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The Foreign Sovereign Immunities Act: The Relationship Between the Commercial Activity Exception and the Noncommercial Tort Exception in Light of De Sanchez v. Banco Central de Nicaragua

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Member of the Class of 1987

I. INTRODUCTION

The sovereign immunity doctrine has been an accepted principle of international law for centuries, allowing governments and their agents to escape prosecution in foreign courts.\(^1\) Over time, however, the doctrine's parameters have expanded greatly. Dissatisfied with this expansion, nations have adopted statutes that restrict sovereign immunity.\(^2\) The prin-
Principle of restrictive immunity gives immunity to a state for its public acts *(jure imperii)*, but not for its private acts *(jure gestionis).*

In an effort to adopt a restrictive sovereign immunity policy, the United States enacted the Foreign Sovereign Immunities Act (FSIA) in 1976. The FSIA established an exclusive standard for the judiciary to use in determining the applicability of sovereign immunity, which was to depoliticize the judicial decisionmaking process.

The FSIA provides several important exceptions under which a foreign sovereign can be denied immunity. This Note explores two of these exceptions: the commercial activity exception and the noncommercial tort exception. The noncommercial tort exception provides that a foreign sovereign may be held liable for certain torts committed in the United States or for torts which cause an effect in the United States. The more controversial exception, however, is the commercial activity exception. It denies a foreign sovereign immunity if the sovereign engages in nongovernmental, commercial acts which create sufficient contacts with the United States to meet constitutional due process requirements.

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3. Letter from Jack B. Tate, Acting Legal Advisor to the Department of State, to the Acting Attorney General Perlman, 26 Dep't St. Bull. 984 (May 1952) [hereinafter Tate Letter].


6. Id. at 7-12. Congress sought to reduce the foreign policy implications which result from judicial determinations of sovereign immunity. *Id.*

7. 28 U.S.C. § 1605. These exceptions involve: 1) waivers of immunity, 2) certain foreign expropriation claims, 3) property rights located in the United States, and 4) specific claims in admiralty. *Id.*

8. *Id.* § 1605(a)(5).

9. *Id.* § 1605(a)(5).

10. *Id.* § 1605(a)(5).

11. The due process requirements are addressed in 28 U.S.C. § 1330. Section 2 of the FSIA sets out a comprehensive jurisdictional scheme for cases involving foreign states. It provides the United States district courts with subject matter and personal jurisdiction over foreign states and their political subdivisions, agencies and instrumentalities. The drafters give broad jurisdiction to the federal courts in order to increase uniformity in court's decisions. Uniformity is desirable because disparate treatment of foreign nations under the FSIA could adversely affect foreign relations. House Report, *supra* note 2, at 12-13. Specifically, § 1330(a) addresses subject matter jurisdiction. It provides federal district courts with original jurisdiction over *in personam* cases against foreign states. The jurisdiction extends to any claim in which a foreign nation is not entitled to immunity under §§ 1605-1607, or under any applicable international agreement of the type contemplated by § 1604. *Id.* at 13. Moreover, to allow actions against foreign states in federal court, jurisdictional requirements are relaxed and subject matter jurisdiction is permitted without regard to the amount in controversy. A district
The scope of these two exceptions has been an area of considerable debate. The debate is attributed largely to the broad definitions stated in the FSIA. United States courts have developed various tests to determine when these statutory exceptions apply. These tests have been applied with varying degrees of success.

The Fifth Circuit Court of Appeals in De Sanchez v. Banco Central de Nicaragua recently announced new tests to determine the application of both exceptions. Applying the new tests, the court found the plaintiff’s claims did not fall within either the commercial activity exception or the noncommercial tort exception to the FSIA. The Fifth Circuit Court of Appeals ruled that a plaintiff cannot maintain an action against a foreign bank for conversion of intangible property under the noncommercial tort exception. The court’s application of the commercial activity exception effectively created such a broad definition of governmental activity that virtually any activity which has an indirect effect on the government easily could be classified as governmental.

This Note will analyze the commercial activity and the noncommercial tort exceptions and how they have been broadly interpreted by vari-

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12. Section 1603(d) of the FSIA defines commercial activity as follows: “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.”


14. 770 F.2d 1385 (5th Cir. 1985).

15. Id. at 1395-99.

16. Id. at 1399.
ous courts. This Note first will trace the development of the foreign sovereign immunity doctrine and will examine the events preceding the enactment of the FSIA. Next, judicial interpretations of the FSIA and its exceptions will be discussed and the relationship between the exceptions will be explored. The effect of the *De Sanchez* decision on previous cases and as precedent for future decisions will be examined. Finally, this Note will criticize the courts’ interpretations and application of the exceptions and will discuss the various implications of the courts’ reasoning. Suggestions to limit the effect of the courts’ interpretations of the commercial activity and the noncommercial tort exceptions will be provided.

II. HISTORICAL DEVELOPMENT OF THE SOVEREIGN IMMUNITY DOCTRINE

A. Absolute Theory of Sovereign Immunity

Sovereign immunity is a principle of international law which provides that domestic courts must in certain circumstances relinquish jurisdiction when a party to the suit is a foreign sovereign. Initially, courts interpreted sovereign immunity to furnish absolute immunity to a foreign sovereign regardless of its activities. In the United States, this principle first was espoused by Justice Marshall in *Schooner Exchange v. M’Faddon*. In *M’Faddon*, two Americans attempted to attach a French warship that had sailed into a United States port and had docked for repairs. Justice Marshall, writing for the Supreme Court, found that sovereign immunity prohibited the exercise of jurisdiction over the vessel:

This full and absolute territorial jurisdiction being alike the attribute of every sovereign and being capable of conferring extra-territorial powers, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication

17. *See supra* note 1 for a definition of sovereign immunity and for a general overview of the concept.
and will be extended to him.\textsuperscript{20}

The Supreme Court expanded the theory of absolute immunity in 1926, in *Berizzi Bros. Co. v. S.S. Pesaro*,\textsuperscript{21} holding that a nation could invoke sovereign immunity irrespective of the nature of its activities. In that case, the Court provided foreign commercial ships with the sovereign immunity traditionally accorded military vessels because "all ships held and used by a government . . . for the purpose of advancing the trade of its people or providing reserve for its treasury . . . are public ships in the same sense that warships are."\textsuperscript{22} The Court thereby extended sovereign immunity to encompass a nation's commercial as well as governmental activities.

In subsequent years, United States courts became increasingly dissatisfied with the principle of absolute sovereign immunity.\textsuperscript{23} The repeated application of the principle to explosive growth in foreign sovereign governmental activities produced inequitable results.\textsuperscript{24} Specifically, application of the absolute sovereign immunity doctrine deprived private citizens conducting business with foreign governments of a legal remedy in any court.\textsuperscript{25} Further, the Supreme Court was concerned that granting absolute immunity to sovereigns gave foreign nations a commercial advantage in the market over private firms not so privileged, especially because governments began to rely increasingly upon sovereign immunity to avoid commercial commitments.\textsuperscript{26} These concerns and inequities led to the development of restrictive sovereign immunity.\textsuperscript{27}

\section*{B. Restrictive Sovereign Immunity}

Although absolute sovereign immunity has no exceptions, restrictive sovereign immunity provides immunity only for governmental acts. Thus, commercial and private activities are outside the ambit of restrictive sovereign immunity.\textsuperscript{28} Any business person who engages in commercial ac-

\begin{itemize}
  \item \textsuperscript{20} Id. at 137.
  \item \textsuperscript{21} 271 U.S. 562 (1926).
  \item \textsuperscript{22} Id. at 563.
  \item \textsuperscript{23} In the twentieth century, as the volume of international trade increased, dissatisfaction with absolute sovereign immunity was reflected in judicial decisions. Schmitthoff & Wool-dridge, supra note 1, at 200.
  \item \textsuperscript{24} Note, supra note 2, at 295-96.
  \item \textsuperscript{25} Note, supra note 18, at 1452; McCormick, *The Commercial Activity Exception to Foreign Sovereign Immunity and the Act of State Doctrine*, 16 LAW & POL'Y INT'L BUS. 477, 484 (1984).
  \item \textsuperscript{26} Note, supra note 18, at 1452. See also The Pesaro, 277 F. 473, 481 (S.D.N.Y. 1921).
  \item \textsuperscript{27} Note, supra note 2, at 296; House Report, supra note 2, at 8.
  \item \textsuperscript{28} Tate Letter, supra note 3; Alfred Dunhill, Inc. v. Cuba, 425 U.S. 682 (1976).
\end{itemize}
tivity with a foreign government should have a remedy available if that
government acts in a wrongful manner. Only when a foreign government
is acting in its sovereign capacity should it be accorded sovereign
immunity.²⁹

In 1952 the State Department announced its restrictive sovereign
immunity policy in the "Tate Letter."³⁰ The Tate Letter responded to
the widespread and increasing commercial activities conducted by for-
eign governments. The State Department's new policy accorded foreign
sovereigns immunity for claims resulting from sovereign or public acts,
but refused immunity for claims arising from private or commercial ac-
tivities.³¹ Despite the Tate Letter directives, application of restrictive
sovereign immunity posed many problems. The lack of adequate guide-
lines for the application of the restrictive interpretation, coupled with the
absence of a clear definition of what constituted "commercial" as op-
posed to "governmental" acts, led to the development of a variety of
tests, each producing different results.³²

The "purpose of the act" test was an early test developed to catego-
rize an activity as either commercial or governmental.³³ Under this test,
acts were classified as sovereign only if they had a public purpose.³⁴ The
application of this test produced difficulties because the test required a
determination of each nation's attitude toward trade. Judges exercised
discretion to characterize activities as sovereign or nonsovereign accord-
ing to their view of "the proper realm of state functioning."³⁵ In the
nations which viewed foreign trade as a sovereign activity, all sovereign
acts were construed as having a public purpose.³⁶ The application of the
purpose test analysis never resulted in an activity being characterized as
noncommercial, since a foreign sovereign defendant always pointed to a
public end. Consequently, the purpose test proved to be an inadequate
means of distinguishing commercial from governmental activities.³⁷

²⁹. Note, supra note 18, at 1469; Somarajah, Problems in Applying the Restrictive Theory
³⁰. Tate Letter, supra note 3.
³¹. Id. at 985.
³². See Holmes, Establishing Jurisdiction Under the Commercial Activities Exception to
³³. Note, supra note 2, at 297.
³⁴. Id.
³⁵. Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336
F.2d 354, 359 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965).
³⁶. Id. at 359.
³⁷. Recognizing the difficulties inherent in the purpose test, the Second District court in
Victory Transport, 336 F.2d 354, adopted a test which identified five categories of public acts
falling within the definition of sovereign immunity. Categories included internal administra-
Moreover, the test defeated the aims of restrictive interpretation and led to the enactment of the FSIA.

