

Oil, Gas, and Rhesus Monkeys: A New Framework for Natural Resources Under the Commercial Activity Exception

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Introduction

Under the Foreign Sovereign Immunities Act of 1976 (FSIA), foreign states are presumptively immune from suits in U.S. courts unless one of several enumerated exceptions applies.¹ Of these exceptions, the most frequently litigated is § 1605(a)(2)'s commercial activity provision, which states that:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case— . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the

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1. See 28 U.S.C. § 1604.

foreign state elsewhere and that act causes a direct effect in the United States²

For a provision that some commentators have labelled as the “heart” of the FSIA,³ the statute leaves the term “commercial activity” curiously undefined.⁴ The commercial activity exception embodies the FSIA’s restrictive theory of sovereign immunity,⁵ according to which foreign states are not entitled to immunity when they act as private players in the marketplace.⁶ Nevertheless, the FSIA offers little by way of guidance on how to interpret this term, explaining only that commercial activity “means either a regular course of commercial conduct or a particular commercial transaction or act”⁷ and that the “character of an activity shall be determined by reference to the nature of the course of conduct . . . rather than by reference to its purpose.”⁸

The FSIA’s obscurity on what constitutes “commercial activity” has given rise to a significant body of federal case law that attempts to define the term. This Note focuses on a particular line of decisions within that case law, wherein courts have been confronted with sovereign states engaging in commercial arrangements to license, market, export, or develop natural resources. Beginning with the Ninth Circuit’s 1984 decision in *MOL, Inc. v. People’s Republic of Bangladesh*,⁹ (*MOL*) courts have generally concluded that transactions involving natural resources are inherently sovereign in nature, and therefore do not fall within the commercial activity exception’s ambit. As a result, the foreign state is entitled to immunity under the FSIA. This Note challenges that principle, which it dubs the “natural resource rule,” arguing that certain natural-resource related transactions should qualify as commercial activity based on a multi-factor balancing test extracted from *In re Complaint of Sedco*,¹⁰ which considered the issue two years before the Ninth Circuit in *MOL*.

Courts assessing the commercial activity exception engage in a two-pronged analysis, asking first if the foreign states’ conduct constitutes commercial activity and second if the plaintiff’s claims are based upon that activity. The natural resource rule comes into play at the initial step, which is where this Note contends the new *Sedco* test should apply in its stead. The *Sedco* test assesses whether a dispute involving natural resources should fall within the commercial activity exception based on: 1) the geo-

2. *Id.* § 1605(a)(2).

3. See JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 351 (2003).

4. See *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 612 (1992) (noting that the statute “leaves the critical term ‘commercial’ largely undefined”); 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, 490–91, 499 (1992).

5. See 28 U.S.C. § 1602; DELLAPENNA, *supra* note 3, at 351.

6. See *Weltover*, 504 U.S. at 613–14.

7. 28 U.S.C. § 1603(d).

8. *Id.*

9. 736 F.2d 1326 (9th Cir. 1984).

10. 543 F. Supp. 561 (S.D. Tex. 1982).

graphical location of the natural resource; 2) the degree of government control over the natural resource; and 3) the existence of a for-profit contract between the state and a private party. This Note does not define the term “natural resource,” and neither does the case law that it addresses.¹¹ This Note is concerned with how the commercial activity analysis proceeds once courts have made the initial determination that a natural resource is in play, not with the legal parameters of the term.

The FSIA constitutes an exception for sovereign states to the normal jurisdictional rules that govern when parties are subject to suit in US courts. The commercial activity provision is a carveout within that broad exception—it deprives sovereign states of their exceptional immunity when they engage in commercial conduct. Within this framework, courts have used the natural resource rule to circumvent the commercial activity carveout and restore immunity to sovereign states. This Note argues that the rule should be abandoned in favor of a much more limited test, thereby increasing the number of sovereign states that would be subject to suit in US courts. Part I addresses the *MOL* case, its doctrinal foundations, and its progeny. Part II analyzes *In re Complaint of Sedco*, extrapolating a new test from the case for when transactions involving natural resources count as commercial and applying the test to existing case law. Part II also addresses and rejects alternative rules for situating natural resource-related cases within the commercial activity exception.¹²

I. The Natural Resource Rule

A. *MOL* and its Doctrinal Foundation

The natural resource rule traces back to the Ninth Circuit’s 1984 ruling in *MOL, Inc. v. People’s Republic of Bangladesh*. The Ninth Circuit relied on a mix of district court, appellate, and Supreme Court precedent to craft a solution in the face of an unusual fact pattern. This section dissects those facts as well as the Ninth Circuit’s complex reasoning.

In *MOL*, the plaintiff—an Oregon corporation—sued Bangladesh for terminating a ten-year licensing contract to capture and export rhesus

11. These decisions treat everything from oil, timber, gas, and minerals to monkeys as natural resources. For possible legal definitions of a natural resource, see 43 C.F.R. 11.14(z) (including “land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources”); see also TOOLKIT AND GUIDANCE FOR PREVENTING AND MANAGING LAND AND NATURAL RESOURCES CONFLICT, UNITED NATIONS INTERAGENCY FRAMEWORK TEAM PREVENTIVE ACTION 1 (2012), <http://www.un.org/en/land-natural-resources-conflict/pdfs/EU-UN%20Introduction%20and%20overview.pdf> [<https://perma.cc/YFC8-RXG3>] (including “oil, gas, minerals, and timber . . . land, water and fisheries”); Glossary of Statistical Terms, OECD, <https://stats.oecd.org/glossary/detail.asp?ID=1740> [<https://perma.cc/NR36-D5XG>] (last visited Feb. 25, 2019) (“Natural resources are natural assets (raw materials) occurring in nature that can be used for economic production or consumption.”).

