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COMMENT: *Millen Industries, Inc. v. Coordination Council for North American Affairs:* Unnecessarily Denying American Companies the Right to sue Foreign Governments Under the Foreign Sovereign Immunities Act

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MILLEN INDUSTRIES, INC. v. COORDINATION COUNCIL FOR NORTH AMERICAN AFFAIRS: UNNECESSARILY DENYING AMERICAN COMPANIES THE RIGHT TO SUE FOREIGN GOVERNMENTS UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

I. INTRODUCTION

When a United States company deals with a foreign state,[1] the economic viability of that company may depend largely on its ability to enforce its rights against that state in the courts of the United States. Nevertheless, as the law stands today, a United States company may have no domestic recourse to uphold a contract, protect its property, or enforce any legal right when a foreign state pleads the doctrine of foreign sovereign immunity.[2] This is especially vital when a company has staked its entire success upon a particular contract, having foregone other opportunities while investing significant capital and energy into a prospective venture. The recent case of *Millen Industries, Inc. v. Coordination Council for North American Affairs*[3] is an example of just such a situation.

Today, foreign sovereign immunity determinations are made under the Foreign Sovereign Immunities Act of 1976 (FSIA or Act).[4] The FSIA confers a general immunity upon foreign states[5] and their political subdivisions, agencies, and instru-

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1. Under international law, a "state" implies an entity that must meet four essential elements: a defined territory; a permanent population; a government; and a capacity to conduct formal relations with other such entities. *See* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 228-36 (2d ed. 1987) [hereinafter L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT]; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) [hereinafter RESTATEMENT (THIRD)].

2. The doctrine of sovereign immunity is a principle whereby one state's courts declines to exercise subject matter jurisdiction over a foreign state on the mere basis that the foreign state is a sovereign, and thus, not subject to the internal rules of the home state. Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812).

3. 855 F.2d 879 (D.C. Cir. 1988).

4. Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. No. 94-583, 90 Stat. 2892 (codified as amended at 28 U.S.C. §§ 1602-1611 (1988)).

5. *Id.* at § 1604. Section 1604 provides:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the [s]tates

mentalities[6] from being sued in United States courts, subject to specified exceptions.[7] One significant exception is the "commercial activities exception," which grants jurisdiction, or more precisely, denies immunity, "in any case in which the action is based upon a *commercial activity*" of a foreign state having sufficient contacts with the United States.[8]

The commercial activities exception of the FSIA nevertheless, has failed to provide a consistent standard upon which courts can make sovereign immunity determinations. United States courts have generally had difficulty in determining whether a government's activities in a certain circumstance are commercial or sovereign, and therefore noncommercial, within the meaning of the FSIA.[9]

For example, when a transaction consists of both commercial and sovereign elements, a court must decide whether the state should be granted immunity based on the sovereign aspects of the transaction or denied immunity under the commercial activities exception. To resolve such conflicts, courts have referred to the explicit language of the FSIA, its legislative history, and an abundance of case law, but unfortunately, neither the Act nor its legislative history sufficiently guides a court in making such determinations. In particular, while a determination of whether certain behavior is commercial is perhaps the most important decision a court faces in an FSIA suit, the Act provides no definition of the term "commercial."[10]

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except as provided in sections 1605 to 1607 of this chapter.

Id.

6. *See id.* at § 1603.

7. *See id.* at §§ 1605-1607.

8. *Id.* at § 1605(a)(2) (emphasis added).

9. *See infra* notes 68-96 and accompanying text.

10. While the FSIA defines commercial activity as being either a "regular course of commercial conduct or particular commercial transaction or act," it fails to further define the term "commercial." 28 U.S.C § 1603(d) (1988). *See infra* note 60 and accompanying text. The legislative history does provide examples of what activities may be considered commercial.

> "[C]ommercial conduct" includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act."
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> Activities such as a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of

Instead of defining the term "commercial," the Act provides that the commerciality of an activity is to be determined by reference to the nature of the course of conduct, transaction, or act, rather than its purpose.[11] It thus adopted the broader "nature of the act" test.[12] This open-ended definition of commercial activity was intended to give the courts flexibility in determining initial claims of jurisdictional immunity by examining the activity at issue on a case by case basis.[13] Many courts, however, have misapplied the "nature" test, and have continued to unnecessarily consider the underlying purpose of a state's activities when determining whether sovereign immunity should apply.[14] Moreover, despite substantial legislative history indicating an opposite intent, many courts have been swayed by political implications of a particular case rather than relying on the FSIA's established "nature" test.[15]

In *Millen Industries, Inc. v. Coordination Council for North American Affairs*,[16] the Court of Appeals for the District of Columbia Circuit (District of Columbia Circuit) had to determine whether a breach of contract claim between a United States citizen and the Coordination Council for North American Affairs (CCNAA), a trade instrumentality of Taiwan, fell within the commercial activities exception to the FSIA. Although the transaction in question was a commercial contract, the court found that certain individual provisions of the contract were sovereign,[17] and thus granted immunity to the CCNAA under the FSIA.[18] The court held that the contract may be bifurcated

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laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition.

H.R. REP. No. 1487, 94th Cong., 2d Sess. 16, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6614-15 [hereinafter H.R. REP. No. 1487].

11. *See* 28 U.S.C. § 1603(d) (1988).

12. *See infra* notes 62-64 and accompanying text; *compare* "purpose" test *with Victory Transport* test. *See infra* notes 41-48 and accompanying text.

13. H.R. REP. No. 1487, *supra* note 10, at 16, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6615; *see also* Von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 49 (1978).

14. For examples of such cases and for an elaboration on this criticism, see *infra* notes 74-86 and accompanying text.

15. *See infra* notes 68-96 and accompanying text.

16. 855 F.2d 879 (D.C. Cir. 1988).

17. The sovereign representation included: (1) that Millen would have the benefits of Taiwanese law; and (2) that raw materials and spare parts could be imported duty-free into Taiwan. *Millen*, 855 F.2d at 885.

18. *Id.*

to isolate its sovereign elements (those terms which only a public entity could offer in a contract), and that the plaintiff could not bring suit based on these sovereign provisions. In essence, the court's "bifurcation of contracts" holding ignored both the case law and the legislative history of the FSIA, and unjustly denied a United States citizen domestic recourse against the Taiwanese Government to recover for economic injuries directly caused by Taiwan's breach of contract.

Millen Industries and the cases before it illustrate the inconsistency of the United States courts in developing a standard for upholding or denying immunity under the commercial activities exception to the FSIA. After exploring the history of the commercial activities exception, this Comment examines the *Millen Industries* case and analyzes the court's holding. The Comment argues that despite the FSIA's goal of achieving uniformity and certainty in sovereign immunity determinations, the courts have generally failed to establish clear guidelines for applying the commercial activities exception. Absent a clearer definition of commercial activity, courts will continue to consider both the purpose of an activity and the political ramifications of a case when making immunity determinations, the consideration of which is explicitly prohibited by the Act. Therefore, this Comment proposes an amendment to the FSIA that would ultimately reflect a more restrictive theory of jurisdictional immunity by requiring that courts deny immunity to foreign states for all breaches of contract.[19] This refinement of the Act would achieve two of the FSIA's original goals — greater uniformity for American businesses and greater opportunity for United States plaintiffs to hold delinquent foreign sovereigns liable in United States courts.[20]

II. BACKGROUND

A. The General Theory of Foreign Sovereign Immunity in International Law

The doctrine of sovereign immunity is a principle of customary international law under which domestic courts relinquish

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19. *See infra* notes 136-41 and accompanying text.

