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KATE YOON

## When the Sovereign Contracts: Troubling the Public/Private Distinction in International Law

**ABSTRACT.** Under current foreign sovereign immunity doctrine, sovereigns are not immune from suit when they engage in “private” acts, such as entering into contracts—in other words, when they act as participants in, rather than regulators of, the market. This Note argues that the distinction between a state’s public and private acts is far less stable and clear-cut than it first appears. Many acts in which sovereigns engage are of a mixed nature. Choosing to see an act or transaction as essentially private or public often obscures other features that complicate that characterization.

U.S. courts have applied foreign sovereign immunity law in such a way as to selectively recognize the private aspects of such transactions, thereby enabling private actors to bring foreign sovereigns into U.S. courts. This has disproportionately affected Global South nations, where the state is more likely to be involved in the economy and to enter into contracts with private parties to accomplish important sovereign aims. This is a dynamic that I call *subordination through private-law adjudication*. However, in the longer history of foreign sovereign immunity law, I also argue that simply expanding the category of public law cannot decisively end the subordination of Global South sovereigns in transnational and international law.

**AUTHOR.** A.B., Harvard College; M.Phil, D.Phil, University of Oxford; J.D. expected 2024, Yale Law School. I would like to thank Professor Aslı Ü. Bâli, who has read more drafts of this Note than I can count, and fellow students in her Third World Approaches to International Law (TWAIL) Seminar, as well as the students in her Advanced TWAIL Directed Research Seminar. I would also like to thank Professors Amy Kapczynski, Congyan Cai, Daniel Markovits, and Samuel Moyn, as well as Ali Hakim, Chloe Miller, Doruk Erhan, Jeff Gordon, and Mark Firmani. I owe special thanks to Sachin Holdheim, a paragon of clarity, as well as to Raquel Leslie, Dena Shata, and the editors of the *Yale Law Journal* for their exceptionally thoughtful engagement with this Note.



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## INTRODUCTION

In the wake of the COVID-19 pandemic, sovereign debt in developing countries ballooned to unprecedented levels. According to one estimate from 2021, the global pandemic added \$24 trillion to global debt, a number that is estimated to be even higher by the time of this Note's publication.<sup>1</sup> A second estimate suggests that the global debt burden increased by more in 2020 than in any other year since World War II.<sup>2</sup> Because it is difficult for countries to service these bloated debts, commentators predict a wave of defaults across low- and middle-income countries.<sup>3</sup> Defaults are likely, in turn, to trigger litigation against those sovereigns for repayment, initiated by private investors in the Global North who collectively hold more than half of all developing country debt.<sup>4</sup>

Litigation against sovereigns in response to debt defaults tends to follow a standard formula. According to one report published by the *New York Times*, about fifty percent of sovereign-debt crises involve litigation, and most of such litigation involves a hedge fund plaintiff.<sup>5</sup> These hedge fund plaintiffs are not the original creditors of the sovereigns. Instead, they purchase "distressed" debt — debt that the debtor is unlikely to be able to repay in full — on the secondary market, for a fraction of its original value.<sup>6</sup> By suing for full repayment on

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1. Marc Jones, *COVID Response Drives \$24 Trillion Surge in Global Debt: IIF*, REUTERS (Feb. 17, 2021, 11:07 AM), <https://www.reuters.com/article/us-global-debt-iif-idUSKBN2AH285> [<https://perma.cc/G42A-KHDL>].
  2. Marcello Estevão & Sebastian Essl, *When the Debt Crises Hit, Don't Simply Blame the Pandemic*, WORLD BANK BLOGS (June 28, 2022), <https://blogs.worldbank.org/voices/when-debt-crises-hit-dont-simply-blame-pandemic> [<https://perma.cc/W3YV-3G7G>].
  3. Jason Beaubien, *An Economic Perfect Storm Is Battering Emerging Markets. Debt Crises Loom*, NPR (Sept. 2, 2022, 6:00 AM ET), <https://www.npr.org/2022/09/02/1120076029/global-economy-emerging-markets-inflation-debt> [<https://perma.cc/FR22-J2GW>]; Sydney Maki, *Historic Cascade of Defaults Is Coming for Emerging Markets*, BLOOMBERG (July 7, 2022, 5:00 PM EDT), <https://www.bloomberg.com/news/articles/2022-07-07/why-developing-countries-are-facing-a-debt-default-crisis> [<https://perma.cc/AWY6-W6YM>].
  4. See Dennis Hranitzky, Kevin Reed, Debra O'Gorman & Alex Loomis, *What to Expect in the Coming Wave of Sovereign Debt Litigation*, QUINN EMANUEL URQUHART & SULLIVAN, LLP 1 (Dec. 16, 2022), <https://www.quinnemanuel.com/media/kifngvwh/what-to-expect-in-the-coming-wave-of-sovereign-debt-litigation.pdf> [<https://perma.cc/3Q73-5Y2R>]; Press Release, U.N. Off. of the High Comm'r for Hum. Rts., UN Experts Back Draft New York Bill to Ensure Effective and Fair Debt Relief: UN Experts (June 8, 2023), <https://www.ohchr.org/en/press-releases/2023/06/un-experts-back-draft-new-york-bill-ensure-effective-and-fair-debt-relief-un> [<https://perma.cc/AA3V-2UR7>].
  5. Jesse Baron, *The Curious Case of Aurelius Capital v. Puerto Rico*, N.Y. TIMES (Nov. 26, 2019), <https://www.nytimes.com/2019/11/26/magazine/aurelius-capital-v-puerto-rico.html> [<https://perma.cc/KBG5-XHW5>].
  6. *Id.*

the original terms of the bonds, they can make profits of up to 300%-400%.<sup>7</sup> These suits usually take place in U.S. courts, and specifically courts in New York such as the District Court for the Southern District of New York (S.D.N.Y.). This is because more than half of debt contracts between private creditors and developing nations are governed by New York law.<sup>8</sup>

In this most recent wave of sovereign debt crises, private creditors of indebted sovereigns have already started to bring suits for repayment. Hamilton Reserve Bank filed a suit against Sri Lanka in S.D.N.Y. after Sri Lanka defaulted on its debt in 2022.<sup>9</sup> The bank filed this suit even before preliminary restructuring negotiations between Sri Lanka and its creditors were complete, and the bank refused to participate in any such negotiations.<sup>10</sup> Ultimately, the court granted Sri Lanka's request to stay the proceedings for six months while it engaged in negotiations with creditors. However, the court also recognized that the plaintiff bank could renew its motion for summary judgment after the end of the stay, and that if it prevailed on its claims it would be eligible to claim prejudgment interest.<sup>11</sup>

While it may seem unsurprising that litigation against debtors often takes place in the location of one of the world's largest financial markets, such litigation in domestic courts against sovereign states is a relatively new phenomenon. The legal framework for it was only established in the 1980s, in the wake of an earlier wave of defaults by indebted sovereigns.<sup>12</sup> For creditors and investors to sue sovereign states in U.S. courts, they had to overcome the legal principle of foreign sovereign immunity: the idea that sovereigns could not be sued in the domestic courts of other countries. Until the 1950s, this doctrine posed a nearly

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7. Shaina S. Potts, *Displaced Sovereignty: U.S. Law and the Transformation of International Financial Space* 153 (2017) (Ph.D. dissertation, University of California Berkeley) (ProQuest); see *Vulture Funds in the Sovereign Debt Context*, AFR. DEV. BANK GRP., <https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility/vulture-funds-in-the-sovereign-debt-context> [<https://perma.cc/369U-TF5S>].

8. U.N. Off. of the High Comm'r for Hum. Rts., *supra* note 4.

9. *Hamilton Rsrv. Bank Ltd. v. Democratic Socialist Republic of Sri Lanka*, No. 22-CV-5199, 2023 WL 7180683, at \*1 (S.D.N.Y. Nov. 1, 2023).

10. *Id.* at \*2; *Creditor Files SDNY Lawsuit Against Sri Lanka in Connection with Its Sovereign Debt Default, Asserting Breach of Contract and Pari Passu Claims*, CLEARY GOTTLEIB STEEN & HAMILTON LLP (June 30, 2022), <https://www.clearygottlieb.com/news-and-insights/publication-listing/creditor-files-sdny-lawsuit-against-sri-lanka-in-connection-with-its-sovereign-debt-default-asserting-breach-of-contract-and-pari-passu-claims> [<https://perma.cc/3964-FBLG>].

11. *Hamilton Rsrv. Bank Ltd.*, 2023 WL 7180683, at \*4, \*6.

12. Jocelyn Sims & Jessie Romeo, *Latin American Debt Crisis of the 1980s*, FED. RSRV. HIST. (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/latin-american-debt-crisis> [<https://perma.cc/VK7K-JCGR>].

insurmountable barrier to suing foreign sovereigns in U.S. courts. That reality was disrupted when U.S. law established a “commercial exception” to foreign sovereign immunity, which abrogated foreign sovereign immunity when states acted in their “private” or commercial capacities, such as by entering into contracts. Such contracts may include agreements between states and private parties to extract natural resources or build infrastructure.<sup>13</sup> Even after the commercial exception to foreign sovereign immunity was established, it was by no means clear that sovereign debt contracts were indeed purely commercial acts.<sup>14</sup> Actions to recover money from indebted sovereigns were ultimately only made possible after the Supreme Court of the United States declared in *Republic of Argentina v. Weltover, Inc.* that sovereign debt contracts were indeed commercial, or private, acts that abrogated states’ sovereign immunity.<sup>15</sup>

The current legal framework governing foreign sovereign immunity distinguishes between acts that are carried out in a state’s sovereign and nonsovereign, or public and private, capacities – in other words, between those acts that are unique to sovereigns (e.g., legislation, regulation) and those that private parties could carry out (e.g., entering into a contract). Drawing this distinction has high stakes because it is the basis for determining which acts are governed by public international law – the law governing the relation between sovereign states – and which acts are governed by the private, domestic jurisdiction of individual states. But this distinction between a state’s public and private acts is also difficult to draw conclusively, given the mixed nature of the many acts in which sovereign states engage. As scholars have long pointed out, a contract for the purchase of military supplies or for the issuance and repayment of sovereign bonds has both

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13. Jan Schokkaert, Yvon Heckscher & Valérie Dejonghe, *Investment Contracts Between Sovereign States and Private Companies – Link Between BITs and State Contracts*, 11 J. WORLD INV. & TRADE 903, 904 (2010).

14. A note on terminology: “foreign sovereign immunity,” which I use to refer to the immunity of foreign states in domestic courts, is the preferred term in U.S. law; however, in international law, terms such as “state immunity” and “jurisdictional immunity of states” are preferred.

15. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 620 (1992). However, this holding is no longer relevant to the extent that most sovereign debt contracts now contain waivers of foreign sovereign immunity, which renders moot the question of whether they fall into the commercial activity exception of the Foreign Sovereign Immunities Act (FSIA). See W. Mark C. Weidemaier & Mitu Gulati, *International Finance and Sovereign Debt*, in 3 THE OXFORD HANDBOOK OF LAW AND ECONOMICS: PUBLIC LAW AND LEGAL INSTITUTIONS 482, 489 (Francesco Parisi ed., 2017) (listing the “enforcement-enhancing clauses” that sovereigns accept in sovereign debt contracts to “pave the way to the courthouse”); *id.* at 489 (noting that “virtually every bond issued to foreign investors [that was not issued by countries with the highest credit rating] waived the sovereign’s immunity from suit”).

features of a commercial transaction and an act of a sovereign.<sup>16</sup> While any actor could enter into an agreement to buy goods in general, sovereigns enter contracts for military supplies because of their uniquely sovereign prerogatives of protecting the integrity of their territory. Likewise, while any actor could enter into an agreement to borrow and repay money, when sovereigns do so, it is with the regulatory purpose of financing essential governmental functions.<sup>17</sup>

In light of the difficulty of characterizing an act as solely public or private, there has been a doctrinal shift in the second half of the twentieth century as U.S. courts have expanded the category of the “private” through a selective highlighting of the facts of an act or transaction. This Note argues that this selective recognition of certain features of an act over others has subjected Global South nations to the judgment of domestic courts in the United States even when they are, at least in part, acting in their sovereign capacity.<sup>18</sup> The expansion of jurisdiction through characterizing sovereign states’ acts as purely private disproportionately affects Global South sovereigns because they are more likely to be involved in the economy through contracts with private parties based in the Global North, given the imperative of economic development.<sup>19</sup> Such exercise of jurisdiction by domestic courts in the Global North, most notably in New York, betrays the principle of sovereign equality in international law, under which *par in parem non habet imperium* – equals do not have authority to judge one another.<sup>20</sup>

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16. See, e.g., Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT’L L. 220, 223 (1951); Joan E. Donoghue, *Taking the “Sovereign” Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 YALE J. INT’L L. 489, 505 (1992); Muthucumaraswamy Sornarajah, *Problems in Applying the Restrictive Theory of Sovereign Immunity*, 31 INT’L COMPAR. L.Q. 661, 663 (1982).

17. See *infra* note 149 and accompanying text.

18. See, e.g., Potts, *supra* note 7, at 4 (“[C]ourts have increasingly reclassified foreign sovereign transnational activities as ‘private’ (rather than ‘public’ or ‘sovereign’) . . .”). Another note on terminology: because the period I am considering extends from the beginning of European colonization of other parts of the world to the late twentieth century, after the formal end of empire, it is difficult to find consistent terminology that succinctly represents the changing relationship between European and non-European nations. Accordingly, I use the term “non-European” throughout the Note when my preferred term, “Global South,” would be anachronistic. I also use the term “Third World” when appropriate in reference to the scholarship with which I am engaging. On the use of the term “Third World,” see Makau Mutua, *What Is TWAIL?*, 94 PROC. ASIL ANN. MEETING 31, 35 (2000) (“The term *Third World* is different from *less-developed*, *crisis-prone*, *industrializing*, *developing*, *underdeveloped*, or *the South* because it correctly captures the oppositional dialectic between the European and the non-European, and identifies the plunder of the latter by the former.”).

19. See *infra* note 136 and accompanying text.

20. *Par in Parem Non Habet Imperium*, in PARRY & GRANT ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 455 (John P. Grant & J. Craig Barker eds., 3d ed. 2009).

In making this argument, I draw on a long line of legal theorists who have critiqued the public/private distinction in the law. Scholars have argued that categorizing some issues as matters of private law (e.g., in the domestic context, contracts and property) and others as matters of public law (e.g., antidiscrimination or voting rights) insulates what is considered the realm of private, economic transactions from political critique and reimagination.<sup>21</sup> Such insulation prevents us from seeing domination and hierarchy within the economic sphere, which then has public and political consequences. The doctrine of foreign sovereign immunity is an important site in which this distinction is drawn and articulated, but it has been underexamined relative to other areas of law, and even other areas of international law.

In Part I, I introduce the doctrine of foreign sovereign immunity and its commercial exception. Although the principle of foreign sovereign immunity is part of customary international law, it is implemented through domestic legislation. The U.S. Foreign Sovereign Immunities Act of 1976 (FSIA) plays an outsized role in foreign sovereign immunity doctrine globally. The FSIA establishes a list of exceptions to the general rule of foreign sovereign immunity, under which foreign sovereigns can be subject to the jurisdiction of U.S. courts. The most important of these is the commercial exception. This raises the question: why is foreign sovereign immunity abrogated when a sovereign acts in its so-called commercial capacity? The most plausible justification, within the terms of the doctrine itself, is based on protecting a state's regulatory powers. However, beginning in the latter half of the twentieth century, U.S. courts have drawn the distinction between public and private acts in ways that undermine states' powers to regulate, and that instead privilege efficiency and certainty. This turn perpetuates an imbalance between capital-importing Global South nations and the investors that file suit in Global North jurisdictions.

In Part II, I expand this claim beyond the context of foreign sovereign immunity to argue that the expansion of the category of states' private acts works more generally against the interests of those Global South nations in international and transnational law. This is a dynamic that I term *subordination through private law adjudication*. When foreign sovereign immunity law presumptively treats a contract that a sovereign state enters into as a "commercial" act, it ignores the political dimensions of that act and subjects it to the seemingly technocratic judgment of depoliticized private law. In this Part, I draw on and bring together the insights of different traditions of legal theory, including Law & Political Economy (LPE) and Third World Approaches to International Law (TWAAIL), both of which have made similar claims in other contexts. I situate foreign sovereign immunity law in two adjacent procedural and substantive areas of law —

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21. See *infra* Section II.A.



international arbitration and sovereign debt—to show how the designation of certain acts as private relies on selective factual analysis that subordinates Global South nations. I then return to the foreign sovereign immunity context, where I demonstrate that the designation of state contracts as purely private acts that do not give rise to foreign sovereign immunity disproportionately impacts the Global South, where states are more likely to play a greater role in the economy given the imperative of development.<sup>22</sup> This brings Global South sovereigns into the domestic courts of the North and especially the United States, which place these sovereign nations on equal footing with private actors.

In Part III, I argue that the expansion of private law in transnational and international adjudication is but one way in which the boundary between public and private law has been drawn to subordinate non-European nations. In the broader history of foreign sovereign immunity law, this boundary has been drawn and redrawn in a variety of configurations that have functionally served similar ends. This means that the antidote to what I term *subordination through private-law adjudication* cannot simply be the expansion of the category of public law.

To illustrate this point, I examine two central moments, centuries apart, in the evolution of foreign sovereign immunity doctrine within the common-law tradition. These two moments represent different configurations of the boundary between a sovereign's public and private acts, but they lead to similar outcomes: the empowerment of private actors vis-à-vis non-Western sovereigns. The commercial exception to foreign sovereign immunity in the Anglo-American common law finds its roots in the case *Nabob of the Carnatic v. East India Company*.<sup>23</sup> This case concerned a dispute between the Nawab of the Carnatic, an Indian ruler, and the British East India Company over a debt. The Court of Chancery refused to take jurisdiction over the Nawab's bill on the grounds that the debt was a treaty between sovereigns, rather than a private contract. This case has surprising resonances with a later U.S. case that marked another crucial moment in the evolution of foreign sovereign immunity doctrine, *Republic of Argentina v. Weltover, Inc.*: the case that enabled suits in U.S. courts against foreign sovereigns for failure to repay their debts.<sup>24</sup> This case, which emerged out of the Latin American debt crisis of the 1980s, expanded the jurisdiction of U.S. courts by characterizing sovereign debt contracts as commercial rather than sovereign

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22. See *infra* note 136 and accompanying text.

23. 30 Eng. Rep. 521, 521 (1793). The case refers to the “Nabob of the Carnatic,” but the more commonly used term in contemporary parlance is “Nawab.” I use “Nabob” only when referring to the case (i.e., “Nabob of the Carnatic”) and “Nawab” when talking about the person.

24. 504 U.S. 607, 620 (1992).



acts. In doing so, it elevated the status of private lenders to that of quasi-sovereign actors that could thwart Argentina's sovereign ability to set economic policy.

Informed by these lessons, Part IV canvasses two possible reforms to the troubled public/private distinction: first, allowing courts to consider possible regulatory purposes behind sovereign acts and transactions; and second, moving foreign sovereign immunity determinations from domestic courts to the international arena through a treaty and/or adjudicatory mechanism. While I conditionally endorse both reforms as improvements to the status quo, I also suggest that, as the preceding Part implies, simply expanding the category of states' "public" acts cannot adequately address the subordination of Global South nations. Instead, we must be clear-eyed about the constraints that make such reforms difficult to realize in practice, and about the possibility that well-intentioned reforms can also have unintended consequences.

Any attempt to reform international and transnational adjudication must take into account the geopolitical shifts we are witnessing today, including the rise of new regional and global hegemony. These shifts bring with them both new possibilities and new challenges, in light of which categorizing the world into "North" and "South," or "First World" and "Third World," may seem increasingly oversimplistic.<sup>25</sup> While such shifts may create an opportunity for negotiation over mutually acceptable rules governing states' jurisdiction over other sovereign states, they also present the possibility that the same dynamics of subordination will replicate themselves, even with a new cast of dominant players, in a multipolar world.

