the Court's adaptation of the doctrine to fit the modern world).
33. See, e.g., Sabbatino, 376 U.S. at 436 (explaining that normal conflict-of-laws rules require the application of foreign law to a foreign sovereign's wholly domestic conduct and noting the act of state doctrine prevents the use of the forum's public policy to escape this general rule).
34. See supra note 19 and accompanying text.
35. See Knight, supra note 5, at 52 (describing the lower courts' complete confusion over the amorphous and conflicting principles underlying the federalized act of state doctrine); see also Bazyler, supra note 2, at 330, 336 (discussing the Sabbatino Court's wide-ranging and confusing justification for the doctrine, and describing the inability of lower courts to formulate a coherent statement of the doctrine).
36. Compare Kirkpatrick, 493 U.S. at 403, 409 (noting the district court applied the act of state doctrine on the basis of its perception that a civil RICO action between two U.S. companies might either (1) cause embarrassment to the Nigerian Government or (2) interfere with the United States' foreign relations, but rejecting this as a sufficient predicate for the doctrine's invocation) with Dressel, 610 F. Supp. at 117 (describing the act of state doctrine as a broad, case-by-case inquiry into the potential effect of judicial proceedings on the Executive's conduct of foreign affairs), 493 U.S. 877 (24 Cir. 1985) and Bazyler, supra note 2, at 346 (describing the Circuit Court's use of the doctrine in Hunt v. Mobile Oil Corp., 550 F.2d 68 (2d Cir. 1977), cert. denied, 434 U.S. 984 (1977) to block examination of a foreign sovereign's motivation rather than the legality of its actions) and Zaitzeff & Knez, supra note 14, at 466 (explaining how the Hunt court found the act of state doctrine barred an examination of the motivation behind the nationalization and rendered the claim non-justiciable) and Zimmerman, supra note 5, at 588 (outlining the act of state doctrine in federal courts).
doctrine. Of these, the most controversial has been the Dunhill plurality's suggested exception for purely commercial activities, which has been characterized as necessary to the integrity of the United States' restrictive view of foreign sovereign immunity. However, perhaps as a result of its failed attempts to clarify the act of state doctrine by the announcement of exceptions, the Supreme Court unanimously adopted a new approach in W.S. Kirkpatrick Company v. Environmental Tectonics Corp., International. Now courts should examine the doctrine's nature before entertaining discussion of its possible exceptions. Under this approach, act-of-state concerns arise only when the litigation turns upon the validity of a foreign sovereign's conduct within its own territory and not when the proceedings might simply embarrass the foreign government. In making this point, the Court emphasized that the act of state doctrine is not a vague principle of judicial abstention, but a narrow rule of decision.

B. Foreign Sovereign Status

Foreign sovereign immunity differs from comity and the act of state doctrine in that it protects the integrity of sovereign status. Traditional conceptions of foreign sovereign immunity start with the proposition that a sovereign's natural power falls away at its borders. Absent some form of intervention, sovereigns would enter the territorial jurisdiction of U.S. courts as private persons. However, to facilitate intercourse between nations, the Supreme Court long ago granted visiting sovereigns presumptive immunity from the

37. See Dunhill, 425 U.S. at 695-707 (citing only four votes for a proposed commercial exception); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767-68 (1972) (providing three votes for a principle of absolute deference to the Executive's position on the doctrine's applicability); id. at 770-73 (Douglas, J.) (advocating a countermajority exception to the act of state doctrine).
38. See supra note 7 and accompanying text (citing nearly two decades of commentary on this unsettled issue).
41. Id. at 404-10 (declining to address the parties' lengthy arguments about possible exceptions to the act of state doctrine because a careful examination of the doctrine's scope established the case's failure to raise act of state concerns).
42. Id. at 406, 409-10.
43. Id. at 406 (quoting Sabbatino, 376 U.S. at 427).
44. See supra note 12 and accompanying text.
45. See The Schooner Exchange, 11 U.S. (7 Cranch) at 136-37 (noting that, by nature, sovereigns enjoy absolute power within their own domain, but that practical considerations have led them to allow visiting sovereigns to carry their states into the forum's territorial jurisdiction); Stephen, supra note 10, at 125 (describing The Schooner Exchange as the recognition of an "implied license" of exemption from the jurisdiction of United States courts). See also, Ex parte Republic of Peru, 318 U.S. 578, 587-88 (1943) (noting that sovereign immunity is not a question of whether a foreign sovereign defendant has come within the territorial jurisdiction of a United States court, but whether that jurisdiction should be exercised after it has attached); Bertini Bros. Co. v. The Penaro, 271 U.S. 562, 575 (1926) (quoting an English case for the proposition that sovereign immunity is a principle by which states agree not to exercise their jurisdiction against one another); Flota Maritima Brownsville v. Motor Vessel Ciudad de la Habana, 335 F.2d 619, 623 (4th Cir. 1964) (noting that sovereign immunity restricts the exercise of a United States court's clearly declared jurisdiction); Sullivan v. State of Sao Paulo, 56 F. Supp. 503, 505 (E.D.N.Y.) (holding that foreign sovereign immunity requires courts to relinquish jurisdiction), aff'd, 122 F.2d 355 (2d Cir. 1941); S. Rep. No. 1310, 94th Cong., 2d Sess. 9 (1976) (declaring that sovereign immunity is a principle by which courts relinquish jurisdiction over a foreign state); H.R. Rep. No. 1487, 94th Cong., 2d Sess. 8 (1976) (same); 1976 Hearings, supra note 8, at 25 (testimony of Monroe Leigh, stating that foreign sovereign immunity is a principle under which the courts of the United States refrain from exercising their jurisdiction).
46. Cf. Dunhill, 425 U.S. at 705 (White, J., plurality opinion) (explaining that the restrictive view of sovereign immunity allows courts that would otherwise have jurisdiction over a foreign sovereign defendant to exercise that jurisdiction in disputes involving commercial activities).
47. The Schooner Exchange, 11 U.S. (7 Cranch) at 136-37 (recognizing the theory of sovereign immunity flows not from the visiting sovereign's inherent power, but from the host sovereign's consent).
compulsory jurisdiction of U.S. courts, leaving express or implied consent as the only basis for the assertion of judicial authority.\(^{37}\)