12. See George K. Foster, *When Commercial Meets Sovereign: A New Paradigm For Applying the Foreign Sovereign Immunities Act in Crossover Cases*, 52 HOUS. L. REV. 361, 405 (2014) (proposing a “sovereign functions” test for assessing negotiating natural resources under the commercial activity exception).

monkeys for scientific research.¹³ The licensing agreement had all the trappings of a standard commercial contract, including specified quantities and prices, a requirement that the plaintiff construct a breeding farm for rhesus monkeys in the future, and an arbitration clause.¹⁴ Bangladesh eventually cancelled the license, alleging that the plaintiff had breached its obligation to build the breeding farm and that it had handed over a number of monkeys to the U.S. army for “neutron bomb radiation experiments.”¹⁵

The Ninth Circuit rejected the plaintiff’s claim that the licensing agreement deprived Bangladesh of sovereign immunity under the FSIA because it constituted commercial activity, reasoning that the agreement “concerned Bangladesh’s right to regulate its natural resources, . . . a uniquely sovereign function.”¹⁶ The court explained that this was no ordinary contract, but rather one “that only a sovereign could have made . . . [because] it concerned Bangladesh’s right to regulate imports and exports.”¹⁷ Finally, the court rejected the contention that it was improperly relying on the purpose rather than the character of the agreement: “[c]onsideration of the special elements of export license[s] and natural resource[s] looks only to the *nature* of the agreement and does not require examination of the government’s motives.”¹⁸

The Ninth Circuit’s rule in *MOL* stated that courts should consider two types of acts to be inherently sovereign: (1) regulating imports or exports and (2) regulating natural resources.¹⁹ Thus, no matter how “commercial” a course of conduct might appear, if it touched on one of these two areas then it constituted a sovereign act outside the reach of the commercial activity exception. The *MOL* court characterized the regulation of imports/exports and natural resources as “sovereign prerogative[s]” unavailable to private parties.²⁰ Although these two rights often overlap in subsequent FSIA cases, courts have treated the natural resource right as a freestanding basis for vitiating the commercial activity exception.²¹ Thus, the import/export prerogative and the natural resource rule are not necessarily co-extensive, but they are likely to arise under the same circumstances. This Note, however, focuses on the latter not the former.

The *MOL* court found doctrinal support for its holding in four cases. First, it cited to its own decision from the previous year in *Clayco Petroleum Corp. v. Occidental Petroleum Corp.* *Clayco* involved a suit brought by plain-

13. *MOL, Inc.*, 736 F.2d at 1327.

14. *Id.*

15. *Id.* at 1328.

16. *Id.* at 1329.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. See *Rush-Presbyterian-St. Luke’s Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 578 n.5 (7th Cir. 1989) (stating that granting “a license to exploit the state’s natural resources” is not commercial activity, without referencing imports or exports).

tiffs who lost out on a Saudi Arabian oil concession.²² In its defense, Saudi Arabia invoked the act of state doctrine,²³ under which “the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.”²⁴ The *Clayco* court denied the plaintiffs’ assertion that an exception to the act of state doctrine for “purely commercial acts” applied to Saudi Arabia’s activities, concluding that “the governmental action here could not have been taken by a private citizen. Granting a concession to exploit natural resources entails an exercise of powers peculiar to a sovereign.”²⁵

Second, the *MOL* court cited to *Bokkelen v. Grumman Aerospace Corp.*, where the Eastern District of New York determined that the Brazilian government’s denial of import licenses to an airplane manufacturer was a sovereign decision “covered by the act of state doctrine.”²⁶ Third, the *MOL* court referenced dicta from the Supreme Court in *Alfred Dunhill of London v. Republic of Cuba*, a case where the Cuban government forcibly took possession of cigar manufacturers.²⁷ There, the plurality explained that states act in a commercial capacity when they do not “exercise powers peculiar to sovereigns . . . [but] only those powers that can also be exercised by private citizens.”²⁸

The *MOL* court apparently had no reservations about cross-pollinating the act of state doctrine with a federal sovereign immunity statute to craft its natural resource rule: none of the first three precedents that it relied on are FSIA cases but rather decisions that rely on the separate act of state doctrine.²⁹ The Supreme Court in *Dunhill*, however, indicated that such a transposition is not necessarily appropriate. There, the Court explained that “purely” commercial conduct was not an act of state, but that § 1605(a)(2) of the FSIA does not incorporate a purity requirement for commercial activity.³⁰ The “pure commercial conduct” standard is what the *Clayco* court looked to in assessing Saudi Arabia’s oil licensing decisions, and that standard almost certainly imposes a higher bar than what the FSIA requires to find that an activity is commercial.³¹ Moreover, *Bok-*

22. See *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 405 (9th Cir. 1983).

23. See *id.* at 406.

24. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). See also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) (“The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.”).

25. See *Clayco*, 712 F.2d at 408.

26. *Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329, 333 (E.D.N.Y. 1977).

27. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 684 (1976).

28. *Id.* at 704.

29. See *Int’l Ass’n of Machinists & Aerospace Workers v. Org. of Petroleum Exporting Countries*, 649 F.2d 1354, 1360 (9th Cir. 1981) (explaining that the act of state doctrine exists independently of the doctrine of sovereign immunity because it “address[es] different concerns and appl[ies] in different circumstances”).

30. *Dunhill*, 425 U.S. at 695 (“[W]e decline to extend the act of state doctrine to acts committed by foreign sovereigns in the course of their purely commercial operations”).

31. See *Clayco*, 712 F.2d at 405.

kelen and *Dunhill* had very little to do with natural resources and therefore provide only tangential support for the category of sovereign natural resource-related transactions that the *MOL* court carved out.³²

The fourth case that the *MOL* court relied on was *IAM v. OPEC (IAM I)*, where the plaintiffs sued 13 member states of the Organization of Petroleum Exporting Countries (“OPEC”),³³ alleging that the group’s price-setting activities violated Section 1 of the Sherman Act.³⁴ The district court rejected the plaintiffs’ assertion that the commercial activity exception applied, finding that the crux of claim was “the ability and willingness [of the defendants] to control production of crude oil.”³⁵ Because this conduct consisted of “the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resource . . . from its territory,”³⁶ the district court determined that it was not “commercial” under the FSIA.³⁷

The district court also relied on the United States’ signing of consent decrees with major oil companies as evidence that this dispute concerned sovereign acts.³⁸ In reaching its conclusion, the district court firmly rejected the plaintiffs’ contention that the relevant conduct was the defendants’ collective price-fixing activities rather than their individual regulation of crude oil.³⁹ The Ninth Circuit affirmed on appeal (*IAM II*), but declined to find that the defendants were immune under the FSIA.⁴⁰ Instead, the court applied the act of state doctrine to hold that “a judicial remedy is inappropriate regardless of whether jurisdiction exists.”⁴¹

Although *IAM I* is frequently cited in subsequent cases that adopt *MOL*’s natural resource rule,⁴² an attentive reading of *IAM II* suggests that the Ninth Circuit was wary of adopting the district court’s approach to the commercial activity exception. In fact, Judge Herbert Choy refused to discuss the FSIA or the doctrine of sovereign immunity at all.⁴³ Instead, he invoked the act of state doctrine to circumvent the district court’s discomfort with the “broader implications of an anti-trust action against the OPEC

32. See generally *Dunhill*, 425 U.S. 682; *Bokkelen*, 432 F. Supp. 329.

33. One of the attorneys for the OPEC defendants was Antonin Scalia, still five years away from his nomination to the Supreme Court.

