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Abstract

This Note examines the development of judicial interpretation of the noncommercial torts exception, section 1605(a)(5) of the Foreign Sovereign Immunities Act of 1976 (FSIA), in United States law. The Note first traces the historical development of the doctrine of sovereign immunity to its statutory codification. Next, it identifies trends in the interpretation of the torts exception that have emerged since the enactment of the FSIA. Finally, this Note proposes a coherent, uniform method of preparing a claim under section 1605(a)(5).

THE NONCOMMERCIAL TORTS EXCEPTION TO THE FOREIGN SOVEREIGN IMMUNITIES ACT

INTRODUCTION

The Foreign Sovereign Immunities Act of 1976¹ (FSIA) allows a plaintiff to bring a foreign state before a United States court, either federal or state, obtain a ruling on the sovereign immunity of the entity, and, if the court does not find immunity, secure an adjudication and satisfaction of its claim.² A central feature of the FSIA is its specification of actions for which foreign states are not entitled to claim immunity from jurisdiction.³ The so-called noncommercial torts exception⁴ sets forth the circumstances in which a foreign sovereign will not be afforded sovereign immunity as a result of its tortious acts or omissions.⁵

This Note examines the development of judicial interpretation of the torts exception, section 1605(a)(5) of the FSIA, in United States law. The Note first traces the historical development of the doctrine of sovereign immunity to its statutory codification.⁶ Next, it identifies trends in the interpretation of the torts exception that have emerged since the enactment of the FSIA.⁷ Finally, this Note proposes a coherent, uniform method of preparing a claim under section 1605(a)(5).⁸

I. HISTORY OF FOREIGN SOVEREIGN IMMUNITY

The common law doctrine of absolute foreign sovereign immunity dominated United States law until 1952, when the restrictive theory of sovereign immunity replaced the absolute

1. 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1976).

2. *Williams v. Shipping Corp. of India*, 653 F.2d 875, 878 (4th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982); *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 851 (S.D.N.Y. 1978).

3. 28 U.S.C. § 1605. A foreign state may not claim immunity when it has waived immunity, or when the action is based upon a commercial activity, certain property rights, certain noncommercial torts, or specified suits in admiralty. *Id.*

4. *Id.* at § 1605(a)(5); *see infra* text accompanying note 36 (noncommercial torts exception).

5. 28 U.S.C. § 1605(a)(5); *see infra* text accompanying note 36 (noncommercial torts exception).

6. *See infra* notes 9-37 and accompanying text.

7. *See infra* notes 38-110 and accompanying text.

8. *See infra* notes 111-38 and accompanying text.

theory. The FSIA, which codified the restrictive theory in 1976, was a legislative response to international disputes formerly governed by the Executive branch of the government.

Absolute foreign sovereign immunity originated in an era of personal sovereignty when sovereign rulers were above the law.⁹ To avoid friction between nations and to preserve the dignity of other sovereigns, the states exempted foreign sovereigns from their jurisdiction.¹⁰ Most advocates of the doctrine of absolute immunity considered all acts of a sovereign to be public or governmental acts, not private or commercial acts.¹¹ In the United States, the absolute theory of foreign sovereign immunity was recognized in the early 1800's,¹² and the absolute notion that the executive branch of government should conduct foreign affairs was embraced by United States courts in the 1940's.¹³

9. Comment, *The Jurisdictional Immunity of Foreign Sovereigns*, 63 YALE L.J. 1148 (1954). The common law maxim, "the King can do no wrong," expressed the essence of the absolute theory of sovereign immunity. *Id.* at 1148 n.3.

10. *Id.* at 1148. This accordance of immunity between sovereigns was reciprocal in nature; failure to grant similar treatment to a foreign state was an indication of either hostility or superiority. *Id.* Thus, in order to maintain peaceful relations, sovereigns granted each other complete and full immunity. *Id.* at 1148 n.4.

In the *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), Chief Justice Marshall brought this absolute theory of sovereign immunity to the United States. When a United States citizen accused Napoleon of "stealing" his ship, Marshall declared "perfect equality and absolute independence of sovereigns" and thus firmly rooted the notion of absolute foreign sovereign immunity in United States law. *Id.* at 136.

