

2013

## Going for Gold: The Meaning of Commercial Activity in the Foreign Sovereign Immunities Act in the Race for buried Treasure in Sunken Shipwreck

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### Recommended Citation

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# Going for Gold: The Meaning of Commercial Activity in the Foreign Sovereign Immunities Act in the Race for buried Treasure in Sunken Shipwreck

## **Keywords**

Odyssey Marine Exploration Inc. -- Trials, litigation, etc., United States. Supreme Court, State immunities (International law), Shipwrecks -- Law & legislation, Treasure troves -- Law & legislation, Absolute immunity (Law), Privileges & immunities -- United States, Admiralty -- United States -- Cases

# GOING FOR GOLD: THE MEANING OF “COMMERCIAL ACTIVITY” IN THE FOREIGN SOVEREIGN IMMUNITIES ACT IN THE RACE FOR BURIED TREASURE IN SUNKEN SHIPWRECK

ZHEN SONG\*

*The theory of absolute sovereign immunity once provided broad jurisdictional immunity protections to foreign states and their properties from adjudication in U.S. courts. However, in the last century, Congress and the Supreme Court have both taken significant steps, in conformity with developments in international law, to limit the doctrine’s application exclusively to acts that are sovereign in nature. Enacted in 1976, the Foreign Sovereign Immunities Act codified several exceptions to sovereign immunity, one of which was for commercial activity. Since then, courts have struggled to define the scope of “commercial activity” in claims involving foreign states.*

*This Comment argues that a court’s determination of what constitutes a commercial activity should remain consistent with the approach Congress and the Supreme Court have established—restricting the applicability of sovereign immunity via expansion of the boundaries of commercial activity. In light of the Court’s decisions in *Republic of Argentina v. Weltover* and *Saudi Arabia v. Nelson*, courts should adopt a two-step analysis for determining whether an act is “commercial” under the Foreign Sovereign Immunities Act. Courts should first narrowly construe the scope of a foreign state’s conduct relevant to the commercial activity analysis, and then broadly interpret the commercial nature of the identified act. Applying this two-part test, this*

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*Comment concludes that the Eleventh Circuit's analysis of "commercial activity" in Odyssey Marine Exploration Inc. v. Unidentified Shipwrecked Vessel not only contradicted the Supreme Court's interpretation of the term's scope in Weltover, but more importantly, it altered the boundaries of "commercial activity" and conflicted with the progress Congress and the Supreme Court have made in limiting the reach of the sovereign immunity doctrine.*

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## INTRODUCTION

On February 27, 1803, the *Nuestra Senora de las Mercedes* (*Mercedes*), a Spanish vessel built in 1788, sailed to Lima to collect funds from the Spanish Viceroyalty of Peru.<sup>1</sup> Upon reaching the port of El Callao in Lima, the *Mercedes* took on board approximately 900,000 silver pesos, 5,809 gold pesos, and other various precious cargo, including 2,000 copper and tin ingots.<sup>2</sup> On March 31, 1804, the *Mercedes* set sail on its journey back to Spain.<sup>3</sup> However, the ship and its cargo never reached its final destination.<sup>4</sup> On the morning of October 5, 1804, only minutes into an attack by a British naval squadron, the *Mercedes* exploded and sank off the coast of Portugal.<sup>5</sup> For the next 200 years, the *Mercedes* and its precious cargo of silver and gold sat on the ocean floor, out of reach for generations of treasure seekers and ocean explorers.<sup>6</sup>

In March of 2007, Odyssey Marine Exploration, Inc. (“Odyssey Marine”) discovered the remains of a Spanish ship along with its cargo of approximately 594,000 gold and silver coins and other valuable artifacts in international waters near the Straits of Gibraltar.<sup>7</sup> Immediately following the recovery of this treasure, estimated to be worth over \$500 million,<sup>8</sup> the company filed an in rem action against the unidentified vessel, its apparel, tackle, appurtenances, and cargo in the U.S. District Court for the Middle District of Florida, asserting both a possessory claim in accordance with the law of finds and a salvage award claim under the law of salvage.<sup>9</sup> Pursuant to the pleading requirements for an in rem complaint in admiralty, Odyssey Marine acknowledged that the unidentified vessel was likely the *Mercedes*.<sup>10</sup> A magistrate judge issued an arrest warrant for the vessel and its apparel, tackle, appurtenances, and cargo, which resulted in the U.S. Marshal taking possession of “a small bronze block” salvaged

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1. Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel, 657 F.3d 1159, 1172 (11th Cir. 2011), *cert denied*, 132 S. Ct. 2379 (2012).

2. *Id.*

3. *Id.* at 1173.

4. *Id.*

5. *Id.*

6. See Verified Complaint in Admiralty in Rem at 3, Odyssey Marine Exp., Inc. v. Unidentified Shipwrecked Vessel, 675 F. Supp. 2d 1146 (M.D. Fla. 2009) (No. 8:07-cv-00614-SCB-MAP) (explaining how Odyssey Marine first located the site of the *Mercedes* in March 2007 using sophisticated shipwreck salvage equipment).

7. *Odyssey*, 657 F.3d at 1166. Odyssey Marine Exploration, Inc. is a company specializing in deep sea exploration and the salvage of sunken shipwrecks. Verified Complaint in Admiralty, *supra* note 6, at 1.

8. Al Goodman, *Spain's Lost Treasure Battle in U.S. Court*, CNN (June 9, 2008), <http://edition.cnn.com/2008/WORLD/europe/06/08/spain.treasure/index.html>.

9. *Odyssey*, 657 F.3d at 1166.

10. *Id.* at 1167.

from the shipwreck as a gesture to satisfy the requirements of constructive in rem jurisdiction.<sup>11</sup>

Immediately thereafter, Spain filed a motion to dismiss, claiming that the *Mercedes'* status as a Spanish warship granted the vessel immunity from judicial arrest under the Foreign Sovereign Immunities Act of 1976<sup>12</sup> (FSIA).<sup>13</sup> The district court upheld Spain's sovereign immunity claim despite the fact that the ship was servicing private citizens and transporting mostly privately owned cargo when it sank.<sup>14</sup> The U.S. Court of Appeals for the Eleventh Circuit affirmed.<sup>15</sup>

A valid claim of immunity from adjudication asserted under the FSIA must overcome a number of exceptions enumerated in the Act.<sup>16</sup> The commercial activity exceptions, which bar a foreign state from asserting a sovereign immunity claim if its government engaged in "commercial activity," remain a major source of litigation under the FSIA.<sup>17</sup> In *Republic of Argentina v. Weltover, Inc.*,<sup>18</sup> the Supreme Court stated that the test for determining whether an activity is "commercial" under the FSIA 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."<sup>19</sup>

This Comment argues that the Eleventh Circuit's analysis of "commercial activity" in *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*<sup>20</sup> contradicted the Supreme Court's interpretation of the term in *Weltover* and was inconsistent with Congress's intent to limit the application of the sovereign immunity doctrine.

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11. *Id.* at 1166–67. See generally *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F. Supp. 2d 1126, 1136–37 (M.D. Fla. 2009) (explaining that because the considerable size of the sunken ship made it impossible for the court to take actual possession of it, the court invoked in rem jurisdiction under the theory of constructive possession), *aff'd*, 657 F.3d 1159, *cert denied*, 132 S. Ct. 2379 (2012).

12. Pub. L. No. 94-583, 90 Stat. 289 (1976) (codified as amended in scattered sections of 28 U.S.C.).

13. See *Odyssey*, 657 F.3d at 1168.

14. *Id.* at 1177.

15. *Id.* at 1184.

16. See generally 28 U.S.C. §§ 1605, 1610–1611 (2006) (outlining several exceptions where sovereign immunity is waived, some of which include: waiver of immunity by a foreign state, disputes over property rights, and issues involving money damages sought for personal injury, death, or damaged property).

17. See *id.* §§ 1605(a)(2), 1610(a)(2) (listing the commercial activity exceptions to sovereign immunity); see also Avi Lew, Comment, *Republic of Argentina v. Weltover, Inc.: Interpreting the Foreign Sovereign Immunity Act's Commercial Activity Exception to Jurisdictional Immunity*, 17 FORDHAM INT'L L.J. 726, 752–66, 728 n.11 (1994) (discussing the various standards courts have used over the years to interpret the meaning of "commercial activity" and the conflicting results).

18. 504 U.S. 607 (1992).

19. *Id.* at 614 (internal quotation marks omitted).

20. 657 F.3d 1159 (11th Cir. 2011), *cert denied*, 132 S. Ct. 2379 (2012).

Furthermore, this Comment suggests that the *Odyssey* decision significantly altered the limits of “commercial activity” under the FSIA and blurred the line between the commercial and the sovereign to the detriment of future suits in admiralty.

Part I evaluates precedent-setting sovereign immunity cases and the evolution of the doctrine leading up to and following the codification of the FSIA in 1976. This Part discusses the Supreme Court’s framework laid out in *Weltover* for determining whether an activity is “commercial.” It also touches upon prior treatment of commercial activity and sovereign immunity in the 1958 Geneva Convention on the High Seas and the Sunken Military Craft Act, both of which are especially relevant to the facts of *Odyssey* and support further restriction of the sovereign immunity doctrine.

Part II demonstrates that *Odyssey* is a flawed application of the *Weltover* test and changes the boundaries of “commercial activity” under the FSIA. This Part argues that the Eleventh Circuit’s interpretation of “commercial activity” in *Odyssey* runs counter to the progress Congress and the Supreme Court have made in restricting the applicability of the sovereign immunity doctrine by allowing foreign states to claim immunity over commercially related property. This Part also discusses the implications of the *Odyssey* decision on the salvage of historic shipwrecks. Finally, this Comment recommends that actions invoking the commercial activity exceptions of the FSIA should apply a two-step analysis that first narrowly construes the scope of government conduct relevant to the commercial activity analysis, and then broadly interprets the commercial character of the identified activity.

## I. BACKGROUND

### A. *Sovereign Immunity and the FSIA*

Sovereign immunity is a well-recognized doctrine of international law rooted in the principle that sovereigns are equal and independent, and therefore cannot exercise jurisdiction over one another absent consent.<sup>21</sup> In the United States, the doctrine of

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21. See H.R. REP. NO. 94-1487, at 8 (1976) (“Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state.”); A.N. Yiannopoulos, *Foreign Sovereign Immunity and the Arrest of State-Owned Ships: The Need for an Admiralty Foreign Sovereign Immunity Act*, 57 TUL. L. REV. 1274, 1275 (1983) (acknowledging the “equality” and “independence” of foreign sovereigns); see also *Schooner Exch. v. M’Faddon*, 11 U.S. (7 Cranch) 116, 136–37 (1812) (extending immunity to a French naval vessel

sovereign immunity has become increasingly limited in scope as Congress and the courts moved away from the theory of absolute sovereign immunity and established exceptions to jurisdictional immunity for a foreign state's commercial activities.<sup>22</sup> This restrictive theory of sovereign immunity, codified in the FSIA, prescribes all circumstances in which a foreign state is not immune from suit because of commercial activity.<sup>23</sup>

1. *The foundation and history of sovereign immunity: Absolute sovereign immunity*

The doctrine of sovereign immunity grew out of the ancient notion that "the King can do no wrong."<sup>24</sup> As such, subjecting a sovereign to the laws of another jurisdiction by allowing parties to bring suit against the sovereign without his consent contradicts the fundamental principle that all sovereigns are independent of one another.<sup>25</sup> In the United States, the Supreme Court first addressed the doctrine of sovereign immunity in *Schooner Exchange v. M'Faddon*.<sup>26</sup> There, John M'Faddon and William Greetham, two American citizens, filed suit against the French government to claim proper ownership of the *Exchange*.<sup>27</sup> The Supreme Court reversed the lower court's order which had conferred ownership of the vessel to M'Faddon and Greetham.<sup>28</sup> Instead, the Court granted the French government sovereign immunity, concluding that property claimed

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because foreign sovereigns are entitled to "perfect equality and absolute independence").

