Notes

EMITTING INJUSTICE?

Foreign State-Owned Enterprises That Cause Transboundary Pollution and the Foreign Sovereign Immunities Act of 1976

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This Note presents an analysis of whether the Foreign Sovereign Immunities Act of 1976 (FSIA) provides foreign state-owned enterprises (SOEs) with immunity in U.S. courts when those entities cause transboundary pollution with effects inside the borders of the United States. Foreign SOEs around the world are heavily involved in the energy sector, which makes them a likely class of defendants in cases involving transboundary pollution. Nonetheless, they may be entitled to immunity in U.S. courts under the FSIA. While the activities of SOEs that result in transboundary pollution seem to fall under the commercial activity exception to the FSIA, a number of cases hold that, to varying extents, activities involving the exploitation of natural resources are sovereign in nature and therefore protected by the FSIA. In this Note, I argue that because the relevant case law is ultimately based on the right of states to control their natural resources under international law, the application of such cases should be limited when that international legal right is also limited. Because international law balances control over natural

resources with an obligation to not cause transboundary harm, I argue that acts of foreign SOEs resulting in transboundary pollution should not be viewed as sovereign acts. Therefore, the commercial activity exception to the FSIA should apply in such cases, and foreign SOEs should be subject to the jurisdiction of U.S. courts.

INTRODUCTION

In 1979, the *Ixtoc I* oil well in the Gulf of Mexico, exploded while under the operation of Petroleos Mexicanos (hereinafter "Pemex"), a national oil company established by the Mexican government.[1] The ensuing oil spill caused damage to public parks and private beaches across the Texas coast, resulting in significant economic losses for local tourism and fishing industries.[2] Shortly thereafter, a number of American plaintiffs brought suit against Pemex. However, the court held that although the spill had caused harm within the borders of the United States, because Pemex was acting under the authority of the Mexican government, it was immune from suit in the United States.[3]

Modernity has forced humanity to contend with countless pollutants from an equally unquantifiable number of sources, and has made it increasingly clear that pollution is an issue that has no respect for national borders.[4] The production of energy plays a particularly prominent role in generating pollutants that cross borders. Processes such as burning coal, drilling for oil, and producing nuclear energy with fuels such as uranium pose stark risks of transboundary pollution.[5]

While both federal and state law provide remedies for injuries arising from pollution, including pollution originating from these sources, a number of likely defendants in such actions pose a unique challenge. Foreign state-owned enterprises (SOEs), corporations that are majority-owned by their respective governments, play an outsized role in the extraction and use of resources that contribute to transboundary pollution due to the important role that those resources play in national policies. However, because they act with the authority of their governments, foreign SOEs benefit from a jurisdictional protection that other defendants do not: the Foreign Sovereign Immunities Act of 1976 (the FSIA).[6] The FSIA provides that foreign states and

1. Melissa B. Cates, Comment, *Offshore Oil Platforms Which Pollute the Marine Environment: A Proposal for an International Treaty Imposing Strict Liability*, 21 SAN DIEGO L. REV. 691, 692 (1984).

2. *Id.*

3. *See generally* In re Complaint of Sedco, 543 F. Supp. 561 (S.D. Tex. 1982), *partially vacated*, 610 F. Supp. 306 (S.D. Tex. 1984).

4. Developments in the Law, *International Environmental Law*, 104 HARV. L. REV. 1484, 1487 (1991).

5. *See* discussion *infra* Section I.A.

6. 28 U.S.C. §§ 1330, 1601.

their instrumentalities, including SOEs, are immune from the jurisdiction of federal and state courts (collectively "U.S. courts"), subject to certain exceptions.

This Note argues that, despite the broad protections of the FSIA, foreign SOEs that cause transboundary pollution should be subject to the jurisdiction of U.S. courts under the commercial activity exception to the FSIA. The commercial activity exception draws a distinction between commercial and sovereign acts by foreign states and their instrumentalities. While a number of courts have held that a state's exploitation of its own natural resources, including activities such as energy production, are sovereign acts,[7] recent developments in international law have demonstrated that this rule cannot apply in cases of transboundary pollution.[8] In this Note, I argue that the transboundary harm principle, an international law doctrine that limits the right of states to control their natural resources, should be applied to FSIA jurisprudence so that acts of foreign SOEs that cause transboundary pollution fall within the commercial activity exception to the FSIA.

Section I.A. of this Note establishes in greater detail the role of energy production in transboundary pollution in greater detail, and Section I.B. indicates the role of foreign SOEs in global energy production. Section I.C. provides a general overview of the history and structure of the FSIA, which is relevant to the way the statute is interpreted in this Note. In Sections II.A. and II.B., I discuss a number of preliminary issues in the application of the FSIA to foreign SOEs and identify the FSIA exception most likely to allow a U.S. court to establish jurisdiction where a foreign SOE has caused transboundary pollution with effects in the United States: the commercial activity exception. In Section II.C., I review the application of the commercial activity exception in greater detail. Specifically, I discuss a number of cases that established the general doctrine that the exploitation of natural resources is a sovereign act under the FSIA and identify a circuit split on how extensively that doctrine should be applied. In Section III.A., I argue that this doctrine and the FSIA in general, which are both based on established principles of international law, should be interpreted through the lens of international law. In Section III.B., I discuss the transboundary harm principle, a relatively new doctrine in international law that limits the rights of sovereigns to control the use or extraction of their resources so that they do not cause harm within the boundaries of other states. In Section III.C., I argue that, in light of the transboundary harm principle, the acts of foreign SOEs are not sovereign in nature when they cause transboundary pollution and

7. *See infra* Section II.C.1.

8. *See infra* Section III.C.

therefore the commercial activity exception to the FSIA should apply to those activities. Finally, Section III.D. includes a brief overview of the potential consequences of my analysis for both domestic law and the international law of immunities with respect to transboundary pollution.

I. TRANSBOUNDARY POLLUTION AND THE CHALLENGE OF STATE-OWNED ENTERPRISES

In this section, I discuss the general policy issue of transboundary pollution, particularly as it relates to the activities of foreign SOEs. I also provide a brief overview of the jurisdictional instrument that will determine whether a foreign SOE could be held liable for transboundary pollution in U.S. courts: the FSIA. First, I provide a general overview of the issue of transboundary pollution and highlight the particular risk of transboundary pollution that energy production causes. Specifically, I highlight three fuels commonly used in energy production—coal, oil, and uranium—that, when extracted or used, create a uniquely high risk of transboundary pollution. Second, I discuss the role of SOEs in the global economy and highlight their interconnectedness with the global energy sector. I point out that while foreign SOEs are an especially likely class of defendants in cases of transboundary pollution, they are often entitled to many of the jurisdictional immunities granted to the governments that established them. Finally, I conclude this section by providing an overview of the history and structure of the FSIA, which is the sole instrument governing the jurisdiction of U.S. courts over foreign governments and their instrumentalities, including foreign SOEs.

A. Transboundary Pollution

Pollutants may be emitted from countless sources and processes, and many are capable of travelling by a number of means. Air and water are readily capable of transporting a variety of pollutants across national borders, including over entire oceans.[9] One industry poses a uniquely high risk of pollution with the potential to cross state

9. Developments in the Law, *supra* note 4, at 1492. *See also* Linda A. Malone, *The Chernobyl Accident: A Case Study in International Law Regulating State Responsibility for Transboundary Nuclear Pollution*, 12 COLUM. J. ENV'T L. 203, 205–06 (1987) (discussing the manner in which pollution emanating from the nuclear disaster in Chernobyl, Ukraine, travelled by air throughout Europe and even to the United States).

borders: energy production.

Global demands for energy have been steadily increasing in recent years.[10] As the global demand for energy has increased, both the diversity of fuels used in energy production and the quantity consumed of each fuel have increased.[11] Nonetheless, barring any massive changes in the energy sector, three fuels that I will highlight in this subsection—coal, oil, and nuclear fuels such as uranium—appear to be irreplaceable in the global market for the foreseeable future.[12] The ubiquity of these fuels, in particular, carries significant implications for the issue of transboundary pollution; for various reasons, the extraction and use of coal, oil, and nuclear fuels such as uranium for energy production pose extremely high risks of transboundary pollution.

The first fuel that poses a considerable risk of transboundary pollution is coal. While coal poses a number of transnational environmental risks, one of the most significant is mercury pollution.[13] Mercury can travel vast distances by air before eventually landing in and contaminating water sources and the wildlife living therein.[14] For humans, ingesting water or fish contaminated with mercury can cause severe neurological and birth defects.[15] This makes potential airborne mercury pollution across state borders a significant problem. In the early 2000s, as much as thirty percent of mercury contamination in the United States had originated overseas, including as far away as East Asia.[16] Coal combustion in China is a particularly common source of mercury pollution, even within the borders of the United States.[17]

Oil is the second fuel responsible for significant transboundary

10. BRITISH PETROLEUM, BP STATISTICAL REVIEW OF WORLD ENERGY 3 (68th ed. 2019).

11. *Id.* at 10.

12. *See generally id.*

13. *See generally* Gui-Bin Jiang et al., *Mercury Pollution in China*, 40 ENV'T SCI. & TECH. 3672 (2006) (discussing the relationship between coal combustion and mercury emissions).

14. Matt Pottinger et al., *Invisible Export–A Hidden Cost of China's Growth: Mercury Migration*, WALL ST. J. (Dec. 20, 2004), https://yaleglobal.yale.edu/content/invisible-export-hidden-cost-chinas-growth-mercury-migration [https://perma.cc/QK4L-QK5M].

15. *See* M. Harada, *Minimata Disease: Methylmercury Poisoning in Japan Caused by Environmental Pollution*, 25 CRITICAL REVS. TOXICOLOGY 1 (1995) (discussing in detail the health effects of mercury consumption).

16. Pottinger et al., *supra* note 14.

17. Jiang et al., *supra* note 13. *See also* U.N. ENV'T PROGRAMME, GLOBAL MERCURY ASSESSMENT 2018, 12–15, 18 (discussing mercury emissions by industry and region, with a map demonstrating that the largest share of emissions come from China); *Mercury Emissions: The Global Context*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/international-cooperation/mercury-emissions-global-context [https://perma.cc/DC37-JWAX].

pollution with potential effects in the United States. Oil's greatest pollution risks come from its extraction rather than its use. This is evidenced by the large number of highly publicized oil spills and drill failures over the past century.[18] Oil spills in the ocean pose transboundary hazards due to the dissipation of spilled oil. Contamination originating in the waters of one state can easily spread into the territory of another,[19] adversely impacting coastal communities and economies.[20]

The third type of fuel that poses a unique threat of transboundary pollution is nuclear fuels such as uranium. While these fuels are less prominent in the global energy market than coal or oil,[21] the few incidents of radiation pollution emanating from nuclear energy production demonstrate the potentially catastrophic transboundary pollution that can emerge from nuclear energy. Radiation emitted from nuclear plants has disastrous consequences and can cover large geographic areas. The most well-known nuclear disaster in history occurred in Chernobyl, Ukraine and resulted in millions of dollars in damage to crops and livestock throughout Europe. Radiation from the meltdown extended as far as the United States.[22] Accordingly, although incidents are infrequent, the acute risk of transboundary pollution from nuclear fuels could result in massive harms to a vast number of plaintiffs.[23]

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18. Scott J. Shackelford, *Was Selden Right? The Expansion of Closed Seas and Its Consequences*, 47 STAN. J. INT'L L. 1, 29 fig.4 (2011) (providing a list of the largest oil spills in history, including two in the Gulf of Mexico).

