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The Political Economy of Foreign Sovereign Immunity

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Articles

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The Foreign Sovereign Immunities Act ("FSIA") prohibits civil litigation against foreign states, their agencies, and instrumentalities unless one of several enumerated exceptions to immunity applies. The most important of these exceptions is for the commercial activity of foreign sovereigns. While underappreciated, various capitalist interests have comported with and been furthered by the FSIA. Applying a political economy lens, this Article demonstrates how the statutory framework for private litigation against foreign sovereigns has aligned with interests and prerogatives associated with particular stages of capitalist development—as evidenced by the historical evolution of foreign sovereign immunity doctrine and the FSIA's eventual passage; the central role of the commercial activity exception in the foreign sovereign immunity scheme before and after the FSIA; and the ways courts have interpreted the FSIA's commercial activity exception to privilege particular corporate interests and plaintiffs over other types of claims and claimants. While capitalism's relationship with the FSIA is a story that has yet to be fully told, its telling benefits and enriches legal analysis and understanding of the FSIA itself and points the way to possible reforms of the statute.

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INTRODUCTION

Passed by Congress in 1976, the Foreign Sovereign Immunities Act ("FSIA")[1] governs all civil litigation in United States federal and state courts against foreign governments, including their agencies and instrumentalities.[2] With more cases brought against foreign sovereigns in the United States than anywhere else[3] and with sovereign immunity doctrine largely shaped by domestic courts,[4] the FSIA is one of the most consequential legal regimes for foreign sovereign immunity worldwide.[5]

Under the FSIA, foreign states enjoy immunity from civil suit unless an enumerated exception to that immunity applies—an approach that is known as "restrictive immunity."[6] Despite including a number of different exceptions to sovereign immunity,[7] the FSIA's most important and most litigated provision involves the commercial activity of foreign states.[8] Under this provision, a foreign government, its agencies, and instrumentalities can be sued for their commercial activities as long as those activities have the requisite territorial nexus to the United States.[9] So, for example, if a foreign state-owned company breaches its contract with a private corporation, the private corporation can theoretically use the commercial activity exception to sue the foreign state-owned company, as well as the foreign state itself depending on the company's relationship to the state.

While many scholars and practitioners working on the FSIA recognize the commercial activity exception's prominence and acknowledge its general

1. 28 U.S.C. §§ 1602–11.

2. *Id.* § 1603(a). An agency or instrumentality of a foreign state is defined as "a separate legal person, corporate or otherwise . . . which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof . . . which is neither a citizen of a State of the United States . . . nor created under the laws of a third country." *Id.* § 1603(b).

3. XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 25 (2012).

4. GAMAL MOURSI BADR, STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW 9 (1984).

5. *See* YANG, *supra* note 3, at 25 (noting that "US . . . courts have decided more [foreign sovereign immunity] cases than the rest of the world put together. . . . ").

6. M.PA. Kindall, *Immunity of States for Noncommercial Torts: A Comparative Analysis of the International Law Commission's Draft*, 75 CALIF. L. REV. 1849, 1850 n.6 (1987). Historically, "restrictive immunity" was narrowly used to refer to limits on immunity for foreign sovereigns engaged in commercial activities. *Id.* However, contemporary applications of the term are often shorthand for any and all exceptions to foreign sovereign immunity. *Id.*; *see also* YANG, *supra* note 3, at 3 (describing restrictive immunity as any restriction on a foreign state's immunity); Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 758 (2003) (describing the restrictive theory of immunity as generally "draw[ing] the line between immune and nonimmune state conduct"). Throughout this Article, restrictive immunity is used in this broader contemporary sense.

7. *See infra* note 226 for a list of the FSIA's current immunity exceptions. This Article focuses on the jurisdiction of courts to hear cases against foreign sovereigns under the FSIA and not their jurisdiction to enforce judgments against foreign sovereigns, which are subject to a separate set of FSIA exceptions under 28 U.S.C. § 1609.

8. De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1386, 1390 (5th Cir. 1985).

9. 28 U.S.C. § 1605(a)(2). See *infra* note 256 and accompanying text for a full definition of the commercial activity exception.

connection to capitalism,[10] there is little scholarship about the relationship between specific capitalist forces and the commercial activity exception's centrality to foreign sovereign immunity doctrine before and after the FSIA's passage; the relationship between capitalist interests and the creation of the FSIA itself; or any exploration of whether or how judicial interpretations of the FSIA's commercial activity exception have aligned with or furthered particular trends associated with capitalism.[11]

For example, while some have argued that "[t]he elimination of [sovereign] immunity [for commercial activity] [has] promote[d] the security of contract and minimize[d] disruption in the normal rules of the marketplace, and thus further[ed] more broadly the interests of the U.S. economic and political system,"[12] they have failed to explore exactly how those economic interests have aligned with foreign sovereign immunity doctrine, before and after the FSIA's passage.

Indeed, some have rejected the idea that economic ideology plays a meaningful role in the doctrine of foreign sovereign immunity and have described the rise of a commercial activity exception as merely a practical response to foreign states' increasing commercial engagement.[13] In fact, most scholars have looked to non-economic theories to understand the rise of restrictions on foreign sovereign immunity, as well as judicial interpretations of the FSIA. For some of these commentators, limitations on foreign sovereign

10. While there are multiple definitions of varying specificity, capitalism is generally defined as a system "in which trade, industry, and the means of production are largely or entirely privately owned and operated for profit." Christopher Tomlins, *Organic Poise? Capitalism as Law*, 64 BUFF. L. REV. 61, 63 (2016) (citation omitted) (quotations omitted). Its central elements include capital accumulation, competitive markets, wage labor, and private ownership of the means of production. *Id.*; MICHAEL MANN, THE SOURCES OF SOCIAL POWER VOLUME 2: THE RISE OF CLASSES AND NATION-STATES, 1760–1914, at 23–24 (2012) [hereinafter MANN, SOURCES OF SOCIAL POWER VOL. 2].

11. Within the American legal academy, critiques of law's relationship to capitalism initially emerged over a century ago with the school of legal realism—an intellectual movement that sought, in part, to understand how law was shaped by, and itself transformed, social, economic, and political systems. Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 468–69 (1988); David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 658 (2014). When it came to economic relationships, legal realists saw the law as "specif[ying] the rights, powers, and enforcement mechanisms that constitute economic transactions, and, more broadly, economic ordering." Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth Century Synthesis*, 129 YALE L.J. 1784, 1792 (2020). While the legal realist movement began to decline after World War II, legal scholars have increasingly reengaged with its intellectual project under the banner of law and political economy. Roger D. Citron, *The Nuremberg Trials and American Jurisprudence: The Decline of Legal Realism, the Revival of Natural Law, and the Development of Legal Process Theory*, 2006 MICH. ST. L. REV. 385, 387 (2006); Britton-Purdy et al., *supra* note 11, at 1791–94; *see also* Samuel R. Bagenstos, *Consent, Coercion and Employment Law*, 55 HARV. C.R.-C.L. L. REV. 409, 411 n.7 (2020) (noting how law and political economy scholars have worked to revive the insights of legal realism). This Article is situated within this broader legal tradition.

12. Joan E. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 YALE J. INT'L L. 489, 521 (1992).

13. *See* YANG, *supra* note 3, at 22–23 (noting that commercial activity exception arose as a result of increasing state trading activities but that ideology is neverhtless irrelevant to the "evolution of state immunity rules").

immunity are rooted in the principle of legality.[14] According to this view, all entities, including persons, organizations, and states, should be subject to the rule of law for reasons of "equity and justice."[15]

Still others have argued that principles of territoriality, mutual respect, and equality between sovereigns represent the FSIA's central rationales.[16] Even though every nation has exclusive and absolute jurisdiction over its territory, the FSIA balances the government's interest in exercising jurisdiction to protect those injured by foreign states against the need to maintain good foreign relations with other countries;[17] according to this view, courts apply a similar balancing approach in construing the FSIA's commercial activity exception.[18]

While these rationales for the FSIA's development and evolution have much force, they fail to appreciate that it was far from inevitable that the commercial activity exception would be so central to limiting foreign sovereign immunity. Nor do they pay much heed to how the interests of certain business groups impacted the structure and substance of the FSIA. They also miss the ways in which some judicial decisions on the FSIA's commercial activity exception have favored certain corporate interests and plaintiffs over others.

This Article fills these gaps. Applying a political economy lens, it demonstrates how the framework for private litigation against foreign sovereigns in U.S. courts aligns with and furthers certain capitalist interests and prerogatives.[19] While capitalism did not necessarily *cause* particular developments in the law of foreign sovereign immunity, those developments *support and comport with* various important themes in capitalism's evolution that appear to be more than just coincidental. Different parts of this story highlight macro-economic forces associated with capitalism's various stages, while others also underscore specific lobbying efforts by U.S. business interests. Understanding these trends is particularly important at this historical moment,

14. Notes and Comments, *Sovereign Immunity – Waiver and Execution: Arguments from Continental Jurisprudence*, 74 YALE L.J. 887, 891 (1965).

15. *Id.* at 890.

16. David A. Brittenham, Note, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440, 1467 n.120 (1982).

17. *Id.* at 1466–68; *see also* George K. Foster, *When Commercial Meets Sovereign: A New Paradigm for Applying the Foreign Sovereign Immunities Act in Crossover Cases*, 52 HOUS. L. REV. 361 (2014) ("The FSIA's drafters designed the statute to screen out cases that pose heightened foreign relations risks . . . ."); Michael A. Granne, *Defining "Organ of A Foreign State" Under the Foreign Sovereign Immunities Act of 1976*, 42 U.C. DAVIS L. REV. 1, 55 (2008) (describing purpose of FSIA as "prevent[ing] interference with foreign relations by making it difficult to sue foreign governments and their agencies and instrumentalities").

18. *See, e.g.*, *Federal Jurisdiction and Procedure*, 107 HARV. L. REV. 254, 268 (1993) (explaining result in FSIA commercial activity case as driven by judicial concerns regarding foreign policy consequences of exercising jurisdiction).

19. In referring to capitalist "interests and prerogatives," I do not mean to anthropomorphize capitalism. The interests associated with capitalism are, of course, held not by capitalism itself but by the actors who benefit from the capitalist system, including for-profit corporations and financial institutions. The terminology of "capitalist interests" and "capitalist prerogatives" is merely my shorthand reference for the interests of these groups.

as critiques and challenges to the capitalist system are becoming prominent within mainstream public debate in the United States.[20]

At a general level, this Article demonstrates how and why the commercial activity exception is at the center of the FSIA's immunity regime by design. More specifically, this Article shows how particular interests reflected in capitalism's various periods aligned with the emergence of foreign sovereign immunity doctrine in the late eighteenth and early nineteenth centuries; comported with the rise of a commercial activity exception to foreign sovereign immunity in the early twentieth century;[21] played a role in the FSIA's creation; and have been reflected in and furthered by judicial interpretations of the FSIA's commercial activity exception, since the statute's enactment. On this last point, this Article tentatively suggests possible remedies for certain inequities created by these judicial interpretations.

While dividing capitalism into periods or stages is necessarily reductive, it is something that economists and economic historians recognize as important to understanding how capitalism has evolved and functioned throughout time.[22] The various periods of capitalism described here are ideal types that have been proposed by some of these experts. Of course, as ideal types, these periods may not capture all the nuances and contradictions of modern capitalism, or adequately reflect important disagreements over its evolution. Nevertheless, this Article's description of capitalism's history attempts to capture broad, generally agreed-upon themes within capitalism's development, at least within the West, and bring specificity and concreteness to its relationship with the FSIA.

The first chapter in this story focuses on the Supreme Court's 1812 decision in *The Schooner Exchange v. McFaddon*.[23] *Schooner Exchange* is considered the most famous early judicial case, both in the United States and globally, concerning civil litigation against foreign sovereigns.[24] It is also widely credited with establishing the principle that foreign states are absolutely immune from suit in the courts of other countries.[25] The decision in *Schooner Exchange* coincided with the first modern period of capitalism dating roughly from the

20. *See infra* notes 580–84, and accompanying text.

21. While this Article focuses on the United States, the commercial activity exception has been the driving force behind the embrace of restrictive immunity worldwide. *See generally* SOMPONG SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW (1959). For this reason, a political economy approach could be useful to understanding foreign sovereign immunity doctrine in other countries as well.

22. DAVID COATES, CAPITALISM: THE BASICS 15 (2016).

23. The Schooner Exchange v. McFaddon, 11 U.S. 116 (1812).

24. Despite its prominence, *Schooner Exchange* was neither the first case to address the issue of foreign sovereign immunity nor the historical starting point for the principle of foreign sovereign immunity more generally. *See infra* notes 66, 75.

25. YANG, *supra* note 3, at 8; BADR, *supra* note 4 at 9–10. This is not to say that *Schooner Exchange* established absolute immunity as a rule of customary international law—it did not. Michael Byers, *Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109, 169 (1995). Many scholars, as well as the Supreme Court, also agree that *Schooner Exchange* itself was a limited decision, even if it was eventually understood as supporting an absolute theory of immunity. *See infra* notes 67–68 and accompanying text.

early to the mid-to-late nineteenth century.[26] This was a time when *laissez-faire* theories were ascendant and when capitalist countries, like the United States, were moving (however inconsistently) toward that approach to commerce.[27] While the *laissez-faire* economic system is subject to varying definitions,[28] it is generally opposed to state regulation and involvement in commercial markets and activities.[29]

Though the inherently private nature of commerce is a central principle of capitalism,[30] Western states did not embrace this ideal until the *laissez-faire* period.[31] As this Article demonstrates, *Schooner Exchange* implicitly reflected the *laissez-faire* view of commerce as the domain of private, rather than state, actors. In doing so, it laid the conceptual groundwork for restricting the immunity of foreign sovereigns whenever they behaved as commercial, and therefore "private," actors.[32]

In the late nineteenth century, capitalist states, including the United States, began to engage more directly with commercial markets, assuming not only a more active regulatory role but also ownership of corporate enterprises and greater participation in trade and commerce.[33] This period of relatively robust state intervention in the capitalist system started from the late nineteenth century, began to unravel in the early 1970s, and came to a close roughly around the end of the Cold War in 1989.[34] This period also witnessed the first modern era of globalized trade from the end of the nineteenth century through World War II.[35]

This marks the second chapter in the story of the FSIA's political economy. With states increasingly acting as global commercial players, foreign sovereign immunity began to be reconciled with the capitalist market system. Amidst increasing, albeit fractured, global trade,[36] some countries, including the United

26. COATES, *supra* note 22, at 12.

27. SUCHARITKUL, *supra* note 21, at 14; *see also infra* Part I.B.

28. P.W.J. Bartrip, *State Intervention in Mid-Nineteenth Century Britain: Fact or Fiction*, 23 J. BRITISH STUD. 63, 63, 82–83 (1983).

29. Jacob Viner, *The Intellectual History of Laissez Faire*, 3 J.L. & ECON. 45, 45–46 (1960). While beyond the scope of this Article, the *laissez faire* system was not a natural or spontaneous occurrence but rather the result of organized and sustained state intervention that required the creation of a centralized administrative state to protect private property rights, remove existing restrictions on markets, and ensure the exploitation of labor. *See* KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 145–47 (1944) (arguing that *laissez-faire* economics "far from doing away with the need for [state] control, regulation, and intervention[,] enormously increased their range," including but not limited to "repealing harmful restrictions" on free markets).

30. *See infra* note 94, and accompanying text.

31. As discussed in Part I.B, states continued to engage in commercial activity during the first few centuries of capitalism. This state-led commercial activity began to drop off (though did not by any means disappear) during the early nineteenth century with the rise of *laissez-faire* policies.

32. *See infra* note 77–84 and accompanying text.

33. MANN, SOURCES OF SOCIAL POWER VOL. 2, *supra* note 10, at 479.

34. COATES, *supra* note 22, at 13–14.

35. Transnational trade had actually started to increase during the middle of the nineteenth century, primarily as a result of British efforts. MANN, SOURCES OF SOCIAL POWER VOL. 2, *supra* note 10, at 282–85.

36. *See infra* Part II.A. This first great wave of globalization experienced a significant downturn from the start of World War I to the end of World War II, when it began increasing again. Esteban Ortiz-Ospina & Diana

States, started to restrict the immunity of foreign sovereigns engaged in commercial activities. As this Article demonstrates, during this period, U.S. courts and Executive Branch officials began to signal their support for restricting foreign sovereign immunity in certain cases involving state-owned merchant ships and corporations, particularly during the interwar period.[37] This rising commitment to restrictive immunity was not, however, only a byproduct of patterns in global trade—it was also consistent with capitalism's place within the U.S. legal system, including with existing restrictions on the immunity of federal and state governments engaged in commercial acts.[38]

The third chapter in the political economy of the FSIA begins with the end of World War II. As the influence of the Soviet Union and communism spread across the globe after 1945, there was even more state involvement and engagement in commercial activities.[39] The second modern period of globalization also started during this time,[40] with the United States and other capitalist countries working to create an international trading system and liberalize trading practices between and within countries.[41] Against this backdrop, the United States took its first step toward formally embracing restrictive immunity in the Tate Letter, which was issued in 1952 by the State Department's Acting Legal Advisor, Jack Tate.[42] The Tate Letter not only marked official American adoption of restrictive immunity; it was also principally aimed at the commercial activities of foreign states.[43] This focus aligned with the U.S. government's twin desires, at the time, of both "fighting" communism and promoting and protecting free trade between U.S. enterprises and foreign sovereigns, including companies owned by communist countries.[44]

When restrictive immunity was codified by the FSIA in 1976, these impulses, especially the desire to protect and facilitate trade, were reflected in

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Beltekian, *Trade and Globalization*, OUR WORLD IN DATA (2014), https://ourworldindata.org/trade-and-globalization#trade-from-a-historical-perspective (last updated Oct. 2018). Nevertheless, the volume of trade during the inter-war period was still greater than it had been for the preceding 400 years—globalization in some form or another had arrived. *Id.*

37. *See infra* Part II.A–B.

38. *See infra* Part II.D. The relationship between federal and state sovereign immunity and foreign sovereign immunity does not flow in one direction. Indeed, recently, scholars have argued that the FSIA's approach to defining commercial activity can help reform prevailing jurisprudential approaches to federal sovereign immunity, which has increasingly served as a "sovereign shield" protecting private government contractors from liability. *See generally* Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign in Commerce*, 73 STAN. L. REV. 1101 (2021) (arguing that the "solution to the sovereign-shield problem" requires an "analysis [that] turn[s] on the nature of the activity performed, not the identity of the actor performing it.").

39. Bernard Fensterwald, Jr., S*overeign Immunity and Soviet State Trading*, 63 HARV. L. REV. 614, 614–15 (1950).

40. Ortiz-Ospina & Beltekian, *supra* note 36.

41. Raymond Vernon, *Introduction*, *in* STATE TRADING IN INTERNATIONAL MARKETS: THEORY AND PRACTICE OF INDUSTRIALIZED AND DEVELOPING COUNTRIES 1 (M.M. Kostecki ed., 1982).

42. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711–15 (1976) (containing the full text of the Tate Letter).

43. *See infra* Part III.A.

44. *See infra* Part III.A.

the commercial activity exception's dominance of the FSIA.[45] It is at this stage, in particular, that the U.S. business community's lobbying efforts most clearly influenced the foreign sovereign immunity regime, as reflected in the FSIA's legislative history.[46]

This brings us to the fourth and current chapter in the political economy of the FSIA. This period of capitalist development, which has been described as "neoliberalism,"[47] fully emerged after the end of the Cold War.[48] It is a period of increasing commodification of goods and services,[49] deregulation of capital and labor markets,[50] and predominance of financial markets[51] as the main drivers of the U.S. economy. It is also a period of weakening workers' rights[52] and increasing economic inequality,[53] with wealth concentrated in the hands of the few[54] and corporate profits substantially increasing worldwide.[55]

In the forty-five years since the FSIA's enactment, judicial interpretations of the commercial activity exception have reflected these trends. Especially when it comes to the Supreme Court, jurisprudence on the commercial activity

45. *See infra* Part III.B.

46. *See infra* Part III.B. This is not to say U.S. business interests did not play a direct role in earlier developments in foreign sovereign immunity doctrine, including, for example, the issuance of the Tate Letter. While corporate and business lobbying may have triggered these and other government responses to foreign sovereign immunity pre-FSIA, publicly available information does not settle that question one way or another.

47. "Neoliberalism" is defined as a system "guided by the imperatives of the international reproduction of capital, represented by the financial markets and the interests of US capital." ALFREDO SAAD-FILHO, VALUE AND CRISIS: ESSAYS ON LABOUR, MONEY, AND CONTEMPORARY CAPITALISM 8 (2018).

48. Even though neoliberalism did not fully take root until the end of the Cold War in 1989, it began to emerge in the late 1970s and early 1980s. COATES, *supra* note 22, at 29–30.

49. *See* ERNEST MANDEL, LATE CAPITALISM 387–88 (1975) (describing late capitalism, which overlaps with neoliberalism, as resulting in ever more commodification of daily life). Commodification is the process of monetizing and selling goods and services, including ones that do not produce any surplus value, via the market. COATES, *supra* note 22, at 20; see also notes 291–94 and accompanying text for a more in-depth discussion of commodification.

50. MICHAEL MANN, THE SOURCES OF SOCIAL POWER VOLUME 4: GLOBALIZATIONS, 1945–2011, at 131 (2013) [hereinafter MANN, SOURCES OF SOCIAL POWER VOL. 4].

51. SAAD-FILHO, *supra* note 47, at 302–03; DAVID HARVEY, THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE 194 (1992).

52. Eoin Flaherty, *Complex Inequalities in the Age of Financialisation: Piketty, Marx, and Class-Biased Power Resources*, *in* TWENTY-FIRST CENTURY INEQUALITY AND CAPITALISM: PIKETTY, MARX AND BEYOND 86, 96–97 (Lauran Langman & David A. Smith eds., 2017).

53. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 15 (2014).

54. *See id.* at 43, 249 (showing that in 2010 20% of the national income of the United States, which is the sum of all income from capital and labor of all residents, was held by the top 1% of the population and 50% of the national income was held by the top 10%); Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, *Most Americans Say There Is Too Much Economic Inequality in the U.S., but Fewer Than Half Call It a Top Priority*, PEW RSCH. CTR. (Jan. 9, 2020), https://www.pewsocialtrends.org/2020/01/09/trends-in-income-and-wealth-inequality (showing that "[t]he richest families in the U.S. have experienced greater gains in wealth than other families in recent decades, a trend that reinforces the growing concentration of financial resources at the top"). The erosion of workers' rights and increasing economic inequality go hand in hand. Flaherty, *supra* note 52, at 86–87.

55. SAAD-FILHO, *supra* note 47, at 305–06; Richard Dobbs, Tim Koller & Sree Ramaswamy, *The Future and How to Survive It*, HARV. BUS. REV., Oct. 2015, at 48.

exception has sometimes privileged the interests of the global financial system,[56] encouraged commodification[57] and deregulation,[58] and provided greater opportunities for corporate, as compared to individual, plaintiffs[59] to succeed on their claims.[60] For example, courts have developed relatively pro-plaintiff approaches in commercial activity cases involving corporate concerns, especially those relating to global financial markets.[61] By contrast, individuals with certain kinds of claims connected to their employment or consumer activity have often had less luck bringing suit under the exception.[62] In some jurisdictions, there have also been noticeably different outcomes for U.S. corporations suing for pure financial losses suffered in the United States—which have often been successful—as compared to individuals bringing similar claims, which have often failed.[63] In general, by giving corporations a better chance than individuals of recouping their financial losses,[64] some of the jurisprudence on the commercial activity exception aligns with the economic inequality and wealth gap endemic to neoliberalism, while also helping erode the rights of American workers.[65]

This Article proceeds as follows. Part I examines the *Schooner Exchange* case and highlights its commitment to the belief, ascendant during the *laissez-faire* period, that commerce is inherently private. Part II demonstrates how increasing state involvement in commercial activity starting in the late nineteenth century aligned with increasing, albeit tentative, embrace of restrictive immunity for the commercial actions of foreign sovereigns after World War I. It also shows how these incipient moves in favor of restrictive

56. Some countries understood the FSIA's benefits to U.S. financial institutions early on. According to one commentator, the British dropped their long-standing reticence to restrictive immunity and quickly incorporated it into their own sovereign immunity statute in 1978 after "London began to lose some international business to New York" following the FSIA's passage. BADR, *supra* note 4, at 1.

57. *See infra* Part IV.A.

58. *See infra* Part IV.A–B.

59. In referencing "corporate plaintiffs" and "corporate interests" in the context of Congress's passage of the FSIA and judicial interpretations of the statute, I use the term "corporate" to denote business organizations generally, including but not limited to corporations.

60. *See infra* Part IV.A–B. In favoring the interests of capitalism, Supreme Court jurisprudence on the FSIA's commercial activity exception arguably aligns with the Court's long-standing commitment to supporting business interests. *See generally* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR RIGHTS (2018) (tracing the historical path to corporations gaining personhood and constitutional rights).

61. *See infra* Part IV.B. While these sorts of claims are not exclusively brought by corporations, they are more typical of corporate rather than individual plaintiffs.

62. *See infra* Part IV.A–B. These claims related to employment and consumer activity include human rights-related claims as well as personal injury claims. *See infra* Part IV.A–B. These injuries are often, though not always, sustained abroad and are arguably often connected to a foreign sovereign's commercial acts either in the United States or abroad. *See infra* Part IV.A–B.

63. *See infra* Part IV.B.2.

64. In privileging corporate over individual plaintiffs in some cases, the courts have arguably departed from the FSIA itself, which makes no distinction between corporate and individual plaintiffs in commercial activity cases.

65. *See infra* Part IV.B.2. The commercial activity exception's tendency to privilege contract over other kinds of claims in some circumstances also aligns with neoliberalism's wealth gap as discussed in Part IV.C.

immunity were influenced by limitations on the immunity of federal and state governments engaged in commercial acts. Part III discusses the Tate Letter as well as the FSIA's passage, setting these developments against the backdrop of communism's spread and an explosion in globalization after World War II. It also highlights substantial support for the FSIA's passage amongst the U.S. business community, as well as the bill's sensitivity to that community's interests. Part IV analyzes how judicial interpretations of the FSIA's commercial activity exception align with interests associated with the neoliberal period. This Article concludes with a brief discussion of tentative solutions to some of the inequities reflected in jurisprudence on the commercial activity exception.

While capitalism's relationship to the FSIA is a story that ought to be told, the purpose of this Article is not to suggest that all or even most aspects of the FSIA can be explained by capitalism. Instead, this Article's more modest project is to demonstrate how a political economy frame highlights underappreciated and underexplored aspects of the statute's history generally and the commercial activity exception's evolution and application more specifically. In particular, it aims to draw attention to jurisprudential trends on the commercial activity exception that exacerbate socio-economic inequalities, in the hopes policy makers and judges might be encouraged to remedy those shortcomings.

I. THE *SCHOONER EXCHANGE* AND THE "PRIVATE" NATURE OF COMMERCE

Decided by the Supreme Court in 1812, *The Schooner Exchange v. McFaddon* is considered to be the most important early judicial decision on foreign sovereign immunity.[66] While the limits of the *Schooner Exchange* holding have been noted,[67] it remains widely credited with establishing the absolute theory of immunity.[68] What is, perhaps, less understood about *Schooner Exchange*, however, is that it set the stage for a commercial exception to foreign

66. *See* Republic of Austria v. Altmann, 541 U.S. 677, 688 (2004) (describing *Schooner Exchange* as the "source of our foreign sovereign immunity jurisprudence"); Spacil v. Crowe, 489 F.2d 614, 616 (5th Cir. 1974) ("In the famous case of *The Schooner Exchange v. McFaddon* . . . the Supreme Court first enunciated the doctrine of immunity for foreign sovereigns . . . ."). In fact, the Supreme Court addressed (and upheld) foreign sovereign immunity before *Schooner Exchange* in cases involving ships owned by foreign governments. *See, e.g.*, U.S. v. Richard Peters, Dist. Judge, 3 U.S. 121, 130 (1795) (holding that "by the laws of nations, the vessels of war of belligerent powers, duly by them authorized, to cruise against their enemies, and to make prize of their ships and goods . . . are not amenable before the tribunals of neutral powers for their conduct therein, but are only answerable to the sovereign in whose immediate service they were, and from whom they derived their authority . . .").

67. *See* Samantar v. Yusuf, 560 U.S. 305, 311 (2010) (noting that "[t]he Court's specific holding in *Schooner Exchange* was that a federal court lacked jurisdiction over 'a national armed vessel . . . of the emperor of France' . . ."); Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983) (noting that "the narrow holding of *The Schooner Exchange* was only that the courts of the United States lack jurisdiction over an armed ship of a foreign state found in our port . . . ."); Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669, 2689–90 (2011) (arguing that *Schooner Exchange* was a limited decision that applied the "personal immunity of royal sovereigns to the distinct entity of the state and its possessions" in situations where the "the forum state has explicitly or implicitly given them leave to enter its territory").

