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"Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they often end by enslaving it." [1]
– Justice Benjamin N. Cardozo (1926)

Abstract

The act of state doctrine is a principle of federal common law that requires courts to assume the legal validity of the acts of foreign governments unless an exception applies. This Note argues that one such exception, the commercial activity exception, originally recognized only by a plurality of the Supreme Court in *Alfred Dunhill of London v. Cuba*, has been adopted *sub silentio* by the lower federal courts through application of *W. S. Kirkpatrick v. Environmental Tectonics*'s "official act requirement," despite a nominal circuit split regarding its applicability.

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1. Berkey v. Third A. R. Co., 155 N.E. 58, 61 (N.Y. 1926).

I. Introduction

Even since its inception, the act of state doctrine has perplexed courts, jurists, and states. Perhaps the first-recorded instance of its application in Anglo-American jurisprudence, *Blad v. Bamfield*,[2] can serve both to highlight its conceptual and procedural difficulty and to shed light on its modern function. In 1674, English subject Bamfield was fishing off the coast of Iceland when Danish subject Blad seized Bamfield's boat for violating a fishing patent – a form of monopoly – which the King of Denmark had granted to Blad.[3] After losing his ship, Bamfield brought a common-law suit against Blad for "trespass and trover."[4] Blad responded by seeking an injunction in the English High Court of Chancery to stay the common-law proceeding.[5] Bamfield defended that his private injury was "done with some kind of affront to and contempt of the English nation," and that Bamfield, as an English subject, had a right to fish in Danish territories under an English treaty with Denmark, and that if the Danish government had violated that treaty by granting a fishing

2. *See* Blad v. Bamfield (1674) 36 Eng. Rep. 992, 993; 3 Swans. 605, 606-607.

3. *Id.* at 992.

4. *Id.*

5. *Id.*

monopoly to a Danish subject, that grant was illegal.[6] Thus, Bamfield's legal and equitable argument rested on the invalidity the Danish King's letters patent.

Lord Nottingham recognized that at first glance, there "never was any cause [of action] more properly before the Court."[7] The common-law claim appeared to merely assert a private injury "fit to be left to a legal discussion," but, upon review, when Bamfield suggested that the treaty between England and Denmark had invalidated the Danish King's grant of the fishing monopoly to Blad, Bamfield had asserted a claim "of vast consequence to the public" that had transformed an ordinary case between two private individuals into "a case of state."[8] On this basis, Lord Nottingham declared that it would be "monstrous and absurd" for a court to "pretend to judge the validity of the [Danish] King's letters patent in Denmark."[9] As a result, Lord Nottingham allowed Blad a perpetual injunction to stay Bamfield's common-law suit.[10]

6. *Id.*

7. *Blad*, 36 Eng. Rep. at 992.

8. *Id.* at 992-993. Lord Nottingham reasoned *vis-à-vis* a flipped hypothetical: suppose that a *Danish* fisherman had been fishing in an *English* territory in contravention of English law, and that English subjects had duly enforced that English law against the Danish fisherman. If Danish courts permitted the Danish fisherman to successfully bring a private action against the English subjects for simply following the laws of England, that would lead to a reciprocal "rupture" of good faith between the two nations.

9. *Id.* at 993.

10. *Id.* Some scholars contend, however, that *Blad v. Bamfield* is better understood as an application of the prevailing 17th century English conflict of laws principle, *lex loci delicti commissi*, or "the law of the place of the injury." Under this principle, the court applies the law of the place of the injury. Since the injury was the seizure in Denmark, Danish law would apply, and since the King of Denmark's patent was legally valid under Danish law, Bamfield's defense would have been non-actionable even in an English court. However, British Supreme Court Justice David L. Jones accurately notes that the actual seizure occurred in international waters, not under Danish jurisdiction, and so would be governed by English admiralty law, not Danish law. *See* David L. Jones, *Act of Foreign State in English Law: The Ghost Goes East*, 22 Va. J. Int'l L. 433, 437 n.16 (1982).

Blad v. Bamfield exhibits a typical, although by no means universal, act of state fact-pattern.[11] The classic American formulation of the doctrine was stated by the Supreme Court in *Underhill v. Hernandez* as the principle that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."[12] It can be useful to think of the core principle embodied by the act of state doctrine as the international inverse of *Marbury v Madison*,[13] in that American courts have the power to adjudge the legality of the acts of the American government, but lack that power over the acts of *foreign* governments.[14] The former acts are reviewable by way of judicial review, the latter are unreviewable under the act of state doctrine.[15]

Thus, act of state issues arise when a court is asked to adjudicate a claim, but in so doing, the court would be required to consider the legal validity of an act of a foreign government, such as a grant of a trade monopoly,[16] the expropriation of a piece of art,[17] the nationalization decree of an important state

11. *See* Jones, *supra* note 10, at 437.

12. Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

13. 5 U.S. (1 Cranch) 137 (1803).

14. *See* Neil J. Kleinman, *The Act of State Doctrine – From Abstention to Activism*, 6 U. Pa. J. Int'l. L. 115, 115 (1984) ("A distinctive attribute of the U.S. federal courts is their power to define and limit their own authority. The act of state doctrine is one expression of this power, used by the courts to limit their authority in matters involving foreign governments.").

15. This Note will show in Section II that Chief Justice Marshall crafted the act of state based on similar principles of the constitutional competency and balance of authority between the executive and judicial branches. *See* discussion *infra* Section II.A.

16. *See Blad*, 36 Eng. Rep. at 993.

17. *See, e.g.*, Stroganoff-Scherbatoff v. Weldon, 420 F. Supp. 18, 21 (S.D.N.Y. 1976).

resource,[18] or the breach of a commercial debt, bailment, or other contractual obligation.[19]

Importantly, as *Blad v. Bamfield* demonstrates, act of state concerns often arise even when a state is not a party to the case.[20] This feature of the act of state doctrine is a key distinguishing characteristic between the act of state doctrine and its jurisprudential cousin, foreign sovereign immunity.[21] The distinction is important, but technical: the Foreign Sovereign Immunity Act of 1976 creates subject-matter immunity from the jurisdiction of an American court.[22] Under the FSIA, if the United States has entered an existing international agreement with a

18. *See, e.g.*, Sea Breeze Salt, Inc. v. Mitsubishi Corp., 899 F.3d 1064, 1072-75 (9th Cir. 2018) (discussing the consequences of deciding upon an action which, if successful, would require the court to order Mexico how to deploy its national salt resources); Int'l Ass'n of Machinists & Aerospace Workers v. Org. of Petroleum Exporting Countries, 649 F.2d 1354, 1361 (9th Cir. 1981) ("the granting of any relief would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources.").

19. *See, e.g.*, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 705 (1976) (discussing the validity of Cuban instrumentality's repudiation of commercial debt obligation); de Csepel v. Republic of Hung., 714 F.3d 591, 598 (2013) (discussing Hungary's breach of a bailment agreement in the context of appropriation of artwork); World Wide Min. v. Republic of Kaz., 296 F.3d 1154, 1166 (D.C. Cir. 2002) (discussing Kazakhstan's denial of an export license).

20. *See Blad*, 36 Eng. Rep. at 992-993.

21. *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 762 (1972). Justice Rehnquist recognized that the act of state doctrine and foreign sovereign immunity both trace their jurisprudential underpinnings back to Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116, 146 (1812) ("the general inability of the judicial power to enforce its decisions in cases of this description . . . that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion . . . ").

22. 28 U.S.C. § 1604 ("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 States except as provided in sections 1605 to 1607 of this chapter.").

responding state party, then the foreign state may raise a 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction.[23] Therefore, foreign sovereign immunity only applies if the defendant asserts a lack of subject-matter jurisdiction. The act of state doctrine, on the other hand, is a substantive defense raised as a legal argument for granting a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted or at summary judgement.[24] The act of state doctrine defense is more broadly applicable because even non-state actors can seek its protection if the adjudication of the suit would somehow call into question the validity of any foreign state's acts, "not merely those of the named defendants."[25] Thus, invoking the act of state doctrine forces the reviewing court to contemplate whether deciding the case at bar would necessarily require the court to declare the act of another state invalid.[26] Professor John Harrison[27] explained that "the act of state principle requires that American courts give to foreign official acts in foreign sovereign territory the juridical force that those acts purport to have."[28]

23. Fed. R. Civ. P. 12(b)(1) ("[A] party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction.").

24. *Id.* ("[A] party may assert the following defenses by motion: . . . (6) failure to state a claim upon which relief can be granted."); Fed. R. Civ. P. 56(a) ("The court shall grant summary judgement if the movant shows that . . . the movant is entitled to judgement as a matter of law.").

25. Callejo v. Bancomer, 764 F.2d 1101, 1115–16 (5th. Cir. 1985).

26. W. S. Kirkpatrick & Co. v. Env't Tectonics Corp., 493 U.S. 400, 405 (1990) ("In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory.").

27. James Madison Distinguished Professor of Law, University of Virginia.

28. John Harrison, *The American Act of State Doctrine*, 47 Geo. J. Int'l L. 507, 508 (2016). Other scholars dispute that the territorial limitation is binding. *Cf.* Joseph W. Dellapenna, *Deciphering the Act of State Doctrine*, 35 Vill. L. Rev. 1, 62 (1990) ("While the [territorial] proposition has never been questioned in the Supreme Court, neither has it ever actually been applied there—it remains mere dictum.").