22. See *infra* Part.I.A.2 (discussing the development and adoption of the restrictive theory of sovereign immunity).

23. See William R. Dorsey, III, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. MAR. L. & COM. 257, 262-65 (1997) (explaining the structure of the FSIA and the various commercial activity exceptions found in the Act).

24. See Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201 (2001) (explaining that the principle of sovereign immunity originated from English law and could be traced back to the reign of Edward the First); see also M. Mofidi, *The Foreign Sovereign Immunities Act and the "Commercial Activity" Exception: The Gulf Between Theory and Practice*, 5 J. INT'L LEGAL STUD. 95, 96-97 (1999) (suggesting that the roots of the doctrine can be traced further back in time to the Roman Empire).

25. See *Schooner Exch.*, 11 U.S. (7 Cranch) at 136-37 ("The world [is] composed of distinct sovereignties, possessing equal rights and equal independence . . . . One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only . . . in the confidence that the immunities belonging to his independent sovereign station . . . will be extended to him.").

26. 11 U.S. (7 Cranch) 116 (1812).

27. *Id.* at 117-18. M'Faddon and Greetham were the original owners of the *Exchange*, which was later seized by the French under the order of Napoleon Bonaparte and converted into an armed public vessel of the French government. *Id.*

28. *Id.* at 147.



by the government of a foreign state could not be subjected to adjudication before a U.S. court without the consent of that foreign sovereign.<sup>29</sup>

Affirming the principle that sovereigns are independent of one another, Chief Justice Marshall noted that “the law of nations . . . requires the consent of the sovereign, either express or implied, before he can be subjected to a foreign jurisdiction.”<sup>30</sup> The opinion embodied a concept of sovereign immunity that eventually became known as the theory of absolute sovereign immunity.<sup>31</sup> Under this theory, a foreign state cannot be subjected to the jurisdiction of U.S. courts without its consent.<sup>32</sup>

The principle of affording absolute immunity to a foreign sovereign—absent any recognized commercial activity exception—was later extended to commercial vessels owned and operated by a foreign state in *Berizzi Brothers Co. v. Steamship Pesaro*.<sup>33</sup> The steamship *Pesaro*, a commercial vessel, was declared immune from arrest for the sole reason that it was owned and operated by the Italian government.<sup>34</sup> In the Supreme Court’s opinion, Justice Van Devanter applied the principles of absolute sovereign immunity declared in the *Schooner Exchange* decision to conclude that sovereign immunity protected commercial activities of a foreign state because they advanced the economic welfare of the people, which in turn served a public purpose akin to the maintenance and training of an army.<sup>35</sup> Therefore, ships used for commercial purposes by a foreign state were afforded the same immunity as those used for military

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29. *Id.*

30. *Id.* at 125.

31. Stephen J. Leacock, Comment, *The Joy of Access to the Zone of Inhibition: Republic of Argentina v. Weltover, Inc. and the Commercial Activity Exception Under the Foreign Sovereign Immunities Act of 1975*, 5 MINN. J. GLOBAL TRADE 81, 85–88 (1996) (discussing the judicial formation of absolute sovereign immunity pursuant to the Court’s judgment in *Schooner Exchange* and its progeny). *But see* 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, 496 n.25 (1992) (suggesting that Chief Justice Marshall’s opinion did not establish the theory of absolute sovereign immunity). Rather, Chief Justice Marshall recognized a distinction between the private and public property of a person who just happened to be a sovereign in that unlike a sovereign’s public property, its private property may be subjected to foreign jurisdictions without the sovereign’s consent. *Schooner Exch.*, 11 U.S. (7 Cranch) at 145.

32. *See* Dorsey, *supra* note 23, at 257 (stating that the principle of sovereign immunity prevents domestic courts from exercising jurisdiction over a foreign state).

33. 271 U.S. 562 (1926).

34. *Id.* at 576.

35. *Id.* at 574 (“[T]he principles [of absolute sovereign immunity] are applicable alike to all ships held and used by a government for a public purpose . . .”).

purposes.<sup>36</sup> The United States continued to adhere to this theory of absolute sovereign immunity until the mid-twentieth century.<sup>37</sup>

2. *The evolution of sovereign immunity: The restrictive theory of sovereign immunity and the FSIA*

As the world became increasingly globalized and sovereigns became more involved in the world market, Congress and the courts were concerned that the sovereign immunity doctrine would be abused to protect foreign states from being sued in the United States.<sup>38</sup> As a result, during the second half of the twentieth century, courts began to prescribe limits to the doctrine and regularly rejected claims of immunity for cases involving transactions that were purely commercial in nature.<sup>39</sup>

Recognition of this restrictive approach to sovereign immunity in the United States can be traced to a 1952 letter written by Jack B. Tate, the Acting Legal Adviser to the Department of State.<sup>40</sup> In his letter, Tate indicated that the State Department had abandoned the theory of absolute sovereign immunity in favor of an approach that limited immunity to certain types of conduct.<sup>41</sup> More specifically, sovereign immunity was afforded to a foreign state's public acts (*jure imperii*), but not for its private acts (*jure gestionis*).<sup>42</sup> Today, this

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36. *Id.*

37. *See, e.g., id.* (failing to recognize the distinction between public acts and private acts of a foreign state when holding that the principles of sovereign immunity applied to merchant and government ships alike); *see also Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943) (explaining that "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").

38. *See generally* H.R. REP. NO. 94-1487, at 7 (1976) (emphasizing the increasing need to codify the restrictive theory of sovereign immunity "to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process").

39. *See, e.g.,* *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706 (1976) (plurality opinion) (recognizing a commercial activity exception to sovereign immunity when it declined "to extend [immunity] to acts committed by foreign sovereigns in the course of their purely commercial operations").

40. Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Att'y Gen. (May 19, 1952), *reprinted in Alfred Dunhill*, 425 U.S. at app. 2, 711-15 [hereinafter Tate Letter].

41. *See generally id.* at 711-15 (outlining the general trend toward adopting the restrictive theory of sovereign immunity in other countries and stating that "[sovereign] immunity should no longer be granted in certain types of cases . . . [because] the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts").

42. *Id.* at 711-12.

approach is known as the restrictive theory of sovereign immunity.<sup>43</sup> The Tate Letter thus set the stage for what would later become the commercial activity exceptions of the FSIA.<sup>44</sup>

In 1976, the Supreme Court first addressed the validity of the restrictive theory of sovereign immunity in *Alfred Dunhill of London, Inc. v. Republic of Cuba*.<sup>45</sup> The case involved an action brought by former owners of Cuban cigar manufacturing companies whose businesses and assets were confiscated by the Cuban government in 1960.<sup>46</sup> The government then appointed “interventors” to take control of and operate these confiscated businesses, which had numerous customers abroad, including Alfred Dunhill of London, Inc. (Dunhill), an importer in the United States.<sup>47</sup> The action arose out of the interventors’ failure to return \$55,000 Dunhill paid in excess for pre-intervention shipment of goods.<sup>48</sup> The interventors maintained that, as agents of the Cuban government, their refusal to return the funds was a sovereign act entitled to immunity in U.S. courts.<sup>49</sup> The Court rejected this argument and held that “the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities.”<sup>50</sup> Addressing the emerging restrictive theory of sovereign immunity, the Court noted that “[i]n their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens.”<sup>51</sup>

A few months after the *Alfred Dunhill* decision,<sup>52</sup> Congress enacted the FSIA, which codified the restrictive theory of sovereign immunity<sup>53</sup> to “serve the interests of justice and . . . protect the rights

43. See Dorsey, *supra* note 23, at 259 (identifying the Tate Letter as the turning point in the movement away from absolute sovereign immunity to the more restrictive theory of sovereign immunity).

44. See generally Lew, *supra* note 17, at 732–33 (arguing that the Tate letter eventually formed the foundation for the commercial activity exceptions in the FSIA).

45. 425 U.S. 682 (1976).

46. *Id.* at 685.

47. *Id.*

48. *Id.* at 688–91.

49. *Id.* at 691.

50. *Id.* at 695 (plurality opinion).

51. *Id.* at 704.

52. See *id.* at 695–99 (resisting previous notions of extending sovereign immunity to foreign commercial activity “absent a suggestion of immunity from the Executive Branch” to allow judicial determinations of immunity to control).

53. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 289 (1976) (codified as amended in scattered sections of 28 U.S.C.).

of both foreign states and litigants in United States courts.”<sup>54</sup> The FSIA prescribes the circumstances under which a foreign state can be sued in U.S. courts<sup>55</sup> and “provides the ‘sole basis’ for obtaining jurisdiction over a foreign state in the United States.”<sup>56</sup>

Of the several exceptions to immunity listed in the FSIA, the most important and oft-discussed are the two separate sets of commercial activity exceptions: one denies sovereign immunity to foreign states<sup>57</sup> while the other applies exclusively to the immunity afforded to the property of foreign states.<sup>58</sup> First, § 1605(a)(2) details the three circumstances under which a foreign state engaged in commercial activity may be denied sovereign immunity and subjected to the jurisdiction of U.S. courts.<sup>59</sup> Additionally, the FSIA does not extend immunity to a foreign state in admiralty suits brought to enforce a maritime lien<sup>60</sup> against a state-owned vessel or cargo if the lien is based on commercial activity.<sup>61</sup>

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54. 28 U.S.C. § 1602 (2006); *see also* H.R. REP. NO. 94-1487, at 7-8 (1976) (listing four objectives for enactment of the FSIA: (1) to “codify the so-called ‘restrictive’ principle of sovereign immunity as presently recognized in international law”; (2) to “insure that this restrictive principle of immunity is applied in litigation before U.S. courts”; (3) to “provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state”; and (4) to “remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state”); Richard W. Cutler, *Commercial Exception to Foreign Sovereign Immunity*, N.Y. L.J., May 3, 1993, at 1 (arguing that “[t]he FSIA was passed in 1976 to regularize procedure by making sovereign immunity a purely judicial matter”).

55. *See, e.g.*, 28 U.S.C. § 1604 (providing a general grant of immunity to foreign states limited only by the Act and pre-existing international agreements).

56. *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 611 (1992) (quoting *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428, 434 (1989)).

57. *See* 28 U.S.C. § 1605(a)(2) (describing three conditions under which the commercial activities of a foreign state may deprive it of the protection of sovereign immunity).

