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Slaying the Leviathan: How Inconsistent Restrictions on State Immunity Undermine the Rule of Law

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SLAYING THE LEVIATHAN: HOW INCONSISTENT RESTRICTIONS ON STATE IMMUNITY UNDERMINE THE RULE OF LAW

BAILEY ROE*

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* J.D. Candidate, May 2021, American University Washington College of Law; B.A. in International Studies, 2016, American University. My sincerest thanks go to Professor Susan Franck, who regularly inspires me. She used this Comment's instant case to test my understanding of international business transactions and has spent countless hours since fueling my love for systems. Also, to Pete, Shelly, Jamie, Blue, et al. – thank you for your endless support of me and my passions. Without you all, this piece would not exist.

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I. INTRODUCTION

Judiciaries around the globe developed out of the premise that people who are wronged should have an opportunity to seek relief in an institutionalized forum.[1] This access to justice principle is foundational to both the domestic and the international rule of law.[2]

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1. *See* United Nations, *Access to Justice*, https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/ (last visited Oct. 5, 2019) ("Access to justice is a basic principle of the rule of law. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable."); *see also* United Nations Development Programme [UNDP], *Access to Justice*, https://www.undp.org/content/undp/en/home/2030-agenda-for-sustainable-development/peace/rule-of-law--justice--security-and-human-rights/access-to-justice.html (last visited Jul. 4, 2020) (affirming the U.N. position on access to justice and the rule of law); Ginevra Peruginelli, *Law Belongs to the People: Access to Law and Justice*, 16 LEGAL INFO. MGMT. 107, 107–08 (2016) (describing how the rule of law is partially based upon "the institutions that produce, implement and enforce [the law]").

2. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR] art. 6, Nov. 4, 1950, 213 U.N.T.S. 221 (articulating

The codification of this principle in national judiciaries, however, does not always ensure that people have access to judicial review.[3]

State immunity presents one limitation on parties' rights to bring suit in national judicial forums.[4] This form of immunity protects foreign states from being subject to suit in other nations' judiciaries and is expressly recognized by many international cases over the last several centuries.[5] While this restraint has not always conflicted with expectations of fair access to justice, globalization has altered the calculus surrounding state immunity from suit.[6] As foreign direct investment and international commercial activities increased, many states placed restrictions on state immunity and have allowed suit against foreign nations to proceed in certain circumstances.[7] The most

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the "Right to a Fair Trial"); The Magna Carta of Edward 1, 1297, 25 Edw. 1., cl. 29 [hereinafter Magna Carta] (describing a person's right to access "the lawful judgment of his Peers or by the Law of the Land.").

3. *See* Jan Paulsson, *Enclaves of Justice*, U. OF MIAMI LEGAL STUD., Apr. 2007, at 2–3 (suggesting that justice is "a surprising anomaly" and that the assumption of injustice being abnormal is erroneous).

4. *See* Kyp Koumi, *Sovereign Immunity: The Restrictive View Grows*, 10 LAW TCHR. 101, 101 (1976) (describing a state's entitlement to proper respect for its dignity and independence).

5. *See, e.g.*, Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, ¶ 58 (Feb. 14) (reiterating that state immunity from suit is customary international law and provided to state actors for the purpose of ensuring that they are fully able to serve in the role of state); The Parlement Belge Case, 1880, 5 P.D. 197, 207–08 (finding that an ambassador to a country must be given state immunity to protect the independence and equality of the state from which they hail).

6. *See generally* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994] (creating the World Trade Organization (WTO), where international issues can be reviewed by an international judicial forum); Consolidated Version of the Treaty on European Union, Feb. 7, 1992 O.J. (C 202) (promoting economic integration and trade within the European Union); The Organisation for Economic Co-Operation and Development [OECD], *Declaration on International Investments and Multinational Enterprises*, OECD Doc. OECD/LEGAL/0144 (June 21, 1976) [hereinafter OECD Declaration] (providing for a more open and transparent investment environment between the declaration's signatories); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 1, Mar. 18, 1965, 575 U.N.T.S. 159; 17 U.S.T. 1270 [hereinafter ICSID] (establishing an institution dedicated to administering international arbitrations).

7. *See* Francesco Francioni, *Access to Justice, Denial of Justice and International Investment Law*, 20 EUR. J. INT'L L. 729, 731–32 (2009) (explaining how the rise of investment arbitration has pushed access to justice on an international

common limitation on state immunity allows people to bring suit against a state that is engaging in private commercial activities.[8]

The basis of this type of restriction is the idea that states acting as corporations should not receive the same immunity from suit that nations engaging in sovereign activities enjoy.[9] Unfortunately, as this paper will show, some states have allowed their commercial restrictions on state immunity to contradict one another, thus creating an access to justice problem for potential litigants.[10] This contradiction undermines the rule of law because the process that a party is entitled to fails to match that to which it has access.[11]

Part II of this paper provides background on access to justice and governmental immunity principles, information on the U.S. Foreign Sovereign Immunities Act (FSIA) and act of state doctrine, and necessary context related to this Comment's focus case (*Sea Breeze Salt Inc. v. Mitsubishi*).[12] Part III analyzes the conflict between access to justice rights and governmental immunity. It demonstrates how improper management of the tension between these two legal concepts injures parties seeking redress for harm done by governmental actors and weakens the international rule of law.[13] Part IV recommends the implementation of statutory provisions that better address situations where inconsistent state immunity doctrines are found.[14] In the absence of these provisions, this paper also suggests that companies

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level to the point of being customary international law).

8. *See* Winston P. Nagan & Joshua L. Root, *The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory*, 38 N.C. J. INT'L L. & COM. REG. 375, 410–11, 417 (2013) (outlining the various restrictions on state immunity).

9. *See* William Harvey Reeves, *Leviathan Bound-Sovereign Immunity in a Modern World*, 43 VA. L. REV. 529, 545, 549 (1956) (describing pure state immunity as an "anachronistic survival of monarchical privilege" and describing how commercial acts must "appear no different from other (non-governmental) commercial transactions").

10. *See, e.g.*, Complaint at 20, Sea Breeze Salt, Inc. v. Mitsubishi, 899 F.3d 1064 (9th Cir. 2018) (No. 2:16-cv-02345) (requesting relief in the form of $100 million for Innofoods and $500 million for Sea Breeze Salt, Inc.).

11. *See* Paulsson, *supra* note 3, at 2–3 (highlighting how a failure to provide process undermines the rule of law and erodes public confidence in courts).

12. *Infra* Part II.

13. *Infra* Part III.