19. U.S. ENV'T PROT. AGENCY, UNDERSTANDING OIL SPILLS AND OIL SPILL RESPONSE 5–8 (1999) (discussing the dissipation of oil in marine environments). Recent developments in global geopolitics have made this issue even more prominent, as states have expanded their territorial claims and off-shore drilling operations. Shackelford, *supra* note 18, at 4. As offshore drilling expands, the risk of transboundary pollution from oil spills will naturally increase.

20. *See, e.g.*, *supra* notes 1–2 and accompanying text. Effects on coastal fishing communities are particularly extensive and long-lasting, with decreased production spanning several years or decades. *See, e.g.*, NW. FISHERIES SCI. CTR., *Delayed Effects of Oil Spill Compromise Long-Term Fish Survival*, NAT'L OCEANIC & ATMOSPHERIC ASS'N (Sept. 8, 2015), https://www.fisheries noaa.gov/feature-story/delayed-effects-oil-spill-compromise-long-term-fish-survival [https://perma.cc/VNU3-LFLY] (discussing effects of the Exxon-Valdez oil spill twenty-five years after the event); Debbie Elliot, *5 Years After BP Oil Spill, Effects Linger and Recovery is Slow*, NPR (Apr. 20, 2015), https://www npr.org/2015/04/20/400374744/5-years-after-bp-oil-spill-effects-linger-and-recovery-is-slow [https://perma.cc/2HPC-GN8L] (discussing effects of the Deepwater Horizon oil spill five years after the event).

21. BRITISH PETROLEUM, *supra* note 10, at 10.

22. Malone, *supra* note 9, at 205–06.

23. *See generally id.* at 207.

Coal, oil, and nuclear fuels inject a tremendous risk of transboundary pollution into global energy production. While a disaster involving the use or extraction of these high-risk fuels is difficult to predict, there is a very real possibility that energy production conducted within the borders of a foreign state will cause harm to private individuals within the boundaries of the United States. Although domestic tort doctrines like public nuisance would typically cover such injuries,[24] one likely class of defendants poses a unique issue for cases of transboundary pollution: foreign SOEs.

B. Foreign State-Owned Enterprises

Generally speaking, an SOE is a corporate entity that is either fully or partially owned by the government of the state in which it is created.[25] While the ownership structures of SOEs vary between and even within foreign states, they generally function to inject the government's policy interests into a particular industry.[26] Furthermore, proponents of SOEs argue that in key industries, SOEs can provide stability and growth that is more aligned with the state's interests.[27] SOEs have existed for centuries, with early notable examples including entities such as the Dutch East India Company.[28] Even in today's almost uniformly capitalist global economy, SOEs continue to play an integral role; they have significant presences in industries ranging from technology to finance and contribute roughly ten percent of global economic output.[29]

While active in a variety of industries, SOEs are particularly prominent in the energy sector. In 2012, the world's ten biggest oil and gas firms were SOEs.[30] Similarly, nearly a third of the largest

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24. *See* RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979).

25. Garry D. Bruton et al., *State-Owned Enterprises Around the World as Hybrid Organizations*, 29.1 ACAD. MGMT. PERSP. 92, 93 (2015).

26. *Id.*

27. *The Rise of State Capitalism*, ECONOMIST (Jan. 21, 2012), https://www.economist.com/leaders/2012/01/21/the-rise-of-state-capitalism [https://perma.cc/5HQ3-W3K4].

28. *Id.* SOEs became particularly prominent, perhaps unsurprisingly, in communist economies such as the Soviet Union and China. *See generally* JANOS KORNAI, THE SOCIALIST SYSTEM: THE POLITICAL ECONOMY OF COMMUNISM 71–73 (1992). SOEs remain prominent in these economies or the economies of their successor states. *See, e.g.*, *infra* notes 32–35 and accompanying text.

29. Bruton et al., *supra* note 25, at 92.

30. *The Rise of State Capitalism*, *supra* note 27.

SOEs in China—the state with the most SOEs in the world—are involved in the energy sector.[31] These numbers demonstrate the close relationship between SOEs and the global energy sector in general, but it is also worth noting the particular connection between SOEs and the fuels mentioned above: coal, oil, and nuclear fuels. First, coal continues to play a prominent role in China's SOE-centric economy,[32] and in recent years Chinese energy production from coal combustion has been increasingly consolidated under state-run conglomerates.[33] China, one of the largest emitters of mercury from coal combustion,[34] demonstrates the close relationship between foreign SOEs and coal combustion for energy production. Similarly, two of the world's largest uranium-producing states—Kazakhstan and Russia—rely on SOEs for said production and the generation of nuclear energy.[35] It can therefore be seen that, among the foreign states that most rely on the extraction and use of coal or uranium for energy production, SOEs are major players in the energy industry.

The aspect of energy production in which SOEs are by far the most involved is the extraction and use of oil. Among the fifteen states with the largest oil reserves in the world, thirteen have large SOEs that are responsible for the extraction of oil for energy production.[36]

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31. Scott Cendrowski, *China's Global 500 Companies Are Bigger than Ever–And Mostly State-Owned*, FORTUNE (July 22, 2015), https://fortune.com/2015/07/22/china-global-500-government-owned/ [https://perma.cc/JF9W-ZPW6].

32. RONGXING GUO, UNDERSTANDING THE CHINESE ECONOMIES 53 (1st ed., 2013) ("[C]oal accounts for more than seventy percent of China's primary energy production."); Jiang et al., *supra* note 13, at 3673.

33. GUO, *supra* note 32, at 54; *China to Promote SOE Mergers in Coal, Telecom, Power This Year*, REUTERS (July 17, 2018), https://www reuters.com/article/us-china-soe-reform/china-to-promote-soe-mergers-in-coal-telecom-power-this-year-report-idUSKBN1K70Y8 [https://perma.cc/P8T6-VDZU].

34. U.N. ENV'T PROGRAMME, *supra* note 17, at 12. China is the largest country in East and Southeast Asia, the region responsible for the largest share of mercury emissions in the world.

35. *Top Uranium Producing Companies in the World*, NS ENERGY (Jan. 11, 2019), https://www.nsenergybusiness.com/news/top-uranium-producing-companies/ [https://perma.cc/L6EK-36K2]. *See also* E.O. Adamov et al., *The Degree of Attainment of Radiation Equivalency of Highly Active Waste and Natural Uranium in the Fuel Cycle of Nuclear Plants in Russia*, 81.6 ATOM. ENERGY 827 (1996).

36. *Compare* Samuel Stebbins, *These 15 Countries, As Home to the Largest Reserves, Control the World's Oil*, USA TODAY (May 22, 2019), https://www.usatoday.com/story/money/2019/05/22/largest-oil-reserves-in-world-15-countries-that-control-the-worlds-oil/39497945/ [https://perma.cc/HUR7-6VGB], *with State-Owned Companies*, NAT. RESOURCE GOVERNANCE INST., https://resourcegovernance.org/resource-governance-index/report/state-owned-companies [https://perma.cc/X3H6-SYL4]. The reader will observe that among the fifteen states with the largest oil reserves in the world, all but three—the United States, Canada, and the United Arab Emirates—have created SOEs for the extraction of oil.

Furthermore, expanded offshore drilling in waters adjacent to the United States, particularly in the Arctic and the Gulf of Mexico, promises to increase SOE involvement in oil extraction that could potentially lead to transboundary pollution with effects inside the borders of the United States.[37] Barring transformative developments in the energy sector, it appears that the risk of transboundary pollution from oil extraction is increasing rather than decreasing, with SOEs leading the charge in many places.

Foreign SOEs are deeply intertwined with the energy sector and high-risk fuels such as coal, oil, and nuclear fuels. It is therefore likely that private plaintiffs in the United States will eventually seek to hold one or more foreign SOEs liable for transboundary pollution in the United States. However, the ownership and function of foreign SOEs may pose a unique obstacle to establishing jurisdiction in such cases; recall that SOEs are owned by their governments and are responsible for realizing the government's policies in the private sector.[38] In that sense, foreign SOEs act on behalf of their governments in the private sector, even when their actions cause harm inside the boundaries of other states. For that reason, despite their significant involvement with methods of energy production that pose a high risk of transboundary pollution, foreign SOEs are often granted protections similar to those afforded to the governments of foreign states in U.S. courts.[39]

C. Background of the Foreign Sovereign Immunities Act of 1976

The FSIA is the sole instrument by which foreign governments are granted certain protections in U.S. courts.[40] It provides immunity for the governments of foreign states and their instrumentalities,

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However, the United Arab Emirates has a regional SOE for the extraction of oil in the form of the Abu Dhabi National Oil Company. *See generally* Varun Rai & David G. Victor, *Awakening Giant: Strategy and Performance of the Abu Dhabi National Oil Company (ADNOC)*, *in* OIL AND GOVERNANCE: STATE-OWNED ENTERPRISES AND THE WORLD ENERGY SUPPLY 481 (David G. Victor et al. eds., 2011). Therefore, in practice, only two states among the fifteen with the largest oil reserves do not have SOEs for the extraction of oil.

37. *See generally* Shackelford, *supra* note 18 (discussing the expansion of offshore drilling, particularly in the Arctic, led by SOEs from states like Russia and Norway).

38. Bruton et al., *supra* note 25, at 93.

39. For a more detailed discussion of when foreign SOEs are subject to the same protections as foreign governments, see *infra* Section II.A.

40. 28 U.S.C. §§ 1330, 1602–1611.

subject to exceptions.[41] In Sections II and III of this Note, I discuss in detail the application of the FSIA to the issue of transboundary pollution caused by foreign SOEs. However, due to the centrality of the FSIA to this Note, a brief overview of the statute's history and structure is warranted.

Congress enacted the FSIA in 1976, yet the foundations of foreign sovereign immunity can be traced back to before the founding of the United States. While some form of foreign sovereign immunity has been practiced since antiquity, its contemporary form emerged with the modern concept of statehood developed in the 1648 Peace of Westphalia.[42] The Westphalian system presupposed that all states were equal on the international stage and the sole authority within their own territory.[43] To preserve the equality and sole domestic authority of states, the doctrine of foreign sovereign immunity developed so that no sovereign state would have its actions scrutinized by the domestic courts of another sovereign.[44] In the centuries following the Peace of Westphalia, foreign sovereign immunity has become so widely practiced that it is now recognized as a doctrine of customary international law.[45]

In the United States, foreign sovereign immunity existed in the federal courts for over 150 years before the enactment of the FSIA. Unlike state sovereign immunity, which was expressly established in the Eleventh Amendment to the United States Constitution,[46] foreign sovereign immunity does not have a clear constitutional basis, and for many years it had no statutory basis. Instead, foreign sovereign immunity first emerged in the United States as a form of judicial restraint.[47] With no clear basis, foreign sovereign immunity developed

41. *See generally id.*

42. Hazel Fox, *The Restrictive Rule of State Immunity – The 1970s Enactment and Its Contemporary Status*, *in* THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 21, 21 (Tom Ruys et al. eds., 2019).