## **I. RECONSTRUCTING THE RESTRICTIVE THEORY OF FOREIGN SOVEREIGN IMMUNITY**

The idea that sovereign states are immune from suit in other nations is generally accepted as a principle of customary international law.<sup>26</sup> However, this idea

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25. See, e.g., Prabhash Ranjan, *TWAIL's Blind Spots Concerning International Investment Law*, *AFRONOMICSLAW* (Mar. 16, 2020), <https://www.afronomicslaw.org/2020/03/16/twails-blind-spots-concerning-international-investment-law> [<https://perma.cc/87R9-GQ2F>] (noting that North America, Western Europe, and Japan's share of global GDP has fallen significantly since the 1970s).

26. G.A. Res. 59/38, United Nations Convention on Jurisdictional Immunities of States and Their Property, annex § 2 (Dec. 2, 2004). The United Nations Convention on the Jurisdictional Immunities of States has not gone into effect because not enough states have ratified it. I discuss the Convention in greater detail in Part IV of this Note.

is largely implemented through domestic law.<sup>27</sup> In the mid-twentieth century, a number of states including the United States and United Kingdom shifted from what scholars refer to as the absolute theory of foreign sovereign immunity, under which sovereigns enjoyed absolute immunity from suit, to the restrictive theory, which enabled suits against sovereigns in domestic courts under certain circumstances.<sup>28</sup> Under the restrictive theory of foreign sovereign immunity, states are immune when they engage in *acta jure imperii*, or “sovereign” activities, but are not immune when they engage in *acta jure gestionis*, or “private” activities.<sup>29</sup> Commercial transactions are the paradigmatic example of such private activities, giving rise to the greatest number of suits against sovereigns.<sup>30</sup>

In this Part, I use the U.S. law on foreign sovereign immunity, as expressed in the FSIA, to illustrate how the restrictive theory of foreign sovereign immunity law works in practice. I do not draw on U.S. law on foreign sovereign immunity because it is necessarily representative: in some important ways it is *not* representative, particularly in its permissive approach to allowing suits against foreign sovereigns in domestic courts. This unrepresentativeness notwithstanding, U.S. law plays an outsized role in the context of foreign sovereign immunity law internationally because much of (and, on some accounts, even the *majority* of) the litigation against foreign sovereigns in domestic courts around the world takes place in the United States.<sup>31</sup> Thus, in the foreign-sovereign-immunity context, U.S. domestic law is both informed by international law and, in turn, forms a key part of international legal practice.<sup>32</sup>

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27. Maryam Jamshidi, *The Political Economy of Foreign Sovereign Immunity*, 73 HASTINGS L.J. 585, 587 (2022); Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 21 EUR. J. INT’L L. 853, 858 (2010); Sompong Sucharitkul, *Preliminary Report on the Topic of Jurisdictional Immunities of States and Their Property*, [1979] II(1) Y.B. Int’l L. Comm’n 227, 231, U.N. Doc. A/CN.4/323; XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 33 (2012); see also RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 451 (AM. L. INST. 2017) (“Under international law and the law of the United States, a state is immune from the jurisdiction of the courts of another state, subject to certain exceptions.”).
28. Letter from Jack B. Tate, Acting Legal Adviser, to Philip B. Perlman, Acting Att’y Gen. (May 19, 1952), reproduced in Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, app. 2 at 712-14 (1976) (listing the countries that have made the transition to the restrictive theory of sovereign immunity); Clive M. Schmitthoff & Frank Woolridge, *The Nineteenth-Century Doctrine of Sovereign Immunity and the Importance of the Growth of State Trading*, 2 DENV. J. INT’L L. & POL’Y 199, 201 (1972) (noting as of 1972 that “only the United Kingdom, India, the Soviet Union and some Eastern European countries now favor the absolute rule of sovereign immunity”); State Immunity Act 1978, c. 33 (reflecting the United Kingdom’s adoption of the restrictive theory).
29. Jamshidi, *supra* note 27, at 601.
30. *Id.* at 587.
31. *Id.*
32. See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 451(c) (AM. L. INST. 2017).

After describing the FSIA, this Part will examine possible justifications – internal to the doctrine – for the restrictive theory, and particularly the commercial exception to foreign sovereign immunity. This reconstruction of the FSIA’s justifications demonstrates that there is a divergence between the best possible justification for the commercial exception and the way in which the commercial exception is applied in practice. In other words, the application of the doctrine does not track the best possible reconstruction of its supposed aims. Instead, it explicitly *excludes* consideration of that which the law is likely intended to protect – sovereigns’ regulatory aims. This reality suggests that there are other forces at play that have dictated the direction of the law, such as material inequalities and imbalances in power between states.

### A. *The FSIA and the Restrictive Theory of Foreign Sovereign Immunity*

The passage of the FSIA gave the U.S. judiciary the power to determine whether a foreign sovereign was immune from suit.<sup>33</sup> In 1952, the United States had turned away from the absolute theory of foreign sovereign immunity and towards the restrictive theory with the issuance of what came to be known as the Tate Letter.<sup>34</sup> As states became increasingly involved in economic activity – for example, through direct transactions with private parties or through state-owned enterprises<sup>35</sup> – the rule of absolute foreign sovereign immunity came into tension with market norms.<sup>36</sup> In response to these developments, the State Department declared in a letter from its Acting Legal Adviser Jack B. Tate to the Acting Attorney General that it would no longer assert immunity on behalf of

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33. 28 U.S.C. §§ 1602-1611 (2018).

34. Letter from Jack B. Tate, *supra* note 28.

35. Schmitthoff & Woolridge, *supra* note 28, at 200 (describing increases in the “volume of state trading” through both direct transactions and transactions involving “state controlled corporation[s]”).

36. See Jamshidi, *supra* note 27, at 601 (“As states reemerged as commercial players on the global stage, foreign sovereign immunity began to be reconciled with the rules of the capitalist marketplace.”). Other relevant context includes the proliferation of newly decolonized states entering the world of supposedly equal sovereigns, and the backdrop of the Cold War, against which the United States may have wanted to assert the dominance of market norms. *Id.* at 591-93, 601.

There is some debate about whether the Tate Letter drove a shift in foreign sovereign immunity law, or merely reflected changes that were already ongoing. See Chimène I. Keitner, *Prosecuting Foreign States*, 61 VA. J. INT’L L. 221, 230 (2021) (noting that the United States had already rejected absolute immunity in certain contexts prior to the issuance of the Tate Letter). *But see* Weidemaier & Gulati, *supra* note 15, at 491 (arguing that “the FSIA . . . actively drove, rather than passively followed, international law and practice”).

foreign sovereigns in suits concerning private or commercial activity.<sup>37</sup> The FSIA codified this move to the restrictive theory of foreign sovereign immunity and allowed courts to make the determination entirely on their own, without the involvement of the Executive.

The FSIA enumerates nine exceptions to foreign sovereign immunity, of which the commercial exception is the most widely invoked.<sup>38</sup> In fact, scholars have suggested that the commercial exception was *the* motivating factor behind the passage of the FSIA itself, as it was seen as a way of promoting trade in a world of increased state participation in the economy.<sup>39</sup> Under the commercial exception to foreign sovereign immunity:

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

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside of the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . .<sup>40</sup>

To fall within the commercial exception, an act must satisfy the commercial activity and territorial nexus requirements. The former requires that the activity be of a commercial nature. The FSIA does not provide further guidance on how this translates in practice, though U.S. courts have interpreted the requirement to mean that the act is one in which a private person or corporation could engage.<sup>41</sup> Courts have further elaborated that what matters is the “nature” of the

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37. John M. Niehuss, *International Law—Sovereign Immunity—The First Decade of the Tate Letter Policy*, 60 MICH. L. REV. 1142, 1142 (1962).

38. 28 U.S.C. §§ 1602-1611 (2018). The FSIA also provides for other exceptions to foreign sovereign immunity, including for noncommercial torts, expropriation, and waivers of foreign sovereign immunity. *Id.* It is notable that the noncommercial torts and expropriation exceptions also arguably correspond to the private-law doctrines of torts and property, suggesting a broader willingness for U.S. courts to make exceptions to the general rule of foreign sovereign immunity for cases concerning “private” acts. Waivers are an important basis for suits against sovereigns. *See supra* note 15.

39. *See, e.g.*, Jamshidi, *supra* note 27, at 618.

40. 28 U.S.C. § 1605(a)(2) (2018).

41. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 607 (“[T]he issue is whether the particular actions that the foreign state performs . . . are the *type* of actions by which a private party engages in trade or traffic or commerce.” (citation omitted)); *Saudi Arabia v. Nelson*, 507 U.S. 349, 362 (1993) (discussing whether the act in question is one “by which private

act rather than its “purpose.”<sup>42</sup> I discuss the nature/purpose distinction further in Section I.C, but for now this standard can be interpreted to mean that the formal features of an action (say, entering into a contract to purchase goods) are relevant but the *reasons* for undertaking the action are not – even if those reasons relate to the regulatory powers and prerogatives that are unique to sovereign states.

The territorial-nexus requirement can be satisfied in three ways, though all three share a preliminary requirement: the at-issue cause of action must be “based upon” an activity of the foreign state.<sup>43</sup> It is not enough for the action to “provide[] the basis for an element of the cause of action.”<sup>44</sup> For example, in *OBB Personenverkehr AG v. Sachs*, the U.S. Supreme Court held that the “based upon” requirement was not satisfied when an individual bought an Austrian railway ticket in the United States, sustained an injury when she fell from the platform while attempting to board the train, and then sued the Austrian railroad for her injuries in U.S. federal court.<sup>45</sup> In this case, the Supreme Court held that the injury was “based upon” conduct solely in Austria, the ticket sale in the United States notwithstanding.<sup>46</sup>

Once the “based upon” requirement is satisfied, a plaintiff must prove that there is a sufficient territorial nexus between the action and the United States. This nexus can be established if (1) the activity is “carried on in the United States,” (2) the activity is “performed in the United States in connection with a commercial activity” carried on elsewhere, or (3) the activity is performed “outside of the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.”<sup>47</sup> These broad nexus requirements allow U.S. courts to exercise jurisdiction over a wide range of activities, even those that appear to take place wholly outside of the United States. For example, the Supreme Court held in 1992 that Argentina’s rescheduling of its debts had a “direct effect” in the United States under the third prong, even though the plaintiff bondholders who had sued Argentina were all based outside of the United States.<sup>48</sup>

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parties can engage in commerce”); *Hond. Aircraft Registry, Ltd. v. Gov’t of Honduras*, 129 F.3d 543, 548 (11th Cir. 1997) (citing *Weltover*, 504 U.S. at 614); *Guevara v. Republic of Peru*, 468 F.3d 1289, 1297–98 (11th Cir. 2006) (citing *Weltover*, 504 U.S. at 613–14).

42. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 454 reporters’ note 1 (AM. L. INST. 2017).

43. *Id.* at reporters’ note 4.

44. *Id.*

45. 577 U.S. 27, 29 (2015).

46. *Id.*

47. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 454 (AM. L. INST. 2017).

48. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610, 618–19 (1992).

Although the FSIA is a jurisdictional statute, it interacts with substantive principles of law concerning foreign affairs and the potentially politically sensitive nature of adjudicating foreign sovereigns' acts in U.S. domestic courts. Under U.S. law, foreign sovereign immunity is closely related to the act of state doctrine, according to which U.S. courts will decline to adjudicate politically sensitive disputes that involve the sovereign acts of foreign states in their own territory. The act of state doctrine is designed to uphold the separation of powers and prevent "piecemeal adjudication of the legality of the sovereign acts of states" that would "risk disruption of [the United States'] international diplomacy."<sup>49</sup> Unlike the doctrine of foreign sovereign immunity, the act of state doctrine is not jurisdictional, and it is not a principle of international law. Rather, it is a prudential doctrine grounded in the domestic law of the United States.<sup>50</sup> In *Alfred Dunhill of London, Inc. v. Republic of Cuba*, a plurality of the Supreme Court suggested that the two doctrines should be considered as being parallels, particularly with regard to authorizing suits against foreign sovereigns based on their commercial and nonsovereign acts.<sup>51</sup> However, courts and commentators have also resisted attempts to completely collapse these doctrines, particularly given the centrality of prudential considerations to the act of state doctrine.<sup>52</sup> In any case, the doctrines are at least closely related in that they limit domestic courts' ability to rule on the acts of foreign sovereigns while providing an exception for acts that are sufficiently nonsovereign in nature.

### B. Reconstructing Justifications for the Restrictive Theory

Under the restrictive theory of foreign sovereign immunity, a state's sovereign acts are immune from suit in another state's jurisdiction, but its commercial acts are not. Conventional justifications for this commercial exception to foreign sovereign immunity are the subject of much confusion in legal cases and

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49. *Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981).

50. See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 441 (AM. L. INST. 2017); *Int'l Ass'n of Machinists*, 649 F.2d at 1359.

51. 425 U.S. 682, 695-99 (1976). For an example of how foreign sovereign immunity doctrine and the act of state doctrine interact, see *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1104-05 (5th Cir. 1985), which overturns the lower court's finding of foreign sovereign immunity on the basis of the commercial exception but recognizes sovereign immunity on the basis of the act of state doctrine.

52. See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 441 reporters' note 5 (AM. L. INST. 2017); *Int'l Ass'n of Machinists*, 649 F.2d at 1360; *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773-74 (1972) (Powell, J., concurring) (distinguishing between "jurisdiction" and "justiciability"); Thomas H. Hill, *Sovereign Immunity and the Act of State Doctrine: Theory and Policy in United States Law*, 46 RABEL J. COMPAR. & INT'L PRIV. L. 118, 161-63 (1982).

commentary alike.<sup>53</sup> Any possible justification must explain what it is about sovereign statehood that makes a sovereign immune from the jurisdiction of another state in order to explain why that principle does not apply for commercial acts. Therefore, justifications for the commercial exception to foreign sovereign immunity also entail or imply justifications for foreign sovereign immunity; or in other words, foreign sovereign immunity and its principal exception are co-constituting.

This Section engages in a rational reconstruction of three potential justifications for the commercial exception to foreign sovereign immunity based on existing sources. It then argues that the imperative of protecting the state's regulatory powers is the most convincing. As I will demonstrate, however, the difficulty of characterizing an act as either public or private means that courts engage in line-drawing exercises that ultimately prevent them from promoting the values put forth by this justification. To fully explain why the line between public and private is drawn where it is, we must look beyond reasons that are internal to the doctrine and turn our attention to the broader context of material inequalities between states.

### 1. "Dignity, Equality, and Independence"

One common justification that commentators have proposed for the commercial exception to foreign sovereign immunity is that foreign sovereign immunity is rooted in the "dignity, equality, and independence" of states and the notion that they lose this dignity when they enter into commercial relations.<sup>54</sup> This widely cited language comes from Lord Macmillan's opinion in the landmark U.K. House of Lords case *The Cristina*, which concerned the Spanish government's seizure of a vessel at a British port.<sup>55</sup> Recognizing Spain's immunity from suit in British courts, Macmillan drew a distinction between sovereign acts (such as Spain's seizure of the vessel) and commercial ones.<sup>56</sup> He stated that the

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53. See YANG, *supra* note 27, at 46-48. For a comprehensive inquiry into the potential legal bases of foreign sovereign immunity more generally (as opposed to its commercial exception), see *id.* at 33-74. Yang concludes that it is pointless to try to pin down the basis of state immunity. *Id.* at 55.

54. Sornarajah, *supra* note 16, at 662 (citing *Compania Naviera Vascongado v. S.S. Cristina* [1938] AC 485 (HL) 498 (Lord Macmillan) (appeal taken from C.A.) (UK)); see also Lakshman Marasinghe, *The Modern Law of Sovereign Immunity*, 54 MOD. L. REV. 664, 666-67 (1991) (referring to the "theory of dignity"); HAZEL FOX & PHILIPPA WEBB, *THE LAW OF STATE IMMUNITY* 30 (2013) (citing 1 OPPENHEIM'S INTERNATIONAL LAW 342-43 (Robert Jennings & Arthur Watts eds., 9th ed. 1992)).

55. *The Cristina*, [1938] AC at 486.

56. *Id.* at 498.



doctrine of immunity had been challenged in recent years by sovereign states that had “so far condescended to lay aside their dignity as to enter the competitive markets of commerce . . . .”<sup>57</sup>

But this imagery of statehood as dignified and commerce as something less can hardly be a justification for a state of affairs; at best, it is a description with which one can agree or disagree. Why *should* we attach such moral value to statehood over commerce, and why should legal consequences follow from that? Even if many people share the sense that commerce is less dignified than other activities a state carries out, that alone cannot be a basis for subjecting states to the jurisdiction of other states. On the flip side, subjecting one state to the jurisdiction of another state does not necessarily have to be an affront to the “dignity” of that state, particularly if that jurisdiction is exercised in a manner consistent with domestic and international law.<sup>58</sup>

## 2. Diplomatic Prudence

The second justification for the commercial exception to foreign sovereign immunity is premised on the separation of powers and diplomatic prudence. Although this reasoning brings us closer to an explanation, it is still unsatisfactory. On this view, because states are equals, they should channel their dealings through the executive rather than judicial branch. As the U.S. Supreme Court reasoned in *Ex Parte Peru*, a case concerning the seizure of a Peruvian vessel, “the judicial seizure of the vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to accept and follow the executive determination that the vessel is immune.”<sup>59</sup> This opinion reflects the view, customary in U.S. law as well as in many other contexts, that the Executive should handle matters of diplomacy and foreign relations.<sup>60</sup>

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57. *Id.*

58. *Cf.* Lauterpacht, *supra* note 16, at 231 (“A state does not derogate from the dignity of another state by subjecting it to the normal operation of the law under proper municipal and international safeguards . . .”).

59. *Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943).

60. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 88 (2d ed. 1996); Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 991 (2013) (noting that “most uses of international law [in the U.S. context] favored the President because of the close connection perceived between executive action and international law”). This is separate from, but related to, the question of whether the Executive should have the power to make foreign sovereign immunity determinations themselves. See Chimène I. Keitner, *Between Law and Diplomacy: The Conundrum of Common Law Immunity*, 54 GA. L. REV. 217, 217-18, 295-96 (2019).