68. *Samantar*, 560 U.S. at 311 (noting that despite its limited holding *Schooner Exchange* has been interpreted as extending absolute immunity to foreign sovereigns); *Verlinden*, 461 U.S. at 486 (same).

sovereign immunity by implicitly embracing newly ascendant capitalist understandings about the private nature of commerce. This perspective on commercial activity marked a turning point in a complex and evolving relationship between the nation-state and capitalism. While states had been active commercial participants during the first few centuries of capitalism's expansion, they began to exit the commercial sphere in the early nineteenth century alongside the rising popularity of *laissez-faire* economic policies. These policies created a stark and largely unprecedented public/private divide that defined the marketplace as the inherent domain of private, not governmental, actors—a view reflected in the *Schooner Exchange* opinion.

Part I.A begins with an analysis of *Schooner Exchange* and highlights its role in articulating the ideological underpinnings for restricting foreign sovereign immunity based on commercial activity. Part I.B demonstrates how the *Schooner Exchange* view of commercial activity coincided with the emergence of a public/private divide that placed commerce on the private side of the ledger. As this Subpart demonstrates, *Schooner Exchange* provides ample support for a commercial exception to foreign sovereign immunity while also underscoring the less than inevitable nature of this exception and its connections to certain capitalist conceptions of commerce that became dominant during the *laissez-faire* period.

A. Schooner Exchange

Schooner Exchange involved the "very delicate and important inquiry" as to whether a U.S. court could take jurisdiction and determine ownership over a foreign state's armed vessel present within the territorial jurisdiction of the United States.[69] In *Schooner Exchange*, plaintiffs, who were American citizens, claimed they were the true owners of a French warship that was docked in the Philadelphia harbor.[70] According to plaintiffs, who sought attachment and return of the ship,[71] their vessel had been forcibly taken on the high seas by agents of the French government.[72]

In an opinion written by Chief Justice John Marshall, the Supreme Court rejected plaintiffs' suit. It held that an armed ship on U.S. territory belonging to a foreign country at peace with the U.S. government could not be subject to the jurisdiction of U.S. courts.[73] As the Court reasoned, a foreign sovereign that enters another sovereign's territory with its consent enjoys immunity from that country's territorial jurisdiction, as a function of the "perfect equality and absolute independence" of all sovereigns.[74]

69. The Schooner Exchange v. McFaddon, 11 U.S. 116, 135 (1812).
70. *Id.* at 117.
71. *Id.*
72. *Id.*
73. *Id.* at 147.
74. *Id.* at 137–39.

In reaching this conclusion, the Court appears implicitly to have been guided by the dictum *par in parem non habet imperium*, or "an equal has no authority over an equal,"[75] which is a general principle of international law.[76] At the same time, however, the Court defined sovereign equality exclusively in terms of a state's "public" acts[77]—something not strictly demanded by the *par in parem non habet imperium* principle.[78] As part of its analysis, the Court canvassed different circumstances in which sovereigns were exempt from the jurisdiction of the territorial states in which they were present.[79] These situations, which ranged from immunity given to foreign ministers to exemptions from arrest and detention afforded to foreign monarchs, focused on the dignity and autonomy sovereigns were entitled to when engaged in exclusively "public" duties.[80] In dicta, the Court explicitly contrasted these public activities with private acts—which it largely defined in commercial terms:

> When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country.[81]

The Court went on to suggest that a sovereign engaging in such private commercial activities, like property ownership, might not be entitled to immunity in foreign courts, noting that "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to

75. Caplan, *supra* note 6, at 748. The *par in parem non habet imperium* principle dates back to the fourteenth century. *Id.* at 748 n.50. Generally speaking, the doctrine of sovereign immunity can be "traced to the time-honored personal inviolability of sovereigns and their ambassadors when present or traveling in foreign countries." *Id.* at 745 n.31.

76. Thomas Weatherall, *Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence*, 46 GEO. J. INT'L L. 1151, 1156 (2015). As some have argued, foreign sovereign immunity doctrine, as reflected in *Schooner Exchange*, seeks to balance the principle of *par in parem non habet imperium* against another principle of international law, namely that states enjoy exclusive and absolute jurisdiction over their own territory. Caplan, *supra* note 6, at 745–46.

77. *Schooner Exchange* did, however, reference one kind of "public act" that would not be entitled to immunity, namely, where another sovereign uses a state's territory for military purposes without the latter's express consent. *See* The Schooner Exchange v. McFaddon, 11 U.S. 116, 140–41 (1812) ("[T]he general license to foreigners to enter the dominions of a friendly power, is never understood to extend to a military force, and an army marching into the dominions of another sovereign, may justly be considered as committing an act of hostility, and, if not opposed by force, acquires no privilege by its irregular and improper conduct.").

78. *See* Caplan, *supra* note 6, at 748–49 (suggesting that under the literal meaning of *par in parem non habet imperium* states are entitled to absolute immunity without exception).

79. *Schooner Exchange*, 11 U.S. at 137–41.

80. *Id.* at 137–39.

81. *Id.* at 144.

the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual . . . ."[82]

B. THE PUBLIC/PRIVATE DIVIDE

There is nothing inevitable about the Court's suggestion in *Schooner Exchange* that commercial activity may be an exception to sovereign immunity[83] or its intimation that commerce is a private endeavor.[84] Indeed, while states largely refrained from direct engagement in commercial activity during substantial parts of the nineteenth century, they had been relatively active commercial players in earlier centuries through the 1700s.[85] In light of the state's historic involvement in commerce, why did the Court suggest that commercial activity was essentially "private" and possibly grounds for limiting foreign sovereign immunity? One possible explanation can be found in the relationship between the nation-state system, the rise of capitalism, and particular views about the nature of commerce that were ascendant during capitalism's *laissez-faire* period.

The nation-state system emerged in 1648 with the Peace of Westphalia, which laid the groundwork for a system of state sovereignty based on territorial borders.[86] It was also around this time that capitalism emerged as an economic and social system.[87] While it did not create the nation-state, the nation-state was critical to capitalism's spread and eventual dominance.[88] As scholars have argued, states provided public goods[89] that private commercial enterprises needed for organizational and production purposes,[90] including judicial systems

82. *Id.* at 146. While *Schooner Exchange* did not reach the issue, in 1820, U.S. Attorney General William Wirt took a clear position in support of a commercial activity exception to sovereign immunity, writing that "'if a foreign [state-owned] ship, departing voluntarily from her appropriate character, chooses to adopt that of a merchant . . . she must . . . be subject to all the consequences of such adoption, and be treated . . . as a merchant . . . .'" Remarks by Jordan Paust, *In International Human Rights in American Courts: The Case of* Nelson v. Saudi Arabia, 86 AM. SOC'Y INT'L L. PROC. 324, 326 (1992). One commentator has described this as the first official U.S. recognition of a commercial activity exception. *Id.* As discussed in Part III, this recognition would become more frequent during the early half of the twentieth century and become official government policy through the Tate Letter.

83. *See* Caplan, *supra* note 6, at 754 (conceding that the distinction between governmental and commercial acts, for purpose of sovereign immunity, is "admittedly somewhat arbitrary").

84. This lack of inevitability is underscored by language in *Schooner Exchange* defining foreign sovereign immunity as an exception to "the full and complete power of a nation within its own territories" that is based on "the consent of the nation itself." The Schooner Exchange v. McFaddon, 11 U.S. 116, 136 (1812). This language suggests that exceptions to foreign sovereign immunity could include almost any activity a nation decided not to consent to. Despite this potential expansiveness, *Schooner Exchange* defined the absence of such consent as largely (though not exclusively) coextensive with the private/commercial activity of foreign sovereigns. *Id.* at 145–46.

85. *See infra* notes 94–97 and accompanying text.

86. Harold K. Jacobson, Book Review, *The Sovereign State and Its Competitors*, 90 AM. J. INT'L L. 519, 526 (1996).

87. ELLEN MEIKSINS WOOD, THE ORIGIN OF CAPITALISM 125 (2017).

88. COATES, *supra* note 22, at 13.

89. MANN, SOURCES OF SOCIAL POWER VOL. 2*, supra* note 10, at 480.

90. *Id.* at 480, 482.

that guaranteed the predictability and certainty needed for business transactions.[91] In return for these public goods, states reaped the benefits of capitalist enterprise, including revenue[92] and goods necessary to the running of government.[93]

For several centuries, this mutually beneficial relationship did not neatly obey the central capitalist presumption that commerce is exclusively a private endeavor.[94] Instead, lines between the so-called "public" work of government and the "private" activities of commercial actors were significantly blurred. Nation-states not only remained involved in commercial activities during this time;[95] many overseas trading companies maintained dual public and private characters as well.[96]

During the early nineteenth century, this all began to change, as a clearer distinction between "private" commerce and "public" state action became ascendant.[97] This was a period when the *laissez-faire* economic approach started to gain more currency. *Laissez-faire* economics rejects state restrictions on and involvement in commerce and trade.[98] While the transition to a *laissez-faire* economy was fitful (including but not limited to the United States),[99] the idea

91. *Id.* at 490; BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, AND THEORY 119 (2004).

92. MANN, SOURCES OF SOCIAL POWER VOL. 2, *supra* note 10, at 499.

93. *Id.* at 132–33.

94. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, BOOK IV 29–30 (Andrew Skinner ed., 1999) (1776) (describing capitalist commerce as the product of the private efforts of self-interested individuals without state interference).

95. SUCHARITKUL, *supra* note 21, at 14.

96. Janet McLean, *The Transnational Corporation in History: Lessons for Today?*, 79 IND. L.J. 363, 365 (2004).

97. *Id.*

98. SUCHARITKUL, *supra* note 21, at 14.

99. There is much to be said about the limits of *laissez-faire* in early nineteenth century America, as well as commercial sectors globally. While a full accounting of this history is well beyond the scope of this Article, a few points are worth making. First, where the United States is concerned, *laissez-faire* policies became more popular after the Civil War, as compared to the first half of the nineteenth century. Bradley V. Bateman, *Bringing in the State? The Life and Times of Laissez-Faire in the Nineteenth Century United States*, 37 HIST. POL. ECON. 175, 180 (2005). That being said, in the early nineteenth century, "the idea that the government had little or no constructive role to play in the economy dominated American life." *Id.* Second, in terms of global commercial sectors, the *laissez-faire* approach faced particular resistance in the realm of international, and specifically colonial, trade. José Luís Cardoso, *The Political Economy of Rising Capitalism*, *in* THE CAMBRIDGE HISTORY OF CAPITALISM VOL. 1: THE RISE OF CAPITALISM FROM ANCIENT ORIGINS TO 1848, at 574, 583 (Larry Neal & Jeffrey Williams eds., 2014). At the time, some scholars argued for colonial trade to obey the rules of *laissez-faire* since "the restrictive processes inherent in the colonial system were prejudicial to the development of trade as a whole, given that they hindered the free enterprise of a multiplicity of agents and interests." *Id.* at 584. Indeed, between 1780 and 1880, European colonialism slowed down (it would increase again during the late nineteenth century until World War I) as the fusion of state power and commercial interests became disfavored. POLANYI, *supra* note 29, at 221–22. Colonial trade was not, however, the only arena where the adoption of *laissez-faire* policies was strained or incomplete. During the *laissez-faire* period, state-involvement in banking was not uncommon, in both the United States as well as Europe. *See infra* Part II.D (discussing ownership of American bank by state of Georgia); *see generally* Julienne M. Laureyseens, *Growth of Central Banking: The Société Générale des Pays-Bas and the Impact of the Function of General State Cashier on Belgium's Monetary System 1822-1830*, 14 BUS. & ECON. HIST. 125 (1985) (describing the important role played by the state-created bank, Société Générale des Pays-Bas, in Belgium's nineteenth century

that the market belonged to private parties engaged in commerce for predominantly profit-seeking goals, without any direct state intervention or participation, became a more readily acceptable notion.[100]

It was against this backdrop that *Schooner Exchange* emerged. With the commercial world increasingly defined as exclusively "private," the Court suggested that, if states did act as commercial players, they would be treated as any other private actor in the market would be—a view that aligned with the prevailing *laissez-faire* spirit of the time.

As the next part explores, a desire to formally restrict immunity for foreign sovereigns engaged in commercial acts began to emerge in the United States in the early twentieth century, just as states were re-asserting themselves as commercial actors in a new globalized market.

II. The Move Toward Restrictive Immunity in Early Twentieth Century America

Many have described the absolute theory of immunity as the prevailing U.S. approach to foreign sovereign immunity until the State Department embraced restrictive immunity via the Tate Letter in 1952.[101] This Part challenges that view.[102] It highlights significant debate, during the first half of the twentieth century, amongst jurists, U.S. government officials, as well as scholars, suggesting that foreign sovereign immunity should be limited. Even though other kinds of foreign sovereign cases—involving tortious accidents or unlawful conduct during war—also raised important immunity questions, calls to restrict immunity during this period were driven primarily by the commercial activity of foreign states.[103] Indeed, as this Part explains, many supporters of

industrialization). In fact, as political economist Karl Polanyi has argued, state-involvement in banking, particularly in the form of central banks that set monetary and credit policy for a state or group of states, was one of the ways the state intervened to support *laissez-faire* economies in the nineteenth century. POLANYI, *supra* note 29, at 201–04.

100. SUCHARITKUL, *supra* note 21, *at* 14–15; *see also* Cardoso, *supra* note 99, at 582 (arguing that, as early as the second half of the eighteenth century, there was a "decline in intervention of national states in regulating internal and external markets . . . .").

101. *See, e.g.*, Christopher A. Whytock, *Foreign State Immunity and the Right to Court Access*, 93 B.U. L. REV. 2033, 2042 (2013) ("[T]here seems to be general agreement that the absolute doctrine prevailed in the early twentieth century [in the United States] . . . ."); Michele Potestà, *State Immunity and Jus Cogens Violations: the Alien Tort Statute Against the Latest Developments in the "Law of Nations,"* 28 BERKELEY J. INT'L L. 571, 573 (2010) (describing absolute immunity as the prevailing American approach to foreign sovereign immunity from *Schooner Exchange* until the shift to restrictive immunity in the Tate Letter).

102. Some scholars have also highlighted fraught judicial commitments to absolute immunity before the Tate Letter. *See* Chimène Keitner, *Prosecuting Foreign States*, 61 VA. J. INT'L L. 221, 230 (2021) ("The rule in United States courts, as elsewhere in the period from 1920 to 1952, was that agencies or instrumentalities of foreign sovereigns that were engaged in commercial activities, were amenable to suit for causes of action arising in connection to those activities.") (citation omitted). This Subpart supplements these accounts by providing an extensive review of the relevant case law and analyzing debates within the Executive branch and contemporary scholarship on absolute versus restrictive immunity during this period. Most importantly, this Subpart demonstrates the ways these incipient moves toward restrictive immunity aligned with various capitalist forces.

103. For example, tortious accidents allegedly caused by foreign-state owned entities were not infrequently litigated in the nineteenth and early twentieth centuries. *See generally, e.g.*, The Republic of Mexico v. Hoffman,

restrictive immunity were motivated by a desire to facilitate cross-border commerce between private U.S. businesses and state trading companies, while ensuring state involvement in commercial activity did not distort the rules of the capitalist market system.

These calls to restrict foreign sovereign immunity coincided with a period in modern capitalism when *laissez-faire* commitments were giving way to increased state involvement in the commercial sphere and participation in global commerce. Indeed, globalized trade experienced its first great modern wave from the end of the nineteenth century through World War II, though it was subject to ebbs and flows because of world events and rising protectionist trade policies in many Western countries. As states reemerged as commercial players on the global stage, foreign sovereign immunity began to be reconciled with the rules of the capitalist marketplace.[104] American efforts to restrict foreign sovereign immunity—which were gaining in steam but remained incomplete and limited during this period—aligned with this trend.

The push towards restrictive immunity did not, however, only emerge alongside a capitalist period in which states were increasingly behaving as economic actors in a globalized marketplace. It also reflected a deeper disconnect between the principle of absolute immunity and the capitalist commitments of the U.S. legal system. Indeed, as efforts to restrict immunity for the commercial activities of foreign states emerged, they were bolstered by

324 U.S. 30 (1945) (denying immunity for merchant ship owned but not possessed by Mexican government in action relating to collision in Mexican waters); The Roseric, 254 F. 154 (D.N.J. 1918) (upholding the immunity of a British government controlled ship that had negligently collided with a privately owned vessel); The Pampa, 245 F. 137 (E.D.N.Y. 1917) (upholding immunity for Argentine navy vessel that collided with another vessel); Mason v. Intercolonial Ry. Of Can., 83 N.E. 876 (Mass. 1908) (upholding foreign sovereign immunity for Canadian railway, owned by the British king, in action for personal injuries); The Pizzaro v. Matthias, 19 F. Cas. 786 (S.D.N.Y. 1852) (upholding immunity for public armed vessel of Spanish government that collided with private vessel). So too the sovereign immunity of foreign-owned ships that had violated U.S. or international law, especially with regard to state neutrality during war, was challenged as far back as the early nineteenth century. *See* The Santissima Trinidad, 20 U.S. 283, 354 (1822) (holding that, in war, a public ship in the service of a foreign government forfeits its prize property where the ship has violated U.S. neutrality); The Divina Pastora, 17 U.S. 52, 63–64 (1819) (holding that the acts of one state against another in war are not amenable to suit in the United States unless U.S. neutrality has been violated); *see generally* Ervin v. Quintanilla, 99 F.2d 935, 940 (5th Cir. 1938) ("It is of course true that no foreign government may, in breach of our laws, or against our consent, exercise any act of sovereignty here."). Even though some of these cases were successful ones for plaintiffs, they were not the primary drivers of efforts to restrict immunity, especially from the Executive branch and scholars, during this period.

104. Even before American courts took action, efforts to restrict foreign sovereign immunity were already occurring in continental Europe. *See* YANG, *supra* note 3, at 13–15 (noting embrace of restrictive immunity by Italian, Belgian, Swiss, Austrian, Greek and French courts in the late nineteenth and early twentieth centuries). The two countries that were the earliest adopters of restrictive sovereign immunity—Belgium (1903) and Italy (1886)—were small states. Pierre-Hugues Verdier & Erik Voeten, *How Does Customary International Law Change? The Case of State Immunity*, 59 INT'L STUD. Q. 209, 214, 220 (2015). As with *Schooner Exchange*, courts in these countries often restricted sovereign immunity based on the capitalist notion that commerce was an inherently private endeavor. *See, e.g.*, SUCHARITKUL, *supra* note 21, at 233–40 (collecting Italian court cases in which sovereigns were stripped of their immunity for commercial acts because of their "private" nature).

similar restrictions on the immunity of federal and state governments engaged in commercial work.

Part II.A begins by exploring emerging tensions within the U.S. judiciary regarding absolute immunity during the first half of the twentieth century. While the courts did not embrace restrictive immunity in all situations, they were more inclined to do so in certain circumstances, particularly where the commercial activities of state-owned companies were involved. Part II.B–C examines rising (though similarly disjointed) support for restrictive immunity within the State Department, as well as more whole-hearted support for restrictive immunity amongst scholars. Part II.D demonstrates how efforts to restrict the immunity of foreign sovereigns were informed by limits on the immunity of federal and state governments for their commercial activities.

A. THE EVOLVING JUDICIAL VIEW ON FOREIGN SOVEREIGN IMMUNITY

During much of the nineteenth century, the issue of whether foreign sovereigns should be immune for their commercial activities rarely arose in U.S. courts,[105] likely because the practice itself was disfavored.[106] The commercial activity of foreign states became a more pressing issue, however, as *laissez-faire* policies gave way to greater state regulation and participation in the market starting in the late nineteenth century.[107] In England, for example, the government assumed share-ownership of private companies and took control of certain industries in the late nineteenth and early twentieth centuries.[108] The 1917 Russian Revolution led to the creation of the first nation-state to enjoy an absolute monopoly on foreign trade.[109] Even the U.S. government got into the economic game, boosting its involvement in commercial activities during World War I and the Great Depression.[110] By the eve of World War II, many Western capitalist countries were directly engaged in commercial and business activities,

105. There were a few exceptions to this trend in the late nineteenth century. S*ee generally* Hassard v. United States of Mexico, 1899 WL 398 (N.Y. Sup. Ct. Nov. 1, 1899); 46 A.D. 623 (N.Y. Sup Ct. 1899), *aff'd* 173 N.Y. 645 (1903) (relying on foreign sovereign immunity to dismiss suit against Mexico and two of its regional states relating to bonds issued by defendants); Long v. The Tampico, 16 F. 491 (S.D.N.Y. 1883) (denying sovereign immunity in suit seeking to recoup compensation for commercial services rendered to two ships owned by the Mexican government because the ships were not technically the property of the Mexican government or in its possession when the services in question were rendered).

106. The relative absence of foreign sovereign immunity cases involving commercial activity in U.S. courts during the mid to late-nineteenth century may also have been a byproduct of U.S. trade policy at the time. For much of the nineteenth century, the U.S. government levied tariffs on imports initially to raise revenue for the government (from 1790 to 1860 tariffs made up 90% of government revenue) and later to protect certain domestic industries from foreign competition. DOUGLAS A. IRWIN, CLASHING OVER COMMERCE: A HISTORY OF U.S. TRADE POLICY 7 (2017). While it is beyond the scope of this Article to explore this issue in depth, these restrictions on foreign imports may have made it even less likely that foreign sovereign commercial activity, itself already limited, would be a source of litigation in U.S. courts.

107. SUCHARITKUL, *supra* note 21, at 15.

108. *Id.* at 16.

109. *Id.* at 17.

110. Elengold & Glater, *supra* note 38, at 1129–30.

including through state-owned corporate enterprises.[111] This increase in commercial activity by foreign states coincided with the first great modern period of globalization,[112] albeit one fractured by a rise in protectionist trade policies,[113] the Great Depression, and the outbreak of World Wars I and II.[114]

During this period, judicial responses to the foreign sovereign immunity issue were a byproduct of rising state-involvement in trade coupled with globalization's substantial, though still incomplete, impact within the United States.[115] Much of this case law revolved around state-owned merchant ships and corporations.[116] In the merchant ship context, U.S. courts displayed a willingness to restrict immunity in some circumstances but not in others. In the context of state-owned corporations, by contrast, courts tended to be more open and consistent in restricting foreign sovereign immunity. The net result was a disjointed approach to sovereign immunity that suggested a desire, nevertheless, to restrict immunity where states engaged in commercial activities in particular kinds of situations.

Judicial approaches to foreign sovereign immunity also reflected other trends during this period. Many decisions on foreign sovereign immunity for state-owned merchant ships and corporations often turned on the *relationship* between those entities and the foreign state. In particular, questions of sovereign ownership and possession of the commercial entity, as well as the entity's separate legal status, were generally more central to the sovereign immunity question than the "private" nature of commerce.[117] Some courts even rejected

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111. SUCHARITKUL, *supra* note 21, at 17–18.

112. Ortiz-Ospina & Beltekian, *supra* note 36.

113. MICHAEL MANN, THE SOURCES OF SOCIAL POWER VOLUME 3: GLOBAL EMPIRES AND REVOLUTION, 1890–1945, at 23 (2013) [hereinafter MICHAEL MANN, SOURCES OF SOCIAL POWER VOL. 3]. As globalized trade was becoming more common from the late nineteenth century through World War II, many Western states increasingly instituted customs tariffs and embargoes on imports and foreign investment, amongst other trade restrictions. POLANYI, *supra* note 29, at 150. These protectionist policies responded not only to globalization but also to the excesses of the *laissez-faire* period—they were, nevertheless, intended to preserve the basic essence of a *laissez-faire* economy, namely that the market regulate itself. *Id.* at 155.

114. IRWIN, *supra* note 106, at 344, 371, 450. This fracturing of globalization largely took geographic form. Refusing to engage in free trade with one another, Western powers sought to acquire overseas territories that they could force to trade on their terms. POLANYI, supra note 29, at 225–27; MICHAEL MANN, SOURCES OF SOCIAL POWER VOL. 3, *supra* note 113, at 23. As a result, much of the "free trade" of this period was between colonial powers and their colonies. *Id.*

115. In the United States, the impact of global trade was arguably limited by protectionist trade policies during the first few decades of the twentieth century. IRWIN, *supra* note 106, at 330. At the same time, domestic efforts to promote free trade grew, albeit fitfully, as the United States became a bigger player in the global economy and a key financial power and major creditor to the rest of the world. *Id.* at 316, 344–46.

116. While courts during this period also heard cases involving the public armed ships of foreign sovereigns, see cases cited *supra* note 103, increasing numbers of foreign-state owned merchant ships as well as corporations raised novel problems for the courts. For example, in *The Maipo,* a case decided in 1918, the district court noted that while judicial precedent "has consistently been in the direction of holding immune the property of a sovereign owned in his sovereign capacity and in his possession," the courts had never specifically decided whether a foreign-state owned vessel ought to retain its immunity where it was engaged in commercial activity. 252 F. 627, 629 (S.D.N.Y. 1918).

117. As discussed below in Part II.A.1–2, because corporations had long been treated as separate legal entities from their owners (McLean, *supra* note 96, at 364), courts were more likely to restrict immunity for the

the distinction between public and private activity all together. Still, despite a general reticence to label commercial activity as "private," many courts drew a distinction between sovereign and commercial acts. For example, cases denying immunity for foreign-state owned merchant ships or corporations often reflected the view that commercial (as distinct from sovereign) activity should be subject to the laws of the market. Whether or not judges believed commerce was synonymous with "private" activity, foreign sovereign immunity cases from this period suggest that, for some courts, commercial activity removed governments from the sovereign realm and placed them, instead, within the realm of the marketplace.

The next two Subparts examine these debates, looking first at foreign state-owned merchant ships and then at foreign state-owned corporations.

1. Foreign State-Owned Merchant Ships

During and after World War I, there was a precipitous rise in state-owned merchant ships.[118] Where these merchant ships were merely owned, but not possessed, by a foreign sovereign, no immunity would attach to the ship's activities.[119] Even where the foreign government pressed its claims and advocated for its interest in the ship, courts consistently withheld immunity and left the foreign sovereign exposed to suit.[120] By contrast, where a merchant ship was both owned *and* possessed by a foreign government, courts were more apt to uphold immunity, even where ships were arguably engaged in commercial activities.[121] The reason for the distinction between ownership and possession was unclear, but may have "depend[ed] upon the aggravation of the indignity where the interference with the vessel" prevents the foreign state from operating it.[122]

Even in merchant ship cases where the government owned and possessed the vessel, however, courts sometimes disagreed over whether immunity ought to protect a state engaged in commercial activities—a disagreement driven, in part, by the implicit view that these activities should not be treated as sovereign or protected from the rules of the market.[123] The most notable example of this

commercial activities of state-owned corporations. In contrast to corporations, courts considered ships, which were owned and possessed by a foreign government, to be one in the same with their government-owners and were more inclined to uphold foreign sovereign immunity for those defendants. *The Maipo*, 252 F. at 630.

118. The Republic of Mexico v. Hoffman, 324 U.S. 30, 41 (1945) (Frankfurter, J., concurring) (quoting Compania Naviera Vascongado v. S.S. Cristina [1938] AC 485, 521–22).

119. *Id.* at 36–38; *see also* The Beaton Park, 65 F. Supp. 211 (W.D. Wash. 1946) (denying immunity to merchant ship that was engaged in commercial activity and owned, but not operated, by the Canadian government).

120. *Hoffman*, 324 U.S. at 35–38.

121. SUCHARITKUL, *supra* note 21, at 75. While courts generally bestowed immunity on these ships, they also made immunity dependent on certain conditions, including by requiring foreign governments to register the sovereign character of their ships through official U.S. government channels. *Id.*

122. *Hoffman*, 324 U.S. at 38.

123. In some cases, courts upheld immunity while also expressing the view that sovereigns should not be immune for their commercial activities because such activities were regularly engaged in by private persons.

disagreement can be seen in a line of decisions relating to *Berizzi Bros. Co. v. The Pesaro*.[124] *Pesaro* was the first Supreme Court case to explicitly extend immunity to a foreign state's commercial activities. In that case, the Supreme Court held that a merchant ship, which was owned and operated by the Italian government and engaged in trade, was entitled to sovereign immunity for its commercial acts.[125]

In sharp contrast to the Supreme Court's decision in *Pesaro*, the district court decision in that case[126] concluded that, because it was engaged in commerce, the ship in question was not entitled to sovereign immunity, regardless of whether she was owned and possessed by a foreign sovereign.[127] Even though the district court rejected the distinction between private and public acts as "specious," it intimated that commercial activity was by its "nature" not entitled to immunity.[128] In reaching this decision, the court relied on a number of factors suggesting that commercial acts were, at the very least, different from sovereign ones, and that such acts should be subject to market rules.