43. *Id.* at 22.

44. *Id*. The doctrine of foreign sovereign immunity emerged both in common law and civil law countries, albeit in different ways. Under common law, foreign sovereign immunity emerged as a form of judicial restraint. *See, e.g.*, Duke of Brunswick v. King of Hanover (1844) 49 Eng. Rep. 724, 729 (HL). In the civil law tradition, sovereign immunity was a by-product of the division between ordinary civil courts and administrative courts; only the latter could have heard suits against a foreign sovereign, but this was practically impossible. Fox, *supra* note 42, at 22; Joseph W. Dellapenna, *Foreign State Immunity in Europe*, 5 N.Y. INT'L L. REV. 51, 55–56 (1992).

45. *See* Jurisdictional Immunities of the State (Ger. v. It.), Merits, 2012 I.C.J. 99, ¶ 57 (Feb. 3).

46. U.S. CONST. amend. XI.

47. *See, e.g.*, The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 126 (1812)

gradually, leaving the doctrine's exact limits unclear and often inconsistent.[48]

The doctrine of foreign sovereign immunity first emerged in *The Schooner Exchange v. McFaddon*,[49] in which Chief Justice John Marshall declined to extend the Court's jurisdiction over a French military vessel.[50] Over the next 150 years, *The Schooner Exchange* provided the foundation for all future foreign sovereign immunity cases.[51] However, the case left one essential question open: What specific acts of a foreign state are immune from the jurisdiction of U.S. courts?

Throughout the Twentieth Century, the U.S. Supreme Court experimented with two possible answers to this question. These respective doctrines are referred to as absolute sovereign immunity and restrictive sovereign immunity. Absolute sovereign immunity is the principle that all activities undertaken by a foreign state are sovereign acts, and therefore entitled to immunity.[52] Restrictive sovereign immunity, on the other hand, draws a distinction between the "public" and "commercial" acts of the sovereign.[53] In early cases, the Court increasingly moved toward absolute sovereign immunity, culminating in the case *Berizzi Brothers Co. v. S.S. Pesaro*.[54] In subsequent decades, however, the courts began actively deferring to the wishes of the State Department to determine whether to grant foreign sovereign immunity.[55] Nonetheless, the State Department almost always requested immunity, preserving absolute sovereign immunity in practice if not in

(finding that exerting jurisdiction over a foreign naval vessel would "amount to a judicial declaration of war"); *Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943) (finding that an exercise of jurisdiction against a friendly sovereign would "embarrass" the executive branch).

48. *See* Verlinden, B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486–88 (1983) (discussing the development of and confusion over foreign sovereign immunity prior to the enactment of the FSIA).

49. The Schooner Exchange, 11 U.S. (7 Cranch) 116 (1812).

50. *Id.* at 137 (holding that the "perfect equality and absolute independence of sovereigns" required limitations on the jurisdiction of one state's courts over the government of another sovereign state).

51. David A. Brittenham, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440, 1451 (1983). *See also* Verlinden, B.V., 461 U.S. at 486–88.

52. Brittenham, *supra* note 51, at 1452.

53. *Id.* at 1440 n.1.

54. Berizzi Brothers Co. v. S.S. Pesaro, 271 U.S. 562 (1926) (declining to extend jurisdiction over a commercial vessel owned by the government of Italy).

55. *See, e.g.*, *Ex parte* Republic of Peru, 318 U.S. 578 (1943); Republic of Mex. v. Hoffman, 324 U.S. 30 (1945).

theory.[56]

However, in the 1950s, changing executive practices led to the adoption of restrictive sovereign immunity as the courts' dominant doctrine. In 1952, in the so-called Tate Letter, the State Department officially espoused a policy of restrictive sovereign immunity.[57] The State Department argued that, in light of the growing prevalence of international commerce and changing practices of foreign courts, it would be the policy of the United States to only grant immunity for the "public" acts of foreign states while allowing their "private" acts to be subjected to the jurisdiction of U.S. courts.[58] Nonetheless, U.S. courts struggled to apply the State Department's new policy of restrictive sovereign immunity in any consistent manner due to an absence of clear case-by-case guidance from the State Department.[59] By the 1970s, it had become evident that a more uniform system of foreign sovereign immunity was necessary.[60]

In 1976, Congress enacted the FSIA to provide the uniform system of foreign sovereign immunity that U.S. courts sorely needed and to make the courts the sole source of immunity decisions.[61] Because of its role in setting out clear principles of foreign sovereign immunity, the FSIA is the sole instrument by which a plaintiff may establish the jurisdiction of a federal or state court over a foreign state or its instrumentalities.[62] The FSIA can best be understood as a product

56. Verlinden, B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983).

57. Letter from Jack B. Tate, Acting Legal Adviser of the U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952) [hereinafter Tate Letter], *reprinted in* 26 DEP'T ST. BULL. 984 (1952).

58. *Id*. at 984.

59. Verlinden B.V., 461 U.S. at 487 (internal citations omitted).

60. *Id.* at 487–88.

61. 28 U.S.C. § 1602 ("The Congress finds that the determination by the United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts."). The House Report on the FSIA reiterated this sentiment:

> A principal purpose of this bill is 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.

H.R. REP. NO. 94-1487, at 7 (1976).

62. Arg. Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989). *See also* Tyler G. Banks, *Corporate Liability Under the Alien Tort Statute: The Second Circuit's Misstep Around General Principles of Law in Kiobel v. Royal Dutch Petroleum Co.*, 26 EMORY INT'L L. REV. 227, 231 n.38 (2012); Luis Enrique Cuervo, *The Alien Tort Statute, Corporate Accountability, and the New Lex Petrolea*, 19 TUL. ENV'T L.J. 151, 179 (2006).

of its history. The stated purpose of the FSIA is to enact the doctrine of restrictive sovereign immunity, allowing the jurisdiction of federal and state courts over a foreign state's commercial activities, but granting immunity for its public activities.[63] However, in keeping with the old tradition of absolute sovereign immunity, the FSIA creates a presumption of immunity for foreign governments and their instrumentalities which may only be overcome if the activities of the foreign state fall within a limited number of exceptions.[64]

II. ISSUES IN APPLYING THE FSIA

The foregoing section has demonstrated that, while foreign SOEs are inextricably linked to the energy sector, an industry that poses a high risk of transboundary pollution, establishing jurisdiction over foreign SOEs in related cases would likely involve applying the FSIA. In this section, I discuss the issues a court may face in exercising jurisdiction over a foreign SOE that causes transboundary pollution under the framework created by the FSIA. First, I discuss when a foreign SOE may be considered an "instrumentality of a foreign state," and therefore entitled to the protections of the FSIA. Second, I identify the commercial activity exception in the Act as the most likely exception for a court to apply to the foreign SOE. Finally, I discuss the U.S. Courts of Appeals' conflicting applications of the commercial activity exception to the exploitation of natural resources by a foreign state, and how this confused jurisprudence creates issues for applying the commercial activity exception to cases of transboundary pollution.

A. "Instrumentality of a Foreign State"

Before determining whether transboundary pollution from foreign SOEs falls within an exception to foreign sovereign immunity, it is essential to establish whether a foreign SOE is entitled to the protections of the FSIA in the first place. In most cases, a foreign SOE would

63. 28 U.S.C. § 1602 ("[S]tates are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities."); H.R. REP. NO. 94-1487, at 7 (1976) (stating that it is the purpose of Congress to enact the distinction between public and private acts discussed in the Tate Letter, which has become increasingly necessary in an international commercial system).

64. 28 U.S.C. § 1604 (emphasis added) ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States *except* as provided in sections 1605 to 1607 of this chapter.").

be entitled to these protections as an instrumentality of the foreign state.

Even before the enactment of the FSIA, foreign sovereign immunity extended to entities beyond the central government of a foreign state.[65] The FSIA, unsurprisingly, does not deviate from this rule. The FSIA defines a foreign state as any political subdivision or instrumentality of a foreign state, thereby expanding the definition beyond just the central government.[66] A corporate entity can only be an instrumentality of a foreign state if it is a legal person separate from the foreign state and is majority owned by that state.[67] In prior cases, various courts have unsurprisingly held that a foreign SOE is instrumentality of a foreign state and therefore entitled to the protections of the FSIA.[68]

Although it is established that an SOE may be considered an instrumentality of a foreign state, one important factual issue remains for courts determining whether to apply the FSIA to foreign SOEs. While the FSIA only provides that an entity must be majority-owned by a foreign state to receive the protections of the FSIA, the Supreme Court has also found that the entity must be directly owned by the government or a subdivision of it rather than by a subsidiary of another SOE.[69] As a result, whether to apply the FSIA to foreign SOEs will be a heavily fact-dependent determination for future courts. The ownership structures of foreign SOEs are diverse, ranging from direct ownership to other structures where SOEs are mainly subsidiaries of one state-owned entity.[70] However, because such an inquiry would be

65. *See, e.g.*, The Schooner Exchange, 11 U.S. (7 Cranch) 116, 118 (1812) (a warship of the foreign state); Berizzi Brothers Co. v. S.S. Pesaro, 271 U.S. 562, 569-70 (1926) (a commercial vessel owned by the foreign state).

66. 28 U.S.C. § 1603(a).

67. The full statutory definition is as follows:

> An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.
>
> 28 U.S.C. § 1603(b).

68. *See, e.g.*, Republic of Arg. v. Weltover, 504 U.S. 607 (1992); Pere v. Nuovo Pignone, Inc., 150 F.3d 477 (5th Cir. 1998); Straub v. A.P. Green, 38 F.3d 448 (9th Cir. 1994); Gen. Elec. Cap. Corp. v. Grossman, 991 F.2d 1376 (8th Cir. 1993).

69. Dole Food Co. v. Patrickson, 538 U.S. 468, 473 (2003).

70. *See generally* Bruton et al., *supra* note 25.

heavily fact-dependent, for purposes of this Note it is assumed that a court would find a foreign SOE that causes transboundary pollution to be an instrumentality of its state.

B. Identifying the Exception

Because foreign SOEs are generally instrumentalities of a foreign state, they are entitled to presumptive immunity unless their activities fall within one of the exceptions under the FSIA.[71] In this subsection, I will analyze what exceptions, if any, may apply to activities resulting in transboundary pollution by foreign SOEs.