20. *See generally* H.R. REP. No. 1487, *supra* note 10, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6604. For a more complete discussion of the background of the FSIA, see Comment, *Martin v. Republic of South Africa: Alienating Injured Americans*, 15 BROOKLYN J. INT'L L. 153, 156-59 (1989).

jurisdiction over a foreign sovereign.[21] One justification for this principle is based on international comity[22] between nations and on mutual respect and deference that states afford to the acts of a foreign sovereign. Immunity is also generally necessary for the effective conduct of international intercourse and the maintenance of friendly nations.[23]

The traditional notion of sovereign immunity was the absolute theory, under which a sovereign was immune from jurisdiction in all cases that it was named as a defendant, unless immunity was waived.[24] As governments became more involved in international commercial activities and began to undertake functions which were formerly considered private, most states began to adopt a more restrictive view of foreign sovereign immunity. Scholars have argued that the immunity of states engaged in such activities was not required by international law and that it was undesirable: immunity deprived private parties that dealt with a state of their judicial remedies and gave states an unfair advantage in competition with private commercial enterprise.[25]

Under the restrictive view, foreign sovereigns would be amenable to foreign jurisdiction for their commercial or private acts, while retaining immunity for their sovereign or public acts.[26]

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21. The principle that courts of sovereign states will decline to exercise their territorial jurisdiction over other sovereign states, their public property and their official agents, is a rule of customary law which grants a foreign state immunity from local jurisdiction unless it consents to that jurisdiction. J. BRIERLY, THE LAW OF NATIONS 243 (6th ed. 1963) [hereinafter J. BRIERLY]. Consent in these instances may be determined on an ad hoc basis or by reference to treaty or agreement between the forum state and the defendant state. *See* M. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 250, 271 (1988) [hereinafter M. JANIS]; *see also* J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 208 (5th ed. 1963).

22. "Comity" is a deference shown by one nation's courts to the courts and laws of another state. M. JANIS, *supra* note 21, at 250. In the United States, a statement of the principle of comity is found in *Hilton v. Guyot*:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

159 U.S. 113, 163-64 (1895).

23. Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 137 (1812); RESTATEMENT (THIRD), *supra* note 1, at 390.

24. *See Schooner Exchange*, 11 U.S. (7 Cranch) at 116.

25. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 239 (1951).

26. *See generally* Feldman, *The United States Foreign Sovereign Immunities Act of 1976 In Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 307-11 (1986)

The denial of immunity for commercial acts was based on the theory that there was an implied waiver of immunity where a state involved itself in a commercial transaction with a private individual.[27] At first, an act was considered sovereign or governmental if it served a public or sovereign purpose.[28] Thus, any act of a state for the public good was immune from scrutiny in another state's courts.[29] A later test of commerciality avoided a determination of the ultimate purpose of an act, and regarded only the nature of the activity.[30] According to this test, a court may deny immunity to a state that has entered into a contract, even if the contract is to serve a public function, on the basis that contracting with private parties on the open market is commercial in nature.

B. The Development of the Restrictive Theory in the United States

American jurisprudence dealing with foreign sovereign immunity began with the establishment of the absolute doctrine.[31] Chief Justice Marshall stated that since all sovereigns possess "equal rights and equal independence" under international law, a sovereign enters the territory of a friendly foreign government "in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are re-

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[hereinafter Feldman].

27. J. BRIERLY, *supra* note 21, at 249.

28. *See infra* note 42 and accompanying text.

29. States began to enter into commercial transactions, but continued to demand immunity because they claimed that the purpose of the transaction was for the public good. *See* J. BRIERLY, *supra* note 21, at 248.

30. *See infra* notes 62-67 and accompanying text; J. BRIERLY, *supra* note 21, at 247-51 (discussing cases that adopt restrictive theory incorporating distinction between public acts and commercial acts).

31. Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812). The United States Supreme Court applied the absolute doctrine in dismissing a libel claim against a friendly foreign sovereign for lack of jurisdiction. In *Schooner Exchange*, M'Faddon and Greetham filed a libel in federal district court against the Exchange, asserting: (a) that they were her sole owners; (b) that the ship had been forcibly taken by agents of the Emperor Napoleon in violation of the rights of the libelants; and (c) that the libelants' property in her remained unchanged and in full force. The executive branch of the federal government opposed the libel on the grounds that the vessel libeled was owned by a friendly foreign sovereign. *Id.* at 117-20. The district court dismissed the libel "upon the ground that a public armed vessel of a foreign sovereign, in amity with our government, is not subject to the ordinary judicial tribunals of the country, so far as regards the question of title, by which such sovereign claims to hold the vessel." *Id.* at 120. On appeal, the circuit court reversed and the case was then appealed to the Supreme Court.

served by implication, and will be extended to him."[32] This theory of absolute immunity, whereby a foreign state could invoke immunity irrespective of the nature of the activities, encompassed a nation's commercial as well as governmental activities.[33]

The inequities consequent to such *carte blanche* immunity eventually led the judiciary to defer to recommendations by the United States Department of State (State Department) when determining whether immunity should apply. A foreign government sued in the United States would first apply to the State Department for recognition of immunity. If the State Department determined immunity to be appropriate, courts tended to accept the suggestions in deference to the Executive's constitutional responsibility of foreign relations.[34] The courts, in effect, moved away from the view that the issue of foreign sovereign immunity was purely a legal question and adopted the view that it was a mixed legal and political question with respect to which determinations of the executive branch should be accorded conclusive effect.[35]

With the rise of the restrictive principle of sovereign immunity internationally,[36] the State Department, in the 1950s, formally announced that it would also adopt the restrictive view and henceforth would not recommend immunity where claims arose from the commercial activities of a foreign state.[37] In this

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32. *Id.* at 136-37.

33. Thus, just as *Schooner Exchange* involved immunity of a foreign military vessel, the United States Supreme Court in 1926 applied the absolute doctrine to *commercial* vessels of a foreign state in Berizzi Bros. Co. v. Steamship Pesaro, 271 U.S. 562 (1926). The Supreme Court in *Berizzi Bros.* concluded that "all ships held and used by a government . . . for the purpose of advancing the trade of its people or providing revenue for its treasury . . . are public ships in the same sense that warships are." *Id.* at 574.

34. *See, e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30 (1945); *Ex parte Peru*, 318 U.S. 578 (1943).

35. The court's rationale was stated in *Ex parte Peru*: "[C]ourts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the [g]overnment in conducting foreign relations." 318 U.S. at 588; *see also Hoffman*, 324 U.S. at 30.