11. Fensterwald, *Sovereign Immunity and Soviet State Trading*, 63 HARV. L. REV. 614, 616 (1950). Generally, three arguments were advanced to support this "pure" absolutist position. First, the custom of foreign sovereign immunity preserved the peace between nations as well as the dignity of the sovereign. Second, it enabled the executive branch of the government to conduct foreign relations properly. Third, the distinction between public and private acts of the sovereign was perceived as meaningless since all acts of the sovereign were necessarily public. *Id.* at 616-17.

The distinction between "public" and "private" acts of a foreign sovereign rested on the nature or purpose of the act. A "public" act was one performed for the benefit of the public interest. Acts that were political, diplomatic, or military in nature were considered "public." *See id.* at 616-17. "Private" acts were those which did not directly benefit the public, such as civil or commercial activities. Thus, when a sovereign acted as a private individual, the sovereign's actions were "private" and the sovereign could be subject to jurisdiction. *See id.* at 620-21.

12. *See supra* note 10.

13. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-36 (1945); *Ex parte Republic of Peru*, 318 U.S. 578, 586-89 (1943); *Compania Espanola De Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938); *Ex parte Muir*, 254 U.S. 522, 533 (1921). In *Republic of Mexico*, the Supreme Court voiced its approval of a court's

Motivated by the trend among foreign nations to adopt a narrower view of foreign sovereign immunity,¹⁴ in the early 1950's the United States adopted the restrictive theory of sovereign immunity.¹⁵ The restrictive theory, which excluded private acts from the status of "governmental" and therefore protected acts, was formally adopted by the State Department in the so-called Tate Letter.¹⁶ The Executive branch incorporated the movement toward the restrictive approach into treaty negotiations with other nations.¹⁷ Thereafter, United States

deference to suggestions by the State Department when a foreign sovereign was brought into a United States court as a defendant when it noted that "it is an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination. . . ." *Republic of Mexico*, 324 U.S. at 36. In fact, a move to a more restrictive theory of sovereign immunity seemed inevitable when the Court stated: "[i]t is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Id.* at 35 (footnote omitted). Thus, the Court advised that it would defer to executive suggestions of immunity, but would also be willing to move to a more restrictive approach if led there by the State Department.

14. Letter from Jack B. Tate, Acting Legal Advisor of the U.S. Dep't of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 app. 2 (1976) [hereinafter cited as the "Tate Letter"]. The Tate Letter notes, in part,

A trend to the restrictive theory is already evident in the Netherlands where the lower courts have started to apply that theory.

. . . In view of the growth of the restrictive theory since [1921] the German courts might [adopt the restrictive approach]. . . .

The newer or restrictive theory of sovereign immunity has always been supported by the courts of Belgium and Italy. It was adopted in turn by the courts of Egypt and of Switzerland. In addition, the courts of France, Austria, and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory. Rumania, Peru, and possibly Denmark also appear to follow this theory.

Id. at 712-13.

15. The restrictive theory of sovereign immunity was based on the rationale that a foreign sovereign should only be granted immunity for its public acts, and private acts of a sovereign should be treated the same as any other private individual. See *infra* notes 16-23 and accompanying text.

16. Tate Letter, *supra* note 14, 425 U.S. at 711 app. 2. This letter advised that the immunity of a sovereign was to be recognized with regard to governmental or public acts, *jure imperii*, of a state, but not with respect to private acts, *jure gestionis*; thus immunity was "restricted" to public acts. *Id.*

17. See, e.g., Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, United States-Republic of Korea, art. XVIII, para. 2, 8 U.S.T. 2217, T.I.A.S. No. 3947; Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, art. XVII, para. 2, 8 U.S.T. 2043, T.I.A.S. No. 3942; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States-Nicaragua, art. XVIII, para. 3, 9 U.S.T. 449, T.I.A.S. No. 4024; Treaty of Amity, Economic Relations and

courts adopted the restrictive theory in case analyses involving foreign nations.¹⁸