For nearly 150 years, U.S. courts adhered to the principle of absolute immunity, shielding foreign sovereigns from compulsory jurisdiction regardless of whether the nature of the transactions that brought them to our shores was public or commercial.\(^{48}\) While the application of sovereign immunity theoretically remained a judicial exercise, the process usually involved a suggestion of immunity by the State Department.\(^{49}\)

During the first half of this century, increased governmental participation in commercial activities prompted many nations to adopt the position that a sovereign's descent to the level of a merchant operated as an implied waiver of immunity.\(^{50}\) In 1952, the United States adopted this "restrictive" view of sovereign immunity when the State Department announced it would no longer file suggestions of immunity in cases arising from foreign sovereigns' commercial activities.\(^{51}\) Theoretically sound, this policy faced insurmountable operational difficulties. Unbound by principles of stare decisis and subject to intense political pressures, the State Department drew inconsistent lines between sovereign and commercial activities.\(^{52}\) Seeking to impose uniform standards on immunity determinations,\(^{53}\) Congress passed the Foreign Sovereign Immunities Act of 1976 (FSIA),\(^{54}\) which vested courts with exclusive authority in these matters.\(^{55}\)

Intended to codify the prevailing international law of foreign sovereign immunity,\(^{56}\) the FSIA did not alter substantive rules of liability,\(^{57}\) but rendered

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47. See Ervin v. Quintanilla, 99 F.2d 935, 938 (5th Cir. 1939) (noting a foreign sovereign may expressly or implicitly waive immunity), cert. denied, 306 U.S. 635 (1939). See also The Schooner Exchange, 11 U.S. (7 Cranch) at 135 (summarizing the Attorney General's argument that sovereign immunity prevents courts from exercising the compulsory territorial jurisdiction that would otherwise attach to a sovereign's activities in the forum; the remaining basis of jurisdiction, consent, appears to be unaffected).

48. See Dunhill, 425 U.S. at 698 (White, J., plurality opinion) (describing the United States' adherence to the absolute view of sovereign immunity until 1952); id. at 711-12 (reproducing the State Department's repudiation of the absolute view); Leacock, supra note 5, at 9 (describing the United States' original adherence to the absolute view).

49. 1976 Hearings, supra note 8, at 62-65 (testimony of Michael H. Cardozo, describing the historical practice of Executive suggestions of immunity); see id. at 26 (testimony of Monroe Leigh, explaining the dispositive effect of an Executive suggestion of immunity); 93 (testimony of Michael Marks Cohen, discussing the Executive's practice of making suggestions of immunity); S. Rep. No. 1310, at 10 (describing the bench's reliance on Executive policy in making immunity determinations); H.R. Rep. No. 1487, at 8.

50. See Dunhill, 425 U.S. at 699-96 (White, J., plurality opinion) (quoting several cases for the proposition that, by descending to the level of a merchant, governments divert themselves of their sovereign status); id. at 711-14 (reproducing the Tate Letter, which describes the restrictive view's growing popularity and justifies its acceptance in the United States in part based on the rise of state trading companies); Leacock, supra note 7, at 10 (explaining increased dissatisfaction with the absolute theory of immunity as the result of foreign governments' increased participation in international trade).

51. See Dunhill, 425 U.S. at 698 (White, J., plurality opinion) (noting the Executive's adoption of the restrictive view by means of the Tate Letter); id. at 711-15 (reproducing the Tate Letter); S. Rep. No. 94-1310, at 10 (describing the State Department's adoption of the restrictive view); H.R. Rep. No. 94-1487, at 8.

52. See 1976 Hearings, supra note 8, at 58 (testimony of Peter D. Trooboff, describing the State Department's uneven application of the restrictive view); McCormick, supra note 7, at 464-66. See also S. Rep. No. 1310, at 9-10 (discussing the difficulties inherent in a political institution's efforts to apply legal standards); H.R. Rep. No. 1487, at 7-8.


55. See S. Rep. No. 1310, at 9 (listing this as a "principal purpose" of the FSIA); H.R. Rep. No. 1487, at 7. 1976 Hearings, supra note 8, at 25-26 (testimony of Monroe Leigh, describing the Act's effect as creating exclusive judicial competence for immunity decisions); McCormick, supra note 7, at 487 (portraying the FSIA as a repudiation of Executive involvement in immunity determinations).


57. See 28 U.S.C. § 1606 (1994) (providing, as a general rule, that states not enjoying immunity are liable in the same manner and to the same extent as private persons); S. Rep. No. 94-1310, at 11 (purporting not to affect substantive rules of liability); H.R. Rep. No. 94-1487, at 12.
foreign sovereign entities immune from suit unless they consented to jurisdiction or an action was based on their nongovernmental conduct which had significant jurisdictional contacts with the United States. For instance, a foreign sovereign is not immune from suits based on: (1) the commercial activity of the foreign sovereign carried on in the United States; (2) an act performed in the United States in connection with a commercial activity of the foreign sovereign elsewhere; or (3) an act outside the United States in connection with a commercial activity of the foreign sovereign elsewhere, which causes a direct effect in the United States. Unfortunately, this concise regime collapsed the distinct issues of personal jurisdiction and immunity into a single inquiry, which has provoked criticism by the jurists called upon to recognize and separate the distinct strands.