36. This principle had been recognized on the international scene as early as 1903. Dralle v. Czechoslovakia, [1950] Int'l L. Rep. 155 (Supreme Court of Austria 1950) *reprinted in* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 1, at 902. It was apparent that the restrictive doctrine had become widely accepted as the international standard of sovereign immunity. *Id.*

37. *See* Letter of Acting Legal Adviser, Jack B. Tate, to acting Attorney General Philip B. Perelman (May 19, 1952) *reprinted in* 26 DEP'T ST. BULL. 984 (1952) [hereinafter Tate Letter]. *See also* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 1, at 905-06.

declaration, the State Department expressed its opinion that the increasing practice of governments engaging in commercial activities made it necessary for persons doing business with them to be afforded an opportunity to have their rights determined in court.[38] It further opined that it was vital to remove politics from immunity determinations so that litigants would be treated equitably and predictably.[39] In practice though, these "suggestions of immunity" were still commonly influenced, directly or indirectly, by diplomatic considerations.[40]

C. *Commercial v. Governmental Activities*

A major problem of the restrictive principle of sovereign immunity was determining which acts of a sovereign were commercial and which were governmental. There were no specific guidelines for a court to follow.[41] An early test used for determining when an act was commercial was "the purpose of the act" test, whereby only those acts that have a public purpose would be immune from judgment in the United States. For example, a United States court using the "purpose" test, held that a government's contracting to purchase shoes and other equipment for its army was an exercise of its sovereign function, and thus for a public purpose, entitling that government to sovereign immunity.[42] The "purpose" test creates several difficulties, perhaps the greatest being that each nation's view of trade is different. In nations with socialist economies, where foreign trade is considered to be an inherently sovereign activity, all acts of the state could be construed to be for a public purpose, which would defeat the principle behind the restrictive theory.[43] In addition, if a court must examine an act to determine whether it has a public purpose, judges would be forced to rely upon their "personal

38. Tate Letter, *supra* note 37.

39. Tate Letter, *supra* note 37.

40. Leigh, *Sovereign Immunity — The Case of the "Imias,"* 68 AM. J. INT'L L. 280 (1974).

41. Guidelines for determining the difference between commercial and sovereign acts were conspicuously left out of the Tate Letter since it was only a declaration of policy, rather than a statute.

42. Kingdom of Romania v. Guaranty Trust Co., 250 F.2d 341, 345 (2d Cir. 1918), *cert. denied*, 246 U.S. 663 (1918).

43. Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) (arguing that applying the "purpose" test could theoretically destroy the commercial exception to foreign sovereign immunity).

notions about the proper realm of state functioning."[44] Thus, the "purpose" test has proved unsatisfactory.

In 1964 the Court of Appeals for the Second Circuit made an attempt to distinguish between commercial acts and sovereign acts by developing its own test. In *Victory Transport, Inc. v. Comisaria General de Abastecimientos Y Transportes*,[45] the court observed that other countries' concerns for individual rights and the simultaneous growth of governmental participation in traditionally private activities caused them to adopt the restrictive theory.[46] Here the court's test limited sovereign immunity to five categories of "public acts:" "(1) internal administrative acts, such as expulsion of an alien; (2) legislative acts, such as naturalization; (3) acts concerning the armed forces; (4) acts concerning diplomatic activity; and (5) public loans."[47] Most courts followed the *Victory Transport* test until the passage of the FSIA.[48]

Despite the movement toward the restrictive theory in cases

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44. *Victory Transp.*, 336 F.2d at 359. For a discussion of *Victory Transp.*, see Comment, *Judicial Adoption of Restrictive Immunity for Foreign Sovereigns*, 51 VA. L. REV. 316, 321 (1965).

45. 336 F.2d 354 (2d Cir. 1964). In *Victory Transport* a branch of the Spanish Ministry of Commerce chartered a ship from the plaintiff, Victory Transport, with the agreement that any future disputes would be arbitrated before an arbitration board in New York. The defendant ultimately damaged the ship and refused to pay damages and submit the claim to arbitration. Plaintiff sued in the United States to compel arbitration, and the defendant moved to dismiss on the grounds of sovereign immunity. The Court of Appeals for the Second Circuit adopted the "restrictive" view of sovereign immunity in holding that the defendant's activities were *jure gestionis* or commercial, and it consequently denied the defendant immunity.

46. *Id.* at 357. Because of the marked changes in the nature and function of sovereigns within the previous half-century, "the wisdom of retaining the doctrine [of absolute sovereign immunity] ha[d] been cogently questioned." *Id.* The court also cited the recommendations of the United States Department of State (State Department) as its reason for adopting the restrictive theory. *See supra* notes 37-39 and accompanying text.

47. 336 F.2d at 360.

48. The *Victory Transport* test was followed in the following cases: Aerotrade, Inc. v. Republic of Haiti, 376 F. Supp. 1281 (S.D.N.Y 1974) (where Haiti was granted immunity since the subject matter of the transactions out of which the cause of action arose involved military equipment, even though Haiti used the equipment for nonmilitary purposes); Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1971) (application of the test indicated that a contract for grain was commercial, but immunity was nonetheless granted since the State Department recommended it); Heaney v. Spain, 445 F.2d 501 (2d Cir. 1971) (a contract by a foreign government with a United States citizen to generate adverse publicity against another foreign government with whom they had competing interests constituted a public act concerning diplomatic activity and as such the contracting foreign government was immune from a suit for breach of that contract).

such as *Victory Transport*,[49] United States courts generally remained reluctant to exercise jurisdiction over foreign sovereigns absent a legislative enactment.[50] In response to United States courts' unwillingness to deny immunity, and in an attempt to draw the commercial-governmental distinction, Congress enacted the FSIA.[51]

D. Codification Into Municipal Law: The Foreign Sovereign Immunities Act and "Commercial Activity"

The FSIA sets forth the sole and exclusive standards for resolving questions of sovereign immunity raised by foreign states in United States courts.[52] It is intended to preempt all other state and federal law, excluding pre-existing international agreements,[53] and to supersede any previous standards for according immunity to foreign governments.[54] Congress passed the FSIA to effect, *inter alia*, two immediate purposes: (1) to discontinue the practice of judicial deference to suggestions of immunity from the executive branch;[55] and (2) to codify the restrictive

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49. For an example of a case espousing the restrictive doctrine of sovereign immunity, see Mexico v. Hoffman, 324 U.S. 30 (1945).

50. McCormick, *The Commercial Activity Exception to Foreign Sovereign Immunity and The Act of State Doctrine*, 16 LAW & POL'Y IN INT'L BUS. 477, 485 (1984).

51. In early 1973 the State Department and the Department of Justice undertook a joint effort to standardize immunity determinations in United States courts. The two departments prepared bills that would codify the restrictive doctrine of foreign sovereign immunity and introduced the identical bill in both Houses of Congress. *See* Comment, *The Impact of S.566 on the Law of Sovereign Immunity*, 6 LAW & POL'Y IN INT'L BUS. 179 (1974); Note, *Sovereign Immunity: Proposed Statutory Elimination of State Department Role — Attachment, Service of Process, and Execution — Senate Bill 566, 93d Cong., 1st Sess. (1973)*, 15 HARV. INT'L L.J. 157 (1974). After some debate, Congress passed the FSIA.

52. Annotation, *Modern Status of the Rules as to Immunity of Foreign Sovereign from Suit in Federal or State Courts*, 25 A.L.R. 3d § 21 (Supp. 1990).