Two sections of the FSIA, § 1605 and § 1607, provide the majority of the FSIA's exceptions to foreign sovereign immunity.[72] However, § 1607 only covers counterclaims against foreign sovereigns, which this Note will not address.[73] § 1605, on the other hand, provides a set of reasonably broad exceptions relating to the subject matter of the claim brought against a foreign sovereign. This section provides exceptions for (1) claims for which the foreign state has waived immunity, (2) claims based on the commercial activity of the foreign state, (3) claims where the foreign state has taken property in violation of international law, (4) claims in which property acquired by gift or succession or immovable property within the United States are involved, (5) claims arising from the tortious actions not based on discretionary use of state authority, and (6) claims enforcing contracts or arbitral awards.[74]

Of these six exceptions, the three covering claims relating to property or contract rights (i.e. the third, fourth, and sixth exceptions) do not apply to transboundary pollution. Furthermore, there are only very limited circumstances in which the first exception, covering waivers of immunity, would apply. In the context of the FSIA, waivers of immunity almost always arise through agreements with private parties.[75] Furthermore, waivers of foreign sovereign immunity are

71. 28 U.S.C. § 1604.

72. 28 U.S.C. §§ 1605, 1607. Two additional sections including exceptions to foreign sovereign immunity for state sponsors of terrorism were added to the FSIA in the last two decades, but they are not relevant to this Note. 28 U.S.C. §§ 1605A, 1605B.

73. 28 U.S.C. § 1607.

74. 28 U.S.C. § 1605(a). The section also provides an exception for admiralty claims, which are not relevant to this Note. 28 U.S.C. § 1605(b).

75. *See, e.g.*, Walker Int'l Holdings Ltd. v. Congo, 395 F.3d 229 (5th Cir. 2004); Worldwide Mins. v. Republic of Kaz., 296 F.3d 1154 (D.C. Cir. 2002); Firebird Glob. Master Fund II Ltd. v. Republic of Nauru, 915 F. Supp. 2d 124 (D.D.C. 2013); Themis Cap., LLC v.

narrowly construed by the courts.[76] For the waiver exception to the FSIA to apply, a foreign sovereign would have to explicitly or, in very limited situations, implicitly waive its immunity for transboundary pollution.[77] Because such a waiver is not likely, this Note will not explore the applicability of the waiver exception any further.

In reality, the only two exceptions to the FSIA that may reliably apply to transboundary pollution are the commercial activity exception and tortious activity exception.[78] Out of these two remaining options, the commercial activity exception is far more likely to apply. The commercial activity exception is the most fundamental exception to the structure of the FSIA.[79] Furthermore, the tortious activity exception expressly only applies to activities not covered by the commercial activity exception.[80] This is a major limitation on the tortious activity exception due to the fact that the commercial activity exception applies to all claims that arise from actions taken in connection with the foreign sovereign's commercial activity, as long as the action causes a direct effect in the United States.[81] As such, tort claims for personal injury or property damage still fall within the commercial activity exception if the harms occur in connection with the foreign sovereign's commercial activities.[82]

Indeed, one would be hard-pressed to imagine a scenario in which a foreign SOE causes transboundary pollution through means other than commercial activity.[83] Furthermore, this Note primarily

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Dem. Rep. Congo, 881 F. Supp. 2d 508 (S.D.N.Y. 2012). In this way, waivers of foreign sovereign immunity are distinct from waivers of state sovereign immunity, which may arise by state legislation. Curran v. Arkansas, 56 U.S. 304, 309 (1853).

76. *See, e.g.*, Gutch v. Fed. Republic of Ger., 444 F. Supp. 2d 1 (D.D.C. 2006).

77. *See, e.g.*, Kim v. Korea Trade Promotion-Inv. Agency, 51 F. Supp. 3d 279, 285 (S.D.N.Y. 2014) (holding that an implicit waiver must be "'unmistakable' and 'unambiguous'"); *In re* Terrorist Attacks on Sept. 11, 2001, 349 F. Supp. 2d 765, 803 n.31 (S.D.N.Y. 2005) (citing Banco de Seguros del Estado v. Mut. Marine Off., Inc., 344 F.3d 255, 261 (2d Cir. 2003)).

78. *See* 28 U.S.C. § 1605(a)(2), (5).

79. This is most clearly evidenced by the fact that Congress's stated purpose in enacting the FSIA was to follow the international trend of granting immunity to foreign states' sovereign, but not commercial, activities. 28 U.S.C. § 1602 ("[S]tates are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned.").

80. 28 U.S.C. § 1605(a)(5). *See also* Frolova v. Union Soviet Socialist Reps., 558 F. Supp. 358, 362 (N.D. Ill. 1983), *aff'd*, 761 F.2d 370 (7th Cir. 1985).

81. de Csepel v. Republic of Hung., 714 F.3d 591, 598 (D.C. Cir. 2013).

82. *See, e.g.*, Lyon v. Agusta S.P.A., 252 F.3d 1078 (9th Cir. 2001) (finding that a products liability claim arising from a plane crash fell within the commercial activity exception).

83. This does not consider actions by the central government of a foreign state, which

focuses on the likelihood of transboundary pollution arising in connection to energy production, which falls squarely within the commercial activities of SOEs and foreign states in general.[84] Therefore, transboundary pollution caused by foreign SOEs is most likely to fall within the commercial activity exception. While the commercial activity exception covers commercial acts inside and directly relating to the United States,[85] the exception also applies to commercial acts in the borders of a foreign state that have direct effects within the borders of the United States.[86] Transboundary pollution, by its nature, would almost certainly fall into this last scenario.

For the above reasons, it can be concluded that, at least as a preliminary matter, claims involving transboundary pollution fall within the commercial activity exception rather than the tortious activity exception. However, determining whether the commercial activity exception actually provides an avenue to subject foreign SOEs to the jurisdiction of U.S. courts in cases of transboundary pollution is a more complicated matter.

C. Applying the Commercial Activity Exception

As discussed above, the commercial activity exception applies to any claims made in connection with commercial activity, as long as the action causes a direct effect in the United States.[87] Therefore, the primary question any court will face in applying the commercial activity exception is whether the actions of foreign SOEs resulting in transboundary pollution are, in fact, commercial activity rather than sovereign acts. In this subsection, I discuss the general distinction between sovereign and commercial acts as it pertains to the commercial activity

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could cause transboundary pollution through acts like bomb testing, operation of naval vessels, etc.

84. See discussion *supra* Parts I.A–B.

85. 28 U.S.C. § 1605(a)(2).

86. *Id.* (covering "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"). The Supreme Court and courts of appeals have developed two requirements for any given harm to constitute a direct effect: that the harm be "legally significant" and is an immediate consequence of the defendant's actions. *See* Republic of Arg. v. Weltover, 504 U.S. 607, 618 (1992); *See* Bell Helicopter Textron, Inc. v. Islamic Republic of Iran, 892 F. Supp. 2d 219, 226 (D.D.C. 2012) (citing Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511, 1515 (D.C. Cir. 1988), *aff'd*, 437 F.3d 1175 (D.C. Cir. 2013)). However, it is difficult to imagine a scenario in which these requirements would not apply to transboundary pollution caused by foreign SOEs.

87. de Csepel v. Republic of Hung., 714 F.3d 591, 598 (D.C. Cir. 2013).

exception, as well as how that distinction is complicated when a foreign state or its instrumentality exerts control over its natural resources. Specifically, I highlight an ongoing split among circuit courts regarding whether a foreign SOE's exploitation of the state's natural resources is a sovereign or commercial act; a division the final section of this Note resolves.

1. The Commercial Activity Exception and Natural Resources

The FSIA provides that, when determining whether a specific state action is commercial activity, courts should look to the nature of the activity rather than its purpose.[88] For this reason, even when a state takes an action that has a public purpose, courts will exercise jurisdiction over that activity if it is fundamentally commercial rather than an exercise of sovereignty.[89] To determine when an action is commercial by its nature, courts generally utilize what is known as the "private actor test," which focuses on whether the foreign state's activity is one that could be done by a private actor.[90] The paradigmatic example of this is the purchase or sale of goods on the market, but courts engage in individualized inquiries into whether a particular state action is one that could be performed by a private party.[91]

This inquiry, however, is particularly complicated when the foreign state's activity involves the exploitation of natural resources.[92] To varying extents, courts have held that that the commercial activity exception does not apply when the foreign state's activity involves certain kinds of exploitation of the state's natural resources. In cases of

88. 28 U.S.C. § 1603(d) ("A 'commercial activity' means 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.").

89. CYBERsitter, LLC v. China, 805 F. Supp. 2d 958, 975–76 (C.D. Cal. 2011); *see also* de Sanchez v. Banco Cent. de Nicar., 770 F.2d 1385, 1393–95 (5th Cir. 1985) (finding that Nicaragua's failure to pay bonds was an extension of the government's monetary policy, which was by its nature a sovereign act).

90. This approach seems to have been intended by Congress when enacting the FSIA. *See* H.R. REP. NO. 94-1487, at 14 (1976) (stating that commercial acts include "those which private persons normally perform"). For applications of the private party test, see, for example, Saudi Arabia v. Nelson, 507 U.S. 349, 361-62 (1993); and Themis Cap., LLC v. Dem. Rep. Congo, 881 F. Supp. 2d 508, 526 (S.D.N.Y. 2012).

91. *Compare* Themis Cap., LLC, 881 F. Supp. 2d at 526 *with* de Sanchez, 770 F.2d at 1393-95.

92. *See generally* George K. Foster, *When Commercial Meets Sovereign: A New Paradigm for Applying the Foreign Sovereign Immunities Act in Crossover Cases*, 52 HOUS. L. REV. 361 (2014); Brittenham, *supra* note 51.

claims involving transboundary pollution, this will be a particularly difficult obstacle to overcome in establishing jurisdiction over a foreign SOE. Foreign SOEs around the world are heavily involved in energy production, which often involves varying degrees of exploitation of the state's own natural resources.[93] Therefore, under certain interpretations of existing case law, the acts of foreign SOEs that result in transboundary pollution may be sovereign rather than commercial activities, immune from the jurisdiction of U.S. courts. To date, no clear standard has developed regarding whether the commercial activity exception applies to a state's exploitation of its natural resources when such acts result in transboundary pollution. However, there is an ongoing and significant divide among circuit courts regarding the extent to which resource exploitation is a sovereign activity. Ultimately, this divide is the issue this Note seeks to resolve.

Three early cases decided between the late 1970s and early 1980s first established that, at least in some instances, a foreign state's exploitation of its natural resources is a sovereign activity not subject to the jurisdiction of U.S. courts. In the first such case, *IAM v. OPEC*,[94] the court dismissed a complaint against the Organization of Petroleum Exporting Countries and its individual member states (collectively "OPEC") for violations of the Sherman Antitrust Act by fixing prices of crude oil.[95] While plaintiffs argued that OPEC's activity was by its nature the selling of goods on the world market, which would fall under the commercial activity exception, the court found that OPEC was actually exercising control over its natural resources.[96] By defining the nature of OPEC's activities as such, the court ultimately found that the private party test alone was insufficient to make an FSIA determination.[97] Instead, the court made its determination in line with international law and found that, under that body of law, it was well established that a state's control over its natural resources was a fundamental attribute of sovereignty.[98] For that reason, the court found that OPEC's actions were sovereign rather than commercial in

93. See discussions *supra* Parts I.A–B.

94. IAM v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981).

95. 477 F. Supp. 553.

96. *Id.* at 567.