The act of state doctrine and foreign sovereign immunity are, thus, different creatures which serve distinct purposes. The former is a rule of federal common law that accords respect to foreign sovereigns' purely domestic conduct by treating it as a rule of decision; the latter is a statutory reflection of customary international law that protects sovereign status by regulating the power of United States courts to assert their authority against foreign sovereigns who cross into their territorial jurisdiction. However, the two doctrines share a subtle, but highly important, characteristic: both are limited by principles of territoriality.

III. CONGRUENCE VS. INDIVIDUALITY

Set in their respective historical contexts, the act of state doctrine and foreign sovereign immunity present relatively simple concepts. However, the con-

58. See, e.g., 28 U.S.C. § 1604 (1994) (providing for immunity unless an exception applies). See also id. § 1605(a)(1) (waiver exception), (2) (commercial activities having a nexus with the United States), (3) (suits based on takings of property in violation of international law under circumstances in which property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state), (4) (real estate and probate actions dealing with property situated in the United States), (5) (certain noncommercial torts occurring in the United States as the result of official—but nondiscretionary—duties), (6) (reference to arbitration or confirmation of arbitral awards having certain contacts with the United States); id. § 1607 (invoking counterclaims brought against foreign sovereigns in United States courts).


60. 1976 Hearings, supra note 8, at 28 (testimony of Monroe Leigh, noting the "subtle point" that, under the FSIA, the contacts necessary for personal jurisdiction are incorporated into the exceptions to immunity), 31 (testimony of Bruno A. Ritts, describing this as the bill's "long-term feature"). See also Sandi Arshad v. Nelson, 507 U.S. 549, 577-78 n.2 (1993) (Stevens, J., dissenting) (noting that the United States nexus of the commercial activities exception embodies a test for personal jurisdiction, and citing authority for this point); Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 306-07 (2d Cir. 1981) (noting that the exceptions to sovereign immunity contain the predicates not only for determinations of immunity and subject matter jurisdiction, but also of personal jurisdiction), cert. denied, 454 U.S. 1148 (1982); Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1061-62 (E.D.N.Y. 1979) (explaining how the commercial activity exception encompasses a threefold test for immunity; personal jurisdiction, and subject matter jurisdiction).

61. See Texas Trading, 647 F.2d at 306-07 (calling the FSIA a "marvel of compression" of concepts requiring distinct analyses, which has induced confusion within the district courts); Harris, 481 F. Supp. at 1061-63 (describing the FSIA's compression of dissimilar principles, the effect of which is to conceal their distinctions); Public Acts of State, the Foreign Sovereign Immunities Act, and the Judiciary, to Proceedings, supra note 19, at 486 (remarks by Joseph W. Delapenna, describing the confusion arising out of the FSIA's merger of distinct concepts). See also United World Trade, Inc. v. Mangeshlikarw Oil Prod. Astrn, 33 F.3d 1232, 1237 (10th Cir. 1994) (describing the direct effects clause as "hopelessly ambiguous" and struggling to identify objective standards for its application), cert. denied, 513 U.S. 1112 (1995); Callejo, 764 F.2d at 1107, 1115 (quoting Gibbons v. Udarsa na Ghandhachi, 549 F. Supp. 1994, 1103, 1106 (E.D.N.Y. 1993) (denying a proposition that the FSIA is a "remarkably opaque...statutory labyrinth" and describing the FSIA as a "tangled web of statutory ambiguity"); Chisholm & Co. v. Bank of Jamaica, 645 F. Supp. 1205, 1202 n.2-3 (S.D. Fla. 1986) (noting the FSIA's merger of subject matter and personal jurisdiction, and quoting a Fifth Circuit opinion for the proposition that the FSIA presents a "peculiarly twisted exercise in statutory draftingmanship").

62. See supra notes 16-20 and accompanying text.

63. See supra notes 45-47 and accompanying text.
fusion surrounding their modern formulations has led to the perception that the two may not be compatible.64

Speaking for a plurality of the United States Supreme Court in Alfred Dunhill of London, Incorporated v. Republic of Cuba,65 Justice White argued that if a foreign government's conduct brought it within the commercial activity exception to sovereign immunity, it should not successfully avoid liability on the basis of the act of state doctrine.66 To harmonize the act of state doctrine with sovereign immunity, Justice White proposed the recognition of a commercial exception to the act of state doctrine.67 Shortly thereafter, Congress passed the FSIA.68 The House and Senate manifested ambivalence with respect to the act of state doctrine. Their reports simultaneously declared that the act of state doctrine should not apply to a foreign sovereign's non-immune commercial activities, but also recognized that the FSIA had no effect on the act of state doctrine or other substantive rules of liability.69

In the absence of clear guidance from the Supreme Court and Congress, a split of authority has developed within the lower federal courts.70 Although several district courts have expressed a willingness to accept a commercial activity exception to the act of state doctrine,71 the circuit courts of appeal have approached the matter with greater reserve, rarely embracing the exception,72 more regularly expressing doubts about its viability,73 and generally declining to resolve the matter.74 The persistence of controversy in this area springs from the odd mixture of strength and weakness inherent in the positions advocated by both sides of the debate.