The adoption of the restrictive theory by the United States created two problems. First, the United States courts needed to clarify the definition of "restrictive." Second, plaintiffs who prevailed in United States courts lacked a satisfactory judgment enforcement procedure. Although the Tate Letter publicly announced adherence to the State Department's restrictive theory,¹⁹ it failed to set forth explicit guidelines for distinguishing between public and private acts.²⁰ Consequently, the

Consular Rights, Aug. 15, 1955, United States-Iran, art. XI, para. 4, 8 U.S.T. 899, T.I.A.S. No. 3853; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, art. XVIII, para. 2, 7 U.S.T. 1839, T.I.A.S. No. 3593; Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. XVIII, para. 2, 4 U.S.T. 2063, T.I.A.S. No. 2863; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, art. XVIII, para. 3, 12 U.S.T. 908, T.I.A.S. No. 4797; Treaty of Friendship, Commerce and Navigation, Aug. 3-Dec. 26, 1951, United States-Greece, art. XIV, para. 5, 5 U.S.T. 1829, T.I.A.S. No. 3057; Treaty of Friendship, Commerce and Navigation, Aug. 23, 1951, United States-Israel, art. XVIII, para. 3, 5 U.S.T. 550, T.I.A.S. No. 2948; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States-Ireland, art. XVIII, para. 2, 1 U.S.T. 785, T.I.A.S. No. 2155; Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948-Jul. 26, 1949, United States-Italy, art. XXIV, para. 6, 63 Stat. 2225. These treaties each contain a provision obligating each contracting party to waive sovereign immunity for state-controlled enterprises engaged in business activities within the territories of the other. See Setser, *The Immunity Waiver for State-Controlled Business Enterprises in United States Commercial Treaties*, in PROCEEDINGS OF AM. SOC. INT'L L. 89 (1961).

18. *E.g.*, *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698-706 (1976); *National City Bank of New York v. Republic of China*, 348 U.S. 356, 360-61 (1955); *Heaney v. Government of Spain*, 445 F.2d 501, 503 (2d Cir. 1971); *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103, 110 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966); *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 358-59 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). These courts were primarily concerned with the distinction between public and private acts, as well as the presence or absence of a State Department suggestion of immunity. *Alfred Dunhill*, 425 U.S. at 698-706; *National City Bank*, 348 U.S. at 360-61; *Heaney*, 445 F.2d at 503; *Petrol Shipping*, 360 F.2d at 110; *Victory Transport*, 336 F.2d at 358-59.

19. "[I]t will hereafter be the [State] Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity." Tate Letter, *supra* note 14, 425 U.S. at 714.

20. *Williams*, 653 F.2d at 878; *Victory Transport*, 336 F.2d at 359-60. The *Victory Transport* court noted that while the State Department made its overall policy of restrictive immunity clear, the Tate Letter offered no guidelines for differentiating between a sovereign's private and public acts. Indeed, the court stated that "[w]hile this criterion is relatively easy to apply, it oftentimes produces rather astonishing results, such as the holdings of some European courts that purchases of bullets or

Second Circuit, in *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*,²¹ enumerated categories of traditionally political or public acts that exempted foreign sovereigns from the jurisdiction of the United States courts.²² The *Victory Transport* court concluded that the restrictive theory mandated that a foreign sovereign be granted immunity in accordance with these all-inclusive categories, and it further advised that courts should not venture outside these specific provisions unless the State Department recommended such a departure.²³

Prior to the enactment of the FSIA, the *Victory Transport* holding stood as the accepted doctrine of foreign sovereign immunity in the United States.²⁴ However, the procedure for obtaining jurisdiction over a foreign sovereign was far from adequate. In addition to the ambiguity of the restrictive immunity concept created by the Tate Letter,²⁵ there was no satisfactory judgment enforcement procedure.²⁶ In cases that denied

shoes for the army, the erection of fortifications for defense, or the rental of a house for an embassy, are private acts." *Victory Transport*, 336 F.2d at 359.