It is not immediately clear why the principle of equality between states requires that states manage their disputes through their executive, rather than judicial, branches. This may be because the Executive is thought to be the symbolic figurehead of the state, serving a similar function to the king in a monarchy.<sup>61</sup> On this traditional conception of the state, it may seem that the judiciary exists to enforce laws that govern subjects' (now citizens') relations to one another rather than the relations between sovereign and subject.<sup>62</sup> However, whether the sovereign enjoys such supremacy even domestically—in other words, whether the sovereign is above its own laws—is not to be taken for granted, especially in the context of the modern, nonmonarchical state.<sup>63</sup> It is true that in some cases, such as in the case of absolute immunity granted to government officials under U.S. law, the sovereign and its agents are insulated from the judgment of its own law. However, the most plausible justification for such immunity is likely not that such government officials are above the law, but rather that such immunity is necessary for officials to carry out their duties without fear of judicial reprisal.<sup>64</sup>

The key contribution of the diplomatic prudence argument, then, is a consequentialist one: unilaterally subjecting states to jurisdiction in domestic courts may offend them. On this view, it may be more appropriate for the Executive to deal with other sovereigns through flexible, prudential decision-making in light of the totality of the circumstances, rather than for the judiciary to treat the

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61. Note, for example, the fact that in most political systems around the world, either a monarch or the chief executive holds the position of head of state, which is in turn vested with significant powers in the external conduct of the state. See JOANNE FOAKES, *THE POSITION OF HEADS OF STATE AND SENIOR OFFICIALS IN INTERNATIONAL LAW* 29, 36 (2014).
62. See Lauterpacht, *supra* note 16, at 235 (noting that the question of whether sovereigns enjoy immunity in foreign courts is connected to the question of whether sovereigns enjoy immunity from their citizens); Sucharitkul, *supra* note 27, at 239 (“[I]n common law jurisdictions the doctrine of immunity of foreign States has, to a large extent, been influenced by the traditional immunity of the local sovereign.”); ERNEST K. BANKAS, *THE STATE IMMUNITY CONTROVERSY IN INTERNATIONAL LAW: PRIVATE SUITS AGAINST SOVEREIGN STATES IN DOMESTIC COURTS* 38 (2022) (“The rule of sovereign immunity is . . . the byproduct of constitutional and innate supremacy of the local sovereign.”).
63. Lauterpacht, *supra* note 16, at 232; see also *United States v. Lee*, 106 U.S. 196, 220 (1882) (“No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.”).
64. See *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974) (“[O]fficial immunity apparently rested, in its genesis, on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.” (footnote omitted)); cf. Donoghue, *supra* note 16, at 519-20 (discussing the justification for diplomatic immunity, centering the preservation of officials’ ability to carry out state functions).

sovereign akin to a private state subject through the impartial and rigid application of laws to facts.<sup>65</sup>

This justification may explain the principle of foreign sovereign immunity, and the necessity for so-called flexible executive judgment as opposed to rigid judicial judgment. However, it does not explain the commercial exception to foreign sovereign immunity. From a prudential point of view, it is not clear that a sovereign state would be any less offended by a foreign state's exercise of jurisdiction over a commercial dispute to which it is a party.<sup>66</sup> Even if it were the case that jurisdiction over purely commercial acts would *generally* be less likely to offend foreign sovereigns, there are nonetheless commercial acts that clearly implicate matters of immense political and diplomatic significance.<sup>67</sup> The distinction between commercial and noncommercial is at best a highly imperfect proxy for political and diplomatic sensitivity. Reliance on alternative doctrines such as the act of state doctrine, which explicitly centers prudential considerations, would allow courts to more closely track the diplomatic sensitivities at stake in a given case.<sup>68</sup>

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65. See Clark C. Siewert, *Reciprocal Influence of British and United States Law: Foreign Sovereign Immunity Law from the Schooner Exchange to the State Immunity Act of 1978*, 13 VAND. J. TRANSNAT'L L. 761, 763-64 (1980).

66. The Supreme Court of the United States made this argument in *Alfred Dunhill of London, Inc. v. Republic of Cuba*: “[S]ubjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts.” 425 U.S. 682, 703-04 (1976).

67. Consider, for example, the facts of *Int'l Assn. of Machinists & Aerospace Workers v. OPEC*. This case concerned a suit brought by a U.S. labor union against OPEC for engaging in price fixing in violation of the Sherman Act. 649 F.2d 1354, 1355-56 (9th Cir. 1981). The Ninth Circuit suggested that the conspiracy to fix prices would likely be a commercial act because of the FSIA's focus on the nature of the act rather than its sovereign purpose. See *id.* at 1357-58. However, it held that the act of state doctrine could preclude U.S. courts from granting relief even for such commercial acts, because of their diplomatic sensitivity. *Id.* at 1360-62.

68. Cf. *id.* at 1358, 1361 (“The act of state doctrine is similar to the political question doctrine in domestic law. It requires that the courts defer to the legislative and executive branches when those branches are better equipped to resolve a politically sensitive question. . . . The record in this case contains extensive documentation of the involvement of our executive and legislative branches with the oil question. IAM does not dispute that the United States has a grave interest in the petro-politics of the Middle East, or that the foreign policy arms of the executive and legislative branches are intimately involved in this sensitive area. It is clear that OPEC and its activities are carefully considered in the formulation of American foreign policy.”). Also consider the fact that the FSIA was enacted precisely to take the determination of foreign sovereign immunity out of the hands of the executive branch, which presumably would be more influenced by diplomatic considerations. Mark B. Feldman, *Foreign Sovereign Immunity in the United States Courts 1976-1986*, 19 VAND. J. TRANSNAT'L LAW 19, 19-20 (1986).

### 3. *Respecting States' Regulatory Powers*

The third justification offered for the commercial exception is the most compelling. On this view, states, as equals under international law, should respect one another's power to regulate within one's own borders.<sup>69</sup> This theory posits that when states act in their commercial, rather than regulatory, capacity, this sovereign regulatory power is not at stake. Instead, states are acting as participants in the market—not regulators of the market. They are playing the game, rather than setting and enforcing its rules. The commercial exception to foreign sovereign immunity not only serves the purpose of respecting and protecting states' regulatory capacity, but also, conversely, the purpose of protecting the fairness of market competition. When states are not acting in their sovereign—that is, regulatory—capacity, they should not receive special treatment.<sup>70</sup>

This justification has been made explicit in U.S. law. The Tate Letter also implicitly invoked this rationale in signaling the State Department's turn toward the restrictive theory of foreign sovereign immunity. Jack Tate wrote that the restrictive theory must be adopted in light of the rise of states' participation in commercial activities and the need to enable the business counterparties of states to vindicate their rights in court.<sup>71</sup> Decades later, in *Republic of Argentina v. Weltover, Inc.*, the U.S. Supreme Court stated that “[w]hen a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are ‘commercial’ within the meaning of the FSIA.”<sup>72</sup> As this language suggests, the primary concern motivating the turn to the restrictive theory, at least in U.S. foreign relations law, was the distinction between the state as regulator of the market and participant in the market.

This reasoning convincingly explains both foreign sovereign immunity and its commercial exception. Yet it faces a fundamental problem: it is extremely

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69. See FOX & WEBB, *supra* note 54, at 36–38; Donoghue, *supra* note 16, at 502, 509, 512 & n.118, 514 & n.132.

70. Sornarajah, *supra* note 16, at 662–63; see also *Saudi Arabia v. Nelson*, 507 U.S. 349, 366 n.2 (1993) (White, J., concurring in the judgment) (“[W]hen the foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid . . . the accidents which it may cause[.] The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties.” (first and second alterations in original) (quoting Testimony of Monroe Leigh, Legal Adviser, Dep’t of State, Hearings on H.R. 11315 Before the Subcomm. on Admin. L. and Governmental Rels. of the H. Comm. on the Judiciary, 94th Cong., 2d Sess. 27 (1976))).

71. Letter from Jack B. Tate, *supra* note 28.

72. 504 U.S. 607, 614 (1992).

difficult to distinguish between a state's sovereign and commercial acts.<sup>73</sup> In fact, the same act can be characterized as either commercial or sovereign depending on what level of specificity we allow in the description. Consider the case of a sovereign's breach of a contract to purchase military jets. At a high level of generality, the case would concern a commercial activity—entering into a contract for the purchase of aircraft. Zooming in, however, it seems that the kind of contract contemplated is one into which only sovereigns, charged with military defense of their territories, can enter. One common attempt courts have made to draw the distinction more clearly is to ask whether a private person could have entered into the contract in question.<sup>74</sup> But here again, we run into the problem of how to define the contract. In many cases, a private person could not have entered into the *specific* contract in question because it is for something that only a government would need or would be able to do (e.g., the purchase of a military jet); but a private person could have entered into a contract that is similar in important ways to the one in question (e.g., the purchase of an aircraft).<sup>75</sup> Therefore, although it is possible to find a satisfactory justification for distinguishing between a state's so-called sovereign and commercial acts, in practice the distinction is extremely difficult to apply with precision.

### C. *The Creation of the Nature/Purpose Distinction*

The best reason for making a distinction between a state's public and private acts is to protect a sovereign's regulatory powers, but current U.S. law requires courts to explicitly *disregard* the regulatory purpose behind a sovereign's acts. This position emerged as courts dealt with the aforementioned difficulty of distinguishing between a state's public and private acts. Courts, in the end, dealt with this difficulty by drawing another line: that between the nature of an act and its purpose. This distinction may allow us to clarify what acts are commercial, but only by diverging from the strongest justification for the commercial exception to foreign sovereign immunity itself.

The FSIA instructs courts to consider the nature of the act and not its purpose, but its text offers very little guidance on how this should be operationalized

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73. See Lauterpacht, *supra* note 16, at 222-26; Donoghue, *supra* note 16, at 501-05; Sornarajah, *supra* note 16, at 663.

74. Donoghue, *supra* note 16, at 500-01 & nn.52-58 (discussing *Tex. Trading & Milling Corp. v. Nigeria*, 647 F.2d 300 (2d. Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982)); Nelson, 507 U.S. at 360.

75. See Donoghue, *supra* note 16, at 500-01.

in practice.<sup>76</sup> Most plausibly, the “nature” of the act corresponds to the formal features of the act itself (e.g., entering into a contract or lease), and the “purpose” corresponds to why the government entered into that contract or lease—whether, for example, to promote national security or to make a profit.<sup>77</sup> But it is not so easy to distinguish the nature of the act from its purpose. The Court of Appeals for the Fifth Circuit explicitly acknowledged this issue in *de Sanchez v. Banco Central De Nicaragua*.<sup>78</sup> There, the plaintiff purchased a certificate of deposit of U.S. dollars from a privately-owned Nicaraguan bank. She attempted to redeem the certificate but could not do so because of a shortage of dollars.<sup>79</sup> The bank then requested the dollars from Banco Central, Nicaragua’s state-owned central bank, which issued a check to the plaintiff for the amount of money she had deposited.<sup>80</sup> She was again prevented from collecting on the check because of Nicaragua’s exchange controls.<sup>81</sup>

Even though the plaintiff sued on the promise to be repaid by the bank, the court held that the commercial exception to foreign sovereign immunity did not apply because the activity in question—Banco Central’s issuance of the check—was a sovereign, public activity rather than a commercial one. The court reasoned that

[t]he principle obstacle in determining whether an activity is commercial or sovereign in nature is that the same activity can often be characterized in a number of different ways . . . Here, a similar quandary arises. Banco Central’s issuance of the check could be characterized either as a sale of foreign currency or as the regulation and supervision of Nicaragua’s foreign exchange reserves.<sup>82</sup>

Confronted with this problem of indeterminacy, the court characterized Banco Central’s issuance of the check as a sovereign act because its purpose in issuing the check was to “maintain stable exchange rates and to allocate scarce

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76. 28 U.S.C. § 1603(d) (2018). The text of the statute merely states, “The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.” *Id.*

77. See *de Sanchez v. Banco Cent. De Nicar.*, 770 F.2d 1385, 1392 (5th Cir. 1985) (discussing the legislative history of the FSIA).

78. *Id.*

79. *Id.* at 1387.

80. *Id.*

81. *Id.* at 1387-88.

82. *Id.* at 1392.

foreign exchange reserves among competing uses.”<sup>83</sup> The court recognized that in considering the purpose of the sale of dollars, it contravened the requirement to only consider the nature, and not the purpose, of the act. However, the court continued, claiming that nature and purpose were not so easily distinguished: “[W]e do not believe that an absolute separation is always possible between the ontology and the teleology of an act. *Often, the essence of an act is defined by its purpose*—gift-giving, for example.”<sup>84</sup>

What the court suggests here is that it is possible to characterize Banco Central’s issuance of the check as merely a sale of foreign currency (an act that any private bank could undertake), but that to do so would be to mischaracterize the situation. To attempt to cast the nature of the act in a manner that is so abstracted from its purpose would be to miss something fundamentally important about the nature of the act itself.<sup>85</sup> The Fifth Circuit’s conclusion demonstrates the reality of the nature/purpose distinction: the two are often co-constitutive and cannot be separated.

For a time in the 1980s, U.S. courts did take into account the purpose of an act in determining its nature. In *MOL, Inc. v. Peoples Republic of Bangladesh*, the Ninth Circuit held that the Bangladeshi Ministry of Agriculture’s act of entering into a contract with a private party to capture and export rhesus monkeys was not a commercial act.<sup>86</sup> This was because the contract was for more than the

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83. *Id.* at 1393. The court in this case engaged in a lengthy factual inquiry regarding whether the issuance of the check was merely a “sale of foreign currency” or “the regulation and supervision of Nicaragua’s foreign reserves.” *Id.* at 1392. While Banco Central did not have exclusive authority over all sales of foreign exchange under Nicaraguan law, the court noted that it did have “overall responsibility for the control and management of Nicaragua’s monetary reserves.” *Id.* at 1393-94.

84. *Id.* at 1393 (emphasis added).

85. See YANG, *supra* note 27, at 94.

86. 736 F.2d 1326, 1329 (9th Cir. 1984). The afterlife of this case is complicated. It was not explicitly overturned by later cases such as *Weltover*, even though after *Weltover*, courts have been extremely reluctant to consider the purpose of acts. See Secretariat of the Asian-Afr. Legal Consultative Comm., *Jurisdictional Immunities of States: US Foreign Sovereign Immunities Act 1976*, 11 COMMONWEALTH L. BULL. 559, 560 (1985). However, later cases have interpreted the holding of *MOL* to dramatically cabin its effects: in *Honduras Aircraft Registry, the Eleventh Circuit interpreted the holding of MOL as particular to its facts. Hond. Aircraft Registry, Ltd. v. Gov’t of Honduras*, 129 F.3d 543, 549 (11th Cir. 1997). The Eleventh Circuit interpreted *MOL* as a case in which the “basis of the suit” was a regulatory action rather than a mere breach of contract, even though the *MOL* court characterized the agreement as a regulatory action based on the purpose of the agreement. *Id.* at 549. In other words, in *MOL*, the determination of the breach as a regulatory act was a *legal conclusion*, whereas the court in *Honduras Aircraft Registry* interpreted that determination as a fact.



trade of monkeys; its purpose was to regulate Bangladesh's natural resources, a uniquely sovereign function.<sup>87</sup>

However, the years since the U.S. Supreme Court's 1992 decision in *Weltover* have seen a retrenchment in favor of courts only considering the nature of an act, in isolation from its purpose.<sup>88</sup> *Weltover* concerned a dispute that arose over Argentina's rescheduling of government bonds because it did not have sufficient foreign reserves to cover the bonds as they began to mature.<sup>89</sup> The Court sided with Argentina's private creditors, arguing that the issuing of the bonds was a commercial activity, over Argentina's argument that the bonds were specifically issued to address a foreign currency crisis.<sup>90</sup> It was on this basis that the Supreme Court held that Argentina's rescheduling of bonds – an act that was arguably undertaken to regulate the economy in the face of a severe foreign currency shortage – could constitute a breach of contract for which Argentina could be liable in U.S. courts.<sup>91</sup> After *Weltover*, the focus on nature over purpose functions by erring on the side of characterizing acts as commercial rather than sovereign – by abstracting away from the specifics of the facts until all that remains is a contract.

The U.S. Department of State and Department of Justice have long interpreted the nature/purpose distinction in accordance with the legislative history of the FSIA. The Report on the Act of the House Judiciary Committee explained that “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 activity or transaction that is critical.”<sup>92</sup> They give the following examples of commercial activities: “a foreign government's sale of a service or product, its leasing of property, its borrowing of money, its employment or engagement of labourers . . . or its investment in a security of an American corporation.”<sup>93</sup> This interpretation suggests that if a government enters into a contract, regardless of its purpose for doing so, then it is undertaking a commercial act. In other words, it instructs courts to characterize acts at a high level of generality.

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

88. 504 U.S. 607 (1992); see also Donoghue, *supra* note 16, at 514-17 (surveying pre-*Weltover* decisions rejecting the nature/purpose distinction and describing how, in *Weltover*, the “Supreme Court closed the door on these efforts”); YANG, *supra* note 27 at 88 (noting that *Weltover* overruled lower court decisions considering purpose).

89. 504 U.S. at 609.

90. *Id.* at 615.

91. *Id.* at 620.

92. H.R. REP. NO. 94-1487, at 16 (1976); see also YANG, *supra* note 27, at 87 (quoting the same); *Birch Shipping Corp. v. Embassy of United Republic of Tanzania*, 507 F. Supp. 311, 312 (D.D.C. 1980) (same).

93. Secretariat of the Asian-Afr. Legal Consultative Comm., *supra* note 86, at 560; YANG, *supra* note 27, at 95.

U.S. courts have characterized a wide range of acts with seemingly regulatory motivations as purely private, commercial acts that do not qualify for immunity. They include the Dubai government's agreement with a political advisor intended to advance Dubai's strategic and military interests;<sup>94</sup> France's agreement with Florida to recover historical shipwreck sites and promote the shared history of the United States and France;<sup>95</sup> a German government agency's management of the privatization process of former East German state-owned businesses;<sup>96</sup> Venezuela's unilateral seizure of historical artifacts in the process of negotiations for their purchase from a private party;<sup>97</sup> Honduras's agreement with a private party for technical assistance to develop a system for registering and regulating aircraft in line with international standards;<sup>98</sup> and Peru's offer to pay a reward in exchange for information about a fugitive.<sup>99</sup>

Many of these cases present gray areas between sovereign and commercial acts, which has given rise to confusion even between courts. For example, circuit courts have reached different conclusions as to whether military purchases fall within the commercial exception.<sup>100</sup> Nonetheless, the nature/purpose distinction does not map onto the relevant underlying distinction between a state's actions in its capacities as a regulator of the market and as a participant in the market. In other words, if the point of making a distinction between a state's public and private acts is to protect its regulatory powers, the nature/purpose distinction contravenes that purpose by explicitly *removing* regulatory purpose from consideration.

The Supreme Court's move in *Weltover*, then, must reflect other demands and influences that exceed the bounds of doctrine alone. Such demands and influences may include, most importantly, the need for efficiency, predictability, and legal clarity. The flexible approach adopted in *Banco Central* or *MOL* may introduce uncertainty because it depends on judges' discretion to determine whether the purpose of an act was primarily commercial or regulatory. Furthermore, determining the purpose of an act necessarily demands more resources than looking to the formal features of the transaction. By contrast, the approach

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94. *Friedman v. Gov't of Abu Dhabi*, 464 F. Supp. 3d 52, 57, 70 (D.D.C. 2020).

95. *Glob. Marine Expl., Inc. v. Republic of France*, 33 F.4th 1312, 1322 (11th Cir. 2022).

96. *WMW Mach., Inc. v. Werkzeugmaschinenhandel GmbH IM Aufbau*, 960 F. Supp. 734, 740 (S.D.N.Y. 1997).

97. *Devengoechea v. Bolivarian Republic of Venezuela*, 889 F.3d 1213, 1221 (11th Cir. 2018).

98. *Hond. Aircraft Registry, Ltd. v. Gov't of Honduras*, 129 F.3d 543, 547 (11th Cir. 1997).

99. *Guevara v. Republic of Peru*, 468 F.3d 1289, 1299 (11th Cir. 2006).

100. William S. Dodge, *Cert Petition Highlights Circuit Split on Sovereign Immunity for Military Purchases*, TRANSNAT'L LITIG. BLOG (Mar. 23, 2023), <https://tlblog.org/cert-petition-highlights-circuit-split-on-sovereign-immunity-for-military-purchases> [<https://perma.cc/H6QE-US7Y>].

in *Weltover* may create predictability by creating a presumption that, for example, entering into a contract counts as a commercial act.

Furthermore, *Weltover* may reflect the perceived need to protect investors in the Global North against defaulting sovereigns, and to signal to debtor states that they will be expected to fulfill their contractual obligations. It is no coincidence that *Weltover* was decided in the midst of the ongoing Latin American debt crisis of the late twentieth century; the decision reflects a context in which sovereign states, especially those in the Global South, were indebted to private investors on whom they relied to provide much-needed credit against the backdrop of economic need. As I argue in Part II, the line between public and private is often drawn in a way that reflects dominant economic interests.

## II. SUBORDINATION THROUGH PRIVATE-LAW ADJUDICATION

As *Weltover* illustrates, foreign sovereign immunity doctrine in the United States has developed in the direction of expanding the category of the commercial, or the “private,” in such a way as to diverge from the best possible justification for the doctrine. The categorization of acts as commercial obscures the public nature of the so-called private acts in which Global South states engage in the context of global economic inequality. When foreign sovereign immunity law presumptively treats a contract that a sovereign state enters into as a commercial act, it ignores the political dimensions of those acts and subjects them to the seemingly technocratic judgment of depoliticized private law. I call this phenomenon *subordination through private-law adjudication*.