58. *See id.* §§ 1609, 1610(a) (listing the circumstances under which properties of a foreign state used for commercial activity may be stripped of immunity and subjected to judicial attachment and arrest).

59. *See id.* § 1605(a)(2) (“A foreign government 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 foreign state elsewhere and that act causes a direct effect in the United States.”); *see also* David E. Gohlke, Comment, *Clearing the Air or Muddying the Waters? Defining “A Direct Effect in the United States” Under the Foreign Sovereign Immunities Act After Republic of Argentina v. Weltover*, 18 HOUS. J. INT’L L. 261, 269-71 (1995) (explaining that the commercial activity of a foreign state may trigger the denial of sovereign immunity under the FSIA if “the activity has substantial contacts with the United States (clause one); . . . the activity is performed within the United States (clause two); or . . . an extraterritorial activity has a direct effect in the United States (clause three)” (internal quotation marks omitted)).

60. Maritime liens are claims on maritime property, such as a ship, that are created for services rendered to the property or injuries caused by that property,

The second set of commercial activity exceptions, applicable only to the property of a foreign state, is addressed in §§ 1609 and 1610(a).<sup>62</sup> In particular, “[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611.”<sup>63</sup> The language of § 1609 explicitly provides that, unless an exception applies, the property of a foreign state is immune from judicial arrest.<sup>64</sup> A notable exception to this presumption of immunity involves commercial activity.<sup>65</sup> For example, if a claim is based on property used for commercial activity within the United States, there is no immunity from attachment arrest.<sup>66</sup>

Although each commercial activity exception varies with regard to the exact conditions that must be satisfied for U.S. courts to exercise jurisdiction over a foreign state or its property,<sup>67</sup> all exceptions share the requirements that the activity in question is *commercial*<sup>68</sup> and that

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thereby giving the owner of the lien the right to bring an in rem action to enforce such a lien. *See, e.g.,* *The General Smith*, 17 U.S. (4 Wheat.) 438, 441 (1819) (noting that the maritime lien arises from civil law giving the “party a lien on the ship itself for his security”); *see also* Delos E. Flint, Jr., *Current Development in United States Maritime Lien Law*, 8 U.S.F. MAR. L.J. 267, 269–70 (1996) (discussing that maritime lien law developed as a way of ensuring payment to those who have provided services to ships).

61. 28 U.S.C. § 1605(b). The commercial activity exceptions set forth in § 1605(a)(2) apply to both admiralty and non-admiralty claims, but § 1605(b) applies only to admiralty claims involving maritime liens. *See* Dorsey, *supra* note 23, at 263 (explaining the two-part division of § 1605 and the applicability of each).

62. 28 U.S.C. §§ 1609–1610(a).

63. *Id.* § 1609.

64. *See* *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1175 (11th Cir. 2011), *cert denied*, 132 S. Ct. 2379 (2012) (recognizing that § 1609 of the FSIA affords the *Mercedes*, property of the Spanish government, with “presumptive immunity” from attachment arrest).

65. 28 U.S.C. § 1610(a) (describing the circumstances in which commercial activity of a foreign state removes the immunity presumed under § 1609).

66. *Id.* § 1610(a)(2).

67. The literature on the other criteria, such as the meaning of “direct effect,” is extensive and outside the scope of this Comment.

68. *Compare id.* § 1605(a)(2) (“A foreign state shall not be immune from the jurisdiction of [U.S. courts] 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 foreign state elsewhere and that act causes a direct effect in the United States.” (emphasis added)), *with id.* § 1605(b) (“A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a *commercial* activity of the foreign state . . . .” (emphasis added)), *and id.* § 1610(a)(2) (“The property in the United States of a foreign state . . . shall not be immune from

the action giving rise to the suit is *based upon*<sup>69</sup> that commercial activity. Therefore, it becomes imperative to determine precisely which types of activities constitute "commercial activity."<sup>70</sup>

The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."<sup>71</sup> However, this definition does not provide guidance on how to determine whether an activity is "commercial" in nature,<sup>72</sup> which has led to contradictory decisions in the lower courts.<sup>73</sup> Accordingly, the issue eventually reached the Supreme Court.

*B. Republic of Argentina v. Weltover, Inc.: Establishing the "Private Person Test" for Commercial Activity*

In *Weltover*, the Supreme Court was asked to determine whether Argentina's issuance of bonds was a "commercial activity" within the meaning of the FSIA.<sup>74</sup> As part of a debt-refinancing program, the Argentinean government issued bonds, or "Bonods," to its creditors, which provided for repayment of its debt and interest in U.S.

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attachment . . . if— . . . the property is or was used for the *commercial* activity upon which the claim is based . . ." (emphasis added)).

69. Compare *id.* § 1605(a)(2) ("A foreign state shall not be immune from the jurisdiction of [U.S. courts] in any case . . . in which the action is *based upon* a commercial activity . . ." (emphasis added)), with *id.* § 1605(b) ("A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is *based upon* a commercial activity of the foreign state . . ." (emphasis added)), and *id.* § 1610(a)(2) ("The property in the United States of a foreign state . . . shall not be immune from attachment . . . if — . . . the property is or was used for the commercial activity *upon which the claim is based . . .*" (emphasis added)).

70. See, e.g., *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 611 (1992) (beginning the jurisdictional analysis by looking at the meaning of the commercial activity exceptions).

71. 28 U.S.C. § 1603(d).

72. See, e.g., *Weltover*, 504 U.S. at 612 (pointing out that rather than defining the critical term "commercial," the statute merely directs the focus of analysis to the "nature rather than purpose" of an activity); *Drexel Burnham Lambert Grp., Inc. v. Comm. of Receivers for A.W. Galadari*, 810 F. Supp. 1375, 1385 n.15 (S.D.N.Y.) (noting that the FSIA provides little guidance on the meaning and scope of "commercial"), *rev'd*, 12 F.3d 317 (2d Cir. 1993); see also H.R. REP. NO. 94-1487, at 16 (1976) (leaving the task of defining "commercial activity" to the courts).

73. Compare *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 825 (9th Cir. 1987) (holding that the issuance of certificates of deposit by Mexican banks constituted a commercial activity), with *De Sanchez v. Banco Central de Nicar.*, 770 F.2d 1385, 1393 (5th Cir. 1985) (affirming the lower court's characterization of a central bank's issuance of certificates of deposit as a governmental activity).

74. *Weltover*, 504 U.S. at 612.

dollars.<sup>75</sup> However, without consulting its creditors, the Argentinian government unilaterally decided to postpone repayment due to insufficient foreign reserves.<sup>76</sup> The creditors then filed suit in the U.S. District Court for the Southern District of New York for breach of contract.<sup>77</sup> After Argentina's unsuccessful attempt to dismiss the case for lack of jurisdiction because of sovereign immunity, the Supreme Court granted its petition for certiorari to address whether the FSIA afforded Argentina jurisdictional immunity for its breach of contract.<sup>78</sup>

When analyzing the FSIA's definition of "commercial activity," the Court looked to the Act's legislative history for guidance and reasoned that any interpretation of the term should remain consistent with the restrictive theory of sovereign immunity.<sup>79</sup> The Court emphasized the importance of differentiating between the "nature" of an act and the "purpose" of the act because of the statutory command to do so.<sup>80</sup> The Court defined the "nature" of an act as "the outward form of the conduct that the foreign state performs or agrees to perform."<sup>81</sup> In contrast, the "purpose" of an act is "the *reason why* the foreign state engages in the activity."<sup>82</sup> Armed with the understanding that the controlling factor in determining the commercial character of an act is its nature, not its purpose, the Court established the following "private person test":

[T]he question is not whether the foreign 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 . . . are the type of actions by which a private party engages in trade and traffic or commerce.<sup>83</sup>

In other words, an act is sovereign in nature if it is the type of act in which only a sovereign can engage.<sup>84</sup> If a private party can also exercise the same power and engage in a similar activity as that of the sovereign, then the act sheds its sovereign nature and becomes "commercial" activity.<sup>85</sup>

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75. *Id.* at 609.

76. *Id.* at 610.

77. *Id.*

78. *Id.*

79. *Id.* at 612-14.

80. *Id.* at 617.

81. *Id.*

82. *Id.*

83. *Id.* at 614 (internal quotation marks omitted).

84. *See id.* ("A foreign state engaging in 'commercial' activities 'do[es] not exercise powers peculiar to sovereigns' . . . ." (quoting *Alfred Dunhill of London, Inc., v. Republic of Cuba*, 425 U.S. 682, 704 (1976) (plurality opinion))).

85. *See id.* (citing *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*,

To illustrate this “private person test” for commercial activity, the Court considered the example of a government’s issuance of currency exchange regulations as a distinct exercise of sovereign power.<sup>86</sup> In contrast, a government’s contract to buy army boots or bullets qualifies as a commercial activity regardless of the reason behind the purchase because private parties can contract to do the same.<sup>87</sup> In providing these examples, the Court underscored the significance of distinguishing the “nature” of an act from its “purpose” when determining the act’s commercial character.

Applying this “private person test” to the facts of *Weltover*, the Court observed that Argentina’s Bonods possessed many commercial characteristics.<sup>88</sup> Not only can private parties own and trade the Bonods, but they are also just as capable of issuing bonds similar to the Bonods.<sup>89</sup> Therefore, the Court concluded that Argentina engaged in commercial activity because its act of issuing the Bonods was of a “nature” no different from a private party’s issuance of ordinary commercial bonds.<sup>90</sup>

### C. *Application of the Commercial Activity Exception in Light of Weltover*

The impact of the *Weltover* decision was immediate as lower courts began to apply its standard for determining commercial activity.<sup>91</sup> A year later, the Supreme Court returned to the issue to further define

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877 F.2d 574, 578 (7th Cir. 1989)) (providing that a commercial activity analysis must look to the mode and function of the transaction, invalidating sovereign immunity for interactions that bear inherent qualities of commercial activity regardless of the foreign party’s motive).

86. *See id.* at 614–15 (explaining that a state’s regulation of its currency exchange is sovereign in nature because the state’s authority and control is exclusive and exceeds that of any private party to do the same).

87. *See id.* (differentiating between a sovereign action seeking to regulate commercial activity and a contractual obligation with a foreign government that is functionally equivalent to a private commercial transaction).

88. *Id.* at 615.

89. *Id.* at 615–16.

90. *See id.* at 614–16 (evaluating Supreme Court precedent to determine that a foreign state’s participation in the marketplace is analogous to the participation of any other private player within it, and the state’s commercial activities do not bar a suit).