In addition to the doctrine of sovereign immunity, the State Department continued to intervene in judicial determinations of jurisdiction.\textsuperscript{38} Since the judiciary would rely upon the State Department’s expertise in foreign affairs, this intervention inhibited the judiciary’s development of consistent case law regarding the application of restrictive foreign sovereign immunity in the United States.\textsuperscript{39} Courts feared that if they erroneously applied the sovereign immunity doctrine, they would embarrass the executive branch.\textsuperscript{40} Thus, the judiciary applied the sovereign immunity doctrine on the basis of State Department recommendations, instead of determining the public versus the private nature of the sovereign’s activities.\textsuperscript{41} The State Department’s recommendations often were contingent upon the identity and power of the sovereign defendant, and were made without due consideration of the nature or the purpose of the sovereign’s activity.\textsuperscript{42} Judicial decisions were influenced so significantly by executive advice that foreign sovereigns often applied directly to the State Department to acquire a grant of immunity.\textsuperscript{43}

The State Department’s conduct was criticized. Critics protested that its secret negotiations and informal hearings on the issue of sovereign immunity prior to advising the courts abridged the rights of private litigants.\textsuperscript{44} One such critic, Sigmund Timberg, stated that each time the State Department issued a “recommendation” of immunity, it deprived a private litigant of a right or remedy provided by federal or state law.\textsuperscript{45} In addition, there were no laws requiring notice to the private litigant that the State Department was considering a sovereign immunity recommendation. If notice was given, an informal conference would be available to the private party upon the party’s request. The conferences, however, did not provide the private litigant with an adequate opportunity to con-

\begin{footnotesize}
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  \item[39.] Holmes, \textit{supra} note 32, at 1005; McCormick, \textit{supra} note 25, at 485-86.
  \item[40.] McCormick, \textit{supra} note 25, at 482.
  \item[42.] McCormick, \textit{supra} note 25, at 483.
  \item[43.] \textit{Id.} at 486.
  \item[44.] \textit{Id.} at 483-86; Note, \textit{supra} note 41, at 435-36.
\end{itemize}
\end{footnotesize}
front the arguments advanced by the foreign government or to question
the considerations that motivated the Department's recommendation. Critics claimed that the State Department's internal methods were defi-
cient because "suggestions of immunity were believed to be issued in ac-
cordance with political expediency regardless of consistency." 

Furthermore, there was no published precedent to guide parties to
challenge a State Department recommendation, because the State De-
partment generally did not specify its rationale for reaching a decision. No appellate review process was available within the State Department
or the judiciary to give parties recourse once immunity had been
granted. Private parties, therefore, were left immobilized and impotent
in the face of unexplained adverse decisions. This state of affairs, along
with problems of enforcing the doctrine of restrictive sovereign immunity
as enunciated in the Tate Letter, contributed to the enactment of the
FSIA in 1976.

III. THE FOREIGN SOVEREIGN IMMUNITIES
ACT OF 1976

A. Goals

Congress enacted the FSIA in 1976, to provide U.S. citizens with a
forum in which they would be able to bring suits against foreign na-
tions. Congress' stated goals were: (a) to codify the principle of restric-
tive sovereign immunity; (b) to ensure that sovereign immunity decisions
were judicial rather than executive; (c) to provide a method for service of
process on foreign state defendants; and, (d) to establish a method for
satisfying in personam judgments. Congress intended the FSIA to pre-
empt all state and federal sovereign immunity laws but not international

46. Id.; See generally Cardozo, Sovereign's Immunity: The Plaintiff Deserves a Day in
Court, 67 HARV. L. REV. 608 (1954); Note, The Sovereign Immunity and Private Property: A
47. Note, supra note 46, at 292-98; Hill, supra note 18, at 155.
48. Hill, supra note 18, at 155.
49. Id.
50. Id.
51. Holmes, supra note 32, at 1005; see generally Lowenfeld, supra note 38, at 905-13.
FSIA states that a "principle purpose of [the Act] 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 deci-
sions are made on purely legal grounds and under procedures that insure due process." House
Report, supra note 2, at 7.
agreements.\textsuperscript{54} In this way, the Act buttressed the courts' ability to apply international law domestically.\textsuperscript{55} The drafters further believed that the elimination of political influences would enable the courts to establish clear jurisdictional standards.\textsuperscript{56} These standards would provide notice to foreign nations doing business with Americans that the nations could be subject to jurisdiction in United States courts.

B. Exceptions

One of the FSIA's principal goals was to establish restrictive sovereign immunity in United States legal practice.\textsuperscript{57} This was achieved by codifying a general rule of sovereign immunity subject to express exceptions.\textsuperscript{58} The general rule is a presumption that all activities of foreign states should be protected from litigation because governmental interests outweigh private ones.\textsuperscript{59} The exceptions, however, represent a set of situations in which the presumption is rebutted because the private interest of litigating claims outweighs the governmental interest in protecting its functions from foreign judicial scrutiny.\textsuperscript{60} This Note focuses on two of the codified exceptions: the commercial activity and the noncommercial tort exceptions.

1. Commercial Activity Exception

Under the commercial activity exception, acts of a sovereign which are commercial in nature and which create sufficient contacts with the United States to fulfill constitutional due process jurisdictional requirements do not receive immunity under the FSIA.\textsuperscript{61} The exception provides that:

\textsuperscript{54} 28 U.S.C. § 1604. "All immunity provisions in sections 1604 through 1607 are made subject to existing treaties and other international agreements to which the United States is a party. In the event an international agreement expressly conflicts with this bill, the international agreement would control. . . ." House Report, supra note 2, at 17.

\textsuperscript{55} House Report, supra note 2, at 12. Under international law nations are not immune from the jurisdiction of foreign courts in so far as their commercial activities are concerned. Sovereign claims of immunity under the Act are decided by courts of the United States and of the states. House Report, supra note 2.

\textsuperscript{56} House Report, supra note 2.

\textsuperscript{57} House Report, supra note 2, at 7.

\textsuperscript{58} 28 U.S.C. §§ 1604-1605.

\textsuperscript{59} Hill, supra note 18, at 204.

\textsuperscript{60} Id. at 204.

\textsuperscript{61} 28 U.S.C. § 1605(a)(2). For constitutional requirements see supra note 11. The commercial activity exception reflects a policy decision that in the business context the private interest will be considered more significant than the governmental interest, largely because in business dealings the private party ordinarily has an expectation of judicial recourse. See Hill, supra note 18, at 205.
(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case: . . . (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside 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. 62

Thus, to exercise subject matter jurisdiction under this exception, a court first must find that the activity is commercial. The statute defines a commercial activity as either a regular course of commercial conduct or a particular commercial act; 63 thus, the commercial character does not depend upon the activity's purpose. 64 Once the court determines that the activity in question is commercial, it must then determine whether the cause of action bears a connection to the United States as provided for in the exception. 65 If the activity is found to be noncommercial, it satisfies none of the three clauses of section 1605(a)(2) and the foreign state is held immune from suit.

2. Noncommercial Tort Exception

The noncommercial tort exception provides that a foreign nation will not be immune from the jurisdiction of American courts when:

money damages are sought against a foreign state for personal injury or death or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee while acting within the scope of his office or employment. 66

Thus, claims which are based upon the exercise or failure to exercise a discretionary function will not be within the exception's ambit. 67 It also provides that claims that arise out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights are not covered by the exception. As a result, a foreigner's acts which can be the basis of any of these claims are immune. 68

63. Id. § 1603(d).
64. Id.
65. Id.
67. Id.
Congress intended this exception to resolve the problem tort victims often faced in obtaining jurisdiction over foreign states or their agents by allowing tort victims to sue foreign states in United States courts. Because the exception is expressed in general terms, it applies to all tort actions for money damages not covered by the commercial activity exception.

IV. ANALYSIS OF JUDICIAL INTERPRETATION OF THE FSIA

A. Commercial Activity Exception

Under the commercial activity exception a foreign entity is held accountable for its commercial activities. Because Congress left the task of interpreting many of the Act's terms to the courts, the commercial activity exception and its terms have been subject to varying interpretations and inconsistent application. The definition of "commercial activity" has been controversial. Congress attempted to clarify this term by indicating in the Act that activities fell within a spectrum which ranged from commercial behavior on the one end to governmental activities on the other. A House report stated that commercial activity encompassed a variety of endeavors from individual transactions to regular commercial conduct. An activity customarily carried on for profit was to be presumed commercial in nature. A regular course of commercial conduct was thought to include commercial enterprises such as mineral extraction, airline operation, or state trading. A single contract, if of the same profit-oriented character as a contract which might be made by a

70. 28 U.S.C. § 1605(a)(5). The commercial exception also does not cover tort actions such as libel and slander which are expressly excluded by the language of the noncommercial tort exception.
71. For example, ownership of an apartment building by the East German government was considered a commercial activity in County Board of Arlington County v. Government of the German Democratic Republic, No. 78-293-A (E.D. Va. 1978). In contrast, the alleged libel in Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849 (S.D.N.Y. 1978), was treated as a governmental rather than a commercial act. In United Euram Corp. v. Union of Soviet Republics, 461 F. Supp. 609 (S.D.N.Y. 1978), a cultural project of the Soviet government to supply performing artists was considered a commercial activity. Id. at 611. In Gittler v. German Information Center, 408 N.Y.S.2d 600, 601-02 (Sup. Ct. 1978), however, work performed on the making of films for the German Information Center was held to be a non-commercial diplomatic activity "in connection with fostering cultural relations and promoting understanding between Germany and the United States." Id. at 601-02.
73. Id.
74. Id. at 16.
75. Id.
private person, was thought to constitute a particular commercial trans-
action or act.\textsuperscript{76}

The FSIA’s exceptions superseded the purpose test.\textsuperscript{77} The FSIA
adopted a test which looked to the nature of the act to determine whether
an activity was commercial or governmental.\textsuperscript{78} The nature of the act
test, however, has proven to be almost as difficult to apply as the purpose
test. Critics of the nature of the act test point out that many activities
which are private in a free market economy are conducted by the govern-
ment in nonmarket economies.\textsuperscript{79} Thus, the commercial activity excep-
tion may encompass the activities of one country but exclude the same
activities when performed by another country due to the different types
of governments. In \textit{Yessenin-Volpin v. Novosti Press Agency},\textsuperscript{80} for in-
stance, a Soviet dissident plaintiff living in the United States claimed that
two Soviet news agencies distributed defamatory news articles about him.
Plaintiff asserted that the operation of a press agency, which regularly
writes and sells articles, is a commercial activity within the definition of
the FSIA. The court held that regardless of the commercial aspects, the
acts in question were not done “in connection with” a profit-making ac-
tivity, but rather were undertaken in cooperation with the government.\textsuperscript{81}
If the suit had been against another nation the result may have been
different.