My argument in this Part is not an argument about the possibility of distinguishing between sovereign and commercial acts with certainty, but rather what has resulted from courts’ attempt to draw that distinction in the face of legal uncertainty: the overemphasizing of the private, commercial aspects of acts at the expense of recognizing their public, sovereign aspects. In this Part, I draw on a tradition of legal scholarship inspired by the American Legal Realists, most recently represented by Law & Political Economy (LPE) and Third World Approaches to International Law (TWAAIL).<sup>101</sup> Both approaches offer valuable conceptual resources for analyzing how the categorization of certain acts as falling solely within the realm of private law functions to obscure the public, political stakes of such acts. This Part canvasses the arguments made by scholars in both traditions to draw out those conceptual resources. I examine analogous areas of

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101. On this intellectual history and the legacies of American Legal Realism, see K. Sabeel Rahman, *Law, Political Economy, and the Legal Realist Tradition Revisited*, LPE PROJECT (Nov. 16, 2017), <https://lpeproject.org/blog/legal-realist-tradition-revisited> [https://perma.cc/YR5G-P2QU].

law in which such critiques have been made, namely commercial arbitration and sovereign debt, before applying them to foreign sovereign immunity law. By referring to these other areas of law, I situate the issues raised by foreign sovereign immunity law within the broader context of a general conceptual problem, namely what we miss by seeing acts as merely private.

A. *Critiquing the Public/Private Distinction*

Mostly in the context of U.S. domestic law, LPE scholars have referred to the perceived divide between public and private law as constituting the “Twentieth-Century Synthesis” – the emergence of a “division of labor” between legal fields that has served to obscure and displace questions about distribution and power in the law. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski and K. Sabeel Rahman describe the Synthesis in the following way:

First, in fields denoted as about “the economy,” the rise of law and economics centered efficiency and sidelined questions of distribution, power, and democracy. Second, in fields understood as more “political” – fields including constitutional law, for example – a parallel set of moves worked to render economic power hard to find and correct: it was background and not foreground, allowed to operate according to its own ostensible rules and protected in various ways from democratic reordering.<sup>102</sup>

In other words, in areas of the law understood to be about the economy, a form of technocratic judgment prevailed in which the role of the law was seen as increasing efficiency and reducing externalities and transaction costs, without regard for distribution or democratic deliberation over collective ends. Categorizing a case or issue as one of private law, then, allowed the law to obscure the political nature of the economy. Simultaneously, in areas of the law understood to be about rights, those rights were shorn of all economic substance and interpreted in their thinnest and most formalistic manner. Categorizing a case or issue as purely one of public law allowed the law to obscure what I term the *economic constraints on rights*.<sup>103</sup>

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102. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1794 (2020).

103. This point is related to a critique of “judicialization” – in other words, the phenomenon whereby political matters get transferred into the technical and less contestable realm of the law. See, among others, Ran Hirschl, *The Judicialization of Politics*, in THE OXFORD HANDBOOK OF POLITICAL SCIENCE 253, 253 (Robert Goodin ed., 2011); and ANDREW LANG,

In making this argument, LPE scholars draw on a long tradition of U.S. legal thought that critiques the public/private distinction, starting with the American Legal Realists in the early twentieth century and continuing through Critical Legal Studies in the late twentieth century.<sup>104</sup> These critiques mostly correspond to the first prong of the Synthesis – the obscuring of the political nature of the economy and removal of the economy from political critique. They are based on several related propositions. First, the public/private distinction is not stable, but instead indeterminate and subject to be filled in by the judgment of particular actors.<sup>105</sup> Second, when those actors characterize certain acts or issues as matters of private law (e.g., entering into a contract), they obscure the political and

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WORLD TRADE LAW AFTER NEOLIBERALISM: REIMAGINING THE GLOBAL ECONOMIC ORDER 221-72 (2011) (describing how trade, once the subject of flexible political and diplomatic negotiation, became the subject of rigid legal adjudication in service of market liberalization).

104. For classic statements, see Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470 (1923) (arguing that coercion is necessary to uphold supposedly voluntary orderings created by the exercise of individual rights); and Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8, 13-14 (1927) (discussing the way in which sovereign power creates private, individual rights). For the late-twentieth-century successors to the Legal Realists, see, for example, Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327, 327-28 (1991) (reconstructing Hale's legal realism and its relevance to contemporary debates). For a helpful overview, see generally Samuel Aber, *Legal Realism: An LPE Reading List and Introduction*, LPE PROJECT (Aug. 9, 2020), <https://lpeproject.org/wp-content/uploads/2020/07/Legal-Realism-Primer.pdf> [<https://perma.cc/Q7V2-D8J4>]; and Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465 (1988). This discussion of the public/private distinction is related to, but not identical to, the deconstruction of the public/private distinction by feminist legal scholars. See, e.g., Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 69 (1993) (describing how the public/private distinction in human rights law renders invisible violations of rights within the private sphere); Anne Orford, *Contesting Globalization: A Feminist Perspective on the Future of Human Rights*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 171, 171 (1998) (referencing the feminist critique of the public/private distinction).
105. See, e.g., Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 645 (1982) (noting that it is inevitable that legal decisionmakers fill in the gaps of legal indeterminacy with their substantive ethical judgments); Karl Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1361 (1982) (describing the “consensus that the public/private distinction is meaningful” and disagreements over what the distinction means); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1009 (1985) (suggesting that “doctrine is redolent with meaning” and “incorporates debates about commitments and concerns central to our society”). While the literature on the indeterminacy thesis is vast, Singer provides a good starting point. See Singer, *supra* note 104, at 470-75. For more critical discussions, see J. Paul Oetken, *Form and Substance in Critical Legal Studies*, 100 YALE L.J. 2209, 2211-12 (1991); and Lawrence Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 463-70 (1987).

public nature of those acts.<sup>106</sup> This statement can be disaggregated, in turn, to a variety of different but related claims: (1) Characterizing an act as private designates it as immune from political contestation and intervention, such as by the state or democracy;<sup>107</sup> (2) Characterizing an act as private fails to recognize the state coercion and use of public power necessary for the so-called private transaction to take place;<sup>108</sup> and (3) Characterizing an act as private ignores the potential imbalance of wealth and power that is both encased in and reinforced by private transactions.<sup>109</sup>

Third, and finally, the supposed neutrality of the law serves to further legitimize the decisions of those particular individuals and makes it appear as though there is no alternative, thereby stamping out more radical political aspirations of reordering the economy through democracy.<sup>110</sup>

These contentions have most often presented themselves in the context of domestic private law – for example, in the enforcement of contracts or property rights. On this view, while contractual doctrines seem to privilege the “freedom to contract” as the expression of the autonomy of two agents, the so-called freedom to contract can operate to empower certain subjects over others with the sanction of public power.<sup>111</sup>

Such arguments extend to international law as well. Theorizing from the point of view of the “Third World,” TWAAIL scholars have made a similar move critiquing the distinction between public and private law, although this connection between critical scholarship addressing U.S. domestic law and international

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106. Klare, *supra* note 105, at 1361 (“[T]he public/private distinction . . . functions more as a form of political rhetoric used to justify particular results. . . . [T]he social function of the public/private distinction is to repress aspirations for alternative political arrangements.”).

107. *Id.* at 1358; Dalton, *supra* note 105, at 1013.

108. Cohen, *supra* note 104, at 11; Singer, *supra* note 104, at 483–85.

109. Hale, *supra* note 104, at 473; Singer, *supra* note 104, at 489.

110. Klare, *supra* note 105, at 1361 (discussing the “apologetic character” of contemporary public/private rhetoric about the workplace which constrains political values).

111. As Singer has summarized it,

The realists argued that the state is fundamentally implicated in all “private” transactions. . . . Defining contract and property rights requires a balancing of competing values and principles. By defining the rules of the market, the state determines the distribution of economic power and thus the distribution of wealth and income. The state necessarily involves itself in the creation of a regulatory system by establishing and enforcing these market entitlements.

Singer, *supra* note 104, at 495.



law has been underexplored.<sup>112</sup> More specifically, TWAIL scholars criticize international law's tendency to characterize the acts of Third World states as purely commercial and private, their political significance and stakes notwithstanding.<sup>113</sup> Such characterizations constitute one dimension of the ways in which international law functions to subordinate Third World states, or what I term *subordination through private-law adjudication*. While my focus is on foreign sovereign immunity, scholars have made a similar critique in two substantive areas of law that are important and closely connected to my analysis: international arbitration and sovereign debt. Examining these structurally analogous literatures before returning to the subject of foreign sovereign immunity illustrates concretely how the critique of the public/private distinction applies across different areas of international and transnational law. Furthermore, situating foreign sovereign immunity within the context of a broader tendency in international economic law underscores the stakes of exploring foreign sovereign immunity as an important site in which the public/private distinction is drawn.

### B. *International Arbitration*

One area in which international law scholars have initially developed an analysis of *subordination through private-law adjudication* is international arbitration. International arbitration is a means of resolving (often commercial) disputes not through domestic courts, but instead through tribunals established by the consent of the parties. Muthucumaraswamy Sornarajah has argued that it is no coincidence that international arbitration rose to prominence as colonialism and

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112. There have been recent attempts to bring together LPE and TWAIL, including through a symposium on economic sanctions. See Asli Ü. Bâli & Ntina Tzouvala, *Economic Sanctions: Where LPE Meets Third World Approaches to International Law*, LPE PROJECT (June 20, 2023), <https://lpeproject.org/blog/economic-sanctions-lpe-twail-international-law> [<https://perma.cc/J3BC-RJQ7>]. Bâli and Tzouvala write that the two bodies of scholarship share in common a focus on “the role of law in the construction, mystification, and legitimization of domination, inequality, and exploitation.” For other references to potential connections (and disjunctions), see Angela P. Harris, *Toward a Law and Political Economy Approach to Environmental Justice*, in *THE CAMBRIDGE HANDBOOK OF ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT* 453, 454–55 (Carmen G. Gonzalez, Sara L. Seck & Sumudu A. Atapattu eds., 2021); and Ntina Tzouvala, *International Law and (the Critique of) Political Economy*, 121 S. ATL. Q. 297, 301–02 (2022). Here, I focus specifically on the commonalities that arise from the critique of the public/private distinction.

113. For an overview of the objectives of TWAIL, see Mutua, *supra* note 18, at 31. On the public/private distinction in international law, see ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* 239–40 (2005). I use the term “Third World” in the following sections when making explicit references to scholars within the TWAIL tradition.



gunboat diplomacy were on their way out.<sup>114</sup> According to scholars writing from the vantage point of the Third World, arbitration functioned to displace domestic courts in newly decolonized states, which were perceived as unreliable and corrupt, and to set up a regime that would be more favorable to business and investor interests.<sup>115</sup>

In this context, TWAIL scholars have argued that the public/private distinction serves to empower tribunals to see transnational disputes as if they concerned merely private transactions, when in fact they invoke a range of political concerns in a way that has been prejudicial to Third World interests. Take Libya as an example. In the early 1970s, the government's nationalization of its oil concessions gave rise to three landmark arbitral decisions.<sup>116</sup> In all three, the respective tribunals concluded that the Libyan government had acted illegally.<sup>117</sup> Amr Shalakany, analyzing these decisions, has argued that it is necessary to look beyond the doctrinal arguments made by the arbitrators to see the "disciplinary sensibility" at work: the way in which arbitrators saw their job as resolving contractual and property disputes between equals, rather than political controversies between *unequals*.<sup>118</sup> The arbitrators saw Libya's acts of nationalization as illegal because they interpreted their task, as arbitrators, to confine the scope of the issue to whether the Libyan government breached its concession contracts, instead of considering the political circumstances of a Third World nation reasserting sovereignty over its natural resources.<sup>119</sup>

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114. Muthucumaraswamy Sornarajah, *The Climate of International Arbitration*, 8 J. INT'L ARB. 47, 50-51 (1991).

115. *Id.* at 52; Muthucumaraswamy Sornarajah, *The UNCITRAL Model Law: A Third World Viewpoint*, 6 J. INT'L ARB. 7, 13-15 (1989); R. Rajesh Babu, *International Commercial Arbitration and the Developing Countries*, 4 AALCO Q. BULL. 386, 389 (2006); Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419, 428 (2000) (discussing Sornarajah's critique of international arbitration, especially its displacement of national judicial systems and its favoring of capital-exporting states' interests); Antony Anghie, *Legal Aspects of the New International Economic Order*, 6 HUMANITY 145, 151-52 (2015). Sornarajah notes the irony of justifying international arbitration on the grounds that it promotes investment by Northern investors, and therefore "development," when the betterment of Global South nations and their citizens would be far more effectively accomplished by "repay[ing] what was taken from them in the past." Muthucumaraswamy Sornarajah, *The Battle Continues: Rebuilding Empire through Internationalization of State Contracts*, in *THE BATTLE FOR INTERNATIONAL LAW: SOUTH-NORTH PERSPECTIVES ON THE DECOLONIZATION ERA* 175, 187 (Jochen von Bernstorff & Philipp Dann eds., 2019).

116. Shalakany, *supra* note 115, at 448.

117. *Id.* at 448-49.

118. *Id.* at 455.

119. *Id.* at 455-57. The legality of the nationalization of natural resources became a lightning rod for debates about the New International Economic Order in the 1970s. See Anghie, *supra* note 115, at 150.

More broadly, scholars have observed how the private-law doctrine of contracts and property has been weaponized against Third World states that attempt to nationalize resources. Such states have been subjected to the application of a disembodied “transnational” law of contracts, rather than their domestic law, and particularly to the doctrine of *pacta sunt servanda* – the idea that agreements must be upheld.<sup>120</sup> Over time, the problem of expropriation and nationalization somewhat migrated back into the sphere of public law as, after the 1980s, Global North nations made a push for bilateral investment treaties under public international law that would give investors from their nation rights vis-à-vis Global South host nations that expropriated investors’ assets.<sup>121</sup> But tribunals ruling on expropriation continue to apply private-law doctrines, such as in their calculation of compensation for states that expropriate the assets of investors.<sup>122</sup> In this way, the expansion of private law as a means of suppressing the broader political stakes of disputes persists.

### C. Sovereign Debt

Scholars have made similar critiques of international law’s function in the arena of sovereign debt and structural adjustment, especially in the context of large and unserviceable Third World debts. Debtor nations, overwhelmingly located in the Global South, have been required to repay their debts as if they were like any other debt or private contract.<sup>123</sup> As Odette Lienau argues, the

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120. See Sornarajah, *supra* note 114, at 64-69; Samuel K. B. Asante, *Stability of Contractual Relations in the Transnational Investment Process*, 28 INT’L & COMPAR. L.Q. 401, 404-06 (1979). See generally Sangwani Patrick Ng’ambi, *The Efficient Breach Theory in International Investment Law*, 41 NW. J. INT’L L. & BUS. 325 (2021) (arguing that international investment law rigidly imposes efficiency imperatives instead of enabling host states to pursue a wider range of legitimate public objectives).

121. Anghie, *supra* note 115, at 154-55. Anghie draws attention to the simultaneous empowering of private actors and the disempowering of public power in the international realm. He writes that “private power – always a driving, if obscured influence on the making of international law – has now expanded its reach massively and this with the support of public international law and institutions.” *Id.* at 155.

122. *Id.* at 154-55; Ng’ambi, *supra* note 120, at 328-340 (illustrating the application of efficiency-motivated private-law standards for calculating compensation under international law).

123. Potts, *supra* note 7, at 9-10 (describing “contract fundamentalism”); *id.* at 12 (describing how sovereign debt contracts present unique dynamics that distinguish them from other debt contracts, such as the influence of sovereign debt on domestic economic regulation and policy-making); James Gathii, *War’s Legacy in International Investment Law*, 11 INT’L CMTY. L. REV. 353, 384 (2009) (“[I]nternational law today has created a sphere of rules allowing capital-importing States to be sued as private actors.”). Although not explicitly situated within TWAIL scholarship, see also Giselle Datz, *Ties That Bind and Blur: Financialization and the*

requirement to repay debts no matter what is premised on the sweeping political assumption that the “sovereign” remains the same regardless of whether the sovereign is legitimate or the debt is undertaken to benefit the people.<sup>124</sup> By seeing debts as private, contractual agreements that must be upheld at all costs, the law prevents us from considering fundamental questions of democratic theory that arise in the enforcement of the debt: can those debts be binding on the body politic and its future generations, even if they were undertaken by a government that was perceived to be illegitimate?<sup>125</sup>

Even under the circumstances of “ordinary” economic crisis, the treatment of sovereign debt as a mere contract for repayment has obscured its political stakes. Consider the case of Argentina’s attempt to restructure its debt. In 2005 and 2010, Argentina made offers to creditors for bonds on which it had defaulted in 2001.<sup>126</sup> Argentina paid the bondholders of the restructured bonds, but not the holdout creditors. NML, one of the “vulture funds” that held out of these restructuring offers, sued in the Southern District of New York to be paid on the original terms of the bond.<sup>127</sup> The contracts in question included *pari passu* clauses (translating literally to “on equal footing”), the meaning of which was

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*Evolution of Sovereign Debt as Private Contract*, 2 REV. EVOLUTIONARY POL. ECON. 571, 583 (2021), which describes how debtor sovereigns are treated as “commercial player[s].” However, it is also true that even in the law as it currently exists, sovereigns are *unlike* regular debtors in important ways – which both disadvantage and advantage them. Sovereign debt can never be discharged because there is no formal bankruptcy procedure akin to the procedures that exist domestically, but sovereigns are also partially protected by legal rules such as immunity from execution. Datz, *supra*, at 575; Weidemaier & Gulati, *supra* note 15, at 483–85 (describing the sovereign debt literature’s response to obstacles to enforcing claims against sovereigns).

124. ODETTE LIENAU, RETHINKING SOVEREIGN DEBT: POLITICS, REPUTATION, AND LEGITIMACY IN MODERN FINANCE 5 (2014); *see also* Robert Howse, *The Concept of Odious Debt in Public International Law*, U.N. Conf. on Trade & Dev. Discussion Papers, July 2007, at 4, 7 (explaining the difference between clean and odious debt, and suggesting that the “notion of odious debt might be invoked against a claim that there is an international law obligation to repay the debt”).
125. There is a close connection between the theory of sovereign continuity and *pacta sunt servanda*. *See* Barry Herman, *A Role for Legitimacy in Sovereign Debt: A Review Essay on Odette Lienau, Rethinking Sovereign Debt*, 2014, 6 ACCT. ECON. L. 219, 226 (2016) (noting the role of *pacta sunt servanda* in the sovereign debt context).
126. U.N. Conf. on Trade & Dev., *Argentina’s ‘Vulture Fund’ Crisis Threatens Profound Consequences for International Financial System*, U.N. CONF. ON TRADE & DEV. (June 25, 2014), <https://unctad.org/news/argentinas-vulture-fund-crisis-threatens-profound-consequences-international-financial-system> [<https://perma.cc/7GM4-JZ3E>].
127. *NML Cap., Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012); *see also* Datz, *supra* note 123, at 577–78.

disputed.<sup>128</sup> Judge Griesa agreed with NML's interpretation of the *pari passu* clause of the contract, holding that it required the holdout creditors to be treated equally to the other creditors. This meant, in effect, that Argentina could not pay the bondholders of the restructured bonds while refusing to pay holdout creditors like NML. According to critics, this interpretation of the *pari passu* clause allowed vulture funds to obstruct Argentina's attempt to restructure its debts and thereby steer its economy in the face of an economic crisis.<sup>129</sup> It thus empowered private actors in the New York financial markets to undermine Argentina's sovereignty, illustrating what I term the *economic constraints on sovereign rights*—a kind of economic constraint that applies specifically to states' sovereign rights as equals.<sup>130</sup>

Meanwhile, indebted sovereigns are subject to stringent structural adjustment regimes, which also obscure the political nature of purportedly economic decisions. Since the 1980s, global economic institutions such as the International Monetary Fund have imposed stringent conditions of privatization and market liberalization on developing countries in exchange for lending money. As Anne Orford has written, these conditions were imposed under the guise of a technocratic expertise that was outside the realm of political contestation.<sup>131</sup> In reality, these conditions had significant consequences and implications for the public sphere of rights (in other words, illustrating the *economic constraints on sovereign rights*). For one, they limited the political rights to self-determination of citizens of those Global South countries. Furthermore, by stripping states of their ability to fulfill the basic needs of their citizenry, the conditions created an environment in which human rights abuses were more likely to occur.<sup>132</sup>

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128. As scholars have pointed out, the *pari passu* clause was boilerplate language whose meaning in the sovereign debt context was unclear. Furthermore, most commentators believed that the Second Circuit misinterpreted the clause, despite the lack of consensus on what the clause *did* mean. See, e.g., Mark Weidemaier, Robert Scott & Mitu Gulati, *Origin Myths, Contracts, and the Hunt for "Pari Passu,"* 38 LAW & SOC. INQUIRY 72, 74 (2013).