But where does this lofty "principle of decision" come from if no statute authorizes it and it is "compelled by neither international law nor the Constitution?"[29] The doctrine lives as a quirk of federal common law.[30] Traditionally, of course, a court sitting in diversity[31] applies the substantive state law of the state in which it sits.[32] But the Court has recognized the act of state doctrine as "federal-court-built" substantive law and has explained that "principles formulated by federal judicial law have been thought by this Court to be necessary to protect uniquely federal interests."[33]

In 1976, a plurality of the Supreme Court recognized an exception to the act of state doctrine for commercial activity, writing that "that the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities."[34] The Court concluded that Congress had excepted commercial activity from the FSIA, thereby granting the judiciary jurisdiction over foreign states engaging in commercial activity affecting the U.S.[35] Thereby, the Court reasoned that the law should ensure that foreign state defendants could not escape scrutiny by asserting the act of state doctrine as a defense for acts over which the FSIA authorized the court to exercise jurisdiction.[36]

The most recent Supreme Court case to address the act of state doctrine, *W.S. Kirkpatrick & Co. v. Environmental*

29. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964).

30. Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 Nw. U. L. Rev. 585, 599-602 (2006); *see* Ingrid Wuerth, *The Future of Federal Common Law of Foreign Relations*, 106 Geo. L. J. 1825, 1835 (2018).

31. Suits against foreign nationals, foreign states, their political subdivisions, and their instrumentalities fall under the court's diversity jurisdiction. 28 U.S.C. § 1332(a); 28 U.S.C. 1603(a).

32. *See* Erie R.R Co. v. Tompkins, 304 U.S. 64, 78 (1938).

33. *Sabbatino*, 376 U.S. at 426-427.

34. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695 (1976).

35. 28 U.S.C. § 1605(a)(2).

36. *Dunhill*, 425 U.S. at 698-699.

Tectonics Corp.,[37] provided two main justifications for the application of the act of state doctrine.[38] Originally, the Court grounded the decision out of respect for international comity.[39] The Court later viewed the act of state doctrine as inherent in the separation of powers between the judicial branch's authority to make case-by-case adjudications and the executive branch's authority over foreign affairs.[40] However, the Court held that "[a]ct of state issues only arise when a court must decide – that is, when the outcome of the case turns upon – the effect of *official* action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine."[41] Since the Court decided *Kirkpatrick* in 1990,[42] lower courts have inconsistently applied the act of state doctrine to cases involving the commercial activity of foreign states and their instrumentalities because the Court left it unclear precisely how *Kirkpatrick* relates to *Dunhill.*[43] As recently as 2019, the Seventh Circuit highlighted that the Supreme Court had left unanswered the question of when the policy purposes underlying the doctrine will justify refusing to

37. W. S. Kirkpatrick & Co. v. Env't Tectonics Corp., 493 U.S. 400, 401 (1990).

38. *Id.* at 404 ("We once viewed the doctrine as an expression of international law, resting upon 'the highest considerations of international comity and expediency[.]' We have more recently described it, however, as a consequence of domestic separation of powers." (quoting Oetjen v. Cent. Leather Co., 246 U.S. 297, 303-304 (1918))).

39. *Id. Compare* Hilton v. Guyot, 159 U.S. 113, 163–64 (1895) (the Court defines international comity as "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.") *with* William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071, 2078 (2015) ("international comity is deference to foreign government actors that is not required by international law but is incorporated in domestic law.").

40. *W. S. Kirkpatrick*, 493 U.S. at 404-405. *See generally* Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 Yale. L. J. 1170 (2006).

41. *W. S. Kirkpatrick*, 493 U.S. at 406 (emphasis added).

42. *See generally id.*

43. *See* Alfred Dunhill of London v. Cuba, 425 U.S. 682 (1976).

apply it.[44] This confusion has resulted in a circuit split between the D.C. Circuit, which nominally recognized and applied the commercial activity exception,[45] and other circuits which have reluctantly avoided this application.

This Note will proceed in three parts. In Section II, this Note will trace the history of the act of state doctrine and its application to commercial activity in American jurisprudence.[46] In Section III, this Note will argue that the split between the D.C. Circuit and other circuits can be reconciled by recognizing that the terms "commercial" and "official" as applied in act of state jurisprudence are mutually exclusive categories. This is illustrated by *Kirkpatrick's* expansion of the judiciary's permitted juridical analysis to reach the excepted commercial activity contemplated by the *Dunhill* plurality. Finally, in Section III.D, this Note articulates the core sovereignty principles animating the act of state doctrine that counsel for or against its deployment to commercial acts of foreign states.

II. The Development of the Act of State Doctrine and the Commercial Activity Exception

A. Branches of the Same Tree: The Schooner Exchange

The Schooner Exchange is not only the progenitor of both the act of state doctrine and foreign sovereign immunity, but

44. Mt. Crest v. Anheuser-Busch InBev, 937 F.3d 1067, 1082 n.70 (7th Cir. 2019) ("The Supreme Court acknowledged that there may be occasions where the policy considerations animating the act of state doctrine—international comity, respect for foreign nations, and avoiding interference with the Executive Branch in the conduct of its foreign relations—would justify a court's declining to apply the doctrine despite its "technical availability." (citing *Kirkpatrick*, 493 U.S. at 409.)).

45. De Csepel v. Republic of Hung., 714 F.3d 591, 604 (D.C. Cir. 2013) ("Given that the family seeks to recover for breaches of bailment agreements, the district court got it just right: their claims challenge 'not sovereign acts, but rather commercial acts' entitled to no 'deference under the act of state doctrine.'" (citing de Cespel v. Republic of Hung., 808 F. Supp. 2d 113, 143 (D.D.C. 2011))).

46. *See generally* Lynn E. Parseghian, *Defining the "Public Act" Requirement of the Act of State Doctrine*, 58 Univ. Chi. L. Rev. 1151 (1991) (surveying judicial formulations of the act of state doctrine over time).

highlights the historical distinction American courts have made between commercial and non-commercial activity. [47] In this case, the Supreme Court confronted a private legal claim imbued with diplomatic importance: an American citizen, M'Faddon, asserted title in a ship seized under Napoleon's Rambouillet decree.[48] A French naval officer had snatched the vessel while it was sailing off the coast of Spain, but nearly a decade later, now under the control of France, the ship "encountered great stress of weather upon the high seas" so it was "compelled to enter the port of Philadelphia for refreshments and repairs."[49] American officials took back the ship, and M'Faddon asked the United States District Court of Pennsylvania to restore his original property right in it.[50] After the trial court denied M'Faddon's request at the behest of the Pennsylvania District Attorney, the circuit court reversed and the District Attorney appealed.[51]

Chief Justice Marshall addressed the issue with his characteristic political intuition.[52] Aware that recognizing

47. *See* The Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812).

48. *Id.* at 122. In 1809, the United States Congress adopted the Nonintercourse Act of 1809 [A Bill to Interdict the Commercial Intercourse Between the United States and Great Britain and France, and their Dependencies, and for Other Purposes], H.R. Res. 64, 10th Cong. § 3 (1809) (enacted) ("[A]ny ship or vessel sailing under the flag of . . . France . . . arrive[ing] with or without a cargo, within the limits of the United States . . . shall be forfeited, and may be seized and condemned in any court of the United States or the territories therof, having competent jurisdiction."), https://memory.loc.gov/cgi-bin/ampage?collId=llhb&fileName=043/llhb043.db&recNum=486 [https://perma.cc/TK6A-4KEP]. In response, Emperor Napoleon issued the "Rambouillet Decree" requiring American vessels entering French ports to be seized. *See Documents Upon the Continental System*, Napoleon Series Archive, https://www.napoleon-series.org/research/government/diplomatic/c_continental.html [https://perma.cc/M3YQ-GNJ6].

49. *The Schooner Exch.*, 11 U.S. at 117-118.

50. *Id.* at 117.

51. *Id.* at 119-120.

52. Marshall had served as the fourth Secretary of State under President Adams. *See* Timothy S. Huebner, *Lawyer, Litigant, Leader: John Marshall and his Papers–A Review Essay*, 48 Am. J. Legal Hist. 315, 323 (2006) ("[Marshall] had tremendous political

M'Faddon's property interest in the vessel could spark a diplomatic backlash against the United States, Chief Justice Marshall distinguished ordinary merchant vessels from public, armed ones.[53]. Justice Marshall wrote that courts should assert jurisdiction over the former because "the foreign sovereign [cannot] have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits."[54] He reasoned that since a public vessel is part of the foreign nation's military force, and because it "acts under the immediate and direct command of the sovereign" in such a way that it is employed for national purposes, the foreign sovereign has a "powerful motive" to prevent other sovereigns, for example, the United States, from frustrating those purposes.[55] Such a frustration, Justice Marshall suggested, could offend the foreign sovereign, so it was most prudent to presume the validity of France's assumption of title in deciding M'Faddon's own property interest.[56]

B. Early Application of the Act of State Doctrine

For the next 75 years, there remained no distinction between the act of state doctrine and foreign sovereign immunity until *Underhill v. Hernandez*.[57] Chief Justice Fuller applied what has remained the core formulation of the act of state doctrine: "the courts of one country will not sit in judgment on the acts of the

savvy, manifested in both his relationships with his colleagues and his understanding of the Court's place in the American polity.").

53. *The Schooner Exch.*, 11 U.S. at 122-124.

54. *Id.* at 144.

55. *Id.* Chief Justice Marshall concluded that because the ship had come into American territory in a friendly manner (rather than as a military vessel) and under an implied promise between the French and the Americans, the vessel "should be exempt from the jurisdiction of [the United States]." *Id.* at 147.

56. *Id.* at 144.