In recent years courts have continued to struggle with the definition
of commercial activity and with the exception’s application.\textsuperscript{82} Courts
have had to determine which activities fit into the three alternate clauses
of the commercial activity exception. These clauses are: (1) commercial
activity “carried on in the United States”; (2) an act within the United
States “in connection with” a commercial activity elsewhere; and (3) an
act outside the United States in connection with a commercial activity
elsewhere which act causes a “direct effect in the United States.”\textsuperscript{83}

\textsuperscript{76} \textit{Id.}
\textsuperscript{77} 28 U.S.C. § 1603(d); Note, \textit{supra} note 18, at 1480.
\textsuperscript{78} \textit{See supra} note 77.
\textsuperscript{79} Note, “Commercial Activity” in the Foreign Sovereign Immunities Act of 1976, 14 J.
\textsuperscript{80} 443 F. Supp. 849 (S.D.N.Y. 1978).
\textsuperscript{81} \textit{Id.} Intragovernmental cooperation refers to the cooperative relationship between pri-
vate agencies and the government. In this case, the intragovernmental cooperation involved
the U.S.S.R., Tass, Novosti (Soviet newspapers) and the Soviet journals in which the articles
were published. \textit{Id.} at 856.
\textsuperscript{82} Examples include De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385 (5th Cir.
\textsuperscript{83} 28 U.S.C. § 1605(a)(2).
1. Activity Carried on in the United States

The first clause has been subject to different interpretations. For example, in *Sugarman v. AeroMexico, Inc.* the court broadly construed the language of the exception. In *Sugarman*, an AeroMexico Airlines passenger was injured while awaiting a delayed flight to New York City from a Mexican airport. The passenger sued the state run airline. The court held that AeroMexico, despite its state run status, was not immune from suit under the FSIA. The court based its decision on several factors: the airline conducted its operations in the United States as a common carrier, the plaintiff purchased a round trip ticket to Mexico in New Jersey, and the events complained of allegedly caused continued physical suffering and economic loss to the plaintiff after he got back to the United States. Thus, the court denied immunity because much of defendant's commercial activity took place in the United States. The court did not require that the commercial activity occur in the United States but rather found it was enough that the acts complained of, "although themselves extraterritorial, grew out of regular course of commercial conduct carried out in the United States."

Conversely, in *Harris v. VAO Intourist Moscow,* the court narrowly construed "activity carried on in the United States" to determine that the court lacked jurisdiction. In *Harris*, the plaintiff brought suit against two state-owned Russian tourist services and the Union of Soviet Socialist Republics to recover damages for the alleged wrongful death of an American tourist in a fire at a Moscow hotel. The plaintiff argued that, because of the integration of the Soviet tourist industry, there was a relationship between the negligent operation of the Moscow hotel and any Soviet activity in the United States that related to the hotel. This relationship, the plaintiff argued, meant that defendant was "doing business" in the United States. The court, however, decided that the relationship between the hotel's operation and the defendant's activities in the United States was too attenuated. Although the Act provides jurisdiction against foreign sovereigns for doing business in the United States, the *Harris* claim was not found to be based upon Soviet commercial ac-

84. 626 F.2d 270 (3d Cir. 1980).
85. Id.
86. Id. at 275.
87. Id. at 270.
88. Id. at 273.
89. Id.
91. Id. at 1056-57.
92. Id. at 1057-59.
tivity in the United States. The *Harris* and *Sugarman* cases demonstrate that even a seemingly self-explanatory statutory term like "a commercial activity carried on in the United States" has presented interpretational problems.

2. Activity Within the United States "In Connection" with a Commercial Activity Elsewhere

The second clause of the exception provides that immunity shall not be granted if the claim is based upon a sovereign's act which was performed in the United States "in connection" with its commercial activity conducted elsewhere. This is the nexus approach to commercial activity. The interpretation of this clause has not been uniform. Some courts follow a broad approach, while others follow a narrow one.

In *Vencedora Oceanica Navegación v. Companie Nationale*, the Court of Appeals for the Fifth Circuit interpreted the second clause of the commercial activity exception. Plaintiff, a vessel owner, brought suit for the wrongful seizure and subsequent destruction of his vessel. The vessel owner sued Algeria and its instrumentality in charge of Algeria's harbor, alleging that they had tortiously deprived him of the vessel. The court ruled that in order to apply the FSIA clause there must be a nexus between plaintiff's grievance and the foreign state's commercial activity in the United States. Applying the rule to the facts, the court found no nexus between the Algerian instrumentality's commercial activity in the United States and the vessel owner's claim that the instrumentality tortiously deprived the owner of his vessel. Thus, it was held that defendant was immune under the FSIA.

*Yessenin-Volpin v. Novosti Press Agency* presents a different interpretation of the second provision of the exception. The plaintiff, as discussed above, was a Soviet dissident living in the United States. The plaintiff sued two Soviet news agencies for publishing and distributing defamatory news articles in the United States. The court held that the defendants engaged in commercial activity by selling the articles to for-

93. *Id.* at 1061.
94. 28 U.S.C. at § 1605(a)(2).
95. 730 F.2d 195 (5th Cir. 1984).
96. *Id.*
97. *Id.* at 202.
98. *Id.*
99. *Id.*
101. *Id.* at 851.
Despite the commercial nature of the acts, the court decided that the alleged defamatory statements were not acts connected with a commercial activity of the U.S.S.R. Instead, the court found the acts to be a result of cooperation within the government to publish articles. Yessenin-Volpin and Vencedora Oceanica demonstrate the courts’ struggles with application of the second clause of the commercial activity exception, and the need for a clear standard or definition of the clause.

3. An Act Outside the United States Which Causes a “Direct Effect” in the United States

The third clause of the exception states that a claim can be based upon an act that occurs outside the United States which is made in connection with a sovereign’s commercial activity elsewhere and which causes a direct effect in the United States. This approach to commercial activity establishes jurisdiction upon a connection or link between the sovereign’s commercial activity and the plaintiff’s claim. A major requirement of this clause is that the sovereign’s act cause a direct effect in the United States. Relying on the direct effect, the clause operates as a type of jurisdictional long-arm statute to allow suits against foreign states that do not actually carry on commercial activities in the United States. The following cases demonstrate how courts have struggled with the interpretation of this clause.

In Berkovitz v. Islamic Republic of Iran, the Court of Appeals for the Ninth Circuit found that the sovereign’s activities did not cause a direct effect in the United States. In Berkovitz, the spouse and children of an American citizen murdered in Iran brought a wrongful death claim against Iran and the Iranian revolutionary group as its agent. The Ninth Circuit ruled that the commercial activity exception was inapplicable to an action against Iran for the wrongful death of an American citizen working in Iran. The court reasoned that even though

102. Id. at 856.
103. Id.
104. Id. at 850. See also supra note 81 and accompanying text.
108. 735 F.2d 329 (9th Cir. 1984).
109. Id. at 330.
110. Id. at 332.
Berkovitz was in Iran as an employee pursuant to his company's contract with Iran, Berkovitz's murder did not occur in connection with his job and it did not cause a direct effect in the United States.\textsuperscript{111} The court's reasoning seemed to rest on the fact that murder was not a foreseeable consequence of taking a job in Iran\textsuperscript{112} and, consequently, the effect was not direct. Thus, Iran was held to be immune.

The district court in \textit{Carey v. National Oil Corp.}\textsuperscript{113} also interpreted the "direct effect" clause to find a foreign sovereign immune. In \textit{Carey}, a New York corporation and its assignee brought suit against the Libyan Arab Republic and a corporation wholly owned by the Libyan government seeking to recover damages for an alleged breach of contract to supply petroleum products.\textsuperscript{114} The contracts to supply the petroleum were initially signed between the American corporation and Libya.\textsuperscript{115} After the outbreak of the Yom Kippur War and the oil embargo imposed by Libya, the plaintiff corporation agreed to a series of charter contracts for delivery of petroleum to its two subsidiaries in the Bahamas and in Libya.\textsuperscript{116} The plaintiffs claimed that the defendants under the charter contracts obtained excessive payments from the plaintiffs by duress.\textsuperscript{117} The district court found that Libya's alleged misconduct did not have a direct effect in the United States because Libya did not consciously involve the United States in any of its commercial undertakings.\textsuperscript{118} Instead, the court found that the activity involved was within the Bahamas and, thus, had no direct effect in the United States.\textsuperscript{119} Consequently, the foreign defendants were granted immunity under the direct effect clause of the FSIA.

In \textit{Upton v. Empire of Iran},\textsuperscript{120} another district court ruled that it lacked jurisdiction because plaintiff could not establish a direct effect. In \textit{Upton} the surviving relatives of two United States citizens, who were killed when a roof collapsed at Tehran's international airport, brought suit against Iran.\textsuperscript{121} The court held that the connection between the deaths sustained in Iran and its effects in the United States, the pain and

\begin{thebibliography}{99}
\bibitem{111} Id. at 330.
\bibitem{112} Id. at 332.
\bibitem{113} 453 F. Supp. 1097 (S.D.N.Y. 1978).
\bibitem{114} Id. at 1099.
\bibitem{115} Id. at 1097.
\bibitem{116} Id. at 1099-1100.
\bibitem{117} Id. at 1098.
\bibitem{118} Id.
\bibitem{119} Id. at 1101.
\bibitem{121} Id. at 265.
\end{thebibliography}
Foreign Sovereign Immunities

suffering of the survivors, was too attenuated. The court reasoned that the effects of the accident could only be felt in the United States if the plaintiff returned alive to the United States. Thus, no effects would be found by the fortuity that those killed were survived by United States citizens. Because Iran's negligence, the personal injuries, and the deaths all occurred in Iran, there was no direct effect in the United States and, consequently, the court dismissed the action for lack of jurisdiction.

Some courts, however, have applied the direct effect test to find jurisdiction. For example, in National American Corp. v. Federal Republic of Nigeria, plaintiff seller brought suit against the Republic of Nigeria and the Central Bank of Nigeria as a result of a dispute arising out of contracts for delivery of cement to Nicaragua. The same court which decided Carey held that "a breach of letter [of] credit having a New York beneficiary, advised and payable through a New York bank met the direct effect test. . . ." Furthermore, the minimum contacts test of Shaffer v. Heitner, was satisfied because the property that the plaintiff had attached formed the basis of the litigation.

As the above decisions indicate, the nexus and direct effect clauses of the FSIA have been applied inconsistently. The courts, however, seem to rely upon certain factors to make their decisions. One such factor is whether the direct effect felt in the United States has an intervening element or whether it flows in a straight line without deviation. For example, in Upton, the court ruled that the direct effect must not have an intervening element. Another factor relied upon by the courts is whether the effect is "substantial, direct and foreseeable" as indicated in Berkovitz. Beyond these two factors, no consistent standard has been revealed.

122. Id. at 266.
123. Id.
124. Id.
125. Id.
127. Id. at 626.
128. Id. at 639.
B. Noncommercial Tort Exception

The noncommercial tort exception authorizes jurisdiction over foreign sovereigns for tort actions in which the plaintiff seeks monetary recovery for personal injury, death, or property damage. The courts' interpretations of the language and the provisions of this exception, as with the commercial activity exception, have not been uniform. The noncommercial tort exception has raised two difficult issues: (1) what torts are covered by the exception, and (2) where the tort must occur in order to fall within the exception.