129. Potts, *supra* note 7, at 163-64. Potts notes that Griesa's reasoning was explicitly anchored in the public/private distinction. *Id.*

130. See *supra* note 103 and accompanying text.

131. Orford, *supra* note 104, at 180-82 (describing threats to human rights enabled by structural adjustment regimes, including "increased income disparity and the marginalization of women, the poor, and rural populations," and "a climate in which abuses of human rights, such as the freedom from torture or the right to life, are more likely to occur"); ANGHIE, *supra* note 113, at 256; Mohsen Al Attar, *Counter-Revolution by Ideology? Law and Development's Vision(s) for Post-Revolutionary Egypt,* 33 THIRD WORLD Q. 1611, 1615 (2012); SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* 4 (2011).

132. Orford, *supra* note 104, at 181.

#### D. Foreign Sovereign Immunity

The public/private distinction operates analogously in foreign sovereign immunity doctrine. It is no coincidence that in the sovereign debt cases, U.S. courts have jurisdiction through the commercial exception to foreign sovereign immunity in the FSIA. The substance of doctrines such as *pacta sunt servanda*—the foundational contract principle that “agreements must be kept”—operates alongside the procedural doctrine of sovereign immunity to enable private parties to sue debtor states.<sup>133</sup> By characterizing certain acts (e.g., a contract for sovereign debt) as commercial rather than sovereign, it is possible to designate them as acts that should be governed by the domestic private law of New York or London.<sup>134</sup>

Applying the framework offered by LPE scholarship, the distinction between a sovereign’s commercial and sovereign acts obscures the political nature of the economy by suppressing recognition of the public and political dimension of state contracts in the context of an unequal global economy.<sup>135</sup> Global South states often play a greater role in the economy than their Northern counterparts because of the imperative of economic development in the face of need.<sup>136</sup> State contracts are particularly important in areas of the economy in which the state may want to be involved to promote broader aims such as economic development, whether through infrastructure development or natural resource extraction.<sup>137</sup>

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133. *Pacta sunt servanda* is also an important principle of international law. See generally Jiang Zhifeng, *Pacta Sunt Servanda and Empire: A Critical Examination of the Evolution, Invocation, and Application of an International Law Axiom*, 43 MICH. J. INT’L L. 745 (2022) (tracing the usage of *pacta sunt servanda* in international law to uphold empire).

134. See Julian Schumacher, Christoph Trebesch & Henrik Enderlein, *Sovereign Defaults in Court*, 131 J. INT’L ECON. 1, 2 (2021) (describing the United States and United Kingdom as “the two dominant markets for international sovereign debt issuance and related legal disputes”).

135. See *supra* notes 102–103 and accompanying text.

136. Schokkaert, Heckscher, & Dejonghe, *supra* note 13, at 907 (“Most State contracts are concluded by African and Asian developing countries . . .”); Korin Kane & Hans Christiansen, *State-Owned Enterprises: Good Governance as a Facilitator for Development*, 5 COHERENCE FOR DEV. 1, 2 (2015) (contrasting the large role that state-owned enterprises play in developing countries with the “more restricted economic role” that they play in developed economies); Peter Nunnenkamp, *State Enterprises in Developing Countries*, 21 INTERECONOMICS 186, 186–87 (1986) (listing reasons why Third World states place high hopes in state enterprises to fulfill “economic and social objectives”).

137. U.N. CONF. ON TRADE & DEV., STATE CONTRACTS 3–4 (2004) (highlighting the role that state contracts play in infrastructure projects and natural resource exploitation and the difference between state contracts and ordinary commercial contracts); *id.* at 10 (noting that “[s]tate contracts are often used in politically sensitive investment areas”).

Furthermore, Global South states often contract with private parties to provide governmental services because of their relative lack of resources and capacity. Given the dominance of the United States in the global economy, such states often contract with U.S. corporations, and may even be required to contract with U.S. corporations as a condition of development aid.<sup>138</sup> In *Guevara v. Republic of Peru* and *Honduras Aircraft Registry v. Honduras*, the Eleventh Circuit explicitly acknowledged the particularity of Global South governments in this respect.<sup>139</sup> *Guevara* concerned the Peruvian government's alleged failure to pay a promised award for information about a fugitive, while *Honduras Aircraft* concerned the Honduran government's alleged breach of contract for goods and services to upgrade Honduras's civil aeronautics program.<sup>140</sup> In *Guevara*, the court noted that the facts of the two cases were similar because they both involved the government contracting out a function that it could not carry out on its own: "Honduras *did not have the resources or the technical expertise* to conduct its own aircraft inspections or to set up a registry," so it "ventured into the marketplace to find the expertise and resources needed to accomplish those tasks."<sup>141</sup> Likewise, "Peru *did not have the resources or the . . . expertise[]*" to "use its police and investigatory powers to search for [the fugitive] without offering money for information from anyone outside the government."<sup>142</sup> The fact that the government had outsourced governmental functions to a private actor transformed the agreement with the private actor into a commercial act, even though the court implied that registering aircraft, or locating and capturing a fugitive, would have constituted a sovereign act.<sup>143</sup>

The commercial exception to foreign sovereign immunity also undermines Global South states' sovereign rights through the market, illustrating the

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138. Secretariat of the Asian-Afr. Legal Consultative Comm., *supra* note 86, at 561; see also Wendy B. Abramson, *Contracting Out Government Functions and Services in Post-Conflict and Fragile States: Examples from the Health Sector in Latin America and the Caribbean*, ORG. FOR ECON. CO-OPERATION & DEV. 3 (2011), [https://www.oas.org/en/spa/dep/m/ventos/workshop\\_Paper\\_Abramson.pdf](https://www.oas.org/en/spa/dep/m/ventos/workshop_Paper_Abramson.pdf) [<https://perma.cc/D233-VNP7>] (describing the potential usefulness of contracting out government services when the capacity of the government is weak).

139. *Guevara v. Republic of Peru*, 468 F.3d 1289 (11th Cir. 2006); *Hond. Aircraft Registry v. Government of Honduras*, 129 F.3d 543 (11th Cir. 1997).

140. *Guevara*, 468 F.3d at 1298-99; *Hond. Aircraft Registry*, 129 F.3d at 547.

141. *Guevara*, 468 F.3d at 1298 (internal citations omitted) (emphasis added).

142. *Id.* at 1299 (quoting *Hond. Aircraft Registry*, 129 F.3d at 547).

143. *Id.* at 1298. The same logic extends to a government's provision of healthcare services: the Restatement (Fourth) of Foreign Relations Law summarizes the confusing state of the law as indicating that "[c]ontracting for the provision of healthcare services is generally considered commercial activity, but providing services as part of the national healthcare system is not." RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 454 (AM. L. INST. 2017).



*economic constraints on sovereign rights.*<sup>144</sup> Despite the legal fiction of sovereign states' equality to one another, some states are more equal than others: courts in the Global North, particularly those located in the world's financial centers, can haul Global South states into their jurisdiction. Developing countries rely on financial markets located in places like New York and London because of their relative lack of economic power, but when they do, they are also required to follow the legal rules established by those markets and institutions. For example, they often borrow in foreign currency (especially U.S. dollars) because it is perceived as less risky by investors, and the terms of their borrowing are governed by New York or English law because of the demands of those investors.<sup>145</sup> These factors allow courts in New York or London to exercise a kind of de facto power over the actions of sovereign states (again, insofar as those actions are characterized as of a commercial nature) – a power that B.S. Chimni calls “extraterritorial jurisdiction.”<sup>146</sup> In this way, the commercial exception works in tandem with the institution of international arbitration and international tribunals that exercise jurisdiction over the sovereign acts of states in the expropriation context.<sup>147</sup>

The most obvious type of cases that are brought into U.S. courts through the commercial exception are sovereign debt cases, such as *NML v. Argentina*, in which private creditors sue foreign sovereigns for attempting to restructure their debt in the face of economic crisis.<sup>148</sup> Taking on a public debt is a means of regulating the economy, and – especially for developing countries – is necessary if the state otherwise lacks the means to finance the essential functions of the government.<sup>149</sup> In this context, private-law doctrines governing contracts and

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144. See *supra* notes 103–104 and accompanying text.

145. See Datz, *supra* note 123, at 576; KATHARINA PISTOR, *THE CODE OF CAPITAL* 8 (2019).

146. B.S. Chimni, *The International Law of Jurisdiction: A TWAAIL Perspective*, 35 *LEIDEN J. INT'L L.* 29, 45 (2022); see also Potts, *supra* note 7 at 1–2 (noting the “development of a form of U.S. judicial power that operates transnationally”).

147. See, e.g., James Thuo Gathii & Harrison Otieno Mbori, *Reform and Retrenchment in International Investment Law: Introduction to a Special Issue*, 24 *J. WORLD TRADE & INV.* 535, 538 & n.11 (2023).

148. *NML Cap., Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012).

149. See U.N. Global Crisis Response Group, *A World of Debt: A Growing Burden to Global Prosperity*, U.N. CONF. ON TRADE & DEV. 6 (July 2023), <https://unctad.org/publication/world-of-debt> [<https://perma.cc/7LGL-D2YG>] (noting that “public debt has increased faster in developing countries compared to developed countries over the last decade . . . due to growing development financing needs . . . and by limited alternative sources of financing”). The initial expansion of Third World debt occurred because of U.S. financial institutions' investment in international markets, and deficits caused by the oil crisis of the 1970s. See 1 *HISTORY OF THE EIGHTIES: LESSONS FOR THE FUTURE: AN EXAMINATION OF THE BANKING CRISES OF THE 1980S AND EARLY 1990S*, at 192 (Fed. Deposit Ins. Corp. ed., 1997); Rory Macmillan,



property are often a conceptual mismatch for the political stakes of the disputes in question. Another prominent category of cases includes those in which the state contracts for a function it cannot perform on its own, usually due to limited resources and capacity, such as *Guevara* and *Honduras Aircraft*.

State-owned corporations and sovereign-wealth funds, which also often have a close connection to economic policymaking, are likewise brought into U.S. courts through the commercial exception. Two recent cases, *Petersen Energía* and *Halkbank*, illustrate the expansion of the commercial exception to cover an increasingly wide range of acts. In *Petersen Energía Inversora S.A.U. v. Argentine Republic & YPF S.A.*, Argentina expropriated shares of a minority shareholder in order to renationalize a once-privatized petroleum company.<sup>150</sup> The Second Circuit, in an interlocutory appeal, held that this action fell under the commercial exception to sovereign immunity because the company violated its tender requirements, as stated in its bylaws, in relation to the minority shareholder in the process of renationalizing the company.<sup>151</sup> This was the case even though ordinarily expropriations are sovereign acts that do not fall within the commercial exception.<sup>152</sup> The Second Circuit considered the lawsuit to be “based on’ Argentina’s breach of [its] commercial obligation” to tender for the minority shareholder’s shares and not its underlying sovereign act of expropriation.<sup>153</sup>

In 2023, the Second Circuit issued a decision on the underlying breach of contract claims. The Second Circuit granted the shareholders’ motion for

*The Next Sovereign Debt Crisis*, 31 STAN. J. INT’L L. 305, 311 (1995) (noting that “[f]ollowing the oil shocks of the 1970s banks held an abundance of ‘petrodollars’ on deposit, and eagerly offered a large volume of cheap loans to developing countries hungry for capital”). In addition, financial liberalization policies have made it easier for Global South sovereigns to borrow money from private creditors in such a way as to accelerate and magnify debt crises. See Martin Khor, *Globalization and the South: Some Critical Issues*, U.N. CONF. TRADE & DEV. DISCUSSION PAPER NO. 147, 22-23 (2000); M. Ahyan Kose, Franziska Ohnsorge, Peter Nagle & Naotaka Sugawara, *Caught by a Cresting Debt Wave*, INT. MONETARY FUND (June 2020), <https://www.imf.org/en/Publications/fandd/issues/2020/06/COVID19-and-debt-in-developing-economies-kose> [<https://perma.cc/7895-3S5Z>].

150. 895 F.3d 194, 199, 202 (2d Cir. 2018) [hereinafter *Petersen II*, following the Second Circuit’s numbering in *Petersen Energía Inversora, S.A.U. v. Argentine Republic*, No. 15 CIV. 2739, 2023 WL 2746022, at \*1 (S.D.N.Y. Mar. 31, 2023)].
151. *Id.* at 211 (characterizing Argentina’s refusal to conduct a tender offer in accordance with YPF’s bylaws as a commercial act).
152. There is a separate exception to foreign sovereign immunity under the FSIA for expropriations in violation of international law: 28 U.S.C. § 1605(a)(3). See *Devengoechea v. Bolivarian Republic of Venezuela*, 889 F.3d 1213, 1229 (11th Cir. 2018) (listing cases supporting the proposition that the commercial exception and expropriation exception are mutually exclusive); *Bock Holdings, LLC v. Republic of Honduras*, 654 F. Supp. 3d 1261, 1268 (S.D. Fla. 2023) (“The expropriation of property can only be accomplished by a sovereign entity, not a private party, and is not commercial activity.”).
153. *Petersen II*, 895 F.3d at 207.

summary judgment on liability, holding that Argentina breached the duty of good faith and fair dealing by failing to make a tender offer in line with the company's bylaws.<sup>154</sup> This decision has momentous consequences. It could lead to an award of damages that is virtually unprecedented in suits against foreign sovereigns in U.S. courts.<sup>155</sup> More importantly, however, it also indicates that sovereigns that attempt to nationalize corporations may be liable in U.S. courts<sup>156</sup>—even when, as in this case, the corporation was incorporated under domestic laws (in this case, the laws of Argentina).<sup>157</sup> The court held that Argentina breached its duty of “good faith and fair dealing,” a generalized and vague contractual principle much like *pacta sunt servanda*.<sup>158</sup>

*Turkiye Halk Bankasi A.S. v. United States* represents one of the starkest examples of the use of the commercial exception to support the extension of U.S. courts' jurisdiction over activities abroad.<sup>159</sup> In this recent case, the Supreme Court held that a district court had jurisdiction over a criminal case involving allegations that Halkbank, a Turkish state-owned bank, had evaded sanctions against Iran. The Supreme Court based its holding primarily on the fact that the FSIA only applied to civil cases, so it did not provide foreign states with immunity from criminal proceedings.<sup>160</sup> Notably, however, Justices Gorsuch and Alito concurred in part and dissented in part. They argued that U.S. courts had jurisdiction in this case not because the FSIA did not apply to criminal cases, but because the suit fell squarely within the FSIA's commercial exception.<sup>161</sup> They would have decided the case as the Second Circuit had, granting jurisdiction based on the fact that the activities Halkbank undertook to evade sanctions against Iran were commercial activities.<sup>162</sup> On the Second Circuit's approach, the

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154. *Petersen Energia Inversora, S.A.U. v. Argentine Republic*, No. 15 CIV. 2739, 2023 WL 2746022, at \*2 (S.D.N.Y. Mar. 31, 2023), *on reconsideration in part*, No. 15 CIV. 2739, 2023 WL 3625784 (S.D.N.Y. May 24, 2023) [hereinafter *Petersen IV*].

155. Ben Love, Blake Atherton & Logan Wright, *U.S. Court Holds Argentina Liable for Conduct Related to 2012 Nationalization of YPF*, BOIES SCHILLER FLEXNER LLP (Apr. 14, 2023), <https://www.bsflp.com/news-events/us-court-holds-argentina-liable-for-conduct-related-to-2012-nationalization-of-ypf.html> [<https://perma.cc/ZX35-8M7T>].

156. *Id.*

157. *Petersen IV*, 2023 WL 2746022, at \*2. The court did not decide whether New York law or Argentine law applied to the dispute. *Id.* at \*9 n.7.

158. Love, Atherton & Wright, *supra* note 155 (noting that the “good faith and fair dealing” holding “enables prospective claimants to more seriously consider the purpose rather than just the text of agreements such as corporate bylaws”).

159. 598 U.S. 264 (2023).

160. *Id.* at 270–71.

161. *Id.* at 283.

162. *Id.*

evasion of sanctions was a commercial activity because it was one in which private parties could engage.<sup>163</sup> While this approach was ultimately not followed by the majority of the Court, it reflects the flexibility with which acts of a political nature can be deemed commercial. More importantly, it also serves to illustrate how the commercial exception can be wielded to enforce the United States' control over the economic activities of other states.<sup>164</sup>

To summarize, the public/private distinction established and enforced by the commercial exception to foreign sovereign immunity obscures the political stakes of supposedly commercial acts. It also obscures the economic constraints on sovereign rights: developing countries' rights to sovereign equality are undermined when they are vulnerable to being brought to court in Global North countries for supposedly commercial acts as a result of their economic dependence on private actors in those Global North countries.

My argument is not that there is *no* legally meaningful distinction between a state's private and public or sovereign acts. It seems more accurate to conceive of the distinction as a spectrum, with clearly private and clearly public acts on either extreme – for example, a state contracting for cafeteria or custodial services for government employees on one end,<sup>165</sup> and a state invading a territory on the other<sup>166</sup> – although I would argue that most seemingly commercial acts still lie

163. *United States v. Turk. Halk Bankasi A.S.*, 16 F.4th 336, 349 (2d Cir. 2021), *aff'd in part, vacated in part, remanded*, 598 U.S. 264 (2023). For other cases that recognize the possibility of the commercial exception applying to alleged criminal acts, see, for example, *In re Grand Jury Subpoena*, 749 F. App'x 1 (D.C. Cir. 2018); and *Adler v. Fed. Republic of Nigeria*, 219 F.3d 869, 875 (9th Cir. 2000), *as amended on denial of reh'g and reh'g on banc* (Aug. 17, 2000).

The facts of *Halkbank* specifically demonstrate that the sanctions-evasion scheme at issue involved a significant exercise of sovereign power: the scheme was carried out with President Recep Tayyip Erdogan's explicit authorization and his top officials' involvement. Eric Lipton & Benjamin Weiser, *Turkish Bank Case Showed Erdogan's Influence with Trump*, N.Y. TIMES (Oct. 29, 2020), <https://www.nytimes.com/2020/10/29/us/politics/trump-erdogan-halk-bank.html> [<https://perma.cc/LXS9-ZBN8>]; Kelly Bjorklund, *Trump's Inexplicable Crusade to Help Iran Evade Sanctions*, FOREIGN POL'Y (Jan. 9, 2021), <https://foreignpolicy.com/2021/01/09/trump-help-iran-evade-sanctions-turkey-halkbank> [<https://perma.cc/MW4D-9W9N>].

164. This is especially the case if – as a recent symposium has argued – unilateral sanctions are an important tool of U.S. geopolitical hegemony. See Asli Ü. Bâli, *Weapons Against the Weak*, LPE PROJECT (June 29, 2023), <https://lpeproject.org/blog/weapons-against-the-weak> [<https://perma.cc/7PLT-GMK4>]; Bâli & Tzouvala, *supra* note 112.