57. Underhill v. Hernandez, 168 U.S. 250, 250-252 (1897). Hernandez, a Venezuelan revolutionary military commander, detained and assaulted Underhill, an American citizen. Underhill filed an action to recover damages for the assault, but the Eastern District of New York and the Second Circuit both denied his plea. *Id.*

government of another, done within its own territory."[58] The affirmed Second Circuit decision explained further that if the tribunals of one nation called into question the conduct of another, the tribunal might "imperil the amicable relations between governments and vex the peace of nations to permit the sovereign acts or political transactions of states to be subjected to the examination of the legal tribunals of other states."[59]

Thus, in *Underhill*, the Court had extended the reach of *The Schooner Exchange* principle beyond merely adjudicating title of a foreign state-owned instrumentality. Now, the same reasons which motivated presuming juridical validity to France's ship seizure applied even to a physical injury caused by a foreign revolutionary leader because granting the plaintiff's requested relief would require the court to find illegal an act of a foreign sovereign, and thus the legal issue was necessarily infected with international implications.[60] The extension of *The Schooner Exchange* thus gave rise to a distinct act of state doctrine apart from foreign sovereign immunity.[61]

Three cases following *Underhill* demonstrated the Court's early application of the doctrine and its separation from foreign

58. *Id.* at 252. Venezuela itself was not a party to the dispute because Underhill had only named Hernandez as a defendant in the case. *Id.*

59. Underhill v. Hernandez, 65 F. 577, 579 (2d Cir. 1895), *aff'd*, 168 U.S. 250 (1897).

60. *See* Mark Haugen & Jeff Good, *Evolution of the Act of State Doctrine:* W.S. Kirkpatrick Corp. v. Environmental Tectonics Corp. *and Beyond*, 13 Univ. Haw. L. Rev. 687, 691 (1991) ("*Underhill* marked a clear departure from the theory of sovereign immunity" because sovereign immunity "deprives a court of jurisdiction," while the act of state doctrine "precludes inquiry on certain issues.").

61. *See id.* At this time, however, both the act of state doctrine and foreign sovereign immunity were "absolute" rather than "restrictive." *See, e.g.*, Ifeanyi Achebe, *The Act of State Doctrine and Foreign Sovereign Immunities Act of 1976: Can They Coexist?*, 13 Md. J. Int'l L. 247 (1989) ("[T]he United States Supreme Court in Underhill v. Hernandez, had established an 'absolute' view of the act of state doctrine by holding that United States courts could not question the act of a foreign government."); *see also* Dellapenna, *supra* note 28, at 31 ("Some of these theories, whether supported by a faction of the Supreme Court or not, propound narrow exceptions or limitations to an otherwise absolute doctrine.").

sovereign immunity: *American Banana Co. v. United Fruit Co.*,[62] *Oetjen v. Central Leather Co.*,[63] and *Ricaud v. American Metal Co.*[64] In *American Banana Co.*, the plaintiff invited the Court to hold the defendant liable for damages resulting from the defendant's instigation of Costa Rica's government to seize the plaintiff's banana farms.[65] The Court declined, reasoning that it cannot be unlawful for a party to "persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper" within the foreign sovereign's jurisdiction.[66] Respecting Costa Rica's sovereignty meant accepting that the "decree of [Costa Rica] makes law," so Costa Rica had rendered the defendant's persuasion "lawful by its own act."[67] According to the Court, while it would have concededly been unlawful for the defendant to have itself seized the plaintiff's property,

62. Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357-358 (1909). The plaintiff sued the defendant alleging that the defendant corporation had instigated Costa Rica's military to "[seize] a part of [the plaintiff's] plantation and a cargo of supplies and have held them ever since and stopped the construction and operation of the plantation and railway." *Id.* at 354–355. The plaintiff attempted to seek the assistance of the United States government but to no avail. The Court held that "a seizure by a state is not a thing that can be complained of elsewhere in the courts."

63. Oetjen v. Cent. Leather Co., 246 U.S. 297 (1918). The Court confirmed the act of state doctrine as the "principle that the conduct of one independent government cannot be successfully questioned in the courts of another[.]" *Id.* at 303. Allowing the "validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'" *Id.* at 304. (quoting Underhill v. Hernandez, 65 F. 577, 579 (2d Cir. 1895), *aff'd*, 168 U.S. 250 (1897)).

64. Ricaud v. Am. Metal Co., 246 U.S. 304 (1918). The Court distinguished the act of state doctrine, arguing that "[t]o accept a ruling authority [of another foreign sovereign] and to decide [the case] accordingly, is not a surrender or abandonment of jurisdiction, but is an exercise of it." *Id.* at 309.

65. *See Am. Banana Co.*, 213 U.S. at 354-56.

66. *Id.* at 358.

67. *Id.*

convincing the Costa Rican government to act at its behest rendered the act valid.[68]

While *Underhill* and *American Banana* applied the act of state doctrine to give legal validity to the acts of foreign states causing tort damage to plaintiffs, in *Oetjen* and *Ricaud*, the Court expanded the act of state doctrine in the context of the Mexican Revolution to require the presumption of the legal validity of forced title transfers, such as expropriation[69] and seizure.[70]

C. Retrofitting the Act of State Doctrine to Foreign Nationalization Decrees

Revolutions continued to raise act of state issues when, in the 1930s, the Court confronted the legal effect of foreign nationalization decrees appropriating American assets. In *United States v. Belmont*, the Court found that recognizing the Soviet Union as a foreign sovereign had the effect of "validat[ing], so far as this country is concerned, all acts of the Soviet Government

68. The Court interpreted the act of state doctrine broadly, even refusing to "admit that the influences were improper or the results [of the state's act were] bad." *Id.* Recently, the Court excised American Banana from the act of state canon, writing that "[s]imply put, *American Banana* was not an act of state case" because the Court had found it illegal to persuade a foreign government to violate U.S. antitrust laws in United States v. Sisal Sales, 274 U.S. 268, 276 (1927). W. S. Kirkpatrick & Co. v. Env't Tectonics Corp., 493 U.S. 400, 407-408, (1990).

69. *See* Oetjen v. Central Leather Co., 246 U.S. 297, 303-304 (1918) (holding that the act of state doctrine "is as applicable to a case involving the title to property brought within the custody of a court . . . as it was held to be in [*Underhill* and *American Banana*], in which claims for damages were based upon acts done in a foreign country[.]"). In *Oetjen*, the plaintiff filed an action to replevy his expropriated property – animal hides – under article 46 of the Convention Respecting the Laws and Customs of War on Land which prohibited the confiscation of property. Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 46, Oct. 18, 1907, 36 Stat. 2277, U.S.T.S. 539 ("Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.").

70. Ricaud v. Am. Metal Co., 246 U.S. 304, 310 (1918) (finding that the act of state doctrine applies to a seizure of an American citizen's property for military purposes "by the legitimate Government of Mexico.").

here involved from the commencement of its existence."[71] Consequently, the Court found itself constrained, despite contrary American public policy, to presume valid the Soviet Union's 1918 decree liquidating a private corporation in Russia and appropriating "all of [the corporation's] property and assets of every kind and wherever situated."[72]

Furthermore, in *Banco Nacional de Cuba v. Sabbatino*,[73] the Cold War landed squarely at the Supreme Court's doorsteps in the form of a dispute between American citizens and the Cuban government after Fidel Castro took control[74] following the collapse of General Batista Zalivar's regime.[75] Against the

71. United States v. Belmont, 301 U.S. 324, 330 (1937). In 1933, President Roosevelt and Soviet Commissar for Foreign Affairs Maxim Litinov held the Roosevelt-Litvinov Conversations, agreeing that the Soviet Government would assign all claims by American nationals against the Soviet Government to the United States government in exchange for diplomatic recognition by the United States. *See* Letter from William C. Bullitt, Ambassador in Soviet Union, to Cordell Hull, Sec'y of State (Feb. 10, 1934), https://history.state.gov/historicaldocuments/frus1933-39/d60 [https://perma.cc/BKH3-NMG8]. The Court therefore held that title had validly passed from the corporation to the Soviet Union, *Belmont*, 301 U.S. at 332, and then to the United States. *Id.* at 330.

72. *Belmont*, 301 U.S at 326-327; *see Bolshevik Decree Nationalizing Industry*, Alpha Hist., https://alphahistory.com/russianrevolution/bolshevik-decree-nationalising-industry-1918/ [https://perma.cc/XX5B-G88Q]. The Soviet Union's first general nationalization decree, "Decree on the Nationalization of Large-Scale Industry and Railway Transportation Enterprises" nationalized private industries such as mining, metallurgy, textile, electric, tobacco, leather, and cement. *See also* Samuel Kucherov, Comment, *Property in the Soviet Union*, 11 Am. J. Comp. L. 376, 377 (1962).

73. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

74. Castro's rise is attributable to a few factors, including internal economic and social development, backlash against the United States, and the influence of the Soviet Union in introducing communism to the island. *See* James O'Conner, *Political Change in Cuba, 1959–1965*, 35 Soc. Rsch. 312 (1968).