14. *Infra* Part IV.

and individuals think strategically about their structures and partners.[15] Finally, Part V will conclude by describing how a failure to remedy the inconsistency in its state immunity doctrines would lead the United States to undermine the international rule of law.[16]

II. BACKGROUND

A. ACCESS TO JUSTICE AND THE INTERNATIONAL RULE OF LAW

The international rule of law is premised upon the idea that people, entities, and states all have rights and obligations that deserve institutional protection.[17] When the right to seek judicial review and the violation of a recognized right combine, the rule of law requires that an individual have access to legal processes for determining the appropriate remedy.[18] This principle is foundational to national, regional, and international judicial systems.

At the national level, many countries expressly provide for rights to a fair trial, due process, and access to justice.[19] These rights can be found in constitutions, civil codes, bills of rights, and other primary legal documents in countries throughout North America,[20] South

15. *Infra* Part IV.

16. *Infra* Part V. Conclusion

17. *See generally* Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331, 336, 355 (2008) (describing the role "process" plays in understanding the rule of law at both the national and international level).

18. *See id.* at 355 (noting how, subject to a few State-mandated restrictions, the "clear normative regime" related to the rule of law requires process guarantees). *But see* Paulsson, *supra* note 3, at 2–3 (noting that this idealistic view of the rule of law is far from the reality).

19. *See* COMPARATIVE CONSTITUTIONS PROJECT, RIGHT TO A FAIR TRIAL 3–9 (Aug. 5, 2008), https://comparativeconstitutionsproject.org/files/cm_archives/right_to_a_fair_trial.pdf?6c8912 (providing "sample constitutional provisions" on rule of law principles).

20. *See, e.g.*, U.S. CONST. amend. XIV (requiring that U.S. citizens not be deprived of "life, liberty, or property, without due process of law"); Constitución Política de los Estados Unidos Mexicanos, CP, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014, arts. 14, 17 (Mex.) (outlining the Mexican right to due process).

America,[21] Europe,[22] Asia,[23] and Africa.[24]

At the regional level, the idea of access to justice is found in several multinational treaties.[25] While these treaties predominately speak to fair trial arising as a requirement in situations of criminal prosecution, regional courts have found these rights applicable in civil case settings as well.[26]

Finally, at the international level, several important treaties include judicial process rights at the forefront of their obligations.[27] In all cases, nationally, regionally, and internationally, the described "right" signifies access to justice in the form of an institutionalized process.

In the commercial sphere, access to justice on an international level has expanded over the last few centuries.[28] As global commercial activities became more common, so did the need for cross-border

21. *See, e.g.*, CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5(LIV) (Braz.) (providing the Brazilian equivalent of a right to trial).

22. *See, e.g.*, Arts. 24, 111, 113 Costituzione [Cost.] (It.) (articulating the Italian right to be heard in court); CONST. PORT., 1976, arts. 20, 32, 268(4)–(5) (providing Portuguese citizens "[a]ccess to law and effective judicial protection"); Magna Carta, *supra* note 2, cl. 29 (providing the right to "lawful judgment").

23. *See, e.g.*, XIANFA art. 130 (1982) (China) (detailing the Chinese right to a public trial); RADTHATHAMMANOON [CONSTITUTION] 1997, B.E. 241, sec. 29 (Thai.) (outlining the right to a trial in criminal matters); NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 37, para. 1 (Japan) (describing the Japanese right to a criminal trial).

24. *See, e.g.*, S. AFR. CONST., 1996, arts. 34, 35.3 (providing the South African right to due process).

25. *See, e.g.*, African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 245, arts. 3, 7, 26 [hereinafter Banjul Charter] (outlining the importance of the right to access judicial process); ECHR, *supra* note 2, art. 6 (outlining the right to a criminal trial); Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, arts. 3, 8, 9, 10 (outlining the importance of judicial process to human rights).

26. *See generally, e.g.*, Apeh v. Hungary, 2000-X Eur. Ct. H.R. 361 (noting that due process rights apply in both the civil and criminal context).

27. *See, e.g.*, International Covenant on Civil and Political Rights arts. 14, 16, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (describing the right to a fair trial); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 10 (Dec. 10, 1948) ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.").

28. *See* Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 858–60 (noting differences between first and second-generation international adjudication).

dispute resolution.[29] This need has led to the rise of international agreements that regulate transnational activity, which in turn has increased the use of international fora for transnational dispute resolution.[30] Multinational disputes can be resolved in a variety of settings, including before international institutions, in confidential arbitral proceedings, and within national courts.[31]

While access to justice in this area is expansive, especially with the rise of alternative fora of dispute resolution, it is not unlimited.[32] For various political, cultural, and economic reasons, many countries and institutions place barriers in the path of obtaining judicial review within their given jurisdictions.[33] One such barrier is state immunity from suit.[34]

B. INTERNATIONAL THEORIES OF STATE SOVEREIGNTY AND IMMUNITY FROM SUIT

While sovereign states are not the only actors on the world stage, they are critical ones.[35] As such, they are afforded special immunity

29. *See, e.g.*, GATT 1994, *supra* note 6, at 23 (establishing the WTO, where international trade issues are reviewed by an international judicial forum).

30. *See generally* Born, *supra* note 28, at 859–67 (analyzing the development and success of international adjudication).

31. *Compare* Matteo P. Arena & Stephen P. Ferris, *A Global Analysis of Corporate Litigation Risk and Costs*, 56 INT'L REV. L. & ECON. 28 (2018) (analyzing litigation in the commercial sphere as one option for resolving disputes), *with* Susan D. Franck, *The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties Have a Bright Future*, 12 U.C. DAVIS J. INT'L L. & POL'Y 47, 52–55 (2005) (describing international treaty arbitration as another dispute resolution option available to commercial parties).

32. *See* Chesterman, *supra* note 17, at 350–55 (noting that while a domestic legal order may be able to place the sovereign "in a vertical hierarchy with other subjects of law," international organizations such as the WTO, the I.C.C., and the United Nations are not yet "autonomous and complete jurisdictions in a manner comparable to the national legal systems that gave rise to the concept of rule of law").

33. *See* Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1090–1100 (2015) (outlining "avoidance doctrines" that the United States uses to keep transnational cases that are too "foreign" from being reviewed in U.S. courts).

34. *See* Koumi, *supra* note 4, at 101 (describing the widespread acceptance of state immunity).

35. *See generally* DAVID A. LAKE, THE STATE AND INTERNATIONAL RELATIONS (2007) (highlighting the importance of the state and outlining the main theories that seek to describe the role of the state in international relations theory).

from suit in many national courts around the globe.[36] By applying state immunity to national judicial proceedings, countries limit plaintiffs' opportunities to bring an action directly against a foreign sovereign.[37] There are two main theories of state immunity—absolute and restrictive.[38]

1. Absolute Immunity and the Leviathan State

The first approach, absolute immunity, is based upon the idea of an absolute or Leviathan sovereign with unchecked power over its people.[39] When Thomas Hobbes, a seventeenth-century English philosopher, spoke of the "social contract" between states and peoples, he described a relationship wherein an absolute state would offer protection and security to its people in exchange for unquestioned authority.[40]

Under a Leviathan theory of state immunity, there are no situations where a state would be subject to suit in a national court.[41] In terms of the international rule of law, so-called "rights violations" committed by states are not violations at all, because the state has the capacity to do whatever it pleases.[42]

2. General Welfare States and the Sovereign Corporation

Alternatively, the second theory of state immunity—the restrictive theory—provides wider access to justice to the detriment of unlimited

36. *See, e.g.*, Foreign Sovereign Immunities Act, 28 U.S.C.A. §§ 1330, 1391(f), 1441(d), 1602–11 (1976) [hereinafter FSIA] (providing foreign states immunity from suit within U.S. national courts).