165. This is different from the case of contracting for, say, the updating of a civil aviation registry because governments operate civil aviation registries using their uniquely sovereign powers to regulate and coordinate actors within the market. On the other hand, even a private employer might feed its employees or hire custodial services to clean its premises.

166. However, Swati Srivastava shows through the case of Blackwater that even military operations reflect the blurring of the boundary between the state and the market. SWATI SRIVASTAVA, *HYBRID SOVEREIGNTY IN WORLD POLITICS* 112-46 (2022).

in a murky middle ground.<sup>167</sup> My point is that some particularly ambiguous scenarios are also high-stakes ones.

Furthermore, and relatedly, this argument may raise the objection that recognizing foreign sovereigns' immunity from the jurisdiction of U.S. courts risks denying justice to possible plaintiffs. As Part I suggests, this was the very concern that animated the restrictive theory of foreign sovereign immunity: that counterparties to states' transactions would not be able to seek recourse in domestic courts by virtue of states' immunity. If many acts that sovereigns engage in are indeed of a mixed nature, then there is a tension between protecting their equality as sovereigns and recognizing their equality to private actors in the market. In the face of this potential tradeoff, my aim here is simply to draw attention to a particular dynamic through which sovereign acts are definitively categorized as private and commercial despite factual ambiguity. Importantly, though, merely recategorizing private acts as public, and therefore out of reach of domestic courts, might not protect Global South nations from the *economic constraints on sovereign rights*.

### III. THE SHIFTING LINE BETWEEN PUBLIC AND PRIVATE

From my argument thus far, it appears that the problem with the public/private distinction in foreign sovereign immunity doctrine is that the category of private law has expanded beyond its proper limits. It is true that in the twentieth century, and particularly since the expansion of financial markets and the acceleration of globalization in the last part of the century, subordination has taken place through the expansion of private law. However, the history of foreign sovereign immunity doctrine in the common law suggests that the best means of redressing the expansion of private law is not a mere expansion of the category of public law. This is because the distinction has been drawn and redrawn, in different directions which sometimes entailed the *expansion* of public law, to disempower and subordinate non-European nations. This reality is confirmed by the history of the public/private distinction in the Anglo-American tradition, which illustrates that even the expansion of public law has had adverse consequences for non-European sovereigns.

In this Part, I tell the story of two debts. Through the juxtaposition of two different moments – the Nawab of the Carnatic's debt to agents of the East India Company in the late eighteenth century, and Argentina's debt to private creditors

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167. Thanks to Daniel Markovits for this framing. Duncan Kennedy identifies “continuumization” (which we could alternatively term “spectrumization”) as one of the steps in what he describes as the decline of the public/private distinction. Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1351–52 (1982).

in the United States in the late twentieth century – I aim to show how a strikingly similar set of facts gave rise to opposing legal conclusions. One court chose to see the transaction as a public one, as a treaty between sovereigns, whereas the other chose to see it as a private contract. Despite opposing legal conclusions, and the drawing and redrawing of the boundary between public and private, what remained constant was the subordination of the non-European sovereign.<sup>168</sup> This allows me to argue further in Part IV that merely redrawing this line again – this time in the direction of *expanding* the category of a sovereign’s public acts – is unlikely to solve, once and for all, the problem of *subordination through private-law adjudication*.

As scholars such as Maryam Jamshidi have pointed out, the commercial exception to foreign sovereign immunity has evolved over time to reflect dominant material interests.<sup>169</sup> Jamshidi in particular argues that foreign sovereign immunity doctrine has reflected different stages of the development of capitalism, and the interests that have been predominant in each of those stages.<sup>170</sup> I give an alternative (albeit complementary) historical account to explicitly take into account the way in which foreign sovereign immunity doctrine has shifted to reflect European and Western nations’ attempts to assert dominance over the world. In doing so, I also illustrate another facet of Antony Anghie’s famous claim that international law emerged out of the “colonial encounter”: “out of the attempt to create a legal system that could account for relations between the European and non-European worlds in the colonial confrontation.”<sup>171</sup> Nowhere is this starker than in the origins of foreign sovereign immunity doctrine in the common law, where British courts attempted to deal with claims brought by Indian sovereigns against the British East India Company.<sup>172</sup> The eighteenth-century British cases not only shaped foreign sovereign immunity doctrine in England, but also had a profound effect in America, where those common-law doctrines travelled.<sup>173</sup> Foreign sovereign immunity doctrine continued to evolve

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168. The two cases that I examine, while both influential and precedential in shaping foreign sovereign immunity doctrine, are not meant to be representative of all of the doctrine. Rather, the stylized contrast between the cases illustrates the broader point that different legal conclusions and doctrinal designations can still result in similar outcomes of subordination of non-European nations.

169. Jamshidi, *supra* note 27, at 589.

170. *Id.* at 590.

171. ANGHIE, *supra* note 113, at 3.

172. See *infra* notes 206–210 and accompanying text.

173. In fact, the doctrine of foreign sovereign immunity (and its commercial exception) under British and U.S. law evolved in tandem. Siewert, *supra* note 65, at 762 (“The development of similar concepts of foreign sovereign immunity law by British and United States

to enable the subordination of Global South nations even after formal decolonization, as the cases that were brought before U.S. courts during the Latin American debt crisis illustrate.<sup>174</sup>

### A. Foreign Sovereign Immunity Under Empire

In English law, as in U.S. law, the absolute doctrine of foreign sovereign immunity prevailed until the mid-twentieth century, when both countries' legal systems moved towards the restrictive theory of foreign sovereign immunity in response to an increase in trading activities by states and state-owned companies.<sup>175</sup> In the United Kingdom, courts “rediscover[ed]” a line of earlier cases from the eighteenth century that supported this turn to the restrictive theory.<sup>176</sup> In *Rahimtoola v. Nizam of Hyderabad*—the modern case that signaled this shift to the restrictive theory—Lord Denning referenced a key case from 1793: *Nabob of the Carnatic v. East India Company*.<sup>177</sup> He cited this case as support for the proposition that sovereign states could be subject to domestic jurisdiction for private or commercial acts (such as the breach of a contract), but not for public or sovereign acts (such as the breach of a treaty).

Since then, scholars have drawn attention to the significance of the *Nabob of the Carnatic* case for subsequent developments in Anglo-American common law. Lakshman Marasinghe has argued that *Nabob of the Carnatic* illustrates the long, if forgotten, pedigree of the restrictive theory of foreign sovereign immunity in the common-law tradition.<sup>178</sup> Seth Davis argues that *Nabob of the Carnatic* inspired another line of cases outside of foreign sovereign immunity doctrine concerning the adjudication of political questions, when the *Nabob* case was picked up by courts in the United States.<sup>179</sup> I use the case, however, not to demonstrate its influence on the subsequent development of the law, but instead to highlight

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courts . . . provides a rare example of direct reciprocal influence.”); see also Marasinghe, *supra* note 54, at 664-84 (discussing the coevolution of U.S. and British foreign sovereign immunity law).

174. See ANGHIE, *supra* note 113, at 268; B.S. Chimni, *Capitalism, Imperialism, and International Law in the Twenty-First Century*, 14 OR. REV. INT'L. L. 17, 28-32 (2012).

175. See *supra* Section I.A.

176. *Rahimtoola v. H.E.H. Nizam of Hyderabad* [1957] 3 All ER 441 (HL) 464; Marasinghe, *supra* note 54, at 674.

177. 30 Eng. Rep. 521; 2 Ves. Jun. 56 [hereinafter *Nabob of the Carnatic II*], to be distinguished from the earlier 1791 case *Nabob of the Carnatic v. East India Company*, 30 Eng. Rep. 391 (1791) [hereinafter *Nabob of the Carnatic I*]. On the two phases of litigation, see *infra* note 186 and accompanying text. On the uses of the term “Nabob” and “Nawab,” see *supra* note 23.

178. Marasinghe, *supra* note 54, at 674, 678.

179. Seth Davis, *Empire in Equity*, 97 NOTRE DAME L. REV. 1985, 1988-89 (2022).



*differences* in how the agreement between the Nawab and his creditors was treated relative to current law. Whereas such an agreement would likely be considered a contract and therefore a commercial act under current U.S. law, the British Court of Chancery highlighted the facts in a way that made it appear more like a treaty between sovereigns.

The case arose out of a dispute between an Indian ruler, Muhammad Ali Khan Wallajah, the Nawab of the Carnatic, and the East India Company. The Nawab had been an important political ally of the British during a period when the East India Company was first making inroads into territorial rule.<sup>180</sup> He used his alliance with the British to support his own territorial ambitions, although in order to do so he had to borrow large amounts of money from the Company.<sup>181</sup> The Nawab had assigned some of his territories to the Company as security for his debt.<sup>182</sup> By the mid-1770s, the Nawab found himself in a disadvantageous economic and strategic position, which eventually led him to demand an accounting of his balance with the East India Company and payment of any surpluses to which he was entitled.<sup>183</sup>

The question in the case concerned whether the dispute between the Nawab and the East India Company was the kind of matter over which a municipal court could exercise jurisdiction. The East India Company's lawyers argued that it was not because it related to "peace and war."<sup>184</sup> The lawyers for the Nawab argued that it was not enough to say that the matter related to peace and war, providing an interpretation of the law that would, centuries later, become the dominant U.S. approach to the commercial exception to sovereign immunity: "Contracts

180. *Id.* at 1992.

181. *Id.* at 1992-93; 2 F. P. LOCK, EDMUND BURKE, 1784-1797, at 38 (2006); Jim Phillips, *A Successor to the Moguls: The Nawab of the Carnatic and the East India Company, 1763-1785*, 7 INT'L. HIST. REV. 364, 366 (1985) (describing the Nawab's territorial ambitions). For general context concerning the expansion of British territorial rule in India, see PHILIP J. STERN, *THE COMPANY-STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA 207-14* (2011). Stern challenges the conventional narrative that the Battle of Plassey marked the Company's transformation from a company to a territorial sovereign, arguing that the Company had a mixed nature from its inception. For a description of the separate loans that constituted the Nawab's debts, see generally Parvathi Menon, *The Carnatic Debts and the Agrarian Crisis of the Eighteenth Century*, 9 REV. AGRARIAN STUD. 10, 15-23 (2019).

182. *Nabob of the Carnatic II*, 30 Eng. Rep. at 521.

183. *Nabob of the Carnatic I*, 30 Eng. Rep. 391, 392 (1791); Phillips, *supra* note 181, at 366-67, 376 (describing the Nawab's indebtedness to the East India Company as a result of his alliance with the Company); Davis, *supra* note 179, at 1998-99.

184. *Nabob of the Carnatic I*, 30 Eng. Rep. at 392.



for arms, for money to carry on a war, &c., relate to peace and war, yet certainly they are the subject of municipal jurisdiction.”<sup>185</sup>

Ultimately, after two phases of litigation, the Court of Chancery rejected the Nawab’s argument.<sup>186</sup> The court reasoned that this was a dispute between sovereigns over which a municipal court could not rule. In characterizing the dispute in this way, the Court of Chancery did two things. First, it chose to see the sovereign/public, rather than commercial/private, aspects of the agreement between the Nawab and the Company. Second, it supported the (contested) position that the East India Company was itself a sovereign. The remainder of this Section will examine both aspects of the decision to demonstrate that the court relied on a selective highlighting of facts that ultimately served to empower the Company to the status of a quasi-sovereign, on level footing with the Nawab.

### 1. *The Public Nature of Private Debts*

Reading the case in context highlights that it was at the center of a political debate about the East India Company and Britain’s expanding empire. That political debate, in turn, implicated the intersecting public and private nature of the Nawab’s debts.

The Nawab’s notoriously large debts had been a matter of public consternation at the time. While the East India Company officially disavowed the Nawab’s attempt to expand his influence by taking on debt from the Company, the Nawab formed an unofficial alliance with private creditors who would benefit from the expansion of his territory, from which further revenues could be drawn.<sup>187</sup> Meanwhile, many suspected that the debts were fraudulent, created to enrich the private creditors of the Nawab.<sup>188</sup> Parliament considered several acts to require a full accounting of the debts, although such acts were frustrated by politicians suspected to be allies of the Nawab’s creditors.<sup>189</sup>

The case attracted much attention in the halls of Parliament, where the politician and political thinker Edmund Burke delivered a lengthy speech

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<sup>185.</sup> *Id.* at 399.

<sup>186.</sup> In the first stage of the proceedings, the East India Company entered a plea arguing that the Company was not subject to the jurisdiction of the Court of Chancery because of its sovereign status, and therefore that the Nawab’s bill should be dismissed, which was rejected by Lord Chancellor Thurlow. In the second stage, the East India Company raised the same objection, and the Court of Chancery dismissed the bill. *Nabob of the Carnatic II*, 30 Eng. Rep. at 521 (noting that the two proceedings covered substantially similar arguments). The Nawab’s death in 1795 put an end to the proceedings. *Id.* at 523.

<sup>187.</sup> LOCK, *supra* 181, at 38.

<sup>188.</sup> *Id.* at 40.

<sup>189.</sup> See the discussions of Fox’s India Bill and Pitt’s India Act. *Id.*

denouncing the corruption of the Company's officers in India and demanding a proper investigation into the debts.<sup>190</sup> Burke's speech – characteristically critical of the East India Company, and reflecting a political orientation that some commentators have characterized as anti-imperial<sup>191</sup> – focused on precisely the complicated relationship between the public and private aspects of the case.

Burke questioned how it was possible for the private creditors of the Nawab to be owed such exorbitant sums at a time when the Company itself was in deep financial trouble, to the extent of requiring bailouts by public funds.<sup>192</sup> As Burke stressed, the amount that these private creditors were supposedly owed was enormous: it totaled over 4.4 million pounds, more than a third of the amount collected annually through land taxes in England and double the annual dividend of the East India Company.<sup>193</sup>

Burke argued that the only possible explanation for this sum was that the debts were actually fictitious and not based on money that had ever been lent to the Nawab.<sup>194</sup> His theory was that private creditors approached the Nawab, who was out of money from waging territorial wars and could not pay his troops their unpaid wages. These creditors took advantage of their posts as officers of the East India Company and – under the guise of Company authority – offered a small advance to pay some of the Nawab's troops in exchange for the right to be assigned the revenues from the Nawab's territories as security for those debts.<sup>195</sup> However, on Burke's telling, the creditors did not immediately pay the Nawab's troops and continued to collect large amounts of interest payments from the Nawab.<sup>196</sup> The Nawab, meanwhile, had intended to discharge his troops in line with the East India Company's official policy, but because he did not receive the promised money from his creditors, he was forced to keep and pay his troops until he could gather the money to discharge his debts to them.<sup>197</sup>

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190. MR. BURKE'S SPEECH, ON THE MOTION MADE FOR PAPERS RELATIVE TO THE DIRECTIONS FOR CHARGING THE NABOB OF ARCOT'S PRIVATE DEBTS TO EUROPEANS, ON THE REVENUES OF THE CARNATIC (London, J. Dodsley 1785) [hereinafter MR. BURKE'S SPEECH]. The Nabob of Arcot is another name for the Nabob of the Carnatic – Arcot was the capital of the Carnatic.

191. On Burke's anti-imperialism, see JENNIFER PITTS, *A TURN TO EMPIRE: THE RISE OF IMPERIAL LIBERALISM IN BRITAIN AND FRANCE* 59-100 (2009). Burke's speech on the Nawab of the Carnatic has remained underdiscussed relative to his other speeches on the British East India Company. For reasons as to why this could be the case, see LOCK, *supra* note 181, at 45.

192. MR. BURKE'S SPEECH, *supra* note 190, at vii.

193. *Id.* at 13.

194. *Id.* at 14-15.

195. *Id.* at 28.

196. *Id.* at 30.

197. *Id.*

Burke concluded that the whole situation was an elaborate scam: the creditors must have gotten the money that they had lent to the Nawab from the Nawab himself—from the territorial revenues they had been assigned as security for the debt.<sup>198</sup> As the private creditors reaped the profits of the assigned revenues, the amount that the Nawab owed his creditors rapidly ballooned because of the high interest rate they had charged.<sup>199</sup> The suspicion that the assigned territorial revenues must have far exceeded the Nawab's actual debt was what ultimately led the Nawab to demand an accounting of his debts before the Court of Chancery.<sup>200</sup>

Ultimately, when the Court of Chancery recognized the “public” over the “private” features of this transaction, the effect was to deny the Nawab the relief that he had sought. For Burke, these complicated aspects of the case meant that it could only be seen in its full light through a parliamentary investigation.<sup>201</sup> The Nawab, however, was denied relief not only through political channels, but also in the litigation before the Court of Chancery, which viewed the case as an agreement between sovereigns. In doing so, the court paradoxically failed to recognize the public and political consequences of interpreting the agreement as a sovereign treaty.

## 2. *East India Company as Sovereign*

In order to argue that the Nawab's agreement with the East India Company was a sovereign one, it was also necessary to elevate the Company to the status of sovereign. The status of the Company, either as something between a private corporation and an extension of the state or as a sovereign in its own right, further complicates any attempt to categorize the Nawab's debts as of a private or public nature.

Whether the East India Company was in fact a sovereign was the subject of much debate. As Philip Stern illustrates, the answer was not straightforward: “The Company combined the rights of private persons, such as to sue and be sued or contract debts, with features of public sovereign power, such as the prerogative to wage war and conduct diplomacy, govern over people and places, coin money, and so on.”<sup>202</sup> Depending on the circumstances, the Company could

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198. *Id.* at 31.

199. *Id.* at 24, 31.

200. *Id.* at 16.

201. *Id.* at 10.

202. Philip J. Stern, *The English East India Company and the Modern Corporation: Legacies, Lessons, and Limitations*, 39 SEATTLE U. L. REV. 423, 434 (2016); see also Swati Srivastava, *Corporate*

be brought before municipal courts in England, but it could also make treaties – like the one in *Nabob of the Carnatic* – that were not subject to municipal jurisdiction.<sup>203</sup> Over the course of the eighteenth century, as the Company’s powers expanded in India, the Company came to argue that it was a sovereign in its own right, rather than merely an agent of the British state.<sup>204</sup> It grounded this argument in its ability to make war and peace, which was also central to its claims against the Court of Chancery’s jurisdiction in *Nabob of the Carnatic*.<sup>205</sup>

In *Nabob of the Carnatic*, the Court of Chancery ultimately adopted the East India Company’s self-characterization as a territorial sovereign.<sup>206</sup> By elevating the Company to the status of sovereign, the court also sided with the material interests of the Company and its agents in not allowing the Nawab to seek relief through an accounting of his debts. *Nabob of the Carnatic* was followed by a series of other cases that also distinguished between a state’s sovereign and commercial acts by characterizing the East India Company as a sovereign entity. In *The Secretary of State for India v. Sahaba* (1859), for example, the Privy Council refused to take jurisdiction over a dispute between the widow of the Rajah of Tanjore and the British East India Company about the alleged confiscation of the Rajah’s property.<sup>207</sup> In *The Ex-Rajah of Coorg v. East India Company* (1860), the Court of Chancery refused to assume jurisdiction for a dispute that arose when the Company destroyed a promissory note for a sum of money it owed to the ruler of Coorg.<sup>208</sup> Each of these cases consisted of a denial of relief to an Indian ruler in relation to a transaction or interaction with the East India Company that could have been characterized as private but was not.

Ultimately, concerns about the East India Company’s exercise of sovereignty and abuse of power abroad led to a reckoning in Britain. Such concerns brought about the beginning of the end of the East India Company’s exercise of “layered sovereignty” and gave rise to a period in which the British government asserted

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*Sovereign Awakening and the Making of Modern State Sovereignty: New Archival Evidence from the English East India Company*, 76 INT’L ORG. 690, 695 (2022) (discussing debates as to whether the East India Company was sovereign). For more context on the “company-state,” see generally STERN, *supra* note 181; ANDREW PHILLIPS & J.C. SHARMAN, *OUTSOURCING EMPIRE: HOW COMPANY-STATES MADE THE MODERN WORLD* (2020); and Michael Mulligan, *The East India Company: Non-State Actor as Treaty-Maker*, in *NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS: CREATION, EVOLUTION AND ENFORCEMENT* (James Summers & Alex Gough eds., 2018).