75. In 1960, the United States and Cuba had a fraught relationship because the former had exerted tremendous influence over the island after the Spanish-American War resulted in American annexation. *See* Geoffrey Warner, *Eisenhower and Castro: US – Cuba Relations 1958-1960*, 75 Royal Inst. of Int'l Affs. 803, 804-805 (1999) (reviewing U.S. Dep't of State, Foreign Relations of the United States, 1958-1960, American Republics (1993) &

backdrop of the newly hostile diplomatic relationship, Congress amended the Sugar Act of 1948 to authorize President Eisenhower, through the Secretary of State, to decrease sugar imports from Cuba.[76] President Eisenhower immediately exercised his new power to punish the Cuban government because it "stood for the opposite of everything the United States stood for: pluralist democracy, free market capitalism, 'free world' solidarity against 'international communism' and, above all, American supremacy in the western hemisphere."[77]

Notably, the *Sabbatino* decision was the most recent instance the Supreme Court found that the act of state doctrine applied.[78] The specific events leading up to the *Sabbatino* decision began when Castro retaliated by nationalizing the American-dominated industries thereby appropriating their assets, including the sugar

Cuba (1991)). As late as the 1950s, American corporate interests dominated Cuba's telecommunications, transit, and petroleum industries. The Eisenhower administration supported these business activities by propping up General Fulgencio Batista Zalivar, who had seized power in a 1952 *coup d'état* by supplying him with arms to maintain political and military control over the island, until Zalivar's regime began to collapse when Fidel Castro mobilized nation-wide strikes against the incumbent regime. When Zalivar reacted by cancelling elections and suspending constitutional rights, the United States scaled back its support for his regime and encouraged him to hand power over to a five-member board approved by the United States, but Zalivar refused. In 1959, Zalivar abandoned Havana without America's support, and Castro marched upon the capital to take control of the Cuban government. *Id.* at 804-805, 808-809.

76. Sugar Act of 1948, ch. 519, 61 Stat. 922; *see also* William C. Pendleton, *American Sugar Policy—1948 Version*, 30 J. Farm Econ. 226, 232 (1948) ("It is generally recognized that Cuba can produce and deliver sugar to the United States more cheaply than any of the five majority domestic areas . . . Yet the Sugar Act encourages expansion of production at home while leaving purchases from Cuba at the mercy of the Secretary's quota determination.").

77. Warner, *supra* note 75, at 817; *Sabbatino*, 376 U.S. at 401-3.

78. Royal Wulff Ventures v. Primero Mining Corp., 938 F.3d 1085, 1100 (9th Cir. 2019) (Bennet, J., dissenting) ("The last time the Court invoked the act of state doctrine was more than fifty years ago, in *Sabbatino*, when it refused to reverse a Cuban expropriation decree.").

of an American-controlled Cuban sugar producer, C.A.V.[79] First, the Court located the doctrine within the "constitutional underpinnings" arising "out of the basic relationships between branches of government in a system of separation of powers [because the act of state doctrine] concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations."[80] The executive branch, unlike the judicial branch, has the ability and responsibility to aggregate together the claims of injured American citizens, engage in bilateral and multilateral negotiations and, if necessary, threaten and impose economic and political sanctions upon foreign governments.[81]

The Court introduced three factors—the three *Sabbatino* factors—[82] for courts to consider when deciding whether to

79. C.A.V. was a "corporation organized under Cuban law whose capital stock was owned principally by United States residents" until nationalization. *Sabbatino*, 376 U.S. at 401. Respondent Farr, Whitlock & Co., an American commodities brokerage firm, had purchased a shipment of sugar on behalf of C.A.V. *Id.* After C.A.V. had already shipped the sugar, C.A.V. and Farr, Whitlock & Co. coordinated to deprive the Cuban government by paying C.A.V. for the sugar instead. *Id.* at 403-405. The new, public owner of C.A.V.'s 'former' assets, Banco Nacional de Cuba, filed a claim against Farr, Whitlock & Co. to recover the payment for the sugar and to enjoin the current holder of the funds, Sabbatino, from dispossessing himself of them. *Id.* at 406. Banco Nacional, the plaintiff, argued that the act of state doctrine applied to its nationalization and expropriation of C.A.V.'s assets, that therefore the Court should assume that title to the sugar validly passed to the Cuban government, and thus that the respondent, Farr, Whitlock & Co. had converted its property. *Id.* The respondents argued that the act of state doctrine should not apply when the act in question violated international law, as is the case when there is an expropriation without just compensation. *See id.* at 421-422. *See generally* Factory at Chorzow (Germ. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13).

80. *Sabbatino*, 376 U.S., at 423.

81. *Id.* at 431–32. Donald Hoagland contends that the *Sabbatino* decision left too much discretion for courts to abdicate their judicial responsibility to apply international law absent drastic limitations on the act of state doctrine or the actual, rather than theoretical pursual by the Executive to obtain individual remedies. *Cf.* Donald W. Hoagland, *The Act of State Doctrine: Abandon It*, 14 Denv. J. Int'l L. 317, 323 (1986).

82. *Sabbatino*, 376 U.S. at 428.

assume the juridical validity of an already established foreign state's act.[83] Act of state deference is more likely (1) when there is a "greater degree of codification or consensus concerning a particular area of international law," (2) when the issue affects "national nerves" and thus has "implications . . . for our foreign relations," and (3) when the "government which perpetrated the challenged act" still exists.[84] Applying each factor, the court determined that there is little international agreement on the legality of nationalization decrees, that the proper relationship between public and private industry is one of the most controverted political issues of the day, and that the Cuban government which issued the decree still existed.[85] With this analysis, the court concluded that the three factors each suggested application of the act of state doctrine.[86]

Congress disagreed.[87] Immediately after the *Sabbatino* decision, Congress limited the act of state doctrine by enacting the Foreign Assistance Act of 1964, also known as the "Second Hickenlooper Amendment."[88] Iowa Senator John Hickenlooper

83. *See* Sea Breeze Salt, Inc. v. Mitsubishi Corp., 899 F.3d 1064, 1073 (9th Cir. 2018) ("*Sabbatino sets* out three factors that courts should consider when evaluating whether the act of state doctrine bars an action against a foreign sovereign.").

84. *Sabbatino*, 376 U.S. at 428.

85. *Id.* at 432-436.

86. *See id.* at 436-437.

87. *See* Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(2).

88. *Id.* The text of the statute reads:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection[.]

Id.; *see also* Robert M. Cooper, *The Act of State Doctrine:* Ethiopian Spice v. Kalamazoo Spice, 12 Den. J. Int'l. L. & Pol'y 285, 289 (1983).

introduced the amendment on October 3, 1964, only a handful of months after the Supreme Court released the *Sabbatino* decision.[89] The legislation was aimed at carving out an exception to the act of state doctrine by statutorily liberating the courts to give effect to the international law principle of just compensation for property confiscated by an act of a foreign state.[90] Four days later, the Senate approved the amendment.[91] Ultimately, the *Sabbatino* decision and its attempted restriction by Congress demonstrate the federal government's aim to create narrower avenues for the judiciary to apply the act of state doctrine in light of a rapidly changing international economic and geopolitical landscape.[92]

While *Sabbatino* was the last time the Supreme Court applied the act of state doctrine, it has found occasion to narrow its application since then.[93] The Court narrowed the application of the act of state doctrine in *Alfred Dunhill of London v. Cuba*, when a plurality of the Court recognized the commercial activity exception to the act of state doctrine.[94] After the Cuban

89. *See* 110 Cong. Rec. 24076-77 (1964) (statement of Sen. Hickenlooper).

90. *Id.*

91. Foreign Assistance Act of 1964 ("An Act to amend further the Foreign Assistance Act of 1961, as amended, and for other purposes"), Pub. L. No. 88-633, 78 Stat. 1009.

92. *See generally* Michael Mastanduno, *System Maker and Privilege Taker: U.S. Power and the International Political Economy*, 61 World Pol. 121 (2009) (discussing the U.S.'s role in shaping international economic and geopolitical conditions).

93. *See* Royal Wulff Ventures v. Primero Mining Corp., 938 F.3d 1085, 1100 (9th Cir. 2019).

94. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695-96 (1976) (plurality opinion). Unlike *Sabbatino's* nearly unanimous opinion over a decade earlier, the Court failed to reach a consensus on the applicability of the act of state doctrine, and importantly, failed to reach a consensus on whether to recognize the commercial activity exception – this lack of clarity has since vexed the judiciary and caused legal scholars to take note of the growing complexity and difficulty of applying the act of state doctrine. *See* Stephen G. Wolfe, Comment, *Rationalizing the Federal Act of State Doctrine and Evolving Judicial Exceptions*, 46 Fordham L. Rev. 295, 295 (1977) ("Over the past three decades these exceptions [including the commercial activity exception] have been variously accepted and rejected by the Supreme Court in a perplexing welter of opinions, dissents, and concurrences.").

Government nationalized the cigar industry, it appointed "interventors" to possess and operate the businesses.[95] A trial court held that the interventors owed a commercial debt to American cigar importers.[96] The justification for the judgement was that any debt for cigars shipped *before* Cuba nationalized its cigar industry would be owed to the previous, private owners, but debt for any cigars shipped *after* the nationalization would be owed to the interventors.[97] Since the American importers had paid the interventors for cigars shipped before nationalization, the interventors owed the previous owners a commercial debt for those mistaken payments, which should have gone to previous owners.[98] Of course, the effect of this judgement was that an American court had ordered the Cuban government to pay the former owners of the industry it had just nationalized, and that the interventors refused to do.[99]

According to the Cuban Government, the interventors' mere statement at trial that they would refuse to pay was itself an act of state subject to deference through the act of state doctrine.[100] Justice White reasoned that this mere refusal does not demonstrate that in addition to authority to operate commercial businesses, to pay their bills and to collect their accounts receivable, interventors had been invested with sovereign authority to repudiate all or any part of the debts incurred by those businesses. Indeed, it is difficult to believe that they had

95. *Dunhill*, 425 U.S. at 685.

96. Menendez v. Faber, Coe & Gregg, 345 F. Supp. 527, 538 (S.D.N.Y. 1972), *rev'd* 485 F.2d 1355 (2nd Cir. 1973), *rev'd sub nom.* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976).