37. *See* George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 476–78 (1953) (providing historical background of the doctrine of sovereign immunity).

38. *See*, Koumi, *supra* note 4, at 101 (explaining the various theories of state or sovereign immunity).

39. *See* Reeves, *supra* note 9, at 531 (describing the Leviathan state as an absolute sovereign with absolute, unquestioned authority).

40. *See id.* at 530–32 (detailing Thomas Hobbes' description of the social contract between Leviathan states and their people).

41. *See id.* at 531 (describing how Hobbes "endow[ed] sovereignty with those same qualities which Rome attributed to it: *superior* right, *all* power, *every* privilege, *absolute* immunity").

42. *See id.* at 531–32 (noting that a state cannot violate rights because it "ow[es] nothing but physical defense to the people over whom it ruled").

sovereign power.[43] While international custom may compel states to offer one another some form of immunity, it does not require that this immunity be absolute.[44] Under the restrictive theory, the state operates as a protector of the general welfare, and not as an absolute authority.[45] People grant sovereignty to the general welfare state in exchange for social, political, and economic support and protection.[46]

When providing these forms of support and protection, the state will often engage in commercial activity, both domestically and transnationally.[47] When this happens, the state essentially acts as a sovereign corporation.[48] It simultaneously enjoys the flexibility and privacy of a corporate entity with the limited liability of the state.[49]

In response to this development, state legislatures in restrictive theory jurisdictions have transitioned to providing immunity only in cases where a foreign government is acting predominantly as a government and not as a commercial entity.[50] Of course, determining when a government is acting as a commercial agent (or when a commercial agent is acting as a government) is a complex exercise. Rather than provide an exhaustive list of factors that can go into these

43. *See* Koumi, *supra* note 4, at 101 (describing how the restrictive theory is considered sanctioned by customary international law).

44. *See generally id.* (noting the transition away from the absolute theory and recognizing that this shift has a ripple effect on what constitutes international customary law).

45. *See* Nagan & Root, *supra* note 8, at 410–17 (explaining that the restrictive theory of sovereign immunity bifurcates sovereign immunity between commercial and non-commercial activity).

46. *See* Reeves, *supra* note 9, at 537–38 (describing the "general welfare" state as a product of modern extensions to the social contract).

47. *See* Nagan & Root, *supra* note 8, at 411 (highlighting the increased "commercial interactions between states" and describing how the commercial exception was the "first categorical exception to the rule").

48. *See* Reeves, *supra* note 9, at 530 (noting that "[c]orporate sovereignty is stronger than the sum total of all of its parts and has attributes and qualities which none of them possess").

49. *See id.* at 530–32 (describing how the sovereign corporation would enjoy public and private rights to the detriment of the people it ruled over).

50. *See* Nagan & Root, *supra* note 8, at 422–23 (explaining how the United Kingdom, the United States, South Africa, Singapore, Argentina, Israel, Japan, Pakistan, and Canada have all transitioned into a restrictive version of state immunity); *see also, e.g.*, State Immunity Act, R.S.C. 1985, c S-18, art. 5 (Can.) (establishing restricted immunity for states in Canada in cases which "relate to any commercial activity of the foreign state").

analyses, this paper will look at how the United States has integrated commercial activity exceptions into its two primary immunity doctrines—the Foreign Sovereign Immunities Act (FSIA) and the common law act of state doctrine.[51]

C. RESTRICTIVE STATE IMMUNITY DOCTRINES IN THE UNITED STATES

1. *The Foreign Sovereign Immunities Act (FSIA)*

The United States codifies the restrictive theory of state immunity via the Foreign Sovereign Immunities Act (FSIA).[52] The FSIA allows foreign governments to avoid suit in the United States by providing them with state immunity.[53] While state immunity is the default under the FSIA, there are exceptions that allow plaintiffs to bring suit against foreign states in U.S. national courts.[54] Under these exceptions, if a state violates another party's rights, immunity is not provided and the aggrieved party is due a judicial process.[55]

This paper focuses on the commercial exception captured in §1605(a)(2) of the FSIA.[56] This exception targets instances when a foreign state acts as a commercial agent and influences commercial activity in the United States.[57] The foreign state's influence can be either direct through actions taking place within U.S. territory, or

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51. *Infra* Part II.C.1. (Foreign Sovereign Immunities Act (FSIA)); Part II.C.2 (Act of State Doctrine).

52. *See* FSIA, 28 U.S.C. § 1605 (1976) (declaring the United States' intent to limit state immunity).

53. *See id.* § 1604 ("Subject to existing international agreements . . . a foreign state shall be immune from the jurisdiction of the courts of the United States.").

54. *See id.* § 1605 (outlining the "[g]eneral exceptions to the jurisdictional immunity of a foreign state").

55. *See id.* § 1605(a) (clarifying that "a foreign state *shall not be immune*" under the exceptions in this section) (emphasis added).

56. *See id.* § 1605(a)(2) ("[A] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.").

57. *See id.* (requiring a connection between the United States and the commercial activity of the foreign state).

indirect through ripple effects from extranational conduct resulting in consequences in the United States.[58] In either case, the FSIA serves as a symbol of the legislative branch's decision that a state acting as a corporation will not receive immunity in U.S. national courts.[59]

2. *Act of State Doctrine*

The common law act of state doctrine also provides a form of state immunity to foreign sovereigns.[60] This doctrine requires that U.S. courts decline jurisdiction in cases involving the review of a foreign sovereign's actions.[61] Defendants have used it as a defense, a jurisdictional barrier, a choice of law rule, a rule of evidence, and an avoidance doctrine.[62]

The act of state doctrine developed out of common law in response to policy concerns surrounding the U.S. judiciary's role in international relations.[63] In 1897, the U.S. judiciary first grappled with these concerns in adjudicating *Underhill v. Hernandez*, a case where a U.S. citizen working in Venezuela made a series of requests to a Venezuelan military official, all of which were denied.[64] The sitting Court ruled in favor of the Venezuelan government official, noting that his actions were those of the Venezuelan government and that it would

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58. *See id.* (describing how an effect on U.S. commerce may satisfy the requirements of this exception).