1. Torts Covered by the Exception

The Act provides that the noncommercial tort exception will not cover those torts covered by the commercial activity exception, nor will it cover the torts of libel, slander, misrepresentation, deceit, abuse of process, malicious prosecution, and interference with contractual rights. Beyond that, the courts have discretion to decide which torts are covered by the exception. The language of the statute, however, is so broad that it really provides no guidance to the courts to determine what specific torts are covered.

In Skeen v. Brazil, a district court held that assault and battery did not fall within the noncommercial tort exception. In that case, the victim of an assault with a deadly weapon filed an action against a foreign ambassador, the grandson of the ambassador, and the country of Brazil. Skeen sought damages for his injuries that occurred when the grandson of a Brazilian ambassador assaulted and shot Skeen outside a local nightclub. The court held that assault with a deadly weapon was not a tort covered under the noncommercial tort exception. It reasoned that to fall within the exception, Skeen had to show that the defendants' actions were "within the scope of his office of employment." The court further reasoned that the noncommercial tort exception is essentially a respondeat superior statute, which holds an employer, the for-

133. 28 U.S.C. § 1605(a)(5).
137. Id. at 1417.
138. Id. at 1416.
139. Id.
140. Id.
141. Id. at 1415.
eign state, liable for certain tortious acts of its employees. When the ambassador's grandson, who was employed by Brazil, assaulted Skeen, the grandson was not acting within the scope of his employment. Therefore, Brazil could not be held liable for the plaintiff's injuries or for the failure of its ambassador to prevent his grandson from committing assault.

Yessenin-Volpin v. Novosti Press Agency, discussed above, involves libel, a tort that the noncommercial tort exception expressly does not cover. The court in Yessenin-Volpin ruled that the Soviet government was immune because libel was a tort that the exception does not cover.

Finally, in De Sanchez v. Banco Central de Nicaragua, the Fifth Circuit further clarified a tort which is not encompassed by the noncommercial tort exception. In De Sanchez, the plaintiff asserted a claim for conversion against a Nicaraguan state bank. The plaintiff asserted that the Nicaraguan bank's failure to honor a check it had issued to her constituted conversion. The court ruled that "although nominally within the ambit of the exception, [it] is not the type of tort claim that the exception intended to cover." The court decided that plaintiff's claim, although sounding in tort, was essentially a claim for unjust taking of property and Congress had provided an exception in section 1605(a)(3) for property taken in violation of international law. In light of the De Sanchez interpretation, not all types of conversion are covered by the noncommercial tort exception.

The above cases illustrate that the types of torts covered under the noncommercial activity exception of the FSIA remain unclear. Whether a particular tort is covered is a question being answered on a case-by-case basis. Case-by-case judicial interpretation leaves plaintiffs in an uncertain position to determine whether they have a valid claim under the FSIA. The plaintiffs' uncertain position is due to the broad and unclear language of the noncommercial activity exception.

142. Id. at 1417.
143. Id. at 1418.
144. Id. at 1418-19.
146. For detailed facts of the case, see supra notes 80-81 and accompanying text.
148. 770 F.2d 1385 (5th Cir. 1985). For additional facts and an in depth discussion of the case, see infra notes 174-205 and accompanying text.
149. Id. at 1389.
150. Id.
151. Id. at 1398.
152. Id.
2. Situs of the Tort

The required situs of the tort is another aspect of the exception that the courts have found difficult to interpret. Some courts have suggested that the non commercial tort exception applies only to tortious acts that occur within the geographic territory of the United States.\textsuperscript{153} For example, in \textit{Hanoch Tel Oren v. Libyan Arab Republic}, the district court held the exception did not apply to a wrongful death and personal injury suit that resulted from a Libyan attack on a bus transporting United States citizens and visitors in Israel.\textsuperscript{154} The district court stated that "it is undoubted that sovereign immunity is still in effect for tort claims unless the injury or death occurs within American borders."\textsuperscript{155} Thus, if the tort does not occur in the territory of the United States, the victim cannot sue the foreign entity in a United States court.

Other courts have interpreted the situs of the tort provision even more narrowly. A district court \textit{In re Sedco, Inc.}\textsuperscript{156} held that the tort, \textit{in whole}, must occur in the United States. The \textit{Sedco} case involved an oil well drilling disaster off the coast of Mexico.\textsuperscript{157} The district court found the alleged acts or omissions to act "all took place in Mexico or in its territorial waters in the Bay of Campeche, and the noncommercial exception [was], therefore, inapplicable."\textsuperscript{158} The Ninth Circuit also adopted a narrow interpretation of the situs of the tort provision in \textit{McKeel v. Islamic Republic of Iran}\.\textsuperscript{159} The plaintiff, a former hostage at the United States embassy in Iran, sued the Islamic Republic of Iran for personal damages suffered as a result of his captivity.\textsuperscript{160} The court held that tortious acts which occurred on an United States embassy did not fall within the noncommercial tort exception requirement of a "tort occurring in the United States."\textsuperscript{161} Thus, sovereign immunity barred plaintiff's suit for damages. The Ninth Circuit reasoned in \textit{McKeel} that although the exception was cast in general terms, Congress did not intend to assert jurisdiction over foreign states for events that occurred wholly within their own territory.\textsuperscript{162} The court determined that to hold otherwise

\begin{footnotesize}
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  \item\textsuperscript{154} 517 F. Supp. 542 (D.D.C. 1981).
  \item\textsuperscript{155} \textit{Id.} at 550.
  \item\textsuperscript{156} 543 F. Supp. 561 (S.D. Tex. 1982).
  \item\textsuperscript{157} \textit{Id.} at 564.
  \item\textsuperscript{158} \textit{Id.} at 567.
  \item\textsuperscript{159} 722 F.2d 582 (9th Cir. 1983).
  \item\textsuperscript{160} \textit{Id.}
  \item\textsuperscript{161} \textit{Id.} at 587.
  \item\textsuperscript{162} \textit{Id.} at 588.
\end{itemize}
\end{footnotesize}
would be inconsistent with international law international law provides that a state loses its sovereign immunity only for tortious acts that occur in the territory of the forum state.\(^\text{163}\)

Upon facts similar to \textit{McKeel}, the Court of Appeals for the District of Columbia Circuit, in \textit{Persinger v. Islamic Republic of Iran}, applied the noncommercial tort exception to a tort that occurred in the United States Embassy in Iran.\(^\text{164}\) The court reasoned that the legislature’s failure to define the scope of territory subject to the United States jurisdiction allowed the court to interpret the FSIA to determine the meaning of the phrase.\(^\text{165}\) According to the court, the FSIA’s language did not specify that “territory” meant only territory geographically in the United States. Thus, the court reasoned that it could interpret the language to include any territory abroad which was under United States jurisdiction.\(^\text{166}\) Further, the court stated that although under international law United States embassies are not regarded as United States territory, they are not necessarily excluded from coverage under the FSIA.\(^\text{167}\) If plaintiff could show that the United States exercises some form of jurisdiction over its embassies, then embassies would fall within the territory contemplated by the noncommercial tort exception.\(^\text{168}\) The court also reasoned that the United States’ jurisdiction does not have to be exclusive, but can be concurrent with the jurisdiction of another country.\(^\text{169}\) The court decided that United States embassies fell under the broad regulatory authority of Congress and that they are subject to State Department determinational regulations governing consular affairs.\(^\text{170}\) From this determination, the court concluded that the United States exercises concurrent jurisdiction over its embassies abroad.\(^\text{171}\) Thus, the District of Columbia Court of Appeals held that United States embassies abroad were territory subject to the jurisdiction of the United States, and therefore, Iran’s actions on

\(^{163}\) \textit{Id.}

\(^{164}\) Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.D.C. 1984). In this case, a former hostage and his parents brought an action against Iran for injuries inflicted by his seizure and detention. \textit{Id.} at 836.

\(^{165}\) \textit{Id.} at 842.

\(^{166}\) \textit{Id.} at 839. The \textit{Persinger} court stated that “territory” could have two meanings. \textit{Id.} It could mean exclusive United States territory in a geographic sense or territory over which the United States exercises some form of jurisdiction. \textit{Id.} The court decided to adopt the latter interpretation, but did not state its reasons.

\(^{167}\) \textit{Id.}

\(^{168}\) \textit{Id.} Because the court chose the jurisdictional interpretation of territory, a plaintiff need only show that the sovereign’s tortious act occurred somewhere under the United States’ jurisdiction to get jurisdiction under the noncommercial tort exception.

\(^{169}\) \textit{Id.} at 840.

\(^{170}\) \textit{Id.} at 839-41

\(^{171}\) \textit{Id.} at 841.
embassy grounds occurred "in the United States" within the meaning of the noncommercial tort exception. Consequently, Iran could not claim immunity under the FSIA and the court had jurisdiction to hear the case.

Under the *Persinger* court's broad interpretation of the situs of the tort plaintiffs who suffer tort injuries on the premises of United States embassy may recover for those injuries in a United States court. Thus, the *Persinger* interpretation allows recovery for torts that occur on territory located outside the borders of the United States. The above cases illustrate the broad range of interpretations that the courts have given the situs of the tort provision.

C. *De Sanchez v. Banco Central de Nicaragua*

In *De Sanchez v. Banco Central de Nicaragua*, the Fifth Circuit attempted to: (1) provide a clear standard for distinguishing commercial and governmental activities for the purposes of the commercial activities exception; (2) further define the torts included in the noncommercial tort exception; and (3) clarify the extent of the relationship, if any, between the commercial activity and noncommercial tort exceptions to the FSIA.

1. Facts

In *De Sanchez*, plaintiff, a former citizen of Nicaragua and a resident of Florida, brought a claim against Nicaragua to collect on a $150,000 certificate of deposit issued to her by Banco Nacional de Nicaragua. When De Sanchez went to the bank, she was told that Banco Nacional did not have sufficient American currency on hand to honor the certificate. Banco Nacional requested currency from Banco Central, with whom it held an account. Banco Central complied with the request and issued a check for $150,000 on its account with Citizens & Southern International Bank ("C&S"), an American commercial bank located in Louisiana. When De Sanchez attempted to cash the check at the C&S bank, officials of the bank refused to cash it because there

172. *Id.*
173. *Id.* at 835.
174. 770 F.2d 1385 (5th Cir. 1985).
175. *Id.*
177. *Id.* at 901.
178. *Id.*
179. *Id.* at 902.
were insufficient funds to cover it. De Sanchez tried to cash the check again a few days later, but it was returned. Banco Central continued to refuse payment on the check.

De Sanchez asserted four claims against defendant Banco Central: breach of the duty to honor the check, breach of contract, misrepresentation, and conversion. Banco Central successfully moved to dismiss, contending that it was immune from suit on all claims because the FSIA barred the court from assuming jurisdiction.