91. *See, e.g.,* *Drexel Burnham Lambert Grp., Inc. v. Comm. of Receivers for A.W. Galadari*, 12 F.3d 317, 328–29 (2d Cir. 1993) (applying the *Weltover* test in finding that management and liquidation of a bank’s assets constituted commercial activity); *see also* *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1544 (11th Cir. 1993) (relying on *Weltover* in holding that designing and manufacturing cars for sale was “a quintessential commercial activity”); *Walter Fuller Aircraft Sales, Inc. v. Republic of the Phil.*, 965 F.2d 1375, 1384 (5th Cir. 1992) (citing *Weltover* when concluding that contracts for goods and services are commercial in nature).



the scope of the FSIA's commercial activity exceptions in *Saudi Arabia v. Nelson*.<sup>92</sup>

1. "Based upon" test: Narrowing the scope of government conduct in *Saudi Arabia v. Nelson*

*Nelson* involved a tort claim brought by Scott Nelson and his wife against the Kingdom of Saudi Arabia.<sup>93</sup> While employed at a Saudi Arabian government-owned and operated hospital, Nelson discovered several safety defects in hospital equipment and reported them to his superiors.<sup>94</sup> Nelson was subsequently arrested by government agents and taken to a jail cell where he was tortured for four days.<sup>95</sup> Upon his return to the United States, Nelson filed suit under the FSIA, alleging that agents of the Saudi government wrongfully arrested, detained, and tortured him.<sup>96</sup> The lower courts disagreed on whether and to what extent a foreign state's commercial activity must relate to the injuries alleged for a commercial activity exception to apply.<sup>97</sup>

Prior to any discussion of whether Saudi Arabia engaged in commercial activity, the Court first identified the specific act upon which the entire suit was "based" because the commercial activity exception implicated in *Nelson*<sup>98</sup> applied only if "[the government conduct in question was] based upon a commercial activity carried on in the United States by the foreign state."<sup>99</sup> Without any guidance

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92. 507 U.S. 349 (1993).

93. *Id.* at 353.

94. *Id.* at 351–52. Nelson signed the employment contract and completed his orientation in the United States before traveling overseas to Riyadh, Saudi Arabia where the hospital was located. *Id.*

95. *Id.* at 352–53. Nelson was kept in jail for thirty-nine days, during which time he was not informed of any charges against him. *Id.* at 353.

96. *Id.* at 353–54.

97. Compare *Nelson v. Saudi Arabia*, 923 F.2d 1528, 1533–36 (11th Cir. 1991), (reasoning that Nelson's "detention and torture . . . are so intertwined with his employment . . . that they are 'based upon' his recruitment and hiring in the United States," and therefore constitute a commercial activity with "substantial contacts" in the United States) *rev'd*, 507 U.S. 349, with *Nelson v. Saudi Arabia*, No. 88-1791-CIV-NESBITT, 1989 WL 435302, at \*3, (S.D. Fla. Aug. 11, 1989) (failing to find a sufficient "nexus" between Nelson's alleged injuries and commercial activity on the part of the Saudi government), *rev'd*, 923 F.2d 1528, *rev'd*, 507 U.S. 349.

98. 28 U.S.C. § 1605(a)(2) (2006).

99. *Nelson*, 507 U.S. at 351. The Court divided the analysis of this commercial activity exception into several elements that must all be satisfied for jurisdiction to exist: (1) the petitioners (Saudi Arabia, the hospital, and the recruiting agency) must have qualified as "foreign state[s]" and the Nelson's claim must have been (2) "based upon" some type of (3) "commercial activity" on the part of the petitioners (4) that had either occurred in or had "substantial contact" with the United States. *Id.* at 356. Writing for the majority, Justice Souter explained that there was no need to address whether the activity occurred in or had substantial contact with the United

from the statute in defining “based upon,” the Court looked to the ordinary dictionary definition to find that “the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case.”<sup>100</sup> The Court applied this definition of “based upon” to the facts of the case and concluded that Nelson’s alleged injuries were the result of intentional tortious acts by Saudi government agents and not the direct consequence of Nelson’s recruitment or employment at the hospital.<sup>101</sup>

Having determined the particular conduct upon which Nelson based his claim, the Court then considered whether such conduct constituted commercial activity under the *Weltover* test.<sup>102</sup> Justice Souter, writing for the majority, argued that the Saudi agents’ wrongful arrest and torture of Nelson, the sole acts upon which the suit was based, were better characterized as sovereign activity because they were exercises of police power reserved only for sovereigns.<sup>103</sup> In other words, private parties cannot use police power to engage in commerce.<sup>104</sup> The Court rejected Nelson’s reliance on the commercial nature of his employment contract as a basis for his suit, despite the fact that his injuries would not have occurred but for his employment at the hospital.<sup>105</sup> The mere connection between a sovereign act and commercial activity is insufficient to bring suit under § 1605(a)(2) “where a claim rests entirely upon activities sovereign in character.”<sup>106</sup>

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States because the Court ruled that the Nelson’s suit was not based upon any commercial activity of the Saudi Arabian government. *Id.*

100. *Id.* at 357.

101. *See id.* at 358 (clarifying that “[w]hile [Nelson’s recruitment, signing of an employment contract, and subsequent employment at the hospital] led to the conduct that eventually injured him, they are not the basis for the Nelsons’ suit. . . . The Nelsons have not, after all, alleged breach of contract . . . . Those torts, and not the arguably commercial activities that preceded their commission, form the basis for the Nelsons’ suit”).

102. *Id.* at 359–60.

103. *See id.* at 361–62 (observing that a state’s police power is “peculiarly sovereign in nature”). Nelson argued that his mistreatment by Saudi agents was a retaliatory action by his employers and thus commercial in nature. *Id.* at 362. However, the Court rejected this premise, noting that Nelson’s argument relied on the *purpose* of the activity, which had no bearing on the issue of an activity’s commercial *nature* under the nature versus purpose test. *Id.* at 363.

104. *See id.* at 362 (providing examples to illustrate that although private parties and states have similar powers while engaging in commerce, some powers, such as the power to legislate, are reserved for states only and cannot be exercised by private parties).

105. *Id.* at 363 (reiterating that the reasons that led to Nelson’s abuse at the hands of the Saudi police were irrelevant because they went toward the purpose, not the nature, of the act).

106. *Id.* at 358 n.4. However, the Court was careful not to issue an oversimplified

Justice White, in a concurring opinion, opposed the majority's application of the *Weltover* "private person test."<sup>107</sup> He found it arbitrary to characterize the use of the police force in carrying out retaliatory measures as sovereign activity simply because the actors were government agents.<sup>108</sup> Justice White reasoned that the actions taken by the Saudi agents were not distinct from anything a private party in the marketplace could do.<sup>109</sup> He specifically pointed out that private employers use retaliatory measures when faced with whistleblowing.<sup>110</sup> In fact, they may even recruit police assistance in carrying out such retaliatory measures.<sup>111</sup> To Justice White, the key inquiry rests not on the proper conduct of private parties engaged in commerce, but rather on the actual conduct of those parties.<sup>112</sup> Regardless of whether the Justices agreed on the correct characterization of the agents' actions, lower courts have since identified the "based upon" test as the first step in their commercial activity analysis and applied *Nelson* to narrowly construe the scope of relevant government conduct.<sup>113</sup>

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bright line rule: "We do not mean to suggest that the first clause of § 1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state, and we do not address the case where a claim consists of both commercial and sovereign elements." *Id.* But see *id.* at 367 (White, J., concurring) (suggesting that at the very least, Nelson's claim was based upon activities that "consist[] of both commercial and sovereign elements," which the majority specifically chose to ignore by characterizing the police power as categorically sovereign in nature).

107. *Id.* at 365 (White, J., concurring). Although Justice White disagreed with the majority's finding of no commercial activity, he did concur in the Court's interpretation of "carried on in the United States," a commercial activity exception criterion beyond the scope of this Comment. *Id.* at 364.

108. See *id.* at 365–67 (contending that if the hospital had hired thugs rather than police officers to retaliate against Nelson, the majority would characterize the act as commercial because the state-run hospital would be acting as a private business rather than a sovereign entity); see also Amelia L. McCarthy, Comment, *The Commercial Activity Exception—Justice Demands Congress Define a Line in the Shifting Sands of Sovereign Immunity*, 77 MARQ. L. REV. 893, 909–10 (1994) (noting that the *Nelson* decision created a loophole in the FSLA commercial activity analysis because "so long as a foreign state utilizes a government entity, it can opt-in or opt-out of United States courts' jurisdiction at will," thus undermining the purpose of the FSLA).

109. *Nelson*, 407 U.S. at 365–66 (White, J., concurring).

110. *Id.* at 365–66.

111. *Id.* at 366.

112. *Id.* at 365.

113. See, e.g., *Kirkham v. Société Air France*, 429 F.3d 288, 291–92 (D.C. Cir. 2005) (relying on *Nelson*'s "based upon" analysis to determine whether the commercial activity of purchasing an airline ticket established the plaintiff's negligence claim); *BP Chems. Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677, 682 (8th Cir. 2002) (applying *Nelson*'s reasoning to conclude that each element of the plaintiff's claim should be subjected to the commercial activity analysis).

## 2. *Commercial activity in practice*

Since Congress enacted the FSIA in 1976, courts have consistently recognized certain acts, such as formation of government contracts for the sale or purchase of goods, as commercial activity.<sup>114</sup> This has proven especially true in the military setting as lower courts have routinely characterized contracts to purchase equipment for military use as commercial activity despite the fact that those goods ultimately served a uniquely sovereign function.<sup>115</sup>

With regard to suits in admiralty, the legislative history of the FSIA indicated that transportation of goods in commerce by a state-operated shipping line would not entitle a foreign state to sovereign immunity.<sup>116</sup> This suggests that courts generally approach commercial activity analysis in admiralty suits the same way they do in non-admiralty suits. In both scenarios, an act is considered commercial activity if it is one that can be performed by a private party in the marketplace.<sup>117</sup>

### *D. The FSIA, the Sunken Military Craft Act, and the Geneva Convention on the High Seas: Shipwrecked at the Intersection of Sovereign Immunity and Commercial Activity*

The commercial activity analysis in the context of salvaging historic shipwrecks requires significant attention to overlapping laws.<sup>118</sup> First,

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114. See, e.g., *Globe Nuclear Servs. & Supply GNSS, Ltd. v. AO Techsnabexport*, 376 F.3d 282, 289–91 (4th Cir. 2004) (concluding that a contract with a Russian company for the sale of uranium constituted commercial activity); *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 581 (7th Cir. 1989) (holding that a contract for purchase of medical services amounted to commercial activity); *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 349 (8th Cir. 1985) (arguing that a contract to purchase aircraft parts for military purposes qualified as commercial activity).

115. See *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614–15 (1992) (reasoning that a contract to purchase army boots and bullets would be commercial activity); *McDonnell Douglas Corp.*, 758 F.2d at 349 (contract to buy military equipment is viewed as commercial activity); see also H.R. REP. NO. 94-1487, at 16 (1976) (“[T]he 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. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity.”).

116. H.R. REP. NO. 94-1487, at 15.

117. See, e.g., *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 819 (3d Cir. 1981) (“[S]ailing a ship into a United States port and discharging and receiving cargo here constitute commercial activity.”).