59. *See id.* (providing that a foreign state engaging in commercial activity which affects the United States will not be granted immunity).

60. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (describing how, under the act of state doctrine, the judiciary "will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law").

61. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 (AM. LAW INST. 1987) (providing a summary of how the United States and its courts have understood and applied the act of state doctrine).

62. *See generally Sabbatino*, 376 U.S. 398 (providing a major case in which a defendant used the act of state doctrine to avoid review by a U.S. court).

63. *See* Michael J. Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PENN. L. REV. 325, 330–44 (1986) (describing the emergence and evolution of the act of state doctrine in the common law).

64. *See generally* 168 U.S. 250 (1897) (providing an overview of the facts of the case).

be improper for any U.S. court to judge the validity of that conduct.[65] *Underhill* emphasized the need for a separation of powers between the three branches of government – executive, legislative, and judicial – when diplomatic relations with other countries are involved.[66] The Court decided ultimately that the validity of the military official's conduct was a matter for the executive or legislative branch, and not the judiciary.[67] Thus, it refused to award the U.S. plaintiff any relief.[68]

Roughly seventy years later, in 1964, the U.S. Supreme Court further developed this doctrine in *Banco Nacional de Cuba v. Sabbatino*, largely basing its decision on the findings in *Underhill*.[69] In *Sabbatino*, the Court determined whether a governmental taking executed by the Cuban government amounted to a form of expropriation that breached Cuba's duties under customary international law.[70] The Court held that it was not the responsibility of U.S. courts to judge the validity of acts committed by foreign, sovereign governments.[71] For this reason, the Court remanded the case without an affirmative ruling for either party involved.[72]

Sabbatino articulated for the first time the four elements that support an act of state doctrine argument: (1) a U.S. court must be adjudicating the case; (2) the act in question must be public or governmental; (3) the sovereign must be recognized by the United States; and (4) the action must have been taken by the foreign

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65. *See id.* at 252–54 (outlining the facts of the case and the foreign policy concerns underlying judicial decisions of this nature).

66. *See id.* at 252 (holding that "the courts of one country will not sit in judgment on the acts of the government or another, done within its own territory," implying that the responsibility for addressing grievances committed by a foreign sovereign lies with the political branches of the government).

67. *See id.* at 254 ("We think the circuit court of appeals was justified in concluding 'that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government.'").

68. *See id.* at 250, 254 (affirming the circuit court's decision).

69. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416–17 (1964) (noting that "[t]he classic American statement of the act of state doctrine . . . is found in Underhill" and that no subsequent cases "in which the act of state doctrine was directly or peripherally involved manifest any retreat from Underhill").

70. *See id.* at 414–15 (outlining the jurisdictional issue presented to the court).

71. *See id.* at 439 ("[T]he act of state doctrine proscribes a challenge to the validity of the Cuban expropriation decree in this case.").

72. *See id.* (reversing the lower court's holding and remanding the case).

sovereign within the territory of the sovereign.[73]

Much like the FSIA, the act of state doctrine applies to the "sovereign corporation."[74] Some legal practitioners believe that there is a commercial activity exception to the act of state doctrine, while others believe that commercial activity taken either directly or indirectly by a foreign government fails to meet the threshold elements of *Sabbatino* in the first instance.[75] Regardless of the approach, when a government acts as a corporation, the act of state doctrine will not step in and prevent a U.S. court from reviewing the action in question.[76]

Examining courts are often asked to evaluate actions taken by corporations with governmental characteristics, flipping the question of commerciality.[77] When this occurs, the act of state doctrine requires judges to ask not whether a state is acting as a corporation, but whether a corporation is acting as a state.[78] The Ninth Circuit recently grappled with this in *Sea Breeze Salt Inc. v. Mitsubishi*.[79]

3. Sea Breeze Salt Inc. v. Mitsubishi and the Application of Foreign State Immunity

In *Sea Breeze Salt Inc. v. Mitsubishi*, two corporate plaintiffs asked

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73. *See id.* at 401 (describing the act of state doctrine).

74. *See* Bazyler, *supra* note 63, at 370 (discussing how sovereigns are not immune when engaged, directly or indirectly, in commercial activity under the act of state doctrine).

75. *See id.* (describing commercial activity as an exception to the act of state doctrine); *see also* Sea Breeze Salt, Inc. v. Mitsubishi, 899 F.3d 1064, 1074–75 (9th Cir. 2018) (detailing the circuit split regarding the existence of a commercial exception to the act of state doctrine).

76. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 706 (1976) (explaining in one part of the plurality opinion that commercial acts should be excepted from the act of state doctrine when a government's agents acted in a purely commercial role).

77. *See, e.g.*, *Sea Breeze Salt, Inc.*, 899 F.3d at 1067 (describing the close ties between one of the corporate defendants and the Mexican government, which owned 51% of the same).

78. *See id.* at 1069 (finding that the corporate defendants' conduct constituted an act of the Mexican government).

79. *See id.* (noting that modern understandings of the act of state doctrine require courts to consider the policies underlying the doctrine in order to determine if and when to apply it).

the Ninth Circuit to review the conduct of three corporations—one Mexican, one Japanese, and one from the United States.[80] The plaintiffs alleged that the defendants violated U.S. antitrust and tort law by engaging in a conspiracy to reroute the distribution of Mexican solar salt away from the plaintiffs.[81] Before evaluating the merits of the case, the Ninth Circuit considered two threshold issues: the application of the commercial activity exception of the FSIA and the availability of jurisdiction under the act of state doctrine.[82]

First, the Ninth Circuit determined that the commercial activity exception to the FSIA was applicable in this case because the commercial conduct of the defendants influenced commercial activity in the United States.[83] In doing so, the Ninth Circuit concluded that the defendants were not subject to state immunity protections as a matter of statutory law.[84]

However, when the Ninth Circuit applied the common law act of state doctrine, it reached a different result regarding immunity from suit.[85] The Court found that the defendant corporations' actions constituted acts of state under the doctrine, barring the Court from proceeding to an analysis of the merits of the case.[86] This conclusion led the Court to refuse jurisdiction and dismiss the plaintiffs' claims in their entirety.[87]

The tension inherent in these two decisions serves as an example of how inconsistent immunity doctrines undermine the rule of law by

80. *See id.* at 1067 (providing an outline of the defendants involved in the case—Mitsubishi Corporation, a Japanese corporation; Mitsubishi International Corporation, a New York corporation; and Exportadora de Sal, S.A. de C.V. (ESSA), a Mexican corporation in which the Mexican government held a 51% stake).

81. *See id.* at 1067–68 (outlining the claims alleged by the plaintiffs).

82. *See id.* at 1068–69 (discussing the application of the FSIA and the act of state doctrine to plaintiffs' case).

83. *See id.* at 1075 n.2 ("[A]gree[ing] with the district court that the FSIA's commercial activity exception is applicable.").