53. 28 U.S.C. § 1604 (1988). Under the FSIA, "[a]ll immunity provisions in sections 1604 through 1607 are made subject to 'existing' treaties and other international agreements to which the United States is a party. In the event an international agreement expressly conflicts with this bill, the international agreement would control." *See* H.R. REP. No. 1487, *supra* note 10, at 17, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6604, 6616.

54. H.R. REP. No. 1487, *supra* note 10, at 17, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6604, 6616.

55. H.R. REP. No. 1487, *supra* note 10, at 12, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6610. The legislative history expressly states that the FSIA would accomplish four basic objectives: (1) to codify the restrictive principle of sovereign immunity; (2) to depoliticize the determination of immunity by transferring the decision from the executive to the judicial branch; (3) to provide a statutory procedure for service of process and obtaining personal jurisdiction; and (4) to provide for enforcement of judg-

principle of sovereign immunity as recognized in international law.[56] First, the removal of the executive branch from jurisdictional issues would reduce the foreign policy considerations inherent in immunity decisions and therefore assure due process for all litigants.[57] Then, by codifying the restrictive principle of sovereign immunity, the FSIA would bring uniformity and predictability to the private individuals who were dealing with foreign sovereigns.[58] Overall, the FSIA constituted a formal recognition of the need to balance the rights and privileges of the individual against the interests of the foreign sovereign as well as the United States.

Under the FSIA, "foreign state[s] [are] immune from the jurisdiction of the courts of the United States," subject to specified exceptions.[59] The most important exception — the commercial activities exception — denies sovereign immunity for actions by a foreign government that are based on commercial activities.[60] Thus, the restrictive theory of sovereign immunity is embodied in the FSIA in terms of the traditional sovereign-commercial dichotomy.

The FSIA defines a commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act."[61] Moreover, the statute requires that the commercial character of an activity be determined by reference to the *nature* of the conduct rather than by reference to its *purpose*.[62] Thus, the United States, through the FSIA, has adopted the "nature" test for determining commercial activity. According to the Act, the nature test means "the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial *nature* of an

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ments. *Id.* at 7-8, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6605-06.

56. H.R. REP. No. 1487, *supra* note 10, at 7, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6605.

57. H.R. REP. No. 1487, *supra* note 10, at 10, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6606.

58. H.R. REP. No. 1487, *supra* note 10, at 7, 13, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6605, 6611.

59. 28 U.S.C. § 1604 (1988).

60. 28 U.S.C. § 1605(a)(2) states that: "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the [s]tates in any case . . . (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state." *Id.* at § 1605(a)(2).

61. *Id.* at § 1603(d).

62. *Id.*

activity or transaction that is critical."[63] This test effectively eliminates assertions of foreign states that their commercial conduct is immune because such conduct serves a public function.

The legislative history of the nature test is equally clear. It states that an action on a contract is based on a commercial activity even if the ultimate object of the contract is a public function.[64] Therefore, conduct such as purchasing cement for military purposes[65] or contracting to buy provisions and equipment to make repairs on an embassy building[66] would constitute commercial activity under this standard, regardless of the potential governmental purpose for these activities.[67]

E. Application of the Commercial Activities Exception by United States courts

In practice, the FSIA has allowed private parties the opportunity to have claims arising out of the commercial activities of foreign governments adjudicated without creating serious diplomatic repercussions.[68] In fact, the FSIA has had a significant impact on international practice; countries such as the United Kingdom,[69] Canada,[70] and several other countries[71] have enacted statutes which apply the same basic principles. However, the FSIA itself has also been criticized. In a frequently cited opin-

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63. H.R. REP. No. 1487, *supra* note 10, at 16, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6615 (emphasis added). This view or a similar view has been adopted by several other countries including Great Britain. *See* State Immunity Act, 1978, ch. 35, *reprinted in* 17 I.L.M. 1123; *see also infra* notes 69-71 and accompanying text.

64. H.R. REP. No. 1487, *supra* note 10, at 16, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6604, 6615.

65. *See* Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

66. H.R. REP. No. 1487, *supra* note 10, at 16, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6615. This provision was applied properly in McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341 (8th Cir. 1985), *cert. denied*, 474 U.S. 948 (1985), where the court rejected Iran's claim of immunity in an action relating to a contract for the supply of parts for military aircraft.

67. H.R. REP. No. 1487, *supra* note 10, at 16, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6615.

68. Note, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440, 1443 (1983).

69. State Immunity Act, ch. 35, 1978, *reprinted in* 17 I.L.M. 1123.

70. State Immunity Act, CAN. REV. STAT., ch. 95, (1985).

71. Singapore, State Immunity Act, 1979 *reprinted in* Materials on Jurisdiction Immunities of States and their Property 28, U.N. Doc. ST/Leg/Ser.B/20 (1982); Pakistan, State Immunity Ordinance, 1981 *reprinted in id.* at 20; South Africa, Foreign State Immunities Act, 1981 *reprinted in id.* at 34; Australia, Foreign State Immunities Act, 1985 *reprinted in* 25 I.L.M. 715 (1986).

ion, the court in *Gibbons v. Udaras na Gaeltachta*[72] observed:

> [T]he Foreign Sovereign Immunities Act of 1976 . . . [is a] statutory labyrinth that, owing to the numerous interpretive questions engendered by its bizarre structure and its many deliberately vague provisions, has during its brief lifetime been a financial boon for the private bar but a constant bane of the federal judiciary.[73]

A major criticism of the FSIA and its commercial activities exception has been the inadequacy of the definition of commercial activity. While the FSIA requires courts to refer only to the nature of a transaction, rather than its purpose, "the absence of further indication as to the factors relevant for the necessary determination leaves the content of the definition highly uncertain."[74] Originally Congress intended a broad definition of the commercial activities exception, in order to permit the courts a degree of flexibility from case to case.[75] However, in many instances the standard has become so flexible that United States courts, in factually similar cases, have inconsistently applied the commercial activities exception and its nature test. Thus, although the FSIA is clear that the commercial character of an activity is to be determined by reference to the nature of the conduct,[76] many courts have continued to analyze the ultimate purpose of a transaction.

In *De Sanchez v. Banco Central De Nicaragua*[77] the Court of Appeals for the Fifth Circuit (Fifth Circuit) disregarded the nature test in holding that a government bank's refusal to honor a check on the country's foreign exchange reserves was not a commercial activity.[78] Here, the Fifth Circuit admitted that it relied on the motivating purposes behind Banco Central's sale of dollars. The court explained that the purpose behind the particular conduct can actually define its nature,[79] and therefore, when the activity took place, the bank was "wearing its sover-

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72. 549 F. Supp. 1094 (S.D.N.Y. 1982).

73. *Gibbons*, 549 F. Supp. at 1105.

74. Delaume, *Public Debt and Sovereign Immunity: The Foreign Sovereign Immunities Act of 1976*, 71 AM. J. INT'L L. 399, 404 (1977).

75. H.R. REP. No. 1487, *supra* note 10, at 16, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6615.

76. 28 U.S.C. § 1603(d) (1988).

77. 770 F.2d 1385 (5th Cir. 1985).

78. *De Sanchez*, 770 F.2d at 1393-94.