118. The 1989 International Convention on Salvage typically governs salvage claims in international waters and entitles “warships or other non-commercial vessels owned or operated by a State” to the protection of sovereign immunity and exempts them from the laws of salvage prescribed in the treaty. International Maritime Organization, International Convention on Salvage, art. 4, Apr. 28, 1989, 1953 U.N.T.S. 165. Although both the United States and Spain are parties to the treaty, it

because the FSIA was not meant to displace any existing international treaties or agreements to which the United States was a party at the time of its enactment, courts must consider potential conflicts with such treaties.<sup>119</sup> Both the United States and Spain were parties to the 1958 Geneva Convention on the High Seas<sup>120</sup> (Geneva Convention) prior to the enactment of the FSIA,<sup>121</sup> which makes it particularly pertinent to this case. Second, it has not been the practice of courts to examine and interpret federal statutes in a vacuum isolated from others that may have implications relevant to the issues at hand.<sup>122</sup> In particular, the Sunken Military Craft Act<sup>123</sup> (SMCA), a federal statute that confers sovereign immunity to sunken U.S. warships, provides

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is nonetheless irrelevant to this case for several reasons. See Status of Participants of the International Convention on Salvage, 1989, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/Pages/showDetails.aspx?objid=08000002800a58b3> (last visited Aug. 22, 2013). First and foremost, the provisions of the treaty do not apply to the *Mercedes* because neither party argued for the applicability of the 1989 Salvage Convention. See generally *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1159–84 (11th Cir. 2011) (omitting any discussion of the 1989 International Convention on Salvage), *cert denied*, 132 S. Ct. 2379 (2012). However, even if Odyssey Marine had raised the issue, the court would not find the treaty controlling because one of the reservations Spain made upon becoming a signatory would apply precisely to the case at hand. See *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Functions* 463 (July 31, 2013), <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202013.pdf> (reserving the right to not apply the treaty “when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed”). The court would most certainly respect Spain’s reserved right to not apply the treaty to the *Mercedes*, thus making it inapplicable to *Odyssey*, because it would be difficult to overcome the argument that a two hundred-year old shipwreck is not “maritime cultural property of prehistoric, archaeological or historic interest.” International Convention on Salvage, *supra*, art. 30, 1953 U.N.T.S. at 207.

119. See 28 U.S.C. §§ 1604, 1609 (2006) (limiting the reach of the FSIA by “[s]ubject[ing it] to existing international agreements to which the United States is a party at the time of enactment of this Act”); see also *Odyssey*, 657 F.3d at 1176 (discussing the applicability of the 1958 Geneva Convention on the High Seas).

120. Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter Geneva Convention] (codifying the rules of international law with respect to a state’s activities in international waters or on the “high seas”).

121. The United States ratified the treaty on April 12, 1961, while Spain’s accession to the Geneva Convention occurred a decade later, in 1971. Status of Participants of the Convention on the High Seas, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg\\_no=XXI-2&chapter=21&lang=en#Participants](http://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=XXI-2&chapter=21&lang=en#Participants) (last visited Aug. 22, 2013).

122. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (articulating that courts should examine statutory provisions in context, interpreting them to establish “a symmetrical and coherent regulatory scheme . . . particularly where Congress has spoken subsequently and more specifically to the topic at hand” in other legislations).

123. Pub. L. No. 108-375, §§ 1401–1408, 118 Stat. 2094 (2004) (codified at 10 U.S.C. § 113 note (2006)).

further guidance because *Odyssey* involved the treatment of a sunken military vessel and its cargo.<sup>124</sup>

### 1. *The 1958 Geneva Convention on the High Seas*

Article 9 of the Geneva Convention specifically addresses the jurisdictional immunity of vessels engaged in commercial activity.<sup>125</sup> It states that “[s]hips owned or operated by a State and *used only on government non-commercial service* shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.”<sup>126</sup> This language clearly implies that not all state-owned vessels are created equal.<sup>127</sup> Limiting immunity to only those that are exclusively performing “government non-commercial service”<sup>128</sup> suggests that vessels engaged in activities that fall outside of this category would be treated differently with regard to sovereign immunity.<sup>129</sup> However, the treaty does not explicitly address whether state-owned vessels engaged in commercial activity are entitled to immunity. Instead, it discusses only “government non-commercial service” without any mention of commercial activity, thereby granting sovereign immunity solely to state-owned vessels engaged in “government non-commercial service.”<sup>130</sup>

The treaty’s language creates a preference for granting sovereign immunity only where a state-owned vessel is carrying out non-commercial government services. In turn, this preference suggests that vessels engaged in commercial activity, regardless of whether the activity served a sovereign purpose, would not receive the same protection in international waters.<sup>131</sup> Both Spain and the United

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124. See *Odyssey*, 657 F.3d at 1180 (referring to the SMCA for determination of whether cargo should be treated as part of the shipwreck for purposes of immunity); see also Treaty of Friendship and General Relations, U.S.-Spain, art. X, July 13, 1902, 33 Stat. 2105 (requiring that the United States treat shipwrecked Spanish vessels as it would its own vessels).

125. Geneva Convention, *supra* note 120, at 2315.

126. *Id.* (emphasis added).

127. See *id.* (singling out state-owned vessels that are engaged in “government non-commercial service” for immunity and omitting state-owned and operated vessels engaged in commercial activity).

128. The Geneva Convention does not specify what constitutes “government non-commercial service,” nor does it define the term “commercial.” *Id.*

129. See *id.* (neglecting to mention any type of vessel other than those engaged in “government non-commercial service,” which indicates that the immunity established by the treaty is likely inapplicable to other types of vessels).

130. See *id.* (“Ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.”).

131. See Dorsey, *supra* note 23, at 258 (stating that the Geneva Convention supports the concept of denying sovereign immunity to state-owned vessels engaged in commercial activity); see also Yiannopoulos, *supra* note 21, at 1288–89 (asserting that the Geneva Convention “[embodied t]he idea that state-owned commercial

States are parties to the Geneva Convention; therefore, any reading of the FSIA should remain consistent with the language of the treaty when deciding claims of sovereign immunity.

## 2. *The Sunken Military Craft Act*

Prompted by the increase in debate about the legal status of sunken military vessels, Congress enacted the SMCA in 2004.<sup>132</sup> By passing the Act, Congress clarified the treatment of and protections afforded to U.S. sunken military vessels located anywhere in the world and foreign sunken military vessels located in U.S. waters.<sup>133</sup> Vessels that qualify as “sunken military craft” under the Act remain properties of the United States unless they have been expressly abandoned.<sup>134</sup> More importantly, as “sunken military craft[s]”, they are entitled to sovereign immunity under both U.S. law and international law.<sup>135</sup>

The SMCA defines “sunken military craft” as “any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government or *military noncommercial service* when it sank.”<sup>136</sup> The applicability of the SMCA is explicitly limited to a very select group of vessels. Simply qualifying as a “warship,” or a government-owned and operated vessel is insufficient to bring the sunken ship within the protections of the SMCA because the definition also requires that the vessel (1) have been engaged in “military noncommercial service” (2) at the time it sank.<sup>137</sup>

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vessels are not entitled to immunity”). *But see* *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1176 (11th Cir. 2011) (rejecting the notion that the language of the Geneva Convention created a commercial activity exception to immunity from arrest for properties of a foreign state under § 1609 of the FSIA), *cert denied*, 132 S. Ct. 2379 (2012).

132. Sunken Military Craft Act, Pub. L. No. 108-375, § 1406(d), 118 Stat. 2094, 2097 (2004) (codified at 10 U.S.C. § 113 note (2006)).

133. *See id.* §§ 1404(e), 1405(a); 118 Stat at 2096 (rejecting the applicability of the law of finds and the law of salvage to any sunken military craft and prohibiting disturbance, removal of, or injuries to any sunken military craft unless otherwise authorized); *see also* David J. Bederman, *Congress Enacts Increased Protections for Sunken Military Craft*, 100 AM. J. INT’L L. 649, 653–58 (2006) (explaining the legal protections provided to any sunken U.S. military craft in the SMCA).

134. Sunken Military Craft Act § 1401, 118 Stat at 2094.

135. *See* Geneva Convention, *supra* note 120, at 2315; Yiannopoulos, *supra* note 21, at 1285–86 (discussing the distinction made in international law regarding the applicability of sovereign immunity between state-owned vessels that serve a “public” purpose and those that serve a commercial purpose).

136. Sunken Military Craft Act § 1408(3)(A), 118 Stat at 2098 (emphasis added).

137. *Id.*; *see also* Brief Amicus Curiae of Members of Congress on the Proper Construction of the Sunken Military Craft Act in Support of Neither Party at 5–6, *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011) (No. 10-10269J), 2010 WL 4279756 [hereinafter Amicus Brief] (explaining that structurally the SMCA’s definition of “sunken military craft”

Similar to the language used in the Geneva Convention to define a military vessel entitled to immunity,<sup>138</sup> the SMCA further underscores Congress' intent to continue limiting sovereign immunity's application in conformity with the development of the doctrine in both domestic and international law.<sup>139</sup> Making a distinction between state-owned vessels, warships included, that engaged in military noncommercial service from those that did not suggests that state-owned vessels engaged in commercial activity are subject to different immunity protections under the SMCA.<sup>140</sup> Reading this in conjunction with the FSIA should lead courts to conclude that sovereign immunity should not be extended to any state-owned and operated vessel, warship or otherwise, engaged in commercial activity when it sank.<sup>141</sup>

#### E. *The FSIA and Odyssey: A Jurisdictional Issue*

Before scrutinizing the Eleventh Circuit's commercial activity analysis, it is important to understand the jurisdictional analysis at issue in *Odyssey*. The Constitution vested judicial power to "all Cases of admiralty and maritime Jurisdiction" in the federal courts.<sup>142</sup> However, federal courts cannot exercise this exclusive adjudicatory power in actions against a foreign state or its property without proper

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requires warships and other government-owned vessels to have been engaged in "military noncommercial service when it sank").

138. Compare Geneva Convention, *supra* note 120, at 2315 (pertaining to "[s]hips owned or operated by a State and used only on government non-commercial service"), with Sunken Military Craft Act § 1408(3)(A), 118 Stat. at 2098 (referencing "vessel[s] that [were] owned or operated by a government on military noncommercial service").

139. See Amicus Brief, *supra* note 137, at 8 (stating that Congress did not intend for the SMCA to apply to vessels performing "non-military commercial service at the time of their sinking"); see also H.R. REP. NO. 94-1487, at 7 (1976) (recommending the enactment of the FSIA to restrict application of sovereign immunity to a foreign state's "public acts").

140. See Sunken Military Craft Act § 1408(3)(A), 118 Stat. at 2098 (excluding government owned and operated vessels performing commercial service from the definition of "sunken military craft"); see also *supra* Part.I.D.1 (discussing the treatment of state-owned and operated vessels engaged in commercial activity under the Geneva Convention).

141. See Amicus Brief, *supra* note 137, at 8-9 (reasoning that affording sovereign immunity to warships engaged in non-military commercial activity under the SMCA would directly conflict with the functions of the FSIA's commercial activity exceptions, which was not the intent of Congress because "[n]othing in the text or legislative history of the SMCA indicate[d] that it was intended to repeal the relevant provisions of the FSIA").