84. *See id.* (confirming that the district court correctly applied FSIA given the facts of the case).

85. *See id.* at 1070–71 (concluding that ESSA's conduct was an act of state and therefore not reviewable).

86. *See id.* (explaining the reasoning behind equating the defendants' conduct with the conduct of the Mexican government).

87. *Id.* at 1075.

providing an opportunity to bring suit against a state while simultaneously restricting jurisdictional availability so as to preclude any such suits from being reviewed on their merits.[88]

III. ANALYSIS

The international rule of law requires that a party whose rights have been violated have access to an institutionalized forum for accessing a remedy.[89] For purposes of this paper, this general assertion will be referenced as the "rule of law formula" – right + violation = access to remedy.[90] When the left side of the formula is satisfied, the national, regional, or international legal instrument responsible for providing the right in the first instance is obligated to provide access to a remedy and round out the formula.[91] This is an affirmative duty – i.e., if a state fails to do this, it has undermined and arguably violated the international rule of law.[92]

This section analyzes how different jurisdictional allowances of state immunity impact the rule of law formula, specifically looking at the different procedural obligations that states undertake when they choose to provide restrictive immunity to foreign sovereigns.[93] This section will also highlight the conflict in the United States between the application of the FSIA and the common law act of state doctrine, and how this conduct undermines the international rule of law.[94]

A. When the Right to Bring Suit Against a State is Granted, a Process Must Be Established to Allow That

88. *See infra* Part III.B.2.
89. *See supra* Part II.A. (detailing how access to justice principles are found in national, regional, and international documents).
90. *See generally* Peruginelli, *supra* note 1, at 107 (describing the elements that are critical to the rule of law).
91. *See id.* (detailing the importance of judicial process to having a strong rule of law).
92. *See* Paulsson, *supra* note 3, at 2–3 (noting the correlation between the failure to provide access to justice and the lack of public trust in the court systems).
93. *See infra* Part II.A. (discussing the affirmative duty undertaken by restrictive theory jurisdictions to provide process in situations where parties are entitled to it).
94. *See infra* Part II.B. (detailing the inconsistency between the commerciality analyses underlying the FSIA and the act of state doctrine).

RIGHT TO BE EXERCISED

1. *Absolute Immunity for the Absolute Sovereign*

Because governmental immunity restrains plaintiffs from bringing claims, it denies access to justice. States that apply a Leviathan theory of state immunity operate under a default wherein an absolute sovereign can never be subject to suit within the national judiciary.[95] These sovereigns enjoy absolute immunity for any and all claims brought before national courts.[96]

Applying the rule of law formula to an absolute immunity jurisdiction proves simple. In these states, citizens maintain similar procedural and substantive rights to those provided in restrictive theory jurisdictions.[97] However, because absolute sovereigns have unquestioned authority, it is impossible for a state ever to commit a true violation of a party's rights.[98] These states may cause inconvenience or harm, but, in a technical sense, a state can never be legally responsible for actions taken in a jurisdiction where it has absolute immunity.[99] Because there cannot be a violation, there will never be a requirement of judicial process under the rule of law formula: right + ~~violation~~ = ~~access to a remedy~~.

A denial of access to justice in certain situations does not prevent access to justice in all situations.[100] In many categories of cases, national courts may reject and redirect certain claims brought to an alternative forum that would be more suited to the underlying dispute.[101] The rule of law does not require that national judiciaries

95. *See* Reeves, *supra* note 9, at 530 (describing the Leviathan state's unquestioned authority and immunity from adhering to its own laws).

96. *See id.* at 531–32 (noting that absolute immunity states need not respect the rights of people or parties and, therefore, cannot violate them).

97. *See* Koumi, *supra* note 4, at 101 (highlighting a certain similarity in legal frameworks between restrictive and absolute theory jurisdictions).

98. *See* Reeves, *supra* note 9, at 531 (noting that an absolute sovereign has the power to do as it pleases in all instances).

99. *See generally id.* at 531–32 (highlighting the fact that a Leviathan state owes nothing to its people beyond physical protection).

100. *See* Franck, *supra* note 31, at 52–54 (describing investment treaty arbitration as a dispute forum outside of a national court where actions of a state can be challenged).

101. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 589, 597 (1991)

always allow for judicial process.[102] Rather, it requires that when a nation manifests its intent to provide judicial process, it follows through on expressed or implicit access to justice promises by allowing for judicial review in the appropriate circumstances.[103]

2. A State in Corporate Clothing – Applying Restrictive Immunity to Sovereign Corporations

States that apply the restrictive theory of state immunity also grapple with questions related to access to justice and the rule of law.[104] Indeed, these jurisdictions have greater obligations under the international rule of law than absolute immunity jurisdictions because of the theory of immunity they have chosen.[105]

Unlike absolute theory, the restrictive theory tackles commerciality by promoting a split default.[106] This means that when a foreign state acts like a sovereign, it will be immune from suit.[107] But, when a state acts like a corporation, it will be subject to suit under the commercial exception of the restrictive theory jurisdiction's applicable immunity doctrine.[108]

For purposes of the rule of law formula, the rights afforded to people remain the same, but the capacity for a state to commit a violation has changed. In other words, the formula is adapted to this:

(refusing jurisdiction over a case that involved a valid forum-selection clause that indicated arbitration as the implicated form of dispute resolution); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 2, 20 (1972) (vacating and remanding the case based on the existence of a forum-selection clause).

102. *See* Nagan & Root, *supra* note 8, at 410–12 (describing categorical exceptions to the state immunity rule which restricted sovereign immunity that states enjoyed).

103. *See* Paulsson, *supra* note 3, at 2–3 (reframing the rule of law as a rare exception in which a state does provide proper access to judicial remedies).

104. *See* Koumi, *supra* note 4, at 101 (describing the restrictive theories approach to suits against states).

105. *See id.* at 104 (highlighting examples of different jurisdictions deciding in favor of restrictive theory by not granting immunity to commercial acts).

106. *See* Nagan & Root, *supra* note 8, at 410–12 (discussing the split default as it relates to states acting in a commercial capacity).

107. *See* Koumi, *supra* note 4, at 101 (confirming that states still maintain a degree of immunity, even in restrictive theory jurisdictions).

108. *See, e.g.*, FSIA, 28 U.S.C. § 1605 (a)(2) (1976) (establishing the commercial activity exception to the FSIA).

right + violation (limited to commercial conduct) = access to a remedy (limited to commercial conduct). Because state immunity is still granted in these states, there will be limits on when states commit violations, and, consequently, on when process will be due.[109]

Of course, the determination of commerciality is more easily described than done. By demonstrating how commerciality under the FSIA and the act of state doctrine produce different results when reviewing the same facts, this paper will show how inconsistent restrictions on state immunity doctrines undermine the international rule of law.[110]

B. CLASH OF THE COMMERCIAL EXCEPTIONS

When the United States renounced the absolute theory of state immunity and enacted the FSIA, it signaled to plaintiffs worldwide that it was willing and able to rule on cases involving other countries' governments, so long as the activity in question satisfied the preconditions outlined in the commercial exception.[111] Now, in contrast to that, the United States seeks to wind back the clock and block the very plaintiffs it welcomed to its courts from accessing them under a different, common law doctrine.[112] This tension in jurisdictional availability cannot stand.