97. *Id.*

98. *Id.* at 567–68. The court also cited domestic law, including the U.S. Constitution, to demonstrate that a similar principle had been acknowledged in the United States. *Id.* The international law doctrine that the court primarily relied on, which established the rule that states have a sovereign right to exploit their natural resources, had emerged over the two decades before *OPEC* was decided. See discussion *infra* Section III.B.1.

nature, and therefore declined to extend the commercial activity exception to plaintiffs' antitrust claim.

In the second early case on the issue, *In re Complaint of Sedco, Inc.*,[99] the court dismissed claims from a variety of plaintiffs against Pemex, a Mexican oil company, arising from the 1979 Bay of Campeche Oil Spill that caused considerable damage within the boundaries of the United States.[100] Once again, the court in this case declined to extend the commercial activity exception to Pemex's oil drilling, which caused the spill.[101] As in *OPEC*, the court dismissed the relative simplicity of the private party test as it pertained to oil drilling.[102] While the court held that a private party could perform the act of drilling for oil, Pemex was acting with the express authorization of the Mexican legislature, and the resources extracted by the company were central to Mexico's economic policies as a whole.[103] For this reason, the court found that the actions of Pemex were, in reality, an extension of Mexico's control over its own natural resources and therefore a sovereign act in any context short of buying or selling those resources on the market.[104] With this holding, the court expanded significantly on the holding in *OPEC* and hinted at a general principle of state immunity when the exploitation of natural resources is involved.

The final, and most frequently cited, early case to recognize control over natural resources as an attribute of sovereignty was *MOL,*

99. 543 F. Supp. 561 (S.D. Tex. 1982), *vacated in part*, 610 F. Supp. 306 (S.D. Tex. 1984). *In re Sedco* has rarely been cited in subsequent decisions, meaning its precedential value is limited. Nonetheless, because it was decided before the emergence of the division in authority discussed *infra* Section II.C.2 and accompanying text, it is included in this discussion as an important point in the development of the doctrine that this Note primarily addresses.

100. *In re Sedco*, 543 F. Supp. 561. This case is the only FSIA case to specifically deal with transboundary pollution arising from a state's control over its natural resources. While it would seem to stand for the proposition that acts resulting in transboundary pollution are sovereign in nature, the reasoning established in *OPEC* and its successor incorporated international law into the issue of a state's control over its natural resources. *See supra* note 98 and accompanying text; sources cited *infra* notes 105–109. Developments in this body of international law would imply that *In re Sedco* is no longer controlling. *See* discussion *infra* Section III.B. For a more detailed discussion of *In re Sedco*'s current legal value, see discussion *infra* note 188.

101. *See In re Sedco*, 543 F. Supp. 561.

102. *Id.* at 565–66 (rejecting the proposition that "every act done by a foreign state which could be done by a private citizen in the United States is commercial activity").

103. *Id.*; *see also* Foster, *supra* note 92, at 396–97.

104. *In re Sedco*, 543 F. Supp. at 566 ("A very basic attribute of sovereignty is the control over its mineral resources and short of actually selling these resources on the world market, decisions and conduct concerning them are uniquely governmental in nature.").

Inc. v. People's Republic of Bangladesh.[105] In this case, an Oregon corporation brought a claim against the Bangladesh Department of Agriculture arising from the Department's breach of a contract which granted the corporation a license to breed and export rhesus monkeys from Bangladesh for medical research.[106] While the court acknowledged that entering contracts was a paradigmatic commercial activity, the granting of a license to export monkeys, a natural resource of the state, was an action that only a sovereign could perform.[107] The court, citing *OPEC* and that court's reliance on international law, found that the granting of a license to export monkeys was an aspect of the state's control over its natural resources, and that control over natural resources is uniquely sovereign.[108] By refusing to apply the commercial activity exception to an action seemingly as simple as breaching a contract, the court in *MOL, Inc.* indicated that any activity arising from a state's control over its natural resources is by its nature sovereign.[109]

2. The Absolutist and Limited Views of Control over Natural Resources

The three cases above, culminating in *MOL, Inc.*, established the basic proposition that a state's control over its natural resources is a sovereign act, and that any activities arising from that control are not commercial activity. Recall that energy production, an industry that is particularly likely to result in transboundary pollution, is uniquely dominated by foreign SOEs established by states around the world.[110] If the use of a state's resources for purposes of energy production were ever to cause harm within the boundaries of the United States, these early cases could support the proposition that a foreign SOE named as a defendant, acting as an instrumentality of its state, was exerting control over the state's natural resources. As such, it could follow that the foreign SOE is immune from jurisdiction under the FSIA.

Whether such a proposition would succeed depends fully on the extent of a state's sovereign right to exploit its natural resources. While *MOL, Inc.* and its preceding cases support the general claim that control over natural resources and exploitation of those resources is an

105. 736 F.2d 1326 (9th Cir. 1984), *cert. denied*, 469 U.S. 1037 (1984).

106. *Id.* at 1327.

107. *Id.* at 1329.

108. *Id.*

109. Foster, *supra* note 92, at 398–99.

110. *See* discussion *supra* Section I.B.

attribute of sovereignty, the extent of a sovereign's control over its natural resources in the context of the commercial activity exception remains a topic of intense debate among courts following *MOL, Inc*.[111]

Among the courts applying *MOL, Inc.*, two general views have developed on this issue. For purposes of this Note, they will be referred to as the absolutist view and the limited view. The absolutist view, as its name implies, asserts that a foreign state has an absolute sovereign right to the exploitation of its natural resources. Under the absolutist view, any activity involving the exploitation of the state's natural resources is a sovereign act, and therefore subject to foreign sovereign immunity. To date, only one District Court has made a ruling formally espousing the absolutist view.[112] However, the Seventh and Ninth Circuits have indicated that they hold a similar view.

The leading case cited for the absolutist view is *Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*.[113] Though the court in this case was dealing with a typical contract for the purchase and sale of services, which fell squarely within the commercial activity exception, the court in dicta stated that its ruling would be different had the contract involved the exploitation of natural resources.[114] The court broadly stated that "natural resources, to the extent they are 'affected with a public interest,' are goods in which only the sovereign may deal."[115] Similarly, in *California v. NRG Energy, Inc.*,[116] the Ninth Circuit found, largely in dicta, that a Canadian energy utility conducted activities that were subject to foreign sovereign immunity by manipulating Canada's water resources.[117] *NRG Energy, Inc.* is an especially useful representation of the absolutist view for purposes of

111. *See* Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co., 841 F. Supp. 2d 769, 787–88 (S.D.N.Y. 2012) (discussing the division among the circuits in applying *MOL, Inc.* to commercial transactions in which natural resources are involved). *See generally* Foster, *supra* note 92.

112. Jones v. Petty Ray Geophysical Geosource, Inc., 722 F. Supp. 343, 346–47 (S.D. Tex. 1989) (holding that "[a] sovereign's conduct with respect to its natural resources is presumptively a governmental function").

113. 877 F.2d 574 (7th Cir. 1989).

114. *Id.* at 578.

115. *Id.*

116. 391 F.3d 1011 (9th Cir. 2004), *vacated in part on other grounds sub nom.* Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224 (2007).

117. *Id.* at 1024. The court primarily found that the utility, BC Hydro, was entitled to foreign sovereign immunity because its actions had no direct effects in the United States. *Id.* Nonetheless, it addressed the substance of the commercial activity exception in dicta. *Id.* (stating that "the ability to make decisions about the management of natural resources is a uniquely sovereign capacity").

this Note, because it specifically tied the foreign state's sovereignty to the use of natural resources for energy production. Therefore, while the Seventh and Ninth Circuits have only espoused the absolutist view in dicta, it can likely be inferred that they would not extend the commercial activity exception to cases where natural resources are used for energy production.

The limited view, by contrast, applies *MOL, Inc.* and its preceding cases more restrictively. Essentially, under the limited view, a foreign state undertakes sovereign activity with respect to its natural resources only when it grants other parties the right to use or export the foreign state's natural resources.[118] The limited view has received more open support in the District Courts.[119] Furthermore, the view has been formally adopted by the Fourth and Eleventh Circuits.

The first case in which a court took a limited view of *MOL, Inc.* was *Honduras Aircraft Registry v. Government of Honduras*,[120] in which plaintiffs brought a claim against the government of Honduras for breaching a contract where the government promised to modernize the Honduran aeronautics program.[121] Although Honduras attempted to dismiss the case on foreign sovereign immunity grounds, citing *MOL, Inc.*, the Eleventh Circuit quickly dispensed with Honduras's desired application of that case. The court held that *MOL, Inc.* had only established that acts involving the exportation of natural resources implicated the sovereign's control over its natural resources.[122] For that reason, the court held that while the contract at issue required Honduras to utilize its natural resources (namely, its airspace for use by the aeronautics program), the government's particular use of its resources did not classify as a sovereign act.[123]

The Fourth Circuit also adopted the limited view in *Globe Nuclear Services & Supply GNSS, Ltd. v. AO Technabexport*.[124] In that case, plaintiffs brought a claim against a corporation that was majority owned by the Russian Federation for breaching a contract to sell

118. Rush-Presbyterian-St. Luke's Med. Ctr., 877 F.2d at 578.

119. *See, e.g.,* Turan Petroleum, Inc. v. Ministry of Oil & Gas of Kaz., 385 F. Supp. 3d 80 (D.D.C. 2019); Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co., 841 F. Supp. 2d 769, 788 (S.D.N.Y. 2012); Oceanic Expl. Co. v. ConocoPhillips, Inc., No. 04-332 (EGS), 2006 WL 2711527 at *4–5 (D.D.C. Sept. 21, 2006).

120. 119 F.3d 1530 (11th Cir. 1997), *amended by*, 129 F.3d 543 (11th Cir. 1997).

121. *Id.* at 1533.

122. *Id.* at 1537.

123. *Id.* at 1536.

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

plaintiffs uranium extracted from decommissioned nuclear weapons.[125] Defendant argued that, because the uranium was Russian in origin, it was a natural resource that only the Russian state had the sovereign right to exploit. The Fourth Circuit, however, found that this argument involved much too broad a reading of *MOL, Inc.* Instead, the court interpreted *MOL, Inc.* to stand for the limited proposition that "the grant of a license to operate within sovereign territory and to extract natural resources from within that territory is sovereign activity."[126]

Ultimately, it is evident that the extent of a foreign state's control over its natural resources remains unclear following *MOL, Inc*. Among the courts that have sought to apply the case, there is essentially an even split between circuits that apply the absolutist view and those that apply the limited view. This circuit split means that the question of whether, under the commercial activity exception to the FSIA, a foreign SOE can be subject to the jurisdiction of U.S. courts in cases of transboundary pollution remains open. To answer this question, it is essential to determine whether the limited or absolutist view of *MOL, Inc.* is more appropriate in cases of transboundary pollution.