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64. See supra note 39 and accompanying text (discussing the perceived need to defend the restrictive view's integrity by establishing a commercial exception to the act of state doctrine).
66. See id. at 698-99.
67. See id. at 706.
68. Compare the FSIA, supra note 54 (passed on October 1, 1976) with Dunhill, 425 U.S. at 682 (decided on May 24, 1976).
70. See supra note 7 and accompanying text.
73. See, e.g., Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422, 425 n.3 (6th Cir. 1984) (discussing the precedential value of the Dunhill plurality's commercial activity exception to the act of state doctrine); International Ass'n of Machinists v. Organization of Petroleum Exporting Countries, 649 F.2d 1354, 1360 (9th Cir. 1981) (explaining that the act of state doctrine in 'not diluted' by the FSIA's commercial activity exception and holding that a foreign state's seemingly commercial activities may trigger the act of state doctrine), cert. denied, 454 U.S. 1163 (1982).
74. See, e.g., Callejo, 764 F.2d at 1114-15 (describing the position taken by the Dunhill plurality, but declining to rule on the status of its proposed exception); Broker, 763 F.2d at 225 (explaining that the Second Circuit has not adopted a commercial exception to the act of state doctrine and leaving the resolution of this issue for another day); Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 408 (9th Cir. 1983) (noting that only four justices supported a commercial exception to the act of state doctrine and declining to resolve the issue), cert. denied, 464 U.S. 1040 (1984); Empresa Cubana Exportadora v. Lamborn & Co., 652 F.2d 321, 329-39 (2d Cir. 1981) (noting a clear differentiation between the act of state doctrine and foreign sovereign immunity, but understanding the two principal Dunhill opinions to suggest that courts should be inclined not to apply the act of state doctrine to a government's commercial activity); see also Lescov, supra note 7, at 2 (describing the tendency of lower federal courts to avoid definitive rulings on the existence of a commercial exception to the act of state doctrine).
Those favoring a commercial activity exception to the act of state doctrine rely on the premise that, in adopting to the restrictive view of foreign sovereign immunity, the political branches of the United States approved the subjection of foreign sovereigns to suit for their commercial activities. Under these circumstances, the bench should not undermine this policy by applying the act of state doctrine. Thus, the judiciary must establish congruity by recognizing a commercial activity exception to the act of state doctrine.

Easily stated and facially reasonable, this position suffers from a series of weaknesses. First, courts strictly construe statutes that derogate from the common law. Thus, because the FSIA does not expressly displace the act of state doctrine's intentional frustration of public policy, courts should not imply such an effect. Second, in explaining the FSIA, Congress expressed its desire not to affect the act of state doctrine. Third, the act of state doctrine is a rule of decision, which differs from the jurisdictional principles embodied in the FSIA. Therefore, even if a court has jurisdiction over a foreign sovereign, the court still must decide which substantive law to apply, which is a matter the FSIA leaves unregulated. And fourth, the Supreme Court traditionally has dis favored the wholesale importation of sovereign immunity exceptions into the act of state doctrine.

Against this litany of arguments, defenders of the proposed commercial exception have mounted a formidable attack. First, notwithstanding the differences between jurisdiction and choice-of-law, Congress chose not to address the act of state doctrine's intentional frustration of public policy, including

See supra notes 57, 81 and accompanying text (explaining that the FSIA makes no changes to substantive rules of liability, including the act of state doctrine). Compare Eiben Co. v. Senior Elec. Mfg. Co., 313 U.S. 487, 493-96 (1941) (establishing that choice-of-law rules are substantive) with supra notes 17, 18, 82 and accompanying text (explaining that the act of state doctrine is a choice-of-law rule).

84. See Sabbatino, 376 U.S. at 438 (refusing to import the foreign sovereign immunity counterclaim exception into the act of state doctrine because the two are logically distinct theories that serve different purposes). See also First Nat'l City Bank, 406 U.S. at 771 (Douglas, J., concurring) (quoting National City Bank v. Republic of China, 348 U.S. 356, 365 (1955)) (providing the only vote in favor of applying the foreign sovereign immunity counterclaim exception to the act of state doctrine). Empress Cuban Exportadora, 652 F.2d at 238 (citing Sabbatino as authority for the refusal to import the FSIA's counterclaim exception into the act of state doctrine).
to cases falling within the latter's commercial activities exception. And second, the bench should not frustrate the legislature's will especially when the result is to make cases turn upon judges' individual perceptions of the effect of litigation on foreign affairs.

The inability of either side to prevail in this debate suggests the answer lies in some overlooked middle ground. Perhaps the substitution of compatibility for absolute congruence would satisfy both the desire to establish harmony between the two doctrines and the effort to maintain their theoretical distinctions.

IV. Do Opposites Attract?

Compatibility arises not from exact duplication, but from interaction between diverse objects. With regard to the act of state doctrine and the FSIA's commercial activity exception, we suggest their distinct territorial limitations provide a natural basis for compatibility.

The act of state doctrine embodies a practical understanding of the wisdom of avoiding a direct conflict with a foreign sovereign's legitimate expectations under circumstances in which U.S. interests and power are minimal. In evaluating the doctrine's applicability to a given set of facts, the first step is to determine whether the litigation turns on the validity of foreign sovereign acts that have come to complete fruition within the foreign sovereign's own territory. If the judicial proceedings would require scrutiny of such behavior, the court must dispose of the matter consistent with the act of state doctrine. However, if the foreign sovereign's conduct spills over its borders prior to completion, only comity applies. Thus, if the foreign sovereign attempts to expropriate a person's property worldwide, the act of state doctrine applies only to property located within the sovereign's territory and not to objects outside its