34. See *Int’l Ass’n of Machinists & Aerospace Workers v. Org. of Petroleum Exporting Countries*, 477 F. Supp. 553, 558-59 (C.D. Cal. 1979).

35. *Id.* at 566-67.

36. *Id.* at 567.

37. *Id.* at 569.

38. *Id.* at 569-70.

39. *Id.* (“Plaintiff’s position, however, is untenable. It is ridiculous to suggest that the essential nature of an activity changes merely by the act of two or more countries coming together to agree upon how they will carry on that activity. The action of sovereign nations coming together to agree on how each will perform certain sovereign acts can only, itself, be a sovereign act.”).

40. See *Int’l Ass’n of Machinists*, 649 F.2d at 1358, 1362.

41. *Id.* at 1361-62.

42. See *Rush-Presbyterian-St. Luke’s Med. Ctr.*, 877 F.2d at 578 n.5; *In re Refined Petroleum Prods. Antitrust Litig.*, 649 F. Supp. 2d 572, 596 (S.D. Tex. 2009); *Liberian E. Timber Corp. v. Gov’t of Republic of Liberia*, 650 F. Supp. 73, 75 n.3 (S.D.N.Y. 1986).

43. See *Int’l Ass’n of Machinists*, 649 F.2d at 1358.

nations.”⁴⁴ Judge Choy subsequently referenced the dependence of the OPEC nations on oil for income and the precarious political repercussions that this reliance engendered.⁴⁵ Despite this change in legal reasoning, the outcome was the same as in *IAM I*—Judge Choy affirmed the district court.⁴⁶

Judge Choy’s pivot to the act of state doctrine is elegant as a matter of judicial reasoning but does not address the flaws in the natural resource rule that the *IAM I* court relied on. Substituting the act of state doctrine for the natural resource rule is not a viable alternative for courts making statutory determinations of sovereign immunity under the FSIA. This practice simply externalizes a problem from one doctrine to another, without providing a solution separate from a blanket rule that when natural resources are involved, state defendants are either immune under a) the FSIA because their conduct is automatically sovereign or b) the act of state doctrine. Both jurisprudential approaches improperly label commercial conduct as sovereign, contravening the FSIA’s purpose and the Supreme Court’s leading precedents.⁴⁷

B. Development of the Natural Resource Rule

Despite its shaky doctrinal foundations, the Ninth Circuit’s decision in *MOL* gave rise to a small but robust set of cases adopting the rule that natural resource transactions are inherently sovereign and fall outside the commercial activity exception. These cases from the late 1980s strengthened the rule ahead of the Supreme Court’s definitive rulings on commercial activity in the early 90s.

In *Liberian E. Timber Corp. v. Government of Republic of Liberia*, the Southern District New York held that a concession contract between the defendant and the plaintiff to harvest timber did not qualify as commercial activity because it involved a “regulation . . . of Liberia’s natural resources and entailed an exercise of powers peculiar to a sovereign.”⁴⁸ Like the court in *IAM II*, the district court focused on the special value of the Liberian forest⁴⁹ and included additional considerations of the public policy effects stemming from the concession contract.⁵⁰

Three years later, the Seventh Circuit, in *Rush-Presbyterian-St. Luke’s Medical Center. v. Hellenic Republic*, followed the Ninth Circuit’s lead,

44. *Id.*

45. *Id.* (“The importance of the alleged price-fixing activity to the OPEC nations cannot be ignored. Oil revenues represent their only significant source of income. Consideration of their sovereignty cannot be separated from their near total dependence upon oil.”).

46. *Id.* at 1362.

47. *See infra* Part I.C.

48. 650 F. Supp. at 75.

49. *See id.* (“[T]he concession contract . . . involved the Liberian forest, one of its most valuable resources . . .”).

50. *See id.* (noting that the contract “was intended to bolster Liberia’s economy, create new jobs, protect the forest preserve, stimulate reforestation, and provide funds for the needs of the people of Liberia”).

addressing the FSIA in the context of the Greek government's reimbursement of doctors for the cost of kidney transplants.⁵¹ The court concluded that these contracts did constitute commercial activity⁵² because private parties routinely make agreements to "reimburse . . . health care provider[s] for the costs of performing medical services for a third party."⁵³ The court's summary of the commercial activity exception is notable for incorporating *MOL*'s natural resource rule as black-letter law.⁵⁴ Although the court observed that, pursuant to the FSIA's legislative history, "contracts for the purchase or sale of goods or services are presumptively 'commercial activities[,]'"⁵⁵ it went on to explain that "a contract whereby a foreign state grants a private party a license to exploit the state's natural resources is *not* a commercial activity, since natural resources, to the extent they are 'affected with a public interest,' are goods in which only the sovereign may deal."⁵⁶

Liberian E. Timber and *Rush-Presbyterian* encapsulate where the natural resource rule stood after *MOL* and before the Supreme Court issued two definitive rulings on the commercial activity exception in the early 1990s, discussed *infra* Part I.C. Contracts and licenses to exploit natural resources did not qualify as commercial activity, because private parties cannot deal in these goods.⁵⁷ The main rationale underpinning the rule was the "inherent sovereignty" principle imported from the act of state doctrine, according to which natural resources implicate the "powers peculiar to a sovereign."⁵⁸ The cases also covered a range of activities, spanning agreements to export, import, exploit, and harvest natural resources.