On De Sanchez's appeal from the dismissal, the Fifth Circuit held that the FSIA's commercial activity exception did not apply. It also held that because appellant's claim sounded in property law rather than tort law, the noncommercial tort exception to the FSIA did not apply. Since neither exception applied, Banco Central was immune from suit under section 1604 of the FSIA and the court lacked jurisdiction over De Sanchez's claim.

2. Court's Reasoning
   a. Commercial Activity Exception

The Fifth Circuit applied a three part test to determine whether the FSIA's commercial activity exception was applicable. First, the Fifth Circuit determined whether the relevant activity was defined with precision. This required an examination of the specific defendant's act. Second, the court determined whether the defendant's activity was sovereign or commercial by assessing the nature, rather than the purpose, of the activity. Third, the court determined that if the sovereign's activ-

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180. Id. at 901.
181. Id. The check was marked "Refer to maker." C&S officials told De Sanchez that because of the turmoil in Nicaragua, all payments from Banco Central's account had been suspended. C&S had been instructed to stop payment by Dr. Arturo Cruz, the President of Banco Central, who assumed office during the installation of the Nicaraguan revolutionary junta. Id.
182. Id. De Sanchez named both Banco Central and C&S as defendants, but did not contest on appeal C&S's motion for summary judgment, which was granted by the district court. De Sanchez, 770 F.2d at 1389.
183. De Sanchez, 770 F.2d at 1390.
184. Id. at 1385. See infra note 203 and accompanying text.
185. Id. at 1395. See infra notes 204-05 and accompanying text.
186. Id. at 1387. Section 1604 of the FSIA provides: "Subject to existing international agreements to which the United States is a party at the time of enactment of this action 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 1604 to 1607 of this chapter." 28 U.S.C. § 1604.
187. De Sanchez, 770 F.2d at 1391.
188. Id. at 1391 (citing Callejo v. Banicomer, S.A., 764 F.2d 1101, 1109 (5th Cir. 1985).
189. Id. at 1390 (citing 28 U.S.C. § 1603(d)).
ity was indeed commercial, the activity had to have the requisite jurisdictional nexus with the United States to fall within the commercial activity exception to the FSIA.\(^{190}\)

In defining the defendant's relevant activity with precision, the circuit court in *De Sanchez* focused on two primary facts: the actual issuance of the check to the appellant, and the subsequent failure by the bank to honor that check.\(^{191}\) After defining the relevant activity, the court determined whether the activity was sovereign or commercial. The issuance of the check was either a sale of foreign currency or regulation of Nicaraguan foreign exchange reserves.\(^{192}\) The Fifth Circuit ignored the commercial aspects of the activity to hold that Banco Central's issuance of the check and its subsequent failure to honor it were a means of regulating Nicaragua's foreign exchange reserves.\(^{193}\) The activity was, therefore, considered sovereign.\(^{194}\)

The court analyzed the nature of Banco Central's activities. Although the provisions of the FSIA explicitly state that courts must look to the "nature of an activity rather than its purpose," the Fifth Circuit explained that absolute separation between nature and purpose was not always possible.\(^{195}\) The court reasoned that often the act's essence was defined by its purpose, and that unless the court could inquire into the purpose, it could not determine the act's nature.\(^{196}\) The court believed this was especially true of commercial activities which were defined by their profit-making nature.\(^{197}\) The Fifth Circuit found that Banco Central's purpose in selling currency defined the nature of the conduct.\(^{198}\) The bank was not engaging merely in the same activity as private banks with a different purpose but was engaging in a different activity.\(^{199}\) The bank was "performing one of its intrinsically govern-

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190. *Id.* at 1391. The court did not reach this stage of inquiry because it found the activity to be governmental rather than commercial in nature. *Id.* at 1391 n.8.

191. *Id.* at 1390. The court did not focus on the connected activities of either the Nicaraguan government or of Banco Central.

192. *Id.* at 1391.

193. *Id.* at 1393.

194. *Id.* at 1386. The Fifth Circuit distinguished sales of currency by Banco Central from sales by private banks on the basis of the different purposes motivating the sales. *Id.*

195. *Id.* at 1393.

196. *Id.*

197. *Id.* See also *House Report*, *supra* note 2, at 16. The court seemed to interpret Congressional intent to preclude foreign governments from asserting sovereign immunity for all of their activities because the majority of acts undertaken by a government could be interpreted as undertaken for the public benefit.

198. *Id.* at 1393.

199. *Id.*
mental functions as the Nicaraguan Central Bank." 200 Thus, the bank was "wearing its sovereign rather than its commercial hat." 201 The court determined that to hold the bank subject to suit for regulating Nicaragua's foreign exchange reserves would be contrary to the intent of the FSIA, because such a holding would interfere with Nicaragua's fundamental governmental function and its right to make national policies. 202

Thus, while the court acknowledged the commercial nature of banking and finance, it looked beyond the banking transaction to Banco Central's function in issuing the plaintiff's particular type of check and its later failure to honor that check. Finding that the bank functioned as a state organ to regulate the country's foreign exchange rate, the court held that the issuance of the check and failure to honor it were governmental rather than commercial acts. 203

b. Noncommercial Tort Exception

The Fifth Circuit also held that De Sanchez's claim against Banco Central was not within the noncommercial tort exception. 204 De Sanchez alleged that Banco Central's failure to honor its check was conversion of her property. The court decided that her claim, although sounding in tort, was essentially a claim for unjust taking of property, a tort which is covered by section 1605(a)(3) of the FSIA. 205

c. Relationship Between the Noncommercial Tort and Commercial Activity Exceptions

Whether a relationship exists between the noncommercial tort exception and the commercial tort activity exception is a question which thus far has not been answered by any court. De Sanchez is one of the few cases in which a plaintiff attempted to sue under both exceptions. De Sanchez is also one of the few cases to discuss both exceptions in some detail. 206

De Sanchez indicates that if a plaintiff argues that a sovereign's activity fits within the requirements of both the noncommercial tort and commercial activity exceptions, the court is likely to find that the sovereign's activity fits neither exception. In De Sanchez, the plaintiff argued

200. Id.  
201. Id. at 1394.  
202. Id.  
203. Id. at 1385.  
204. Id. at 1396.  
205. Id.  
206. See supra notes 174-205 and accompanying text.
that both the commercial activity and the noncommercial tort exceptions applied to the Nicaraguan bank’s activity—its refusal to honor its own check. De Sanchez claimed that this activity was a commercial act within the ambit of the commercial activity exception. She also alleged that the bank’s refusal to honor the check was conversion and thus, the bank’s act was a tort, fitting within the noncommercial tort exception. The Fifth Circuit, after extensive analysis, held that the bank’s refusal to honor the check was within the purview of neither exception and denied jurisdiction.

V. CRITICISMS AND IMPLICATIONS

A. Commercial Activity Exception

In De Sanchez, the Fifth Circuit determined that Banco Central’s conduct was governmental. The De Sanchez court’s defined “governmental activity” so broadly that virtually any activity could be classified as governmental and accorded immunity. The court’s broad definition threatens the vitality of the FSIA, because the FSIA’s main purpose was to establish restrictive sovereign immunity in the United States. The court’s all-encompassing definition of “governmental” is tantamount to the doctrine of absolute sovereign immunity. The court seemed to reason that a commercial entity engaging in commercial and governmental activities will be immune if the commercial activity indirectly affects the government. The purpose of the FSIA was to differentiate between activities so that only governmental acts would be held immune. In De Sanchez, the court found that the activity was commercial, yet proceeded to grant immunity to the commercial activity and its actor.

Moreover, the court’s reasoning in De Sanchez did not tie the grant of sovereign immunity to the particular function that Banco Central performed. Regulation of the foreign exchange rate is hardly synonymous with the activity in question—nonpayment of a debt the bank owed to one of its customers. The bank’s refusal to honor the check is a breach of contract between the bank and its client; as such, a foreign sovereign should be just as liable as any other citizen. This is especially significant because the FSIA was intended to make a foreign sovereign accountable,
when acting as a commercial entity, for any deviations from the provisions of a commercial agreement.\textsuperscript{214} By refusing to honor its check, the bank was acting as a commercial entity and, therefore, should have been liable for its debt as would any other commercial bank. The district court’s determination that Banco Central’s activities were predominantly commercial\textsuperscript{215} seems correct. The fact that the bank’s activities had a governmental aspect to them is irrelevant. If one engages in commercial conduct one should be treated as a commercial party according to commercial principles. If a commercial activity, such as nonpayment of a check, is classified as a governmental act then the definition of governmental activities may be extended to include any activity of a company or a government which influences a governmental function.

The *De Sanchez* standard of distinguishing governmental acts from commercial is different from past decisions which have applied the commercial activity exception, in that *De Sanchez* stretches the language of the exception further than others courts. The broad statutory language of the exception and the commercial activity definition provide essentially all courts with the authority to constantly reinterpret the statute. Some courts construe the language of the exception more broadly than others.\textsuperscript{216} In *Harris v. VAO Intourist Moscow*, the court construed the language of the commercial activity exception narrowly.\textsuperscript{217} Because the commercial activity in that case did not occur in the United States and had no direct effect in the United States as required by the exception, the court correctly decided that it had no jurisdiction over the defendant.\textsuperscript{218} Conversely, in *Sugarman v. AeroMexico, Inc.*,\textsuperscript{219} the court chose to stretch the language of the exception. The exception provides that the commercial activity giving rise to the plaintiff’s claim must occur in the

\textsuperscript{214} Legislative history as enunciated in the Congressional House Report suggests that the FSIA was intended to allow American citizens to force foreign entities to be more responsible for their actions. *See* House Report, *supra* note 2, at 9. The FSIA was enacted to codify restrictive sovereign immunity. *See* House Report, *supra* note 2, at 9. Under restrictive sovereign immunity, foreign entities are held accountable for their commercial acts and, thus, are treated as any private party engaging in commercial conduct. House Report, *supra* note 2; Tate Letter, *supra* note 3.

\textsuperscript{215} *De Sanchez v. Banco Central de Nicaragua*, 515 F. Supp. 900 (E.D. La. 1981). The district court stated that Banco Central’s activities generally are of a private, commercial nature. The only function of this bank that could be classified as governmental is their regulation of the foreign exchange, which began when Nicaragua’s government was overthrown by the revolutionary junta.

\textsuperscript{216} *See* supra notes 84-122 and accompanying text for examples of courts interpreting the statutory language of the commercial activity exception.

\textsuperscript{217} 481 F. Supp. 1056 (E.D.N.Y. 1979). *See* supra notes 90-93 and accompanying text.

\textsuperscript{218} *Id*.