References:
85. See S. Rep. No. 94-1310, at 19 n.1 (anticipating that the act of state doctrine would not apply to actions falling within the FSIA's commercial activity exception); H.R. Rep. No. 94-1487, at 20 n.1; see also Zaltzeff & Kunz, supra note 14, at 468-69 (quoting the House Report on this point).
86. See supra note 59 and accompanying text. See also note 76 and accompanying text.
87. Henkin, supra note 3, at 826 (doubting the bench's competence to determine the needs of U.S. foreign policy); Knight, supra note 5, at 60-61 (stating that courts are ill-equipped to predict the effect of litigation on foreign policy).
88. See supra note 19 and accompanying text. See also note 34 and accompanying text.
89. See Baskin, 752 F.2d at 224 (applying the "complete fruition" territorial standard as the first step in an act of state doctrine analysis); Zaltzeff & Kunz, supra note 14, at 451-52 (quoting Tabacalera, 393 F.2d at 715, cert. denied, 393 U.S. 924 (1968)) (announcing the "complete fruition standard" and stating that the Second Circuit applies the territoriality limitation as the first step in an act of state case). See also Kirkpatrick, 493 U.S. at 400 (noting the act of state doctrine does not apply unless a court must directly pass judgment on the validity of a foreign sovereign's domestic acts).
90. See Kirkpatrick, 493 U.S. at 401.
91. See, e.g., Allied Bank, 757 F.2d at 522 (finding the situs of Costa Rica's debts to be in the United States and, therefore, applying a comity analysis instead of the act of state doctrine), cert. denied, 473 U.S. 934 (1985); United Bank, Ltd v. Cosmic Int'l, Inc., 542 F.2d 868, 872-77 (2d Cir. 1976) (applying a comity analysis to a foreign sovereign's decree seizing of overseas assets because the act of state doctrine does not apply to conduct not completed in the foreign sovereign's territory); Republic of Iraq, 353 F.2d at 50, 51, cert. denied, 382 U.S. 1027 (1965); Boland, 614 F. Supp. at 1173-74 (refusing to apply the act of state doctrine to a foreign sovereign's decision to terminate and libel an employee in the United States, and noting that only comity applies to decisions which cannot be completed within the foreign sovereign's domain); Drexel Burnham Lambert Group, Inc. v. Galadari, 610 F. Supp. 114, 118 (S.D.N.Y. 1985) (declining to recognize a foreign decree as an act of state because the act of state doctrine looks to the situs of completed conduct rather than the situs of an official decision, which is entitled only to comity), aff'd in relevant part, 777 F.2d 877 (2d Cir. 1985).
Like the act of state doctrine, the traditional conception of sovereign immunity rests on territorial principles: it remedies the natural loss of power experienced by sovereigns outside their domain. Foreign sovereign immunity compensates for this phenomenon by shielding foreign sovereigns from the compulsory jurisdiction that would otherwise attach upon their entry into the territorial jurisdiction of United States courts. However, foreign sovereign immunity has never closed the door to jurisdiction by consent, which may be express or implied. One manifestation of implied consent, ultimately accepted by the United States, is participation in commercial activities having a significant jurisdictional nexus with the forum. Thus, under the common law of foreign sovereign immunity, courts held that jurisdiction may lie against a

dominion. Similarly, the act of state doctrine does not apply to a sovereign's decision to repudiate an obligation calling for performance abroad or a foreign sovereign's internal decision to terminate an employee in the United States. And the domestic initiation of tortious activity is not an act of state if the foreign sovereign takes steps within the United States to ensure its completion. Under each of these circumstances, the foreign sovereign's conduct has not reached fruition at home and, therefore, merits comity—but not recognition as an act of state. In sum, the act of state doctrine carries an inherent territorial limitation; it protects sovereign activity that does not cross the sovereign's borders before achieving completion.