97. *Dunhill*, 425 U.S. at 687-689.

98. *Id.*

99. *Id.* at 687. After nationalization, the former owners of the cigar manufacturers emigrated to the United States, where they filed a cause of action against the American importers to recover the commercial debt. Their claims raised an important legal question as to whether the Cuban government's appropriation of the property of the Cuban cigar manufacturers caused the debt owed by the importers to the Cuban corporate entities to be appropriated as well, thus accruing to the state of Cuba, as well as whether the previous owners retained their rights to collect on the debt. *Id.* at 685-86.

100. *Id.* at 688.

the power selectively to refuse payment of legitimate debts arising from the operation of those commercial enterprises.[101]

What mattered was the type of authority the interventors possessed: governmental or commercial. The interventors claimed "the authority to commit an act of state" purporting to exercise sovereign authority, but only demonstrated commercial authority to the Court.[102] For this reason, the Court reversed the Second Circuit's application of the act of the state doctrine.[103]

Up until that point, the Court spoke as a majority of five justices, but Justice Stevens would not join the plurality with respect to the second justification for not applying the act of state doctrine.[104] The plurality's second justification, however, is the commercial activity exception, based on the executive branch's restrictive view of sovereign immunity as expressed through the 1952 Tate Letter.[105] The plurality aimed to prevent procedural gamesmanship whereby a foreign government over which a United States court may rightfully exercise jurisdiction – that is, a foreign government which does not enjoy foreign sovereign immunity – could repudiate a commercial debt, seek refuge in the act of state doctrine, and gain the consideration received without owing the debt.[106] The plurality reasoned that "that the concept

101. *Id.* at 691-93.

102. *Dunhill*, 425 U.S. at 693-94.

103. *See id.* at 706.

104. *Id.* at 715 (Stevens, J., concurring).

105. *Id.* at 698 (plurality opinion) ("[T]he United States abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions.").

106. *Id.* at 698-99. To illustrate this point, consider a hypothetical: Company D is a state-controlled enterprise of a foreign government F. Suppose an American citizen, P, enters a contract for a shipment of commercial goods with D. After D receives payment from P, D repudiates its commercial debt and refuses to deliver the commercial goods to P. P files an action in a federal district court naming D as a defendant, seeking damages for breach of contract. Since D has engaged in a commercial transaction, D is clearly not protected by foreign sovereign immunity. Therefore, the federal court will have jurisdiction over the case. However, if repudiating the commercial debt nevertheless counted as an 'act of state' for purposes of the act of state doctrine, D could assert the doctrine,

of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities."[107]

The Court further narrowed the act of state doctrine in recent years in *W. S. Kirkpatrick v. Environmental Tectonic Corp.*[108] At that time, a circuit split had developed between a more expansive interpretation of the act of state doctrine in the Ninth and Second Circuits,[109] and a stricter interpretation in the Fifth and Third Circuits.[110] Under the expansive interpretation, a court would

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and the court would rule in favor of D because the court would need to have assumed that D acted lawfully. *See* 28 U.S.C. § 1604.

107. *Id.* at 695. Justice Marshall's dissent preferred *Sabbatino*'s balancing approach because it was "aware of the variety of situations presenting act of state questions and the complexity of the relevant considerations [and] eschewed any inflexible rule in favor of a case-by-case approach." He argued that international law is divided on "the limitations on a state's power to expropriate the property of aliens," and that just as in *Sabbatino*, state appropriation touches on national nerves. *Id.* at 728-30 (Marshall, J., dissenting).

108. W. S. Kirkpatrick & Co. v. Env't Tectonics Corp. 493 U.S. 400, 409 (1990).

109. *See* Clayco Petrol. Corp. v. Occidental Petrol. Corp., 712 F.2d 404, 406 (9th Cir. 1983) ("This circuit's decisions have similarly limited inquiry [through the act of state doctrine] which would 'impugn or question the nobility of a foreign nation's motivation.'" (citing Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 607 (9th Cir. 1976))); Hunt v. Mobil Oil Corp., 550 F.2d 68, 78 (2d Cir. 1977) ("As we have already discussed, the issue of legality cannot be isolated from the issue of motivation of the foreign sovereign."); Occidental Petrol. Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 110 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972) ("But such inquiries by this court into the authenticity and motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert.").

110. Indus. Inv. Dev. Corp. v. Mitsui & Co., 594 F.2d 48, 55 (5th Cir. 1979) ("Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action."); Williams v. Curtiss-Wright Corp., 694 F.2d 300, 304-5 (3d Cir. 1982); *see also* Christopher B. Walther, *Motivation Cases and* W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International, 80 Ken. L.

accord act of state deference when a necessary judicial inference to grant the requested relief could merely impugn the motivation of a foreign nation,[111] while under the strict interpretation, act of state deference would only be accorded when granting the requested relief would require declaring or assuming the legal invalidity of the foreign government's specific act.[112]

W. S. Kirkpatrick & Company had attempted to bribe the Nigerian government to award it a contract to construct an aeromedical center for the Nigerian air force.[113] The unsuccessful bidder, Environmental Tectonic Corporation, thus sued Kirkpatrick seeking RICO damages. Justice Scalia, writing for a unanimous Court, not only adopted the stricter interpretation of the doctrine, but narrowed it even further. First, he noted that it was "unnecessary . . . to pursue those inquiries [into the possibility of exceptions to the act of state doctrine] since the factual predicate for application of the act of state doctrine does not exist."[114] He explained that "[i]n every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the *official* act of a foreign sovereign performed within its own territory."[115] Since the legality of the Nigerian government's contract with Kirkpatrick was not a question to be decided, there was no act of state issue at all.[116]

J. 269, 283 (1991) ("Cases in the Third and Fifth Circuits have explicitly rejected the *Buttes-Gas-Hunt-Clayco* line.").

111. *Clayco*, 712 F.2d at 407 (quoting *Timberlane*, 549 F.2d at 607).

112. *Mitsui*, 594 F.2d at 49 ("[N]either the validity of those regulations or the legality of the behavior of the Indonesian government is in question here.").

113. *Kirkpatrick*, 493 U.S. at 402.

114. *Id.* at 405.

115. *Id.* (emphasis added).

116. *See id.* at 406 ("Act of state issues only arise when a court *must decide* -- that is, when the outcome of the case turns upon -- the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine. That is the situation here.").

III. Implementing Kirkpatrick's Official Act Requirement

Most federal appellate courts have confronted cases where parties raised the *Dunhill* plurality's commercial activity exception.[117] In almost every case, the courts have either doubted that the commercial activity exception is binding law or found no need to resolve the issue.[118] The D.C. Circuit, on the other hand, has not only accepted the commercial activity exception's existence, but applied it.[119] However, this Note contends that *Kirkpatrick* so narrowed the applicability of the act of state exception that it implicitly adopted the commercial activity

117. The First, Fourth, Eighth, and Tenth Circuits have not commented upon the applicability of *Dunhill*. The Second, Third, and Sixth have "noted the views expressed by the *Dunhill* plurality but not found a need" to pass judgement upon its existence. The Fifth, Ninth, and Eleventh have found the commercial activity exception does not exist. Sea Breeze Salt, Inc. v. Mitsubishi Corp., 899 F.3d 1064, 1074 (9th Cir. 2018). Since the *Sea Breeze Salt* decision, the Seventh Circuit encountered the potential application of the commercial activity exception but declined to pass judgement on its validity. *See* Mt. Crest SRL, LLC v. Anheuser-Busch InBev SA/NV, 937 F.3d 1067, 1078-79 (7th Cir. 2019).

118. *See, e.g.*, Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int'l B.V., 809 F.3d 737, 744 (2nd Cir. 2016) ("As an initial matter, neither the Supreme Court nor this Circuit has ever concluded that there is a commercial exception to the doctrine of act of state."). The Second Circuit cited *Kirkpatrick* as standing for the proposition that a "majority of the Supreme Court has never adopted a commercial exception to the doctrine of the act of state." *Id.*; *see also* Williams v. Curtiss-Wright Corp, 694 F.2d 300, 302 n.2 (3rd Cir. 1982) ("We note that neither exception has ever been accepted by a majority of the Supreme Court.").

119. *See* de Csepel v. Republic of Hung., 808 F. Supp. 2d 113, 142-43 (D.D.C. 2011), where the D.C. Circuit explained that:

> Plaintiffs allege that they entered into a series of bailment agreements with defendants after World War II, and that defendants have breached these bailments by refusing to return the property. The actions challenged by plaintiffs, therefore, are not "sovereign acts," but rather *commercial* acts that could be committed by any private university or museum. Such "purely commercial" acts do not require deference under the act of state doctrine.

exception by limiting act of state doctrine application to "official" acts of foreign sovereigns, which are necessarily non-commercial. Commercial activity, in this way, silently escaped the ambit of the act of state doctrine.

A. Locating Dunhill's Ghost.

Recent act of state cases since *Kirkpatrick* generally apply the doctrine through a convoluted three-step analysis. *Sea Breeze Salt v. Mitsubishi* represents a paradigmatic example:[120]

Step One: *Kirkpatrick* Official Act Requirement. As demonstrated when the Ninth Circuit invoked *Kirkpatrick,* there are two mandatory conditions necessary to satisfy the official act requirement – a factual predicate for an act of state.[121] There must be both "an official act of a foreign sovereign performed within its own territory;" and, "the relief sought or the defense interposed [in the action would require] a court in the United States to declare invalid the [foreign sovereign's] official act."[122]

Step Two: *Sabbatino* Factors. After determining whether the "factual predicate for application of the act of state doctrine" exists, "even when the two mandatory elements" are satisfied, the courts "may appropriately look to additional factors to determine whether application of the act of state doctrine is justified."[123] This step thus requires the court to consider the three *Sabbatino* factors.[124]

Step Three: *Dunhill* Commercial Activity Exception. Only after surviving the previous two steps does the court

120. *See Sea Breeze Salt*, 899 F.3d at 1069.