C. The Supreme Court—*Weltover* and *Nelson*

In 1992 and 1993, the Supreme Court weighed in on the commercial activity exception. In *Republic of Argentina v. Weltover*, the Court held that the petitioner, the Republic of Argentina, had engaged in commercial activity by issuing bonds to stabilize its currency.⁵⁹ The Court acknowledged the slipperiness of the term "commercial activity,"⁶⁰ but nevertheless attempted to distinguish between the "purpose" and "nature" elements in the FSIA:

However difficult it may be in some cases to separate "purpose" (*i.e.*, the *reason* why the foreign state engages in the activity) from "nature" (*i.e.*, the outward form of the conduct that the foreign state performs or agrees to

51. See 877 F.2d at 575.

52. See *id.* at 583.

53. *Id.* at 581.

54. See *id.* at 578-79.

55. *Id.* at 578 (quoting *Segni v. Commercial Office of Spain*, 835 F.2d 160, 164 (7th Cir. 1987)).

56. *Id.* (emphasis in original).

57. See *id.*

58. See *Clayco*, 712 F.2d at 408.

59. *Weltover*, 504 U.S. at 620.

60. See *id.* at 612 (noting that the statute "leaves the critical term 'commercial' largely undefined").

perform), the statute unmistakably commands that to be done.⁶¹

Under this framework, the Court found that Argentina's issuance of "garden-variety debt instruments"⁶² was indistinguishable from the everyday actions of a private player in the market.⁶³ A year later, the Court offered further clarification in *Saudi Arabia v. Nelson*, stating that whether or not a state acts in the same way as a private party is a "question of behavior, not motivation."⁶⁴

Both of these rulings pose serious problems for the natural resource rule that the Ninth Circuit laid down 8–9 years earlier in *MOL*. If the appropriate inquiry is the "outward form of the conduct that the foreign state performs,"⁶⁵ there is little question that Bangladesh's activity was commercial—they executed a standard contract with a private party that was "formally" identical to any other routine commercial agreement.⁶⁶ Likewise, *Nelson*'s command that courts should examine behavior rather than motivation conflicts with the analysis in *IAM I*, where the Central District of California treated the "the ability and willingness [of the defendants] to control production of crude oil" as dispositive.⁶⁷ If *MOL* and its progeny are taken at face value, however, then the Supreme Court's guidance in *Nelson* and *Weltover* would have little force in any dispute where the state could plausibly claim to be dealing with a natural resource, because this would be sufficient to transfigure an otherwise commercial "form" into a sovereign act.⁶⁸ Finally, the Supreme Court's holdings in *Weltover* and *Nelson* emphasized the *MOL* court's divergence from the FSIA's plain text, which specifies that "character of an activity shall be determined by reference to the nature of the course of conduct . . . rather than by reference to its purpose."⁶⁹ As Joan E. Donoghue explained in an article published just before the *Weltover* ruling, the *MOL* court "examined the foreign government policy that the activity advanced, rather than the activity itself. As such, the court's analysis looked at least in part to the purpose of the activity, contrary to the FSIA's instructions."⁷⁰

61. *Id.* at 617 (citations omitted).

62. *Id.* at 615.

63. *See id.* at 614.

64. *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993).

65. *Weltover*, 504 U.S. at 617.

66. *See MOL, Inc.*, 736 F.2d at 1327 (describing how the Bangladesh Ministry of Agriculture granted *MOL* "a ten-year license to capture and export rhesus monkeys . . . [that] specified quantities and prices").

67. *Int'l Ass'n of Machinists & Aerospace Workers* 477 F. Supp. at 566 (emphasis added).

68. *Weltover* and *Nelson* might also be in tension with *MOL*'s import/export prerogative. This is because imports and exports are typically arranged in commercial terms that specify trade details such as prices, quotas, etc. (the contract at issue in *MOL* is a good example). If the "outward form" of these transactions is so resolutely commercial, it is difficult to imagine that the *Weltover* Court would consider all imports/exports as sovereign activity.

69. 28 U.S.C. § 1603(d).

70. Donoghue, *supra* note 4, at 502, 514.

Weltover and *Nelson* should have rendered *MOL* obsolete by clarifying that only outward conduct counts towards applying the commercial activity exception. As the next section explores, however, lower courts have been reticent to relinquish the natural resource rule.

D. Continued Vitality of the Natural Resource Rule

Despite tensions with Supreme Court precedent, the natural resource rule has yet to breathe its last and has resurfaced in at least three recent cases. In *RSM Production Corp. v. Fridman*, the Southern District of New York determined that the government of Grenada did not engage in commercial activity when it terminated the plaintiff's license to conduct oil and gas exploration off its coast because "licensing the exploitation of natural resources is a sovereign activity."⁷¹ Here, the court dismissed the fact that Grenada had "spoken in commercial terms" when it breached the contract, because the agreement was not one that a private citizen could have made in the first place.⁷² Similarly, the Southern District of Texas in *In re Refined Petroleum Products Antitrust Litigation*—another antitrust suit brought against OPEC defendants—concluded that the only acts relevant for the commercial activity exception were "the individual decisions of the foreign sovereign members of the alleged conspiracy on crude oil production levels."⁷³ Again, the court concluded that these decisions must be considered as "inherently sovereign acts" even if they were the basis of commercial price-fixing negotiations among OPEC's members.⁷⁴ Finally, in 2010, the Northern District of Illinois held that the state-actor defendant's reduction of potash exports was a sovereign act, citing to *Rush-Presbyterian*.⁷⁵

How do we account for the continued vitality of the natural resource rule even after *Nelson* and *Weltover*? The rule might be appealing because it is easy to administer and apply. Given the doctrinal fog that surrounds the commercial activity exception, it is quite straightforward for courts to point to a natural resource as directly indicative of a sovereign act. Moreover, the rule has strong roots in the act of state doctrine and allows courts to tiptoe around the sensitive political issues that transactions in resources, like oil or gas, can raise. Neither of these justifications, however, are sufficient to sustain the natural resource rule in the face of the FSIA's plain language and the Supreme Court's interpretations of it in *Nelson* and *Weltover*. Convenience alone cannot exempt courts from undertaking the sensitive legal analysis that the FSIA mandates. Indeed, the *MOL* rule undercuts the basic premise of that statute by allowing states to claim immunity for conduct that is commercial in all but one sense—it involves a natural resource.⁷⁶

71. 643 F. Supp. 2d 382, 399 (S.D.N.Y. 2009).