92. See, e.g., Cosmic Int'l, 542 F.2d at 872-73 (refusing to accord act of state status to a foreign decree's attempted seizure of assets located within the United States and applying a comity analysis instead); Republic of Iraq, 355 F.2d at 50-51.
93. See, e.g., Allied Bank, 757 F.2d at 521 (refusing to treat a debt repudiation as an act of state, because the debt's repayment site was in the United States, and applying a comity analysis instead); Eckert, 934 F. Supp. at 172 (declining to consider the breach of a consulting agreement as an act of state because the contract anticipated performance in the United States); Galadari, 610 F. Supp. at 118-19 (refusing to treat the 'freezing' of a private person's debt payments as an act of state because the obligations anticipated performance outside of Dubai, and applying a comity analysis instead).
94. See, e.g., Boland, 614 F. Supp. at 1173-74 (refusing to terminate an employee in the United States as an act of state, because it was not completed in Iran, and noting that a comity analysis applies to cases involving the extraterritorial effect of decrees which are aimed at rights whose situs lies outside the foreign sovereign's domain). See also Eckert, 934 F. Supp. at 172 (involving a contract for lobbying services to be performed in the United States).
95. See, e.g., Boland, 614 F. Supp. at 1173-74 (declaring to apply the act of state doctrine to a libel action, because publication occurred in the United States, and noting that a comity analysis applies to cases involving the extraterritorial effect of foreign sovereign activity which is not completed domestically).
96. See supra notes 13, 16, 9296 and accompanying text (establishing that only comity attaches to foreign sovereign conduct which does not come to complete fruition within the sovereign's domain).
97. See, e.g., Tchacos, 766 F.2d at 1336 (recognizing that principles of territoriality run deep through the act of state doctrine).
98. See supra notes 45-47 and accompanying text.
99. Ex parte Republic of Peru, 318 U.S. 578, 587-88 (1943) (noting that sovereign immunity is not a question of whether a foreign sovereign defendant has come within the territorial jurisdiction of a United States court, but whether that jurisdiction should be exercised after it has attached); Benzi Bros., 271 U.S. at 575 (quoting an English case for the proposition that sovereign immunity is a principle by which states agree not to exercise their jurisdiction against one another); Fista-Marrama Brooming do Cubo, 355 F.2d at 623 (4th Cir. 1964) (noting that sovereign immunity restricts the exercise of a United States court's clearly declared jurisdiction); Sullivan v. State of Sao Paulo, 36 F. Supp. 503, 505 (E.D.N.Y. 1941) (holding the recognition of foreign sovereign immunity requires courts to relinquish jurisdiction), aff'd, 122 F.2d 355 (2d Cir. 1941); S. Rep. No. 1310, at 9 (declaring that sovereign immunity is a principle by which courts relinquish jurisdiction over a foreign state); H.R. Rep. No. 1487, at 8.
100. See Ex parte Republic of Peru, 318 U.S. at 587-89 (deciding whether a foreign sovereign waived its immunity); Ehrin v. Quintilla, 99 F.2d 935, 938 (5th Cir. 1939) (noting a foreign sovereign may waive immunity expressly or implicitly); cert. denid, 306 U.S. 615 (1939); S. Rep. No. 1310, at 18 (noting that courts had found implicit waivers of immunity); H.R. Rep. No. 1487, at 18 (same). See also The Schooner Exchange, 11 U.S. (7 Cranch) at 125, 135 (summarizing the United States Attorney's position that sovereign immunity could be waived by implication and summarizing the Attorney General's argument that sovereign immunity destroys a court's compulsory jurisdiction).
101. See supra note 50 and accompanying text; see also The Schooner Exchange, 11 U.S. (7 Cranch) at 145 (apparently suggesting that a foreign sovereign's purchase of land within the forum for private purposes might operate as an implied waiver); Stana Redert A/B v. Comision de Contratos, 925 F.2d 380, 391 (5th Cir. 1991) (discussing the applicability of the FISA's commercial activity exception in terms of whether the foreign sovereign "acted in any way inconsistent with the grant of sovereign immunity").
foreign sovereign for suits arising from its commercial activities.102 This means not that the presence of a commercial activity is sufficient to invoke the jurisdiction of United States courts, but that sovereign immunity will not inhibit the proper assertion of territorial jurisdiction in suits based on commercial acts.103

Unfortunately, courts and commentators occasionally misinterpret this principle and suggest that jurisdiction will lie for actions involving a foreign sovereign's commercial activities.104 That was not true at common law105 and it remains untrue under the FSIA.106 While the Act's compression of immunity and jurisdictional concepts has led to some confusion,107 it most definitely retains a strong territorial component.108 Thus, jurisdiction will not lie in respect of a foreign sovereign's commercial activity unless the suit is based on an act which occurred, or caused a direct effect, in the United States.109 Thus, there is a tentative basis for compatibility between the act of state doctrine and the commercial activity exception to the FSIA: if the suit is based upon an event that occurred within the United States, the act of state doctrine cannot apply because the relevant conduct has not come to fruition within the foreign sovereign's domain.110 At first blush, the direct effects prong raises a question

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102. See Dunhill, 425 U.S. at 682, 705 (1976) (plurality opinion of White, J.) (noting the restrictive view of foreign sovereign immunity permits courts otherwise seized of jurisdiction to adjudicate the commercial obligations of foreign governments). Cf. 28 U.S.C. § 1602 (describing the restrictive view as a concept under which foreign sovereigns cannot claim immunity from the normal jurisdiction of courts when litigation involves their commercial activities).


104. See, e.g., Aantes Aircraft, L.P. v. Federal Republic of Nigeria, 999 F.2d 33, 37 (2d Cir. 1993) (Altman, J., dissenting) (arguing that the direct effects clause applies whenever a foreign sovereign harms a United States partnership, which would essentially extend jurisdiction to all commercial disputes between foreign sovereigns and United States business partnerships), cert. denied, 510 U.S. 1071 (1994); Gould, Inc. v. Pechinay-Ugine Kohmannn, 853 F.2d 445, 448, 452-53 (6th Cir. 1988) (describing the facts of a case in which a former employee of the U.S. corporate plaintiff contacted a French governmental company regarding the plaintiff's trade secrets, the former employee and the defendant met in France to discuss the matter, and the defendant ultimately secured the plaintiff's proprietary information from a Japanese company, and holding the plaintiff's experience of a financial loss supported jurisdiction under the direct effects clause); Magnon Elec., Inc. v. La Republica Argentina, 830 F.2d 1380, 1404-05 (7th Cir. 1987) (citing Gallego and noting the existence of authority for the proposition that a U.S. corporate's economic loss can trigger jurisdiction under the direct effects clause); Gallego, 764 F.2d at 1111-12 (construing the direct effects clause to apply because a natural person residing in the United States suffered financial harm); AMPAC Group, Inc., v. 797 F. Supp. at 977 (S.D. Fla. 1992) (finding a direct effect in the United States based on the fact that a United States corporation suffered a financial loss, aff'd, 40 F.3d 389 (11th Cir. 1994). Obenchain Corp. v. Corporacion Nacional de Inversiones, 656 F. Supp. 335, 340 (W.D. Pa. 1987) (noting a split of authority regarding the sufficiency of economic loss to trigger jurisdiction under the FSIA and holding that financial loss to a United States corporation would support jurisdiction under the direct effects clause, but that financial loss to its Panamanian subsidiary would not, aff'd in part and rev'd in part, 698 F.2d 142 (3d Cir. 1980). Achebe, supra note 4, at 281; Barzley, supra note 2, at 351; Purcell, supra note 39, at 841 (stating the FSIA grants jurisdiction to hear cases involving a foreign sovereign's commercial activities). See also Leoncova, supra note 7, at 14 (apparently suggesting that the FSIA grants jurisdiction over foreign sovereign commercial activities having no contacts with the United States). Cf. Dreszel, 12 F.3d at 329 (agreeing with the trial court that the foreign sovereign's activities may have been commercial in nature, but reversing its decision not to grant immunity because the relevant conduct possessed no jurisdictional nexus with the United States), cert. denied, 114 S. Ct. 1644 (1994); Eckher, 834 F. Supp. at 170-71 (applying the FSIA's commercial activity exception without any serious inquiry into the jurisdictional nexus with the United States), aff'd, 32 F.3d 77 (4th Cir. 1994). But see Antares Aircraft/1, 999 F.2d at 36 (rejecting the argument that a foreign sovereign's domestic tortious behavior caused a direct effect in the United States by virtue of the financial harm inflicted on a U.S. business partnership and recognizing that such a construction would leave foreign sovereign open to litigation in the United States for any commercial disputes with U.S. businesses and individuals).