First, the district court noted substantial criticism of absolute immunity as an anachronism that should be abandoned in light of the modern state's wide-ranging commercial activities.[129] Second, while it suggested that sovereign or political activity would be subject to immunity, it pointed to precedent, both domestic and foreign, suggesting that immunity should not apply to a state's commercial activities.[130] Finally, the district court observed that "[t]o deprive parties injured in the ordinary course of trade of their common and well-established legal remedies would . . . work great hardship on them."[131] By contrast, restrictions on foreign sovereign immunity for merchant ships would encourage trade and commerce with these foreign state-owned enterprises.[132]

See, e.g., The Maipo, 259 F. 367, 368 (S.D.N.Y. 1919) (upholding immunity for ship owned and possessed by Chilean government while noting that "it may be the opinion of counsel, as it assuredly is my opinion, that when a sovereign republic, empire, or whatnot, goes into business and engages in the carrying trade, it ought to be subject to the liabilities of carriers just as much as any private person").

124. Berizzi Bros. Co. v. The Pesaro, 271 U.S. 562, 570–71 (1926).

125. *Id.* at 576.

126. The Pesaro (*Pesaro I*), 277 F. 473 (S.D.N.Y. 1921), *rev'd sub nom. on other grounds*, Berizzi Bros. Co. v. The Pesaro, 271 U.S. 562 (1926).

127. *See id.* at 481 (concluding that "the immunity of a public ship should depend primarily not upon her ownership but upon the nature of the service in which she is engaged and the purpose for which she is employed").

128. *Id.* at 482. Even though it rejected the private/public distinction, the district court in *Pesaro* nevertheless suggested commerce may be a "private" activity by pointing to language in *Schooner Exchange* drawing "a manifest distinction between the private property of the person who happens to be a prince and that military force which supports the sovereign power and maintains the dignity and the independence of a nation." *Id.* at 476.

129. *Id.* at 475.

130. *Id.* at 482–85.

131. *Id.* at 481.

132. *See id.* (noting that if immunity was granted to state-owned ships engaged in ordinary commercial activities, "[s]hippers would hesitate to trade with government ships"). While the district court also relied on the fact that the ship was not immune from suit under Italian law, the bulk of the decision focused on the commercial activity issue. *Id.* at 482–83.

The district court in *Pesaro* was not the only court to abrogate foreign sovereign immunity for merchant ships that were both owned and possessed by foreign states. Nor was it the only one to distinguish between sovereign and commercial activity. Other courts also viewed the rules of the marketplace as demanding restrictions on foreign sovereign immunity. For example, in the case of *Gul Djemal*, which preceded the Supreme Court's decision in *Pesaro*, the district court held that a vessel operated *and* owned by the Turkish government was not entitled to immunity, in part, because it was engaged in ordinary commercial activity.[133] In explaining its decision, the district court noted that a foreign state that engages in trade and commerce divests itself of its "sovereign character."[134] The court also noted that "[t]he existing immunities and prerogatives of governments are all but too extensive, and the one here claimed should not be permitted to destroy, as it would, the basic principle that in trade and commerce there should be for the persons engaged therein a fair field and no favors."[135]

Several years after the Supreme Court's decision in *Pesaro*, some of the Court's justices suggested the case had gone too far in upholding immunity for a foreign states' merchant ships. In 1945, Justice Felix Frankfurter penned a concurrence, joined by Justice Hugo Black, in which he urged the Court to disavow the *Pesaro* decision.[136] Frankfurter's opinion attacked the notion that government ownership and possession were determinative of the foreign sovereign immunity issue, noting that it was "too tenuous a distinction [for] differentiat[ing] between foreign government-owned vessels engaged merely in trade that are immune from suit and those that are not."[137] Instead, Frankfurter suggested immunity should simply not be given to commercial ships owned by foreign governments, a position he justified, in part, by noting rising state participation in trading activities:

> Half a century ago foreign Governments very seldom embarked in trade with ordinary ships, though they not infrequently owned vessels destined for public uses, and in particular hospital vessels, supply ships and surveying or exploring vessels. These were doubtless very strong reasons for extending the privilege long possessed by ships of war to public ships of the nature mentioned; but there has been a very large development of State-owned commercial ships since the Great War, and the question whether the immunity should continue to be given to ordinary trading ships has become acute. Is it

133. The Gul Djemal, 296 F. 567, 569 (S.D.N.Y. 1922), *aff'd,* 264 U.S. 90 (1924).

134. *Id.* at 569. While the court's decision to limit sovereign immunity also turned on the fact that diplomatic relations between the U.S. and Turkish governments were severed at the time of the ship's seizure, the bulk of the decision focused, yet again, on the ship's commercial activities. *Id.*

135. *Id.* The district court's decision in *Guj Djemal* came after the district court decision in *Pesaro*, which was used as a basis for the *Guj Djemal* opinion. *Id.* at 568.

136. The Republic of Mexico. v. Hoffman, 324 U.S. 30, 39–40 (1945) (Frankfurter, J., concurring).

137. *Id.*

> consistent with sovereign dignity to acquire a tramp steamer and to compete with ordinary shippers and ship-owners in the markets of the world?[138]

By suggesting that a state's involvement in trading activities was different from its activities for public use, Frankfurter may not have explicitly drawn a line between public and private acts. He did, however, suggest that commercial activities were distinct from the sort of activities that deserved sovereign immunity protection.

2. Foreign State-Owned Corporations

Merchant ships were not the only vehicle for a foreign state's commercial activities. State-owned corporations were also becoming active in international commerce during the first half of the twentieth century. Where states directly engaged in commerce, and did not use the corporate form, courts largely upheld immunity.[139] However, in cases involving foreign state-owned corporations, courts were even more inclined to restrict immunity than they were in the merchant ship context.[140] In various cases, including after the Supreme Court's decision in *Pesaro*, courts generally denied immunity to foreign state-owned corporations engaged in commercial acts.[141]

These restrictions on immunity were often a result both of the separate legal form of the corporation—which represents one of the central vehicles for commerce and trade[142]—and the corporation's participation in commerce.[143] Though courts rarely mentioned the "private" nature of commercial activity, the combination of a corporation's separate legal form with its commercial endeavors often prompted courts to restrict immunity and subject foreign state-owned corporations to the rules of the marketplace. For example, in *Coale v. Societe Co-op Suisse des Charbons, Basle*, the court denied immunity on a breach of contract claim against a government-controlled and created Swiss company because it was an independent corporation engaging in commercial acts.[144] Even though the company had been established by the Swiss government to engage in the importation and distribution of coal on the government's behalf and was controlled by the government, the court concluded that the company

138. *Id.* at 41 (quotations omitted) (citation omitted).

139. *See, e.g.*, Oliver Am. Trading Co. v. Gov't of U.S. of Mex., 5 F.2d 659, 661–67 (2d. Cir. 1924) (upholding foreign sovereign immunity for contract claim against Mexican state-owned and operated railroad which was not a separate corporate entity but rather an arm of the Mexican government); Bradford v. Dir. Gen. of R.R.s of Mex., 278 S.W. 251, 252 (Tex. App. 1925) (same).

140. At the time, scholars took note of increasing judicial reluctance to give state-owned companies immunity from suit during the early twentieth century. *Immunity from Suit of Foreign Sovereign Instrumentalities and Obligations*, 50 YALE L.J. 1088, 1089 (1941).

141. SUCHARITKUL, *supra* note 21, at 187.

142. McLean, *supra* note 96, at 365.

143. *See* Dunlap v. Banco Cent. Del Ecuador, 41 N.Y.S.2d 650, 652 (Sup. Ct. 1943) (noting that immunity is unavailable to a corporation organized or controlled by a foreign state where it is carrying out private, commercial activities as a separate legal entity); Hannes v. Kingdom of Roumania Monopolies Inst., 20 N.Y.S.2d 825, 834 (App. Div. 1940), *order resettled*, 26 N.Y.S.2d 856 (App. Div. 1940) (same).

144. *See* Coale v. Société Co-op Suisse des Charbons Basle, 21 F.2d 180, 180–81 (S.D.N.Y. 1921).

was not entitled to immunity because "the latter, as a corporate entity, was liable for its corporate [including commercial] obligations."[145]

In *U.S. v. Deutsches Kalisyndikat Gesellschaft*, a case involving U.S. antitrust claims against several defendants, including a French company, the court rejected the French government's argument that the defendant company was entitled to immunity simply because it was created and owned by France and worked for the benefit of the state.[146] Relying on *Pesaro*, the court rejected the notion that the "public or governmental" nature of the activities in question was relevant[147] and generally held that "the person of the foreign sovereign and those who represent him are immune, whether their acts are commercial tortious, criminal, or not, no matter where performed."[148] Nevertheless, the court concluded that immunity was inappropriate in that case because, under the general corporation laws of France where defendant was organized, it was a separate legal entity that could be sued.[149] While that separateness was decisive,[150] the court also noted that by engaging in commercial activity in the United States defendant was acting as any private corporation would.[151]

Relying on *Deutsches Kalisyndikat Gesellschaft* and *Coale*, the court in *Ulen & Co. v. Bank Gospodarstwa Krajowego* held, as a general matter, that "a corporation organized by either a domestic or foreign government for commercial objects in which the government is interested, does not share the immunity of the sovereign."[152] Concluding that defendant bank, which was a "State institution" of the Republic of Poland, was not entitled to immunity, the court relied both on the bank's separate legal status[153] as well as its involvement in commercial activities to reach its decision.[154] As in *Deutsches Kalisyndikat Gesellschaft* and *Coale*, the court's holding suggested the combination of corporate separateness and commercial activity stripped defendant of any sovereign protections and made it amenable to suit, as any other market player would be.

145. *Id.* at 181.
146. U.S. v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199, 202–03 (S.D.N.Y. 1929).
147. *Id.* at 201.
148. *Id.*
149. *Id.* at 202.
150. *Id.*
151. *See id.* (noting that "[t]he only difference between the defendants and other foreign corporations and their officers and agents doing business in the United States is that the French Republic owns a part of the stock of the defendant corporation, and that the defendant company and its agents are selling potash for the French government as well as for others").
152. Ulen v. Bank Gospodarstwa Krajowego (Nat'l Econ. Bank), 24 N.Y.S.2d 201, 206 (App. Div. 1940).
153. While there was some dispute over whether defendant was technically a corporation, the court found that it had "all the characteristics of a corporation." *Id.*
154. *Id*.

B. The Evolving State Department View on Foreign Sovereign Immunity

As happened amongst courts during the first half of the twentieth century, officials inside the State Department also grappled with the increasing commercial practices of foreign states and the serious economic implications of bestowing immunity on their commercial activities. Much like the courts, State Department efforts to restrict immunity were tentative while also seemingly guided by the belief that the commercial activities of foreign states should be subject to market rules.

At the time, the State Department's position on foreign sovereign immunity was incredibly important since it had substantial influence on the courts.[155] Though there were exceptions,[156] typically where the State Department recognized and allowed a claim of immunity by a foreign state,[157] or decided an issue of fact relating to the status of a foreign state or state-owned entity, courts largely considered those determinations to be binding on them.[158]

The State Department's embrace of restrictive immunity seems to have started after the end of World War I, when the department began to more consistently deny immunity in cases involving states' commercial activities.[159] In a letter issued in November 1918 to the U.S. Attorney General, Secretary of State Robert Lansing stated that, "'[w]here [state-owned] vessels [a]re engaged in commercial pursuits, they should be subject to the obligations and restrictions of trade, if they were to enjoy its benefits and profits'" ("Lansing Letter").[160] In Lansing's view, the reasons for restricting immunity were the "'soundness of the theory that when a sovereign enters into a business, he submits himself to the conditions thereof."[161] A conservative democrat who had risen to the post of secretary during World War I, Lansing believed "blindly in the value of capitalism" and was "in the forefront of those pressing for its global expansion."[162]

In accordance with the Lansing Letter, by the early 1920s, the State Department was explicitly declining to support immunity for foreign state-owned merchant ships in U.S. courts.[163] Indeed, in the *Pesaro* case*,* the State

155. SUCHARITKUL, *supra* note 21, at 192.

156. In some cases, where the State Department suggested immunity not be granted, the courts overruled its suggestion, as the Supreme Court did in the *Pesaro* case. *Id.*; *see also supra* notes 124–125 and accompanying text. After 1945, however, the judicial practice of deferring to State Department suggestions of immunity would become more institutionalized and consistent. SUCHARITKUL, *supra* note 21, at 192–93.

157. According to one decision from 1941, the State Department had only conclusively intervened in favor of dismissal in two suits involving foreign sovereign immunity until that point; one of them was *The Schooner Exchange* case. Sullivan v. State of Sao Paolo, 122 F.2d 355, 357 (2d. Cir. 1941).

158. SUCHARITKUL, *supra* note 21, at 191.

159. *Id.* at 195–96.

160. *Id.* at 196 (quotations omitted) (citation omitted). Notably, the Justice Department disagreed with Lansing's view and generally remained supportive of absolute immunity for foreign sovereigns. *Id.* at 195 n.43.

161. *Id.* at 196 (quotations omitted) (citation omitted).

162. DAVID GLASER, ROBERT LANSING: A STUDY IN STATECRAFT 18 (2015).

163. The Pesaro (*Pesaro I*), 277 F. 473, 479 (S.D.N.Y. 1921).

Department suggested that immunity not be granted. In a letter to the district court in *Pesaro*, the State Department stated that "government-owned merchant vessels or vessels under requisition of governments whose flag they fly employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war."[164]

The State Department also applied this restrictive immunity approach to foreign state-owned companies. For example, in the *Deutsches Kalisyndikat Gesellschaft* case, the State Department took the position "that agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoy no privileges or immunities not appertaining to other foreign corporations, agencies, or individuals doing business here, and . . . should conform to the laws of this country governing such transactions . . . ."[165]

Despite these pronouncements, the State Department's immunity practices were not consistent, particularly during World War II when the Department made more regular suggestions of immunity.[166] This shift was, however, likely a response to the exigencies of the war rather than a retreat from the department's previous position. Indeed, that position was soon reaffirmed by the Tate Letter, which was issued only a few years after the war's end.

C. The Scholarly View on Foreign Sovereign Immunity

While judicial and State Department approaches to restrictive immunity may have remained incomplete during the first half of the twentieth century, most scholars in the United States whole-heartedly supported limits on immunity for the commercial activities of foreign countries as state involvement in global trade was surging. Indeed, these scholars rarely made mention of other grounds for restricting foreign sovereign immunity in U.S. courts.[167] Like their judicial and executive branch counterparts, many of these scholars believed these restrictions were important for leveling the commercial playing field between private business and foreign sovereigns, as well as to facilitate trade.

For many scholars, failing to create a commercial activity exception to foreign sovereign immunity distorted the free market and adversely affected

164. *Id.* at 479–80 n.3.

165. U.S. v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199, 200 (S.D.N.Y. 1929); *see also* Molina v. Comision Reguladora del Mercado de Henequen, 103 A. 397, 398 (N.J. 1918) (communicating State Department's view that "political subdivisions of a foreign government engaging in ordinary commercial transactions must be regarded as subjecting themselves to the obligations arising from commercial transactions if they are also to reap the benefits and enjoy the rights of trade").

166. *See, e.g.*, Ex parte Republic of Peru, 318 U.S. 578, 581 (1943) (case in which State Department supported Peruvian government's request for sovereign immunity on behalf of a ship chartered by a private company to carry a cargo of sugar to New York).

167. While torts committed by sovereigns did give rise to some scholarly calls to restrict immunity, these were not as widespread as calls to limit sovereign immunity for commercial activities. Indeed, to the extent scholars advocated for tort exceptions to foreign sovereign immunity, these arguments were often framed in terms of the state's underlying commercial activities. Alfred Hayes, *Private Claims Against Foreign Sovereigns*, 38 HARV. L. REV. 599, 601 (1925).

private business interests—on this view, immunity gave states an unfair economic advantage over private companies.[168] Other commentators suggested that immunity for commercial activities encouraged the formation of anti-competitive business cartels between states and private companies.[169] As early as the 1920s, some even recommended passing legislation such that "a foreign state engaged in commercial undertakings which extends its operations into the United States would *ipso facto* consent to the jurisdiction of the territorial sovereign."[170] For some scholars, restricting the immunity of foreign sovereigns engaged in commerce would also benefit trade between private parties and state-owned corporations.[171]

D. Immunity for Federal and State Governments Engaged in Commercial Activity

The United States' gradual embrace of restrictive immunity during the first half of the twentieth century was more than just aligned with a period of greater commercial activity by states around the globe. It was also consistent with capitalism's place within the U.S. legal system and drew inspiration from existing restrictions on the immunity of state and federal governments engaged in commercial activities.

Described by some scholars as the most capitalist country in the world,[172] the United States' legal and political commitments have often tracked its capitalistic impulses. Indeed, as conventionally understood, the American Revolution was, at least partially, the result of British attempts to regulate American capitalism, through the levying of taxes,[173] as well as restrictions placed on colonial occupation and possession of indigenous lands.[174] American colonists responded to these measures by creating a Constitution that would "guarantee . . . the power of capitalist property in America."[175] For the founders of the American Republic, "[p]rivate property became truly sacred, inviolate from state and anarchism alike."[176] For these men, all of whom were wealthy property owners,[177] individual rights and liberties were merely the political

168. *Immunity from Suit of Foreign Sovereign Instrumentalities and Obligations*, *supra* note 140, at 1089; John G. Hervey, *The Immunity of Foreign States When Engaged in Commercial Enterprises: A Proposed Solution*, 27 MICH. L. REV. 751, 751 (1929); Hayes, *supra* note 167, at 601.

169. Hervey, *supra* note 168, at 751–55.

170. *Id.* at 773. *See Sovereign Immunity for Commercial Instrumentalities of Foreign Governments*, 58 YALE L.J. 176, 182 (1948) (advocating for restrictive immunity legislation in the "interest of private [commercial] rights").

171. *See*, *e.g.*, Fensterwald, Jr., *supra* note 39, at 614 ("[P]rivate traders will be reluctant to deal with state traders if their legal rights and remedies are greatly curtailed by the principle of sovereign immunity.").

172. MANN, SOURCES OF SOCIAL POWER VOL. 2, *supra* note 10, at 137.

173. *Id.* at 151.

174. AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 65–70 (2010).

175. MANN, SOURCES OF SOCIAL POWER VOL. 2, *supra* note 10, at 158.

176. *Id.*

177. *Id.* at 150.

expression of the free market and necessary to its existence.[178] In particular, individual rights were meant to ensure that private property was protected from interference by the state, as well as the masses.[179]

The American commitment to capitalism was reflected, in part, in how courts, as well as Congress, handled federal and state government involvement in commercial activity. In general, this approach was characterized by two important legal principles: that government-owned corporations did not enjoy the sovereign's immunity from suit; and that the sovereign itself could be sued for its private, commercial activities.

The first of these two principles was established by Chief Justice Marshall in *Bank of the United States v. Planter's Bank of Georgia*.[180] In that case, Planter's Bank claimed immunity from suit because one of its incorporators was the state of Georgia. In rejecting the bank's argument, Justice Marshall held that:

> [W]hen a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many States of this Union who have an interest in Banks, are not suable even in their own Courts; yet they never exempt the corporation from being sued.[181]

In dicta, Marshall laid down an identical rule for the federal government's corporate affairs:

> The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the Bank . . . . The government . . . by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter."[182]

Subsequent Supreme Court case law reaffirmed and expanded on this notion, definitively establishing that a corporation does not enjoy the immunities of state or federal government, even where the government is the corporation's sole owner.[183]

As jurisprudence and state practice developed, government itself became directly accountable for its corporate activities. In the 1850s, Congress passed

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178. JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S, at 22 (1984).

179. MANN, SOURCES OF SOCIAL POWER VOL. 2, *supra* note 10, at 156–57.

180. Bank of U.S. v. Planters' Bank of Georgia, 22 U.S. 904 (1824).

181. *Id.* at 907.

182. *Id.* at 908.

183. *See* Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 388 (1939) (holding that corporations created by the federal government do not become entitled to its immunity simply because they do its work); Briscoe v. Bank of Commonwealth of Ky., 36 U.S. 257, 325–26 (1837) ("[A] state, when it becomes a stockholder in a bank, imparts none of its attributes of sovereignty to the institution; and . . . this is equally the case, whether it own a whole or a part of the stock of the bank.").

legislation subjecting the federal government to suits enforcing contract rights.[184] During the early part of the twentieth century, Congress passed additional legislation allowing the federal government to be sued in maritime cases for contract and other claims.[185]

These legal developments had a very clear impact on courts limiting foreign sovereign immunity for commercial activities in the early twentieth century.[186] In the *Guj Djemal* case, for example, the district court cited to *Planter's Bank*, in holding that a foreign-state owned ship engaged in commerce was not entitled to immunity.[187] In its decision to restrict foreign sovereign immunity, the lower court in *Pesaro* also cited to *Planter's Bank* as well as a range of other cases in which federal and state government immunity was limited in the commercial context.[188]

In the *Beaton Park* case, the district court referenced the U.S. government's lack of immunity for its commercial activities in denying foreign sovereign immunity to a merchant ship owned, but not operated, by the Canadian government and engaged in "ordinary commercial operation[s]."[189] As the court observed:

> In this country our theory as to government in business is that when our Government enters upon an ordinary commercial business undertaking, such as operating merchant ships, it does so under the same liabilities and responsibilities as private individuals when they engage in the same kind of business; and Congress has given consent for the institution of legal actions by those aggrieved for the enforcement of such liabilities of the Government.[190]

Other cases withholding immunity from foreign state-owned corporations made similar references to case law denying immunity to corporations owned by or instrumentalities or agencies of federal or state governments.[191]

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184. Court of Claims Act of 1855, 10 Stat. 612. Generally, the U.S. government is immune from suit unless Congress expressly waives its immunity. U.S. v. Lee, 106 U.S. 196, 204–06 (1882). In the 1940s, Congress also passed the Federal Tort Claims Act, allowing the U.S. government to be sued for torts committed by persons acting on its behalf. Federal Tort Claims Act, 28 U.S.C. § 1346.

185. Public Vessels Act, 46 U.S.C. § 31102; Suits in Admiralty Act, 46 U.S.C. § 30903.

186. As discussed in Part III.A, these considerations were also mentioned in the Tate Letter to justify restricting foreign sovereign immunity. *See infra* note 192 and accompanying text.

187. *The Gul Djemal*, 296 F. 567, 569 (S.D.N.Y. 1922), aff'd, 264 U.S. 90 (1924).

188. *See* The Pesaro (*Pesaro I*), 277 F. 473, 476–78 (S.D.N.Y. 1921) (citing to various cases in which sovereign immunity was abrogated, including a suit involving a bank owned by the state of Kentucky).

189. The Beaton Park, 65 F. Supp. 211, 212 (W.D. Wash. 1946). Although plaintiff had brought suit relating to a maritime collision, rather than a commercial claim, the court in *Beaton Park* denied sovereign immunity based, in part, on the ship's commercial work at the time of the accident. *Id.* at 212–13.

190. *Id.* at 212. In the course of withholding foreign sovereign immunity from a Mexican-owned merchant ship, the Supreme Court in *The Republic of Mexico v. Hoffman* also cited to several cases in which liens were enforced against property owned but not in the actual possession or operation of the U.S. government. 324 U.S. 30, 37 (1945).

191. *See, e.g.*, Hannes v. Kingdom of Roumania Monopolies Inst., 20 N.Y.S.2d 825, 834–35 (App. Div. 1940) (tentatively suggesting that foreign state-owned corporation should not receive immunity and citing to various cases in which corporations that were agencies of the U.S. government were not given immunity); Ulen

Though underappreciated, early twentieth century efforts to restrict the immunity of foreign sovereigns for commercial acts were still fitful and incomplete. As the second wave of modern globalization emerged after World War II, those efforts began to crystallize into formal government policy. As discussed in the next Part, the shift began with the State Department's official adoption of the restrictive theory of immunity and culminated in the passage of the FSIA.

III. THE TATE LETTER AND PASSAGE OF THE FSIA

The Tate Letter marked the United States' formal commitment to restrictive immunity.[192] Formal U.S. support for restrictive immunity came at an important political and economic moment. Following World War II, the United States had dedicated itself to fighting communism and furthering the second modern wave of globalization, which was just beginning. Restricting immunity for the commercial activities of foreign sovereigns comported with both those goals. In particular, it helped support American interests in liberalizing and expanding trade across borders by encouraging commerce between American companies and state-owned enterprises, while still preserving market rules. Returning to the *Schooner Exchange* view, a belief in the inherently "private" nature of commercial activity re-emerged during this time.[193] The Tate Letter approach to foreign sovereign immunity was eventually codified in 1976 by the FSIA,[194] with substantial support from the American business community.

Part III.A demonstrates how the State Department conceptualized restrictive immunity in commercial terms by examining the Tate Letter's text. It also explores how this focus aligned with the letter's ideological and historical backdrop. Part III.B turns to the FSIA's passage, highlighting both macroeconomic trends and the American business community's important role in advocating for the bill. In particular, it demonstrates how the FSIA's drafters supported that community's interests by placing the commercial activity exception front and center, as well as by generally structing the statute in ways that facilitated, rather than disrupted, trade with foreign states.

v. Bank Gospodarstwa Krajowego (Nat'l Econ. Bank), 24 N.Y.S.2d 201, 204–06 (App. Div. 1940) (holding that foreign state-owned corporation should not receive immunity citing to various cases in which corporations owned by or instrumentalities of federal or state governments were not given immunity).

192. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711–15 (1976) (full text of Tate Letter).

193. The reemergence of the inherently "private" nature of commercial activity may partially reflect America's general abandonment of protectionist policies and commitment to free trade after World War II. The U.S. government's rejection of trade protectionism was not, however, wholly consistent throughout the second half of the twentieth century, especially during the 1970s. *See, e.g.*, IRWIN, *supra* note 106, at 547–48 (describing the Nixon administration efforts to restrict importation of textiles from abroad). Nevertheless, the U.S. government has generally remained committed to free trade, despite notable departures from that rule. *See generally* Nancy Williams, Note, *The Resilience of Protectionism in U.S. Trade Policy*, 99 B.U. L. REV. 683 (2019) (arguing that protectionism never "completely left U.S. trade law and policy").

194. *See* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612 (1992) (noting that FSIA codified the Tate Letter).

A. THE TATE LETTER

In 1952, the State Department's Acting Legal Advisor, Jack Tate, issued a letter officially committing the United States to restrictive sovereign immunity.[195] As revealed by its text, while the Tate Letter broadly indicated that the restrictive view would apply to a foreign sovereign's "private" acts, it specifically targeted foreign states' commercial activities.[196] This focus on commercial activity also comported with broader U.S. interests in combatting communism and promoting free trade.

Beginning with the text itself, the Tate Letter's focus on commercial activity is evident in several ways. First, its use of the phrase "restrictive immunity" likely alluded to the term's prevailing definition at the time—namely to restrict immunity for a foreign state's commercial activities.[197] Second, the letter highlighted the U.S. government's own lack of immunity for suits in contract,[198] and long practice of refraining from invoking immunity for its merchant vessels,[199] as well as similar practices by other countries.[200] Third, and perhaps most tellingly, the Tate Letter stated 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."[201] This is the only reference in the Tate Letter to the kinds of cases that would be impacted by restrictive immunity.

Finally, while the Tate Letter did not explicitly reference communism, its focus on the practices of communist and non-communist states further suggests that restrictive immunity was synonymous with commercial activity. As the Tate Letter noted, the "Soviet Union and its satellites" fully accepted the absolute theory of immunity.[202] By contrast the Tate Letter described other countries, which were mostly non-communist,[203] as adopting or moving towards a restrictive approach.[204] As others have observed, the Soviet Union's adherence to absolute immunity was predicated on "the notion that there are two antagonistic economic systems in the modern world, and that the choice between the restrictive and the absolute theories of sovereign immunity translate[d] into

195. *Alfred Dunhill*, 425 U.S. at 711–15 (full text of Tate Letter).

196. While the Tate Letter mentioned that the United States could be sued in tort, this was the only reference to a possible non-commercial reason for adopting restrictive immunity and was dwarfed by the many commercial justifications the letter gave for limiting foreign sovereign immunity. *Alfred Dunhill*, 425 U.S. at 714.

197. *See* Kindall, *supra* note 6, at 1850 n.6 (describing the historical definition of "restrictive immunity").

198. *Alfred Dunhill*, 425 U.S. at 714.

199. *Id*.

200. *Id*. at 713.

201. *Id*. at 714.

202. *Id*.

203. *Id*. at 712–13. Amongst other countries, the letter mentioned that Romania had adopted restrictive immunity. *Id.* at 713. What the letter does not mention, however, is that while Romania had adopted restrictive immunity during the inter-war period (when it was not a communist country) it reverted to absolute immunity after World War II when it became a Soviet satellite state. Verdier & Voeten, *supra* note 104, at 214 n.8.