III. APPLYING INTERNATIONAL LAW TO CASES OF TRANSBOUNDARY POLLUTION UNDER THE FSIA

In the final section of this Note, I resolve the question of whether a sovereign's control over its natural resources makes transboundary pollution resulting from the extraction or use of those natural resources, particularly for energy production, a commercial or sovereign act under the FSIA. Because the current authorities stemming from *MOL, Inc.* are divided on this issue, I interpret the commercial activity exception through the lens of international law, which is much clearer on the relationship between a sovereign's control over its natural resources and transboundary pollution. Under international law, the transboundary harm principle imposes an obligation on states to not exploit their natural resources in a manner that causes harm within

125. GNSS, 376 F.3d at 284.

126. *Id.* at 291. This interpretation of *MOL, Inc.* may seem distinct from the interpretation in *Honduras Aircraft Registry*, in which the court focused on the exportation of natural resources. However, the cases both stand for the general proposition a sovereign entity's control of a natural resource like uranium is a sovereign function "only to the extent it governs the ability of other actors to use that resource." Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co., 841 F. Supp. 2d 769, 788 (S.D.N.Y 2012).

the boundaries of another states.[127] I argue that, in light of the transboundary harm principle, the limited view of *MOL, Inc.* is a more appropriate understanding of a sovereign's right to control its natural resources in cases of transboundary pollution and that the commercial activity exception should apply in such cases. Finally, I provide a brief discussion of the potential benefits and adverse consequences of my conclusion for domestic and international law.

A. Applicability of International Law

It is clear that, at least to some extent, the exploitation of a state's natural resources is a sovereign activity and therefore not covered by the commercial activity exception in the FSIA.[128] For this reason, in cases of transboundary pollution caused by foreign SOEs, it is necessary to determine the extent of a sovereign's control over its natural resources. If a foreign SOE is acting within the state's sovereign authority when it extracts or uses natural resources in a manner that causes harm within the boundaries of the United States, then the SOE would be performing a sovereign act that is not covered by the commercial activity exception to the FSIA.[129] For this reason, it is clear that the absolutist and limited views of *MOL, Inc.* would result in different resolutions to this issue. Under the absolutist view, under which natural resources are always affected with the public interest,[130] it would follow that any use of the state's natural resources, including those resulting in transboundary pollution, are sovereign acts. By contrast, under the limited view, a sovereign's control over natural resources only extends to its ability to control what parties may extract and export those resources.[131] Because acts resulting in transboundary pollution do not fit that limited scope of sovereign authority, they would not be sovereign acts under the FSIA, and the commercial activity exception would apply.

Unfortunately, none of the seminal cases discussed above nor the text of the FSIA provide a clear understanding of the line between sovereign and commercial acts resulting in transboundary pollution.[132]

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127. *See* discussion, *infra* Section III.B.

128. *See* discussion *supra* Section II.C.1.

129. *See generally* 28 U.S.C. § 1605(a)(2).

130. Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic, 877 F.2d 574, 578 (7th Cir. 1989).

131. GNSS v. AO Techsnabexport, 376 F.3d 282, 291 (4th Cir. 2004).

132. *See* discussion *supra* Section II.C.

The seminal cases discussed above only establish that a sovereign has the right to control and exploit its natural resources, but does not specify the extent of this right.[133] Furthermore, the text of the FSIA does not provide a useful distinction between sovereign and commercial activities; while the statute does define "commercial activity," it ambiguously defines it as the "regular course of commercial conduct or a particular commercial transaction."[134] While this definition is often simply applied by way of the private party test, *MOL, Inc.* and its predecessors demonstrate that more nuance is required in the context of a state's exploitation of its natural resources.[135] However, another source of law may be useful in understanding the extent of a sovereign's right to exploit its natural resources: international law.

As a threshold matter, it is important to note that there is no relevant doctrine within the international law of immunities that provides any binding authority for U.S. courts.[136] Nonetheless, international law may be useful in interpreting the FSIA.[137] There are two reasons why international law may be particularly useful for this Note. First, while the FSIA is a domestic legal instrument, it can also be understood as a recognition of general principles of international law. Second, the doctrine developed in *OPEC* and *MOL, Inc.* is expressly based on substantive principles of international law.

The FSIA, and particularly the commercial activity exception, is a recognition of the international law of sovereign immunity. Two aspects of the FSIA support this proposition: the history of sovereign immunity law in the United States and the purpose of the FSIA as evidenced by its statutory text and legislative history.

The history of sovereign immunity law in the United States provides the first reason for viewing the FSIA as a recognition of the international law of immunities. Sovereign immunity is a practice that

133. MOL, Inc. v. People's Republic of Bangl., 736 F.2d 1326, 1329 (9th Cir. 1984) (citing IAM v. OPEC, 477 F. Supp. 553, 567–68 (C.D. Cal. 1979) (holding that the right to regulate natural resources is "a uniquely sovereign function").

134. 28 U.S.C. § 1603(d).

135. *See, e.g.*, *supra* note 97 and accompanying text.

136. Lori Fisler Damrosch, *The Sources of Immunity Law–Between International and Domestic Law*, *in* THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 40, 44–45 (Tom Ruys et al. eds., 2019); *see also* 28 U.S.C. § 1602 (providing that the FSIA is the mechanism by which courts should make immunities determinations). The United Nations has developed a uniform system of immunities that, if it receives thirty ratifications, would be binding. However, it has not yet received a sufficient number of ratifications and therefore has no effect. Damrosch, *supra*, at 48; RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 reporter's note 1 (AM. L. INST. 2018).

137. Damrosch, *supra* note 136, at 45.

has existed in one form or another since ancient times, and one that took root in a number of distinct civilizations.[138] In a similar vein, even in its earliest foreign sovereign immunity decisions, the Supreme Court indicated that affording immunity to foreign sovereigns was a matter of common practice among states.[139] Due to how widely it is practiced, seemingly out of a sense of legal obligation, the doctrine of foreign sovereign immunity is now indisputably a doctrine of customary international law after a recent ruling by the International Court of Justice ("I.C.J.").[140]

The Tate Letter also represents a particularly strong example of how the FSIA is aligned with the customary international law of immunities. In advocating for the restrictive rule of sovereign immunity, the Tate Letter primarily argued that international practice was shifting toward the restrictive rule.[141] For that reason, the Tate Letter argued that U.S. courts should also shift to a practice of restrictive foreign sovereign immunity to better reflect international practice.[142] While the history of American sovereign immunity law in general shows that the FSIA should be interpreted according to international law, the Tate Letter shows that the distinction between sovereign and commercial acts is a particularly important one in international law, and therefore that distinction should reflect principles of international law.

The second reason to generally view the FSIA as a recognition of international law is the purpose of the FSIA itself, as evidenced by its text and legislative history. This is particularly true with regard to the commercial activity exception, and by extension the distinction between sovereign and commercial acts. The text of the FSIA, namely the section including Congressional findings and purpose, most clearly evidences this; the statute provides that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned."[143] The House of Representatives Report on the FSIA, in discussing the same section, provides a more detailed explanation of the applicability of international law to the commercial activity exception. First and foremost, the Report states that the purpose of the FSIA in general is to establish a statutory

138. *Id.* at 43.

139. *Id.* at 42.

140. Jurisdictional Immunities of the State (Ger. v. It.), Merits, 2012 I.C.J. 99, ¶ 57 (Feb. 3).

141. *See generally* Tate Letter, *supra* note 57.

142. *Id.*

143. 28 U.S.C. § 1602.

regime that incorporates standards of international law into judicial decision making.[144] While the Report acknowledges that foreign sovereign immunity decisions are ultimately made by domestic courts, it specifically points out that the doctrine of restrictive sovereign immunity, and with it the distinction between sovereign and commercial acts, is a widely accepted practice among states and the existing practice of the United States.[145] As such, the House Report and text of the FSIA both demonstrate that, particularly with respect to the distinction between sovereign and commercial acts, the FSIA is a codification of international law. For that reason, international law should be consulted in determining the distinctions between those two kinds of acts under the commercial activity exception.

While international law is generally useful in interpreting the FSIA and commercial activity exception, it is uniquely important in applying the case law providing some form of sovereign immunity when a sovereign's control over its natural resources is involved. While *MOL, Inc.* is the most frequently cited decision in favor of the proposition that a state's exploitation of its natural resources is a sovereign act, recall that the ruling in that case was primarily based on the ruling in *OPEC*.[146] Therefore, the ruling in *OPEC* is particularly instructive in understanding why courts have viewed the exploitation of natural resources as sovereign acts to varying extents. The court in *OPEC* held that, under international law, it was the sovereign right of all states to exploit their natural resources in accordance with their own economic policies.[147] In light of this sovereign right, the court held that, in applying the commercial activity exception, a state's exploitation of its natural resources was a sovereign act and therefore not covered by said exception.[148]

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144. H.R. REP. NO. 94-1487, at 14 (1976) (citing Tate Letter, *supra* note 57).

145. *Id.* Because Congress, and the courts interpreting the FSIA, acted and continue to act out of a sense of continued legal obligation as evidenced by the House Report, the FSIA represents state practice and evidence of *opinio juris*, the two elements necessary for establishing customary international law. Damrosch, *supra* note 136, at 44–45 (citing RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 cmt. c (AM. L. INST. 2018)).

146. MOL, Inc. v. People's Republic of Bangl., 736 F.2d 1326, 1329 (9th Cir. 1984) (citing IAM v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979)).

147. IAM v. OPEC, 477 F. Supp. at 567–68 (citing a number of sources in international law that establish a sovereign's control over natural resources). For a more detailed discussion of the sources discussed in IAM v. OPEC, see discussion *infra* Section III.B.

148. 477 F. Supp. at 568–69. An important distinction for purposes of this Note, which will be discussed in greater depth *infra* at Section III.D., is that the court in *OPEC* did not base its ruling on the substantive international law of immunities. While such law does exist and may be useful in interpreting the FSIA, *see* Damrosch, *supra* note 136, at 4445, the court in *OPEC* based its ruling on a separate right enjoyed by all states under international law.

Although international law is consistently useful in interpreting the FSIA and especially the commercial activity exception, *OPEC* demonstrates how it is particularly useful in determining when a state's exploitation of its natural resources is a sovereign or commercial act. Because the ruling in *OPEC*, and in turn *MOL, Inc.*, was based on a sovereign's control over natural resources under international law, determining the extent of that control under international law will clarify what acts involving those resources are sovereign or commercial under the FSIA, especially since courts following *MOL, Inc.* are split on the issue. In the following subsection, I will discuss how the relatively recent development of the transboundary harm principle is a limitation on the right of states to control their natural resources.

B. Control Over Natural Resources Under International Law

In this subsection, I will first discuss the logic and extent of the international law doctrine that states have a sovereign right to control their natural resources. Then, I will discuss the transboundary harm principle and why it should be understood as a limitation on the right of states to control their natural resources.

1. The Doctrine of Sovereignty over Natural Resources

When the court in *OPEC* found that, under international law, all sovereigns had a right to control their natural resources,[149] it based its ruling on a well-established but relatively new principle under international law. One could argue that the right of a state to control and exploit its natural resources is inherent in the concept of territorial sovereignty.[150] However, the right to control natural resources did not expressly emerge in international law until the process of decolonization gained momentum in the 1950s and 60s.[151] The large number of post-colonial states then emerging in the international system argued that exclusive control over their natural resources was an essential aspect of guaranteeing their continued independence.[152] Throughout the

149. 477 F. Supp. at 567.