72. *Id.* at 400.

73. See 649 F. Supp. at 595-96.

74. *Id.* at 596.

75. See *In re Potash Antitrust Litig.*, 686 F. Supp. 2d 816, 823 (N.D. Ill. 2010).

76. See 28 U.S.C. § 1602 ("Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and

II. The Sedco Test

A. *In re Complaint of Sedco*

Two years before *MOL*, a district court in Texas confronted the commercial activity exception in a case involving natural resources and followed a very different path, albeit with the same outcome. Following a 1979 oil spill in the Bay of Campeche,⁷⁷ American plaintiffs sued state-owned Mexican oil companies (including Pemex) in tort.⁷⁸ Pemex then filed a motion to dismiss based on the FSIA.⁷⁹ The district court began its analysis by acknowledging the commercial character of Pemex as a national oil corporation.⁸⁰ The court then explained that although not every act done by a foreign state that a private citizen could replicate qualifies as commercial, “[t]here is little doubt that where a foreign nation enters into the world marketplace to purchase or sell goods, it has engaged in commercial activity for purposes of the FSIA.”⁸¹ A contractual agreement, the court noted, though not “essential to a finding of commercial activity,”⁸² is nevertheless “often indicative of such conduct.”⁸³ The court then engaged in a fact-based assessment of Pemex’s actions to reach its conclusion that the commercial activity exception did not apply:

Here, Pemex was engaged in drilling an exculpatory oil well in its patrimonial waters, the Bay of Campeche. The data derived from this exploration was integral to the Mexican government’s long range planning and policy making process concerning the production and utilization of state-owned minerals. Such policy is not made by Pemex, but is formed by higher levels of government [including] . . . various government ministries Pemex had not entered into a contract with anyone for the oil and gas produced from the IXTOC I well, nor had it contracted with a United States business to drill the well. . . . Acting by authority of Mexican law within its national territory and in intragovernmental cooperation with other branches of the Mexican government, Pemex was not engaged in commercial activity as contemplated by Congress in the FSIA when the IXTOC I well was drilled.⁸⁴

The court ended with an observation that control over mineral resources was still a basic attribute of sovereignty, and “*short of actually selling these resources on the world market*, decisions and conduct concerning them are

their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.”).

77. An explosion on the IXTOC I oil platform caused 140 million gallons of oil to pour into the Bay of Campeche. It remains the third largest oil disaster to date, behind the Deepwater Horizon and Gulf War spills. See *10 Largest Oil Spills in History*, THE TELEGRAPH (Oct. 7, 2011), <https://www.telegraph.co.uk/news/worldnews/australiaandthepacific/newzealand/8812598/10-largest-oil-spills-in-history.html> [<https://perma.cc/W7UA-E8JG>].

78. *Sedco, Inc.*, 543 F. Supp. at 564, 572.

79. *Id.* at 564.

80. See *id.* at 565.

81. *Id.*

82. *Id.* at 566.

83. *Id.*

84. *Id.*

uniquely governmental in nature.”⁸⁵

The *Sedco* court’s natural resource analysis, as excerpted above, can be broken down into three factors:

- 1) The geographical location of the natural resource
- 2) The degree of government control over the natural resource and its exploitation
- 3) The existence of a for-profit contract between the state and a private party.⁸⁶

The first factor asks whether the resource is located within the defendant state’s territory. This should be a straightforward inquiry for courts in most cases, except perhaps for those instances involving disputed borders.⁸⁷ The second factor examines the degree of government control over the natural resource and its exploitation. Here, courts should ask if the foreign state government crafted the policies for exploiting the natural resource, and if state agencies or entities implemented these initiatives or if they delegated implementation to a private party. A significant level of government control over natural resource exploitation and transactions indicates that the state’s conduct is closer to sovereign than commercial in nature. As a policy matter, federal courts should also be more inclined to allow immunity when natural resources are intertwined with foreign state policies in this fashion. Finally, the third factor asks if the foreign state defendant has entered into a for-profit contract with a private party for exploiting the natural resource. If such a contract exists, then it is more likely that the “outward form” of the state’s conduct is commercial—under *Weltover*, this is the critical inquiry.⁸⁸

In *Sedco*, all three factors militated against a finding of commercial activity. First, the oil well was located within Mexico’s undisputed territorial waters.⁸⁹ Second, multiple government agencies exercised control over the drilling operation as part of the state’s planning process for utilizing mineral deposits.⁹⁰ Third, Pemex had not formed a contract with any private party in order to sell or license the products that the drilling operation

85. *Id.* (emphasis added).

86. *Id.*

87. For an interactive map of ongoing border disputes around the world, see *A World of Disputed Territories*, METROCOSM, <http://metrocosm.com/disputed-territories-map.html> (last visited Feb. 22, 2019).

88. *Weltover*, 504 U.S. at 617.

89. *Sedco, Inc.*, 543 F. Supp. at 566.

90. *Id.* (“The data derived from this exploration was integral to the Mexican government’s long range planning and policy making process concerning the production and utilization of state-owned minerals. Such policy is not made by Pemex, but is formed by higher levels of government. Mexican law, however, mandates that Pemex gather information concerning these resources and create programs to implement the six-year national development plan devised by the various government ministries and adopted by the President of Mexico.”). See also *id.* at 567 (“Pemex, in this case, was executing a national plan formulated at the highest levels of the Mexican government by exploring for Mexico’s natural resources.”).

was likely to produce.⁹¹

When applied to the facts of *MOL*, this multi-factor *Sedco* test suggests that Bangladesh should not have benefited from sovereign immunity. Bangladesh could likely show that the first factor weighs in their favor, since the rhesus monkeys were located within its borders.⁹² The other two factors, however, do not cut in their favor. Part of the licensing agreement at the center of the dispute required the plaintiffs to construct and operate their own breeding farm.⁹³ This suggests that Bangladesh was ceding immediate oversight of its resource to a third party, rather than delegating control to a government agency or entity. Finally, the licensing agreement constituted a for-profit contract with a private party, specifying the quantity of monkeys that the plaintiff would be permitted to export and the amount that it would have to pay Bangladesh for them.⁹⁴

What advantages does the *Sedco* test have over *MOL*'s natural resource rule? First, the *Sedco* test moves away from natural resource rule's broad sweep—which consigns too many cases to the outskirts of the commercial activity exception—by encouraging a case-specific, fact-based analysis. The hypothetical application to the facts of *MOL* demonstrates as much. The *Sedco* test therefore expands the commercial activity exception to the advantage of plaintiffs with meritorious claims, reducing the number of cases that courts will dismiss for lack of jurisdiction solely because a natural resource is involved.