21. 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

22. *Id.* at 360. These categories were: internal administrative acts, such as the expulsion of an alien; legislative acts, such as nationalization; acts concerning the armed forces; acts concerning diplomatic activity; and public loans. *Id.*

23. *Id.* The court stated:

We do not think that the restrictive theory adopted by the State Department requires sacrificing the interests of private litigants to international comity in other than these limited categories. Should diplomacy require enlargement of these categories, the State Department can file a suggestion of immunity with the court. Should diplomacy require contraction of these categories, the State Department can issue a new or clarifying policy pronouncement.

Id.

24. *See Heaney*, 445 F.2d at 503-04; *Petrol*, 360 F.2d at 106, 110; *Aerotrade, Inc. v. Republic of Haiti*, 376 F. Supp. 1281, 1282-83 (S.D.N.Y. 1974); *see also Lowenfeld, Litigating A Sovereign Immunity Claim—The Haiti Case*, 49 N.Y.U. L. REV. 377, 412 (1974); Goodman, *Immunity of Foreign Sovereigns: A Political or Legal Question—Victory Transport Revisited*, 38 BROOKLYN L. REV. 885 (1972).

25. *See supra* note 20 and accompanying text.

26. *See, e.g., Flota Maritima Browning de Cuba, S.A. v. Motor Vessel Ciudad de la Habana*, 335 F.2d 619, 626-27 (4th Cir. 1964); *Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705, 710 (2d Cir. 1930), *cert. denied*, 282 U.S. 896 (1931); *New York & Cuba Mail S.S. Co. v. Republic of Korea*, 132 F. Supp. 684, 685 (S.D.N.Y. 1955); *Weilamann v. Chase Manhattan Bank*, 21 Misc. 2d 1086, 1087-89, 192 N.Y.S.2d 469, 470-72 (Sup. Ct. 1959). Indeed, even if a plaintiff prevailed against a foreign state "under international law property of a foreign government [was] immune from attachment and seizure, and that . . . principle [was] not affected

immunity to a foreign sovereign, absolute immunity from execution of judgment produced a right without any effective remedy.²⁷ These shortcomings created the need for a legislative solution to what had previously been an executive and judicial determination.

Recognizing the need to transfer the determination of sovereign immunity from the executive branch to the judicial branch, Congress enacted the FSIA. This codified the restrictive theory of sovereign immunity into United States domestic law, and brought the United States into conformity with modern international law.²⁸ The primary rationale supporting the enactment of the FSIA was to clarify the procedure by which parties could obtain jurisdiction over a foreign state in the courts of the United States, and also to establish the circumstances in which a foreign state would be entitled to immunity.²⁹

The FSIA sets forth mandatory jurisdictional requirements, conferring subject matter jurisdiction over nonjury civil actions in courts of the United States when the foreign state is not entitled to sovereign immunity,³⁰ and personal jurisdiction

by [the Tate Letter], in which the Department of State indicated its intention to be governed by the restrictive theory of sovereign immunity in disposing of requests from foreign governments that immunity from suit be suggested in individual cases." *New York & Cuba Mail*, 132 F. Supp. at 685; see Atkeson, Perkins, and Wyatt, *H.R. 11315—The Revised State-Justice Bill on Foreign Sovereign Immunity: Time for Action*, 70 AM. J. INT'L L. 298 (1976); Reeves, *The Foreign Sovereign Before United States Courts*, 38 FORDHAM L. REV. 455 (1970); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 69 (1965).

27. *Williams*, 653 F.2d at 878; see Note, *Sovereign Immunity—Proposed Statutory Elimination of State Department Role—Attachment, Service of Process, and Execution—Senate Bill 566, 93d Congress, 1st Session (1973)*, 15 HARV. INT'L L.J. 157, 165 (1974); Note, *The Immunity of Foreign Sovereigns in U.S. Courts—Proposed Legislation*, 6 N.Y.U. J. INT'L L. & POL. 473, 489-90 (1973); Reeves, *supra* note 26, at 455.

28. H.R. REP. NO. 1487, 94th Cong., 2d Sess., reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6605-06 [hereinafter cited as "HOUSE REPORT"]. Indeed, it is noted in the legislative history that this statute would replace the traditional policy of deference to State Department suggestions of immunity, reduce the foreign policy implications of immunity determinations, and assure litigants that these decisions were made on purely legal grounds, under procedures that insure due process. *Id.* at 6606-07; see also *National Airmotive Corp. v. Government and State of Iran*, 499 F. Supp. 401, 406 (D. D.C. 1980) (primary purpose of FSIA was to depoliticize sovereign immunity decisions by transferring them from the executive to the judicial branch of government).