1. The Commerciality Exceptions Under the FSIA and the U.S. Act of State Doctrine are Inconsistent

International standards surrounding access to justice mandate that legal processes be available for redressing harm committed in the violation of a party's protected rights.[113] Many states value absolute immunity over access to justice.[114] Under the absolute theory of state

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109. *See generally*, FSIA § 1604 (maintaining that states will remain immune from suit so long as their conduct does not fall in one of the outlined exceptions).

110. *Infra* Part III.B.2.

111. FSIA § 1605(a)(2) (excluding foreign governments that engage in primarily commercial activity in the United States from state immunity).

112. *See* Sea Breeze Salt Inc. v. Mitsubishi, 899 F.3d 1064, 1072–74 (9th Cir. 2018) (explaining the act of state doctrine).

113. *See* Peruginelli, *supra* note 1, at 107–08 (describing the role of institutional process in the promotion of access to justice).

114. *See generally Sea Breeze Salt, Inc.*, 899 F.3d at 1068–69 (articulating the rationales for providing state immunity to other countries).

immunity, a state cannot violate a party's rights and, therefore, judicial process will never be required because a remedy will never be deserved.[115] This limitation on process represents a policy question, but not necessarily a rule of law problem – as judicial review in these instances was never allowed or expected in the first instance.[116]

The access to justice problem arises when a state is unclear in its position, thereby opening the door to allow a legal process and then slamming that same door closed in the face of a deserving plaintiff.[117] By providing parties with the limited right to bring suit against states acting as corporations, restrictive theory countries have undertaken the affirmative duty of providing access to judicial processes in those situations.[118]

When the United States opted for the restrictive theory of state immunity, it decided that individuals and companies should have the right to access judicial review against states acting as corporate sovereigns.[119] Barring access to that process through the application of another contradictory common law immunity doctrine undermines this access and the rule of law as a whole.[120]

The U.S. Foreign Sovereign Immunities Act (FSIA) and common law act of state doctrine both address commerciality as a restriction on state immunity from suit.[121] In many cases, the FSIA and the act of state doctrine cover different types of state conduct – with the FSIA focusing on internal connections to the United States and the act of state doctrine focusing on conduct occurring in a foreign sovereign's

115. *See* Reeves, *supra* note 9, at 531–32 (outlining the contours of absolute state immunity).

116. *See id.* (noting that an absolute sovereign is immune from following the law).

117. *See Sea Breeze Salt, Inc.*, 899 F.3d at 1068, 1075 n. 2 (describing the conflicting decisions regarding commerciality and refusing to hear the case further).

118. *See* Koumi, *supra* note 4, at 101 (indicating that, under the restrictive theory, people had some, albeit limited, right to bring suit against other states).

119. *See generally* Nagan & Root, *supra* note 8, at 411 (outlining various states' transitions away from absolute immunity and towards restrictive immunity, especially where commercial activity is concerned).

120. *See infra* Part III.B.2 (connecting the failure in maintaining consistent doctrines with a denial of process and an inevitable negative impact on the rule of law).

121. *See generally* FSIA 28 U.S.C. § 1605(a)(2) (1976) (providing an exception for commercial activity); Bazyler, *supra* note 63, at 370 (describing different approaches to commerciality under the act of state doctrine).

territory.[122] This internal versus external split has often led to only one of these doctrines being applicable per case.[123] However, as transnational commercial activities have grown increasingly complex, the opportunity for both doctrines to apply and for them to conflict with one another has arisen.

On the one hand, the FSIA's commercial exception focuses on commercial conduct that occurs within or that is connected to the United States.[124] It represents a judgment call by the legislative branch that when a foreign state engages in commercial dealings that affect U.S. commerce, that state should be subject to suit in U.S. national courts.[125] Of course, this restriction on state immunity is limited (i.e., the state can only be brought to suit for activity that expressly falls into this exception).[126]

Meanwhile, the act of state doctrine focuses on the activity of a sovereign conducted within that sovereign's own territory.[127] This doctrine also considers commerciality, although scholars and courts disagree about how it does so.[128] Some believe that there is a

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122. *See* Jonathan M. Wight, *An Evaluation of the Commercial Activities Exception to the Act of State Doctrine*, 19 U. DAYTON L. REV. 1265, 1279–80, 1282–83 (1994) (describing the relationship between sovereign immunity as articulated in the FSIA and the act of state doctrine).

123. *See id.* at 1279–80 (explaining sovereign immunity and state doctrine cannot both apply when defendant's own territory and the forum state are different).

124. FSIA § 1605(a)(2) (exempting any 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").

125. *See id.* (providing that a "foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case[. . .]in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States").

126. *See generally id.* § 1605(a) (stating that this subsection is intended to serve as exceptions to the larger provision of immunity).

127. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (noting that the fourth element of the doctrine is that the foreign sovereign must have taken the action within the territory of the sovereign).

128. *See* Sea Breeze Salt, Inc. v. Mitsubishi, 899 F.3d 1064, 1074 (9th Cir. 2018) (detailing the circuit split that has erupted out of the varied application of the act of

commercial activity exception to the act of state doctrine that allows acts of states to come before U.S. courts if they are sufficiently commercial.[129] Others focus on the threshold elements of the doctrine and claim that commercial activity fails to meet these elements as it is not "public or governmental."[130] Whichever approach is taken, the result is the same – when a government acts as a corporation, the act of state doctrine will not be applied to prevent a U.S. court from reviewing the action in question.[131] This approach to commerciality largely aligns with the FSIA's commercial activity exception.[132]

Unfortunately, the fact that they are largely in alignment, but not completely so, indicates that there is a margin within which these two doctrines produce different results when applied to the same circumstances.[133] The rights, obligations, and policies involved in circumstances where the FSIA and act of state doctrine conflict are obtuse in the abstract. *Sea Breeze Salt Inc. v. Mitsubishi* demonstrates how the right to access justice extended by the FSIA can be squashed through the application of the act of state doctrine.[134] The refusal to allow access in this case undermines the international rule of law, which mandates access to justice for the violation of a protected right.[135]

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state doctrine's purported commercial activities exception and highlighting the lack of clarity surrounding the exception).

129. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 706 (1976) (believed to be the plurality opinion that established the commercial exception); *see also* Bazyler, *supra* note 63, at 370 (discussing the commercial exception to the act of state doctrine).