121. *Id.*

122. *Id.* (quoting Credit Suisse v. United States Dist. Ct., 130 F.3d 1342, 1346 (9th Cir. 1997) ("Under this current view, an action will be barred only if: (1) there is an 'official act of a foreign sovereign performed within its own territory'; and (2) 'the relief sought or the defense interposed [in the action would require] a court in the United States to declare invalid the [foreign sovereign's] official act.'")). The circuit split resolved by *Kirkpatrick* pertained to the second prong of this step.

123. W. S. Kirkpatrick & Co. v. Env't Tectonics Corp., 493 U.S. 400, 405 (1990); *Sea Breeze Salt*, 899 F.3d at 1072-73.

124. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964); *Sea Breeze Salt*, 899 F.3d at 1072-1073; Royal Wulff Ventures LLC v. Primero Mining Corp., 938 F.3d 1085, 1096 (9th Cir. 2019).

consider whether an exception exists for commercial activity.[125] Thus, the reviewing court then must consider whether the act is "purely commercial" in the sense that the act is an exercise of power *not* "peculiar to sovereigns".[126] If it is not peculiar to sovereigns, the court will refuse to apply the act of state doctrine.[127] The result of such a refusal is that the court reviews the act.[128]

After setting up this test, the Ninth Circuit applied it to an alleged antitrust conspiracy against ESSA,[129] a joint venture between the Mexican Government and Mitsubishi Corporation which produces 90% of Mexico's salt. The act in question was ESSA's refusal to fulfill purchase orders for salt.[130] Under step one, the court held that because the Mexican government appoints the majority of the board and the position-equivalent of the CEO, ESSA's repudiation of the commercial obligation was an official act by the Mexican government, which necessarily must always act through its agents.[131] Under Mexican law, only the government of Mexico is permitted to own and exploit sea salt, so its decision to distribute the salt through Mitsubishi is not an everyday commercial decision that could have been made by a private company.[132]

After finding that the *Sabbatino* factors counseled in favor of applying the act of state doctrine to ESSA's repudiation of its commercial obligations under step two, the court considered whether to apply *Dunhill*'s commercial activity exception under step three.[133] The Ninth Circuit then discussed the circuit split: "The Fifth and Eleventh Circuits have held that no commercial

125. *Sea Breeze Salt*, 899 F.3d at 1074.

126. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 704-05 (1976).

127. *Id.*

128. *See id.* at 706.

129. Exportadora de Sal, S.A. de C.V. is 51% owned by Mexico and 49% owned by Mitsubishi Corporation. *Sea Breeze Salt*, 899 F.3d at 1067.

130. *Id.* at 1067.

131. *Id.* at 1069.

132. *Id.* at 1070-71.

133. *Id.* at 1074-75.

exception to the act of state doctrine exists, while the D.C. Circuit has arguably adopted the exception."[134] In *Sea Breeze Salt*, the court declined to pass judgement on the commercial activity exception's validity because it would be inapplicable.[135] The Ninth Circuit reasoned that, "as explained above [under the step one analysis], the acts alleged here—decisions about the exploitation and distribution *en masse* of Mexico's sovereign natural resources—are exactly the kind of powers that are 'peculiar to sovereigns.'"[136]

But notice that step three of the *Kirkpatrick* analysis is, according to the logic of the *Sea Breeze Salt* decision, seemingly already accounted for under step one.[137] The same factors which demonstrated that the act was "official" under step one showed that it was clearly not "commercial" for purposes of applying *Dunhill* under step three. If, as suggested in *Sea Breeze Salt* footnote four, the commercial activity exception has been subsumed by the official act requirement, then Justice Scalia's statement in *Kirkpatrick* that it was "unnecessar y . . . to pursue those inquiries" into the possibility of exceptions to the act of state doctrine had buried the lede.[138] The Ninth Circuit had hit upon the reality that *Kirkpatrick* adopted, *sub silentio*, the *Dunhill* plurality's commercial activity exception by baking it into the official act requirement.[139]

134. *Id.* at 1074.

135. *Sea Breeze Salt*, 899 F.3d at 1075.

136. *Id.* at 1075.

137. *Id.* at 1075 n.4 ("Indeed, it appears possible that any commercial exception is in fact subsumed within the prima facie requirement that the challenged conduct constitute an 'official act of a foreign sovereign.'") (citing Credit Suisse v. United States Dist. Ct., 130 F.3d 1342, 1346 (9th Cir. 1997)).

138. *Id.*; W. S. Kirkpatrick & Co. v. Env't Tectonics Corp., 493 U.S. 400, 405 (1990).

139. *See, e.g.*, Von Saher v. Norton Simon Museum of Art, 754 F.3d 712, 727 (9th Cir. 2014) (finding it "unnecessary" to determine whether the Ninth Circuit recognizes the exception because "a private citizen could not have granted a concession to exploit natural resources").

B. The Majority's Approach

Understanding *Dunhill*'s commercial activity exception incorporation within *Kirkpatrick*'s official act requirement explains the recent interpretations of other circuits as well.

For example, in *Mt. Crest SRL, LLC v. Anheuser-Busch InBev SA/NV*, the Seventh Circuit considered an antitrust claim against American multi-national beer companies for having conspired to retain trade by means of an agreement with the Liquor Control Board of Ontario, and the American defendants responded by invoking the act of state doctrine.[140] In applying step one to determine whether the allegedly illegal acts in question were "official," the Seventh Circuit cited the following four salient facts: "the 2015 Amendment to the Liquor Control Act . . . is an official legislative enactment," the Liquor Control Board of Ontario is "a wholly owned Crown agency," the LCBO is "required to abide by the policy decisions and directives of the Government," and, "the government exercised considerable control over the LCBO" where "complex high level decisions were made from time-to-time by senior Government officials."[141] Therefore, the Seventh Circuit found that the acts were official and attributable to Canada.[142]

The District Court for the Western District of Wisconsin has recognized that "even if this court were to follow Justice White's [the *Dunhill* plurality's] view in *Alfred Dunhill*, it would make no difference" because the acts at issue were not commercial.[143] Rather, "the decisions at issue in this case involved policy choices regarding how Ontario wanted alcohol to be distributed and sold," and the LCBO was not free to carry on business as if it were a private, profit-maximizing commercial enterprise free of government influence.[144]

140. Mt. Crest SRL, LLC v. Anheuser-Busch InBev SA/NV, 937 F.3d 1067, 1077 (7th Cir. 2019).

141. *Id.* at 1083 (citing Hughes v. Liquor Control Bd. of Ont., 2018 ONSC 1723, ¶ 82, 84 (Can. Ont.), *aff'd* (2019), 145 O.R. 3d 401 (Can. Ont. C.A.)).

142. *Anheuser-Busch*, 937 F.3d at 1083-84.

143. Mt. Crest SRL, LLC v. Anheuser-Busch InBev SA/NV, No. 17-cv-595-jdp, 2018 U.S. Dist. LEXIS 83471, at *28 (W.D. Wis. May 16, 2018), *aff'd in part, rev'd in part*, 937 F.3d 1067 (7th Cir. 2019).

144. *Id.*

Even though the Seventh Circuit had noted that the Supreme Court had not passed upon the validity of the commercial activity exception in *Kirkpatrick*, the application of the *Kirkpatrick* analysis in *Anhesuer-Busch* makes it clear that the commercial activity exception lives in step one rather than as a separate consideration under step three.[145] The courts will struggle to apply an exception for a "commercial act" to the act of state doctrine if, as a threshold matter, the only eligible acts they can consider are "official." Put differently, there is no act that could survive step one that would require a separate analysis under step three. The analysis in *Anheuser-Busch* is evidence that *Dunhill*'s commercial activity exception has been incorporated within *Kirkpatrick*'s official act requirement, and thus reviewing courts have been implicitly applying the *Dunhill* plurality's commercial activity exception all while doubting its existence.

This is conceptually important because trial courts and litigants have mischaracterized the status of the commercial activity exception. For example, in *In re Refined Petroleum Prods. Antitrust Litigation*, the Southern District of Texas applied the three-step *Kirkpatrick* analysis to antitrust claims made against Texas defendants for an alleged price-fixing conspiracy with OPEC and the Russian Federation.[146] At step one, the court found that because the acts complained of—price-fixing refined petroleum products—were "undertaken by recognized sovereigns within their own territory" and because the "outcome of the plaintiff's claims . . . would turn upon the legality of [OPEC's and Russia's] acts," then the official act requirement was satisfied.[147]

But after that, both the plaintiffs and the trial court mischaracterized the law. The plaintiffs understandably argued against applying the act of state doctrine even after the act satisfied steps one and two, citing *Dunhill*'s commercial activity exception and urging that the Fifth Circuit had implicitly adopted the commercial activity exception in a post-*Kirkpatrick decision, Walter Fuller Aircraft Sales, Inc. v. Republic of*

145. *Anheuser-Busch*, 937 F.3d at 1083 n.69, 1084-86.

146. *In re* Refined Petrol. Prods. Antitrust Litig., 649 F. Supp. 2d 572, 588-89 (S.D. Tex. 2009).