\textsuperscript{219} 626 F.2d 270 (3d Cir. 1980). *See* supra notes 84-89 and accompanying text.
United States.\textsuperscript{220} In Sugarman, the plaintiff sued for injuries that he received while at an airport in Mexico, not in the United States.\textsuperscript{221} The injuries were the basis of the claim. But, the court managed to tie the injuries to the defendant's commercial conduct in the United States and construe the commercial conduct as the basis of the claim.\textsuperscript{222}

Courts like De Sanchez are able to stretch the language of the exception because the difference between commercial and governmental activities is not clear. Between activities which are clearly governmental, such as making national policy, and those which are clearly commercial, such as a profit-making contract for the sale of goods between a manufacturer and a retailer, there is a "grey area." In this grey area, those activities which are labeled commercial or governmental are purely a matter of interpretation. In this area, courts like De Sanchez are able to broadly interpret the definition of governmental activity under the exception.

The problems which exist with the interpretation and application of the commercial activity exception's three clauses also seem to relate to the lack of a clear definition of commercial activity. If the legislature or the courts clearly defined "commercial activity," courts would have less difficulty determining whether a sovereign had conducted activity in the United States, whether a connection existed between the commercial activity conducted elsewhere and acts performed in the United States, or whether the commercial act had caused a direct effect in the United States.

Courts which have interpreted and applied the second clause of the commercial activity exception have required a strong connection between the defendant's commercial activities abroad and the defendant's activities in the United States.

In Yessenin-Volpin v. Novosti Press Agency, a district court decided that despite the commercial nature of defendant's activities, the alleged libelous acts were not connected with a commercial activity of the USSR and were thus immune.\textsuperscript{223} In Vencedora Oceanica Navigation v. Compagnie Nationale,\textsuperscript{224} the Fifth Circuit found no nexus between an Algerian instrumentality's commercial activity in the United States and plaintiff's claim that he was tortiously deprived of his vessel by Algeria. Algeria

\begin{itemize}
\item \textsuperscript{220} 28 U.S.C. § 1605(a)(5).
\item \textsuperscript{221} 626 F.2d at 270.
\item \textsuperscript{222} The commercial conduct upon which the court based its decision was that the defendant conducted its operation as a common carrier in the United States and plaintiff bought his plane ticket in New Jersey. \textit{Id.} at 270.
\item \textsuperscript{224} 730 F.2d 195 (5th Cir. 1984).
\end{itemize}
was, therefore, found to be immune.\textsuperscript{225}

Both courts determined there was insufficient nexus between the defendant’s commercial acts in the United States and its acts elsewhere to establish jurisdiction. Neither court, however, precisely defined the degree of connection necessary to meet the nexus requirement. Thus, litigants have no clear standard to determine whether a defendant’s contacts are sufficient to comply with the nexus requirement. While some magic nexus or connection between the foreign sovereign’s act in the United States and its commercial activity conducted elsewhere must exist, the extent of the connection required is left to the interpretation of each court.

Inconsistent interpretation of the third clause of the commercial activity exception\textsuperscript{226} also makes it difficult for litigants to determine whether their cause of action constitutes one which results in a “direct effect” in the United States. The death of a United States citizen while working in Iran was determined not to create a direct effect in the United States.\textsuperscript{227} No direct effect was found in a breach of contract action when the contracts were with the plaintiff corporation’s United States subsidiaries.\textsuperscript{228} Conversely, a direct effect was found when a disputed letter of credit was payable through a New York bank and the beneficiary resided in New York.\textsuperscript{229} While failure to pay on a letter of credit and failure to pay for delivery of goods do not seem to be all that different, especially since the entities ultimately affected by the failure to pay are United States corporations, the broad language of the commercial activity exception allows courts to interpret its clauses as including or excluding facts which are not necessarily different. Thus, what constitutes a direct effect in the United States remains for the courts to decide on a case by case basis. The lack of one consistent standard makes it difficult for litigants to figure out whether they have a valid cause of action and whether they should even pursue litigation under the FSIA. Application of inconsistent standards may also encourage litigants to engage in forum shopping.

Broad judicial interpretations of the commercial activity exception

\textsuperscript{225} Id.


\textsuperscript{227} Berkovitz v. Islamic Republic of Iran, 735 F.2d 329 (9th Cir. 1984). \textit{See supra} notes 108-11 and accompanying text.


\textsuperscript{229} \textit{National Am. Corp.}, 448 F. Supp. 622. \textit{See supra} notes 117-20 and accompanying text.
could also have international implications. The *De Sanchez* case could be used as precedent by banks in other foreign nations to justify nonpayment to their American customers. Banks could claim that they were performing a regulatory function of some kind for the government and under the *De Sanchez* standard the banks would be immune. After *De Sanchez*, an American with funds in a foreign bank may never be able to enforce the payment of a check issued by that bank.

The *De Sanchez* analysis could logically be extended to any company supplying its government with goods or services that indirectly affect its governmental functions. For example, a Nicaraguan manufacturer that makes men's dress shoes as well as shoes for the Nicaraguan army, might come to the United States to purchase leather. The manufacturer, to avoid paying for the leather, could claim that because it manufactures shoes for the Nicaraguan army the shoe company is governmental in nature and therefore is immune from suit. The company could argue that if it had to pay its debt it would not have enough money to manufacture shoes for the army, and the army would be rendered unable to march, thus jeopardizing national security. This indirect effect on the government is similar to the indirect effect argument presented by Banco Central in *De Sanchez*. Although the lawsuit in *De Sanchez* involved a debt the bank owed De Sanchez, it was not clear how the debt was related to regulating the currency rate. The bank's claim was that payment of De Sanchez's check would reduce the available foreign currency funds in Nicaragua.\(^\text{230}\) Under this analysis, however, all banks and partial governmental agencies could claim that payment of their bills would shrink the foreign currency treasury.

If courts accept defense claims of an indirect effect on the government, unpredictability in the international business arena could result. Future courts, however, may limit this argument to when the foreign company's nation is experiencing political or economic turmoil.

Additionally, leaving the exception's interpretation to a case by case analysis, courts may become influenced by the political aspects of each case. The political power of the defendant nation and the possible foreign relations ramifications may become factors that a court considers in reaching its decision regarding whether the activity in question is within the commercial activity exception. In both *De Sanchez* and *Yessenin-Volpin*, it appeared the decisions were influenced by political factors not unlike a decision the State Department would have made under similar

\(^{230}\) *De Sanchez*, 770 F.2d at 1393.
circumstances. In *Yessenin-Volpin*, the court appeared to be influenced by the political clout of the Soviet Union and the possible implications for American-Soviet relations when it classified as sovereign the Soviet news agencies' commercial activities of publishing and distributing libelous articles. Similarly, the court in *De Sanchez* seemed to rely on factors other than the "nature of the activity" to classify as governmental an activity which traditionally was viewed as commercial. The court likely was influenced by the potential effect of the decision upon American-Nicaraguan relations as well as the political turmoil existing in Nicaragua at the time of the decision. When a court is influenced by political aspects of a case, a decision is not in keeping with the legislative policy of "depoliticizing" sovereign immunity determinations. Yet despite the drafters' intent, it appears courts still consider foreign policy in determining whether to grant sovereign immunity. *De Sanchez* and *Yessenin-Volpin* seem to indicate that even if an activity is commercial on its face, the court can and will recharacterize it as governmental if the court believes there will be significant political ramifications should it determine that jurisdiction exists.

**B. Noncommercial Tort Exception**

The inconsistent application of the noncommercial tort exception and its territorial limitations results in an ambiguous standard. The lack of a consistent standard renders case outcomes unpredictable and may create forum shopping by plaintiffs seeking a court favorable to their position. *De Sanchez* did little to clarify the requirements for proper application of the noncommercial tort exception. Because the language of the noncommercial tort exception is broad, it lends itself to case-by-case interpretation. For example, *Skeen v. Brazil* held that the tort of an assault

231. The State Department, prior to the enactment of the FSIA, essentially decided the sovereign immunity cases. Its decisions were based largely on the political factors in the cases. See supra notes 41-51 and accompanying text.


233. *De Sanchez*, 515 F. Supp. 900 (E.D. La. 1981). At the time of the decision, Nicaragua had just undergone a revolution. *De Sanchez*, 770 F.2d at 1386. Shortly after the revolutionary junta began to govern, exchange control regulations were adopted limiting foreign exchange to ten specific purposes. Id. at 1387. Nicaragua was also experiencing a deficit of over $200 million in foreign exchange and its total liquidity was purported to be more than three and one half million dollars, barely enough to meet an average day's import requirements. *De Sanchez*, 515 F. Supp. at 902. Because of all the monetary problems Nicaragua was experiencing, even if the Fifth Circuit ruled in De Sanchez's favor, the revolutionary government would have been unlikely to comply with a ruling that her check must be honored.

234. House Report, supra note 2, at 7. See also supra note 51 and accompanying text.
did not fall within the exception.\textsuperscript{235} In that case, the sovereign was held immune from liability for the tortious act of the grandson of its agent, the ambassador.\textsuperscript{236} The court reasoned that the grandson was not acting within the scope of his employment when he assaulted the victim, and therefore, his actions could not be attributed to the sovereign.\textsuperscript{237} What constituted actions within the scope of employment for a representative of a foreign government was not enunciated. Therefore, the court left unclear exactly when an assault by a foreign sovereign will be actionable and when it will not. In fact, the court's reasoning regarding the nonapplicability of the noncommercial tort exception is subject to criticism.

In \textit{De Sanchez}, Banco Central refused to honor the check it had previously issued to De Sanchez and it kept her money.\textsuperscript{238} It is difficult to conceive of a clearer example of conversion. Still, the Fifth Circuit decided that the bank's actions did not constitute conversion but instead was an unjust taking of property.\textsuperscript{239} The court, however, never really explained the difference between the two torts nor did it state whether conversion was a tort covered by the noncommercial tort exception. Thus, which torts are included and excluded by the exception is still open to question.

The main problem in interpreting this exception, however, is determining whether a tort has occurred in the United States. Some courts strictly interpret the language of the exception and require that the tort occur in the continental United States, while others interpret the language more broadly. Generally, a narrow interpretation is rendered when injuries occur in an area within the exclusive jurisdiction of another country and do not involve any question of concurrent United States jurisdiction.\textsuperscript{240}

For example, in \textit{Hanoch Tel Oren v. Libyan Arab Republic}, the court held that the exception did not apply to a wrongful death and personal injury suit arising out of an attack in Israel on a bus containing United States citizens.\textsuperscript{241} The court stated that the tort must occur in the continental United States, otherwise the American citizen has no valid cause of action in an American court.\textsuperscript{242} In \textit{In re Sedco, Inc.}\textsuperscript{243} the court

\begin{footnotesize}
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\item \textsuperscript{235} 66 F. Supp. 1414 (D.D.C. 1983).
\item \textsuperscript{236}  Id. at 1418.
\item \textsuperscript{237}  Id.
\item \textsuperscript{238}  \textit{De Sanchez}, 707 F.2d at 1387.
\item \textsuperscript{239}  Id. at 1339.
\item \textsuperscript{240}  See \textit{infra} text accompanying notes 241-46.
\item \textsuperscript{241}  \textit{Hanoch Tel Oren}, 517 F. Supp. at 544.
\item \textsuperscript{242}  Id. at 548-50.
\item \textsuperscript{243}  543 F. Supp. 561 (S.D. Tex. 1982).
\end{itemize}
\end{footnotesize}
held that the whole tort must occur in the United States. Thus, the tortious acts or omissions which occurred in Mexico precluded application of the noncommercial tort exception. These interpretations of the exception limit the ability of American citizens to recover when injured by a foreign sovereign. The effect of the court's decisions is that American citizens must seek recovery from the courts in whichever country their injury occurs. If a foreign country chooses not to acknowledge the claim of an American citizen, the American is left with no remedy.