142. U.S. CONST. art. III, § 2, cl. 1; see also *Odyssey*, 657 F.3d at 1171 (noting that "[a]n *in rem* suit against a vessel is . . . distinctively an admiralty proceeding" and therefore within the subject matter jurisdiction of United States courts (citation omitted)).



jurisdiction<sup>143</sup> over the defendant.<sup>144</sup> Because the FSIA is the “sole basis” for obtaining jurisdiction over claims involving foreign states, denying sovereign immunity to a foreign state under § 1605 or to a foreign state’s property under §§ 1609 and 1610 implies that the court has both subject matter jurisdiction to adjudicate the controversy and personal jurisdiction over the defendant.<sup>145</sup> Accordingly, because the *Mercedes* was Spain’s property, §§ 1609 and 1610 of the FSIA governed the court’s jurisdiction over Odyssey Marine’s in rem action against the salvaged vessel and its cargo.<sup>146</sup>

Section 1609 states:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.<sup>147</sup>

The language of this particular section establishes two conditions that must exist before a U.S. court can exercise its arrest power over the property of a foreign state. First, the property in question must be within the United States.<sup>148</sup> Second, an exception to the presumptive jurisdictional immunity provided in § 1609 must apply.<sup>149</sup> With regard to this second criterion, a party attempting to overcome the

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143. Both subject matter jurisdiction and personal jurisdiction over the defendant are required. See 28 U.S.C. § 1330(a)–(b) (2006) (providing federal district courts with subject matter jurisdiction and personal jurisdiction over foreign states that are not entitled to sovereign immunity under the FSIA).

144. See *Odyssey*, 657 F.3d at 1171 (discussing how federal courts obtain jurisdiction in an in rem action against a vessel); see also, e.g., 28 U.S.C. §§ 1609–1611 (delineating the circumstances under which U.S. federal courts may gain in rem jurisdiction over the property of a foreign state).

145. See, e.g., *Odyssey*, 657 F.3d at 1178 (explaining that structurally §§ 1605 to 1607 of the FSIA provide exceptions to immunity for a foreign state, while §§ 1610 and 1611 dictate the exceptions to immunity for *properties* of foreign sovereigns); see also Dorsey, *supra* note 23, at 262 (explaining that under the FSIA, personal jurisdiction depends upon the existence of subject matter jurisdiction, which in turn is specified in the Act as circumstances in which actions involving foreign states are subject to adjudication in U.S. courts).

146. See 28 U.S.C. § 1609 (controlling courts’ exercise of in rem jurisdiction); *supra* Part.I.A.2 (discussing the different commercial activity exceptions within the FSIA as applied to a foreign state and its property).

147. 28 U.S.C. § 1609 (conveying jurisdiction for in rem actions in a manner similar to § 1604, which provides for jurisdiction over foreign states, rather than property of foreign states).

148. See *id.* (prescribing immunity *only* for “property in the United States of a foreign state” unless the property falls into a number of exceptions, including those for commercial activity (emphasis added)).

149. See *id.* (referencing the list of exemptions in §§ 1610 to 1611 that would make exercise of jurisdiction appropriate); see also *Odyssey*, 657 F.3d at 1175 (indicating that Odyssey Marine had the burden of establishing an exception to immunity, without which federal courts could not exercise jurisdiction).

presumed immunity from arrest can either (1) establish that an exception enumerated in § 1610 or § 1611 applies to the case at hand, or (2) demonstrate that existing international agreements to which the United States is a party create an exception to sovereign immunity.<sup>150</sup>

In approaching the first condition, the *Odyssey* court acknowledged that Odyssey Marine's deposit of a portion of the *Mercedes*' cargo with the district court brought the shipwrecked vessel within the territorial jurisdiction of an U.S. court.<sup>151</sup> As for satisfying the second condition, Odyssey Marine chose to argue that the Geneva Convention, an existing international treaty to which the United States is a party, limited the application of sovereign immunity to state-owned vessels engaged in non-commercial services.<sup>152</sup> In other words, incorporating the language of the treaty into § 1609 created an unenumerated commercial activity exception to sovereign immunity that the *Mercedes* could not overcome.<sup>153</sup> Although the court did not find this argument persuasive, it nevertheless addressed the issue of whether the *Mercedes* was engaged in commercial activity when it sank.<sup>154</sup>

## II. THE DECISION OF THE ELEVENTH CIRCUIT IN *ODYSSEY RUNS COUNTER TO THE SOVEREIGN IMMUNITY DOCTRINE'S DEVELOPMENT OF A LIMITED REACH OF JURISDICTIONAL IMMUNITY OVER COMMERCIAL ACTIVITY*

The Supreme Court's reading of the FSIA's commercial activity exceptions, as demonstrated in its decisions in *Weltover* and *Nelson*, indicates the adoption of and adherence to a restricted approach to granting sovereign immunity in actions involving commercial activity.<sup>155</sup> The analytical frameworks set forth in *Weltover* and *Nelson* require a two-step analysis.<sup>156</sup> The first step is identifying the specific

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150. See *Odyssey*, 657 F.3d at 1175–76 (explaining that immunity from arrest under § 1609 of the FSIA is subject to both the statutory exceptions in §§ 1610 and 1611 and existing international agreements).

151. See *id.* at 1175 (explaining that in an in rem action against a shipwreck in international waters, a court can exercise constructive possession over the vessel as long as a portion of the vessel is presented to the court).

152. *Id.* at 1176. The court did not consider whether any exceptions to jurisdictional immunity listed in §§ 1610 and 1611 applied to the *Mercedes* because Odyssey Marine did not raise a claim under either §§ 1610 or 1611. *Id.*

153. *Id.*; see also *supra* notes 126–131 and accompanying text.

154. *Odyssey*, 657 F.3d at 1176–78.

155. See *supra* Part I.A–C (discussing the evolution of the sovereign immunity doctrine).

156. See *supra* Part I.C.1 (discussing the approach the Court took in first distinguishing *Nelson's* arrest and torture at the hands of Saudi government agents

government conduct subject to the commercial activity analysis.<sup>157</sup> The second step is applying the *Weltover* “private person test” to the identified act to ascertain whether it is “commercial activity” under the FSIA.<sup>158</sup>

The Eleventh Circuit’s commercial activity analysis in *Odyssey* incorrectly construed the “private person test,” leading to the conclusion that the *Mercedes* was engaged in non-commercial service when it sank.<sup>159</sup> An accurate application of the two-step analysis for commercial activity would not have led the Eleventh Circuit to characterize the *Mercedes* as a Spanish military vessel entitled to sovereign immunity.<sup>160</sup>

A. *The Supreme Court Intended to Set a Broad Scope for Interpreting Commercial Activity and Limit the Applicability of Sovereign Immunity*

The significance of having a clearly defined scope of commercial activity and the impact of the *Odyssey* decision on that scope are best viewed in light of the history and evolution of the sovereign immunity doctrine.<sup>161</sup> While the concept of sovereign immunity developed as a way to maintain diplomatic relations among members of the international community,<sup>162</sup> contemporary approaches taken by Congress, the courts, and the international community have extensively limited the scope of the doctrine.<sup>163</sup> In enacting the FSIA and codifying the restrictive theory of sovereign immunity, Congress provided uniform standards for sovereign immunity claims.<sup>164</sup> Perhaps more importantly, the FSIA prescribed all the circumstances

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from Nelson’s employment at the government-owned and operated hospital before taking on any commercial activity analysis).

157. See *supra* Part I.C.1 (arguing that Justice Souter’s interpretation of the statute requires consideration of whether the government’s conduct in question was based on a commercial activity before application of the commercial activity exception).

158. See *supra* Part I.B (analyzing the Court’s reasoning in *Weltover* and its adoption of the “private person test” for commercial activity).

159. Compare *Odyssey*, 657 F.3d at 1176–78 (concluding that there was no commercial activity after applying the *Weltover* test), with *infra* Part II.B.2 (addressing *Odyssey*’s inaccurate application of *Weltover* decision).

160. See *infra* Part II.B (applying the two-step analysis to *Odyssey*).

161. See, e.g., *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 612–14 (1992) (referring to the legislative history of the FSIA for guidance on how to construe “commercial activity”).

162. See, e.g., *Yiannopoulos*, *supra* note 21, at 1275 (noting that the purpose of sovereign immunity is to “avoid friction in international relations”).

163. See *supra* Part I.A.2 (explaining the evolution of the sovereign immunity doctrine from absolute sovereign immunity to a restrictive theory of sovereign immunity); *supra* Part I.D.1 (discussing the Geneva Convention’s restrictive approach to the applicability of sovereign immunity for state-owned vessels).

164. See H.R. REP. NO. 94-1487, at 6 (1976) (stating that the purpose of the FSIA is to clarify when and how a foreign state can be subjected to the jurisdiction of U.S. courts).

under which a foreign state can be subjected to the jurisdiction of U.S. courts.<sup>165</sup> This shift from a complete bar on exceptions to sovereign immunity toward acknowledgement and codification of numerous exceptions demonstrates Congress's willingness and commitment to significantly limit the scope of the doctrine.<sup>166</sup>

When first confronted with the task of defining the scope of "commercial" within the FSIA, the Supreme Court acknowledged that the language of the FSIA did not offer a clear definition of "commercial activity."<sup>167</sup> Thus, in keeping with congressional intent, the *Weltover* Court looked to the legislative history of the FSIA and the circumstances that gave rise to the restrictive theory for guidance on how to interpret the meaning of "commercial activity."<sup>168</sup> The Court reasoned that its interpretation of the scope of "commercial activity" had to conform to the restrictive theory emerging at the State Department and in the lower courts, which had already begun the practice of carving out exceptions to immunity at the time Congress enacted the FSIA.<sup>169</sup> Therefore, the *Weltover* Court broadly construed the limits of "commercial activity" via the adoption of the "private person test."<sup>170</sup> This interpretation widened the scope of activities that qualify for the commercial activity exceptions, thereby corresponding with Congress's objective in enacting the FSIA.<sup>171</sup>

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165. See 28 U.S.C. §§ 1605–1607, 1610–1611 (2006) (listing the exceptions to sovereign immunity).

166. See H.R. REP. NO. 94-1487, at 6–7 (recognizing the need for a restrictive application of sovereign immunity to preserve private parties' ability to resolve certain legal disputes in court as a result of the increase in commercial transactions between foreign states and private individuals).

167. See *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 612 (1992) (stating that the definition provided in the statute "merely specifies what element of the conduct determines commerciality (*i.e.*, nature rather than purpose), but still without saying what 'commercial' means").

168. See *id.* at 612–13 ("The meaning of 'commercial' is the meaning generally attached to that term under the restrictive theory at the time the statute was enacted."); see also H.R. REP. NO. 94-1487, at 16 ("Activities such as a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition [of commercial activity].").

169. See *Weltover*, 504 U.S. at 613 (observing that "after the State Department endorsed the restrictive theory of foreign sovereign immunity in 1952, the lower courts consistently held that foreign sovereigns were not immune from the jurisdiction of American courts in cases 'arising out of purely commercial transactions.'" (quoting *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 703 (1976) (plurality opinion))).

170. See *id.* at 614 ("[W]hen a foreign government acts, not as 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.").

171. See H.R. REP. NO. 94-1487, at 7 (stating that Congress's intent was to "codify the so-called 'restrictive' principle of sovereign immunity" by enacting the FSIA).