The *Sedco* test is also more sensitive to the FSIA's plain language and the Supreme Court's decisions in *Weltover* and *Nelson*. Both the control and for-profit factors direct attention towards the "outward form of the conduct that the foreign state performs"⁹⁵ in a way that the natural resource rule simply did not. As such, the *Sedco* test better serves the FSIA's underlying purpose to ensure that states do not benefit from immunity when they act in a commercial capacity, even where their conduct implicates natural resources.⁹⁶ Finally, the test is still administrable because it only asks judges to consider three factors, and it provides enough space at the margins for desirable outcomes in borderline cases.⁹⁷

Replacing the natural resource rule with the *Sedco* test does come with some of the downsides that accompany any multi-factor test, including

91. *Id.* ("Pemex had not entered into a contract with anyone for the oil and gas produced from the IXTOC I well[.].")

92. *See MOL, Inc.*, 736 F.2d at 1327.

93. *See MOL, Inc. v. Peoples Republic of Bangladesh*, 572 F. Supp. 79, 80-81 (D. Or. 1983).

94. *See id.*

95. *Weltover*, 504 U.S. at 617.

96. *See Foster, supra* note 12, at 402 (noting that the FSIA's drafters "explained that entering into a contract to construct a government building or carrying on a mineral extraction enterprise should be considered commercial activities . . . despite the fact that both endeavors often require governmental permits.").

97. For example, the "for-profit" element of the contract prong means that this factor would not weigh in favor of finding commercial activity where a state loaned out antiquities or cultural artifacts for research purposes, assuming *arguendo* that such objects would count as natural resources.

decision costs and unpredictable outcomes due to increased judicial discretion.⁹⁸ The *Sedco* test requires what Patrick M. McFadden calls result-balancing, wherein the product of the analysis “is neither a statement of fact nor a rule of law, but the disposition of the case.”⁹⁹ This disposition, however, is precisely what the FSIA empowered courts and judges to do in the first place. The statute’s preamble declares that “the determination by United States courts of the claims of foreign states to immunity would serve the interests of justice and would protect the rights of both foreign states and litigants.”¹⁰⁰ This is a strong endorsement of the judiciary’s capacity to resolve foreign immunity questions.¹⁰¹ There is nothing in that language to suggest Congress would be concerned with the additional flexibility that a multi-factor inquiry like the *Sedco* test gives to courts.

Moreover, case-by-case balancing is especially appropriate in a jurisdictional context. It is a foundational legal principle that no court may hear a case unless it is satisfied that it has jurisdiction.¹⁰² Where Congress has dictated the applicable jurisdictional rules through a statute like the FSIA, “a court faced with a claim of immunity must be sensitive to the particular facts of the case.”¹⁰³ Additional decision costs are worthwhile at this stage of the litigation because the court needs to get the jurisdictional question right *before* proceeding to a lengthy and expensive adjudication on the merits.¹⁰⁴ Balancing tests also have other well-recognized advantages: they “refine[] the process of judicial review . . . soften[] the rigors of absolutes, [and] make[] room for judgment and for sensitivity to differences of degree.”¹⁰⁵ All of these benefits are essential to a court addressing the basic question of whether or not it has jurisdiction.

There is one further distinction between *Sedco* and the *MOL* case: the *MOL* plaintiffs sued for breach of contract,¹⁰⁶ while the *Sedco* plaintiffs brought a tort claim.¹⁰⁷ This formal difference, however, does not affect

98. See generally Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585 (1988) (discussing the use of judicial balancing tests for constitutional statutory interpretation, in conflict with “rule-based reasoning.”).

99. *Id.* at 600.

100. 28 U.S.C. § 1602.

101. See Joseph W. Dellapenna, *Foreign State Immunity in Europe*, 5 N.Y. INT’L L. REV. 51, 61–62 (1992) (“In the United States, the core bases of immunity are prescribed in such utterly ambiguous terms that the [Act] leaves a large measure of discretion in the hands of the courts.”).

102. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869) (“Without jurisdiction, the court cannot proceed at all in any case. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”).

103. *Rush-Presbyterian-St. Luke’s Med. Ctr.*, 877 F.2d at 579.

104. *Bolivarian Republic of Venez. v. Helmerich & Payne Int’l Drilling Co.*, 137 S. Ct. 1312, 1317 (2017) (noting that “consistent with foreign sovereign immunity’s basic objective, namely, to free a foreign sovereign from *suit*, the court should normally . . . reach a decision about immunity as near to the outset of the case as is reasonably possible.”).

105. Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1047 (1978).

106. See *MOL, Inc.*, 736 F.2d at 1327–28.

107. See *Sedco, Inc.*, 543 F. Supp. at 566–67.

the *Sedco* test's viability. Courts must determine whether a foreign state is immune, and by extension whether the commercial activity exception applies, independent of the case's procedural posture. What matters for the FSIA's purposes is the identity of the defendant and the nature of their conduct, not the claim that the plaintiff brings. From an evidentiary standpoint, a breach of contract plaintiff might be able to meet the *Sedco* test's third prong more easily than a tort plaintiff (presumably, the existence of a for-profit contract in that hypothetical case would be the reason why they are suing), but even in a tort case the court should still look to the existence of for-profit contracts between the defendant state and private parties to determine if the state's conduct was commercial.¹⁰⁸

B. The Foster Rule

The *Sedco* test that this Note proposes is not the only option that has been suggested for situating natural resources within the commercial activity exception. Addressing these alternative proposals demonstrates that the *Sedco* test is not just preferable to the natural resource rule, but that it is the best way to approach this issue.