204. *Alfred Dunhill*, 425 U.S. at 712–14.

a choice between the free-market and the centrally-controlled economic systems."[205] While the Tate Letter did not reference these different economic systems, its comparison of communist and noncommunist state practice suggests the letter's drafters viewed the choice between immunity regimes as driven by commercial concerns.[206]

This focus on commercial activity comported with the Tate Letter's ideological and historical backdrop. First and foremost, restricting immunity for foreign states' commercial activities aligned with the U.S. government's ideological battle against communism.[207] As the Tate Letter itself notes, the commitment to absolute immunity amongst communist countries[208] was "most persuasive" that the United States should "change its policy" and adopt the restrictive view.[209] While the letter does not elaborate on this statement, restricting foreign sovereign immunity for commercial activities—more than any other kind of restriction on immunity—would directly threaten the communist view of economic ordering.[210]

Second, adopting restrictive immunity for commercial activities aligned with American interests in promoting free trade, including with foreign state-owned enterprises. By the time World War II was over, the United States had dedicated itself to creating a multilateral free trading system that would ensure the expansion of international trade and eliminate barriers to it[211]—a situation that was viewed as benefiting American corporations.[212] As suggested by the U.S. government's bilateral treaties of friendship, commerce, and navigation (FCNs) with other countries, restrictive immunity would help eliminate trade barriers that were anathema to this global trading system. Right after World War II and before the Tate Letter, the U.S. government started to include provisions restricting the immunity of state-owned commercial entities in these FCN treaties in order to encourage trade with these states.[213] A broad government

205. Christopher Osakwe, *A Soviet Perspective on Foreign Sovereign Immunity: Law and Practice*, 23 VA. J. INT'L L. 13, 13–14 (1982).

206. *See Alfred Dunhill*, 425 U.S. at 712–14.

207. *See* IRWIN, *supra* note 106, at 495 (noting that one of the U.S. government's main foreign policy concerns after World War II was to contain the spread of "Soviet Communism"). This impulse was reflected in contemporaneous scholarly writing which argued that responding to communism's expansion required restricting state immunity. *See, e.g.*, *Sovereign Immunity for Commercial Instrumentalities of Foreign Governments*, *supra* note 170, at 177 ("In an era of increasing socialism abroad, re-examination of the present policy of the United States toward granting [foreign sovereign] immunity may be in order.").

208. This portion of the letter refers to these countries as "state trading countries." *Alfred Dunhill*, 425 U.S. at 714.

209. *Id.*

210. Osakwe, *supra* note 205, at 21–22. While communist and noncommunist states were generally divided on the issue of restrictive immunity, communist states eventually became more flexible in their approach to foreign sovereign immunity in order to do business in non-communist countries. *See infra* note 237 and accompanying text.

211. IRWIN, *supra* note 106, at 460–63, 471–72.

212. MANN, SOURCES OF SOCIAL POWER VOL. 4, *supra* note 50, at 24–25.

213. SUCHARITKUL, *supra* note 21, at 196–97. Specifically, after World War II, the U.S. government's FCN treaties regularly included a waiver of sovereign immunity for commercial enterprises owned or controlled by

commitment to lifting immunity for all foreign states engaged in commercial activities would not only support this practice, but also remove a potential trade barrier between American businesses and foreign state-owned commercial entities more broadly.

Finally, for the United States, restrictive immunity was also a practical necessity in a globalized trading system in which communist state-owned companies were important players. Even though the U.S. commitment to free trade was connected to its fight against communism,[214] the United States understood that trade with communist state-owned enterprises could not be avoided. As one scholar described the situation, while the United States had once prohibited Soviet trade delegations from coming to the country,[215] this was no longer feasible given "the possibility, even the probability, that state trading will either continue on the present scale or increase."[216] It was imperative, therefore, for the United States to embrace "[a] new theory of 'no immunity,' logically based on a recognition of a radical change in conditions" triggered by "communism and state socialism as practical realities."[217]

In theory, the State Department's decision to officially embrace restrictive immunity amounted to a sea change in judicial decisions on foreign sovereign immunity for commercial activities. In reality, however, the results were mixed. In some cases, the department's immunity decisions gave more weight to political rather than economic and legal concerns.[218] In other cases, where the State Department did not weigh in, courts made immunity decisions based on "outdated" understandings of departmental practices.[219] In some cases, judges even granted immunity where the State Department had suggested otherwise.[220] As a result of this unpredictability and inconsistency, commentators soon began calling for a more reliable approach to immunity determinations.[221] These calls culminated in the creation of the FSIA, which codified restrictive immunity and placed all immunity decisions squarely with the courts.[222]

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foreign governments. John F. Coyle, *The Treaty of Friendship, Commerce, and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT'L L. 302, 315 (2013).

214. IRWIN, *supra* note 106, at 495.

215. Fensterwald, Jr., *supra* note 39, at 634–35.

216. *Id.* at 635, 640.

217. *Id.* at 635, 641.

218. Sigmund Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 TEX. L. REV. 1, 11 (1976).

219. Fredric Alan Weber, *The Foreign Sovereign Immunities Act of 1976, Its Origins, Meaning, and Effect*, 3 YALE STUD. WORLD PUB. ORD. 1, 10 (1976).

220. *Id.* at 12.

221. *See, e.g.*, Monroe Leigh, *Sovereign Immunity—the Case of the 'Imias'*, 68 AM. J. INT'L L. 280 (1974) (criticizing post-Tate Letter practices and urging action on then-stalled foreign sovereign immunity legislation).

222. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 before the Subcomm. On Admin. L. & Gov't Rels. Of the H. Comm. On the Judiciary*, 94th Cong. 25 (1976) (statement of Monroe Leigh, Legal Adviser, U.S. Dep't of State, accompanied by Michael Sandler, Legal Adviser's Off., State Dep't) [hereinafter Leigh Testimony].

B. Passage of the FSIA

The FSIA went into effect on January 19, 1977.[223] At its heart were the same abiding concerns with trade and commerce—particularly with the continuing rise of state trading companies and desire to facilitate and protect trade with those entities—that had long aligned with the push toward restrictive immunity during this period of state involvement in commercial activities.

While the FSIA's legislative history variously describes the statute's purpose as "depoliticizing the area of sovereign immunity"[224] and "minimiz[ing] irritations in foreign relations arising out of . . . litigation [against foreign states],"[225] it is dominated by references to the FSIA's important commercial character and benefits to trade. Indeed, while the FSIA bill included several exceptions to sovereign immunity,[226] the main focus of and impetus for the bill was the commercial activity exception.[227] As one government official noted during Congressional hearings on the FSIA, the statute's approach to sovereign immunity was necessary "because it is manifest now that the adjudication of a commercial claim against a foreign state on the merits does not affront the sovereignty of a foreign nation."[228]

The FSIA's focus on free trade can also be seen in other testimony about the statute's benefits to private enterprise, including lobbying by U.S. business interests, as well as efforts by its drafters to ensure the FSIA would not impede free trade with foreign sovereigns.

To begin with testimony on the bill, during Congressional hearings, representatives from the State Department, which had been primarily

223. *See* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94–583, 90 Stat. 2891 (Oct. 21, 1976) (codified as amended in scattered sections of 28 U.S.C.) (noting FSIA would go into effect ninety days after date of enactment).

224. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 before the H. Comm. On the Judiciary*, 94th Cong. 31 (1976) (statement of Bruno Ristau, Chief, Foreign Litig. Section, Civ. Div., U.S. Dep't of Just.) [hereinafter Ristau Testimony].

225. Leigh Testimony, *supra* note 222, at 29.

226. As originally passed, the FSIA created exceptions to immunity in the following circumstances: (1) for certain types of cases involving the commercial activity of foreign sovereigns; (2) in cases of express or implied waiver of immunity by the foreign state; (3) in cases involving a foreign sovereign's expropriation of property in violation of international law; (4) in cases involving rights in property in the United States acquired by succession or gift or immovable property in the United States; (5) in cases involving noncommercial torts committed in the United States by foreign sovereigns; and (6) in cases involving enforcement of maritime liens, based on a foreign state's commercial activities, against a vessel or cargo of the foreign state. Foreign Sovereign Immunities Act. In subsequent years, the FSIA was amended to create immunity exceptions for: (1) enforcement of agreements to arbitrate or arbitral awards against foreign sovereigns, under certain enumerated circumstances; (2) in cases involving foreclosure of a preferred mortgage as defined under the statute; (3) in certain cases involving expropriated art work; (4) in cases involving acts of international terrorism committed by designated state sponsors of terrorism; and (5) in cases involving international terrorist attacks on U.S. soil caused by the tortious acts of a foreign state or its officials taken in their official capacity. 28 U.S.C. §§ 1605(a)(6), (d), (h)(2); *id.* § 1605A; *id.* § 1605B.

227. See *infra* note 261 and accompanying text for definition of the commercial activity exception.

228. Ristau Testimony, *supra* note 224, at 30.

responsible—along with the Justice Department—for crafting the legislation,[229] emphasized the FSIA's upside for trade and commerce:

> [F]rom the standpoint of the private citizen, the current [Tate Letter] system generates considerable commercial uncertainty . . . . [W]hen the foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of the agreements which it may breach . . . . The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties . . . . [I]n this modern world of transnational commerce where foreign state enterprises are everyday participants, this is a bill whose time has come.[230]

A representative from the Justice Department similarly emphasized the bill's commercial purpose and benefits to those doing business with state-owned enterprises:

> The restrictive theory rests, at bottom, upon consideration that the widespread practices on the part of governments engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. That consideration is even more forceful today than it was two decades ago, for the intervening years have seen a sharp increase in the volume of trade between American businesses and foreign states or their instrumentalities, acting in a commercial capacity . . . . In sum, private parties with claims against foreign states arising out of their commercial or private-law activities should not be denied their day in court . . . .[231]

Various corporate interest groups lobbied on behalf of the bill, which they understood as promoting the interests of U.S. business. At one Congressional hearing, a representative from one of these corporate interest groups noted that "enactment of [the FSIA] would . . . benefit the American business community as a whole . . . [and] constitute a significant step in placing private parties on the basis of nearer equality with governmental entities before the law in commercial disputes."[232] Representatives from another interest group described the bill as similarly critical for commercial reasons: "From our perspective, this bill is important because of the increasing tendency of governments abroad to conduct foreign business through state trading organizations, state-owned corporations, or directly through government ministries."[233]

229. H.R. REP. NO. 94-1487, at 9 (1976).

230. Leigh Testimony, *supra* note 222, at 27, 29.

231. Ristau Testimony, *supra* note 224, at 30–31.

232. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 before the H. Comm. On the Judiciary*, 94th Cong. 80 (1976) (statement of Cecil J. Olmstead, Chairman, the Rule of L. Comm., and Vice President, the Texaco Co., accompanied by Timothy Atkeson Couns.).

233. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 before the H. Comm. On the Judiciary*, 94th Cong. 71 (1976) (letter from Timothy W. Stanley, President of the Int'l Econ. Pol'y Ass'n, to the Hon. Walter Flowers).

Reinforcing the bill's value to American business interests, members of the private bar celebrated the FSIA bill for providing private parties with a more reliable means of protecting their commercial interests as compared with the old Tate Letter approach. One private attorney, who testified in favor of the FSIA, lambasted the State Department for disproportionately favoring foreign sovereigns in commercial disputes with private parties post-Tate Letter.[234] In this attorney's view, since the FSIA would eliminate the State Department's influential role in sovereign immunity determinations, it would better protect private parties engaged in commerce with foreign sovereigns.[235]

In addition to statements about the FSIA's benefits to free trade and commerce, the statute's legislative history demonstrates sensitivity to how the FSIA's restrictive immunity regime might impact U.S. business with foreign states. In addressing this issue, representatives from the State Department argued that restrictive immunity would not disrupt trade with non-communist countries because many of those countries were increasingly adopting the restrictive approach.[236] With respect to communist states, the State Department similarly argued that, even though those countries were committed to absolute immunity, the switch would "do nothing to exacerbate the very minor difference we occasionally have with the state trading companies of the socialist governments."[237]

Indeed, Congress otherwise structured the FSIA bill in ways that facilitated, rather than disrupted, American business with foreign sovereigns.[238] For example, the bill included a requirement that commercial activity cases have a substantial connection to the United States—a requirement that was likely included "to anticipate the fears of the [American] business community in general that the United States would otherwise become an international

234. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 before the H. Comm. On the Judiciary*, 94th Cong. 59–60 (1976) (statement of Peter D. Trooboff, Att'y, Covington and Burling, Wash., D.C., and Co Chairman, Comm. On Transnat'l Jud. Proc., Am. Bar Ass'n, Int'l L. Section) [hereinafter Trooboff Testimony].

235. *Id.* at 60.

236. Leigh Testimony, *supra* note 222, at 56.

237. *Id.* Even though many communist countries remained officially committed to absolute immunity until the end of the Cold War, the need to engage in business transactions with capitalist states tempered their expectations about receiving absolute immunity in those countries; indeed, on some occasions, communist countries even agreed to waive their sovereign immunity in treaties with other states. Verdier & Voeten, *supra* note 104, at 215.

238. As mentioned earlier, the FSIA extends immunity, under certain circumstances, to the agencies and instrumentalities of foreign sovereigns. *See* 28 U.S.C. § 1603 (a)–(b). This provision could be understood to undermine, rather than protect, American business interests since it makes it possible for separately incorporated foreign state-owned corporations to be immune from suit. In fact, some countries do not extend sovereign immunity to separately incorporated foreign state-owned corporations. Keitner, *supra* note 102, at 246–47. But, as Part IV makes clear, furthering American business interests does not mean subjecting foreign state-owned corporations to suit in all situations. Indeed, extending immunity to certain agencies and instrumentalities may be understood, at times, as protecting American corporate interests by ensuring that foreign state-owned companies are not dissuaded from doing business in the United States because the country has become an "international collection agency." *See infra* notes 239–45 and accompanying text.

collection agency, to the injury of its trade with foreign states."[239] The legislation's treatment of execution and pre-judgment attachment of foreign sovereign assets was similarly understood to promote, rather than disrupt, trade and commerce. Under the proposed bill, plaintiffs could execute judgments against a state's commercial property related to the commercial activity under dispute, but could not touch unrelated commercial property[240]—a provision understood to promote "investment by foreign states in American capital markets."[241] As for pre-judgment attachment of a foreign state's commercial assets, it was prohibited by the bill[242]—another provision meant to placate the interests of a domestic business community concerned foreign states might otherwise refrain from investing in American markets.[243] Finally, the FSIA bill immunized the assets of foreign central banks "held for [their] own account" from attachment or execution absent an express waiver[244]—a protection intended, yet again, to avoid discouraging foreign investment in the United States.[245]

As described so far, the commercial activity exception has long been central to the development of foreign sovereign immunity doctrine in ways that comport with and support certain capitalist interests. Concerns relating to capitalism would continue to be reflected in the FSIA's development over the coming decades, as explored in the next part.

IV. CAPITALISM & THE FSIA'S COMMERCIAL ACTIVITY EXCEPTION

Since the statute's enactment, capitalism's alignment with the FSIA has been most clearly evident in judicial approaches to the commercial activity exception.[246] Over the last forty-five years, courts have rounded out the contours

239. Weber, *supra* note 219, at 42–43. This provision was understood to adversely impact the interests of "alien traders," who wanted to sue foreign sovereigns in U.S. courts, and to have less of a negative effect on American corporations. *Id.*

240. Foreign Sovereign Immunities Act of 1976 § 4(a), 28 U.S.C. § 1610. In contrast to property owned by the state itself, the FSIA bill generally gave less protection to the assets of a state's agencies or instrumentalities engaged in commercial activities in the United States. *Id.*

241. Weber, *supra* note 219, at 43.

242. 28 U.S.C. § 1610.

243. Weber, *supra* note 219, at 42–44.

244. Foreign Sovereign Immunities Act of 1976 § 4(a), 28 U.S.C. § 1611. This immunity applies regardless of whether the central bank is independent from the foreign state. NML Capital, Ltd. V. Banco Central de la Republica Argentina, 652 F.3d 172, 188–90 (2d Cir. 2011). *But see* Iran Threat Reduction and Syria Human Rights Act 2012 § 502, 22 U.S.C. § 8772(a) (creating an exception to the FSIA's central bank execution rules that allows Iran's central bank assets to be executed on or attached in specific terrorism-related cases subject to particular judicial findings, even if there is no express waiver of attachment by Iran or the bank).

245. Ingrid Wuerth, *Immunity from Execution of Central Bank Assets*, *in* THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 266, 266 (Tom Ruys, Nicolas Angelet & Luca Ferro eds., 2019).

246. While beyond the scope of this Article, other exceptions included in (or absent from) the FSIA may have been prompted, at least in part, by capitalist concerns. For example, while the original FSIA bill created an exception to immunity for expropriated property taken "in violation of international law" it did not address violations of civil or human rights enshrined under international law. Weber, *supra* note 219, at 46. Indeed, there is still no immunity exception in the FSIA for claims relating to human or civil rights. As some have noted, the "[most] likely explanation [for this] . . . is that only deprivations of property rights [are] important enough to

of the exception, in some cases reinforcing and in others expanding upon Congress's wishes. In some cases, these interpretations (whether intentionally or not) have bolstered trends endemic to capitalism's neoliberal period.

This period of capitalist development began to take root in the late 1970s but only fully emerged with the end of the Cold War.[247] It was triggered by various events that occurred in the early 1970s, including the plunging value of the U.S. dollar, rising inflation, a precipitous rise in oil prices, increasing unemployment, and decreasing rates of foreign trade.[248] Together these and other factors led to criticism of state intervention in the market and calls to return to more *laissez-faire*-like approaches to capitalist economics.[249]

The neoliberal period that has since been ushered in has featured increasing commodification of goods and services,[250] deregulation of capital and labor markets,[251] and the predominance of finance as the main driver of the U.S. economy.[252] It has also featured substantial economic inequality, as manifested by a small wealthy elite,[253] increasing corporate profits world-wide,[254] and weaker rights for workers.[255] As this Part explores, judicial approaches to the commercial activity exception have comported with a number of these trends.

According to the commercial activity exception:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . .
>
> (2) 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

American policy makers and the American business community to warrant the strain such a suit would create in our relations with the defendant state." *Id.* More recently, the Supreme Court reaffirmed this view, and held that the expropriation exception is limited to violations of the property rights of aliens and does not extend to violations of international human rights law. *See* Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 712 (2021) (holding that "the expropriation exception is best read as referencing the international law of expropriation rather than of human rights"). In reaching this decision, the Court noted that the expropriation exception reflects the U.S. government's desire "to protect the property of its citizens abroad as part of a defense of America's free enterprise system" rather than an "all-purpose jurisdictional hook for adjudicating human rights violations." *Id.* at 713.

247. *See supra* note 48, and accompanying text; COATES, *supra* note 22, at 29–30.

248. JOYCE APPLEBY, THE RELENTLESS REVOLUTION: A HISTORY OF CAPITALISM 576–77, 587 (2010).

249. *Id.* at 587–91.

250. *See supra* note 49 and accompanying text; COATES, *supra* note 22, at 20 (defining commodification).

251. *See* MANN, SOURCES OF SOCIAL POWER VOL. 4, *supra* note 50, at 131.

252. *See* SAAD-FILHO, *supra* note 47, at 302–03; HARVEY, *supra* note 51, at 194. The type of finance that has dominated U.S. and global markets since the 1970s is primarily driven by speculative, short-term investments in things like stocks and debt instruments rather than in trade and manufacturing. *See* NOAM CHOMSKY, PROFIT OVER PEOPLE: NEOLIBERALISM AND GLOBAL ORDER 23 (1998) (noting that, in 1971, "90 percent of international financial transactions were related to the real economy—trade or long-term investment" while "by 1995 about 95 percent of the vastly greater sums were speculative").

253. *See* PIKETTY, *supra* note 53, at 15, 43, 249; Horowitz et al., *supra* note 54.

254. *See* SAAD-FILHO, *supra* note 47, at 305–06; Dobbs et al., *supra* note 55, at 48.

255. *See* Flaherty, *supra* note 52, at 96–97.

> commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[256]

Applying a political economy lens, this Part examines how neoliberalism has aligned with judicial approaches to two of the most important issues raised by the commercial activity exception: the definition of commercial activity itself and the requirement that the commercial activity have a territorial connection to the United States.

Overall, judicial approaches to these issues have, at times, promoted commodification, and demonstrated a particular tendency to protect the global financial industry, headquartered in New York.[257] They have facilitated deregulation by privileging continued trade and commerce between U.S. business and foreign sovereigns over other interests that tend to favor the rights of individuals, especially consumers and workers. Judicial approaches to the commercial activity exception also have affinities with the economic inequality characteristic of the neoliberal age, by providing greater opportunities for corporate, rather than individual, plaintiffs to recoup financial losses. In these ways, judicial interpretations of the commercial activity exception have, in some cases, helped reinforce an important overall trend in neoliberal capitalism: the "system[ic] favour[ing] [of] large capital at the expense of small capital and the workers."[258]

This Part unpacks these various claims. Part IV.A demonstrates how the Supreme Court's expansive definition of commercial activity in *Republic of Argentina v. Weltover* has facilitated the commodification of a vast array of activities.[259] It shows how this commodification has particularly benefitted plaintiffs with claims aligned with the interests of the global financial industry. At the same time, Part IV.A shows how, despite its breadth, *Weltover's* definition of commercial activity has excluded certain interests—particularly human rights claims—even when those claims arguably satisfy the *Weltover* test for commercial activity. Part IV.A demonstrates how this exclusion furthers neoliberalism by protecting against regulatory interventions that may threaten corporate interests, while also comporting with the FSIA's tendency to protect trade and other commercial transactions with foreign states.

Part IV.B demonstrates how judicial approaches to the territorial nexus requirement have similarly promoted deregulatory objectives, while also

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256. 28 U.S.C. § 1605(a)(2).

257. *See* Saskia Sassen, *Global Financial Centers*, 78 FOREIGN AFFS. 75, 75 (1999) (describing New York, as well as London, as the foremost centers of global finance). While other cities, like Singapore and Hong Kong, have emerged in recent years as important financial centers, New York continues to dominate the world of global finance. Huw Jones, *New York, London Keep Top Spots in Global Financial Centres Index*, REUTERS (Sept. 24, 2021, 1:04 AM), https://www.reuters.com/business/finance/new-york-london-keep-top-spots-global-financial-centres-index-2021-09-24.

258. SAAD-FILHO, *supra* note 47, at 216.

259. While many often use the terms commodification and commercialization interchangeably, commodification is different from commercialization, which exists in both capitalist and non-capitalist systems and simply denotes the act of exchange or trade. WOOD, *supra* note 87, at 76.

favoring corporate, over individual, plaintiffs. Specifically, Part IV.B shows how some defendant-friendly interpretations of the territorial nexus requirement have been developed in the context of commercial activity cases raising personal injury, human rights, or employment claims, while more plaintiff-friendly approaches have emerged in cases that further the interests of global finance. This trend further undermines workers' rights and generally helps facilitate deregulation, while promoting trade and commerce with foreign sovereigns. In addition, Part IV.B demonstrates how, in certain jurisdictions, the territorial nexus requirement has aligned with neoliberalism's economic inequality and wealth gap by giving more protections to corporations and other business organizations suffering pure financial losses in the United States, as compared to individual plaintiffs in the United States suffering the same kind of loss.

Finally, Part IV.C describes how the commercial activity exception's territorial nexus requirement is more often triggered in cases involving contractual rights—which are central to the orderly running of a capitalist economic system—and less likely to be triggered in other kinds of commercial cases, including those involving business torts. As with Part IV.B, this Subpart demonstrates how these circumstances benefit corporate, over individual, plaintiffs in ways that reinforce economic inequality.

The analysis conducted in this Part is based on a qualitative review of hundreds of judicial opinions from the FSIA's inception until early 2021. In particular, it homes in on major developments in judicial approaches to the commercial activity exception, which are often reflected in Supreme Court decisions. The argument presented in this Part is *not* that courts have been explicitly or even implicitly guided by the concerns of neoliberalism or that those concerns explain all judicial decision-making under the commercial activity exception. Instead, the more modest argument is that a noticeable and underexplored trend in judicial approaches to the exception is that certain capitalist concerns and corporate plaintiffs have, at times, benefitted over individuals and interests that do not promote the ends of neoliberal capitalism.[260] This is especially true for individual plaintiffs bringing claims for human rights,

260. While beyond the scope of this Article, it may be fruitful to apply a political economy lens to other exceptions to FSIA immunity. In particular, a political economy approach to the FSIA's terrorism-related exceptions, under 28 U.S.C. §§ 1605A and 1605B, would be useful in unpacking the political forces behind those exceptions, including lobbying efforts by the plaintiffs' bar and other groups, as well as the impact, if any, those exceptions (and the laws related to them) have had on corporate and financial interests in the United States. For example, Section 1605B was added to the FSIA via the Justice Against Sponsors of Terrorism Act. Pub. L. No. 114-222, 130 Stat. 852 (2016). [hereinafter "JASTA"]. This exception to immunity, which primarily targets Saudi Arabia, was passed as a result of lobbying by families of 9/11 victims who had previously sought but failed to sue Saudi Arabia for the attack because the Saudi government was protected by foreign sovereign immunity. Chris Mondics, *If 9/11 Plaintiffs Prevail, Saudis Could Face Up to $100 Billion in Damages*, THE PHILA. INQUIRER, (Sept. 25, 2016), https://www.inquirer.com/philly/business/law/20160926_If_9_11_plaintiffs_prevail__Saudis_could_face_up_to__100_billion_in_damages.html; *see also* Iran Threat Reduction and Syria Human Rights Act 2012 § 502, 22 U.S.C. § 8772(a) (subjecting central bank assets of Iran—a country with which the United States has little to no economic and financial relationship—to attachment in specific terrorism-related cases).

personal injury, or employment, even where those claims are arguably connected to the commercial acts of foreign sovereigns.

A. Defining Commercial Activity: Alternatively Boosting & Restricting Commodification

The FSIA provides a broad definition of commercial activity. As reflected in the statute:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.[261]

Providing little in the way of other guidance, the FSIA's drafters gave the courts significant latitude to parse the nuances of the definition.[262] As this Subpart explores, courts soon began to disagree over the proper interpretation of "commercial activity," especially when it came to the nature/purpose issue. Some courts took the position that only the nature of the activity could be considered, though they sometimes disagreed about how "nature" should be defined. Other courts suggested the "purpose" of the activity could also be part of the analysis.

In *Republic of Argentina v. Weltover*, the Supreme Court weighed in on these debates and issued three key holdings.[263] First, it held that only the nature of the act could be considered in defining commercial activity.[264] Second, it held that an activity was commercial in "nature" as long as it was something a private person could do.[265] Third, it held that commercial activity did not require a profit-motive.[266]

As this Subpart argues, these holdings did more than just provide an interpretation of the FSIA's text and legislative history; they generated a definition of commercial activity that was as expansive as the statute would allow. In doing so, *Weltover* effectively ended judicial efforts, however unconscious or implicit, to take a more modest approach to defining commerciality. As this Subpart reveals, this outcome supported the goals of neoliberalism by ensuring that a vast array of activities would be commodified, including those that U.S. judicial practice had once treated as sovereign in nature. This result has been particularly favorable to plaintiffs with claims

261. 28 U.S.C. § 1603(d).

262. H.R. Rep. No. 1487, at 16 (1976); *see* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612 (1992) (noting that the FSIA's commercial activity exception leaves the critical term "commercial" largely undefined).

263. *Weltover*, 504 U.S. at 607.

264. *Id.* at 614.

265. *Id.*

266. *Id.*

relating to the global financial industry, especially those having to do with the public debts of foreign sovereigns.

Part IV.A ends by examining the Supreme Court's inconsistent commitment to the *Weltover* test for certain types of claims. As demonstrated by its decision in *Saudi Arabia v. Nelson*,[267] the Court has taken a muddled approach to the *Weltover* test in response to human rights-based claims, even where those claims arguably satisfy *Weltover's* definition of commercial activity. This discrepancy, between the *Weltover* and *Nelson* approaches to commercial activity, further aligns with neoliberalism by protecting against regulatory interventions that may threaten corporate interests.[268] In particular, it protects corporate transactions with foreign sovereigns by ensuring the United States does not become the sort of "international collection agency"[269] that might threaten continued U.S. business with foreign governments—a goal of the FSIA itself that aligns with neoliberal capitalism's privileging of "profit over people."[270]

1. Republic of Argentina v. Weltover

As the FSIA's legislative history makes clear, the commercial activity exception is intended to cover a "broad spectrum" of activity.[271] Nevertheless, the statute and its legislative history left various questions unanswered. Critically, while the text of the commercial activity exception indicates that commercial activity should be defined in terms of its "nature," rather than "purpose," the legislative history seems to combine the two. For example, it implies that not-for-profit activity could be considered commercial in nature,[272] while also stating that a profit-making purpose could render an activity presumptively commercial[273]—a confusing pair of statements, if nature is truly all that matters.