The subsequent *Nelson* decision highlighted the Court's efforts to further refine the application of the commercial activity exceptions. The *Nelson* Court particularly underscored the point that the FSIA's "based upon commercial activity" language requires that such activity have more than a tenuous connection to commerce.<sup>172</sup> Rather than explicitly restricting the boundaries of "commercial activity," the Court narrowed the scope of conduct relevant in the analysis of whether a claim is "based upon" commercial activity.<sup>173</sup> This in turn implied that "commercial activity" should be broadly interpreted so as to limit the application of sovereign immunity.<sup>174</sup>

The *Nelson* Court's two-step analysis created an interpretive framework for determining commercial activity. It requires courts to strike a delicate balance between the necessity of continually limiting the reach of the sovereign immunity doctrine and the drawbacks of an all-encompassing definition of commercial activity.<sup>175</sup> When resolving questions of sovereign immunity in cases that raise a commercial activity exception, the Supreme Court has consistently limited the application of the doctrine.<sup>176</sup>

*B. Altering the Boundary of Commercial Activity: Odyssey's Flawed Application of the Weltover "Private Person Test"*

*1. The "based upon" test and Nelson*

Using the narrow scope of *Nelson*'s "based upon" test to identify the precise government act relevant to the commercial activity analysis should reveal that the claim for the *Mercedes* was based upon acts and services performed during its last voyage across the Atlantic.<sup>177</sup> Spain argued that at the time of its sinking, the *Mercedes*

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172. See *Saudi Arabia v. Nelson*, 507 U.S. 349, 358 (1993) (noting that although *Nelson* was recruited and employed by petitioners, these were not the bases of *Nelson*'s tort claim against them).

173. See Kevin Leung, Note, *Cicippio v. Islamic Republic of Iran: Putting the Foreign Sovereign Immunity Act's Commercial Activities Exception in Context*, 17 LOY. L.A. INT'L & COMP. L. REV. 701, 712 (describing the "based upon" test adopted by the Supreme Court in *Nelson* as a "more stringent" requirement compared to those previously used by the Court).

174. See *Nelson*, 507 U.S. at 358 n.4 ("We do not mean to suggest that the first clause of § 1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state . . .").

175. See *supra* Part I.C.1 (discussing Justice Souter's view that application of the commercial activity exception should only occur if the plaintiff's claim is based on commercial activity of a foreign state).

176. See *supra* Part I.A–C (cataloging the evolution of the sovereign immunity doctrine and the Supreme Court's decisions in cases involving the doctrine).

177. *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1166–68 (11th Cir. 2011), *cert denied*, 132 S. Ct. 2379 (2012).

was a Spanish Royal Navy Frigate commissioned by the Spanish government and operated by naval officers on a mission to collect funds from the Spanish Viceroyalties.<sup>178</sup> Therefore, the *Mercedes* should be characterized as a “warship” engaged in military noncommercial activity and granted immunity from judicial arrest under § 1609 of the FSIA because no commercial activity exception applied.<sup>179</sup>

This focus on the reason behind *Mercedes*’ trip to and from Peru merely goes to the but-for cause of its demise in the same way that Nelson’s employment contract was the but-for cause of his injuries.<sup>180</sup> Just as the *Nelson* Court was unpersuaded by the argument that Nelson’s claim was based upon his employment at the Saudi hospital,<sup>181</sup> the claim against the *Mercedes* should not have been based upon the Spanish government’s need to collect funds for its treasury.<sup>182</sup> Instead, the court should have separated the Spanish government’s reasons for dispatching the *Mercedes* to Peru from the specific act the ship engaged in and judged that act in light of the *Waltover* “private person test” to determine whether that act was commercial in nature.<sup>183</sup> Furthermore, it was not necessary for the court to determine that the *Odyssey* case was based entirely on Spain’s commercial activity.<sup>184</sup> So long as one element of *Mercedes*’ final mission involved activity that was commercial in nature, the Eleventh Circuit should not have rejected Odyssey Marine’s commercial activity argument.

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178. *See id.* at 1172 (stating that the Spanish Minister of the Navy dispatched the *Mercedes* and one other Spanish Royal Navy Frigate for the purpose of collecting and bringing back precious cargo from the Spanish Viceroyalty of Peru).

179. *See id.* at 1180 (discussing that vessels characterized as “warship[s]” are afforded special protection in international law).

180. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 363 (1993) (observing that Saudi Arabia’s recruitment and employment of Nelson, though commercial in nature, were not the bases for his tort claim).

181. *See generally* Part I.C.1 (discussing the Court’s approach to “based upon” analysis in *Nelson*).

182. *See, e.g.*, Brief of Appellee Kingdom of Spain at 17, *Odyssey*, 657 F.3d 1159 (No. 10-10269-J), 2010 WL 4279755 (describing the historical background and the reasons for which the *Mercedes* was dispatched on its final mission).

183. *See Nelson*, 507 U.S. at 360 (stating that the Court “emphasized in *Waltover* that whether a state acts ‘in the manner of’ a private party is a question of behavior, not motivation”).

184. *See BP Chems. Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677 (8th Cir. 2002). Relying on *Nelson*, the Eighth Circuit stated that “only one element of a plaintiff’s claim must concern commercial activity . . . . ‘The entire case need not be based on the commercial activity of the defendant.’” *Id.* at 682 (quoting *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000)).

## 2. *Applying the “private person test” to Odyssey*

In determining whether the *Mercedes* was engaged in commercial activity, the Eleventh Circuit initially looked to *Weltover* for guidance.<sup>185</sup> The court specifically noted that any analysis of the commercial character of an act demands a distinction between the nature and the purpose of that act.<sup>186</sup> However, when the court began considering the facts of the case, any adherence to the *Weltover* decision disappeared.<sup>187</sup>

Rather than basing its conclusion on an objective commercial activity analysis of the facts presented, the court accepted Spain’s skewed characterization of the *Mercedes*’ final voyage. The court emphasized that the *Mercedes* was a registered Spanish Navy vessel under the command of a Spanish Navy captain when it sank.<sup>188</sup> Its crew consisted of naval personnel, including officers, sailors, and marines.<sup>189</sup> However, evidence indicated that the gun decks of the *Mercedes*, an alleged “warship,” were altered to make room for additional paying passengers.<sup>190</sup> Civilian officers were among members of the crew, which was a prohibited practice under Spanish naval regulations during actual wartime.<sup>191</sup> With the exception of a small portion of government-owned cargo, the majority of the cargo on board the *Mercedes* belonged to private Spanish citizens;<sup>192</sup> a fact so indisputable that even Spain’s historical expert acknowledged it in a book he published prior to his involvement with the case.<sup>193</sup>

The court held that the *Mercedes*’ transportation of private cargo for a fee was a distinctly sovereign act because historians claimed that one of the military functions of the Spanish Navy in times of war or threatened war was to protect Spanish citizens and their property

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185. See *Odyssey*, 657 F.3d at 1176 (noting that the “Supreme Court clarified that an activity is commercial under the FSIA: ‘when a foreign government acts, not as regulator of a market, but in the manner of a private player within it’” (quoting *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614 (1992))).

186. See *id.* (referring to *Weltover* for support).

187. See *infra* Part II.B.2 (discussing *Odyssey*’s application of the *Weltover* “private person test” for commercial activity).

188. See *Odyssey*, 657 F.3d at 1177 (detailing the ship’s armaments, cargo, instructions, and composition of the crew to suggest that the vessel’s purpose was exclusively sovereign).

189. *Id.*

190. Appellant’s Reply Brief at 6, *Odyssey*, 657 F.3d 1159 (No. 10-10269-J), 2010 WL 4279758.

191. *Id.* (noting that both the master listed on the cargo manifest and the silver master were civilians, a fact the court conveniently chose not to address).

192. *Odyssey*, 657 F.3d at 1177.

193. See Appellant’s Reply Brief, *supra* note 190, at 6 (“describ[ing] the *Mercedes* as being laden with private cargo—wool, bark, cocoa, animal skins and other goods as well as privately owned specie” to the point of obstructing decks and passageways).

during their voyage across the Atlantic.<sup>194</sup> While it may be true that the Spanish Navy dispatched many ships to serve this exact purpose, the facts and circumstances surrounding the *Mercedes*' last voyage do not support Spain's assertion that it was performing a non-commercial military service when it sank. First, the *Mercedes*' manifest and all Bills of Lading<sup>195</sup> for the cargo held titles of "Comercio Libre," meaning "Free Commerce."<sup>196</sup> This is indicative of the commercial nature of the activity in which the vessel was engaged. Additionally, historical evidence revealed that in the aftermath of the sinking of the *Mercedes*, the Spanish government publicly denounced Britain's attack on the ship because "it was being used to transport passengers and cargo, *not as a warship*."<sup>197</sup> When the *Mercedes* sank, Spain encouraged treating those who lost assets onboard as "private claimants . . . [whose] only recourse was to seek relief from the British government."<sup>198</sup> These facts show that Spain acknowledged the *Mercedes*' status as something other than a warship immediately prior to its sinking, and suggest that Spain was not exercising military power unique to a sovereign.

Despite strong evidence to the contrary, the Eleventh Circuit applied the *Weltover* "private person test" to the facts of *Odyssey* and reached the questionable conclusion that the *Mercedes* was not engaged in commercial activity when it sank.<sup>199</sup> In the court's view, "the *Mercedes* was not act[ing] like an ordinary private person in the marketplace."<sup>200</sup> However, what the court failed to consider was that under the *Weltover* "private person test," the relevant inquiry for determining commercial activity is whether a sovereign's act is the type of activity in which a private party can also engage.<sup>201</sup> It matters

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194. *See id.* (noting the particular importance of this role during the 18th and 19th centuries, when Spanish ships voyaging between Spain and the Americas frequently passed through territory controlled by hostile nations' warships).

195. A bill of lading is a printed document issued by the ship's master to the shipper to acknowledge the receipt of goods, identify the party authorized to accept delivery, and specify the terms under which the goods are transported. NICHOLAS J. HEALY ET AL., *CASES AND MATERIALS ON ADMIRALTY* 347 (5th ed. 2011).

196. Appellant's Reply Brief, *supra* note 190, at 7–8.

197. Appellant's Opening Brief at 9, *Odyssey*, 657 F.3d 1159 (No. 10-10269J), 2010 WL 4279754.

198. *Id.*

199. *See Odyssey*, 657 F.3d at 1178 (concluding that "[b]ecause Spain was acting like a sovereign, not a private person in the marketplace . . . the *Mercedes* was not conducting commercial activity and is immune from arrest under the FSIA").

200. *Id.* at 1177 (internal quotation marks omitted).

201. *See Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614–15 (1992) (comparing the fact that a government's issuance of currency exchange regulations is sovereign activity because private parties cannot exercise such authority, but a government contracting for sale or purchase of goods is commercial activity because private companies can do the same).



not whether a private party did or did not engage in that activity.<sup>202</sup> Rather, what matters is that a private person *could* act in the same way.<sup>203</sup>

In the case of *Odyssey*, whether a private party can also engage in the same activities as those carried out by the *Mercedes* must be answered in the affirmative, thus making it commercial activity.<sup>204</sup> The *Mercedes* charged private citizens a fee for transportation of their personal properties, which accounted for over seventy-five percent of the cargo on board.<sup>205</sup> Drawing on *Weltover*'s example qualifying a government's purchase of army boots or bullets as commercial activity because a private consumer could make a similar transaction, the Spanish Navy's transportation of its private citizens and their personal properties and assets should also have been considered commercial activity because a privately owned shipping company could have just as easily been hired to perform the same service.<sup>206</sup> In addition, Justice White's concurrence in *Nelson* suggested that activities typically attributed to sovereigns, such as the exercise of police power, could be considered commercial depending upon the circumstances.<sup>207</sup> Therefore, the Eleventh Circuit should not have allowed Spain's classification of the *Mercedes* as a warship to control its commercial activity analysis.