105. See supra note 102 and accompanying text.

106. See, e.g., Janard v. Kuwait Univ., 43 F.3d 1534, 1537 (D.C. Cir. 1995) (emphasizing that a foreign sovereign's commercial activity does not resolve the question of jurisdiction under the FSIA, which also depends on the presence of a nexus with the United States); Kremer v. Boeing Co, 705 F. Supp. 1352, 1359-96 (D. Minn. 1989) (dissenting a claim against a foreign air carrier because its commercial activities in the United States had no connection to the suit at bar); 1976 Hearings, supra note 8, at 31 (testimony of Bruno A. Kissner, explaining that, for jurisdiction to lie under the FSIA, the dispute must have some relation to the United States); Kukule, supra note 7, at 407 (noting that Congress intended to subject foreign sovereigns to suit for commercial activities having the requisite jurisdictional nexus with the United States).

107. See supra note 50 and accompanying text.

108. See supra note 106 and accompanying text.


110. See S. Rep. No. 1310, at 19 n.1 (noting the act of state doctrine should not apply to cases falling within the FSIA's commercial activity exception, "whose touchstone is a concept of 'commercial activity involving significant jurisdictional contacts with this country'" (emphasis added); H.R. Rep. No. 1487, at 20 n.1.
about the two doctrines' full compatibility because a "direct effect in the United States" suggests that the underlying conduct may have been completed elsewhere.\textsuperscript{111} However, a careful examination of recent cases establishes that the FSIA's "direct effects" clause describes conduct falling outside the act of state doctrine's scope.

To come within the direct effects clause, the foreign sovereign's commercial activity must fulfill two criteria. First, the effect must not be remote or attenuated. To be direct, an effect must not be purely trivial, speculative, or attenuated.\textsuperscript{114} However, it need not be substantial, provided it flows as an immediate consequence of the foreign sovereign's activity.\textsuperscript{115} Estimating the United States as the location of the direct effect presents a greater challenge.\textsuperscript{116} The contact with the United States must not be remote or fortuitous.\textsuperscript{117} Rather, the determination of location depends chiefly upon the situs of the legally significant acts, omissions, or events giving rise to the plaintiff's cause of action.\textsuperscript{118} Thus, a foreign sovereign's renunciation of an agreement with a U.S. entity has no direct effect in the United States if the contract did not provide for performance in the United States.\textsuperscript{119} The fact that a person located in the U.S. suffered a loss is of no consequence because the direct effect is felt at the

\textsuperscript{111} See Callejo, 764 F.2d at 1111-12 (concluding that a foreign sovereign's commercial activity had a direct effect in the United States because it had harmed a United States resident, but applying the act of state doctrine because the foreign sovereign's unilateral debt restructuring took place entirely within its territory); International Ass'n of Machinists, 649 F.2d at 1357-61 (suggesting the alleged antitrust activities of a foreign sovereign might fall within the FSIA's commercial activity exception, but applying the act of state doctrine to defeat the plaintiff's suit); in its discussion, the Ninth Circuit did not seriously explore the territorial aspects of either doctrine, cert. denied, 454 U.S. 1163 (1982); Leacock, supra note 7, at 30 (noting a potential conflict between the act of state doctrine and the FSIA because a foreign sovereign's completed domestic conduct could have a direct effect in the United States); McCormick, supra note 7, at 305, 315.


\textsuperscript{113} See Woltower, 941 F.2d at 152 (deciding whether a direct effect was located in the United States); Texas Trading, 647 F.2d at 512.

\textsuperscript{114} See, e.g., Woltower, 504 U.S. at 618 (stating that jurisdiction cannot be based on purely trivial effects in the United States, suggesting that certain phenomena may be too speculative to be considered effects, and finding that a purported effect was too attenuated to be direct); McKesson Corp. v. Islamic Republic of Iran, 52 F.3d 346, 350 (D.C. Cir. 1995) (noting the effect must not be purely trivial), cert. denied, 116 S. Ct. 704 (1996); AMPAC Group, Inc., 797 F. Supp. at 977 (requiring that an effect not be speculative), aff'd, 40 F.3d 399 (11th Cir. 1994).


\textsuperscript{116} See, e.g., Woltower, 941 F.2d at 152 (calling this a "more troublesome inquiry"); Texas Trading, 647 F.2d at 312 (stating this is "the most difficult aspect of the direct effects clause").