When a tort involving a foreign sovereign occurs in a place subject to concurrent jurisdiction, United States courts have more readily applied the exception. In *Persinger v. Islamic Republic of Iran*, the District of Columbia Court of Appeals allowed a plaintiff to recover for a tort that occurred at a United States embassy. The court ruled that the situs of a tort for recovery purposes under the noncommercial tort exception can be a United States embassy located in a foreign territory or in international waters.\(^2\) Thus, the court effectively extended the ambit of the exception to situations in which the United States and another country have concurrent jurisdiction.\(^2\) Because Persinger demonstrated that the United States exercised some form of jurisdiction over its embassies, his claim was found to fall within the boundaries of the noncommercial tort exception.\(^2\)

The *Persinger* interpretation of the exception's language was unprecedented. If other courts follow the *Persinger* court's analysis, jurisdiction of United States courts could be extended beyond the legislature's intent. In enacting the FSIA, Congress stated that the noncommercial tort exception was intended mainly to facilitate recovery by United States traffic accident victims for accidents caused by foreign diplomatic personnel driving in the United States.\(^2\) Congress never stated nor implied that United States courts should have jurisdiction over claims arising in territories over which the United States only has concurrent jurisdiction. To allow recovery in concurrent jurisdiction cases could lead to a great increase in litigation and to a need to enforce judgments in foreign territories never contemplated by Congress when it enacted the FSIA.

One year earlier, the Ninth Circuit ruled, upon identical facts as *Persinger*, that United States courts have no jurisdiction over United

\(^{244}\) *Persinger*, 729 F.2d at 839.  
\(^{245}\) Id. at 840.  
\(^{246}\) Id.  
States embassies abroad. The court determined that to rule otherwise would be contrary to the prevailing international law which provides that a foreign sovereign may be held liable only for torts that occur within the territory of the forum state. This interpretation comports with the legislative intent behind the FSIA. To allow United States courts to exercise jurisdiction over foreign states for acts committed by foreign agents on United States embassy grounds is contrary to most foreign sovereigns' conceptions of sovereignty. Most foreign states consider themselves sovereign over territory within their borders. The Persinger interpretation effectively makes United States embassies part of the United States territory for jurisdictional purposes. Thus, the Persinger interpretation could create hostility and strain diplomatic relations between the United States and other countries.

C. Relationship Between the Noncommercial Tort and the Commercial Activity Exceptions

Thus far, most courts have failed to specify the relationship between the commercial activity exception and the noncommercial tort exception. A few courts have discussed the relationship between the two exceptions, but have not done so in a thorough manner. De Sanchez v. Banco Central de Nicaragua, is a recent decision that discusses the relationship between the exceptions in some detail.

De Sanchez illustrates the phenomenon that once the court determines that one FSIA exception is inapplicable, the other exception is also likely to be found inapplicable. This phenomenon is also evident in other cases. For example, in In re Sedco, Inc., the plaintiffs sued a Mexican company for tortious injuries to the southern coast of Texas, caused by an oil spill that occurred while an oil well was being drilled in the Gulf of Mexico. The plaintiffs argued that both the commercial activity and the noncommercial tort exceptions applied, giving the United States

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248. McKeel v. Islamic Republic of Iran, 722 F.2d 582 (9th Cir. 1983). See supra notes 159-63 and accompanying text.
249. Id. at 588.
252. 770 F.2d 1385 (5th Cir. 1985).
254. Id. at 564-65.
courts jurisdiction over the Mexican company. The court held that neither exception applied.\textsuperscript{255} The commercial activity exception did not apply because the Mexican company sued was characterized as an arm of the Mexican government and also because the court found the company's acts to be sovereign in that the Mexican government charged the company with exploring and planning Mexico's state-owned natural resources.\textsuperscript{256} The specific acts the court focused on and found to be sovereign rather than governmental were state efforts to determine the extent of Mexico's natural resources.\textsuperscript{257} The noncommercial tort exception did not apply because the court found that efforts to determine a nation's natural resources were discretionary acts done in furtherance of the company's legal mandate to explore for Mexico's hydrocarbon deposits.\textsuperscript{258} Discretionary acts are explicitly exempted from the ambit of the exception in section 1605(a)(5)(A).\textsuperscript{259} Thus, the Sedco court, like the De Sanchez court, interpreted the acts which were the basis of the lawsuit to be applicable under neither exception and denied jurisdiction.\textsuperscript{260}

Carey v. National Oil Corp.\textsuperscript{261} provides another illustration. In Carey, an American corporation brought suit against Libya and a corporation wholly owned by the Libyan government, seeking to recover damages for an alleged breach of contract to supply petroleum products.\textsuperscript{262} Specifically, plaintiffs claimed that defendants obtained excessive payments from plaintiffs by duress.\textsuperscript{263} The court found neither exception applicable to the case.\textsuperscript{264} The noncommercial tort exception was inapplicable because the duress exerted by the corporation was interpreted to be an act of nationalization by Libya, which is a quintessentially sovereign act or at most an interference with contract rights.\textsuperscript{265} The commercial activity exception did not apply because the alleged misconduct did not have a direct effect on the United States.\textsuperscript{266} Thus, as in De Sanchez, once

\begin{itemize}
  \item \textsuperscript{255} Id. at 566-67.
  \item \textsuperscript{256} Id. at 564-66.
  \item \textsuperscript{257} Id. at 565.
  \item \textsuperscript{258} Id. at 567.
  \item \textsuperscript{259} 28 U.S.C. § 1605(a)(5)(A).
  \item \textsuperscript{260} Other cases serve to illustrate the phenomenon that once a court finds one exception inapplicable, the other exception is also likely to be found inapplicable. See Berkovitz v. Islamic Republic of Iran, 735 F.2d 329 (9th Cir. 1984); Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849 (S.D.N.Y. 1978).
  \item \textsuperscript{261} 453 F. Supp. 1097 (1978).
  \item \textsuperscript{262} Id. at 1099-1100.
  \item \textsuperscript{263} Id. at 1100.
  \item \textsuperscript{264} Id. at 1100-02.
  \item \textsuperscript{265} Id. at 1102.
  \item \textsuperscript{266} Id. at 1101. See infra note 235 and accompanying text.
\end{itemize}
the Carey court found the alleged misconduct was not within the ambit of one exception, it proceeded to find the other exception similarly inapplicable.

Cases which interpret the two exceptions raise questions regarding the interrelationship between the exceptions. The De Sanchez court did not address whether recovery under one exception to the FSIA precludes recovery under the other exception. While no court has ruled explicitly that recovery under one exception precludes recovery under the other, the court in Persinger v. Islamic Republic of Iran\(^{267}\) has stated that a comparison of the noncommercial tort and the commercial activity exception demonstrated that Congress intended the former to be narrower than the latter.\(^{268}\) The commercial activity exception, on the one hand, explicitly provides that a foreign sovereign's commercial activities "outside the territory of the United States" having a "direct effect" in the United States may allow a United States court to deny sovereign immunity.\(^{269}\) The noncommercial tort exception, on the other hand, does not provide for a "direct effect" exception. When Congress uses express language in one part of a statute to cover a specific situation and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing.\(^{270}\) Yet, the fact that some plaintiffs have successfully fit one cause of action under both exceptions without much difficulty demonstrates just how broadly the provisions of the statute are worded. It also demonstrates that plaintiffs are at the mercy of the courts, who may or may not decide that the exceptions apply to the facts of a case. This problem is aggravated by the fact that there is little consistent precedent for the courts to follow.

Because the noncommercial tort exception has been interpreted to require that the injury occur in the territorial United States,\(^{271}\) the "direct effect" provision of the commercial activities exception is important. Theoretically, the direct effect provision allows plaintiffs to recover for harm caused by a sovereign, especially those plaintiffs who would be precluded from recovery under the noncommercial tort exception. Conse-

\(^{267}\) 729 F.2d 835 (D.C. Cir. 1984).
\(^{268}\) Id. at 843.
\(^{270}\) Persinger, 729 F.2d at 843. See also Russello v. United States, 464 U.S. 16, 23 (1983); United States v. Martino, 681 F.2d 952, 954 (5th Cir. 1982) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)).
\(^{271}\) For a general discussion of this interpretation, see supra notes 153-63 and accompanying text. Two cases have held to the contrary: Persinger v. Islamic Republic of Iran, 729 F.2d 835, (D.C. Cir. 1984) and Olsenby Sheldon v. Government of Mexico, 729 F.2d 641 (9th Cir. 1984). See also supra notes 164-73 and accompanying text.
quently, plaintiffs seeking to recover for harm which occurred outside the territorial United States should always include a cause of action under the commercial activity exception clause. However, plaintiffs have been unsuccessful in arguing: (1) that although the alleged tort occurred outside the United States, it had a direct effect in the United States; or (2) that the definition of United States should include embassies and bodies of water.

The interrelationship between the two exceptions raises another issue: whether an action based on one of the torts excluded by the non-commercial tort exception could be brought under the commercial activity exception, provided the requirements of the latter exception were met. Two courts have answered that a plaintiff could do so while one has disagreed. In *Yessenin-Volpin*, the plaintiff brought an action in libel. Libel is explicitly excluded as a cause of action under the noncommercial tort exception. The court, however, took jurisdiction under the commercial activity exception. Similarly in *United Euram Corp.*, the court took jurisdiction under the commercial activity exception on a cause of action for interference with contractual relations, which is expressly excluded by the noncommercial tort exception. The contracts required the plaintiff impresario to pay cash fees to the Soviet State Concert Society, as well as paying artists' salaries and tour expenses. The Society was to send artists to the United States and Great Britain to give performances organized by the plaintiff. These contracts were pursuant to a cultural exchange agreement between the United States and the Soviet Union. The court held that the cause of action was within the commercial activity exception, and proceeded to

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273. McKeel v. Islamic Republic of Iran, 722 F.2d 582 (9th Cir. 1984). See supra notes 158-63 and accompanying text.
283. Id. at 610.
284. Id.
add that even though the noncommercial tort exception was intended to cover noncommercial torts, the restrictions embodied in subsection 1605(a)(5)(B) were not intended to restrict the scope of the commercial activity exception. 