130. *See Sea Breeze Salt, Inc.*, 899 F.3d at 1074–75 (distinguishing between conduct that is commercial and conduct that is public or governmental).

131. *See* Wight, *supra* note 122, at 1282–83 (describing how commercial activities of states may be subject to review by U.S. courts).

132. *See generally* FSIA § 1605(a)(2) (outlining the commercial activity exception to the FSIA).

133. *See* 899 F.3d at 1075 n.2 (serving as an example of an instance where the FSIA and the act of state doctrine returned different results when applied to the same factual scenario).

134. *See id.* at 1075 (holding that the act of state doctrine applied to the case and the court lacked jurisdiction to review).

135. *See* Peruginelli, *supra* note 1, at 107–08 (noting that access to law is fundamental for the purpose of not only policy of justice, but also public policy and social cohesion).

2. The Conflict Between the FSIA and the Act of State Doctrine Undermines the International Rule of Law by Failing to Align the Rights Provided with the Process Accessible

Even though steps have been taken to make access to justice and state immunity coexist in the international commercial sphere,[136] there is still room for growth, especially in the United States. The United States' application of the act of state doctrine creates a category of non-litigable cases, wherein the plaintiffs have no hope of accessing justice under a national court system or an alternative form of dispute resolution. *Sea Breeze Salt Inc. v. Mitsubishi* is an example of one of these cases.[137] It falls within a category of disputes that is unfit for an institutionalized dispute resolution forum because of the parties, the chronology, and the claim itself.

As discussed previously, *Sea Breeze Salt Inc.* was a case that came up through the Ninth Circuit.[138] It involved five parties of different nationalities—U.S., Mexican, and Japanese—and a series of antitrust and state law tort claims.[139] Before the Ninth Circuit got to the merits of the case, it first had to make two threshold determinations about the application of the FSIA and of the act of state doctrine.[140] These determinations were necessary because one of the defendants—ESSA—had close ties to the Mexican government.[141] In a bizarre turn of events, the Ninth Circuit concluded that the FSIA's commercial activity exception applied in this case.[142] It then concluded, however,

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136. *See generally* Koumi, *supra* note 4, at 101 (highlighting the growing popularity of restrictive state immunity doctrines and the manner that they interface within the transnational commercial sphere).

137. *See* 899 F.3d at 1075 (providing a case study for a claim that was rendered unfit for institutionalized dispute resolution by the Ninth Circuit).

138. *See id.* at 1067 (introducing the context of the case).

139. *See* Complaint, *supra* note 10, at 1 (describing how plaintiffs, Sea Breeze Salt, Inc. (U.S. company) and Innofoods (Mexican company) initiated suit against defendants, ESSA (Mexican company), Mitsubishi International (U.S. Company), and Mitsubishi Corporation (Japanese company), for violation of U.S. antitrust laws and engagement in common law torts under Californian law).

140. *See generally* 899 F.3d at 1074 n.2 (discussing the FSIA and the act of state doctrines' exceptions regarding government conduct that is commercial in nature).

141. *See id.* at 1069 (explaining how the Mexican government was sufficiently involved in ESSA's activities to merit a threshold review of sovereign immunity application under the FSIA and act of state doctrines).

142. *See id.* at 1069 n.2 (agreeing with the district court that "the FSIA's

that the actions involved were not reviewable by the court because they met the elements of the act of state doctrine.[143] Therefore, the Ninth Circuit dismissed the case without looking at the merits of the plaintiffs' claims.[144]

These two outcomes on the same set of facts indicate that the doctrines have two ways of analyzing commerciality.[145] Under the FSIA, a state acting as a commercial entity is subject to suit in the United States.[146] However, under the act of state doctrine, a commercial entity standing in the place of a sovereign state is not subject to suit in the United States.[147] Now—this is where it gets complicated. There are two main questions to ask when evaluating commerciality under these doctrines.[148] Who is the actor? And what is the nature of the conduct?

In *Sea Breeze Salt Inc. v. Mitsubishi*, the Ninth Circuit concluded first that the defendants were not due immunity under the FSIA because while the FSIA did apply to the governmental parties involved, the conduct in question satisfied the commercial exception to immunity contemplated in the statute.[149] Then, in the same opinion,

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commercial activity exception is applicable because the suit is based 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'").

143. *See id.* at 1069 (describing how ESSA was a government agent for purposes of the act of state doctrine because the Mexican government owned 51% of the corporation, the government controlled ESSA's board, and because ESSA's conduct related to the export of solar salt, a natural resource said to be distributable solely by the Mexican government under the Mexican Constitution).

144. *See id.* at 1075 (refusing to proceed any further with the case, in light of the act of state doctrine's application).

145. *See generally id.* at 1075 n.2 (indicating the different conclusions regarding commerciality under the two doctrines).

146. FSIA § 1605(a)(2) (describing the commercial nature of the exception to the FSIA).

147. *See, e.g., Sea Breeze Salt, Inc.*, 899 F.3d at 1069 (concluding that ESSA (a Mexican corporation) was standing in the shoes of the Mexican government and therefore capable of conducting acts of state sufficient to serve as a jurisdictional barrier to suit).

148. *See* FSIA §1605(a)(2) (indicating that for a state to be immune under the FSIA, the actor and the conduct must both be sovereign in nature); *see also* Wight, *supra* note 122, at 1282–83 (describing similar requirements under the act of state doctrine).

149. *See* 899 F.3d at 1075 n. 2 (finding that ESSA was a government actor and, therefore, the FSIA applied, but concluding that the conduct was commercial and

the Ninth Circuit concluded that under the act of state doctrine, ESSA was acting as the Mexican government, and the conduct was not commercial.[150] These two findings are inconsistent, with one returning a conclusion of commercial activity and the other returning a result of non-commercial or governmental activity.[151]

It now makes sense to return to the rule of law formula (right + violation = access to a remedy) one last time. In this instance, under U.S. antitrust and California tort law, the plaintiffs did have substantive rights at issue.[152] So, the first element of the formula has been met: right (present) + violation = access to a remedy.

Under the FSIA, ESSA, or the Mexican Government, was not immune from suit and was therefore capable of violating those substantive rights.[153] Thus, the second prong of the formula was satisfied: right (present) + violation (present) = access to a remedy.

However, the act of state doctrine stepped in as a jurisdictional barrier and prevented the case from being heard on the merits.[154] In other words, it denied the plaintiffs the right to access justice to which it was entitled under the international rule of law. This denial limited the plaintiffs' ability to access a remedy on the right side of the formula, resulting in the following: right (present) + violation (present) = ~~access to a remedy~~.

Because the left and right sides of this formula are out of balance, it becomes clear that the rule of law has been undermined—in this case, by the inconsistent application of restrictive state immunity doctrines.[155]

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thus immunity should not be granted).

150. *See id.* at 1069 (concluding that ESSA was a government actor and that the conduct in question was governmental).