150. Stephan Hobe, *Evolution of the Principle on Permanent Sovereignty Over Natural Resources: From Soft Law to a Customary Law Principle?*, *in* PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES 3 (Marc Bungenberg & Stephan Hobe, eds., 2015) (citing generally U.N. Charter art. 2, ¶ 1).

151. Hobe, *supra* note 150, at 4–5.

152. *Id.*

1950s, a number of notable events increasingly brought sovereignty over natural resources to the forefront of international politics, such as Iran's nationalization of the Anglo-Iranian Oil Company in 1952.[153] In light of similar emerging controversies, as well as the increasing power of recently independent states in the United Nations ("U.N".), the right of all states to control and exploit their natural resources was officially acknowledged by the U.N. General Assembly in Resolution 1803: *Permanent Sovereignty Over Natural Resources*.[154]

Resolution 1803 included a number of express rights and obligations for states regarding the use of their natural resources, but most notably recognized "the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests."[155] Most importantly for the purposes of this Note, the U.N. General Assembly with this recognition specifically tied the exploitation of the state's natural resources to that state's sovereignty.[156] Over the next few years, the U.N. General Assembly tied control over natural resources to sovereignty in increasingly clear terms, particularly through two resolutions in 1974, which involved the development of a new international economic order to accommodate recently independent states.[157]

While the legal force of the U.N. General Assembly Resolutions remains uncertain, it is generally accepted that the connection between sovereignty and control over natural resources is an element of customary international law.[158] First, the General Assembly has frequently reiterated the right to control natural resources in the aforementioned resolutions as well as in a number of other resolutions

153. *Id.*

154. G.A. Res. 1803 (XVII), Declaration on Permanent Sovereignty Over Natural Resources, declaration 1 (Dec. 14, 1962) [hereinafter Resolution 1803]. The court in *OPEC* particularly cited this Resolution in support of its finding that the exploitation of natural resources was a sovereign act. *See* IAM v. OPEC, 477 F. Supp. at 567.

155. Resolution 1803, *supra* note 154, preamble.

156. Hobe, *supra* note 150, at 11. *See also* Resolution 1803, *supra* note 154, declaration 5 ("The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.").

157. G.A. Res. 3281 (XXIX), Charter of Economic Rights and Duties of States art. 2.1 (Dec. 12, 1974) ("Every state has and shall freely exercise full permanent sovereignty. . . over all its wealth, natural resources and economic activities . . . ."); G.A. Res. 3201 (S-VI), Declaration on the Establishment of a New International Economic Order in 1974 art. 4(e) (May 1, 1974) (guaranteeing "[f]ull permanent sovereignty of every State over its natural resources" including express protections for activities such as naturalization").

158. Hobe, *supra* note 150, at 11.

throughout the 1960s and 70s.[159] Typically, frequent statements of the same principle by the General Assembly are considered *opinio juris*, which is a necessary element of customary international law.[160] Furthermore, there is extensive state practice of the rule, including in the United States, where the right has at least been recognized through a number of FSIA decisions.[161] Considering these facts, the I.C.J. has specifically recognized sovereignty over natural resources as customary international law.[162]

For these reasons, it can be safely concluded that the courts in *OPEC* and *MOL, Inc.* were correct in holding that, at least to some extent, the exploitation of a state's natural resources is a sovereign act by that state. However, in the decades following those two decisions, another doctrine of customary international law, the transboundary harm principle,[163] has emerged as a limitation on the right of states to exploit their natural resources. Ultimately, this limitation must also be considered in cases of transboundary pollution under the FSIA, which will affect any court's analysis under the commercial activity exception to the FSIA.

2. The Transboundary Harm Principle

The transboundary harm principle imposes an obligation on states to not to use their resources in a manner that causes harm within the boundaries of another state. In many ways, the transboundary harm principle emerged starting in the 1970s as a natural follow-up to the right to control natural resources. It was a logical attempt to foster cooperation among states in their exploitation of those resources.[164] While the principle has never been formally adopted in a single agreement, over decades it has become customary international law.

The origins of the transboundary harm principle lie with the

159. For a full list of such reiterations, *see* IAM v. OPEC, 477 F. Supp. at 567 (citing a number of relevant U.N. resolutions).

160. Hobe, *supra* note 150, at 11.

161. For a discussion of how the right has been applied in American FSIA decisions, *see* discussion *supra* Section II.C. For a discussion of how the right has been applied in foreign states, *see* Hobe, *supra* note 150, at 10.

162. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 244 (Dec. 19).

163. Some scholars also refer to this principle as the "no harm rule." Hereinafter, any citations or quotes that include the term "no harm rule" may be assumed to apply to the transboundary harm principle.

164. Hobe, *supra* note 150, at 8.

Trail Smelter arbitration between the United States and Canada in 1941.[165] In this arbitration, the United States held Canada liable for sulfur dioxide emissions emanating from a smeltery in British Columbia that severely damaged crops in Washington state.[166] This arbitration represented the first instance in which one state was found to have breached an obligation to another by causing harm inside that state's territory.[167] The exact precedential value of this ruling, however, was unclear for some time; the arbitral panel had jurisdiction under a treaty solely between the United States and Canada, and the ruling was at least partially based on the common law of public nuisance that had developed in U.S. courts.[168] Nonetheless, the panel also found that its ruling was, at least to some extent, based on international law.[169] The I.C.J. later confirmed that a similar principle existed under international law in the *Corfu Channel* case of 1949.[170] In that case, the British government successfully held Albania liable for loss of life caused to British sailors after Albania had set mines in its territorial waters.[171] The I.C.J. primarily found that every state has an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[172] While this ruling did not exactly incorporate *Trail Smelter* into international law, it did stand for the similar proposition that the right of states to use their own territory was limited when those uses would cause harm to the rights of other states.

After *Trail Smelter* and *Corfu Channel*, the international community began to formally establish what would ultimately become the transboundary harm principle through a number of U.N. General Assembly resolutions and agreements in the 1970s. The first and most significant step in the establishment of the transboundary harm principle was Principle 21 of the Stockholm Declaration on the Human Environment, which expressly provided that "states have . . . the

165. Trail Smelter Arb. (U.S. v. Can.), 3 R.I.A.A. 1905 (1941).

166. *Id.* at 1965.

167. Timothy J. Heverin, Comment, *Legality of the Threat or Use of Nuclear Weapons: Environmental and Humanitarian Limits on Self-Defense*, 72 NOTRE DAME L. REV. 1277, 1296 (1997).

168. *Id.* at 1297. *Compare* Trail Smelter Arb., 3 R.I.A.A. at 1965 *with* Georgia v. Tenn. Copper Co., 206 U.S. 230, 238 (1907).

169. Trail Smelter Arb., 3 R.I.A.A. at 1965 ("[U]nder the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury . . . to the territory of another or properties or persons therein.").

170. Corfu Channel Case (U.K. v. Alb.), Judgment, 1949 I.C.J. 4 (Apr. 9).

171. *Id. See also* Shackelford, *supra* note 18, at 13.

172. Corfu Channel Case, 1949 I.C.J. at ¶ 22.

sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States . . . ."[173] Although the Stockholm Declaration itself was not binding, the U.N. later enshrined similar principles, often using nearly identical language, in a number of more limited but binding agreements involving biodiversity protection;[174] acid rain mitigation;[175] and marine pollution.[176]

Following these developments, the I.C.J. formally acknowledged the incorporation of the transboundary harm principle into customary international law with its 1996 Advisory Opinion *Legality of the Threat or Use of Nuclear Weapons*.[177] In this opinion, the court analyzed whether the threat or use of nuclear weapons violated any principles in three areas of international law: environmental law, humanitarian law, or the law of armed conflict.[178] The court ultimately found that such acts did not violate international environmental law, declining to extend that body of a law to a blanket prohibition against the use of nuclear weapons.[179] Nonetheless, the court held that this ruling was only a result of its unwillingness to extend what it otherwise found to be a principle of customary international law: that all states have an obligation "to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control [which] is now part of the corpus of international law."[180]

In this way, the *Nuclear Weapons* opinion formally acknowledged the incorporation of the transboundary harm principle into customary international law. However, an essential aspect of the transboundary harm principle that the I.C.J. did not address is the principle's core relationship to states' sovereignty over their natural

173. U.N. Conference on the Human Env't, *Stockholm Declaration on the Human Environment*, Principle 21, U.N. Doc. A/Conf.48/14/Rev.1 (June 25, 1972) [hereinafter "Stockholm Declaration"].

174. U.N. Convention on Biological Diversity art. 3, May 22, 1992, 1760 U.N.T.S. 79.

175. U.N. Convention of 1979 on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 1302 U.N.T.S. 217.

176. U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

177. 1996 I.C.J. 226 (July 8).

178. Heverin, *supra* note 167, at 1278.

179. *Id.* at 1279.

180. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. at ¶ 29. While this portion of the opinion does not expressly refer to the transboundary harm principle, the language used by the court very closely mirrors that from the Stockholm Declaration. *See supra* note 173 and accompanying text.

resources. Recall that Principle 21 of the Stockholm Declaration includes an express balancing act between the rights of sovereigns to control their natural resources and their obligations not to cause transboundary harm.[181] A similar balancing act can be seen in the U.N. Charter of the Economic Rights and Duties of States, in which the U.N. General Assembly both reiterated the rights of states to control their natural resources and offered language identical to Principle 21 of the Stockholm Declaration.[182] For this reason, it is important to view the transboundary harm principle not only as a freestanding doctrine of international law, but also as an essential limitation on the otherwise absolute right of states to control and exploit their own natural resources.

C. Application of the Transboundary Harm Principle to the Commercial Activity Exception

In this subsection, I will apply the limitation posed by the transboundary harm principle to the rule established in *MOL, Inc.* In light of that limitation I will argue that, at least in the context of transboundary pollution caused by foreign SOEs, the limited view of *MOL, Inc.* is more appropriate. For that reason, I will argue that the commercial activity exception to the FSIA should apply to foreign SOEs that cause transboundary pollution, and therefore such actors should be subject to the jurisdiction of U.S. courts.

In *OPEC*, which the court in *MOL, Inc.* followed in its own decision,[183] the court primarily held that the commercial activity exception did not apply when a state was exerting control over its natural resources because all states have an established right to control and exploit their resources according to their own national policies under international law.[184] As the international authorities cited by the court in *OPEC* demonstrate, the right to control natural resources is

181. *See supra* note 173 and accompanying quote.

182. *Compare* G.A. Res. 3281 (XXIX), Charter of Economic Rights and Duties of States art. 2.1 (Dec. 12, 1974) ("[E]very state has and shall freely exercise full permanent sovereignty . . . over all its wealth, natural resources and economic activities.") *with id.* art. 30 ("All states have the obligation to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states . . . .").

183. MOL, Inc. v. People's Republic of Bangl., 736 F.2d 1326, 1329 (9th Cir. 1984) (citing IAM v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979) and acknowledging that the decision was based on international law).