79. *Id.* at 1393.

eign rather than commercial hat."[80] The court applied a confused interpretation of the FSIA and its legislative history, and was clearly wrong to examine the purpose of Banco Central's conduct. One rationale for its refusal to apply the nature test has been that the court may have been influenced by the recent strain of relations between Nicaragua and the United States at that time, and it thus upheld immunity for purely political reasons.[81]

United States courts have especially had difficulty in disregarding the purpose of a transaction that involves the administration of natural resources.[82] In *MOL, Inc. v. Peoples Republic of Bangladesh*,[83] the court failed to apply the nature test to a dispute about a contract that required the government of Bangladesh to export monkeys to a United States company. The Court of Appeals for the Ninth Circuit (Ninth Circuit) concluded that the revocation of the agreement was a sovereign act and that Bangladesh was immune from suit. In the court's words:

> Bangladesh was terminating an agreement that only a sovereign could have made. This is not just a contract for trade of monkeys. It concerned Bangladesh's right to regulate imports and exports, a sovereign prerogative . . . . It concerned Bangladesh's right to regulate its natural resources, also a uniquely sovereign function . . . . A private party could not have made such an agreement.[84]

The court's reasoning, however, that a private party could not have made this sort of agreement, appears to frustrate the intent of Congress. Private parties do not normally raise armies, nor do they regulate the exports of natural resources, but they do contract for the purchase and sale of goods. If the *MOL* decision is followed, there will be no security of contract with foreign governments for the purchase of oil, metals, or other raw pri-

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80. *Id.* at 1394.

81. For a more complete criticism of *De Sanchez*, see Comment, *De Sanchez v. Banco Central De Nicaragua: Too Many Exceptions to the Commercial Activities Exception of the Foreign Sovereign Immunities Act of 1976?*, 14 BROOKLYN J. INT'L L. 715 (1988).

82. *See generally* Delaume, *Economic Development and Sovereign Immunity*, 79 AM. J. INT'L L. 319 (1985).

83. 736 F.2d 1326 (9th Cir. 1984), *cert. denied*, 469 U.S. 1037 (1984).

84. *MOL*, 736 F.2d at 1329.

mary commodities.[85]

The *MOL* court erred in considering the purpose of the transaction in its decision since the nature of the transaction was private and commercial. Thus, the court should have denied immunity. The *MOL* case, therefore, is a perfect illustration of the difficulty in attempting to "fit complex issues into pat phrases such as 'nature' and 'purpose' of the transaction."[86] The court simply denied it was looking at the purpose of the agreement.

Courts have also failed to ignore the political implications in making FSIA determinations. This is especially evident, again, in the context of natural resources. In *International Association of Machinists & Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*,[87] consumers of oil and gas sued the member states of OPEC in an antitrust action for controlling the production and price of oil. The district court found that the price-fixing activities of the defendant states were not commercial, and that the states were therefore entitled to the defense of sovereign immunity.[88] The court described the actions of OPEC as involving regulation of natural resources and held that exercise of such control over those resources is a sovereign activity.[89]

The court's finding that the OPEC states' activities were not commercial runs contrary to the legislative history of the FSIA. Indeed, upon appeal, the Ninth Circuit implicitly recognized that the acts were commercial. The court observed that "[t]he control of natural resources is the *purpose* behind OPEC's actions, but the act complained of here is a conspiracy to fix prices," which is commercial in nature.[90] The FSIA instructs us to look upon the *act itself* rather than underlying sovereign motivations.[91] The court affirmed the lower court's disposition of the case, however, because it found that the act of state doctrine applied.[92]

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85. Feldman, *supra* note 26, at 309.

86. Feldman, *supra* note 26, at 309.

87. 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

88. *IAM*, 477 F. Supp. at 564-70.

89. *Id.* at 567.

90. *IAM*, 649 F.2d at 1358 (emphasis added).

91. 28 U.S.C. § 1603(d) (1988) (emphasis added).

92. *IAM*, 477 F. Supp. at 567. The act of state doctrine is a judicial abstention principal based largely on separation of powers considerations, and on the presumed inability

Presumably, the court in *IAM v. OPEC* was influenced by the obvious political sensitivity of dragging OPEC into a United States court. This is evidenced by the fact that one year earlier in *Outboard Marine Corp. v. Pezetel*,[93] a factually similar antitrust suit against a Polish state-owned manufacturer of golf carts, a Delaware district court held that the foreign state had engaged in commercial activities and therefore could not avail itself of the defense of sovereign immunity.[94] The overriding judicial concern for the politically sensitive nature of the dispute in the *IAM* case is apparent as dealing in oil *is* a commercial activity under the FSIA. The production and distribution of oil is no more sovereign than is the production and distribution of golf carts, and thus, it must have been the political pressures inherent in a suit against OPEC which caused the *IAM* court to grant immunity, while the *Outboard Marine* court denied such immunity to a state-owned manufacturer. Under the FSIA, the *IAM* court was clearly wrong to have granted the OPEC states immunity.

One of the original purposes of the FSIA was to "depoliticize" all immunity determinations by removing them from the executive branch and placing them with the judiciary so that immunity will be granted on purely legal grounds.[95] If the FSIA is to function equitably, the courts must apply the commercial activities exception to all foreign sovereigns in all circumstances equally.

The commercial activities exception was codified in the United States for the basic purposes of "depoliticizing" and "regularizing" judicial applications of the restrictive doctrine of sovereign immunity.[96] In general, the FSIA's failure to set a stringent standard of what constitutes a commercial activity has allowed courts the freedom to consider both the purpose of an activity and to be swayed by political ramifications in denying immunity. Thus, many courts have failed to interpret and apply this doctrine and its nature test with consistency. The case of

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of United States courts to judge the official acts of foreign countries, due to the lack of clear standards. *See, e.g.*, De Sanchez v. Banco Central De Nicaragua, 770 F.2d 1385, 1389 (5th Cir. 1985).

93. 461 F. Supp. 384 (D. Del. 1978).

94. *Outboard Marine Corp.*, 461 F. Supp. at 394-95.

95. H.R. REP. No. 1487, *supra* note 10, at 7, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6606.

96. H.R. REP. No. 1487, *supra* note 10, at 7, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6606. *See supra* notes 55-58 and accompanying text.

Millen Industries, Inc. v. Coordination Council for North American Affairs[97] represents yet another attempt to define commercial activity. However, like the cases before it, the District of Columbia Circuit failed to apply the correct nature test, and thus it granted immunity to the government of Taiwan when such a privilege was not warranted.