203. Stern, *supra* note 202, at 425.

204. Srivastava, *supra* note 202, at 698–99, 702.

205. *Id.* at 699 (noting Robert Clive’s argument that “war [was] the source of Company sovereignty”).

206. Mulligan, *supra* note 202, at 51.

207. Marasinghe, *supra* note 54, at 679.

208. *Id.*

a conception of indivisible, unitary sovereignty where the Company was subordinate to the state.<sup>209</sup> This nineteenth-century unitary conception of sovereignty roughly coincided with and supported the absolute theory of foreign sovereign immunity: as states were seen as distinct from corporations, they enjoyed absolute immunity before courts in other states.<sup>210</sup>

*B. Foreign Sovereign Immunity After Empire*

States enjoyed this status into the beginning of the twentieth century, until two things began to shift. First, as discussed above, the rise of the Soviet/Communist bloc meant that the line between state and corporation was once again blurred.<sup>211</sup> In the context of increased state involvement in the economy, many believed that subjecting states to the rules of the market would protect private parties and ultimately encourage trade.<sup>212</sup> Second, a wave of newly independent sovereigns in the Global South joined the rank of formally equal, sovereign states. These states would have otherwise been granted absolute immunity under the absolute theory of foreign sovereign immunity, but with the rise of the restrictive theory, they were not. This was one way in which the meaning of sovereignty itself shifted when a new cast of characters, formerly denied the status of sovereign statehood, gained access to that status.<sup>213</sup>

The restrictive theory was ultimately codified in the United States in the FSIA, and in the United Kingdom in the State Immunity Act 1978.<sup>214</sup> By this time, formal empire had ended, and the hegemony of the British Empire had been eclipsed by the rise of the United States. The late 1970s also marked the end of a period of agitation by postcolonial states that had sought to reorder the international economic order to rectify the injustices of the colonial period.<sup>215</sup> These radical ambitions were extinguished by the two oil crises of the 1970s, increased interest rates in light of the economic crisis, and the subsequent

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209. Srivastava, *supra* note 202, at 709.

210. Phillips and Sharman suggest that the rise of the opposition between public and private led to the decline of the company-state. PHILLIPS & SHARMAN, *supra* note 202, at 6, 13. The nineteenth century also saw the rise of positivism, which placed a greater emphasis on the special status of statehood and state sovereignty. See ANGHIE, *supra* note 113, at 33 (“Positivist jurisprudence is based on the notion of the primacy of the state . . .”).

211. See *supra* note 36 and accompanying text.

212. See *supra* Part I.

213. ANGHIE, *supra* note 113, at 197-99 (noting that when formerly colonized states in Asia and Africa gained independence and formal sovereignty, their attempts to assert that sovereignty were frustrated).

214. 28 U.S.C. § 1605; State Immunity Act 1978, c. 33 (UK).

215. Anghie, *supra* note 115, at 145.

ballooning of Third World debt.<sup>216</sup> Latin American countries were particularly hard-hit by this sequence of events, with many unable to service their debts.<sup>217</sup> While these debts were very different from those of Indian sovereigns at the end of the Mughal Empire, they raise similar questions about the difficulty of distinguishing between the public and private features of a transaction, and the functioning of that distinction to subordinate non-European nations.

*Republic of Argentina v. Weltover, Inc.*, as discussed in Part I, formed today's legal framework for foreign sovereign immunity in U.S. law. The case emerged out of the context of the Latin American debt crisis of the 1980s. *Weltover* shaped foreign sovereign immunity doctrine in the United States by significantly expanding U.S. courts' powers over transactions involving sovereign states. In the 1980s, the Argentine government developed a foreign-insurance-contract program (FEIC) to insure Argentine businesses in cross-border transactions against the real risk of currency depreciation.<sup>218</sup> This was necessary because Argentine pesos were not accepted in international transactions, so Argentine businesses would need to borrow U.S. dollars. However, the instability of the peso and the shortage of U.S. dollars in Argentina made this feat challenging.<sup>219</sup> Under the foreign insurance contracts, Argentine domestic borrowers gave the government a predetermined amount of local currency in exchange for the promise to receive U.S. dollars when their foreign debts matured.<sup>220</sup>

Because of the devaluation of Argentine pesos, the Argentine government itself did not have enough U.S. dollars to pay the domestic borrowers when the FEIC contracts became due in 1982.<sup>221</sup> To solve this problem, the Argentine government refinanced the FEIC-backed debts by issuing bonds (called "Bonods") to the creditors of the Argentine businesses.<sup>222</sup> A foreign creditor could either accept the bonds in satisfaction of the initial debt, which would have made the Argentine government the debtor in the place of the private Argentine businesses, or remain a debtor with the Argentine government acting as a guarantor.<sup>223</sup> In 1986, the Bonods began to mature, but Argentina still did not have

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216. See *id.* at 152; Margot E. Salomon, *From NIEO to Now and the Unfinishable Story of Economic Justice*, 62 INT'L & COMPAR. L.Q. 31, 46-47 (2013).

217. See Sims & Romero, *supra* note 12 (noting that many Latin American countries were hard-hit by the oil crises of the 1970s and were unable to service their debt).

218. See *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 609 (1992).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 610.

enough foreign currency to repay them.<sup>224</sup> The President of Argentina issued a decree that unilaterally extended the time for repayment.<sup>225</sup> Some of the bondholders refused this rescheduling and brought an action in the Southern District of New York to compel Argentina to honor its initial agreement under the Bonods. The bondholders relied on the FSIA as the basis for jurisdiction.<sup>226</sup>

Ultimately, the case made its way to the U.S. Supreme Court, which held that federal courts did have jurisdiction over Argentina under the FSIA and its commercial exception.<sup>227</sup> In reaching this conclusion, Justice Scalia, writing for the Court, determined that the Argentine government's issuance of bonds was a "commercial" act.<sup>228</sup> Much like in *Nabob of the Carnatic*, the Court's determination that the issuance of bonds was a private, commercial act that could be subject to the jurisdiction of municipal courts relied on a selective reading of the much more complicated facts. Again echoing *Nabob of the Carnatic*, this decision also had the effect of elevating private actors – in this case, private investors located in the Global North – to a status equal to that of a sovereign.

### 1. *The Public Nature of Private Debts*

The Court in *Weltover* characterized the Argentine government's issuing of bonds as a private, commercial act by focusing on some features at the exclusion of others – in particular, by focusing on the so-called nature of an act over its purpose. As discussed in Section I.C, the FSIA instructed courts to determine whether an act was commercial by reference to its nature rather than its purpose. *Weltover* cemented this distinction at a time when some courts had been deviating from it.<sup>229</sup> Justice Scalia applied the distinction to the facts in the following way:

[W]e conclude that when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," 28 U.S.C. § 1603(d), the question is not whether the foreign

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224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 614-15.

228. *Id.*

229. For additional context, see my discussion of *Banco Central* and *MOL*; *supra* notes 77-87 and accompanying text.



government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in “trade and traffic or commerce.” Thus, a foreign government’s issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a “commercial” activity, because private companies can similarly use sales contracts to acquire goods.<sup>230</sup>

This reasoning raises two questions. First, one might object that to consider the nature of an act as distinct from its purpose is to miss something essential about the nature of the act itself.<sup>231</sup> In this case, it is possible to characterize Argentina’s issuance of bonds as akin to any private entity’s issuance of bonds, but the bonds themselves arose out of a very particular set of circumstances: Argentina’s need to insure its private businesses in the context of its economic crisis, and its assumption of the liabilities of those private businesses as a backstop against their default. No private party that did not have an interest in regulating the economy as a whole would have any reason to insure businesses in this way. And Argentina’s acts were arguably undertaken not only with regulatory *purpose*, but also with the *means* of public power. It was the President of Argentina that had, through a decree, unilaterally extended the time for payment of the bonds.<sup>232</sup>

Second, even under the terms of the law as it existed, it is not clear that Argentina’s issuance of bonds to private creditors was a commercial act. Justice Scalia cited two examples of the paradigmatic “sovereign” and “commercial” transaction: a foreign government’s issuance of regulations limiting foreign currency exchange, on the one hand, and a contract to buy army boots or bullets, on the other.<sup>233</sup> Based on this reasoning, it may seem initially that Argentina’s issuance of bonds is more like the regulation than the contract to buy boots, because it is a government policy aimed at regulating the market and preventing Argentine businesses from defaulting on their debts to foreign creditors.

Justice Scalia quickly preempted this reasoning by insisting again on adherence to the nature/purpose distinction. He argued that Argentina’s issuance of the Bonods was more like the army contract than the currency regulation because

230. See *Weltover*, 504 U.S. at 614-15 (citations omitted).

231. See *supra* notes 77-84 and accompanying text (discussing the Fifth Circuit’s reasoning in *Banco Central*).

232. *Weltover*, 504 U.S. at 610.

233. See *id.* at 614.

the Bonods “are in almost all respects garden-variety debt instruments: They may be held by private parties; they are negotiable and may be traded on the international market (except in Argentina); and they promise a future stream of cash income.”<sup>234</sup> He continued, stating that there was “nothing distinctive about the state’s assumption of debt (other than perhaps its purpose) that would cause it always to be classified as *jure imperii*[.]”<sup>235</sup> However, despite his purported disavowal of consideration of the purpose of the act, some of the features of the bond Scalia highlighted as commercial spoke more to their purpose than their nature – specifically their purpose of maximizing profits for private investors. The promise of a future stream of income went to the purpose (i.e., profitmaking) of the act that Scalia had, earlier in the opinion, urged excluding from consideration.<sup>236</sup>

What Scalia was requiring, then, was not necessarily to ignore the purpose of an act, but to ignore what the purpose of the act would have been for *the sovereign*. In doing so, the Supreme Court advanced a highly selective reading of the facts of the case, choosing to highlight the private and commercial aspects of the transaction at stake rather than the public and sovereign aspects.

## 2. *The Empowerment of Private Actors*

*Weltover* had the opposite effect from *Nabob of the Carnatic*: it expanded U.S. courts’ jurisdiction over transactions that took place outside of the United States. However, it did so in a way that favored the private creditors of Third World states and ultimately empowered them to profit from the economic distress of those states. Specifically, the Supreme Court’s expansion of U.S. jurisdiction for so-called commercial acts empowered “vulture funds” to buy bonds issued by distressed debtor states and sue for repayment on the original terms of the bond, even when such repayment was at odds with those states’ restructuring plans and possibly even the policy of the United States.<sup>237</sup> In this way, *Weltover* had exactly the same effect for those private investors that *Nabob of the Carnatic* had for the East India Company: it elevated their status to that of a quasi-sovereign.<sup>238</sup>

*Weltover* opened the door to this result by, among other things, announcing that the issuance of sovereign debt was a commercial activity that was not

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<sup>234</sup> *Id.* at 615.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 614.

<sup>237</sup> Potts, *supra* note 7, at 134-35.

<sup>238</sup> For the language of the “quasi-sovereignty” of private actors and the connection between the eighteenth century and the twentieth century, see ANGHIE, *supra* note 113, at 232-35.

protected by foreign sovereign immunity.<sup>239</sup> These vulture funds bought discounted distressed debt on the secondary market. They then held out from restructuring plans to sue for full repayment—which was possible because they could sue indebted sovereigns in U.S. courts after *Weltover*—or otherwise demand advantageous settlements.<sup>240</sup> In this way, throughout the 1990s and 2000s, the vulture funds were able to profit from lawsuits against more than a dozen sovereign states and generate profits of up to 300% or 400%.<sup>241</sup>

The position of the vulture funds in sovereign-debt litigation can be analogized to the role of the East India Company and its officers in the late eighteenth century. They acted at times for their private interest—in tension with the stated policy of the United States—but in doing so they also promoted the broader interests of the United States in relation to the world. On the one hand, the U.S. government had upheld an official policy of allowing distressed debtor nations to write down and restructure their debt. Under what was then called the Brady Plan, the U.S. government attempted to address the Latin American debt crisis of the 1980s by converting the bank loans on which distressed debtor nations had defaulted into discounted bonds.<sup>242</sup> By doing so, the loans became liquid assets that private investors could buy from the banks, which reduced the risks posed by default for the banks—and by extension, for the U.S. economy.<sup>243</sup> On the other hand, even though the U.S. government had a vested interest in successful restructuring, it stressed the voluntary nature of the restructuring plans and, in *Weltover*, filed an amicus brief supporting the holdout creditors' attempts to bring Argentina before U.S. federal courts.<sup>244</sup> As Shaina Potts has argued, the U.S. government had a broader interest in empowering New York and its courts as a creditor- and contract-friendly jurisdiction.<sup>245</sup>

In any case, private parties exerted a great deal of power over sovereigns through what appeared on the surface to be market exchanges. These private parties included both the private banks from which the sovereign states had initially borrowed large amounts of money starting in the 1970s and the vulture funds that held out from restructuring plans when states started to default on

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239. See *BANKAS*, *supra* note 62, at 510. It also did so through the direct-effects holding, which is beyond the scope of this Note. See Potts, *supra* note 7, at 143.

240. See *supra* notes 5-8 and corresponding text.

241. See *supra* note 7 and accompanying text.

242. Potts, *supra* note 7, at 118; see also Jessica W. Miller, Comment, *Solving the Latin American Sovereign Debt Crisis*, 22 U. PA. J. INT'L ECON. L. 677, 685-86 (2001) (describing the Brady Plan).

243. Potts, *supra* note 7, at 118; Macmillan, *supra* note 149 at 313-14, 322 (noting that banks accepted the prospect of writing down the loans under the Brady Plan).

244. Potts, *supra* note 7, at 154-55.

245. *Id.* at 155.

that borrowed money.<sup>246</sup> This complicated interplay between private and public actors, and private and public interests, underscores just how difficult it is to characterize acts as one or the other for the purposes of foreign sovereign immunity determinations. It further illustrates how such characterizations often mask a much more complex reality in the service of subordinating non-European sovereigns and elevating private actors (such as private creditors). Contrasting *Nabob of the Carnatic* with *Weltover* demonstrates that it is unhelpful to focus on where the line between public and private is drawn; contrasting doctrinal designations are compatible with functionally similar outcomes. This means that any attempt to reform the law, too, must take into account the possibility for different doctrinal designations to result in the continued subordination of Global South sovereigns.

#### IV. RETHINKING THE PUBLIC/PRIVATE DISTINCTION IN INTERNATIONAL LAW

In this final Part of the Note, I conclude with some thoughts on concrete changes that may address the issues that arise from drawing the public/private distinction in international law and its consequent subordination of the Global South. I identify two axes along which reform might be pursued: first, on the level of public versus private law, and second, on the level of domestic versus international law. As Part II argued, there are two distinct but interrelated problems with the current framework that characterizes sovereign acts as entirely private, obfuscating their potential dual sovereign and regulatory purposes: first, that they are brought under a system of adjudication that treats states merely as private parties without considering the political stakes of the seemingly private transactions they engage in; and second, that through this categorization, they are brought into domestic courts in jurisdictions overwhelmingly located in the North. The solution appears to be to move to the opposite pole in both cases: seeing sovereign actions as public rather than private and adjudicating disputes in the international rather than domestic realm. Accordingly, I make a conditional defense of reform along both axes: considering the purpose of acts rather than just their nature and bringing adjudication from the domestic, unilateral realm to the international and multilateral realm.

However, the juxtaposition of *Nabob of the Carnatic* with *Weltover* in Part III illustrates that different doctrinal designations can lead to strikingly similar

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246. See, e.g., Philip J. Power, *Sovereign Debt: The Rise of the Secondary Market and Its Implications for Future Restructurings*, 64 *FORDHAM L. REV.* 2701, 2709-10 (1996) (describing how commercial banks' cooperation was necessary for restructuring sovereign debt and the potential threat that holdout creditors pose in restructuring).

outcomes depending on context. This should lead us to be skeptical of the possibility of a once-and-for-all doctrinal or institutional solution to the problem of *subordination through private-law adjudication*.<sup>247</sup> Instead, proposed reforms must be sensitive to potential pitfalls and the constraints of the broader system in which reforms operate—constraints including, for example, the need for states in the Global South to gain international credibility and attract investment in light of their weaker economic position.

As new actors are rising on the world stage and signaling the end of the United States' singular dominance, a new range of constraints and possibilities present themselves. The rise of new powers may present an opportunity for states to renegotiate mutually acceptable terms under which sovereigns may be subject to the jurisdiction of other states' courts. However, these new powers that are on the rise may also use the tools of transnational litigation to their own strategic advantage, reproducing the dynamics of subordination discussed in Part III above.

#### A. *Recentering Purpose*

As I have argued above, the FSIA's insistence that courts only consider the nature of an act, rather than its purpose, leads courts to potentially characterize states' activities in such a way as to make Global South sovereigns vulnerable to suit in U.S. courts, even for acts that have a public or sovereign character.<sup>248</sup> Given this risk, one possible reform would be for U.S. courts to recognize the public character of those activities by taking into account their governmental purpose, rather than merely their formal characteristics as contracts.

As early as 1985, Global South nations recognized that the FSIA's privileging of the nature of an act over its purpose could be prejudicial to their interests.<sup>249</sup> The Secretariat of the Asian-African Legal Consultative Committee (AALCC) expressed a general concern that the FSIA expanded U.S. courts' jurisdiction to a wide range of state activities, even those undertaken outside of U.S. territory.<sup>250</sup> It further noted that under the FSIA's expansive definition of commercial activities, which did not take into account the governmental purpose of those activities, sovereign states could be brought to U.S. courts for such things as contracts

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247. Cf. NTINA TZOUVALA, *CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW* 212-13 (2020) (discussing the indeterminacy of the law and its ability to accommodate and adapt to a range of ends).

248. See *supra* Section I.C.

249. Secretariat of the Asian-Afr. Legal Consultative Comm., *supra* note 86, at 561-62 (describing the concerns that developing countries have expressed about the FSIA).

250. *Id.* at 561.

for the construction of a plant in the sovereign state's own territory.<sup>251</sup> This posed a problem because state actors in many developing countries were more involved in economic development than in developed nations and specifically relied on transactions with U.S.-based multinationals to fulfill the governmental development objective. As the AALCC Secretariat noted, U.S. law's strict emphasis on the nature rather than purpose of an act was not grounded in international consensus.<sup>252</sup> Around the same time, Sornarajah argued for greater flexibility in foreign sovereign immunity determinations. He argued that the tension between the conflicting imperatives of sovereign equality and equality between actors in the marketplace demanded a kind of flexible judgment that considers the totality of circumstances.<sup>253</sup>

Introducing purpose into determinations of whether an act is commercial or sovereign would likely have two interrelated outcomes. For one, it would enable flexible determinations based on the context of acts and transactions, and second, it would (as a result) likely expand immunity for states. This is because many acts that seem to be commercial on their face – such as signing a contract for the provision of goods or services – turn out to be motivated by underlying regulatory purposes. A few pre-*Weltover* cases, such as *Banco Central* and *MOL*, suggest what such a shift in the doctrine might look like.<sup>254</sup> In *Banco Central*, the Fifth Circuit held that Nicaragua's issuance of a check as part of its attempt to regulate foreign currency reserves was a sovereign act.<sup>255</sup> In *MOL*, the Ninth Circuit held that Bangladesh's entering into a contract to capture and export monkeys was a sovereign act.<sup>256</sup> In both cases, the court looked beyond the formal features of the transaction to consider why the governmental actor engaged in the transaction, which ultimately led to the determination that the sovereigns in question had been acting in their sovereign capacity.<sup>257</sup>

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251. *Id.*

252. *Id.* at 569. For a comparative discussion of alternative legal standards, including context-based determinations of foreign sovereign immunity, see also YANG, *supra* note 27, at 85-108.