In a recent article, Professor George K. Foster suggested that courts should “ask whether [an FSIA case involving natural resources] would require the court to evaluate, and potentially second-guess, the performance of any sovereign functions by the foreign state. If the claim would not require the court to do so, then it is potentially within the commercial activity exception.”¹⁰⁹ Professor Foster then went on to specify that:

[E]xercises of governmental authority contemplated in a contract [should] retain their sovereign character, but . . . U.S.-connected claims relating to the contract [should] come within the commercial activity exception so long as their elements do not actually and necessarily place any of the sovereign functions in issue.¹¹⁰

Professor Foster's proposed standards for negotiating natural resources and the commercial activity exception are flawed. A standard that encourages courts to ask if their jurisdictional ruling would disrupt the sovereign functions of other countries is nothing but the act of state doctrine by another name.¹¹¹ Under *IAM II*, the act of state doctrine still exists,¹¹² but that does not negate the need for a judicially manageable *statutory* standard to deal with natural resource related claims—this is the hole that the *Sedco* test fills.

108. A breach-of-contract plaintiff might also have an easier time showing that their claim is “based upon” commercial activity, unlike, for example, the tort plaintiff in *Nelson*. See, e.g., *Nelson*, 507 U.S. at 356. As explained in Part I however, the *Sedco* test is not relevant to this step of the commercial activity analysis.

109. Foster, *supra* note 12, at 405 (emphasis in original).

110. *Id.* at 407.

111. See, e.g., *Underhill*, 168 U.S. at 252 (describing the act of state doctrine as the legal principle according to which “the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.”).

112. See Part I.A.

The second half of Foster's standard, which emphasizes whether a natural resource claim is connected to the United States, improperly grafts a nexus requirement onto the commercial activity exception that is unsupported by the statutory text. FSIA § 1603(d) instructs courts assessing commercial activity to examine the "nature of the course of conduct,"¹¹³ but says nothing about whether that conduct needs to be connected to the United States. The presence of an explicit nexus requirement elsewhere in FSIA § 1605(a)(2) counsels against inserting one into § 1603(d).¹¹⁴ Had Congress wanted to include such a requirement, they would have written it into the statute themselves.

A variation on Professor Foster's rule would focus on the nature of the state's regulatory behavior. Under this theory, where a foreign state owns a natural resource in a commercial sense, transactions related to that resource are commercial activity.¹¹⁵ Where a foreign state regulates a natural resource, however, and consents via contract (i.e., a licensing agreement) to change, repeal, or disapply its regulations, then these transactions are not commercial activity.¹¹⁶ The Fourth Circuit provided a useful response to this approach in *Globe Nuclear Services*. The next section discusses this case in greater detail, but in brief, the court rejected the defendant's claim that it should be immune because it was "not merely dealing in uranium; it [was] *regulating* its inventory of [uranium hexafluoride] and LEU supply in a manner that no private player can."¹¹⁷ Circuit Judge J. Michael Luttig did not find this distinction persuasive:

[T]his stylized usage of the term "regulation" proves far too much. Under Tenex's usage, it would also follow that a government which enters into a contract to purchase bullets for its army is "regulating" its bullet supply, or that the government of Argentina, in *Weltover*, was "regulating" its money supply. . . . [A]cceptance of Tenex's usage of "regulation" is not only inconsistent with the Supreme Court's decision in *Weltover*, but would also strip the "commercial activity" exception of much, if not all, of its meaning, for a foreign state would almost always be able to characterize its activities as sovereign "regulation" of some subject matter related to the conduct at issue.¹¹⁸

113. 28 U.S.C. § 1603(d).

114. 28 U.S.C. § 1605 (a)(2) ("commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]").

115. See e-mail from Zachary D. Clopton, Associate Professor of Law at Cornell Law School, to author (Apr. 13, 2018, 18:22 EST) (on file with Cornell International Law Journal).

116. *Id.*

117. *Globe Nuclear Servs. & Supply, Ltd. v. AO Techsnabexport*, 376 F.3d 282, 289 (4th Cir. 2004).

118. *Id.* at 289-90. Cf. Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L COMP. L.Q. 302, 310 (1986) ("[A] case can certainly be made that regulation of natural resources by political authorities is not a commercial activity, particularly where the regulation is effected through the taxing power However, a critical distinction must be maintained between regulation and transactions. If a sovereign State makes and then breaks a contract . . . it should be

Although Judge Luttig may have overstated the deceptive inclinations of foreign-state defendants in this passage, his basic point that governments can easily represent their behavior as regulatory remains sound. This standard therefore comes with the same flaw as the natural resource rule, because it would allow states to escape the commercial activity exception for manifestly commercial conduct. The only difference under this theory is that states would point to “regulation” rather than the natural resource itself for justification.

C. *Sedco* Test and Existing Case Law

There are two recent decisions that have applied limited versions of the natural resource rule: *Globe Nuclear Services* and *Oceanic Exploration Co.*¹¹⁹ Both provide useful case studies for the multi-factor *Sedco* test that this Note proposes, indicating that it yields coherent solutions when applied to actual fact patterns.

In *Globe Nuclear Services*, a Delaware corporation sued a state-owned Russian company (Tenex).¹²⁰ The plaintiff alleged that Tenex had breached its contract to supply them with uranium hexafluoride extracted from decommissioned nuclear warheads.¹²¹ Here, the Fourth Circuit held that the commercial activity exception did apply because the “entrance into a contract to supply a private party with uranium hexafluoride is the very type of action by which private parties engage in ‘trade and traffic or commerce.’”¹²² The Fourth Circuit rejected Tenex’s contention that uranium hexafluoride was a finite natural resource belonging to Russia,¹²³ articulating instead a limited conception of the holdings in *MOL* and *Rush-Presbyterian*:

[W]e read the decision in *MOL* and the dicta in *Rush* to stand not for the overly broad proposition that all contracts involving “natural resources” or their derivative products constitute sovereign activity, but for the narrower and much sounder principle that the grant of a license to operate within sovereign territory and to extract natural resources from within that territory is sovereign activity.¹²⁴

Only the third factor of the *Sedco* test weighs in favor of a commercial activity finding in *Globe Nuclear Services* because Tenex’s long-term supply agreements with American customers for uranium hexafluoride constitute for-profit contracts with private parties.¹²⁵ The first and second factors, however, cut the other way. In addition to the warheads being within Rus-

held accountable for damages for breach of contract in any court of competent jurisdiction.”).