29. HOUSE REPORT, *supra* note 28, at 6604.

30. 28 U.S.C. § 1330(a) (1982). This section reads:

whenever subject matter jurisdiction exists and service of process has been made.³¹ Both personal and subject matter jurisdiction turn on whether the foreign state is entitled to sovereign immunity. If the dispute does not fall within one of the enumerated exceptions to immunity, the court lacks both subject matter and personal jurisdiction.³² Therefore, sovereign immunity is not merely a defense under the FSIA; rather, its absence is a jurisdictional requirement.³³

Section 1604 of the FSIA sets forth the basic grant of immunity to foreign sovereigns.³⁴ Section 1605 then carves out specific exceptions to this grant of jurisdictional immunity.³⁵ The noncommercial torts exception, section 1605(a)(5) of the FSIA, provides:

- a) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case—
- 5) . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of

The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

Id.

31. 28 U.S.C. § 1330(b) (1982). This section states that “[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.” *Id.* Legislative history reveals that this federal long-arm statute was patterned after the District of Columbia’s long-arm statute. HOUSE REPORT, *supra* note 28, at 6612.

32. *Olsen by Sheldon v. Government of Mexico*, 729 F.2d 641, 644 (9th Cir.), *cert. denied*, 105 S. Ct. 295 (1984).

33. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493-94 n.20 (1983). The Supreme Court recently noted that while sovereign immunity is an affirmative defense which must be specifically pleaded, subject-matter jurisdiction still turns on the existence of an exception to foreign sovereign immunity. Thus, if a foreign state does not enter an appearance to assert the immunity defense, the courts still must consider whether immunity is available under the FSIA. *Id.* at 493 n.20.

34. 28 U.S.C. § 1604. Section 1604 provides: “Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.” *Id.*

35. 28 U.S.C. § 1605. This in fact is an opposite result of the *Victory Transport* categorization approach, which provided an exclusive means of granting immunity. See *supra* notes 22-23 and accompanying text (*Victory Transport* categorization approach).

property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) Any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.³⁶

Although Congress codified the doctrine of sovereign immunity to eradicate the vagaries of the common law, the judicial interpretation that followed the enactment of the FSIA has become almost as diversified as its common law predecessor.³⁷

II. JUDICIAL INTERPRETATION OF THE NONCOMMERCIAL TORTS EXCEPTION

The noncommercial torts exception was intended to bring certainty and consistency to an area of tort law that had previously lacked such qualities.³⁸ Following 1976, individuals who

36. 28 U.S.C. § 1605(a)(5). The FSIA also defines essential terms. A "foreign state" includes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." *Id.* at § 1603(a). An "agency or instrumentality of a foreign state" means "any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country." *Id.* at 1603(b). The "United States" includes "all territory and waters, continental or insular, subject to the jurisdiction of the United States." *Id.* at § 1603(c).

37. *See supra* notes 20-27 and accompanying text.

38. *See supra* notes 19-27 and accompanying text. Prior to the enactment of the FSIA, tort claims against foreign sovereigns were considered in light of the absolute or restrictive theory of sovereign immunity, or under either of these theories plus the Act of State doctrine.

During the period when the United States followed the absolute position on sovereign immunity, a foreign state could not be sued without its consent. In *United States v. Diekelman*, 92 U.S. 520 (1875), the Court stated:

One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sover-

believed they had been wronged tortiously by a foreign sovereign sought jurisdiction under the FSIA.

A. Torts Within the Scope of Section 1605(a)(5) of the FSIA

Rather than explicitly enumerate those torts for which an individual *may* sue, section 1605(a)(5)(B) of the FSIA strictly forbids certain causes of action. Subsection B of the noncommercial torts exception is clear and unambiguous on its face. Courts have uniformly agreed that they will not grant jurisdiction if a plaintiff alleges a tort action based on libel, slander, deceit, misrepresentation, interference with contract rights, malicious prosecution, or abuse of process.³⁹ In addition, a reading of statutory and case law suggests that only noncom-

eign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it. He may pay or reject it; he may submit to arbitration, open his own court to suit, or consent to be tried in the courts of another nation. All depends upon himself.