III. *MILLEN INDUSTRIES, INC. V. COORDINATION COUNCIL FOR NORTH AMERICAN AFFAIRS*

A. Facts

Millen Industries, Inc. (Millen) is a leading manufacturer of shoe boxes in the United States. The CCNAA, is an "instrumentality"[98] of Taiwan, organized for the purpose of soliciting United States persons to establish commercial ventures in Taiwan. In 1978 the CCNAA, acting as "public relations agent and broker" for Taiwan, induced Millen to establish a shoe-box factory in Taiwan by promising: (1) that Millen would have easy access to raw materials and spare parts through Taiwanese customs and (2) that raw materials could be imported duty-free into Taiwan so long as the finished products were used for Taiwan's footwear export trade.[99] However, these promises only gave Millen the benefits of existing Taiwanese law, and no spe-

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97. 855 F.2d 879 (D.C. Cir. 1988). The facts in this case are based on the appellant's amended complaint and were taken as true by the court of appeals for the purposes of this decision. *Millen*, 855 F.2d at 880. The substantive facts of the case were never tried in the district court because the district court dismissed plaintiff's complaint on the grounds that it failed to state claims upon which relief can be granted and alternatively, because its claims are barred by the act of state doctrine. *Id.* The court of appeals decided this case solely on the grounds of jurisdictional questions. The court of appeals then remanded the case to the district court for "further development of the jurisdictional facts and determination of the jurisdictional question." *Id.* at 886.

98. An "instrumentality" of a foreign state is considered a "foreign state" under the FSIA, and thus, is afforded (or denied) immunity under the same principles as the state itself. 28 U.S.C. § 1603(a) (1988). The FSIA defines an instrumentality of a foreign state as any entity:

> (1) which is a separate legal person, corporate or otherwise, and
> (2) 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, and
> (3) which is neither a citizen of a [s]tate of the United States, nor created under the laws of any third country.

Id. at § 1603(b).

99. Brief for the United States as *Amicus Curiae* at 5, Millen Industries, Inc. v. Coordination Council for North American Affairs, 855 F.2d 879 (D.C. Cir. 1988) (No. 87-7075) (citing Appellant's First Amended Complaint ¶¶ 23, 26, 32-35).

cial concessions or benefits that were unavailable to similarly qualified investors.[100]

In reliance on these representations and promises, Millen signed a contract with the CCNAA and organized a Taiwanese corporation, leased machinery to it, obtained all necessary approvals and licenses,[101] and in late 1983, commenced operations of a state-of-the-art shoe-box factory in Taiwan.[102] From the beginning, however, Taiwan, together with the CCNAA, refused to honor its obligations under the contract (1) by obstructing Millen's importation of raw materials and necessary equipment and (2) by cancelling, without notice, all duty exemptions for raw materials.[103] As a result of Taiwan's actions, Millen's plant operated at a loss and closed in 1985.[104] Thereafter, Taiwan did not permit Millen to remove its raw materials and machinery from Taiwan, and the CCNAA acquiesced in this refusal.[105]

Millen sought relief in the District of Columbia Circuit on four causes of action:[106] (1) breach of contract; (2) detrimental reliance;[107] (3) misrepresentation; and (4) conversion.[108] The district court dismissed the suit against the CCNAA because plaintiff's claims "alleged promises relating directly to uniquely sovereign import-export activity" and, therefore, was barred by the act of state doctrine.[109] The district court alternatively held that the complaint alleged no promises at all, and thus, no contract, and therefore, dismissed counts (1), (3), and (4) for failure to

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100. Brief for the United States at 5, *Millen* (No. 87-7075) (citing Appellant's First Amended Complaint ¶¶ 28-29, 36).

101. Brief for the United States at 5, 6, *Millen* (No. 87-7075) (citing Appellant's First Amended Complaint ¶¶ 37-43).

102. Brief for Appellant at 14, Millen Industries, Inc. v. Coordination Council for North American Affairs, 855 F.2d 879 (D.C. Cir. 1988) (No. 87-7075).

103. *Millen*, 855 F.2d at 881. Coordination Council for North American Affairs' (CCNAA) contract with Millen was made under a program implemented by the CCNAA under Taiwanese law, which permitted the CCNAA to make promises to foreign investors like those made to Millen so that it could entice foreign entrepreneurs to start up businesses in Taiwan. The government of Taiwan had been considering cancelling the CCNAA program, at the same time it had been contracting with Millen, and the CCNAA was aware of this. *Id.*

104. Brief for Appellant at 18, *Millen* (No. 87-7075).

105. Brief for the United States at 6, *Millen* (No. 87-7075) (citing Appellant's First Amended Complaint ¶¶ 73-75).

106. There was a fifth count, based on 19 U.S.C. § 2462, but Millen abandoned its appeal of the district court's dismissal of that claim. *Millen*, 855 F.2d at 881 n.2.

107. The district court renamed this claim "promissory estoppel." *Id.* at 881.

108. *Id.*

109. *Id.* For an explanation of the act of state doctrine, see *supra* note 92.

state a claim.[110] Millen appealed to the United States Court of Appeals for the District of Columbia Circuit.

B. The Court of Appeals Decision: Sovereign Immunity Under the FSIA

The court of appeals granted the CCNAA immunity under the FSIA.[111] The court held that although the transaction between Millen and the CCNAA involved both sovereign and commercial elements, the specific promises in the contract, involving extending duty-free status and the benefits of Taiwanese law would be considered sovereign.[112] Therefore, the court of appeals, upon remand, held that the district court should have no subject matter jurisdiction over Millen's breach of contract suit.[113]

The court, in its holding, relied primarily on its own precedent in *Practical Concepts, Inc. v. Republic of Bolivia*,[114] which

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110. The district court claimed that there was no consideration in the Millen Industries-CCNAA contract since Millen was promised only the benefits of existing Taiwanese law. In other words, any similarly qualified American investor allegedly could have applied for these benefits, and received them upon meeting certain criteria. *Id.*

111. The court of appeals held that the district court had erroneously found subject matter jurisdiction to be proper under the alienage diversity statute. *Millen*, 855 F.2d at 883. The court of appeals held that since the CCNAA uses an instrumentality of Taiwan, and since the FSIA applied to Taiwan, the FSIA would be the exclusive basis for jurisdiction. *Id.* at 883-84 (citing MacArthur Area Citizens Ass'n v. Republic of Peru, 809 F.2d 918, 919 (D.C. Cir. 1987)).

The court of appeals removed the case to the district court for the development of additional jurisdictional facts, which would resolve the applicability of the commercial activities exception to the FSIA, specifically whether the CCNAA had provided "easy access . . . for imported machinery and equipment." *Id.* at 885 (suggesting that such a promise could support jurisdiction under the commercial exception on removal). The court reasoned that if subject matter jurisdiction was not proper because of immunity under the FSIA, issues of adequacy of the underlying claim or of the possible application of the act of state doctrine would be moot. *Id.* at 882.

The FSIA, by its terms does apply to an instrumentality of a foreign state, such as the CCNAA. *See* 28 U.S.C. §§ 1603(a), (b) (1988).

112. *Millen*, 855 F.2d at 885.