Conversely, in *Carey v. National Oil Corp.*, the court stated that a claim under the commercial activity exception could not be based upon one of the torts expressly excluded by the noncommercial tort exception. In that case, the causes of action were also interference with contractual relations and breach of contract, both of which are excluded by the noncommercial tort exception from the scope of the FSIA. The court decided that the alleged misconduct was not within the ambit of the commercial activity exception and granted sovereign immunity to Libya. Thus, the success of a suit under the commercial activity exception based on one of the torts listed in the noncommercial tort exception depends on the court which hears the case. Some courts believe there is a relationship between the exceptions, while others do not. Therefore, it becomes a case-by-case determination whether a relationship exists between the exceptions.

Finally, the issue of the interrelationship between the commercial activity and noncommercial tort exceptions can be seen to relate to attachment under section 1610 of the FSIA. The commercial activity exception has an attachment or a judgment enforcement provision in section 1610 of the FSIA, while the noncommercial tort exception does not. Thus, a plaintiff who successfully obtains jurisdiction under the noncommercial tort exception, and prevails on the merits, still will not be able to attach the defendant’s property. Conversely, a plaintiff who obtains a judgment against a sovereign’s instrumentality, or against the sovereign itself under the commerical activity exception, may enforce the judgment under section 1610 of the FSIA. As a result, plaintiffs stand a better chance of recovering on their judgments if they sue under the commercial activity exception.

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285. *Id.* at 612.
293. *Id.*
The foregoing discussion indicates that the relationship between the commercial activity and the noncommercial tort exceptions remains unclear. Courts have not explicitly ruled that suing under one exception precludes the plaintiff from suing under the other; that is, they have not specified that the exceptions are mutually exclusive. Since courts have not clarified the nature of the relationship between the exceptions, litigants do not know whether they should pursue litigation under both exceptions, especially if by doing so they could jeopardize their chances of winning under either one of the exceptions.

VI. SUGGESTIONS AND PROPOSALS

As has been discussed and illustrated throughout this Note, the interpretations of the noncommercial tort and the commercial activity exceptions are imbued with confusion and inconsistency. The problems seem to emanate largely from the broad phrasing of the exceptions. The wording of the FSIA is so broad that the decision whether or not to grant immunity comes down to a case-by-case interpretation of the cause of action and its facts, and courts such as De Sanchez have leeway to broaden the boundaries of the FSIA to unprecedented extents. Because each exception is plagued with its own unique problems, the remedies for each exception will be discussed separately.

A. Commercial Activity Exception

The provisions of the FSIA’s commercial activity exception are phrased very broadly. Such broad phrasing has forced the courts to interpret the FSIA and thereby to determine sovereign immunity on a case-by-case basis. These piecemeal determinations have resulted in confusing and inconsistent standards. Amendment of the commercial activity exception provisions may remedy this problem. The amendment should explicitly specify what activities qualify as “commercial,” and what activities qualify as “governmental.” Specifying activities as either governmental or commercial would simplify the courts’ application of the exception. Despite the potential benefits, however, such amendment may be impracticable. Further, Congress may be reluctant to enumerate acts that qualify as commercial because in so doing it may preclude the application of the exception to activities which have not yet been identified.

If amending the commercial activity exception in this manner is not feasible, then a different standard of what qualifies as commercial activity should be adopted. The standard should be narrower than the one ad-
vanced by the *De Sanchez*\(^{294}\) court, because the *De Sanchez* standard of commercial activity could present unpredictability in international business transactions. To avoid unpredictability, courts should reject the claims of sovereign immunity as to activities which affect the government indirectly. More specifically, such claims should be rejected if they are made by a governmental agency which is a "commercial governmental hybrid" like the bank in the *De Sanchez* case.\(^{295}\) The granting of sovereign immunity should be restricted to traditional governmental functions. *De Sanchez* would have been resolved differently applying this narrower standard because the bank would have been granted immunity only if regulation of foreign currency was the issue in the lawsuit. If in *De Sanchez* the bank devalued the Nicaraguan currency from ten Cordobas per American dollar to fifty Cordobas per dollar, De Sanchez's check would have fallen drastically in value. In this situation, De Sanchez would have no claim against the bank for her loss because the bank's act would be within the scope of its function of regulating the foreign exchange rate.

Other solutions to the problem of inconsistent implementation of the commercial activity exception might be appropriate. First, Congress could enact a statute requiring a foreign company to file with the Secretary of State or a similar United States governmental entity a list of activities that are recognized as governmental by the nation where the foreign company is incorporated or where it conducts the majority of its business. The companies would not be able to default on commercial obligations by claiming immunity unless they had filed information previously with the United States government indicating that the transaction in question was considered a governmental act. This information would be publicly available and thus, would serve as notice to private citizens entering contracts with the foreign company. Such information would be especially important when dealing with companies from Socialist nations where the government is ubiquitous. For example, as *Yessenin-Volpin* illustrated, the publishing of propaganda by a commercial entity such as a newspaper was seen as a Soviet governmental function.\(^{296}\) In the United States, a similar newspaper publication could not claim sovereign immunity for any of its acts.

Statutory filing may not be considered a feasible solution because Congress may be willing to incur the expense necessary to register the filings. Congress would not have to enforce filings, however, because

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294. *See supra* notes 183-202 and accompanying text.
they would be enforced by the courts with the finding of no sovereign immunity. Another objection to such a filing requirement may come from foreign countries that consistently conduct business with the United States. These countries may not want to trouble themselves with filing and may not want to file because it could restrict their future behavior. If, however, these countries want to conduct business with United States companies they would have to comply with such a statutory filing.

Second, the commercial activity exception could be made more consistent by having United States companies require express contractual waivers of sovereign immunity from foreign entities with which they contract, in accordance with section 1605(a)(1) of the FSIA.\textsuperscript{297} This solution could be used along with the statute requiring filing of governmental activities. United States companies could check the public records to determine whether or not a particular transaction is seen as governmental by the foreign country before an agreement is reached. If the activity is governmental, the company could bargain with the foreign company for an express waiver of sovereign immunity as to the transaction. Congress is not likely to object to the use of express waivers in this way because express waivers are already an exception under the FSIA.\textsuperscript{298}

Alternatively, express disclosure could be required. Prior to allowing a sovereign immunity claim, the foreign company would have the burden of proving that it expressly disclosed to the contracting company that the activity in question was considered an immune governmental function. If the foreign company fails to prove a disclosure was made, the nondisclosure should be construed by the courts as an implied waiver of sovereign immunity. Congress is not likely to object to the use of implied waivers because such waivers are also excepted from the FSIA.\textsuperscript{299}

B. Noncommercial Tort Exception

The provisions of the noncommercial tort exception, like those of the commercial activity exception, are phrased broadly. Thus, courts are forced to determine the exception's applicability on a case-by-case basis. As a consequence, the judicial decisions regarding the noncommercial

\begin{itemize}
\item \textsuperscript{297} 28 U.S.C. § 1605(a)(1) provides:
(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.
\item \textsuperscript{298} \textit{Id.}
\item \textsuperscript{299} \textit{Id.}
\end{itemize}
tort exception frequently create confusing and inconsistent standards. Amendment of the exception should be considered to remedy this problem. Congress should amend the exception to specify which torts fall within the noncommercial tort exception. Such specification would help plaintiffs determine whether to initiate a suit based on the torts committed by a foreign sovereign. Despite the benefits of a clearly drafted exception, Congress may not want to amend the exception, in order to provide the courts discretion to assume jurisdiction over newly emerging torts.

Congress should also amend the noncommercial tort exception to clarify what territories are within the jurisdiction of the United States. Congress needs to specify whether United States embassies and bodies of waters are territories within the jurisdiction of the United States. Such amendments are essential because of the varied and inconsistent standards applied to the interpretation of the FSIA. The Persinger court held that embassies are within the territorial jurisdiction of the United States, while the McKeel court held exactly the contrary. If a clear, consistent standard is not enacted, plaintiffs may resort to forum shopping.

Finally, Congress must enact an attachment or judgment provision for the noncommercial tort exception, as such a provision exists for the commercial activity exception under section 1610 of the FSIA. Currently, plaintiffs who prevail under the noncommercial tort exception have no feasible way to enforce their judgments against foreign defendants. Congress enacted the FSIA to allow United States citizens to hold foreign sovereigns accountable for their tortious actions, especially when agents of sovereigns cause traffic accidents. Hence, Congress should not object to the enactment of a provision that would allow United States citizens to enforce judgments against foreign sovereigns over which United States courts have jurisdiction and whom they have found to be liable on the merits. The only possible objection to such an enforcement provision would be if it explicitly contradicted an international agreement on the same subject.

300. Persinger v. Islamic Republic of Iran, 729 F.2d 562 (9th Cir. 1984). See supra notes 164-73 and accompanying text.
301. McKeel v. Islamic Republic of Iran, 722 F.2d 582 (9th Cir. 1983).
C. Relationship Between the Commercial Activity and the Noncommercial Tort Exception

The relationship between the two exceptions has not been clarified by the courts. Therefore, Congress should clarify the relationship between these two exceptions in an amendment to the FSIA. Specifically, Congress should state whether the exceptions are mutually exclusive. Also, it should specify whether or not a tort specified in subsection (a)(5)(B) of the noncommercial tort exception could be the basis for a cause of action under the commercial activity exception.

VII. CONCLUSION

Congress enacted the FSIA to establish a consistent, exclusive standard for the judiciary to determine the applicability of sovereign immunity. The Act encompasses two major exceptions: the commercial activity exception and the noncommercial tort exception. De Sanchez and previous decisions illustrate that the standards for the application of the exceptions continue to be broad and confusing. Such interpretations threaten the establishment of restrictive sovereign immunity in the United States. Prior to the FSIA plaintiffs were at the mercy of State Department recommendations. These recommendations followed no consistent pattern of decision-making or precedent. If the FSIA exceptions are not amended, American plaintiffs seeking relief against foreign sovereigns will continue to be victims of inconsistent interpretations of the FSIA provisions. Inconsistent judicial interpretations will defeat the very purpose of a statute designed to provide an exclusive standard to determine the applicability of the sovereign immunity doctrine.

To reinforce the restrictive sovereign immunity doctrine, Congress needs to clarify or the courts need to delineate the ambit of the exceptions as well as the relationship between them. Congressional amendment would make the courts' application of the exceptions easier and would inform plaintiffs whether their claims are valid under either or both of the exceptions. If amendments and clarifications are not made, a plaintiff may have to resort to remedies outside the Act, such as contractual waivers. Thus, it is clear that some solution must be found if the purposes of the FSIA are to be fulfilled. Otherwise, courts may inadvertently recreate the same atmosphere of absolute sovereign immunity that existed prior to the enactment of the FSIA.

305. House Report, supra note 2, at 12.
306. See supra notes 36-51 and accompanying text.