Id. at 524. When the sovereign assumed the responsibility of presenting the individual's claim, only a grievous wrong would initiate a confrontation between the two sovereigns. The Act of State doctrine created this situation. The basic tenet of the doctrine was that courts of one independent government could not sit in judgment on the validity of the acts of another independent government done within its own territory. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

During the restrictive period, the Act of State doctrine precluded courts from inquiring into the validity of public acts of a foreign sovereign. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); *Victory Transport*, 336 F.2d at 363. Moreover, while some tortious wrongs of a purely private nature might be compensable, trial procedures could still make suits impractical if not inconvenient. Note, *Procedural Aspects of a Claim of Sovereign Immunity by a Foreign State*, 20 U. PITT. L. REV. 126 (1958); see Note, *Torts: National and International Sovereign Immunity*, 16 OKLA. L. REV. 457, 465 (1963).

39. See *Gilson v. Republic of Ireland*, 517 F. Supp. 477, 485 (D. D.C. 1981), *rev'd in part on other grounds*, 682 F.2d 1022 (D.C. Cir. 1982) (deceit, interference with contract rights); *De Sanchez v. Banco Central de Nicaragua*, 515 F. Supp. 900, 913 (E.D. La. 1981), *aff'd*, 770 F.2d 1385 (5th Cir. 1985) (malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, interference with contract rights); *United Euram v. U. of Soviet Socialist Republics*, 461 F. Supp. 609, 612 (S.D.N.Y. 1978) (interference with contract rights); *Carey v. National Oil Corp.*, 453 F. Supp. 1097, 1102 (S.D.N.Y. 1978), *aff'd*, 592 F.2d 673 (2d Cir. 1979) (interference with contract rights); *Yessenin-Volpin*, 443 F. Supp. at 855 (libel).

mercial torts are actionable under section 1605(a)(5).⁴⁰

The statutory language of the torts exception provides general areas of tortious activity that may be actionable. Subject to further qualification,⁴¹ a proper case is one "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property. . . ."⁴² In deference to this clause, courts have recognized that personal injury actions,⁴³ wrongful death actions,⁴⁴ and, in at least one case, an action in conversion⁴⁵ may be proper tort claims within the meaning of section 1605(a)(5).⁴⁶ However, courts seem unwilling to go beyond these boundaries, and have yet to permit jurisdiction in any action not based on death, personal injury, or property rights.⁴⁷ Such holdings represent a narrow

40. See *United Ewram*, 461 F. Supp. at 612. FSIA section 1605 "[s]ubsection (a)(5) was intended to cover noncommercial torts. . . ." *Id.*; see *Olsen*, 729 F.2d at 645; *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir.), *cert. denied*, 105 S. Ct. 247 (1984); *In Re Sedco, Inc.*, 543 F. Supp. 561, 566 (S.D. Tex. 1982). The statutory language of the torts exception also makes this clear by explicitly noting that this section refers to actions "not otherwise encompassed in paragraph (2) [the commercial activities exception] above. . . ." 28 U.S.C. § 1605(a)(5).

41. See *infra* notes 65-91 and accompanying text (examining the situs of the tortious act and injury and the discretionary functions provision).

42. 28 U.S.C. § 1605(a)(5).

43. *Persinger*, 729 F.2d 836-37; *Perez v. Bahamas*, 652 F.2d 186, 188 (D.C. Cir.), *cert. denied*, 454 U.S. 865 (1981); *Skeen v. Fed. Repub. of Brazil*, 566 F. Supp. 1414, 1416 (D. D.C. 1983).

44. *Olsen*, 729 F.2d at 643; *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329, 330 (9th Cir.), *cert. denied*, 105 S. Ct. 510 (1984); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1354 (1985); *Kline v. Republic of El Salvador*, 603 F. Supp. 1313, 1315 (D. D.C. 1985); *Castro v. Saudi Arabia*, 510 F. Supp. 309, 312 (W.D. Tex. 1980); *Letelier v. Republic of Chile*, 488 F. Supp. 665, 671-74 (D. D.C. 1980).