119. See generally *Oceanic Exploration Co. v. ConocoPhillips, Inc.*, 2006 U.S. Dist. LEXIS 72231 (D.D.C. Sept. 21, 2006).

120. *Globe Nuclear*, 376 F.3d at 283-84.

121. *Id.* at 284.

122. *Id.* at 289.

123. *Id.* at 291.

124. *Id.* The reference to “derivative products” suggests that the Fourth Circuit might not have considered this as a natural resources case in the first place.

125. *Globe Nuclear*, 376 F.3d at 289.

sian territory, Tenex carried out its extraction procedures pursuant to a 1993 agreement with the United States “Concerning the Disposition of Highly Enriched Uranium (HEU) Extracted from Nuclear Weapons.”¹²⁶ The Russian government appointed Tenex as its sole agent in this deal, which obligated them to remove and dilute high grade uranium from the warheads before selling it back to either the United States Enrichment Corporation or other private American utility firms like the plaintiff.¹²⁷ This close government control of Tenex’s activities, as well as the location of the uranium hexafluoride, indicates that under the *Sedco* test their conduct should be deemed sovereign rather than commercial.

In *Oceanic Exploration Co.*, plaintiffs sued after the Timor Sea Designated Authority (TSDA) after it did not award them a government contract to develop oil and gas on the seabed between East Timor and Australia.¹²⁸ The district court concluded that the defendant agency was not immune under the FSIA because it had been granted the authority to “lay out the terms of a joint commercial venture between the TSDA and the private companies to produce and market petroleum and natural gas from the Timor Gap.”¹²⁹ The district court described the contracts that the defendant had entered into with other private parties, under which the defendant set up profit-sharing arrangements and “reserve[d] the right to market petroleum covered by the . . . contract.”¹³⁰

In *Oceanic Exploration Co.*, the natural resource was located within the defendant’s territorial waters.¹³¹ There were, however, far fewer indicia of direct government control in this case as opposed to *Globe Nuclear Services*. Timor’s national constitution had a single provision that “asserted sovereignty over its natural resources, and specifically nullified any previous concessions not ratified by the new independent government.”¹³² The TSDA was the product of a treaty between Timor and Australia that authorized it “to oversee the granting of exploration and development concessions” to third parties like the plaintiff.¹³³ This structure generates government control that is much more diffuse than the oversight in *Globe Nuclear Services*. There, the agreement between Russia and the United States dictated the specific terms and procedures for exploiting, extracting, and selling the natural resource.¹³⁴ Here, the government’s control ends with policing access to the resource in the first place. The third factor also shifts the balance significantly towards commercial activity. Not only did the Timorese defendant routinely enter for-profit contracts with private parties, it also retained the absolute right to sell any oil or gas that might be

126. *Id.* at 284.

127. *See id.*

128. *Oceanic Exploration Co.*, 2006 U.S. Dist. at *6.

129. *Id.* at *17.

130. *Id.* at *18.

131. *Oceanic Exploration Co.*, 2006 U.S. Dist. at *6.

132. *Id.* at *9.

133. *Id.*

134. *Globe Nuclear*, 376 F.3d at 284.

discovered.¹³⁵ Such an arrangement mirrors the closing words in *Sedco*, which described the circumstances under which a natural resource can no longer shield a state from the consequences of its commercial activity: “[a] very basic attribute of sovereignty is the control over its mineral resources . . . short of actually selling these resources on the world market.”¹³⁶

The fact that the *Sedco* test yields different outcomes in these two cases demonstrates that this Note is not arguing for a broad inversion of MOL that would sweep all, or even most, disputes involving natural resources into the commercial activity exception. Instead, the *Sedco* test allows for a rigorous, case-by-case analysis that goes further than a simple classification of any natural resource transaction as sovereign activity. Such a bright-line rule distorts the commercial activity exception and is at odds with the FSIA’s basic objective of granting limited immunity to sovereign states.

Conclusion

This Note set forth a new, multi-factor standard—dubbed the *Sedco* test after its foundational case—for situating natural resources within the FSIA’s commercial activity exception. The *Sedco* test looks to: 1) the geographical location of the natural resource; 2) the degree of government control over the natural resource and its exploitation; and 3) the existence of a for-profit contract between the state and a private party.

The *Sedco* test is responsive to the Supreme Court’s current jurisprudence on the commercial activity exception and offers courts a workable alternative to the overbroad natural resource rule. The path that judges must tread in order to solve the cases that this Note discusses is not an easy one: the commercial activity carveout is a specific exception layered on top of a broader exemption that the FSIA adds to general rules of jurisdiction so that sovereign states can benefit from immunity. There is also no denying that the term “commercial activity” is a perplexing term thanks to the FSIA’s opaque wording. Within this difficult area of the law, disputes involving natural resources pose an especially thorny problem—how are courts supposed to categorize transactions that appear for all intents and purposes to be commercial, but are negotiated for commodities that the state alone purports to possess?

This Note asserts that the natural resource rule should not answer that question, and it is not alone in that contention. In 1986, one of the FSIA’s drafters declared the MOL decision to be “very troublesome . . . [because] the Court’s reasoning that a private party could not have made this sort of agreement seems to flout the intention of Congress. . . . With all due respect, this decision sets back the law 30 years”.¹³⁷ Three decades of jurisprudence have confirmed this author’s anxieties, as courts have con-

135. *Oceanic Exploration Co.*, 2006 U.S. Dist. at *18.

136. *Sedco, Inc.*, 543 F. Supp. at 566 (emphasis added).

137. Feldman, *supra* note 118, at 309. Notwithstanding, Feldman is critical of the *Sedco* case, which he identifies as another point of difficulty in US courts’ attempts to grapple with the meaning of commercial activity. See *id.* at 310.

tinually deployed the natural resource rule to undercut the FSIA's commercial activity exception. In contrast, the *Sedco* test that this Note proposes both serves FSIA's underlying policies and remains faithful to its plain text by directing courts to examine the outward form of the sovereign state's conduct. It is high time for courts to extricate themselves from *MOL*'s ham-fisted grip, and the *Sedco* test is the ideal way for them to do so.