113. The court did remand the case to the district court for further determinations of jurisdictional facts. The court acknowledged that potentially the allegation that the defendant promised the plaintiff easy access through customs for machinery and equipment could refer not to the essentially governmental activities of customs agents but rather the commercial activity of a commercial "customs expediter." Therefore, the claims based on the breach of that promise may fall within the commercial activities exception, and therefore, should not be dismissed on jurisdictional grounds. *Id.*

114. 811 F.2d 1543 (D.C. Cir. 1987). *Practical Concepts*:

> involved the breach of a technical assistance and consulting services contract between Practical Concepts, Inc. (PCI), an American company, and the Republic of Bolivia. The contract involved a three-year, comprehensive program

established that a court may, in some circumstances, deny jurisdiction over a commercial transaction as long as there are sovereign elements in the contract.[115] *Practical Concepts* also stated that the commerciality of a transaction must be determined by reference to the nature of a transaction rather than to its specific "auxiliary" and "facilitating features,"[116] and therefore, a transaction which is commercial in nature should not give rise to immunity. Nevertheless, the court in that case explicitly reserved the question of the application of the commercial activities exception to a claim that is "based on" sovereign element(s) of a transaction.[117] The same court, in *Millen Industries*, then addressed the question, stating that: "when a transaction partakes of both commercial and sovereign elements, jurisdiction under the FSIA will turn on which element the cause of action is based on. Even if a transaction is partly commercial, jurisdiction will not obtain if the cause of action is based on a sovereign activity."[118]

This holding enabled the court to bifurcate the contract between Millen Industries and the CCNAA thus denying jurisdiction to adjudicate plaintiff's claims based on those elements of the contract that the court believed were sovereign. The court found that although promotion of investment is ordinarily a commercial activity in that private parties commonly act as public relations agents,[119] the right to regulate imports and exports is a sovereign prerogative.[120] Therefore, according to the court's

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of development of Bolivia's rural areas. Although the only contracting parties were PCI and Bolivia, the United States Agency for International Development (AID) was to provide the funding. After AID cut off the funds, Bolivia cancelled the contract PCI sued in federal court in the United States.

Millen, 855 F.2d at 884.

115. *Id.* at 884-85.

116. *Practical Concepts*, 811 F.2d at 1548.

117. In *Practical Concepts*, the Court of Appeals for the District of Columbia Circuit reversed a district court holding that the Republic of Bolivia was entitled to immunity from suit based on the sovereign elements of the transaction between Practical Concepts, Inc. (PCI) and Bolivia. The district court reached its conclusion, relying on certain terms in the PCI-Bolivia contract that only a government could perform. First, Bolivia exempted PCI employees from certain taxes and expedited their immigration and emigration. Also, Bolivia promised not to object if the United States chose to grant PCI diplomatic privileges. The court of appeals reversed because those terms were auxiliary to the essentially commercial nature of the transaction. *Id.* at 1549-50.

118. *Millen*, 855 F.2d at 885.

119. *Id.* (citing, *inter alia*, Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094 (S.D.N.Y. 1982)).

120. *Id.* (citing MOL, Inc. v. Peoples Republic of Bangladesh, 736 F.2d 1326, 1329

rationale, Millen's causes of action based on the CCNAA's breach of promises, as well as other allegedly actionable conduct involving the extension of duty-free status and the benefits of Taiwanese law, were plainly sovereign aspects of the transaction over which the court lacked jurisdiction.[121]

C. *Analysis*

The court's decision in *Millen Industries* is flawed in two respects. First, by "bifurcating" the contract between Millen Industries and the CCNAA, the court contravened the original legislative intent of the FSIA by failing to apply the nature test espoused in the FSIA. Second, the *Millen Industries* court's application of the case law on the commercial activities exception to the facts is clearly insufficient and thus the court's finding that certain elements of the contract were sovereign is incorrect.

1. "Bifurcation" versus the "Nature" Test

In determining whether the relevant activity is commercial or governmental under the FSIA, the analysis must focus on the *nature* of the activity rather than its *purpose*.[122] Thus, the District of Columbia Circuit in *Practical Concepts*[123] was correct in stating that a court, in considering the nature of the transaction, must only consider the essence or character of a transaction, rather than its individual, "auxiliary provisions."[124] Earlier, in *De Sanchez v. Banco Central De Nicaragua*,[125] the Fifth Circuit had held that:

> Congress' intent in instructing us to focus on the nature of an activity rather than on its purpose was to preclude foreign governments from always being able to claim sovereign immunity. Whenever a government enters into the marketplace to buy or sell goods, its purpose ultimately is not to earn profits; in some sense, its motivation is the public good.[126]

The legislature, in enacting the FSIA, did not intend the courts

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(9th Cir. 1984)).

121. *Id.*

122. *See* 28 U.S.C. § 1603(d) (1988); *see also* Callejo v. Bancomer, S.A., 764 F.2d 1101, 1108 n.6 (5th Cir. 1985); *see also supra* notes 62-67 and accompanying text.

123. *Practical Concepts*, 811 F.2d at 1543.

124. *Id.* at 1548.

125. 770 F.2d 1385 (5th Cir. 1985).

126. *De Sanchez*, 770 F.2d at 1393.

to bifurcate a contract into individual provisions. The legislative history is clear that a contract, commercial in *nature*, must be considered commercial under the FSIA, regardless of what goods were covered by the contract.[127]

Moreover, the original theory behind the commercial activities exception is that if a state involves itself in a commercial transaction with a private individual, it is implicitly submitting itself to the jurisdiction of the domestic state.[128] This implied waiver of immunity is considered equitable since a foreign nation that has ventured to contract with a United States citizen has acted as a private enterprise, rather than a sovereign, and should thus be accountable in United States courts for breaches of that contract. The FSIA requires courts to refer to the nature or essence of a course of conduct or particular transaction in an attempt to eliminate the sort of hair-splitting engaged by the District of Columbia Circuit in *Millen Industries*. By bifurcating the Millen Industries-CCNAA contract, the *Millen Industries* court ignored the congressional intent of the statute, and allowed a sovereign to avoid adjudication of its commercial contracts with a United States citizen.

2. Application of the Case Law to the Millen Industries-CCNAA contract

Even if the bifurcation of a commercial contract was consistent with the FSIA's purposes, the *Millen Industries* court still erred in finding that the specific provisions of the contract were sovereign, rather than commercial. The court examined the applicability of its holding by relying on *MOL, Inc v. Peoples Republic of Bangladesh*,[129] and by stating that the CCNAA's promises of duty-free treatment were immune from judicial scrutiny because they related to an import-export policy which was a uniquely "sovereign prerogative."[130] *MOL*, however, is a deeply flawed and highly criticized decision.

In *MOL*, the government of Bangladesh terminated an

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127. Such a contract is presumed to be commercial even if the ultimate object of the contract is a public function. H.R. REP. No. 1487, *supra* note 10, at 16, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6604, 6615. *See infra* notes 128-34 and accompanying text, regarding the unimportance of the fact that a contract is made for the purchase or sale of a natural resource.

128. J. BRIERLY, *supra* note 21, at 249. *See supra* note 26 and accompanying text.

129. 736 F.2d 1326 (9th Cir. 1984), *cert. denied*, 469 U.S. 1037 (1984).