Moreover, with respect to the nature versus purpose dichotomy of the commercial activity analysis, the fact that a private shipping company could have engaged in the activity indicates that it was the nature of the activity that was commercial, not the purpose.<sup>208</sup> Because the act of transporting privately owned property is not

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202. See *id.* (clarifying that "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") (internal quotations marks omitted).

203. See *id.* (discussing that the Bonods were simple debt instruments, and therefore commercial, because they could be held, bought, sold, and traded by private individuals).

204. See *supra* Part I.B (analyzing the Court's reasoning in *Weltover* and its adoption of the "private person test" for commercial activity and applying it to the *Mercedes*).

205. *Odyssey*, 657 F.3d at 1177.

206. See *Weltover*, 504 U.S. at 614–15 (describing how "a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods").

207. *Saudi Arabia v. Nelson*, 507 U.S. 349, 365–68 (1993) (White, J., concurring) (speculating that the circumstances surrounding an activity should dictate whether or not it is commercial).

208. See *supra* Part I.B (summarizing the Court's decision in *Weltover* and the significance of distinguishing between an act's nature and purpose in the "private person test"). See generally *Weltover*, 504 U.S. at 607 (discussing that it is the nature of an activity and not the purpose of that activity that controls the commercial activity analysis).

inherently sovereign in nature, the Eleventh Circuit should have concluded that the *Mercedes* was engaged in commercial activity when it sank.

### 3. *Salvaging the restrictive theory of sovereign immunity*

Even if the Eleventh Circuit had concluded that commercial activity was involved, the question still remained whether the *Mercedes* was entitled to immunity from arrest under § 1609 of the FSIA. Although the court quickly dismissed Odyssey Marine's argument that the Geneva Convention provided for a commercial activity exception to immunity from arrest under § 1609 for state-owned and operated vessels,<sup>209</sup> it could have arrived at an entirely different conclusion had it considered the issue in light of the evolution of the sovereign immunity doctrine within the United States and internationally.

The Geneva Convention became law in the United States long before the enactment of the FSIA in 1976.<sup>210</sup> Yet, at the time, the United States was no stranger to a developing restrictive theory of sovereign immunity.<sup>211</sup> By reconciling the United States' ratification of the Geneva Convention with other legislative and judicial actions, one can argue that becoming a party to the treaty was simply another step toward limiting the scope of the sovereign immunity doctrine.<sup>212</sup> The language of the Geneva Convention suggests that state-owned and operated vessels are not entitled to claims of sovereign immunity merely because of the sovereign nature of their owner.<sup>213</sup>

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209. See *Odyssey*, 657 F.3d at 1176 (stating that the Geneva Convention merely created "an affirmative grant of immunity to vessels engaged in 'non-commercial service,'" but did not "appear to create a commercial activity exception to § 1609's immunity to arrest").

210. See Geneva Convention, *supra* note 120, at 2315 (creating immunity for state-owned ships involved in non-commercial activity, as enacted in 1958).

211. See *supra* Part I.A (discussing the development of the doctrine of sovereign immunity and the restrictive theory the United States adopted and codified in the FSIA).

212. See Tate Letter, *supra* note 40 (addressing the international trend toward a restrictive theory of sovereign immunity and the benefits of embracing that theory domestically); see also H.R. REP. NO. 94-1487, at 7 (1976) (discussing the enactment of the FSIA for the purpose of "codify[ing] the so-called 'restrictive' principle of sovereign immunity as presently recognized in international law"). See generally *supra* Part I.A (summarizing the restrictive approach taken by the United States in regard to sovereign immunity).

213. See Geneva Convention, *supra* note 120, at 2315 (providing that [s]hips owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction and any State other than the flag State"). By using the language "used only on government non-commercial service," the Convention created an exception in which state-owned and operated vessels or commercial service are not entitled to sovereign immunity. *Id.*

Given this historic progress toward limiting the applicability of sovereign immunity, the *Odyssey* court erred when it failed to take into account the implications of the Geneva Convention. Because § 1609 of the FSIA subjects the grant of immunity from arrest to the Geneva Convention,<sup>214</sup> the court should have seriously considered the contention that the treaty created a commercial activity exception under the FSIA.<sup>215</sup> In addition, the court did not discuss the applicability of the SMCA in its commercial activity analysis.<sup>216</sup> Had the court entertained the SMCA's treatment of military vessels engaged in commercial activity in terms of sovereign immunity, it may have found further support for both the argument that the *Mercedes* was engaged in commercial activity and that the Geneva Convention created a commercial activity exception to § 1609's immunity to arrest state-owned vessels.<sup>217</sup>

#### CONCLUSION

The Eleventh Circuit's decision in *Odyssey* has potentially significant consequences for the futures of the commercial activity analysis and the salvage of historic shipwrecks. As *Odyssey Marine* demonstrated, shipwreck salvage efforts can be both time-consuming and costly.<sup>218</sup> This is especially true for historic shipwrecks because of the uncertainty over the precise location of the wreck, and a greater likelihood that the vessel and artifacts are scattered over the ocean floor.<sup>219</sup> Because the passage of time does not affect a State's

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214. 28 U.S.C. § 1609 (2006) ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter."); see also Geneva Convention, *supra* note 120, at 2315 (same).

215. See Appellant's Opening Brief, *supra* note 197, at 35–36, (arguing that since "[t]he FSIA expressly incorporates international law rules into its determination of foreign sovereign immunities . . . the *Mercedes* would not be immune from a salvage proceeding such as this" (emphasis added)).

216. See *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1180–81 (11th Cir. 2011) (addressing the SMCA only in regard to the connection between cargo and vessel for immunity purposes), *cert denied*, 132 S. Ct. 2379 (2012).

217. See Christine Nicole Burns, Note, *Finders Weepers, Losers Keepers: The Eleventh Circuit Denies Salvage Company's Claims to a Sunken Military Vessel Found in International Waters in Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 36 TUL. MAR. L.J. 803, 813–15 (2012) (making the case for a commercial activity finding for the *Mercedes* using the language of the SMCA); see also *supra* notes 136–141 and accompanying text (discussing the lack of sovereign immunity protection afforded to military vessels engaged in commercial service).

218. See Appellant's Opening Brief, *supra* note 197, at 5–6, (describing the process of discovering the *Mercedes* as having cost "a great deal of time, money, technology and effort").

219. See Allison Leigh Richmond, *Scrutinizing the Shipwreck Salvage Standard: Should*

property interest in its sunken military vessels like the *Mercedes*, any money and time spent on salvaging these shipwrecks will likely go uncompensated.<sup>220</sup> Therefore, allowing foreign states to claim sovereign immunity for any ship that may be characterized as a state-owned or military vessel without regard to the nature of its use prior to sinking will disincentivize future salvage of sunken state-owned vessels or vessels whose ownership are in dispute or unknown.<sup>221</sup> A potential compromise for preserving sovereign immunity for sunken state-owned vessels without deterring private salvage companies like Odyssey Marine from continuing their work would be to offer a reward or compensation for salvage efforts.<sup>222</sup>

The progress of the sovereign immunity doctrine since the 1950s indicates that foreign states are no longer afforded unqualified protection from the jurisdiction of U.S. courts. Congress's codification of the restrictive theory of sovereign immunity via the enactment of the FSIA demonstrates its intent to impose significant limits on the doctrine, especially with regard to commercial activities of foreign states. Moreover, the Supreme Court's decisions in both *Weltover* and *Nelson* conform to this shift towards restricting the applicability of sovereign immunity.

*Odyssey* suggests that state ownership and involvement, combined with a non-commercial motivation, are sufficient for an act to be characterized as "sovereign" rather than "commercial."<sup>223</sup> While it is

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*a Salvor be Rewarded for Locating Historic Treasure?*, 23 N.Y. INT'L L. REV. 109, 140–42 (2010) (stating that compared to modern shipwrecks, more research, time and effort must be spent on the salvage of historic shipwrecks because of the lack of information on the final resting place of the sunken vessel, which when found, are often broken in pieces and scattered).

220. See *Odyssey*, 657 F.3d at 1182 (affirming the lower court's decision ordering Odyssey Marine to return the recovered artifacts to Spain).

221. See Richmond, *supra* note 219, at 138 (describing the standard compensation scheme for "private individuals who have recovered 'treasures and artifacts' from historic shipwrecks").

222. See *Int'l Aircraft Recovery, L.L.C. v. Unidentified, Wrecked & Abandoned Aircraft*, 218 F.3d 1255, 1263 (11th Cir. 2000) (suggesting that the salvage company "may be eligible for a salvage award for [its] past efforts" in salvaging a United States Navy torpedo bomber that crashed in international waters during World War II); see also Burns, *supra* note 217, at 815 (proposing that courts should at least entertain the idea of allowing salvors to be compensated for discovering historic shipwrecks). But see *Sunken Military Craft Act*, Pub. L. No. 108-375, § 1406(d), 118 Stat. 2094, 2097 (2004) (codified at 10 U.S.C. § 113 note (2006)) (declaring that the law of salvage does not apply to any United States sunken military craft, wherever located; or any foreign sunken military craft located in U.S. waters).

223. See *supra* Part II.B.1 (discussing the Eleventh Circuit's analysis of commercial activity in *Odyssey*); see also McCarthy, *supra* note 109, at 909–10 (drawing attention to the loophole that exists in the analysis of commercial activity under the FSIA by pointing out that "so long as a foreign state utilizes a government entity, it can opt-in or opt-out of United States courts' jurisdiction at will").

possible that the court's decision reflected its effort to appease Spain and promote international comity, and thereby signal an expectation that other nations who discover sunken U.S. warships will do the same, it is nevertheless contradictory to the *Weltover* "private person test."<sup>224</sup> More importantly, the Eleventh Circuit's commercial activity analysis runs counter to the progress Congress and the Supreme Court have made in limiting the scope of sovereign immunity; a development that will further confuse the application of the interpretive frameworks for the FSIA's commercial activity exceptions.<sup>225</sup> To avoid setting a troubling standard for future determinations of sovereign immunity, courts should apply the two-step analysis developed in *Weltover* and *Nelson*, and adhere to the principle that if a sovereign acts like a private party when engaging in commerce, it should be treated like one under the FSIA.

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224. Compare *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 617 (1992) (holding "that Argentina's issuance of the Bonods was a 'commercial activity' under the FSIA"), with *Odyssey*, 657 F.3d at 1177 (concluding that, given the evidence, the *Mercedes* was exercising powers reserved for a sovereign rather than acting as a "private person" when it sank).

225. See *supra* Part I.A–D (summarizing the actions taken by both Congress and the Supreme Court in their efforts to limit the scope of the sovereign immunity doctrine by developing a broad interpretation of the commercial activity exceptions).