147. The court described its step one analysis as: "the factual predicate for application of the act of state doctrines exists in this case . . . " *Id.* at 584.

Philippines.[148] But the trial court dismissed their concern citing *Callejo v. Bancomer*, a pre-*Kirkpatrick* decision, and found that the Fifth Circuit had not adopted the commercial activity exception.[149]

On one hand, the plaintiffs overlooked that even if the Fifth Circuit *had* explicitly adopted the commercial activity exception, it would not save them from the act of state doctrine.[150] Rather, the court cited the "inapplicability" of the exception and duplicated its step one analysis.[151] As before, the court found that "application of the commercial activity exception proposed by the *Dunhill* plurality is unwarranted because the acts of which plaintiffs complain are inherently sovereign—as opposed to 'purely commercial'—in nature.[152] The court even recognized its duplicative analysis under step three, prefacing its explanation with "as discussed in Part II.B.1(b)(1)(i), *infra* . . . "[153]

On the other hand, the plaintiffs were right that *Walter Fuller* had implicitly adopted the commercial activity exception, which they had applied at step one. In *Walter Fuller*, the Philippine Government created the Presidential Commission on Good Government which had exercised its power to sequester a Falcon 50 jet from Faysound, the original owner, which the PCGG then sold to Fuller, the new owner.[154] Part of the contract between PCGG and Fuller was that PCGG would defend Fuller if Faysound brought an claim against Fuller, but when that happened, the PCGG simply refused to uphold its obligation under the deed of sale.[155] When the defendants contended that

148. *Id.* at 594-95.

149. *See id.* at 595 ("The Fifth Circuit has cited Dunhill on a number of occasions, but has never adopted the commercial activity exception articulated in Dunhill's plurality opinion.") (citing Callejo v. Bancomer, 764 F.2d 1101, 1115 n.17 (5th Cir. 1980)).

150. *See id.* at 595-96.

151. *Id.*

152. *Id.* The court explained that the act in question was "agreements of the foreign sovereign members of the alleged conspiracy to restrict crude oil production within their boundaries." *Id.* at 596.

153. *See id.* at 595.

154. Walter Fuller Aircraft Sales, Inc. v. Republic of Phil., 965 F.2d 1375, 1377 (5th Cir. 1992).

155. *Id. See* Faysound, Ltd. v. Walter Fuller Aircraft Sales, Inc., 748 F. Supp. 1365 (E.D. Ark. 1990) (holding that the PCGG was not

the "PCGG's commercial acts were traceable to sovereign acts," the court distinguished the case at bar from *Callejo*, because:

> Unlike in *Callejo*, where the nationalized bank's breach of its obligation to the plaintiffs was required by a governmental edict concerning currency exchange rates, no act of state forced the PCGG to refuse to defend Fuller. Finding a breach in *Callejo* would have called into question the official acts which directly caused the breach. There is no comparable connection here between any public acts and the PCGG's refusal to defend.[156]

The refusal to defend was not forced by an act of state, so the Fifth Circuit found that the act of state doctrine did not apply and that it need not assume the juridical validity of the PCGG's refusal to defend Fuller.[157] The Fifth Circuit disposed of the defendant's act of state defense at step one, writing that "the district court need not adjudicate the validity of any of the public acts authorizing the PCGG . . . in the course of determining whether the PCGG wrongfully repudiated its contractual obligation."[158] Thus, without citing *Dunhill* and making it to step three, the Fifth Circuit reached the same conclusion by applying *Kirkpatrick* step one. Indeed, the fact pattern and holding between *Dunhill* and *Walter Fuller* are nearly identical: a commercial instrumentality of a foreign state refused to perform a commercial legal obligation, but the act of state doctrine did not preclude inquiry because the act in question was not traceable to an official act.[159]

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exercising sovereign power when it sequestered and sold the Falcon because the PCGG as receiver only had authorization to act under the authority of a court, thus the act of state doctrine did not apply), *appeal dismissed*, 940 F.2d 839 (8th Cir. 1991) (per curiam), *cert. denied*, 502 U.S. 1096 (1992).

156. *Walter Fuller*, 965 F.2d at 1388 (citing *Callejo*, 764 F.2d at 1115-16).

157. *Id.*

158. *Id.* The court used the terms "public act," "sovereign act" and "official act" interchangeably.

159. *Compare* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (repudiating commercial debt obligation is not an act of state), *with Walter Fuller*, 965 F.2d (repudiating deed of sale obligation that imposes a duty to defend is not an act of state).

This explanation makes clear both why the *Refined Petroleum* plaintiffs correctly perceived a commercial activity exception in the Fifth Circuit, and why the trial court reached the correct outcome through needlessly duplicative reasoning: the trial court in *Refined Petroleum* overlooked that *Walter Fuller*'s application of *Kirkpatrick* had amounted to application of *Dunhill*'s commercial activity exception.[160]

160. See also Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int'l B.V., 809 F.3d 737, 744 (2nd Cir. 2016). The Second Circuit's reasoning in *Sojuzplodoimport* suggests further evidence for this claim. The court held that an intergovernmental transfer of American trademarks is not a commercial act, and so, if there were a commercial activity exception, it would not apply:

> The subject matter of the transferred rights is the ability to exploit trademarks for commercial gain—but that does not render the transfer itself a commercial transaction. The Russian Federation did not act as a trader or merchant; it acted as a government by allocating its rights to assert legal claims to FTE (which is itself a branch of the sovereign).

Id. at 745. The Eleventh Circuit also briefly addressed the possible existence of the commercial activity exception in Hond. Aircraft Registry v. Hond., 129 F.3d 543 (11th Cir. 1997). A private company had contracted with the Director General of Civil Aeronautics to "upgrade and modernize the Honduran civil aeronautics program," to which the private company "would provide goods and services to aid Honduras in achieving this goal." *Id.* at 545. Then, "Honduras . . . abrogated the contract" and the plaintiffs sued the Director General and the Government of Honduras to recover the value of the goods and services provided but not paid for. *Id.* at 546. The Southern District of Florida found the act of state doctrine did not apply because "exceptions to the doctrine include those acts of state that are purely commercial . . . " and cited *Dunhill* without commenting that the opinion in *Dunhill* was a plurality opinion, and without applying the three-step *Kirkpatrick* analysis. Hond. Aircraft Registry v. Hond., 883 F.Supp. 685, 688 (S. D. Fl. 1995), *aff'd in part, vacated in part*, 129 F.3d 543 (11th Cir. 1997), *cert denied*, 524 U.S. 952 (1998). The trial court then found that "[t]his is type of contract private parties enter into in the course of commerce" and appeared analogous to a "private commercial transaction." *Id.* at 688. But on appeal, the Eleventh Circuit stated bluntly that "there is no commercial exception to the act of state doctrine as there is under the FSIA. The factors to be considered, as recited in *Kirkpatrick*, may sometimes overlap with the FSIA commercial exception, but a commercial exception alone is not enough." *Hond. Aircraft Registry*, 129 F.3d at 550.

C. The D.C. Circuit's Approach

Sea Breeze Salt's analysis suggested a circuit split between the other circuits, which did not explicitly acknowledge the applicability of the commercial activity exception,[161] and the D.C. Circuit, which has directly applied it.[162]

In *Malewicz v. City of Amsterdam*, the D.C. District Court explained that the defendant's attempt to characterize its acquisition of challenged paintings as an "official act stretches the meaning of that phrase – and hence the act of state doctrine – too far."[163] The reason was that only sovereign acts such as "a law passed by the British legislature" would be immune from scrutiny under the act of state doctrine.[164] According to the court, "official," for purposes of *Kirkpatrick* step one, does not mean an action 'done by a state employee acting in his capacity as such,' but rather an action "taken by right of sovereignty."[165] This is because any private person or entity could have purchased the paintings for display in a public or private museum as the defendant had.[166] As support, the D.C. District Court cited *Dunhill*'s commercial activity exception favorably, finding that, "[Courts] are in no sense compelled to recognize as an act of state the purely commercial conduct of foreign governments . . . "[167] Unlike the cases discussed above, the court properly analyzed the act of state

161. *See infra*, part III, Section A.

162. *See, e.g.*, de Csepel v. Republic of Hung., 714 F.3d 591, 604 (D.C. Cir. 2013); McKesson Corp. v. Islamic Republic of Iran, 672 F.3d 1066, 1075 (D.C. Cir. 2012); Malewicz v. City of Amsterdam, 517 F. Supp. 2d 322, 328-29 (D.D.C. 2007).

163. *Malewicz*, 517 F. Supp. 2d at 338.

164. The court described a sovereign act using the Roman law concept of *jure imperii* and included other examples such as an order issued by foreign president to seize commercial goods, a foreign state's issuing an export license, a foreign minister of finance's ordering tax payments, and Israel's settlement policies. *Id.* at 338-39.

165. *Id.* at 339.

166. *Id.* (citing Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 697-98 (1976) ("courts are in no sense compelled to recognize as an act of state the purely commercial conduct of foreign governments.")).