Because of this sparse and somewhat contradictory guidance,[274] courts took different approaches to determining whether foreign sovereign activity was

267. Saudi Arabia v. Nelson, 507 U.S. 349, 350 (1993).

268. As with judicial approaches to the territorial nexus requirement, differing approaches to the definition of commercial activity in *Weltover* and *Nelson* suggest that individual plaintiffs, who are more likely to bring human rights-based claims, will have a harder time satisfying the test for commercial activity as compared to corporate plaintiffs, who are more likely to bring claims implicating the interests of the global financial industry.

269. *See* Weber, *supra* note 219, at 42–43; *see also supra* note 239 and accompanying text.

270. *See* CHOMSKY, *supra* note 252, at 36 (noting that the present neoliberal order places "profit over people").

271. H.R. REP. NO. 94-1487, at 16 (1976). Notably, the FSIA approach to defining commercial activity departs from earlier proposals for a foreign sovereign immunity statute that took a narrower view of commercial activity. *See* Andreas F. Lowenfeld, *Claims Against Foreign States – A Proposal for Reform of United States Law*, 44 N.Y.U. L. REV. 901, 937 (1969) (proposed foreign sovereign immunity statute that would have allowed suit for "express or implied contract[s] entered into, to be performed, or arising out of transactions in the United States" but no other kinds of commercial claims).

272. H.R. REP. NO. 94-1487, at 16 (1976).

273. *Id.*; YANG, *supra* note 3, at 87.

274. Donoghue, *supra* note 12, at 517.

commercial in the early days of the FSIA. Some courts embraced an exclusively nature-based test. Many of these courts took the additional step of defining commerciality as those actions a private person could undertake[275] —something that was loosely suggested by the legislative history.[276] Other courts that adopted an exclusively nature-based test took a different route and focused more on whether the activity was inherently sovereign.[277]

Still other courts questioned the nature/purpose distinction all together. For example, in *De Sanchez v. Banco Central de Nicaragua*, the Fifth Circuit held that the commercial activity exception did not bar the court from "considering the purposes of different types of activities."[278] In *De Sanchez*, plaintiff attempted to cash a check denominated in U.S. dollars and issued by Banco Central before a revolution toppled the president.[279] Plaintiff, whose husband had been the Minister of Defense under the toppled leader, was unable to cash the check after the new government placed a stop-payment order on it.[280] In holding that defendant's issuance of the check was a sovereign act, the court conceded that it took into consideration the purpose of the activity, namely, to regulate the sale of foreign currency.[281] In doing so, the court insisted, that "an absolute separation is [not] always possible between the ontology and teleology of an act . . . [as] the essence of an act is [often] defined by its purpose."[282]

The Supreme Court's decision in *Weltover* reinforced the "nature" test's dominance and rejected the purpose test in all circumstances. In *Weltover*, the Supreme Court considered whether Argentina and its state-owned bank, which had issued bonds as public debt and then failed to honor them on their maturity date, had engaged in commercial activity.[283] In concluding that defendants' acts were commercial ones, the Court held that the bonds in question were "garden variety debt instruments," and, therefore, commercial in nature.[284] In emphasizing that it was only the "nature" of the activity that should be

275. Some courts questioned the logic of this "private person" test, implicitly raising concerns about how the test exclusively embraced capitalist economic notions. *See, e.g.*, Matter of Sedeco Inc., 543 F. Supp. 561, 565–66 (S.D. Tex. 1982), *vacated on other grounds by* Complaint of Sedeco, Inc., 610 F. Supp. 306 (S.D. Tex. 1984) (noting that to conclude that "every act done by a foreign state which could be done by a private citizen in the United States" is commercial activity is unrealistic and denies "the existence of other types of governments and economic systems").

276. Donoghue, *supra* note 12, at 500. While the FSIA's legislative history does not expressly say that commercial activity is defined in terms of what "private persons" can do, it does state that a contract that is "of the same character as a contract which might be made by a private person" satisfies the definition. H.R. REP. NO. 1487, at 16 (1976).

277. Donoghue, *supra* note 12, at 512–13. Some courts combined a sovereignty and private-person test. *Id.*

278. De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1393 (5th Cir. 1985).

279. *Id.* at 1387.

280. *Id.*

281. *Id.* at 1393.

282. *Id.*

283. Republic of Argentina v. Weltover, Inc., 504 U.S. 612, 609–10, 617. As discussed in Part IV.B.2, Argentina unilaterally rescheduled the payment dates on the bonds, which were denominated in U.S. dollars and were supposed to be paid to plaintiffs in New York.

284. *Id.* at 615.

considered, the Court held that what mattered was not "whether the foreign government is acting with a *profit motive* or instead with the aim of fulfilling uniquely sovereign objectives."[285] Rather, what was important was that the "particular actions that the foreign state performs . . . are the *type* of actions by which a private party engages in 'trade and traffic or commerce[.]'"[286]

In holding that commercial activity is the kind of activity a private party engages in and does not require a profit-motive, *Weltover* was not inconsistent with the FSIA's language or legislative history. It did, however, double-down on a particularly expansive reading of the FSIA's definition of commercial activity[287] and ensure it would be determinative in most cases.[288]

For various reasons, this outcome favors interests aligned with neoliberalism, especially with regards to commodification and the global financial industry.[289] First, *Weltover* generally facilitates commodification, which is central to capitalist commercial transactions[290] and particularly important to neoliberal capitalism.[291] Commodities are "goods and services produced for sale, rather than consumption by their own producers," and have both use value as well as exchange value—what this means is that commodities are both socially valuable and can be exchanged for other commodities, like money.[292]

In theory, anything can be made into a commodity, as "[v]alue . . . is never an inherent property of objects, but is a judgment made about them by subjects."[293] By embracing a private person test that eschews a profit-motive, *Weltover* helps make this theoretical possibility an actual reality.[294] This is because the test favors commodification of any foreign sovereign activity that may be analogous to an activity a private person might pursue in the market—even if the *actual* activity in question has no inherent exchange value and/or

285. *Id.* at 614 (emphasis added).

286. *Id.* (quotations omitted) (citation omitted).

287. *See* YANG, *supra* note 3, at 91 (arguing that post-*Weltover*, the definition of commercial activity leaves "precious little that is done by a State, short of an all-out war, outside the scope" of the exception).

288. *Id.* As discussed in Part IV.A.2, *Weltover's* broad approach to defining commercial activity has not been applied to human rights cases.

289. Of course, as discussed in Part I.B, defining commercial activity as anything a private person does also comports with capitalism's view of commercial activity as the exclusive purview of private actors.

290. MANN, SOURCES OF SOCIAL POWER VOL. 2, *supra* note 10, at 23; KARL MARX, CAPITAL: A CRITICAL ANALYSIS OF CAPITALIST PRODUCTION (Samuel Moore & Edward Aveling trans., Fredrick Engels eds., 1887), *reprinted in* MARX AND ENGELS COLLECTED WORKS VOLUME 35 – KARL MARX: CAPITAL VOLUME I 31, 157 (2010).

291. *See* HARVEY, *supra* note 352, at 160.

292. SAAD-FILHO, *supra* note 47, at 20.

293. Arjun Appadurai, *Introduction: Commodities and the Politics of Value*, *in* THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE 3, 3 (Arjun Appadurai ed., 1986).

294. Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614–15 (1992).

does not involve a commercial transaction or act.[295] This outcome has been borne out by caselaw applying the *Weltover* test.[296]

Second, *Weltover* aligns with neoliberalism by subjecting debt instruments—which are a key component of the global financial system[297]—to legal accountability even when issued by foreign sovereigns. Under leading post-Tate Letter, pre-FSIA case law, public debts were considered sovereign activity.[298] Indeed, an earlier iteration of the FSIA bill prohibited claims against foreign countries for "debt obligations incurred for general governmental purposes."[299] Though the FSIA's final version did not include this provision,[300] it also did not indicate whether all public debt fell within the commercial activity exception's reach. Indeed, some courts suggested, post-FSIA, that some kinds of public debt might still be immune from suit.[301]

The *Weltover* decision bucked these perspectives.[302] While it claimed to have "no occasion to consider" whether public debt was *per se* commercial

295. By eschewing a profit-motive, the *Weltover* test also ensures plaintiffs that expect to financially profit from their transactions with foreign sovereigns, even where the sovereigns themselves do not, will be able to satisfy the definition of commercial activity. Indeed, in *Weltover*, the public debt in question did not appear to result in any financial "profit" to the Argentine government. *See id.* at 616 (noting that "Argentina points to the fact that the transactions in which the [bonds] were issued did not have the ordinary commercial consequence of raising capital or financing acquisitions").

296. In one FSIA case involving the Holy See, the court expressly noted these odd, yet inevitable, results of the *Weltover* test. As it noted, "with purpose and motive deleted from the evaluation, the [religious and pastoral] activities of the Holy See might be characterized as commercial. This would be, to say the least, ironic . . . [t]o describe core religious duties as the equivalent of private commercial activity may superficially apply existing precedent, but ultimately results in a transmogrification of the facts." Doe v. Holy See, 434 F. Supp. 2d 925, 941 (D. Or. 2006), *aff'd in part, rev'd in part, on other grounds*, 557 F.3d 1066 (9th Cir. 2009); *see also* Sun v. Taiwan, 201 F.3d 1105, 1107–08 (9th Cir. 2000) (defining the sponsoring and operation of a not-for-profit cultural tour aimed at fostering cultural exchange as commercial); Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298, 313–14 (D.D.C. 2005) (defining the temporary loan of artwork for educational purposes between not-for-profit museums as commercial); Dale v. Colagiovanni, 337 F. Supp. 2d 825, 839 (S.D. Miss. 2004), *aff'd by* 433 F.3d 425 (5th Cir. 2006) (describing the creation of a charitable trust as commercial). Congress itself has not always been comfortable with the expansive approach to commercial activity *Weltover* facilitated. Indeed, in 2016, it passed an amendment to the FSIA that explicitly extended sovereign immunity to certain temporary loans of artwork. Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, Pub. L. No. 114-319, 130 Stat. 1618 (2016).

297. *See* ADAIR TURNER, BETWEEN DEBT AND THE DEVIL: MONEY, CREDIT, AND FIXING GLOBAL FINANCE 21–23 (2016) (illustrating the centrality of debt to the growth of the global financial industry).

298. *See* Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) (leading case law on commercial activity exception under the Tate Letter which describes public debt as governmental activity subject to sovereign immunity).

299. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 before the Subcomm. on Admin. L. & Gov't Rels. of the H. Comm. on the Judiciary*, 94th Cong. 10–11 (1976).

300. H.R. REP. NO. 94-1487, at 10 (1976).

301. In *Asociacion De Reclamantes v. United Mexican States*, for example, the D.C. district court suggested that "non-commercial debt obligations," a term it did not define, might enjoy immunity under the FSIA. 561 F. Supp. 1190, 1195 n.10 (D.D.C. 1983), *aff'd*, 735 F.2d 1517 (D.C. Cir. 1984). The court also noted that, in removing the provision giving immunity to public debts, the FSIA's drafters merely suggested that only those public debts "which are of a commercial nature and should be treated like other commercial transactions are excepted from sovereign immunity." *Id.* (quotations omitted) (citation omitted).

302. Indeed, *Weltover* expressly rejected *Victory Transport's* holding that public debt was sovereign activity. Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 615 (1992).

activity, the *Weltover* court broadly concluded that there was nothing distinctively sovereign about public debt.[303] In doing so, it adopted a view of public debt that aligned with judicial decisions largely from the Second Circuit—which includes the financial hub of New York City—treating public debt as commercial in nature.[304] Indeed, courts have since relied on *Weltover*, as well as the Second Circuit cases it implicitly sanctioned, to treat public debt as inherently commercial.[305]

Weltover's historical context starkly demonstrates how the global financial industry has benefited from *Weltover's* treatment of public debt. The *Weltover* decision occurred against the backdrop of Argentina's slow-rolling but pervasive fiscal crisis in the 1980s[306]—one of several fiscal crises happening in the developing world at the time that were triggered by global financial practices.[307] During the 1970s, U.S. banks had been awash in cash and eager to invest in less developed countries.[308] These countries had often been offered "low interest rates, enabling them to borrow massively to finance their sagging economies . . . ."[309] Then, in 1979, the U.S. Federal Reserve hiked interest rates[310] (other creditor countries followed suit), increasing the cost of repaying loans and triggering a global debt crisis[311] that affected many Latin American countries including Argentina.[312] Several of the most heavily indebted Latin American states faced interest payments that swallowed more than one-third of revenues from their exports of goods and services, with Argentina shouldering

303. *Id.*

304. *See, e.g.*, Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1018 (2d Cir. 1991) ("It is self-evident that issuing public debt is a commercial activity"); Carl Marks & Co. v. Union of Soviet Socialist Republics, 841 F.2d 26, 27 (2d Cir. 1988) (holding that "issuance of public debt falls within the 'commercial activity' exception").

305. *See*, *e.g.*, Rogers v. Petroleo Brasileiro, S.A., 673 F.3d 131, 135 (2d Cir. 2012) (citing to Second Circuit case law in holding that it is "well-settled that the issuing of public debt is a commercial activity"); Phaneuf v. Republic of Indonesia, 106 F.3d 302, 307 (9th Cir. 1997) (citing to *Weltover* in holding that "issuance of sovereign debt is a commercial act").

306. *See generally* Rudiger Dornbusch & Juan Carlos de Pablo, *Argentina: Debt and Macroeconomic Instability* (Nat'l Bureau of Econ. Rsch., Working Paper No. 2378, 1987) (discussing Argentina's debt crisis during the 1980s), https://www.nber.org/system/files/working_papers/w2378/w2378.pdf.

307. *See, e.g.*, Jocelyn Sims & Jessie Romero, *Latin American Debt Crisis of the 1980s*, FED. RSRV. HIST., (Nov. 22, 2013), https://www.federalreservehistory.org/essays/latin-american-debt-crisis (describing foreign debt crisis in Latin American countries in the 1980s).

308. MANN, SOURCES OF SOCIAL POWER VOL. 4, *supra* note 50, at 167.

309. *Id.*

310. The Federal Reserve's interest rate hike was an attempt to reverse the 1970s-era inflation crisis in the United States. JAMES M. BOUGHTON, SILENT REVOLUTION: THE INTERNATIONAL MONETARY FUND 1979-1989, at 319 (2001), https://www.imf.org/external/pubs/ft/history/2001/index.htm.

311. MANN, SOURCES OF SOCIAL POWER VOL. 4, *supra* note 50, at 167.

312. Sims & Romero, *supra* note 307. While there were many factors that led to the Argentine debt crisis, they included "much higher interest rates" that made it harder for Argentina to service its foreign debt. Dornbusch & de Pablo, *supra* note 306, at 10.

a burden of fifty percent.[313] As of 1985, Argentina alone had approximately $48.3 billion in debt held by foreign lenders.[314]

Even though Argentina's actions were aimed at staving off a major domestic financial crisis[315]—indeed the International Monetary Fund had required that Argentina take the actions it did in order to receive loans to help deal with its fiscal crisis—[316]the Court ignored the unique sovereign attributes of Argentina's debt.[317] Instead, the Court adopted a definition of commercial activity that protected those holding Argentina's public debt and the global financial industry that had financed it.[318] As one scholar described the situation at the time, "[p]rotecting institutional lenders from [Latin American] sovereign default" was vital because "[t]he failure of one or two multinational banking institutions could jeopardize the entire U.S. banking system . . . ."[319]

2. Excluding Human Rights Claims

Since *Weltover*, the Supreme Court has inconsistently applied its broad definition of commercial activity, at least when it comes to claims involving human rights. In its decision in *Saudi Arabia v. Nelson*—a commercial activity claim decided after *Weltover*—the Court held that acts of detention and torture committed during plaintiff Scott Nelson's employment in Saudi Arabia were not commercial in nature. In reaching this result, the Court departed from *Weltover's* definition of commercial activity. It did so by factoring into its analysis the identities of those government officials who had engaged in the activities in question. Relying on *Nelson*, other courts have gone even further and reintroduced a purpose-based test to dismiss human rights claims brought under the commercial activity exception, which would otherwise seem to satisfy the *Weltover* test. Overall, these decisions have aligned with the interests of

313. BOUGHTON, *supra* note 310, at 418 n.6.

314. Dornbusch & de Pablo, *supra* note 306, at 5.

315. Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 616 (1992). In its brief to the Supreme Court, Argentina argued that the bonds it issued were "necessary steps in its administration of the Government's own obligations under a program designed to assure access to foreign exchange, in order to avoid a credit crisis within the country's private sector." Brief of Republic of Argentina and Banco Central de La Republica Argentina at 3, *Weltover*, 504 U.S. 607 (No. 91-763), 1992 WL 526250 [hereinafter Argentina Brief].

316. BOUGHTON, *supra* note 310, at 462, 464–65, 469–71; Argentina Brief, *supra* note 315, at 10.

317. In addition to facing a financial crisis, Argentina was a relatively new democracy in which "the baton of economic control had very recently been passed from the military" to a civilian government. BOUGHTON, *supra* note 310, at 462.

318. As discussed in Part IV.B.2, the Second Circuit decision in *Weltover* demonstrates even more clearly that applying the commercial activity exception to this case was seen as good for global financial markets, especially those in New York.

319. W.H. Knight, Jr., *International Debt and the Act of State Doctrine: Judicial Abstention Reconsidered*, 13 N.C. J. INT'L L. & COM. REG. 35, 35–36 (1988). While banks heavily invested in Latin American public debt faced the possibility these loans would not be repaid, it is debatable whether this situation would have, in fact, seriously threatened the U.S. financial industry. *Id.* By the mid-1980s, most commercial banks exposed to the sovereign debt crisis had had enough time to set aside adequate reserves to deal with any potential defaults. BOUGHTON, *supra* note 310, at 415.

neoliberalism by protecting against regulatory interventions that may threaten U.S. business with foreign states.

In *Nelson*, an American citizen employed in a Saudi hospital brought claims against the hospital, its purchasing agent in the United States, as well as the Saudi government based on injuries arising from his alleged detention and torture by government officials.[320] Scott Nelson had been recruited in the United States by a company working for the Saudi government, and signed his employment contract here.[321] As part of his position at the hospital, which was owned and operated by the Saudi state, Nelson was responsible for monitoring all facilities, equipment, and systems to ensure safety requirements were met.[322] After reporting various safety defects to hospital staff, Nelson was detained and tortured by Saudi government agents including police officers.[323] He was ultimately held for thirty-nine days in jail, without charge, before being released.[324]

After returning to the United States, Nelson and his wife sued.[325] The district court dismissed their claims, but the Eleventh Circuit reversed, concluding, in part, that Saudi Arabia's recruitment and hiring of Nelson was commercial activity.[326] The Supreme Court granted *cert* and reversed the appellate court.[327]

While the Court's majority conceded that Saudi Arabia's recruitment and employment of Nelson led to his injury,[328] it concluded that the relevant activity was, in fact, Saudi Arabia's detention and torture of plaintiff.[329] In the Court's view, those activities "however monstrous" were uniquely sovereign because they were "an exercise of the powers of police," and "not the sort of action by which private parties can engage in commerce."[330]

Four justices disagreed with the majority opinion, with several justices specifically disputing whether defendants had engaged in commercial activity.[331] In a concurring opinion joined by Justice Blackmun, Justice White held that Nelson's detention and torture could be considered commercial activity.[332] As he explained, private parties regularly retaliate against whistle-blowers, like Nelson, and, in that regard, may "conspire[e] with public authorities to effectuate an arrest."[333] Going a step further, Justice White also

320. Saudi Arabia v. Nelson, 507 U.S. 349, 351 (1993).
321. *Id.* at 351–52.
322. *Id.* at 352.
323. *Id.* at 352–53.
324. *Id.* at 353.
325. *Id.* at 351.
326. Nelson (*Nelson I*) v. Saudi Arabia, 923 F.2d 1528, 1533 (11 Cir. 1991), *rev'd*, 507 U.S. 349 (1993).
327. *Nelson*, 507 U.S. at 363.
328. *Id.* at 351.
329. *Id.* at 358, 361.
330. *Id.* at 361–62.
331. *Id.* at 364–79.
332. *Id.* at 364–70 (White, J., concurring).
333. *Id.* at 364–66.

suggested that if the hospital had hired thugs, instead of police officers, to retaliate against Nelson, the majority would have no choice but to characterize the activity as "commercial" in nature.[334] In a dissenting opinion, Justice Stevens agreed with Justice White's view that the hospital's disciplinary procedures were commercial activities.[335]

While Justices White and Stevens arguably adhered to *Weltover's* private person test, the approach taken by the *Nelson* majority is more muddled. Indeed, various statements by the majority suggested the "nature" of Saudi Arabia's actions may not have exclusively guided the Court's decision. In particular, the majority focused on the status of those acting on Saudi Arabia's behalf, namely, "police and penal officers"[336]—an approach that Justice White, in fact, criticized.[337] For the majority, the involvement of police, who exercise disciplinary and punitive powers, proved Saudi Arabia's actions were not commercial in nature. Put another way, the *Nelson* majority did not simply conclude that the "powers of police" were not the sort of activity private persons could undertake. It also suggested those activities could not be commercial because police do not generally pursue commercial aims. As other courts have since described this aspect of the majority's decision, it revolved less around the "nature" of the activity and more around the "status of the police alleged to have tortured the plaintiff."[338]

Since *Nelson*, some courts have taken the majority's approach even further and implicitly reintroduced purpose into the analysis.[339] Like *Nelson*, these cases have featured human rights-related claims brought by individuals. Unlike *Nelson*, however, these suits have involved "private thugs" allegedly hired by foreign sovereigns, their agencies, or instrumentalities, to commit serious human rights violations—precisely the sort of claims Justice White thought would inevitably satisfy *Weltover's* private person test for commercial activity.[340]

For example, in *Cicippio v. Islamic Republic of Iran*, the D.C. Circuit dismissed claims brought under the commercial activity exception against the Iranian government for allegedly hiring private thugs to commit a kidnapping.[341] Citing to *Nelson*, the court held that, even though the act in question was allegedly committed by private parties, that was not enough to strip the kidnapping of its sovereign character and place it within a "commercial

334. *Id.* at 366.

335. *Id.* at 378 (Stevens, J., dissenting).

336. *Id.* at 361–62.

337. Justice White described the majority opinion as reflecting a "single-minded focus on the exercise of police power" that "hardly does [the case] justice." *Id.* at 367 (White, J., concurring).

338. Cicippio v. Islamic Republic of Iran, 30 F.3d 164, 167, 168 n.4 (D.C. Cir. 1994).

339. Some commentators have suggested that the *Nelson* majority itself relied on a "purpose" test. *See* Steven Weisman, *Individual Protection Crumbles While Sovereignty Reigns: A Comment on Saudi Arabia v. Nelson*, 11 HOFSTRA LAB. L.J. 429, 448 (1993) ("It appears that the Supreme Court [in *Nelson*] has gone astray by focusing on the 'purpose' test instead of the 'nature' test [in defining commercial activity].").

340. *Nelson*, 507 U.S. at 366 (White, J., concurring).

341. *Cicippio*, 30 F.3d at 165.

context."[342] Because the Iranian government's actions did not feature such a "commercial context" and were otherwise attenuated from the marketplace, the court held that the commercial activity exception did not apply.[343] By contrast, as the court itself noted, if Iran had kidnapped a commercial rival, then *that* kidnapping would have qualified as commercial activity.[344] Even though the court insisted that a commercial context approach was not "inconsistent with eschewing consideration of purpose,"[345] it seems evident that if Iran's purpose had been commercial—for instance, to undermine a business competitor—then that would satisfy the commercial activity exception.

Similarly, in *Jin v. Ministry of State Security*, the D.C. district court held that the commercial activity exception did not apply to claims that the Chinese government had hired private thugs in the United States to intimidate members of the Falun Gong, a persecuted Chinese group.[346] While the court attempted to frame its inquiry in terms of the activity's nature,[347] in fact, its analysis depended on the belief that China had a political rather than commercial purpose in hiring the thugs.[348] Relying on *Nelson*, the court determined that China's alleged actions did not constitute commercial activity because there was no "hidden or implicitly commercial component to the Chinese government's hiring of thugs to implement its policy of suppressing Falun Gong as a cult."[349] In reaching this conclusion, the court effectively suggested that if a commercial purpose had existed the result may have been different.

Whether or not one agrees with the outcomes in these cases, it is hard to argue that *Nelson*, *Cicippio*, and *Jin* adhere to *Weltover's* exclusively nature-based test for defining commercial activity. While foreign policy concerns may help explain these departures,[350] the outcomes in these cases also align with the deregulatory objectives of neoliberalism.[351] A basic premise of neoliberalism is that deregulation, coupled with free market competition, improves a state's

342. *Id.* at 168.

343. *Id.*

344. *Id.*

345. *Id.* at 167–68.

346. Jin v. Ministry of State Sec., 557 F. Supp. 2d 131, 140–41 (D.D.C. 2008).

347. *See id.* at 141 ("The defendant ministries' mandate to implement China's policy and its authority to hire 'thugs' is not of the nature that may be exercised by private citizens participating in the marketplace, excepting those residing in Hobbes's state of nature.").

348. *See id.* (holding that the "broader political context" behind plaintiffs' allegations was relevant to the commercial activity question).

349. *Id.*

350. *See, e.g.*, *Leading Cases: Commercial Activities*, 107 HARV. L. REV. 264, 268 (1993) (suggesting the *Nelson* majority's otherwise unpersuasive and inconsistent decision was driven by concerns that exercising jurisdiction would create foreign policy problems); Robert H. Wood, *Saudi Arabia v. Nelson: Roll over Weltover, Tell Scott Nelson the News*, 2 TUL. J. INT'L & COMPAR. L. 175, 187 (1994) (suggesting that *Nelson's* narrowing of the definition of commercial activity was a result of the "politically sensitive areas" involved in the case).

351. Foreign policy rationales do not fully account for statements made by some of these courts that a commercial "context" or "component" would have changed the outcome. A political economy lens, by contrast, provides a more coherent way of understanding these decisions.

attractiveness to business interests in the global market place.[352] Regulating detention, torture, and killing, outside of a "commercial context," could threaten the United States' market position by dissuading foreign sovereigns from entering into business in the country or with U.S. entities.[353] Closely connected with this concern, preventing human rights suits from proceeding also aligns with the FSIA's underlying structural tendency to protect the United States from becoming the sort of "international collection agency" that might undermine domestic business interests.[354]

As discussed in the next Subpart, like its definition of commerciality, the commercial activity exception's territorial nexus requirement has also been judicially finessed in ways that align with interests endemic to neoliberalism.

B. The Territorial Nexus Requirement: Disadvantaging Individuals & Benefiting Corporate, Especially Financial, Interests

The concept of territoriality is at the heart of foreign sovereign immunity. Indeed, as far back as *Schooner Exchange*, foreign sovereign immunity has typically been an issue where a foreign sovereign has engaged in activities within or closely effecting the territory of other states.[355] This territorial hook continues to be central to the FSIA's commercial activity exception.[356] In fact, because *Weltover* and *Nelson* have settled many of the questions surrounding the definition of commercial activity, most cases under the commercial activity exception are now more focused on the exception's territorial requirement.[357]

Under the commercial activity exception, an action must be based on one of three possible territorial connections to the United States: (1) commercial activity carried on by the foreign sovereign in the United States; (2) activity "performed in the United States in connection with a commercial activity of the foreign state elsewhere;" or (3) activity "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."[358] In order to qualify under one of these requirements, "the commercial activity that provides the jurisdictional nexus with the United States must . . . be the activity on which the lawsuit is *based*."[359]

352. David Harvey, A Brief History of Neoliberalism 65 (2005).

353. By contrast, allowing foreign sovereigns to use their police powers against commercial rivals would ostensibly give them an unfair commercial advantage over private business and distort the free market, making them worthwhile objects of regulation.

354. Weber, *supra* note 219, at 42–43; *see also supra* text accompanying note 239.

355. Schooner Exchange v. McFaddon, 11 U.S. 116, 135–38 (1812).

356. Yang, *supra* note 3, at 65. There are exceptions to this rule, most notably, the FSIA exception for acts of international terrorism committed by state sponsors of terrorism. 28 U.S.C. § 1605A.

357. Yang, *supra* note 3, at 108.

358. 28 U.S.C. § 1605(a)(2).

359. Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo Gen. del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C., 923 F.2d 380, 387 (5th Cir. 1991) (emphasis added).

As commentators have noted, the case law on territoriality "is the most diversified, the most fluid, and the most confusing . . . part of the US judicial practice on State immunity."[360] Nevertheless, a political economy lens highlights several underexplored aspects of the jurisprudence. In general, the territorial nexus requirement has disadvantaged individual plaintiffs and benefitted corporate actors, especially those linked with the global financial industry. As this Subpart explores, courts have tended to adopt defendant-friendly interpretations of the phrase "based upon" and "direct effect"—two key elements of the territorial nexus requirement—in cases raising personal injury, human rights, or employment claims—claims that are more typically brought by individuals—making these claims harder to win. By contrast, courts have adopted more plaintiff-friendly approaches to the "direct effect" clause in cases brought by corporations or that implicate the interests of the global financial industry —which are more typically brought by corporate plaintiffs. In addition, in some jurisdictions, courts have afforded more protections under "direct effect" to American corporations suffering pure financial losses in the United States, as compared to individual plaintiffs in the United States suffering the same kind of loss.