151. *See id.* at 1075 n.2 (indicating that the conduct engaged in by ESSA was both commercial under the FSIA and not commercial under the act of state doctrine).

152. *See generally* Complaint, *supra* note 10, at 1 (outlining the plaintiffs' claims in reference to their substantive rights under U.S. antitrust laws and California tort law).

153. *See Sea Breeze Salt, Inc.*, 899 F.3d at 1075 n.2 (allowing the court to retain jurisdiction over the instant case).

154. *See id.* at 1075 (restricting the court from proceeding to a further review of plaintiffs' case following the application of the act of state doctrine).

155. *Cf. id.* (demonstrating how inconsistency in state immunity protections can eliminate a party's right to bring suit).

When a party is provided the right to bring suit and suffers a violation fit for review, then the international rule of law requires that the party have access to an institutionalized forum for dispute resolution.[156] Currently, the conflict between the FSIA and the act of state doctrine undermines the international rule of law by failing to align the rights provided with the process available.[157]

IV. RECOMMENDATIONS

A. THE UNITED STATES SHOULD ESTABLISH A STATUTORY DEFAULT FOR REVIEWING COMMERCIAL ACTIVITY FOR PURPOSES OF STATE IMMUNITY

The conflict between the FSIA and the act of state doctrine indicates inconsistent positioning towards restrictive state immunity in the United States.[158] Rather than allow this inconsistency to stand, the United States should make the FSIA the statutory default in cases involving commercially active foreign states.[159] Such a default would provide critical guidance regarding a state's immunity from suit with respect to commercial dealings.

Instituting the FSIA as the statutory default would serve three important policy considerations. First, a default would quell concerns surrounding the separation of powers. The act of state doctrine largely developed out of the fear that U.S. judiciaries would inappropriately make decisions that would have foreign policy implications.[160] The U.S. Supreme Court felt it necessary to prevent this by instituting a

156. *See* Peruginelli, *supra* note 1, at 107 (articulating a party's right to process under the international rule of law).

157. *See generally Sea Breeze Salt, Inc.*, 899 F.3d at 1075 (demonstrating the harm caused by the inconsistent treatment of commercial activities under the FSIA and the act of state doctrine).

158. *See id.* at 1075 n.2 (showing how the FSIA and the act of state doctrine can yield inconsistent results regarding the application of state immunity).

159. *Cf.* State Immunity Act 1982, *reprinted in* 21 I.L.M. 798 (Can.) (providing an example of Canada's clear statutory default in the restrictive state immunity context).

160. *See* Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (providing the initial policy rationales underlying the development of the common law act of state doctrine).

common law doctrine punting these issues out of national courts.[161] After the institution of the FSIA, however, this concern was alleviated.[162] The legislative branch actively spoke through the text of the FSIA of its intention that U.S. courts should judge the validity of commercial actions taken by foreign states.[163] To allow the act of state doctrine to supersede that mandate would be to undermine the legislative branch's voice on these matters, as expressed in the FSIA.

Second, having the FSIA as a default in cases of inconsistency would provide greater clarity to issues of state immunity. The act of state doctrine has been and still is a hotly debated doctrine with a complicated application history.[164] Requiring plaintiffs and defendants to sift through this history when there is an alternative standard available is a waste of both party and judicial resources.

Finally, this default would bring a higher level of predictability into the realm of state immunity—a development that would benefit individuals, companies, and states engaging in transnational activities. So long as the inconsistency between the FSIA and the act of state doctrine continues, parties on both sides of pending and future litigation will be forced to engage in a preventable guessing game.

In a world of increased commercial dealings, consistency is key. Here, the United States should make the FSIA the statutory default for purposes of determining whether state immunity will be granted in cases of commercial activity. This step toward a more consistent restrictive immunity regime is critical to establishing a stable framework for future cases that involve both governmental and commercial elements.

B. CORPORATIONS OPERATING TRANSNATIONALLY SHOULD DO

161. *See generally* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (developing further the act of state doctrine in line with ongoing concerns regarding the judiciary's role in international diplomacy).

162. *See generally* FSIA §§ 1330, 1391(f), 1441(d), 1602–11 (serving as the first statutory codification of sovereign immunity for foreign states in the United States).

163. *See generally id.* (representing the will of the legislature as expressed through statutory provisions).

164. *See generally* Bazyler, *supra* note 63, at 327–28 (warning that confusion about the act of state doctrine has caused courts to misapply the doctrine).

THEIR BEST TO PREPARE FOR UNSTABLE IMMUNITY REGIMES

So long as unstable restrictive immunity regimes like the United States exist, commercial entities should take steps to manage the risks associated with their business dealings, especially where corporate engagement with foreign state actors is concerned.

While an unpredictable legal framework provides unique challenges to companies like Sea Breeze Salt Inc., harm can be mitigated with thoughtful use of political risk or litigation insurance,[165] contracts with dispute resolution clauses,[166] considerate corporate structuring, and smart business dealings. Of course, as such things are also subject to uncertainty and inconsistency, it is doubtful that these measures could ever serve as a full remedy to the challenges brought about by inconsistent immunity doctrines.

Because the international dispute resolution climate is ever shifting, the main takeaway for companies should be this—think early and often about how disputes will be resolved in the event they arise. Uncertainty in this area is a certainty, so monitoring developments and being flexible in the face of adversity are key to managing risk and protecting international commercial activities.

V. CONCLUSION

Under the international rule of law, a state must provide the access to justice that it affirmatively indicates its people are entitled to expect. In absolute theory jurisdictions, there is no expectation that suit could be brought against a foreign state, and so there is no rule of law problem when access is never granted. Alternatively, however, when a restrictive theory state grants its people the right to bring suit against foreign states in certain instances, it takes upon itself the obligation to provide process when appropriate.

In the United States, the FSIA extends the right to bring suit against a foreign state to cases where the foreign state acts as a commercial

165. *See* Celine Tan, *Risky Business: Political Risk Insurance and the Law and Governance of Natural Resources*, 11 INT'L J. L. CONTEXT 2, 174–94 (2015) (describing broadly the role political risk insurance can play in dealings surrounding natural resource distribution).

166. *Cf.* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (affirming the validity of a dispute resolution clause calling for arbitration).

entity. Thus, the U.S. has undertaken the duty to provide access to justice in those cases. In *Sea Breeze Salt Inc.*, the U.S. failed to follow through on this duty by using the act of state doctrine to renege on protection previously extended under the FSIA. This action undermines the rule of law by blocking access to justice in a situation where a plaintiff was statutorily entitled to it.

To solve this problem, the United States should implement legislation that eliminates inconsistencies in its immunity doctrine. Alternatively, corporations and individuals should think critically and holistically when entering into commercial relationships, contemplating up front the types of jurisdictional pitfalls they could encounter by working with entities that are partially governmental in nature.