167. *Malewicz*, 517 F. Supp. 2d at 338 (quoting *Dunhill*, 425 at 697-98).

issue by avoiding the unnecessary third step. The court understood that *Dunhill* had been integrated directly into the *Kirkpatrick* official act requirement. In effect, the court recognized that both *Dunhill* and *Kirkpatrick* stand for the proposition that what makes commercial activity worth excepting is that it is not 'sovereign' activity.[168] This determination is exactly the distinction that Chief Justice Marshall made in *The Schooner Exchange*.[169]

The D.C. Circuit Court followed this characterization five years later in *McKesson Corp. v. Republic of Iran*,[170] and again in *de Csepel v. Republic of Hungary*.[171] When agents of the Iranian government froze out and stopped paying dividends to other McKesson Corp. shareholders, the court examined the act to assess whether it met the official act requirement.[172] The court also examined that the failure to pay the dividends "cannot fairly be characterized as public or official acts of a sovereign government" because "Iran did not pass a law, issue an edict or decree, or engage in formal governmental action explicitly taking McKesson's property for the benefit of the Iranian public."[173] The court then cited *Dunhill* to support its conclusion that this unofficial freeze out and refusal to disburse dividend payments by agents of the Iranian government did not count as a "public act of a foreign sovereign power" protected by the act of state doctrine.[174]

In *de Csepel*, the D.C. Circuit affirmed the D.C. District Court's interpretation of *Dunhill*.[175] There, plaintiffs asserted that the Republic of Hungary had held a number of paintings owned by the plaintiffs but possessed by the Hungarian Government in

168. *Id.*

169. *See* The Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116, 144 (1812).

170. McKesson Corp. v. Islamic Republic of Iran, 672 F.3d 1066, 1074 (D.C. Cir. 2012). According to Judge Brown, the procedural saga in McKesson is a "nightmare" that "resembles the harshest caricature of the American litigation system." *Id.* at 1070.

171. De Csepel v. Republic of Hung., 714 F.3d 591, 604 (D.C. Cir. 2013).

172. *McKesson*, 672 F.3d at 1074.

173. *Id.*

174. *Id.*

175. *See de Csepel*, 714 F.3d at 604

a constructive bailment relationship.[176] "Given that the family seeks to recover for breaches of bailment agreements, the district court got it just right: their claims challenged "not sovereign acts, but rather commercial acts" entitled to no "deference under the act of state doctrine."[177] Indeed, the trial court had noted explicitly that "purely commercial" acts do not require deference under the act of state doctrine, and thus the repudiation of a commercial debt was not truly a sovereign act.[178]

D. Refocusing the Commercial Activity Exception on the Sovereign Authority of the Agent

Whether the court integrates the commercial nature of the act directly into the official act requirement in *Kirkpatrick* step one, as the D.C. Circuit does,[179] or applies *Kirkpatrick* steps one and three separately and then inevitably finds no need to pass judgement upon the existence of the commercial activity exception in step three as the majority of circuits do,[180] the cases only matter insofar as the court is accurately cataloguing applicable precedent. Either characterization is unlikely to be outcome determinative precisely because the different analyses reach the same result. *Dunhill* is alive and well in American jurisprudence and remains important to understand the true and evolving impact of *Kirkpatrick* on the act of state doctrine.

The benefit of the *Kirkpatrick* official act requirement, and thus by implication, the commercial activity exception, is that it requires the foreign states to more publicly and accountably take the deleterious action purported and prevents defendants from circumventing the FSIA.[181] By requiring a legislative act, decree, edict, or judgement, foreign states must go through the substantial procedural motions of declaring legitimate or actually ratifying the behavior of the lower-level instrumentality.[182]

176. *See id.* at 596.

177. *Id.* at 604 (quoting de Csepel v. Republic of Hung., 808 F. Supp. 2d 113, 143 (D.D.C. 2011)).

178. *De Csespel*, 808 F. Supp. 2d at 142.

179. *See infra*, Part III, Section C.

180. *See infra*, Part III, Sections A-B.

181. *See infra*, Part III, Section A.

182. *McKesson*, 672 F.3d at 1074.

Requiring notice – that the foreign state has imbued a certain entity with sovereign power – makes it easier for the United States and its citizens to understand the implications of their commercial and diplomatic transactions with foreign states. Indeed, the *Dunhill* plurality's concern with using the act of state doctrine as an aegis for otherwise reviewable conduct seems legitimate to apply to state party defendants.

But employing Justice Scalia's bright-line rule in *Kirkpatrick*, thereby collapsing the distinction between "official" and "unofficial" to no more than the presence of a formal legislative, executive, or judicial order by a foreign state, leaves open the possibility for gamesmanship by foreign sovereigns.[183] For example, under the facts of *Dunhill*, had the Castro regime made an order requiring state-run enterprises to repudiate any commercial debts, this would bring the refusal of the interventors within the ambit of the act of state doctrine.[184] The same result would follow under the facts of *McKesson Corporation v. Islamic Republic of Iran*[185] had the Iranian government enacted a law forbidding the payment of dividends to extra-national shareholders. Consider also the logic of *Walter Fuller*'s reasoning: had the Philippine Government explicitly eliminated the authorization of the PGCC to defend third parties in lawsuits by amending in its enabling statute, the Court would have found exactly the sort of act of state from which it had distinguished *Callejo*.[186] An alternative distinction that would provide the predictability of *Kirkpatrick*'s bright line rule without opening up the act of state doctrine to abuse by nominally official ratifications of otherwise unofficial acts is needed.

183. *See* Dellapenna, *supra* note 28, at 57 ("To always rely on formal authority would be self-defeating because foreign states could then bring an act within the act of state doctrine merely by ratifying the act formally.").

184. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695 (1976) ("No statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated its obligations in general or any class thereof or that it had as a sovereign matter determined to [repudiate].").

185. *McKesson*, 672 F.3d at 1071.

186. Walter Fuller Aircraft Sales, Inc. v. Republic of Phil., 965 F.2d 1375, 1388 (5th Cir. 1992) (citing Callejo v. Bancomer 764 F.2d 1101, 1115-16 (5th Cir. 1980)).

Identifying an exercise of foreign sovereignty is at the core of the act of state doctrine when the doctrine requires categorizing the act of a foreign instrumentality. While such a determination is context dependent, courts should – and often do – begin by asking: does the foreign state instrumentality possess the power to proscriptively alter or coercively enforce the substantive content of legal rights and obligations appurtenant to persons within its territory or to the territory itself?[187] The courts then should – and often do – ask, if the foreign state instrumentality possessed that power, did they actually invoke that authority to accomplish the act in question?[188] This standard has two advantages. Firstly, it explains what it is about commerce that is not sovereign: there is no coercion. On the other hand, engaging in an arm's length commercial transactions requires consent between the parties with respect to the act in question. This distinction captures lower-level agents insofar as they are actually utilizing truly sovereign, and therefore official, power and it explains why providing act of state protection merely because the agent possesses such a power or merely because the agent is a commercial enterprise owned by the state appears fortuitous.[189]

187. *See* Dellapenna, *supra* note 28 at 63-4.

188. *Id.* at 60. An "act of state" should be recognized "whenever there has been a decision under the authority of a foreign state to create or change specific legal rights or duties if this decision expresses policies central to the political sovereignty of that state." *Id.* Dellapenna's criterion is worth amending slightly, because it begs the question: what exactly is 'central to the political sovereignty of that state?' Thomas Hobbes provides an insightful, if still incomplete answer:

> [It] is annexed to sovereignty the whole power of prescribing the rules, whereby every man may know, what goods he may enjoy, and what actions he may do, without being molested by any of his fellow-subjects . . . this is it men call propriety . . . These rules of propriety (or *meum* and *tuum*) and of *good*, *evil*, *lawful*, and *unlawful*, in the actions of subjects, are the civil laws.

Thomas Hobbes, Leviathan 119 (J. C. A. Gaskin ed., 3d ed. 2008).

189. *See, e.g.*, Malewicz v. City of Amsterdam, 517 F. Supp. 2d 322, 339 (D.D.C. 2007) (finding that publicly owned art museum employee's purchase of painting is not official even though the purchase was within the scope of his authority as a public official because a private citizen could also purchase the painting.).

Secondly, an official act so conceived helps explain why courts remain cautious to grant injunctive relief that would order or constrain the deployment of a foreign state's natural resources.[190]

IV. Conclusion

The Schooner Exchange presents an early example of American law grappling with the concept of foreign sovereignty and the original justification for treating the 'public' activity of foreign governments differently than 'commercial' activity.[191] Herein, Chief Justice Marshall's reasoning drew a lasting distinction: the foreign government does not "employ" commercial ships, so unlike war ships, the foreign government has not placed the commercial ship under its "immediate and direct command."[192] Chief Justice Marshall focused on the level of control exerted by the foreign government because he wanted to avoid offending the foreign government, so using the commercial versus public distinction was a useful proxy in the early 19th century.[193] However, it is unclear whether the line he drew can still faithfully capture his primary aspiration to avoid offending the foreign government when many foreign states have nationalized key industries and blurred the line between commercial and public acts. By recognizing that the act of state doctrine's commercial activity exception has been integrated into the official act requirement of *Kirkpatrick v. Environmental*

190. *See* Int'l Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354, 1361 (9th Cir. 1981) ("[G]ranting of any relief would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources."); Spectrum Stores, Inc. v. Citgo Petrol. Corp., 632 F.3d 938, 955 (5th Cir. 2011) ("[G]ranting of any relief to Appellants would effectively order foreign governments to dismantle their chosen means of exploiting the valuable natural resources within their sovereign territories."); Sea Breeze Salt, Inc., v. Mitsubishi Corp. 899 F.3d 1064, 1071 (9th Cir. 2018).

191. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695-96 (1976); *see* Christine G. Cooper, *Act of State and Sovereign Immunity: A Further Inquiry*, 11 Loy. U. Chi. L. J. 193, 197 (1980).

192. The Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116, 144 (1812).

193. *Id.*

Tectonics, and by tailoring the new standard to the nuanced forms of foreign commercial and political relationships to which it must inevitably apply, courts can provide more predictability for international commerce and ensure the appropriate balance of enforcing legal rights against diplomatic pressures.