130. *Millen*, 855 F.2d at 885.

agreement that gave a United States company a ten year license to capture and export rhesus monkeys from Bangladesh for medical research. In a suit for breach of that contract, the Ninth Circuit held that Bangladesh was merely "regulating its natural resources, . . . a uniquely sovereign function"[131] and it thus granted immunity to the foreign sovereign. However, this holding ignored the strict language of the nature test. The breach of contract here was a commercial transaction by nature, but the court nevertheless considered the *purpose* of Bangladesh's actions — the regulation of its natural wildlife. The *MOL* decision contravened the FSIA, and it has consequently been criticized by some commentators as a poor decision.[132] Thus, the District of Columbia Circuit should not have relied on its precedent in *Millen.*

The court should have instead adopted the same reasoning of *Gibbons v. Udaras na Gaeltachta,*[133] which provides a strikingly similar case to *Millen Industries.* In *Gibbons*, an "instrumentality" of Ireland (IDA) enticed the plaintiffs to invest in Ireland for capital grants and various tax incentives. After building a factory pursuant to their agreement with IDA, plaintiffs never received their benefits and sued in the United States. In denying IDA's motion to dismiss, the district court said:

> While it may well be, as defendants argue, that IDA exists in order to serve a *purpose* integral to the Irish government's plans for Ireland's economic development, the promotional activities that IDA generally performs and allegedly engaged in here are, *by nature*, no different at all from the promotional activities engaged by a private public relations firm.[134]

Thus, the court found that IDA's activity was commercial in nature, and denied Ireland immunity.

The *Millen Industries* court, however, dismissed the *Gibbons* holding without much discussion. Although the *Gibbons* case is not direct legal precedent for the case at bar,[135] the former case provides the correct analysis of immunity under the FSIA. The CCNAA's liability for breach of its representations to Millen based upon its promotional activities is no different from

131. *MOL*, 736 F.2d at 1329.
132. *See* Feldman, *supra* note 26, at 309.
133. 549 F. Supp. 1094 (S.D.N.Y. 1982).
134. *Gibbons*, 549 F. Supp. at 1110-11 (emphasis in original).
135. *See supra* note 132.

that of IDA in *Gibbons*. By applying the nature test, the *Gibbons* court correctly denied immunity to a foreign sovereign for its breach of contract. If the *Millen* court had scrutinized the case law more closely and applied the correct nature test, it would have found that the provisions of the Millen Industries-CCNAA contract to be commercial in nature. It then should have taken jurisdiction over Millen's claims against CCNAA.

IV. Proposed Amendment to the FSIA

The bifurcation of the Millen Industries-CCNAA contract in the *Millen Industries* case represents merely another court's attempt to define "commercial activity" with respect to the commercial activities exception to the FSIA. However, neither the *Millen Industries* case, nor many of the previous cases have been able to accomplish this goal satisfactorily. In general, United States courts' application of the FSIA's exceptions to sovereign immunity have exhibited a pattern of inconsistency.

The holdings in cases such as *Millen Industries* are so troublesome that it may be prudent to amend the FSIA to provide a workable definition. Although some commentators have suggested that sovereign immunity in its entirety should be abolished,[136] this Comment does not suggest such a drastic proposal. There still remain persuasive legal and traditional reasons for retaining some sense of sovereign immunity.[137]

This Comment suggests an amendment that would provide adjudication of *all claims of breach of contract* which is performed partly or wholly in the United States. The sovereign immunities statute enacted in the United Kingdom espouses jurisdiction primarily on this basis. The United Kingdom State Immunity Act of 1978[138] establishes the jurisdiction of the English courts with respect to all contracts that are to be performed in the United Kingdom, in whole or in part, and other commercial transactions, entered into by a state.[139] Amending

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136. *See generally* Bazyler, *Abolishing the Act of State Doctrine*, 134 U. Pa. L. Rev. 325 (1986).

137. *See supra* notes 21-23, 31-33 and accompanying text.

138. State Immunity Act, ch. 35, 1978, *reprinted in* 17 I.L.M. 1123.

139. *Id.* at ch. 33 § 3(1) (a) and (b). Section 3 of the State Immunity Act of 1978 states that:

> (1) A [s]tate is not immune as respects proceedings relating to —
>
> (a) a commercial transaction entered into by the [s]tate; or
>
> (b) an obligation of the [s]tate which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the

the FSIA to reflect this more restrictive view of sovereign immunity would be more fair to United States citizens investing abroad, while retaining the FSIA's original purposes and goals.

Indeed, one of the original framers of the FSIA has stated that the commercial activities exception was intended "to encompass all international trade and banking transactions with the United States."[140] In retrospect, the framer has written, "it would have been far better to provide for adjudication of all claims for breach of contract which have the requisite contacts with the jurisdiction."[141] Even though the Act was intended to include all contracts, courts have not followed such intent, and therefore an amendment is necessary.

Perhaps the following definitions can be utilized to provide a more consistent standard for making commercial activity determinations:

> "Commercial activity" includes any commercial transaction, including all contracts and trade that are commercial in nature.
> "Commercial transaction" means:
> (a) any contract for goods, services or money
> (b) any other transaction into which the foreign state enters other than in its sovereign capacity.

This test may still require a court to determine if a particular act is commercial or sovereign. However, it severely restricts grants of immunity to cases that do not involve commercial contracts or trade. Under this test, any contract or trade would be, by definition, commercial, and therefore, subject to adjudication in the United States.

It is clear that the FSIA intended that every contract for

United Kingdom.

(3) In this section "commercial transaction" means —

(a) any contract for the supply of goods or services;

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a [s]tate enters or in which it engages otherwise than in the exercise of sovereign authority;

but neither paragraph of subsection (1) above applies to a contract of employment between a [s]tate and an individual.

State Immunity Act of 1978, ch. 33, *reprinted in* 17 I.L.M. 1123, 1124.

140. Feldman, *supra* note 26, at 317.

141. Feldman, *supra* note 26, at 309.

the sale of goods and services be deemed a commercial activity under the FSIA's commercial activities exception.[142] This amendment would define every contract that involves a foreign state's entry into the international marketplace as a commercial act. By amending the FSIA, the courts will be more apt to follow the original intent of Congress, and the decisions of the courts will be more consistent, creating more certainty for American businesses investing abroad. Although critics may argue that it intrudes on traditional notions of sovereignty, such an amendment is necessary in today's world. Markets have become more international, and governments have entered the market as private players. Therefore, the sensitivities of a foreign state should not stand in the way of the administration of justice where there is an uncompensated breach of contract and the foreign state seeks the benefits of United States markets. Application of sovereign immunity in those circumstances would frustrate the administration of justice and the intent of Congress.

V. CONCLUSION

The development of the restrictive principle of sovereign immunity left unresolved the problems of its application. The major flaw in the FSIA is that it fails to lay down specific guidelines for making the commercial-sovereign determination under the commercial activities exception. The statute requires courts to make immunity determinations, based on the nature and not the purpose of a transaction.[143] However, a majority of courts remain confused in their analysis,[144] and no court has yet adequately narrowed the definition of "commercial activity," provided in section 1603, to give courts a consistent model to follow. This author's proposed amendment to the FSIA seeks to balance the concepts of due process and predictability for domestic plaintiffs while incorporating traditional notions of comity and sovereign immunity, albeit in a more restrictive fashion. Such an amendment, if enacted, would undoubtedly alleviate much of

142. Feldman, *Amending the Foreign Sovereign Immunities Act: The ABA Position*, 20 INT'L LAW. 1289, 1290 (1986); *see also supra* notes 119-26 and accompanying text.

143. 28 U.S.C. § 1603 (d) (1988).

144. *See supra* notes 68-96 and accompanying text.

the inconsistency in interpretation of the commercial activities exception in the courts.

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