These trends reflect and reinforce interests aligned with neoliberalism. As with *Nelson's* decision to exclude human rights from the definition of commercial activity, removing certain claims sounding in personal injury and human rights—including ones relating to employment and consumer activity—from the territorial nexus requirement can be viewed as a species of deregulation. When it comes to employment-related claims more generally, the territorial nexus requirement has, in some situations, reinforced neoliberalism's tendency to broadly undermine workers' rights.[361]

By giving corporate plaintiffs a better chance than individual claimants at recouping their financial losses, jurisprudence on the territorial nexus requirement also aligns with the wealth gap created by neoliberalism. Under neoliberal capitalism, there is a "bias of income redistribution from labor toward capital"—meaning that while employees and other laborers make less income, corporate executives and wealthy investors reap more financial gains.[362] While the parallel here is far from exact, the judicial tendency in some commercial activity cases to allow corporate plaintiffs to recoup their pure financial losses,

360. YANG, *supra* note 3, at 110.

361. *See* Flaherty, *supra* note 52, at 98 (noting that neoliberalism has "weaken[ed] the labor movement under the combined pressures of service sector growth, labor market deregulation, and the loosening of capital restraints . . . ."); MANN, SOURCES OF SOCIAL POWER VOL. 4, *supra* note 50, at 143 (noting that neoliberalism "privileges fighting inflation over fighting employment and it seeks to keep wages low"). The FSIA itself is generally less protective of employee rights as compared to other foreign sovereign immunity statutes. Richard L. Garnett, *The Perils of Working at a Foreign Government: Foreign Sovereign Immunity and Employment*, 29 CAL. W. INT'L. L.J. 133, 137 (1998). For example, the UK State Immunity Act of 1978 has a specific provision stripping immunity from foreign sovereigns where they are party to an employment contract made or wholly or partly performed in the United Kingdom. *Id.*; State Immunity Act 1978, c. 33, § 4 (UK).

362. Flaherty, *supra* note 52, at 101.

while individual plaintiffs with similar claims are denied that opportunity, comports with neoliberalism's wealth gap.[363]

This Subpart starts with judicial approaches to "based upon," then examines "direct effect."

1. "Based Upon"

As mentioned earlier, the "based upon" requirement applies to all three avenues for establishing territoriality. It has, however, been particularly important to the commercial activity exception's first and second nexus requirements. The first nexus requirement—"commercial activity carried on in the United States by a foreign state"—is defined as "commercial activity carried on by such state and having substantial contact with the United States."[364] The second nexus requirement—activity "performed in the United States in connection with a commercial activity of the foreign state elsewhere"—applies to a sovereign's non-commercial acts in the United States[365] that relate "either to a regular course of commercial conduct elsewhere or to a particular commercial transaction concluded or carried out in part elsewhere."[366] In practice, courts have treated the two nexus requirements as virtually identical.[367]

Neither the FSIA nor its legislative history defines what "based upon" means.[368] In the first few years after the FSIA's passage, courts took relatively flexible approaches to the requirement. In a series of later decisions, however, the Supreme Court narrowly construed "based upon" to exclude claims that were not directly and squarely related to foreign sovereign commercial activity in the United States. This defendant-friendly approach was developed in two cases that variously implicated human rights (relating to an employment relationship) and personal injury claims (relating to consumer activity): *Saudi Arabia v. Nelson*[369] and *OBB Personenverkehr AG v. Sachs*.[370]

While these decisions are trans-substantive, the *Nelson* and *Sachs* approaches to "based upon" have had a particularly negative impact on claims

363. One might also argue that the case law's tendency to disfavor individual rights sounding in human rights, personal injury, and employment, also aligns with neoliberalism's wealth gap as well.

364. 28 U.S.C. § 1603(e).

365. Schoeps v. Bayern, 27 F. Supp. 3d 540, 545 (S.D.N.Y. 2014).

366. H.R. REP. NO. 94-1487, at 19 (1976).

367. Since the second clause of the nexus requirement is largely redundant of the first clause and rarely used, most cases focus on the first nexus requirement. Richard Wydeven, *The Foreign Sovereign Immunities Act of 1976: A Contemporary Look at Jurisdiction Under the Commercial Activity Exception*, 13 REV. LITIG. 143, 155, 180 (1993). Where courts have considered both clauses, however, the analysis and outcome have often been identical. *See, e.g.*, Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 708–10 (9th Cir. 1992) (holding that plaintiffs' expropriation claims satisfied both the first nexus requirement, which required a "nexus" between plaintiff's claims and defendant's commercial activity in the United States, and the second nexus requirement, which required a "material connection" between the plaintiff's claim and defendant's actions in the United States).

368. Saudi Arabia v. Nelson, 507 U.S. 349, 357 (1993).

369. *Id.* at 356–58.

370. OBB Personenverkehr AG v. Sachs, 577 U.S. 27, 32–38 (2015).

similar to those brought in those cases—namely human rights and personal injury claims sustained abroad that are arguably connected to the employment and consumer-related activities of foreign sovereigns in the United States. They have also been generally devastating to employment-based claims of varying types.[371]

The approach to "based upon" reflected in *Nelson* and *Sachs* is neither required by the text nor legislative history of the FSIA. Nevertheless, the relatively rigid approach to "based upon" adopted in both cases has made it more difficult for courts to regulate foreign sovereign activity in the interest of protecting workers and consumers from harm—something courts had been able to do under earlier, more flexible judicial approaches to the "based upon" requirement.

a. Early Approaches to "Based Upon"

In the early years of the FSIA, courts took various approaches to "based upon,"[372] sometimes ignoring it entirely or adopting a liberal reading.[373] Whether intentionally or not, these approaches created opportunities for plaintiffs to succeed on claims that not only implicated their business interests, but also rights in labor and employment, as well as rights related to consumer activity.

For example, in *State Bank of India v. NLRB*, the Seventh Circuit adopted an approach to the "based upon" requirement that denied immunity for claims raising labor rights issues.[374] In that case, the court concluded that petitioner bank, an instrumentality of the Indian government, was not entitled to immunity in a dispute with the National Labor Relations Board (NLRB).[375] The NLRB had issued various orders against the State Bank of India, which was doing business in the United States, finding that it had committed unfair labor practices in refusing to bargain with a union.[376] The bank argued, in part, that the FSIA prevented the NLRB from asserting jurisdiction.[377] In determining that the bank was not entitled to immunity under the first nexus prong, the court effectively ignored whether the claim against it was actually based upon the bank's

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371. As discussed in Part IV.B.2, direct effect jurisprudence has effectively foreclosed certain personal injury claims, including those related to employment, as well. *See infra* notes 454–64, 483–87 and accompanying text.

372. *See* Vencedora Oceancia Navigazion, S.A. v. Compagnie Nationale Algerienne De Navigation, 730 F.2d 195, 200 (5th Cir. 1984) (pre-*Nelson* case noting that in construing the "based upon" language of the first nexus requirement appellate and district courts took four different approaches, including the "literal" approach, the "nexus" approach, a "bifurcated literal and nexus" approach, and a "doing business" approach).

373. Garnett, *supra* note 361, at 141, n.33. While courts also took more rigid approaches to "based upon" during this time, the liberality of some approaches to the phrase are notable, especially post-*Nelson* and *Sachs*. *Vencedora Oceancia*, 730 F.2d at 200.

374. State Bank of India v. NLRB, 808 F.2d 526 (7th Cir. 1986).

375. *Id.*

376. *Id.* at 527.

377. *Id.*

commercial activity, and instead relied on the fact that the bank generally engaged in commercial transactions in the United States.[378]

In *Sugarman v. Aeromexico, Inc.*, the Third Circuit adopted an approach to "based upon" that was not as forgiving as *State Bank* but still allowed a personal injury claim related to consumer activity to move forward.[379] In construing the first nexus prong, the court defined the "based upon" requirement to require a "course of commercial conduct" in the United States.[380] Plaintiff, a passenger on Mexico's state-owned airline, Aeromexico, claimed defendant caused him various forms of mental and physical anguish, as well as economic losses, because of delays to its flight from Mexico to the United States.[381] The court held that the commercial activity exception's first nexus requirement applied because Aeromexico engaged in a "regular course of commercial conduct" in the United States and because plaintiff had purchased his plane ticket in the United States.[382]

Though rare, courts sometimes interpreted "based upon" to allow human rights-based claims connected to employment to be brought against foreign sovereigns. Indeed, in the Eleventh Circuit decision in *Nelson*, the court held that plaintiff's claims of detention and torture satisfied the "based upon" requirement.[383] In construing plaintiffs' argument under the first nexus prong,[384] the appellate court held that "based upon" required "a bond or link" between the foreign sovereign's commercial activity in the United States—namely, the recruitment and hiring of Scott Nelson—and plaintiffs' injury—namely, Nelson's detention and torture.[385] In the court's view, Nelson's detention and torture were so "intertwined" with his employment that they were, indeed, based upon his recruitment and hiring in the United States.[386]

b. The *Nelson* Approach to "Based Upon"

The Supreme Court's decision in *Saudi Arabia v. Nelson* was the first blow to these and other cases taking a flexible approach to "based upon." In *Nelson*, a plurality of the Court held that, under the commercial activity exception, the phrase "based upon" required something more than a "mere connection with, or relation to," commercial activity.[387] Instead, to determine whether a claim was "based upon" commercial activity conducted in the United States, it was necessary to examine "those elements of a claim that, if proven, would entitle a

378. *Id.* at 535.
379. Sugarman v. Aeromexico, Inc., 626 F.2d 270, 273 (3rd Cir. 1980).
380. *Id.*
381. *Id*. at 271.
382. *Id.* at 273.
383. Nelson v. Saudi Arabia, 923 F.2d 1528, 1535 (11 Cir. 1991), *rev'd*, 507 U.S. 349 (1993).
384. *Id.* at 1533–34.
385. *Id.* at 1534.
386. *Id.* at 1535.
387. Saudi Arabia v. Nelson, 507 U.S. 349, 358 (1993).

plaintiff to relief under his theory of the case."[388] Applying this approach, the Court concluded that various commercial activities allegedly conducted by defendants in the United States, while leading to the conduct that injured plaintiffs, were not the basis for their suit.[389]

In explaining its analysis, the Court noted that the FSIA's legislative history provided no definition of "based upon."[390] Nevertheless, the plurality insisted that its approach reflected the clear and "natural" meaning of the term.[391] In his dissenting opinion, Justice Stevens disagreed with this supposedly obvious interpretation and came to the very different conclusion that Nelson's injury was, in fact, based upon his recruitment and hiring in the United States.[392]

The plurality in *Nelson* did not provide "principled reasons" for its decision or reconcile its approach to "based upon" with those taken by other courts.[393] Indeed, the plurality *could* have construed the "based upon" requirement less narrowly and literally, as both Justice Stevens and the Eleventh Circuit had done.[394] It could have taken an approach that did not swing so broadly but still allowed certain cases involving individual rights to be heard. For example, it could have allowed rights-based claims that were otherwise "peripherally" connected to commercial activities to proceed where they satisfied higher jurisdictional requirements.[395]

The impact of *Nelson's* rigid approach to "based upon" has since been felt in various ways that have, at times, negatively impacted corporate claimants[396] while benefiting some individual plaintiffs with commercial claims.[397] That

388. *Id.* at 357.

389. *Id.* at 358.

390. *Id.* at 357.

391. *Id.*

392. *Id.* at 378 (Stevens, J., dissenting).

393. *Commercial Activities*, *supra* note 350, at 268. Cases like *Sugarman v. Aeromexico, Inc.*, which held that even though plaintiff's claim arose from acts committed abroad it satisfied the first nexus requirement because the claim arose from commercial activity inside the United States, suggest the first prong could have been satisfied in *Nelson* based on a similar connection between acts abroad and an employment relationship established in the United States. *Id.* at 270–71.

394. *Id.* at 268.

395. *Id.* at 272.

396. The *Nelson* approach has been particularly unfavorable for private corporations that are foreign. *See, e.g.*, Goodman Holdings v. Rafidain Bank, 26 F.3d 1143, 1145–46 (D.C. Cir. 1994) (citing *Nelson* and holding that Irish corporate plaintiffs' claim did not satisfy the first nexus requirement because the fact that defendant paid plaintiffs through a U.S. bank account, which was the basis for plaintiffs' argument that the territorial nexus requirement was satisfied, was legally irrelevant to plaintiffs' claim); Crystallex Int'l Corp. v. Petroleos De Venez, 251 F. Supp. 3d 758, 766–70 (D. Del. 2017) (citing to *Nelson* and holding that Canadian corporate plaintiff's claim did not satisfy the first or second nexus requirements even though it was related to defendant's general course of commercial conduct in the United States); Chemarketing Industries, Inc. v. C.V.G. Industria Venezolana De Alumino, C.A., No. 97 civ 1791, 1998 WL 199937 at *2–3 (S.D.N.Y. Apr. 23, 1998) (citing to *Nelson* and holding that breach of contract claim brought by British West Indies corporation did not satisfy the first nexus prong because proof of the elements of plaintiff's claim was not based upon defendants' commercial activity in the United States).

397. *See, e.g.*, Friedman v. Gov't of Abu Dhabi, United Arab Emirates, 464 F. Supp. 3d 52 (D.D.C. 2020) (citing to *Nelson* and holding that individual plaintiff's claims for quantum meruit and unjust enrichment in

being said, *Nelson's* devastating effects have been most pronounced for plaintiffs bringing suit under the first or second nexus requirement for certain personal injury and human rights claims—even where they relate to consumer activity or employment—or for certain employment-related claims.

First and foremost, *Nelson* has effectively foreclosed most human rights claims—including those relating to employment—whether in the United States or abroad both because of its narrow definition of commercial activity and because of its rigid approach to the "based upon" requirement.[398] Second, with a few exceptions, *Nelson* has generally made it more difficult for plaintiffs, including consumers, to succeed on claims for personal injuries sustained abroad even when they are based on commercial activities undertaken in the United States.[399]

Finally, *Nelson* has had a damaging effect on particular kinds of employment-related cases more generally.[400] When it comes to employment cases, the commercial activity exception usually focuses on "the context of employment, the status of the employee, and the territorial connection between the action and the United States forum."[401] It is on this last issue—the territorial connection—that *Nelson* has had the most impact. Post-*Nelson* employment cases have tended to reinforce an employee-employer dynamic in which the employee has limited rights. This has most often occurred when the employment itself is *outside* the United States, notwithstanding links to foreign sovereign commercial activity in the United States.

Like *Nelson*, cases involving employment abroad have often relied on job recruitment by foreign sovereigns in the United States.[402] Before *Nelson*, the

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connection with defendant's failure to pay on several promissory notes satisfied the commercial activity exception's first nexus requirement).

398. *See*, *e.g.*, Alexander J. Mueller, *Nelson v. Saudi Arabia and the Need for a Human Rights Exception to the Foreign Sovereign Immunities Act*, 13 N.Y. INT'L L. REV. 87, 125 (2000) (arguing that *Nelson* makes it likely that "the injustices suffered by Scott Nelson [will] be revisited upon other victims of human rights violations by foreign sovereigns . . . .").

399. *See*, *e.g.*, Sun v. Governmental Authorities on Taiwan, No. C 94-2769 SI, 2001 WL 114443 (N.D. Cal. Jan. 24, 2001), *aff'd by* Sun v. Taipei Economic, 34 Fed Appx. 529 (9th Cir. 2002) (applying *Nelson's* "based upon" test to reject plaintiffs' claim that their son's death abroad was based upon tour operator's commercial activities in the United States because those activities were not a necessary element of plaintiffs' claim). One notable exception to this trend were claims relating to international transportation to or from the United States, especially with regards to negligence claims based upon the sale of airline tickets in the United States. These claims, which were based on cases like *Sugarman v. Aeromexico*, continued to be recognized after *Nelson*. *See infra* note 432 and accompanying text. As discussed below, the Supreme Court's decision in *Sachs* likely put an end to these cases as well. *See infra* note 433 and accompanying text.

400. *See* Garnett, *supra* note 361, at 141 n.33 (citing to *Nelson* in arguing that "[w]hile in early cases the phrase 'based upon' was ignored or liberally interpreted, more recently it has received a stricter construction which has had the effect of significantly increasing the grant of immunity to foreign sovereigns in employment cases"); Weisman, *supra* note 339, at 455 ("[B]y restricting the application of the commercial activity exception to the FSIA [partly through its interpretation of 'based upon'], [*Nelson*] has substantially limited the employees' right of redress in the U.S. courts.").

401. Garnett, *supra* note 361, at 138.

402. *See id.* at 160 (noting that "persons employed abroad have been forced to rely upon their initial recruitment in the United States" to bring claims under the first prong of the commercial activity exception).

"based upon" requirement was relatively easy to satisfy for claims based on such recruitment efforts.[403] While cases like these were few and far between, courts hearing these claims generally construed "based upon" in plaintiff-friendly ways.[404] For example, in *Zedan v. Kingdom of Saudi Arabia*, the D.C. Circuit adopted a flexible approach to "based upon" that only required a "direct causal connection" between plaintiff's recruitment and his injury.[405] After *Nelson*, the connection between recruitment in the United States and plaintiff's injury abroad became substantially harder to establish. This is because "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case" are more likely to depend upon actions that occurred outside the United States than they are on recruitment in the United States.[406]

For example, in *Good v. Aramco Services Co.*, the court denied various claims brought by a husband, wife, and their child on the ground that they were not "based upon" commercial activity in the United States or on an act performed in the United States in connection with commercial activity of the foreign state elsewhere.[407] In *Good*, plaintiffs claimed that when defendant hired Mr. Good it made various representations that its medical services were equal to or better than in the United States and promised that his employment would include those services.[408] After the couple moved to Saudi Arabia, Mrs. Good gave birth to a son with brain injuries that allegedly resulted from the quality of medical care defendant had provided.[409] Invoking the first and second nexus requirements, plaintiffs argued their injuries were based upon defendant's recruitment activities in the United States, including the execution of an employment contract with Mr. Good and representations made to him about the quality of medical services plaintiffs would receive in Saudi Arabia.[410] Citing to *Nelson*, the court held that plaintiffs' claims were not "based upon" activities in the United States because the elements of their injury, if proven, resulted from actions taken in Saudi Arabia.[411] Relying on *Nelson*, other cases have also concluded that a foreign sovereign's recruitment and other pre-employment

403. *Id.* at 152.

404. *See id.*

405. Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511, 1514 (D.C. Cir. 1988). Even though *Zedan* adopted a more flexible approach to "based upon," the court concluded that the commercial activity upon which plaintiff's claim was based—a recruitment call in the United States—was too attenuated from his claim. *Id.* at 1513–14. Other pre-*Nelson* claims involving employment contracts executed in the United States were more successful. *See* Brewer v. Socialist People's Republic of Iraq, 890 F.2d 97, 101 (8th Cir. 1989) (holding that claim based on execution of employment contract in the United States brought by two individuals, who were subsequently employed in Iraq, satisfied the commercial activity exception, without elaboration).

406. Garnett, *supra* note 361, at 157; *see* Wood, *supra* note 350, at 188–87 (noting that under *Nelson's* "literal approach" to defining "based upon" both the "act and the commercial activity must take place in the United States").

407. Good v. Aramco Servs. Co., 971 F. Supp. 254 (S.D. Tex. 1997).

408. *Id.* at 255.

409. *Id.* at 255–56.

410. *Id.* at 257.

411. *Id.* at 258–59.

activity with individuals in the United States, who were ultimately employed abroad, do not satisfy the "based upon" requirement.[412]

While the *Nelson* approach to "based upon" has not generally impacted cases involving employment *in* the United States,[413] in some instances it has also had a negative effect on these suits. For example, in *Gates v. Victor Fine Foods*, plaintiffs brought various claims under the first nexus prong relating to their termination by defendant's subsidiary.[414] Defendant, Alberta Pork, which was an agency or instrumentality of the Canadian government,[415] was involved in selling hogs to pork processors in the United States and directly or indirectly owned certain U.S. pork processing plants of which the subsidiary was one.[416] Relying on *State Bank of India v. NLRB*, the district court concluded that the "based upon" requirement was satisfied because the defendant generally engaged in commercial activity in the United States.[417] The appellate court reversed. Citing to *Nelson*, the court held that "we will not find jurisdiction merely because [defendant] [generally] engaged in commercial activity" in the United States and instead required that plaintiffs' claims directly arise from those activities.[418] Concluding that plaintiffs' claims were not, in fact, based upon defendant's commercial activity in the United States—selling hogs to pork processors together with stock ownership in the subsidiary—but rather were based upon their termination by the subsidiary (in which defendant had not been involved), the appellate court upheld immunity.[419]

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412. For example, in *Janini v. Kuwait University*, the D.C. Circuit also relied on *Nelson's* rigid approach to "based upon" to conclude that plaintiff's claim against his employer, a university in Kuwait, was based not upon his "pre-employment contact" with his employer in the United States, but rather on the university's termination of his contract in Kuwait, though the court did not decide whether that act could otherwise satisfy the commercial activity exception. 43 F.3d 1534, 1536–37 (D.C. Cir. 1995). Similarly, in *Lempert v. Republic of Kazakstan, Ministry of Justice*, the court cited to *Nelson* in concluding that plaintiff's claims for breach of consulting contract and unjust enrichment were not "based upon" preliminary employment negotiations and solicitation of plaintiff's services in the United States but rather on actions taken in Kazakhstan. 223 F. Supp. 2d 200, 203 (D.D.C. 2002).

413. Even after *Nelson*, if employment occurs in the United States, courts are generally inclined to conclude that the "based upon" requirement is satisfied as long as the employee is not a civil servant or diplomat or otherwise performs duties related to government policymaking. Garnett, *supra* note 361, at 152; *see also* El-Hadad v. United Arab Emirates, 496 F.3d 658, 663–77 (D.C. Cir. 2007) (holding that claims by Egyptian employee at UAE embassy in the United States satisfied the commercial activity exception because they were "based upon" breach of his employment contract and defamation connected with that breach and because plaintiff was not a civil servant and was not involved in government policymaking). In explaining why courts are relatively sympathetic to claims relating to employment in the United States, one commentator has noted these courts are "influenced strongly by the policy that all persons employed in the United States should have the same rights of redress." Garnett, *supra* note 361, at 144.

414. Gates v. Victor Fine Foods, 54 F.3d 1457, 1459 (9th Cir. 1995).

415. *Id.* At 1461.

416. *Id.* At 1459.

417. *Id.* At 1463–64.

418. *Id.* At 1465.

419. *Id.*

While it may often be improper for courts to exercise jurisdiction in cases like *Nelson*,[420] the rigid approach to "based upon" reflected in that case virtually ensures U.S. citizens employed by foreign sovereigns abroad will enjoy few workplace protections under U.S. law. At times, the same may be true for workers employed by foreign sovereigns in the United States. These circumstances reinforce neoliberal capitalism's tendency to "increase . . . the structural powerlessness of labor," in part, through labor market deregulation—meaning that workers have less protections against employers and are often insecure in their jobs.[421]

c. The *Sachs* Approach to "Based Upon"

Twenty-two years after *Nelson*, the Supreme Court narrowed the "based upon" requirement even further, this time in a case involving claims relating to consumer activity. In *OBB Personenverkehr AG v. Sachs*, plaintiff sued an Austrian railway company, owned by the Austrian government, for injuries she sustained while boarding one of its trains in Austria.[422] Plaintiff argued that her various tort and contract claims were based upon commercial activity conducted by the foreign state in the United States, as she had purchased her train ticket over the Internet while still in the country.[423]

In an *en banc* decision, the Ninth Circuit agreed with the plaintiff. It held that the "based upon" requirement was satisfied for a particular claim "if *an element* of [that] claim consists in conduct that occurred in commercial activity carried on in the United States."[424] Because the sale of the railway ticket formed "an essential element of each of Sachs's claims," the court concluded that the commercial activity exception was satisfied.[425] In reaching this decision, the Ninth Circuit relied not only on *Nelson*, but also on a line of cases under the first nexus requirement establishing that "common carriers owe a duty of utmost care to their passengers" and that "the basis for that duty of care is established when

420. Indeed, one might argue that it is generally improper for U.S. courts to apply employment-related laws abroad and "thereby interfer[e] with the foreign government's right and capacity to apply its own laws." Garnett, *supra* note 361, at 154 n.98; *see* Weisman, *supra* note 339, at 460 (noting that some might have criticized a different decision from the Supreme Court in *Nelson* as "enabl[ing] courts to unfairly affix jurisdiction to sovereign states . . . thus . . . unfairly expanding the reach of United States employment laws"). At the same time, however, other countries have included provisions in their foreign sovereign immunity statutes stripping immunity from certain employment contracts not performed on their territory. *See supra* note 363.

421. Flaherty, *supra* note 52, at 97, 99.

422. OBB Personenverkehr AG v. Sachs, 577 U.S. 27 (2015).

423. *Id.* At 29–30.

424. Sachs v. Republic of Austria, 737 F.3d 584, 599 (9th Cir. 2013), *rev'd, sub nom*, OBB Personenverkehr AG v. Sachs, 577 U.S. 27 (2015) (emphasis in original).

425. *Id.* At 602. While plaintiff had bought the railway ticket through a Massachusetts company, the appellate court had concluded the company was an agent of OBB and, therefore, attributed the sale to defendant. *Id.* At 593. Though defendant challenged this holding, the Supreme Court did not reach the issue. *OBB Personenverkehr AG*, 577 U.S. at, 32–33.

a foreign state or its agent sells a ticket or otherwise makes travel arrangements [in the United States] for passage abroad."[426]

The Supreme Court reversed the Ninth Circuit's decision. Citing to *Nelson*, the Court held that for a claim to be "based upon" particular sovereign conduct it was not enough for the conduct to establish only one element of the claim.[427] What was necessary, instead, was to examine the "core" of the suit.[428] Applying this test, the Court concluded that the "essentials" of plaintiff's case occurred in Austria, not the United States.[429]

The decision in *Sachs* foreclosed one of the last avenues for consumers to hold foreign sovereigns liable under the commercial activity exception for personal injuries occurring abroad. Even after *Nelson*, courts continued to allow plaintiffs who had purchased tickets for foreign air travel in the United States or otherwise arranged international transportation to or from the United States to bring at least some suits under the commercial activity exception's first nexus prong.[430] After *Sachs*, however, those cases, which were based on an approach to "based upon" seen in cases like *Sugarman v. Aeromexico*, were no longer possible.[431]

By further constraining the meaning of "based upon," the *Sachs* decision also reinforced existing challenges *Nelson* created for U.S. citizens bringing claims related to their employment abroad.[432] For example, in the post-*Sachs*

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426. *Id.* At 600.

427. *OBB Personenverkehr AG*, 577 U.S. at 34.

428. *Id.* At 35.

429. *Id.* At 36.

430. *See, e.g.*, Kirkham v. Societe Air France, 429 F.3d 288, 291–93 (D.C. Cir. 2005) (holding that plaintiff's negligence claim based on purchase of airline ticket in United States from defendant satisfied first nexus requirement under *Nelson* as it was necessary to prove an element of her claim); Sugimoto v. Exportadora de Sal, S.A. de C.V., 19 F.3d 1309, 1311 (9th Cir. 2004) (holding that wrongful death suit brought under first nexus prong satisfied *Nelson* because "an element of plaintiffs' claim consists in the tortious flying of the plane [defendant chartered from Mexico] in United States air space"); Nazarian v. Compagnie Nationale Air France, 989 F. Supp. 504, 509 (S.D.N.Y. 1998) (holding that plaintiffs' negligence claim based on purchase of airline ticket in United States from defendant satisfied first nexus requirement under *Nelson* as it was necessary to prove an element of their claim). *But see* Seisay v. Compagnie Nationale Air France, No. 95-civ-7660, 1997 WL 431084 at *4–6 (S.D.N.Y. July 30, 1997) (holding that plaintiff's claim for "false imprisonment" in Paris was not "based upon" plaintiff's purchase of his plane ticket in New York because it was not required to prove a false imprisonment claim).