184. IAM v. OPEC, 477 F. Supp. at 567.

inextricably tied to the territorial sovereignty of each state.[185] As such, the exploitation of those resources is a domestic political act of the sovereign, which is exactly the kind of activity foreign sovereign immunity is generally meant to shield from the jurisdiction of other states.[186] Therefore, *OPEC* and *MOL, Inc.* stand for the general proposition that the commercial activity exception to the FSIA should not apply when a foreign state or its instrumentalities act within their sovereign authority to control or exploit the natural resources within their territory.

For this reason, the transboundary harm principle must be read to limit the applicability of *OPEC* and *MOL, Inc.* in cases of transboundary pollution. Because the transboundary harm principle is a limitation on the right of a state to control its natural resources, it follows that a state *has no right* to exploit its resources in a manner that causes harm within the borders of another state.[187] Therefore, because *OPEC* and *MOL, Inc.* were primarily premised on protecting the sovereign right of foreign states to control their natural resources, those cases should not be read to protect activities that are not within the sovereign authority of foreign states, such as activities that cause transboundary pollution.[188]

Recall that there are currently two views of how to apply *MOL, Inc.* to cases in which a foreign state or its instrumentality, such as an SOE, exploits the state's natural resources: the absolutist view and the limited view.[189] For the foregoing reasons, in cases of transboundary pollution caused by foreign SOEs, the limited view of *MOL, Inc.* is more appropriate.[190] Because it is not within the sovereign authority

185. *See supra* notes 154–157 and accompanying text.

186. Fox, *supra* note 42, at 22.

187. *See generally* Hobe, *supra* note 150, at 8 (citing Principle 21 of the Stockholm Declaration as a limitation on the right to control natural resources).

188. This analysis may lead the reader to conclude that one of the early cases discussed *supra* Section II.C.1, *In re Sedco*, was incorrectly decided. However, this Note simply argues that the development of the transboundary harm principle in international law would imply that *In re Sedco* is outdated. The transboundary harm principle was only formally acknowledged in 1996 with the *Nuclear Weapons* opinion, see *supra* notes 177–180 and accompanying text. Therefore, while a sovereign's right to control its natural resources was more absolute at the time *In re Sedco* was decided, that is no longer the case. Furthermore, courts reaching both the absolutist and limited views have primarily cited *MOL, Inc.*, implying that future decisions regarding transboundary pollution are not particularly bound by the ruling in *In re Sedco*.

189. *See* discussion *supra* Section II.C.2.

190. Based on the authorities reviewed in this Note, it is not possible to fully determine whether the absolutist or limited view as a general rule is more appropriate. This Note only argues that the limited view is appropriate in the context of transboundary pollution.

of states to exploit their natural resources in a way that causes transboundary harm, such activities, when carried out by a foreign SOE, should not be viewed as sovereign acts. Because the primary purpose of the FSIA is to distinguish between sovereign and commercial acts of foreign states and their instrumentalities,[191] if an act is not sovereign, it should be viewed as a commercial activity as long as it is in some way related to commerce.[192] Therefore, when a foreign SOE acts in a manner that causes transboundary pollution through activities such as energy production, the commercial activity exception to the FSIA should apply to those activities, in which case the foreign SOE would be subject to the jurisdiction of U.S. courts.

D. Consequences of the Limited View

In this final subsection, I will briefly discuss several consequences that would follow from submitting foreign SOEs to the jurisdiction of U.S. courts in cases of transboundary pollution.

The first, and perhaps most obvious, benefit of applying the commercial activity exception to foreign SOEs that cause transboundary pollution would be the expansion of redress for private individuals within the United States. So far, there is no general international liability regime that could be used to hold a foreign SOE liable for harms caused in the territory of another state.[193] Similarly, there are significant questions regarding whether the transboundary harm principle affords any remedy in private international law, or whether the rule only provides remedies between states.[194] Extending the commercial activity exception to cases of transboundary pollution would allow private parties to avoid these difficult issues. Because the FSIA is only a jurisdictional instrument,[195] any court applying the commercial activity exception would apply domestic law to the substance of a claim against a foreign SOE.[196] By opening the remedies available under U.S. tort

191. H.R. REP. NO. 94-1487, at 7 (1976) (citing Tate Letter, *supra* note 57).

192. *See, e.g.*, Saudi Arabia v. Nelson, 507 U.S. 349, 360 (1993).

193. *See generally* Marissa Smith, *The Deepwater Horizon Disaster: An Examination of the Spill's Impact on the Gap in International Regulation of Oil Pollution from Fixed Platforms*, 25 EMORY INT'L L. REV. 1477 (2011) (discussing the current inadequacy of international law in dealing with transboundary oil spills).

194. Special Rapporteur, Third Report on the Legal Regime for the Allocation of Loss in Case of Transboundary Harm Arising Out of Hazardous Activities, U.N. Doc. A/CN.4/566 (May 7, 2006).

195. 28 U.S.C. § 1604.

196. One likely substantive doctrine that would be applied in these cases is public nuisance, where activities such as pollution interfere with a public right such as public health

law or some other body of law to cases of transboundary pollution caused by foreign SOEs, private plaintiffs will have a more firmly established means of gaining redress that international law has so far failed to provide.

Additionally, this conclusion may have an effect (with both positive and negative aspects) on the treatment the United States government and its instrumentalities receive in foreign courts. While some version of sovereign immunity is guaranteed under customary international law, the practice of sovereign immunity by the domestic courts of each state is at least partially premised on reciprocity.[197] In other words, a state is generally only entitled to immunity in the courts of another state if it can be assumed that the first state's courts would grant immunity in a similar situation.[198] As such, if U.S. courts adopt a limited view of *MOL, Inc.* in cases of transboundary pollution and do not grant immunity in such cases, it could very well follow that foreign courts will be unwilling to grant immunity to the United States government or its instrumentalities in similar cases.

While this consequence may seem to contradict the United States' interests, it may advance other policy interests in the long term. As a doctrine of customary international law, the law of immunities is subject to change based on changes in state practice.[199] If immunity law changes in a sufficient number of domestic legal systems on the basis of reciprocity such that acts resulting in transboundary pollution are no longer immune from jurisdiction, then the customary international law doctrine will move in that direction, as well. Such a transformation could have significant effects on international and domestic environmental policy and subject states to greater restraints in the way they extract and use their natural resources for activities such as energy production. Therefore, while a limited view of *MOL, Inc.* may have short-term adverse impacts on the interests of the United States, it could have long-term benefits for environmental policy and influence the practices of industries, such as the energy sector, so that they mitigate the risks of transboundary pollution.

One ultimately rebuttable criticism of this Note's conclusion should be addressed here, as well. A potential adverse consequence of this Note's conclusion is that, by relying so heavily on the transboundary harm principle, U.S. courts would essentially be enforcing international law even though the FSIA is an exclusively domestic legal

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or safety. *See* RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979).

197. Damrosch, *supra* note 136, at 45.

198. *Id.*

199. *Id.* at 44–45.

instrument.[200] However, this criticism would stem from a misreading of the rule established in *OPEC* and *MOL, Inc.* As the court in *OPEC* took pains to establish, its decision was merely a recognition of the fact that the exploitation of natural resources is an activity that is protected for foreign sovereigns under international law.[201] Therefore, the decision in *OPEC*, and consequently *MOL, Inc.*, was based on domestic immunity law, while only referring to rights protected under international law in determining whether a particular act was sovereign or commercial in nature. In this context, therefore, the transboundary harm principle only acknowledges a limitation on that right so that, for purposes of domestic law, acts resulting in transboundary pollution should not be considered sovereign acts.

One final noteworthy issue with applying this Note's proposed resolution, while not strictly an adverse consequence, arises from the fact that, under international law, the transboundary harm principle imposes a duty of due diligence on states.[202] Therefore, the transboundary harm principle may be difficult to apply to a jurisdictional statute such as the FSIA, particularly when a strict liability doctrine such as public nuisance provides the substantive law for the dispute.[203] However, because the exact claims brought against foreign SOEs in cases of transboundary pollution may vary, the exact application of the resolution proposed in this Note would also likely vary. For that reason, a comprehensive resolution to this difficulty cannot be fully discussed in this Note.

Overall, despite some issues in application, a limited view of *MOL, Inc.* in the context of transboundary pollution would open the door for a significant expansion in liability for transboundary pollution in U.S. courts and potentially in the courts of other foreign states, as well. Such an expansion would provide greater redress for transboundary harms caused by foreign SOEs, which would ultimately inject greater environmental considerations into a sector of the economy that has a major role in activities such as energy production.[204]

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200. *See generally* H.R. REP. NO. 94-1487, at 15 (1976) (confirming that immunity decisions are ultimately a matter of domestic law).

201. IAM v. OPEC, 477 F. Supp. 553, 567 (C.D. Cal. 1979).

202. Hans-Georg Dederer, *Extraterritorial Possibilities of Enforcement in Cases of Human Rights Violations, in* PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES 187, 200 (Marc Bungenberg & Stephan Hobe eds., 2015).

203. *See* RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979).

204. *See* discussion *supra* Section I.B.

CONCLUSION

This Note has primarily argued that *MOL, Inc.* and its predecessors should not apply when a foreign SOE uses the state's natural resources in a manner that causes transboundary pollution. While *MOL, Inc.* was primarily premised on the sovereign right of states to control their natural resources under international law,[205] subsequent developments in international law have demonstrated that the same reasoning should not apply in the context of transboundary pollution. Because the transboundary harm principle is a limitation on the right of states to control their natural resources, the actions of foreign SOEs that cause transboundary pollution should not be viewed as sovereign acts under the FSIA, and therefore, the commercial activity exception to the FSIA should apply to those activities.

Although pollution is an issue that does not respect national borders, both our domestic and international legal systems are exceptionally preoccupied with those same borders. This Note has highlighted one potential obstacle to addressing transboundary pollution that arises from that reality. Despite the disturbing health and safety consequences of transboundary pollution,[206] one of the industries that is most likely to cause transboundary pollution, energy production, is dominated by foreign SOEs.[207] Due to their status as instrumentalities of foreign states, foreign SOEs are generally entitled to the same protections as their governments under the FSIA. For that reason, foreign SOEs are potentially immune from the jurisdiction of U.S. courts when their acts, particularly in the context of risky industries like energy production, cause transboundary pollution. Nonetheless, this Note has demonstrated that recent developments in international law should lead courts to find that, despite the broad protections of the FSIA, foreign SOEs are in fact subject to the jurisdiction of U.S. courts when they cause transboundary pollution. An application of the commercial activity exception to this effect would provide domestic plaintiffs suffering the effects of transboundary pollution with jurisdictionally competent courts and may ultimately push judicial systems around the world to expand their jurisdiction in a crucial area where international law continues to fall short.[208]

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205. MOL, Inc. v. People's Republic of Bangl., 736 F.2d 1326, 1329 (9th Cir. 1984).

206. *See* discussion *supra* Section I.A.

207. *See* discussion *supra* Section I.B.

208. *See generally* Developments in the Law, *supra* note 4 and accompanying text.

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