\textsuperscript{117} See, e.g., Woltower, 504 U.S. at 618, 112 S. Ct. at 2168 (holding that a direct effect in the United States cannot be remote); Antares Aircraft v. Federal Republic of Nigeria, 999 F.2d 33, 36 (2d Cir. 1993) (refusing to apply the FSIA's commercial exception because the claim involved only a fortuitous nexus with the United States), cert. denied, 510 U.S. 1071 (1994); Reed Intl Trading Corp. v. Donau Bank AG, 666 F. Supp. 750, 754 (S.D.N.Y. 1984) (denying an immunity-based motion to dismiss because the effect in the United States was not fortuitous); see also United World Trade, 33 F.3d at 1238 (noting the direct effects clause does not confer jurisdiction over a dispute simply because its ripples eventually manage to reach our shores).

\textsuperscript{118} See, e.g., United World Trade, 33 F.3d at 1239 (quoting Woltower, 941 F.2d at 152, for the proposition that, in fixing the location of a direct effect, courts often look to the place of legally significant acts giving rise to the claim); Antares Aircraft, 999 F.2d at 36 (applying the "legally significant acts" test and stating the Supreme Court used a similar approach in Woltower); General Elec. Capital Corp. v. Grosvenor, 991 F.2d 1376, 1383-85 (8th Cir. 1993) (noting that courts frequently use the "legally significant acts" test to localize direct effects); Woltower, 941 F.2d at 152 (noting that courts frequently use the "legally significant acts" test to establish the situs of direct effects); see also Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511, 1515, (D.C. Cir. 1988) (using the situs of legally significant "happenings" to determine the location of direct effects).

\textsuperscript{119} See, e.g., United World Trade, 33 F.3d at 1237 (finding no direct effect in the United States because no part of the contract was to be performed here); Goodman Holdings, 26 F.3d at 1140 (same).
The act of state doctrine and foreign sovereign immunity

If a commercial tort's locus falls entirely outside the United States, there is no direct effect in the United States, even if a domestic entity suffers a crushing financial setback. Conversely, the repudiation of an obligation slated for performance in the United States causes a direct effect in the United States. Similarly, the tortious production of consumer goods abroad causes a direct effect in the United States if the United States is the site of physical injury. Significantly, these same contacts also prevent application of the act of state doctrine.

Thus, under the direct effects clause, there can be no jurisdiction unless the dispute involves the occurrence of some legally significant act within the United States. As a result, if jurisdiction lies under the direct effects clause, the act of state doctrine cannot apply because the relevant sovereign conduct has not achieved complete fruition within the sovereign's territorial domain. Herein lies the key to harmonizing the act of state doctrine with FSIA's commercial exception: the former poses no threat to the latter because the two are naturally confined to distinct territorial spheres. The act of state doctrine involves a foreign sovereign's purely domestic conduct, while the FSIA commercial activities exception attaches to conduct that in some way crosses into the territorial jurisdiction of United States courts. As a consequence, the act of state doctrine should never apply to conduct falling within the FSIA's commercial exception and the FSIA's commercial exception should never apply to conduct falling within the act of state doctrine. Thus, although the Dunhill plurality and its many scholarly defenders have wisely argued in favor of avoiding a conflict between the act of state doctrine and the commercial exception to foreign sovereign immunity, their talk of absolute congruity presents an unnecessary detour because the desired harmony flows naturally from the doctrines' distinct territorial underpinnings.

V. Conclusion

The modern federalization of the act of state doctrine and foreign sovereign immunity has transformed relatively simple concepts into doctrinal hobgoblins. Placing the narrow act of state into a cavernous vehicle, the Sabbatino Court invited confusion about the doctrine's scope. Compressing notions of

120. See Zedan, 849 F.2d at 1515 (holding that when all legally significant events took place overseas, a U.S. individual felt the effects there); see also United World Trade, 33 F.3d at 1238-39 (rejecting the argument that a United States corporation can experience the effects of a financial setback only in the United States).
121. See Antares Aircraft, 999 F.2d at 36 (concluding the FSIA's commercial activity exception did not apply to a conversion claim, because all legally significant acts took place outside the United States, and refusing to find a direct effect in the United States based on the alleged overseas conversion of a U.S. partnership's sole asset).
122. See, e.g., Willsover, 506 U.S. at 618-19 (finding a direct effect in Argentina's unilateral rescheduling of a debt obligations, the payments of which were due in New York); see also 1976 Hearings, supra note 8, at 37-38 (testimony of Monroe Leigh stating that the FSIA is consistent with the European Convention on State Immunity and setting forth the Convention's text, including Article 4, which renders states non-immune in suits based on their failure to perform contractual obligations that were due in the forum's territory).
123. See Vemonden, 985 F.2d at 1545 (concluding that a French automobile producer's negligent design and manufacture of a passenger restraint system produced a direct effect in the United States because the complaint alleged this activity caused injury in an automobile accident within the United States), cert. denied, 508 U.S. 907 (1993).
124. See supra notes 92-96 and accompanying text.
125. See supra notes 35-36 and accompanying text.
immunity and territorial jurisdiction, the FSIA's drafters made it difficult to recognize their separate identities and the existing body of precedent that they represent. Not surprisingly, jurists and scholars initially voiced concern that the act of state doctrine might devour the FSIA's commercial exception. However, the Supreme Court's recent decision to look through the miasma and into the act of state doctrine's core makes such fears unwarranted. The distinct territorial underpinnings of the act of state doctrine and the FSIA's commercial activity exception suggest a natural harmony, which is confirmed by recent case interpretations.

126. See supra notes 60-61 and accompanying text.
127. See supra notes 38-39, 66-67 and accompanying text.
128. See supra notes 9, 40-41 and accompanying text.
129. See supra note 110 and accompanying text.
130. See supra notes 110-124 and accompanying text.