431. While these suits have been few and far between since the Supreme Court's decision in *Sachs*, existing case law suggests *Sachs* has made it difficult for plaintiffs to succeed on such claims. For example, in *Popli v. Air India Airline*, the district court denied plaintiff's claim for personal injury under the first nexus clause. No. 17-337, 2017 WL 1826499, at *3 (E.D. Pa. May 5, 2017). Citing to *Sachs*, the court held that the Supreme Court had "implicitly reject[ed] contrary lower court reasoning" in cases like *Sugarman v. Aeromexico, Inc*. *Id.* It also concluded that plaintiff's claim, in which he alleged he had not received assistance from airline staff after getting sick on his New York-bound flight on Air India, was not based on commercial activity in the United States, even though Air India "operates flights, maintains offices, and pays taxes in the United States." *Id.* at *1, *3. Instead, plaintiff's personal injury claim was based on the purchase of contaminated food at Air India's first-class lounge in Delhi, India before his flight. *Id.*

432. As with *Nelson*, *Sachs's* approach to "based upon" has not uniformly disfavored employee-plaintiffs. Indeed, notwithstanding *Sachs's* rigid test, claims against foreign sovereigns related to employment in the United States have continued to survive motions to dismiss, though as noted above these sorts of claims tend to receive

case of *Sarkar v. Petroleum Company of Trinidad & Tobago Limited*, plaintiff brought claims for breach of contract, negligent misrepresentation, and negligence based, in part, on commercial activity undertaken by defendants in the United States "related to recruitment, hiring, negotiation, and employment."[433] Sarkar, a U.S. citizen, was recruited in the United States by an agent of an oil company owned by the government of Trinidad and Tobago to work at the oil company.[434] Plaintiff was subsequently interviewed for the job in the United States and purportedly negotiated and signed his employment contract here.[435] A few weeks after executing the contract, while plaintiff was still in the United States, the defendant oil company terminated his employment because it could not secure a work permit for him in Trinidad and Tobago.[436] Evaluating plaintiff's claim under the commercial activity exception's first clause, the court cited to *Sachs* for the proposition that it "must focus on the core of the suit—the foreign sovereign's acts that actually injured the plaintiff—rather than individually analyzing each cause of action."[437] Though conceding that plaintiff's claims were based on "negotiations and communications" between him and the oil company, the court ultimately concluded that the negotiations and communications in the United States did not, in fact, have a "[material] connection to the causes of action pleaded."[438]

Though some commentators have described *Sachs*, like *Nelson*, as being driven by foreign policy concerns,[439] the approach to "based upon" found in both *Nelson* and *Sachs* has made it demonstrably harder for employees and consumers to bring certain kinds of claims relating to foreign sovereign commercial activity in the United States. By and large, these types of claims have little positive impact on trade or financial markets but could make foreign

more favorable treatment generally. *See, e.g.*, Merlini v. Canada, 926 F.3d 21 (1st Cir. 2019) (citing to *Sachs* in holding that workers compensation claim brought by plaintiff, a clerical employee of the Canadian consulate in Boston, was "based upon" her employment at the consulate). At times, the *Sachs* test has also disfavored corporate plaintiffs. *See, e.g.*, Packsys, S.A. de C.V. v. Exportadora de Sal, S.A. de C.V., CV-15-9704-JFW, 2016 WL 3563504, at *5 (C.D. Cal. Mar. 3, 2016) (citing to *Sachs* in holding that plaintiff Mexican-corporation's breach of contract claim was not "based upon" commercial activity in the United States as none of the alleged ties between plaintiff's claim and the United States "form[] the gravamen of its suit").

433. Sarkar v. Petroleum Co. of Trinidad & Tobago Ltd., civ-H-15-2372, 2016 WL 3568114, at *8–9 (S.D.Tex. June 23, 2016).

434. *Id.* at *1.

435. *Id.*

436. *Id.* at *3.

437. *Id.* at *8.

438. *Id.* at *8–9. Rather confusingly, the court characterized the communications between plaintiff and defendants as relating to a "CFO position" as opposed to the position he was ultimately hired for. *Id.* at *9. While the oil company's agent, who plaintiff also sued, had originally approached plaintiff for the CFO position, they contacted him again to offer a different position, for which plaintiff was ultimately hired. *Id.* at *1. In rendering its decision, it is unclear whether the court considered these sets of communications to be separate and, if it did, why it believed such a division to be justified.

439. *See* Jason E. Myers, Note, *Preserving International Comity: the Foreign Sovereign Immunities Act of 1976 and* OBB Personenverkehr AG v. Sachs, 90 S. CALIF. L. REV. 913, 914 (2017) (arguing that at the heart of *Sachs* is a "virtual tug of war" between the rights of private litigants and foreign policy concerns).

sovereigns more reticent to do business in the United States or with American firms by subjecting them to the regulatory reach of American law.[440]

The *Nelson* and *Sachs* approaches to the "based upon" requirement have not only been developed in the context of claims typically brought by individual plaintiffs; they have also disadvantaged those types of claims. As the next Subpart explores, the favoring of corporate, over individual, plaintiffs is particularly apparent in judicial interpretations of the commercial activity exception's third nexus prong—the most frequently used basis for bringing claims under the exception.

2. *"Direct Effect"*

The "direct effect" prong is perhaps the most important factor in determining whether the commercial activity exception applies. Under this territorial nexus requirement, a sovereign's commercial activity abroad is only actionable under the FSIA if it has a "direct effect" in the United States. Congress did not define "direct effect"[441] or provide a clear rationale for this prong of the nexus test.[442] But as this Subpart explains, over the years, direct effect jurisprudence has evolved to privilege the interests of corporations and businesses, especially those linked with the global financial industry, over the interests of individual plaintiffs. In supporting the interests of finance and ensuring corporations, rather than individuals, are positioned to accumulate wealth, direct effect jurisprudence further reflects trends associated with neoliberalism.

To demonstrate this, Part IV.B.2 begins by looking at the historical evolution of judicial approaches to the direct effect clause. As it demonstrates, two tests were initially developed for "direct effect." The more rigid defendant-friendly test, which emerged first, responded to personal injury claims brought by individual plaintiffs. In the FSIA's early days, it was mostly individuals, and not corporate plaintiffs, who relied on the direct effect prong. By and large, these cases involved claims for economic and other losses associated with injury or death of Americans abroad. In response to these claims, the first judicial test for determining direct effect, the test of "substantial foreseeability," emerged. Under this test, "the effect [had to] be (1) direct; (2) substantial; (3) foreseeable, not fortuitous; and (4) a legally significant event in the United States, beyond

440. Other commentators have, in fact, applauded how *Nelson* and *Sachs* favored the smooth operation of global commerce. *Id.* at 933 (arguing that the *Sachs* decision was correct from a policy standpoint because "expanding the scope of the commercial activity exception would hinder global commerce"); J.H. Trotter, *Narrow Construction of the FSIA Commercial Activity Exception:* Saudi Arabia v. Nelson, 33 VA. J. INT'L L. 717, 733 (1993) (suggesting that the *Nelson* decision creates the sort of "clear boundaries" crucial to "stable international commerce" with foreign sovereigns).

441. *See* Tex. Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 311 (2d Cir. 1981), *overruled on other grounds by* Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Rep., 582 F.3d 393 (2d. Cir. 2009) (noting that the FSIA's legislative history provides little guidance on the meaning of "direct effect").

442. Brittenham, *supra* note 16, at 1458 n.88.

mere financial loss."[443] Applying this relatively rigid test, courts dismissed nearly all the early cases brought by individual plaintiffs for death or injury abroad.

Around the same time, a more flexible, plaintiff-friendly test for direct effect emerged, which rejected the requirement that effects be either substantial or foreseeable. This second test, which was first articulated by the Second Circuit in *Texas Trading Milling Corp. v Federal Republic of Nigeria*, responded to a very different set of claims: ones brought by corporate plaintiffs for commercial interests connected to the global financial industry.[444]

After its emergence, the substantial foreseeability test was embraced by most circuits for all direct effect claims, whether personal or corporate.[445] Then, in *Republic of Argentina v. Weltover*, the Supreme Court rejected the substantial foreseeability test and adopted the broader *Texas Trading* test.[446] In doing so, the Court sided (yet again) with the Second Circuit, which was committed to the *Texas Trading* approach. The Second Circuit's dedication to the test was driven, at least partially, by its desire to protect the interests of the global financial industry headquartered in New York City—interests that were also preserved by *Weltover*.

Part IV.B.2 ends by demonstrating how *Weltover's* approach to direct effect has differentially impacted corporate and individual plaintiffs. For example, courts adopting *Weltover's* direct effect test have continued to reject claims from American plaintiffs—including employees and consumers—physically injured abroad. In certain jurisdictions post-*Weltover*, there have also been noticeably different outcomes for U.S. corporations suing for pure financial losses suffered in the United States—which have often been successful—as compared to individuals bringing similar claims, which have often failed. These trends align with the economic inequality and wealth gap that have become endemic to the neoliberal age.

a. "Direct Effect": The Early Days, Pre-*Weltover*

While initially referenced in a case brought by corporate plaintiffs, the substantial foreseeability test was developed and defined in a series of personal injury cases that significantly tightened and narrowed the test's original articulation.

The first reference to the substantial foreseeability test came in *Carey v. National Oil Corp*.[447] In that case, the Southern District of New York dismissed

443. Nicolas J. Evanoff, *Direct Effect Jurisdiction Under the Foreign Sovereign Immunities Act of 1976: Ending the Chaos in the Circuit Courts*, 28 HOUS. L. REV. 629, 645 (1991).

444. *Tex. Trading*, 647 F.2d 300.

445. As discussed below, the rationale for extending the substantial foreseeability test from personal injury to corporate cases may also arguably be aligned with capitalist concerns. *See infra* notes 489–94 and accompanying text.

446. Republic of Argentina v. Weltover, Inc. 504 U.S. 607, 617–18 (1992).

447. Carey v. Nat'l Oil Corp., 453 F. Supp. 1097 (S.D.N.Y. 1978), *aff'd*, 592 F.2d 673 (2d Cir. 1979).

breach of contract claims brought under the commercial activity exception by a New York corporation and assignee against the Libyan government and its state-owned oil company.[448] While the court did not use the language of substantial and foreseeable effects, it laid out the legal underpinning for that test. Citing to the FSIA's legislative history, the court held that the "(t)he requirements of minimum jurisdictional contacts and adequate notice are embodied" in the direct effect prong.[449] In the court's view, those minimum contacts were based on *International Shoe Co. v. State of Washington*,[450] the seminal Supreme Court case that allowed states to exercise general jurisdiction over defendants "doing business" within their borders.[451]

A little over a year later, in a case involving the death of an American citizen abroad, the test laid out in *Carey* was modified and significantly tightened. In *Harris v. VAO Intourist, Moscow*, plaintiff brought a wrongful death claim against the Soviet Union and two Soviet-owned tourist services for the death of an American in a fire at a Moscow hotel.[452] The court conceded that defendants had enough tourism activities in the Unites States to satisfy *International Shoe's* minimum contacts analysis.[453] But the court balked at applying that test to the FSIA, suggesting that the statute's "language and policy" required a more restrictive approach to direct effect.[454]

In developing its alternative test, the court relied on language in the statute's legislative history suggesting that direct effect jurisdiction should be exercised consistently with principles set out in Restatement (Second) of Foreign Relations Law of the United States § 18—Jurisdiction to Prescribe With Respect to the Effect Within the Territory.[455] According to that provision,

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either:
>
> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
>
> (b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is *substantial*; (iii) it occurs as a *direct and foreseeable result of the conduct outside the territory*; and (iv)

448. *Id.* at 1101.
449. *Id.* (quotations omitted) (citation omitted).
450. *Id.*
451. Int'l Shoe Co. v. State of Wash., Office of Unemployment Compensation and Planning, 326 U.S. 310, 319 (1945).
452. Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056 (E.D.N.Y. 1979).
453. *Id.* at 1059.
454. *Id.*
455. *Id.* at 1062–63.

> the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.[456]

The *Harris* court conceded that because the case involved a widely-recognized tort it could adopt the more permissive approach of subsection (a).[457] But, instead, the court adopted the "more restrictive" requirements of subsection (b) simply because it, like the third nexus prong itself, contained the words "direct" and "effect."[458] On this arguably thin rationale, the court held, for the first time, that the direct effect requirement demanded "an effect which is both substantial and the direct and foreseeable result of conduct outside the jurisdiction."[459]

Relying on this substantial foreseeability test, courts repeatedly dismissed claims for personal injury or death sustained by American citizens abroad.[460] These cases became such universal failures that several courts held that injury to American citizens sustained in other countries—including injuries in connection with employment or consumer activity[461]—could not create a direct effect in the United States, as a categorical matter, even where the person sustained economic losses in the country.[462]

On the heels of the substantial foreseeability test's development, a looser, more plaintiff-friendly test began emerging in the corporate context. Litigation

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456. *Id.* at 1063 (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAWS OF THE UNITED STATES § 18 (AM. L. INST. 1965)) (emphasis added).

457. *Id.*

458. *Id.*

459. *Id.* The court also looked to the District of Columbia's long-arm statute, though it concluded that because it was so different from the FSIA it was hard to use that law as a road map for understanding the direct effect requirement. *Id.* at 1061. Instead, the court used the long-arm statute, which had been a guide for the FSIA's drafters, to support its Restatement-based analysis. In an earlier case involving claims relating to the death and injury of American citizens abroad, another court also invoked D.C.'s long arm statute to deny relief under the direct effect clause. Upton v. Empire of Iran. 459 F. Supp. 264, 266 (D.D.C. 1978), *aff'd* 607 F.2d 494 (D.C. Cir. 1979). Like *Harris*, that case appears to have taken a more stringent approach than *Casey*. Though it did not use the language of "substantial foreseeability," *Upton* did say that "[t]he common sense interpretation of a 'direct effect' is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." *Id.*

460. *See*, *e.g.*, Berkovitz v. Islamic Republic of Iran, 735 F.2d 329, 332 (9th Cir. 1984) (dismissing wrongful death claim against Iranian government and revolutionary group for lack of direct and substantial effect in the United States, as required by the direct effect clause); Tucker v. Whitaker Travel, Ltd., 501 A.2d 643, 647 (Pa. 1985) (holding that direct effect "'requires a substantial impact in this country that is a directly foreseeable result of the negligent act outside the country'" in dismissing personal injury claims against agencies and instrumentalities of Bahamian government).

461. *See, e.g.*, Zernicek v. Brown & Root, Inc., 826 F.2d 415, 418 (5th Cir. 1987) (rejecting claim under the direct effect clause by employee of subcontractor against Mexican national petroleum company for personal injuries at job site in Mexico because personal injury abroad is not "direct" within the meeting of the commercial activity exception); Sugarman v. Aeromexico, Inc., 626 F.2d 270, 272 (3rd Cir. 1980) (rejecting claim under direct effect clause brought by airline passenger for personal injuries suffered in connection with flight abroad because injury to American citizen abroad is not direct enough).

462. *Zernicek*, 826 F.2d at 418; Close v. Am. Airlines, Inc., 587 F. Supp. 1062, 1064 (S.D.N.Y. 1984); Verlinden B.V. v. Cent. Bank of Nigeria (*Verlinden I*), 488 F. Supp. 1284, 1298 (S.D.N.Y. 1980), *aff'd*, Tex. Trading & Milling Corp. v. Fed. Republic of Nigeria, 647 F.2d 320 (2d Cir. 1981), *rev'd on other grounds*, 461 U.S. 480 (1983); Tucker, 501 A.2d at 647.

arising out of the 1970s Nigerian cement crisis was the impetus for this alternative direct effect test. The Nigerian cement crisis was "one of the most enormous commercial disputes in history, and present[ed] questions which strike to the very heart of the modern international economic order."[463] Faced with claims that had significant implications for global trade and finance, U.S. courts shifted gears and introduced a test for direct effect that was comparatively more forgiving.

Awash in oil money, the Nigerian government had purchased large quantities of cement in the spring of 1975 for various infrastructure projects.[464] In total, Nigeria executed 109 contracts with 68 suppliers, purchasing over 16 million metric tons of cement at a price close to one billion dollars.[465] While Nigeria expected only twenty percent of those suppliers to fulfil their contracts, hundreds of ships were soon arriving in its ports carrying concrete, with more ships on the way.[466] Realizing it had misjudged the market, the Nigerian government took steps to restrict additional ships from entering its ports while also notifying suppliers to cease sending cement.[467]

In August 1975, the government attempted to stave off further economic loss by instructing Morgan Guaranty Trust Company of New York ("Morgan") not to honor letters of credit from the Nigerian government presented by cement sellers, unless sellers provided supplemental documentation not previously required under those letters.[468] In response to Nigeria's actions, cement sellers brought countless suits against the government in the United States and Europe.[469]

In *Texas Trading Milling Corp. v Federal Republic of Nigeria*, American corporations brought claims relating to the cement crisis against the Nigerian government. Unlike courts applying the substantial foreseeability test, the court in *Texas Trading* ultimately held that financial loss suffered in the United States was sufficient to trigger the direct effect clause.[470] In particular, because plaintiffs were supposed to be paid by Morgan in New York, the court concluded that the direct effect clause was satisfied.[471] In reaching this conclusion, the court suggested that neither a "substantial" nor "foreseeable" effect was required to satisfy direct effect.[472] In justifying its approach, the Second Circuit noted the importance of being "mindful of Congress's concern with providing 'access to the courts' to those aggrieved by the commercial acts of a foreign

463. Tex. Trading & Milling Corp. v. Fed. Republic of Nigeria, 647 F.2d 300, 302 (2d Cir. 1981).
464. *Id.* at 302–03.
465. *Id.* at 303.
466. *Id.* at 305.
467. *Id.*
468. *Id.* In addition to documents required by the letter of credit, Nigeria demanded each cement vendor present Morgan with a written document from the Central Bank of Nigeria authorizing payment. *Id.*
469. *Id.* at 306 n.15.
470. *Id.* at 312.
471. *Id.*
472. *Id.* at 311 n.32.

sovereign . . . ."[473] "No rigid parsing of [the direct effect clause] should lose sight of that purpose[,]" it wrote.[474]

As the court itself observed, however, the result in *Texas Trading* did more than just uphold Congress's intent—it also protected the interests of corporations engaged in global commerce:

> Our rulings today vindicate more than Congressional intent. They affirm the right of all participants in the marketplace of the world to be treated as equals, and to ascribe to principles of trade which found their birth in the law merchant, centuries ago. Corporations can enter contracts without fear that the defense of sovereign immunity will be inequitably interposed, and foreign states can bargain without paying a premium required by a trader in anticipation of a judgment-proof client. Commerce is fostered, and all interests are advanced.[475]

At the time, *Texas Trading* was a watershed. It was the first case to hold that direct effect did not require substantial and foreseeable effects and to recognize financial losses in the United States as satisfying that test. It also arguably benefited the interests of global finance, especially in the United States. At the time, the New York banking industry was focusing more and more on lending money to foreign governments.[476] Many foreign sovereigns, especially in the developing world, were desperate for the capital.[477] While *Texas Trading* could be viewed as discouraging foreign governments from transacting with American banks, the need for American capital meant the decision did not meaningfully threaten those investments. Instead, *Texas Trading* likely bolstered New York's reputation as a leader in global finance by preserving the integrity of its transactions.[478]

In the wake of *Texas Trading*, corporate plaintiffs were increasingly successful on direct effect claims for economic losses sustained in the United States.[479] *Texas Trading's* benefits to individuals were, however, more mixed. While some individual plaintiffs bringing claims based on economic losses suffered in the United States did well, those results often depended on their

473. *Id.* at 312–13.

474. *Id.* at 313.

475. *Id.* at 315–16.

476. HARVEY, *supra* note 352, at 29.

477. *Id.* at 28–29.

478. *See id.* at 72–73 (arguing that neoliberal states, like the United States, "typically facilitate the diffusion of financial institutions . . . [by] guarantee[ing] the integrity . . . of financial institutions at no matter what cost").

479. *See*, *e.g.*, Transamerican S.S. Corp. v. Somali Democratic Republic, 590 F. Supp. 968, 975–76 (D.D.C. 1984), *aff'd in part and rev'd on other grounds*, 767 F.2d 998 (D.C. Cir. 1985) (applying *Texas Trading* analysis to conclude that the direct effect clause applied to economic losses sustained in the United States by a U.S. corporate plaintiff); Chisholm & Co. v. Bank of Jamaica, 643 F. Supp. 1393, 1401 (S.D. Fla. 1986) (citing to *Texas Trading* and holding that the direct effect clause was satisfied where defendant had breached a contract with a U.S. corporation that was to be paid in the United States); Schmidt v. Polish People's Republic, 579 F. Supp. 23, 27 (S.D.N.Y. 1984) (citing to *Texas Trading* in holding that direct effect was satisfied because American company was to receive payment in the United States, but had not).

losses, in fact, being substantial and foreseeable.[480] When it came to plaintiffs who had suffered personal injuries abroad, the *Texas Trading* approach arguably made them even worse off than they were under the substantial foreseeability test. This is because *Texas Trading* included language suggesting individual plaintiffs should be treated differently from corporate ones. As the decision noted, where those injured abroad are "natural persons, not corporations, it is easy to locate the 'effect' outside the United States" whereas whether "an American corporation injured overseas incurs a direct effect in the United States remains an open question."[481]

A number of courts that otherwise adopted the *Texas Trading* approach latched onto this language to deny relief to individual plaintiffs who had suffered personal injuries abroad.[482] In one case, the court noted that, under *Texas Trading*, "corporations injured in their American pocket books by commercial activities of state trading companies occurring outside the United States would enjoy greater access to the American courts than personal injury or death claimants similarly injured . . . ."[483] While the court conceded that this "would seem on initial examination to present a somewhat anomalous statutory construction,"[484] it was bound by *Texas Trading* and required to deny relief.[485]

Most courts did not adopt the *Texas Trading* test and, instead, applied the more rigid substantial foreseeability test to all direct effect claims.[486] While this test was more difficult even for corporate plaintiffs to satisfy, the test was still used, in some circumstances, to protect the U.S. financial industry's interests. This can be seen in the district court decision in *Verlinden B.V. v. Central Bank of Nigeria*, which was also about the Nigerian cement crisis.[487]

Verlinden was one of the earliest decisions to apply the substantial foreseeability test to a suit brought by a corporate plaintiff. Whether or not its

480. For example, in *Callejo v. Bancomer*, the Fifth Circuit relied in large part on *Texas Trading* to hold that the direct effect clause was satisfied where individual plaintiffs had suffered financial losses inside the United States. 764 F.2d 1101, 1111–12 (5th Cir. 1985). In reaching this decision, however, the court held that plaintiffs' financial loss was a substantial and foreseeable effect, thereby modifying *Texas Trading's* direct effect test. *See id.* (noting that financial loss in United States was "foreseeable" and that bank had engaged in business with plaintiffs over a several year period, mailing certificate of deposits to them in United States and remitting payment through American bank).

481. *Tex. Trading*, 647 F.2d at 312 n.35.

482. *See, e.g.*, Martin v. Republic of South Africa, 836 F.2d 91, 94 (2d Cir. 1987) (in denying application of commercial activity exception to personal injury case observing that, in *Texas Trading*, "we stated that when Americans sustain personal injuries overseas it was easy to locate the 'effect' outside the United States"); Close v. Am. Airlines, Inc., 587 F. Supp. 1062, 1065 (S.D.N.Y. 1984) (citing to language from *Texas Trading* stating that for "natural persons, not corporations, it is easy to locate the 'effect' outside the United States" in denying application of commercial activity exception to personal injury case).

483. *Close*, 587 F. Supp. at 1065.

484. *Id.*

485. *Id.*

486. *See, e.g.*, Am. W. Airlines, Inc. v. GPA Group, Ltd., 877 F.2d 793, 799 (9th Cir. 1989) (adopting the substantial and foreseeable test for direct effect and noting that the majority of appellate courts had done the same).

487. 488 F. Supp. 1284 (S.D.N.Y. 1980).

reasoning was sound, the district court's application of the substantial foreseeability test was driven, in part, by a desire to protect New York's status as a center of global finance. In *Verlinden*, the court concluded that Morgan's failure to pay a foreign corporate plaintiff in New York on an irrevocable letter of credit issued by the Central Bank of Nigeria was insufficient to establish direct effect under the commercial activity exception.[488] In reaching this decision, the court stated that, in its view, "solicitude for New York's 'preeminent financial position' should induce the courts to forbear the exercise of jurisdiction in close cases."[489] The court went on to note that "New York would be detrimentally served by a decision subjecting foreign customers of its banks to the in personam jurisdiction of American courts whenever they advise credits to foreign beneficiaries through American banks."[490] Expressing concern that this arrangement would encourage foreign sovereigns to use non-U.S. banking institutions for their transactions, the court insisted it would have "hardly been the purpose of Congress to force the loss of such business on the American financial community."[491]

While this early push and pull between different interpretations of direct effect may have had varying consequences for corporate plaintiffs, it exhibited sensitivity to the financial industry's interests either way. By contrast, individual plaintiffs were often on the losing end of this tug of war. As discussed in the next Subpart, these trends have continued with the Supreme Court's decision in *Republic of Argentina v. Weltover*, which rejected the test of substantial foreseeability and adopted the *Texas Trading* approach.

b. "Direct Effect": *Weltover* and Its Progeny

In *Weltover*, the Supreme Court finally weighed in on the definition of direct effect. In that case, plaintiffs sued Argentina for breach of contract in connection with its unilateral decision to extend the payment time on certain government bonds.[492] The bonds were denominated in U.S. dollars and could be paid in various specified locations, including New York, at the creditor's election.[493] Plaintiffs, who held $1.3 million in bonds, refused to accept Argentina's debt rescheduling, and demanded payment in New York.[494]

Focusing their claim on the commercial activity exception, plaintiffs argued that Argentina's activities caused a direct effect in the United States—an

488. *Verlinden I*, 488 F. Supp. at 1298.

489. *Id.*

490. *Id.*

491. *Id.* As discussed below, by the 1990s, when *Weltover* was decided, *Verlinden's* fears about the risk of adverse effects on New York banking was arguably outdated, as the U.S. financial industry had fully established itself as a primary center of global finance that foreign sovereigns had little choice but to use. *See infra* notes 511–13 and accompanying text. Indeed, it was likely outdated even when *Verlinden* itself was decided.

492. Republic of Argentina v. Weltover, 504 U.S. 607, 610.

493. *Id.* at 609–10.

494. *Id.* at 610.

argument that had been accepted in an earlier Second Circuit decision in the case.[495] In affirming the Second Circuit, the Supreme Court held that direct effect does not contain any requirement of substantiality or foreseeability.[496] Instead, as the Court concluded, a direct effect "follows as an immediate consequence of the defendant's . . . activity" and must not be "too remote and attenuated."[497] Applying this rule to the facts of the case, the Court held that, because payment under the parties' contract was supposed to be, but had not been, made in a New York bank account,[498] there was a sufficiently direct effect in the United States.[499]

That a direct effect should have been found on the facts of this case was not immediately obvious—plaintiffs, who were two Panamanian corporations and a Swiss Bank,[500] were all located abroad, with no other connection to the United States;[501] most of the commercial activity relating to their claims also took place outside the United States.[502] The only territorial connection was the fact that payment was to be made in U.S. dollars to New York banks. For the appellate court in *Weltover*, this connection to New York banking was particularly important. In upholding jurisdiction under the commercial activity exception, the Second Circuit expressly stated that preserving New York's status as a preeminent financial center favored abrogating immunity.[503] In particular, the appellate court noted that "public policy should make American courts available to foreign plaintiffs if this will preserve or even enhance New York's status as a world financial leader."[504] According to the court, to protect New York's status as a global financial hub, courts must "encourag[e] foreign debtors to pay their debts that are due in New York even though plaintiffs are not domiciled in New York."[505]

While the Supreme Court rejected this New York-centric justification for exercising jurisdiction,[506] it also did not challenge its logic.[507] Indeed, the

495. *Id.* at 617–18.

496. *Id.* at 618. In line with *Texas Trading*, the Second Circuit's decision in *Weltover* had also rejected a substantial foreseeability requirement for the direct effect clause. Weltover (*Weltover I*) v. Republic of Argentina, 941 F.2d 145, 152 (2d Cir. 1991).

497. *Weltover*, 504 U.S. at 618.

498. Argentina had previously made some interest payments to defendants' New York accounts before altering the payment schedule. *Id.* at 619.

499. *Id.*

500. *Id.* at 610

501. *Id.* at 619.

502. *Id.* at 609–10.

503. *Weltover I*, 941 F.2d at 153.

504. *Id.*

505. *Id.*

506. *Weltover*, 504 U.S. at 618.

507. In an unrelated case, the Second Circuit similarly observed that the United States had an important interest in "ensuring that creditors entitled to payment in the United States in United States dollars under contracts subject to the jurisdiction of United States courts [can] assume that, except under the most extraordinary circumstances, their rights will be determined in accordance with recognized principles of . . . law." Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521–22 (2d Cir. 1985).

Second Circuit's concerns were both quite sensible and responsive to the time. During the 1970s, 80s, and 90s, the U.S. financial sector had become the most important part of the U.S. economy[508] and one of the main centers of global finance.[509] In extending the protections of U.S. law to the transaction in *Weltover*—despite the arguably tenuous connection to the United States—the Second Circuit understood that protecting investor interests would only bolster and strengthen the U.S. financial sector's preeminence.[510] In ratifying the appellate court's decision, the Supreme Court reinforced those benefits.