45. *De Sanchez v. Banco Central De Nicaragua*, 515 F. Supp. 900 (E.D. La. 1981). In *De Sanchez*, a Nicaraguan citizen who left her country during the 1979 revolution that ousted the regime of Anastasio Somoza Debayle brought suit against the Banco Central de Nicaragua to recover \$150,000 on a check drawn in her favor by that bank. The court held that the defendant foreign sovereign would not be granted immunity under the noncommercial torts exception and the court rejected the defendant's argument that liability must be limited to *physical* personal or property damage. *Id.* at 913; see *infra* note 92.

46. However, with the exception of three cases, *Olsen*, 729 F.2d 641; *De Sanchez*, 515 F. Supp. 900; *Letelier* 488 F. Supp. 665, every reported case which has considered the noncommercial torts exception as applied to a foreign sovereign defendant has declined to find jurisdiction under 28 U.S.C. § 1605(a)(5).

47. See *Persinger*, 729 F.2d 835 (parents of a former Iranian hostage sued the Republic of Iran for mental and emotional distress); *Frolova v. Union of Soviet Socialist Republics*, 558 F. Supp. 358 (N.D. Ill. 1983), *aff'd*, 761 F.2d 370 (7th Cir. 1985) (action for loss of consortium by a plaintiff against the Soviet Union for refusing to

judicial interpretation of which torts will suffice to disallow immunity under the FSIA.

The legislative history of the FSIA also suggests which torts should be actionable under section 1605(a)(5). This history states that while section 1605(a)(5) was directed primarily at the problem and effects of traffic accidents, it was also intended to apply to all tort actions for money damages not otherwise encompassed by the commercial activities exception.⁴⁸ Thus, the legislative history of the FSIA indicates that *any* noncommercial tort action requesting money damages is, in fact, encompassed by section 1605(a)(5). However, no court has been willing to broaden this scope accordingly, although a few have acknowledged this piece of legislative history.⁴⁹ Therefore, further support exists for the proposition that courts will take a narrow view of which torts give rise to acceptable causes of action in a section 1605(a)(5) case.⁵⁰

B. *The Proper Defendant*

Congress intended a foreign state or its political subdivision to be the proper defendant to an action under the FSIA.⁵¹ Section 1603 of the FSIA defines terms essential to the determination of the proper defendant in all sovereign immunity ac-

allow her husband to immigrate to the United States); *Castro*, 510 F. Supp. 309 (action for negligent entrustment of an automobile to a Saudi Arabian soldier).

48. HOUSE REPORT, *supra* note 28, at 6619-20. Section 1605 (a)(5)

denies immunity as to claims for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state. . . .

The purpose of section 1605(a)(5) is to permit the victim of a traffic accident or *other noncommercial tort* to maintain an action against the foreign state. . . .

Id. (emphasis added).

49. *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 243 (1984); *Frolova*, 558 F. Supp. at 362; *Sedco*, 543 F. Supp. at 567; *De Sanchez*, 515 F. Supp. at 913; *Letelier*, 488 F. Supp. at 672.

50. *See supra* notes 43-47 and accompanying text.

51. 28 U.S.C. § 1603(a). "A 'foreign state,' except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." *Id.* "[T]he term 'foreign state' . . . includes not only the foreign state but also political subdivisions, agencies and instrumentalities of the foreign state. The term 'political subdivisions' includes all governmental units beneath the central government, including local governments." HOUSE REPORT, *supra* note 28, at 6613.

tions.⁵² A “foreign state” has the same definition for both the commercial activities exception and the noncommercial torts exception to the FSIA.⁵³ In many noncommercial tort cases already decided, a foreign government was the defendant in the action.⁵⁴ For FSIA purposes, an “agency or instrumentality of a foreign state”⁵⁵ is also considered to be a foreign state.⁵⁶

In *Yessenin-Volpin v. Novosti Press Agency*,⁵⁷ the court identified the three-part statutory test set forth in section 1603(b) used to determine whether a defendant is a proper agency or instrumentality under the FSIA.⁵⁸ First, the defendant must be a “separate legal person, corporate or otherwise. . . .”⁵⁹ Second, it must not be a citizen of the United States.⁶⁰ Third, the

52. 28 U.S.C. § 1603.