253. Sornarajah, *supra* note 16, at 670. As he wrote, "The test should take into account the fact that modern international commerce requires the settlement of disputes concerning even foreign governmental entities by domestic courts and the conflicting fact that in the international order which is still horizontal the imposition of norms based on political values by domestic courts would be resented." *Id.*

254. See *supra* notes 77-87 and accompanying text.

255. *de Sanchez v. Banco Cent. De Nicar.*, 770 F.2d 1385, 1392 (5th Cir. 1985).

256. *MOL, Inc. v. Bangladesh*, 736 F.2d 1326, 1329 (9th Cir. 1984).

257. These cases provide an illustration of what it might look like for U.S. courts to consider purpose in determining whether an act is commercial or sovereign. They therefore suggest that there are resources even within U.S. case law for this proposed reform. Importantly, they

On the other hand, it is possible that considerations of purpose could increase uncertainty, especially compared to a test that looks to more formal features of a transaction. This is especially the case because some “purposes” with which governments undertake activities or transactions are also of a mixed nature. For example, a government could undertake a commercial venture with the purpose of making a profit (a quintessentially “commercial” motivation), but the profit might ultimately be intended for raising money for the government’s sovereign activities. As the AALCC noted, such problems are more likely to arise in the context of Global South countries for whom economic development is an important mandate. Nonetheless, as I have noted in the context of contracts for military supplies and healthcare provision, even the current standard that only considers the “nature” of acts, rather than their purpose, is far from clear.<sup>258</sup> More importantly, it might even be argued that uncertainty is itself a desideratum: in other words, what we call uncertainty may be another name for flexibility and contextual determination.

However, even if U.S. courts were to consider the purpose of an act rather than just its nature, and even if considering purpose would lead to more determinations in favor of states’ immunity, my analysis has suggested that expanding the category of the “public” is not the be-all end-all of reform.<sup>259</sup> In *Nabob of the Carnatic*, the Court of Chancery *did* recognize the immunity of the sovereign in question, but in a way that was prejudicial to his interests.<sup>260</sup> Even today, we

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suggest that it is possible for courts to read the FSIA’s nature/purpose distinction to bring in considerations of purpose *as part of* the consideration of the nature of an act. This means that it would not be necessary to change the language of the FSIA to enact the proposed reform. However, as I have discussed *supra* in Section I.B.3, the case law has evolved away from this reading of the FSIA, as *Weltover* signaled a decisive turn away from the kind of reasoning that the courts engaged in in *Banco Central* and *MOL*. This suggests that *Weltover* would have to be overturned for courts to permit consideration of purpose.

258. See *supra* notes 100 & 143 and accompanying text.

259. For a recent case that strikingly illustrates this phenomenon, see *Certain Iranian Assets (Islamic Republic of Iran v. U.S.)*, Judgment, Mar. 30, 2023. In this case, Iran claimed that the United States violated a 1955 Treaty of Amity that gave certain rights to “companies” when the United States allowed private suits against Iran and the attachment of Iranian central bank assets to satisfy judgments from those private suits. *Id.* at ¶¶ 34-35. The International Court of Justice ultimately accepted the United States’ argument that the central bank was not a “company” because the bank’s activities were “inseparable from its sovereign function.” *Id.* at ¶ 52. See also Declaration of Judge Salam, *Certain Iranian Assets*, ¶ 7 (noting that, “as the United States courts have themselves pointed out, [the transactions of the Iranian Central Bank] constitute commercial activities in the United States”); Chloe Miller, *U.S. Sanctions: Central Banks, Investment Treaties and the Assets of Central Banks* 11 (2023) (unpublished manuscript) (on file with author) (describing how the United States had previously denied sovereign immunity in domestic litigation in part on the grounds that the central bank was engaged in commercial activity).

260. See *supra* note 186 and accompanying text.



can see the way in which the expansion of foreign sovereign immunity might backfire. Expanding foreign sovereign immunity by characterizing more acts as public rather than private may simply lead to other means of defeating foreign sovereign immunity, such as voluntary waivers of immunity in state contracts.<sup>261</sup>

Expanding immunity may also lead to the migration of disputes from U.S. courts to international arbitration – either commercial or investment arbitration. These alternative fora may present certain advantages compared to the unilateral exercise of domestic courts’ jurisdiction in that they are creatures of consent; and indeed, *some* form of international adjudication is necessary to resolve disputes and avoid denials of justice.<sup>262</sup> However, as I have argued in Part II.B, international commercial arbitration may also contribute to the phenomenon of *subordination through private-law adjudication*.<sup>263</sup> International investment arbitration does take place on the plane of public international law as it is the creature of treaties entered into by states. Under bilateral investment treaties, investors can sue sovereign states for alleged violations of investors’ rights.<sup>264</sup> However, some have argued that the rise of international investment arbitration in the late twentieth century has had the effect of bringing state disputes into public law only by elevating the status of private parties based in the North. This is analogous to how, in *Nabob of the Carnatic*, the Court of Chancery characterized the dispute between the Nawab and the East India Company as a dispute between sovereigns only by elevating the status of the Company to that of a sovereign.<sup>265</sup> States are thus treated as sovereigns, but they are not immune from suit when acting in their regulatory capacity. Instead, private actors are simply elevated to an equivalent level where they can bring suits before international tribunals.<sup>266</sup>

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261. 28 U.S.C. § 1605(a)(1) (2018).

262. Alternative international adjudication fora – depending on the nature of the dispute and the parties involved – include state-to-state arbitration (especially in place of investor-state arbitration), multilateral investment courts, and other international courts (such as the International Court of Justice). See Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 HARV. INT’L L.J. 1, 1 (2014); Georgios Dimitropoulos, *National Sovereignty and International Investment Law: Sovereignty Reassertion and Prospects for Reform*, 21 J. WORLD INVEST. & TRADE 71, 88 (2020).

263. See *supra* Part II.B.

264. See *supra* note 121 and accompanying text.

265. J. Benton Heath, *The Anti-Reformist Stance in Investment Law*, 24 J. WORLD INV. & TRADE 564, 569 (2023) (describing investment law as “a system of special rights for special people”); *id.* at 571-72 (describing rationales explaining why investors receive special rights under investment law).

266. The literature critiquing investor-state arbitration is vast. As one example of the critiques that have been made on the basis of states’ regulatory authority, see generally U.N. Secretariat, *Possible Reform of Investor-State Dispute Settlement: Submission from the Government of*

It is important to consider such alternative forms of adjudication not only because of the possible risks and downsides of those alternatives, but also because doing so reminds us of the important point that – except in the case of suits that fall within relevant exceptions to sovereign immunity – the relationship between sovereigns is primarily governed by *international* law. This is the second axis along which I propose reforms, which I turn to next.

### B. *Decentering Domestic Decision-Making*

Bringing considerations of purpose into determinations of foreign sovereign immunity may resolve many of the problems with the current configuration of the public/private distinction. But it would not address another related problem: that sovereign states are subject to the determination of a judge in a foreign domestic jurisdiction, applying rules that they had no say in making, for whether they can be brought to court at all. Even though foreign sovereign immunity is the subject of international law, it is currently governed by the different domestic laws of each state. This means that certain jurisdictions, such as the United States and specifically the courts located in U.S. financial centers, wield disproportionate control over immunity determinations.<sup>267</sup> Therefore, another axis of potential reform concerns moving foreign sovereign immunity determinations from the domestic to the international arena.

One possibility involves passing an international treaty on internationally applicable rules of foreign sovereign immunity. An international treaty to be negotiated between sovereign states would give them the opportunity to shape the rules to which they are subject. Depending on states' preferences, this treaty might establish not only the rules but also a procedure for resolving disputes concerning foreign sovereign immunity – for example, if one sovereign sought to challenge another in its domestic application of the treaty rules. In this way, domestic judicial determinations could be subject to the ruling of a tribunal.

Such an attempt at reaching an international consensus regarding foreign sovereign immunity has already been made, most importantly through the United Nations Convention on Jurisdictional Immunities of States and their

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South Africa, Note by the Secretariat, U.N. COMM'N ON INT'L TRADE L. WORKING GRP. III, U.N. Doc. A/CN.9/WG.III/WP.176 (July 17, 2019). See also Gathii & Mbori, *supra* note 147, at 538 (describing the asymmetrical access to rights accorded to investors under investment arbitration). For works that historicize the development of investment law, see generally KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL* (2013); and James T. Gathii, *War's Legacy in International Investment Law*, 11 INT'L CMTY. L. REV. 353 (2009).

267. See *supra* notes 144-164 and accompanying text (discussing the “economic constraints on sovereign rights” that are reflected in the reality that Global South states are brought into the domestic courts of Global North countries).

Property (the Convention).<sup>268</sup> The Convention resulted from the International Law Commission (ILC)'s attempt to codify customary rules on foreign sovereign immunity over a process that spanned decades. The ILC first proposed the jurisdictional immunities of states as a topic for codification to the United Nations General Assembly in 1977.<sup>269</sup> The ILC prepared a set of draft articles in 1991, which was then adopted as the Convention by the General Assembly in 2004.<sup>270</sup> The Convention has been signed by twenty-eight states and ratified by twenty-three and will enter into force once thirty states have ratified it.<sup>271</sup>

The fact that the Convention has not yet entered into force reflects several facts about the Convention and about foreign sovereign immunity law more generally. First, the Convention was the result of a difficult compromise between different geopolitical constituencies.<sup>272</sup> In fact, one of the most contentious issues in the negotiations was whether the purpose of an act should be taken into account in immunity determinations.<sup>273</sup> Ultimately, the Convention recognized the diversity of state practice in declaring that it was acceptable to take into account the purpose of an act in determining whether it was commercial or sovereign "if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction."<sup>274</sup> That it is difficult to develop an international consensus even about the Convention, which embodies a flexible approach to such issues as the nature/purpose distinction, suggests that it would be even harder to establish a shared standard, and harder yet to establish an adjudicatory system based on the Convention.

Secondly, the fact that the Convention has not entered into force may reflect the possibility that reaching an international consensus on foreign sovereign immunity is not currently a priority for states. As Roger O'Keefe has written, this may be because states prefer to be guided by customary international law or even

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268. *United Nations Convention on Jurisdictional Immunities of States and Their Property*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=III-13&chapter=3&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en) [<https://perma.cc/J864-FNRG>].

269. THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY: A COMMENTARY, at xxxvii (Roger O'Keefe & Christian J. Tams eds., 2013).

270. *Id.*

271. *United Nations Convention on Jurisdictional Immunities of States and Their Property*, *supra* note 268.

272. THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, *supra* note 269, at xxxix.

273. *Id.* at 58.

274. G.A. Res. 59/38, *supra* note 26, annex § 2.2.

to maintain their existing domestic law.<sup>275</sup> This might especially be the case for states that continue to adhere to the absolute theory of foreign sovereign immunity, given that the Convention reflects the general consensus in favor of the restrictive theory.<sup>276</sup> Moreover, there is limited “countervailing *cachet*” that a state can gain from becoming a party to the Convention, unlike in other more politically salient areas of international law such as human rights.<sup>277</sup>

And finally, assuming that there could be consensus over substantive rules, and that there could be the political will to push forward something like an international treaty on foreign sovereign immunity, it is always possible that states could sign waivers of immunity and agree to forum-selection clauses that would bring them back into domestic jurisdictions. Even international adjudication is no panacea; as the rise of international investment law illustrates, certain forms of public-international-law adjudication can still empower private parties to bring claims against states.<sup>278</sup> States might be inclined to voluntarily waive their immunity, or to allow private parties to bring claims against states in other fora, because of the need to provide assurances to private parties about the risks of doing business with a state counterparty.<sup>279</sup>

The turn to the restrictive theory of foreign sovereign immunity was itself motivated by the need to facilitate market transactions in a world in which sovereigns were increasingly entering the marketplace. Notably, the turn happened with the active support of many representatives of the newly decolonized Global South. The Asian-African Legal Consultative Committee – the very organization that later mobilized against the “nature over purpose” standard – had once spear-headed efforts to codify the restrictive theory of foreign sovereign immunity.<sup>280</sup>

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275. THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, *supra* note 269, at xl-xli.

276. *Id.* at xxxix. China, however, signed the Convention despite its adherence, until relatively recently, to the absolute theory of foreign sovereign immunity. Changhao Wei, *China to Allow Some Suits Against Foreign States: A Summary of the Foreign State Immunity Law*, NPC OBSERVER (Sept. 11, 2023, 5:00 PM), <https://npcobserver.com/2023/09/china-foreign-state-immunity-law> [<https://perma.cc/SP2X-GJUX>].

277. THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, *supra* note 269, at xli.

278. *See supra* notes 262-265.

279. ANGHIE, *supra* note 113, at 240-41 (describing the competition for foreign investment among Third World states); Schokkaert, Heckscher & Dejonghe, *supra* note 13, at 910 (describing the sovereign risk that arises from states’ ability to change their laws). *See also supra* note 123 on sovereign risk in the specific context of sovereign debt.

280. Asian Afr. Legal Consultative Comm., ASIAN AFRICAN LEGAL CONSULTATIVE COMMITTEE: THIRD SESSION, COLOMBO, 1960, at 62 (1960); Sompong Sucharitkul, *Contribution of the Asian-African Legal Consultative Organization to the Codification and Progressive Development of*

Throughout the history of international economic law, there have been many instances in which Global South states and those defending their interests have argued for rules that would make it easier for such states to gain credibility vis-à-vis investors and creditors in light of economic necessity.<sup>281</sup>

All of these considerations do not necessarily prescribe what we should do, but they do point us toward what we should think about: the conditions and constraints under which international and transnational law operate. Specifically, these constraints include the fact that sovereigns, when they engage with private actors in the market, need to be seen as predictable, reliable, and credit-worthy. They must negotiate with the preferences of their counterparties, who are often located in the Global North and specifically in the United States, given its economic dominance. Such actors prefer contracts that are executed by U.S. financial institutions and law firms and governed by U.S. (and specifically New York) law.<sup>282</sup> It may be the case either that the possibility of changing the rules is constrained in light of these realities, or that changing the rules does not change these realities in a way that leads to unintended outcomes.

This is not to say that such constraints are necessary or constant: for example, as Odette Lienau has illustrated in the context of sovereign debt, the idea that states must not repudiate their obligations in order to maintain their credibility and reputation vis-à-vis creditors was not a historical inevitability.<sup>283</sup> Instead, such norms concerning creditworthiness and reputation are themselves politically shaped and malleable.<sup>284</sup> The present moment may be one in which, in the context of geopolitical realignment, states are making demands that previously had been considered too risky in light of market norms. Countries such as South Africa and India have withdrawn from previous commitments to submit to investor-state dispute resolution, or have otherwise heavily constrained the ability of investors to bring claims despite the conventional wisdom that

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*International Law*, in *ESSAYS IN INTERNATIONAL LAW* 8, 12 (Asian Afr. Legal Consultative Org. ed., 2007).

281. See, e.g., Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 *ICSID REV.-FOREIGN INV. L.J.* 1, 1-3 (1986) (defending investment arbitration on the grounds that it depoliticizes disputes between countries in the context of power disparities).

282. PISTOR, *supra* note 145, at 8 (noting that “[t]wo legal systems dominate the world of global capital: English common law and the laws of New York State”).

283. LIENAU, *supra* note 124, at 227.

284. *Id.*

investor-state dispute resolution attracts foreign capital and provides a necessary assurance to investors.<sup>285</sup>

Perhaps the clearest sign of the changing times is China's recent adoption of the restrictive theory of foreign sovereign immunity. China had long been a holdout adherent to the absolute theory of foreign sovereign immunity, despite having signed the Convention.<sup>286</sup> In September 2023, the Standing Committee of the National People's Congress announced a legislative change that would enable suits against foreign states in Chinese courts under certain circumstances.<sup>287</sup> The Chinese Ministry of Foreign Affairs cited the fact that most other countries had adopted the restrictive theory in light of economic globalization, and importantly, that China's Belt and Road Initiative expanded the scope of cooperation between Chinese corporations and foreign states.<sup>288</sup> Western pundits' apprehensions that this law signals a form of "Wolf Warrior Diplomacy" are likely overblown, especially as this change merely brings China in line with prevailing international practice.<sup>289</sup> Still, the shift does reflect the reality that non-Western and non-European states are also increasingly exporters of capital to other states. The weakening of U.S. unipolar hegemony means that there may be a wider range of private parties with whom states can do business, with more or less favorable rules for those states. It also means that there are more jurisdictions in which foreign states could be brought to domestic courts. Finally, it means that it may be possible for U.S. courts and legal practice to evolve with the awareness that their approaches to jurisdiction may be reciprocally applied by other states.<sup>290</sup>

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285. Dimitropoulos, *supra* note 262, at 71, 73, 82. Some of these countries have already expressed signs of backtracking from their most anti-investment arbitration positions. See Ravi Dutta Mishra, *India May Drop Local Remedies Clause in New BITs as UK Trade Pact Nears*, MINT (Oct. 24, 2023), <https://www.livemint.com/news/india/india-shifts-stance-in-bit-talks-with-uk-seeks-faster-investor-state-dispute-resolution-in-new-treaty-11698164336568.html> [<https://perma.cc/CB3C-37UE>]; see also Congyan Cai, *Balanced Investment Treaties and the BRICS*, 112 AJIL UNBOUND 217, 219 (expressing doubt about whether India's and South Africa's reform measures are practicable and sustainable in the long term).

286. Wenhua Shan & Peng Wang, *Divergent Views on State Immunity in the International Community*, in THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 63 (Tom Ruys, Nicolas Angelet & Luca Ferro eds., 2019).

287. William S. Dodge, *China Adopts Restrictive Theory of Foreign State Immunity*, TRANSNAT'L LITIG. BLOG (Sept. 14, 2023), <https://tlblog.org/china-adopts-restrictive-theory-of-foreign-state-immunity> [<https://perma.cc/9Q5D-D3LB>]; Wei, *supra* note 276.

288. Wei, *supra* note 276.

289. Dodge, *supra* note 287.

290. See Ryan Mitchell, *China's New Sanctions Regime and the Problem of Mimetic Unilateralism* 5 (Aug. 14, 2023) <https://ssrn.com/abstract=4540653> [<https://perma.cc/KW5M-S7WT>]

Amid such reorientation, the two proposals I have advanced here — bringing considerations of regulatory purpose into determining whether an act is commercial and internationalizing the procedure by which the determination is made — may be more likely than ever before, even if still unlikely. On the one hand, some constraints remain constant, such as the Global South’s economically subordinate position and its need to attract foreign investment in light of that position. Such constraints prevent a more optimistic prognosis of the prospects for reform. On the other hand, the United States may now have a greater interest than ever before in advancing rules that will not be “mimetically” used against its own interests,<sup>291</sup> and perhaps even in engaging in negotiating international frameworks that serve as the basis for such restraint.

## CONCLUSION

A close examination of how the public/private distinction functions in international law, through the lens of the law of foreign sovereign immunity, illustrates that the supposedly formalistic, technical distinction between a state’s public and private acts obscures as much as it clarifies. Demonstrating that the boundary between the private and public, between the market and politics, is less stable than it seems also serves another function: it opens up possibilities for reimagining that boundary. It shows that it is for us — whoever is affected by the boundary — to collectively determine the limits of the market and the reach of its norms.<sup>292</sup> This approach brings to the fore power struggles that are otherwise masked by the façade of judicial objectivity. That, after all, has been the contribution of generations of scholars that have challenged the public/private distinction in law — a contribution that remains ever relevant in the face of new economic crises, such as those precipitated by the growing debt in the Global South today.

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(coining the term “mimetic unilateralism” to describe China’s move towards a regime of economic sanctioning that closely resembles the United States’); *id.* at 31-34 (specifically discussing developments in China’s foreign sovereign immunity law).

291. See generally *id.*

292. This point is inspired by recent scholarship that has attempted to apply a “moral economy” framework to economic questions. See Luke Herrine, *What Is Consumer Protection For?*, 34 *LOY. CONSUMER L. REV.* 222, 222 (2023); Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 *YALE L.J.* 175, 175 (2021).