Since *Weltover*, the circuits have spilt over how to interpret the Court's definition of direct effect. Some jurisdictions have taken a narrow approach and interpreted the direct effect clause as requiring a "legally significant act,"[511] like, for example, an express breach of contract occurring in the United States.[512] Other circuits have taken a broader approach that requires no such legally significant act.[513] Invoking *Weltover*, these courts, which include the Fifth, Sixth, and D.C. Circuits, have defined direct effect as an effect that "follows as an immediate consequence of the defendant's . . . activity."[514]

Even under this broader test, individual plaintiffs have been disfavored as compared to corporate plaintiffs.[515] Specifically, where individual plaintiffs have allegedly suffered pure financial losses in the United States, courts have often been reticent to exercise jurisdiction absent contractual language or representations from the foreign sovereign demonstrating specific performance contemplated in the United States. By contrast, where an American company

508. HARVEY, *supra* note 352, at 33.

509. *See* Sassen, *supra* note 257, at 75.

510. As with the decision in *Texas Trading*, because of New York's global dominance, foreign sovereigns were unlikely to take their business elsewhere or avoid transacting with American investors as a result of *Weltover*. Indeed, despite the unfavorable ruling it received in *Weltover*, Argentina chose to use J.P. Morgan, a New York investment bank, as one of the two lead managers for its $1 billion bond offering in November 1998; most buyers were U.S. institutional investors. *Id.* at 76.

511. *See* Adler v. Fed. Republic of Nigeria, 107 F.3d 720, 727 (9th Cir. 1997) (adopting legally significant acts test); United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n, 33 F.3d 1232, 1239 (10th Cir. 1994) (same); Gen. Elec. Cap. Corp. v. Grossman, 991 F.2d 1376, 1385 (8th Cir. 1993) (same).

512. While there has been much confusion about what the "legally significant acts" requirement demands, defendant's breach of an express contractual term that contemplates performance in the United States seems to satisfy this test. Guirlando v. T.C. Ziraat Bankasi A.S., 602 F.3d 69, 76 (2d Cir. 2010); Virtual Countries, Inc. v. Republic of South Africa, 300 F.3d 230, 239 (2d Cir. 2000).

513. *See, e.g.*, Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 818 (6th Cir. 2002), *abrogated on other grounds by* Samantar v. Yousuf, 560 U.S. 305 (2010) (rejecting legally significant acts test); Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887, 894 (5th Cir. 1998). (same); Glob. Index, Inc. v. Mkapa, 290 F. Supp. 2d 108, 113 (D.D.C. 2003) ("While other circuits have expressly adopted or rejected the 'legally significant act' test, the D.C. Circuit follows the same, more general approach set forth in *Weltover*.").

514. *Voest-Alpine Trading*, 142 F.3d at 893 (quotations omitted) (citation omitted).

515. Notably, even after *Weltover* rejected the substantial foreseeability test, courts across the circuits continued to classify cases of personal injury or death abroad as beyond the scope of the direct effect clause as a categorical matter. *See, e.g.*, Evans v. Petroleos Mexicanos, 05-20434, 2006 WL 952265, at *2 (5th Cir. Apr. 13, 2006) (dismissing plaintiff's claims against instrumentalities of Mexican government arising from personal injury in Mexico for failing to satisfy direct effect test); Antares Aircraft, L.P. v. Fed. Republic of Nigeria, 999 F.2d 33, 36 (2d Cir. 1993) (noting that economic loss to an American citizen as a result of personal injury sustained abroad is not a direct effect under the commercial activity exception).

has experienced pure financial losses in the United States, flexible approaches to direct effect have been more common. This latter group of decisions has turned not on any clear contractual obligation to pay the company in the United States—rather, the determinative fact has often been that these are American companies that have suffered financial setbacks. [516]

The D.C. Circuit case of *Odhiambo v. Republic of Kenya* neatly highlights this disparity between individual and corporate plaintiffs suffering pure financial losses.[517] In *Odhiambo*, the majority held that plaintiff, a private individual, had failed to satisfy the direct effect prong because his payment agreement with defendant did not contemplate contractual performance in the United States.[518] In *Odhimabo*, a Kenyan national and employee at a private bank in Kenya, alleged that he was entitled to reward payments from the Kenyan government for whistle-blowing on hundreds of account holders who had potentially engaged in tax evasion.[519] Plaintiff had reported this tax evasion in response to a reward scheme established by the government to encourage people to share such information.[520] After making his reports, plaintiff had received two reward payments under the scheme.[521] After experiencing various threats to his safety as a result of his whistle-blowing activities, plaintiff was forced to flee Kenya and seek asylum in the United States.[522] According to plaintiff, he was still owed reward payments from the Kenyan government, which he pressed through written correspondence, fact-to-face meetings with Kenyan officials in the United States, and, eventually, litigation in U.S. court.[523]

Characterizing plaintiff's claim as a "pay wherever you are arrangement," the majority rejected plaintiff's suit and reasoned that, under the direct effect clause, there needed to be, but was not, an express or implicit contractual agreement under which Kenya agreed to pay plaintiff in the United States.[524] Instead, in the majority's view, the effect in the United States arose "only after

516. By contrast, in cases where the corporation is not an American one, courts eschewing the legally significant acts test have often adopted a stringent approach that effectively mirrors that test. For example, in *Goodman Holdings v. Rafidain Bank*, the D.C. Circuit held that plaintiffs, Irish corporations, had not established a direct effect in the United States since there was no breach of an express contractual provision designating the United States as the place of performance. Goodman Holdings v. Rafidain Bank, 26 F.3d 1143, 1146–47 (D.C. Cir. 1994). In some cases, courts have actually conceded that they applied *Weltover's* more flexible direct effect test to benefit American corporations but not foreign ones. *See Voest-Alpine Trading*, 142 F.3d at 893 (noting nationality of plaintiffs in flexible direct effect cases and underscoring greater success of American as compared to foreign plaintiffs using that clause in the Fifth Circuit).

517. Odhiambo v. Republic of Kenya, 764 F.3d 31 (D.C. Cir. 2014).

518. *Id.* at 40.

519. *Id.* at 33.

520. *Id.* at 34.

521. *Id.*

522. *Id.* at 34.

523. *Id.*

524. *Id.* at 39, 41. Plaintiff had argued that his claim satisfied the "direct effect" prong because his contract with Kenya did, in fact, contemplate performance, specifically payment of the reward, in the United States. *Id.* at 40.

a variety of intervening events, including the unveiling of Odhiambo's role as a whistle-blower . . . and move to the United States as a refugee."[525]

In a partially concurring opinion, one judge challenged the majority's understanding of the direct effect requirement, and argued that it did not necessitate contractual language, explicit or implicit, designating the United States as the place of performance or payment.[526] As the concurrence noted, "[t]he absence of a United States place-of-performance clause in Kenya's reward scheme cannot negate the fact that Kenya's nonpayment is felt here" because "Odhiambo's presence in the United States and the financial loss he suffers here are a direct effect of actions in connection with the commercial activity of the reward contract."[527]

In particular, the concurring judge noted that the majority's decision was inconsistent both with circuit precedent as well as with decisions in sister courts on the direct effect clause.[528] Indeed, many of these cases—all of which involved corporate plaintiffs—took a more flexible approach to concluding that plaintiffs' pure financial loss in the United States satisfied the direct effect requirement, even where there was a chain of intervening events or little indication the parties' agreement was intended to be expressly or implicitly performed in the United States.

For example, the *Odhiambo* concurrence referenced *Cruise Connections Charter Management 1, LP v. Attorney General of Canada*.[529] In *Cruise Connections*, the D.C. Circuit held that direct effect was satisfied where plaintiff, a U.S. corporation, did not receive its expected economic benefits, even though that expectation was not wholly reflected in the parties' agreement and depended, in part, upon an intervening chain of events.[530] In *Cruise Connections*, plaintiff entered into a contract with the Royal Canadian Mounted Police ("RCMP") to provide ships to house Canadian security personnel during the 2010 Olympic Games in Vancouver.[531] After executing the contract, plaintiff sought financing for the deal through the Royal Bank of Canada ("RBC").[532] Because it had no ships of its own, plaintiff also began negotiations with two American cruise lines to provide the vessels.[533] Those negotiations fell through when RCMP refused the cruise lines' request that RCMP pay income and payroll taxes incurred while the cruise ships were in Canada.[534] RCMP also demanded a letter of credit from plaintiff, which had not been required under the original

525. *Id.* at 41.
526. *Id.* at 44 (Pillard, J., concurring in part).
527. *Id.* at 50.
528. *Id.* at 47.
529. *Id.* at 48.
530. Cruise Connections Charter Mgmt. 1, LP v. Att'y Gen. of Can., 600 F.3d 661 (D.C. Cir. 2010).
531. Cruise Connections Charter Mgmt. 1, LP v. Att'y Gen. of Can. (*Cruise Connections I)*, 634 F. Supp. 2d 86, 87 (D.D.C. 2009), *rev'd and remanded*, 600 F.3d 661 (D.C. Cir. 2010).
532. *Id*.
533. *Id.*
534. *Cruise Connections*, 600 F.3d at 663. RCMP had allegedly initially agreed to pay these taxes. *Id.*

agreement.[535] Plaintiff refused to comply with the request and, as a result, RBC declined to provide financing.[536] Ultimately, RCMP terminated the contract with plaintiff for failure to timely secure financing.[537]

According to the D.C. Circuit, plaintiff satisfied the direct effect prong because it had suffered financial losses in the United States.[538] In reaching this conclusion, the appellate court took a flexible approach to direct effect, which did not exclusively focus on the contractual agreement between the parties.[539] Instead, it emphasized the agreement's general impact on the U.S. travel and cruise industry, including the loss of "$40 million (U.S.) worth of cruise-related business in the United States."[540] It also concluded that plaintiff's lost revenue from a separate, third-party deal with a U.S. travel agency to charter one of the cruise ships as it traveled from the United States to Canada constituted a direct effect, even though there was no indication the third-party deal was contemplated by the RCMP and Cruise Connection contract.[541]

To the extent the court did focus on the parties' agreement, it pointed to effects that seemed to be no less remote and attenuated as those in *Odhiambo*. In particular, the court insisted that because the parties' agreement required plaintiff use ships from two specific cruise companies, and that record evidence established those companies were U.S.-based, defendant's actions caused a direct effect in the United States.[542] Even though this effect would require a series of intervening events, including plaintiff's ability to successfully secure contracts with these other entities and the third-parties' ability to perform on those contracts,[543] the court rejected defendant's argument that it was too remote and attenuated.[544]

The *Odhiambo* concurrence also referenced *DRFP LLC v. Republic Bolivariana de Venezuela*,[545] a Sixth Circuit case where the court held that plaintiff, an Ohio corporation, satisfied the direct effect requirement because it had demanded, but not received, payment in Ohio.[546] The court reached this

535. *Cruise Connections I*, 634 F. Supp. 2d at 87.

536. *Id.*

537. *Id.*

538. *Cruise Connections*, 600 F.3d at 665.

539. The district court in Cruise Connections, which held that the direct effect clause was not satisfied, focused exclusively on the transaction between RCMP and Cruise Connections. *Cruise Connections I*, 634 F. Supp. 2d, at 87. It also considered direct effect only in terms of payment, rather than broader contractual performance, in the United States (as the D.C. circuit did). *Id.* at 89–90; *Cruise Connections*, 600 F.3d at 666.

540. *Cruise Connections*, 600 F.3d at 665.

541. *Id.* at 663–65.

542. *Id.* at 665.

543. The district court had rejected this direct effect claim, finding that it was too attenuated from the agreement between Cruise Connections and RCMP. *Cruise Connections I*, 634 F. Supp. 2d, at 90.

544. *Cruise Connections*, 600 F.3d at 664–66. Notably, the appellate court never resolved whether the parties' contract contemplated payment in the United States, a claim the district court rejected. *Id.* at 663–64, 666.

545. Odhiambo v. Republic of Kenya, 764 F.3d 31, 47 (D.C. Cir. 2014) (Pillard, J., concurring in part).

546. DRFP L.L.C. v. Republic Bolivariana de Venez., 622 F.3d 513 (6th Cir. 2010).

conclusion even though the relevant contract arguably did not require, either expressly or implicitly, that payment be made in the United States. In *DRFP*, plaintiff had purchased promissory notes from a Panamanian company.[547] The promissory notes were originally issued in 1981 by a Venezuelan state-owned bank, with a maturity date of December 1999.[548] After the Panamanian company demanded payment in 2001, the Venezuelan Finance Ministry conducted an investigation and concluded the notes were invalid forgeries.[549] Aware of the Ministry's position, plaintiff acquired the notes from the Panamanian corporation and demanded payment at its Ohio office, a request which Venezuela denied.[550] Plaintiff's demand for payment in Ohio was the only connection between Venezuela's commercial activity—the issuance of the notes—and the United States.[551]

Rather than examining whether Venezuela had *agreed*, either explicitly or implicitly, to make payment in the United States, the Sixth Circuit looked to "whether the bearer of the notes . . . is *restricted* by contract or by the terms of the notes in selecting the United States" as place of payment.[552] Looking to Swiss law, which was the law governing the notes, the court held that the bearer of the notes may sue for collection in the jurisdiction of their choosing.[553] While the court conceded that "neither the terms of the notes nor any other contractual arrangement between the parties explicitly designated the United States as the place of payment," the court held that reliance on Swiss law meant the note bearer could be paid where it wanted—[554] precisely the sort of "pay wherever you are arrangement" the D.C. Circuit rejected in *Odhiambo*.[555]

As the *Odhimabo* concurrence pointed out, the majority approach was even inconsistent with language in the Second Circuit case of *Hanil Bank v. PT Bank Negara Indonesia*, which actually adopted the more stringent legally significant act test.[556] Much like *DRFP*, the Second Circuit concluded there was a direct effect in the United States because plaintiff had selected the United States as the place of payment, payment had not been made, and plaintiff was not forbidden from selecting the United States for payment under the parties' agreement.[557] In

547. *Id.* at 515.
548. *Id.*
549. *Id.*
550. *Id.*
551. *Id.* at 516.
552. *Id.* (emphasis added)
553. *Id.*
554. *Id.* at 517.
555. While the court insisted that under "the provision that Swiss law will be applied, the parties implicitly agreed to leave it to the bearer to demand payment of the notes anywhere," it arguably adopted a flexible approach by looking beyond the parties' agreement and course of conduct to the governing law to determine what place of payment defendant had "implicitly" agreed to. *Id.* at 517.
556. Odhiambo v. Republic of Kenya, 764 F.3d 31, 47 (D.C. Cir. 2014) (Pillard, J., concurring in part).
557. Hanil Bank v. PT Bank Negara Indonesia, 148 F.3d 127, 132 (2d. Cir. 1998). Like *DRFP*, plaintiff's contractual right to be paid in the United States was far from clear based on the parties' agreement. *See id.* at 129–130, 133 (noting that the letter of credit governing the transaction between the parties provided that

reaching its conclusion the court explicitly held that the direct effect clause does not require "that the place of performance" be in the United States "in order for a financial transaction to cause a direct effect in this country."[558] Instead, it held that direct effect "only requires an effect in the United States that follows as an immediate consequence of the defendant's actions overseas"[559] —a holding that was also arguably at odds with the D.C. Circuit approach in *Odhiambo*.

The disparate outcome, post-*Weltover*, between direct effect claims involving individual and corporate plaintiffs suffering pure economic losses in the United States can be seen in a number of other cases, as well.[560] These results reflect neoliberal capitalism's overall tendency to protect the wealth of corporate plaintiffs while disadvantaging private individuals whose transactions do not implicate important commercial or financial interests. As a result, these individuals are left economically vulnerable, a situation that comports with neoliberalism's economic inequality and resulting wealth gap.

The FSIA's tendency to protect corporate, over individual, plaintiffs is further underscored by the role contractual rights play in commercial activity cases, as discussed in the next Subpart.

C. CONTRACTS

Freedom of contract is central to capitalism. It is unsurprising, then, that the commercial activity exception—especially its direct effect clause—has often been successfully used by plaintiffs in cases involving contracts and less often in cases involving other kinds of claims, like business torts. This privileging of contract has helped ensure that more sophisticated parties with access to lawyers—typically corporations—are able to benefit the most from the commercial activity exception's reach, a reality that further aligns with disparities in wealth between the most and least affluent members of society.

As the modern law of contract took shape in the nineteenth century, it was intimately connected to the capitalist belief that society was most efficiently organized around markets where parties exchanged commodities according to

defendant would reimburse plaintiff "according to [plaintiff's] instruction" while also noting defendant's argument that under letter of credit law Indonesia was the place of performance, not the United States).

558. *Id.* at 133.

559. *Id.*

560. *See, e.g.*, Peterson v. the Kingdom of Saudi Arabia, 416 F.3d 83, 89–91 (D.C. Cir. 2005) (holding that there was no direct effect in the United States, as a result of the Saudi government's failure to refund payments to a U.S. citizen in the United States under a Saudi retirement fund because there was no agreement "implied or express" that plaintiff was to be paid in the United States, even though plaintiff presented evidence the Saudi government knew plaintiff would be moving back to the United States, and therefore would need to be paid there, the government's practice was to remit payment to the United States for similarly situated foreign workers, and the government had made representations it would pay plaintiff wherever he was); Virtual Def. & Dev. Int'l, Inc. v. Republic of Moldova, 133 F. Supp. 2d 1, 6–7 (D.D.C. 1999) (holding that that the direct effect clause was triggered where a U.S. corporation suffered a pure financial loss in the United States because plaintiff "is solely a United States corporation and the alleged contract contemplated that [it] would receive compensation," notwithstanding the fact that the contract had been negotiated in Moldova and did not call for payment to be made in the United States).

their individual self-interest and free will.[561] Protecting this market required a predictable and reliable legal system for enforcing contractual rights. Through the common law of contracts, nineteenth century judges and lawyers worked to ensure this predictability and reliability.[562]

The FSIA's commercial activity exception is similarly aligned with upholding the sanctity of contract. In fact, an early draft of the FSIA developed in the late 1960s for the State Department largely limited the commercial activity exception to claims for contractual breach.[563] While the FSIA's drafters eschewed that approach for a broader view of "commercial activity," contract was still front of mind. For instance, the FSIA's legislative history contains various examples of "commercial activity," which mostly focus on contract-based scenarios.[564] These examples include entering into contractual arrangements for the sale of services or products, as well as other transactions typically involving contracts, including the lease of property and borrowing of money.[565]

Admittedly, since the FSIA went into effect, courts have resisted treating breach of contract claims as *per se* commercial.[566] Nevertheless, contract-based claims are still more likely to trigger the commercial activity exception's territorial nexus requirement as compared to other kinds of claims.[567] In particular, some courts have made clear that contract performance in the United States can, on its own, satisfy the commercial activity exception's direct effect requirement.[568] Indeed, contract breach has arguably become one of the most well-developed and reliable ways of establishing direct effect since *Weltover*.[569]

561. Julian S. Webb, *Contract, Capitalism, and the Free Market: The Changing Face of Contractual Freedom*, 21 L. TCHR. 23, 24 (1987).

562. Daniel Song, *From Status to Contract (and Back?): A Historiography of Contract Law and the Transition to Capitalism*, 22 EX POST FACTO 127, 134 (2013).

563. The State Department-commissioned proposal provided that an:

> [a]ction may be brought . . . against a foreign state, or [its] agency or instrumentality . . . only upon . . . an express or implied contract entered into, to be performed, or arising out of transactions in the United States . . . under circumstances where the foreign state, agency, or instrumentality, if a private person, would be subject to suit in accordance with the law of the place where the action is brought.

Lowenfeld, *supra* note 271, at 937.

564. Brittenham, *supra* note 16, at 1473.

565. H.R. REP. No. 94-1487, 94th Cong., 2d Sess. 1, 10, 16 (1976).

566. *See* Practical Concepts Inc. v. Republic of Bolivia, 613 F. Supp. 863, 869 (D.D.C. 1985), *rev'd on other grounds* 811 F.3d 1543 (D.C. Cir. 1987) (listing FSIA cases in which "courts have not automatically treated every contract for goods or services as commercial activity"). *But see* Tex. Trading Milling Corp. v Fed. Republic of Nigeria, 647 F.2d 300, 309 (2d Cir. 1981) ("The House Report [on the FSIA] seems to conclude that a contract or series of contracts for the purchase of goods would be per se a "commercial activity . . . .").

567. Donoghue, *supra* note 12, at 504–05.

568. Odhiambo v. Republic of Kenya, 764 F.3d 31, 40 (D.C. Cir. 2014); Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna, JSC, 813 F.3d 98, 108-09 (2d Cir. 2016).

569. *See Cruise Connections I*, 634 F. Supp. 2d at 88 (articulating the various ways in which contract breach satisfies the direct effect requirement).

Other grounds for establishing direct effect are not nearly as successful.[570] For example, some courts have suggested that foreign business torts will not, on their own, trigger the direct effect clause.[571]

This privileging of contract means that private parties can structure their agreements with foreign sovereigns in ways that help ensure they can sue in U.S. courts, if necessary. Indeed, during congressional consideration of the FSIA, one private attorney insisted the FSIA would "assist potential litigants and their counsel in appraising the effective contractual provisions, the extent to which negotiations can take into account the likelihood that a foreign state party could be subject to suit in the United States, and have those specific contractual provisions enforced."[572] While this guidance is undoubtedly useful to all litigants, it is especially beneficial to sophisticated parties, like large corporations, that can afford lawyers and have sufficient bargaining power to press their interests with their foreign sovereign counterparts.[573]

In this way, the FSIA's commercial activity exception helps facilitate what Professor Katharina Pistor refers to as the "coding of capital."[574] As Pistor describes it, lawyers—usually ones who work for the largest and most prestigious law firms—"use their legal know-how, which they built over years of practice in exchanges with clients and their professional kin, to craft . . . capital" and help already wealthy individuals and entities accumulate even more wealth.[575] While Pistor is concerned with how lawyers use the law to

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570. *See* Wydeven, *supra* note 367, at 167 (noting that "[i]t is difficult to ascertain the parameters of direct effect jurisdiction when the plaintiff suffers a financial injury unconnected with any contractual relationship").

571. *See* Guirlando v. T.C. Ziraat Bankasi A.S., 602 F.3d 69, 78 (2d Cir. 2010) ("[T]he fact that an American individual or firm suffers some financial loss from a foreign tort (like conversion or fraud) cannot, standing alone, suffice to trigger the exception.") (quotations omitted) (citation omitted). Of course, courts may have good reasons for limiting the exception's scope in this way. As one court wrote, "[i]f a loss to an American individual and firm resulting from a foreign tort were sufficient standing alone to satisfy the direct effect requirement, the commercial activity exception would in large part eviscerate the FSIA's provision of immunity for foreign states." Antares Aircraft, L.P. v. Fed. Republic of Nigeria, 999 F.2d 33, 36 (2d Cir. 1993). It is, however, hard to reconcile this approach with a broad, nearly *per se* rule, that as long as there is contract performance in the United States jurisdiction will lie. Another possible explanation for the approach to foreign torts, including business torts, is that, under the FSIA, jurisdiction in contract cases is based on the place of performance, while in tort cases jurisdiction is based on the locus of injury. Nnaka v. Federal Republic of Nigeria, 238 F. Supp. 3d 17, 29 (D.D.C. 2017), *aff'd* 756 Fed. Appx. 16 (D.C. Cir. 2019). Again, however, this does not explain why foreign business torts that financially injure plaintiffs *in* the United States would not suffice, "standing alone," to trigger the commercial activity exception.

572. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing before the 94th Congress Committee of the Judiciary*, 94th Cong. 88 (1976) (statement of J. Roderick Heller, Member of the D.C. Bar Ass'n, Partner in the Wash., D.C. L. Firm of Wilmer, Cutler, & Pickering, and Lecturer at Geo. Wash. L. Sch.).

573. Of course, states and state-owned enterprises also benefit from increased predictability under the FSIA. *See* Lowenfeld, *supra* note 271, at 903 (noting that the pre-FSIA regime created uncertainty and unpredictability for foreign sovereigns and urging adoption of sovereign immunity statute to mitigate the problem). But sophisticated parties with access to lawyers, like corporations, are still far more likely to negotiate for better terms than are less sophisticated parties, like individuals, entering into transactions with foreign states.

574. KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 3 (2019).

575. *Id.* at 160–62.

create and protect new corporate devices or asset classes,[576] the basic logic applies to the commercial activity exception as well. In the FSIA context, the coding of capital is similarly about taking assets "that exist outside the law," turning them into capital, and protecting them through law[577]—a practice that aligns with neoliberalism's wealth gap. Specifically, by drafting a contract that takes the FSIA and its commercial activity exception into account, lawyers ensure that certain assets—for example, express agreements to make payments in the United States—are transformed into a form of capital that does not "exist outside the law" as a result of sovereign immunity, but rather is protected by law in ways that disproportionately allow certain more affluent and powerful plaintiffs—like large corporations—to continue accruing wealth, while leaving other less affluent parties—like individuals—out in the dust.

Conclusion

A political economy approach shows how the history of foreign sovereign immunity doctrine and the development of the FSIA have centered upon the commercial activity of foreign states and aligned with and furthered capitalist interests. It also demonstrates how the FSIA's commercial activity exception has been applied and interpreted by courts such that certain rights and interests—often those implicating the U.S. financial sector—held by certain plaintiffs—corporations, as opposed to individuals—have enjoyed noticeable benefits.

Given the statute's history and evolution, capitalist tendencies are likely to be reflected in the future development of the FSIA's commercial activity exception. Addressing the effects of this alignment is, however, particularly urgent and timely. While the United States has long been considered the "epicenter" of capitalism,[578] capitalism's centrality to the U.S. economic and political framework is increasingly being challenged. As a result of decades of deregulation,[579] stagnant wages,[580] and the 2008 financial crisis,[581] mainstream criticism and debate about capitalism's (especially neoliberalism's) place within American society are becoming more prominent.[582] Addressing these problems will require substantial legal reforms, including to doctrines like the FSIA's commercial activity exception that embody neoliberal norms.

576. *Id.* at 164.

577. *Id.* at 165.

578. SVEN BECKERT & CHRISTINE DESAN, AMERICAN CAPITALISM: NEW HISTORIES 2 (2d ed., 2019).

579. Eric Keller & Nathan J. Kelly, *Partisan Politics, Financial Deregulation, and the New Gilded Age*, 68 POL. RSCH. QUART. 428–44 (2015).

580. Richard V. Reeves, *Capitalism is Failing. People Want a Job and a Decent Wage—Why Is That So Hard?*, BROOKINGS (Apr. 29, 2019), https://www.brookings.edu/opinions/capitalism-is-failing-people-want-a-job-with-a-decent-wage-why-is-that-so-hard.

581. Rana Foroohar, *American Capitalism's Great Crisis*, TIME (May 12, 2016), https://time.com/4327419/american-capitalisms-great-crisis.

582. *Id.*; Kim Kelly, *What Capitalism Is and How It Affects People*, TEEN VOGUE (Apr. 11, 2018), https://www.teenvogue.com/story/what-capitalism-is.

While it is beyond this Article's scope to fully describe all the necessary changes to the exception, it is worth mentioning a few basic modifications. They include addressing existing and unjustified inconsistencies in the case law on commercial activity, like the disparate treatment of corporate and individual plaintiffs suffering pure financial losses in the United States. They also include promoting a consistent definition of commercial activity, instead of one that toggles between nature and purpose depending upon the type of case under consideration. In terms of the case law's deregulatory effects, one starting point would be to introduce an amendment to the commercial activity exception that strips away immunity for employment contracts that are made, or partially or fully performed, in the United States—a provision that exists in the foreign sovereign immunity statutes of some other countries.[583]

A more ambitious project for FSIA reform would address the commercial activity exception's role in promoting the interests of the global financial system. For example, judicial approaches to the commercial activity exception might be less protective of global finance and more solicitous of the interests of foreign sovereign defendants protecting public goods, including domestic economies upon which their citizens' survival depends. A case in point are public debt cases like *Republic of Argentina v. Weltover*. This shift would, of course, require more drastic changes to the definition of commercial activity, including revisiting the exclusively nature-based test set out in *Weltover* and devising a more flexible test that accounts for the purpose of sovereign activity. A more thorough reform program would also require deeper engagement with the FSIA case law's deregulatory effects and, in particular, provide robust protections for employment, personal injury, and human rights-related commercial activity claims, even if they occur abroad. To this end, amending the commercial activity exception ought to go beyond the earlier suggestion relating to employment contracts made, or partially or fully performed, in the United States, and protect *all* employment, personal injury, and human rights claims that result from the commercial activity of states and lead to injury, including financial losses, in the United States or to U.S. persons.

State-owned companies are amongst the largest and fastest-growing multinational enterprises.[584] Coupled with globalization's continued dominance, this reality means commercially-related transactions with foreign state-owned businesses are likely to persist and even increase.[585] In this environment, the FSIA's political economy and tendency to privilege certain commercial activity claims and parties over others must be understood and addressed.

583. *See supra* note 363.

584. Victoria A. Valentine, Shelli Feinberg & Simone Fibiilli, *The Foreign Sovereign Immunities Act's Crippling Effect on United States Business*, 24 MICH. ST. INT'L L. REV. 625, 636 (2016).

585. *Id.*

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