53. HOUSE REPORT, *supra*, note 28, at 6613. “The term foreign state [is] used in all provisions of chapter 97 except section 1608.” *Id.*; see *Gilson*, 517 F. Supp. at 480; *De Sanchez*, 515 F. Supp. at 902 n.3; *Carey*, 453 F. Supp. at 1100 n.2; *Yessenin-Volpin*, 443 F. Supp. at 852.

54. *Berkovitz*, 735 F.2d 329 (Iran); *Olsen*, 729 F.2d 641 (Mexico); *McKeel*, 722 F.2d 582 (Iran); *Perez*, 652 F.2d 186 (Bahamas); *Kline*, 603 F. Supp. 1313 (El Salvador); *Castro*, 510 F. Supp. 309 (Saudi Arabia). *But see Sheen*, 566 F. Supp. 1414. In *Sheen*, the plaintiff brought suit against the government of Brazil alleging that the grandson of a Brazilian ambassador assaulted him outside a local nightclub. The court declined to hold the government of Brazil responsible for the grandson’s actions, stating that even if one assumed that the ambassador’s grandson was acting as an agent of the Republic of Brazil, he was not acting within the “scope of his employment” within the meaning of section 1605(a)(5) of the FSIA. *Id.* at 1417-19. Additionally, *Sheen* is significant as the only case to discuss the “scope of employment” portion of section 1605(a)(5).

55. 28 U.S.C. § 1603(b).

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

Id.

56. *Id.* at § 1603(a); see *supra* note 51.

57. 443 F. Supp. 849 (S.D.N.Y. 1978).

58. *Id.* at 852.

59. 28 U.S.C. § 1603(b)(1). The HOUSE REPORT states:

The first criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name.

HOUSE REPORT, *supra* note 28, at 6614.

60. 28 U.S.C. § 1603(b)(3). The HOUSE REPORT states:

defendant must be "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof. . . ." ⁶¹

The *Yessenin* court applied this test to the defendant press agency and determined that it was an agency or instrumentality, and therefore a foreign state, for FSIA purposes. ⁶² Other courts, while generally noting section 1603, have not applied this test as explicitly as in *Yessenin*; however, every court which has considered this issue in a torts context has determined that the defendant was an agency or instrumentality for section 1605(a)(5) purposes. ⁶³ Thus, the terms "foreign state" and "agency or instrumentality of a foreign state" are broadly construed by the courts. ⁶⁴ This trend may reflect a realization by the courts that such an interpretation is beneficial to both parties: to the plaintiff, who must establish this fact to obtain jurisdiction, and to the defendant, who must prove its status as a foreign state to be granted immunity.

[This] criterion excludes entities which are citizens of a State of the United States . . . for example a corporation organized and incorporated under the laws of the State of New York but owned by a foreign state. (*See Amtorg Trading Corp. v. United States*, 71 F.2d 524 (C.C.P.A. 1934).) Also excluded are entities which are created under the laws of third countries. The rationale behind these exclusions is that if a foreign state acquires or establishes a company or other legal entity in a foreign country, such entity is presumptively engaging in activities that are either commercial or private in nature.

HOUSE REPORT, *supra* note 28, at 6614.

Legislative history also reveals that a citizen of any foreign state, such as an ambassador or consul, was also not an intended defendant. *Id.* at 662.

61. 28 U.S.C. § 1603(b)(2). Additionally, the HOUSE REPORT states:

If such entities are entirely owned by a foreign state, they would of course be included within the definition. Where ownership is divided between a foreign state and private interests, the entity would be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision.

HOUSE REPORT, *supra* note 28, at 6614.

62. *Yessenin-Volpin*, 443 F. Supp. at 852-54. The court also noted the difficulty that may be encountered in precisely applying this test since the nature of U.S.S.R. agencies could be quite different from our own. *Id.*

63. *See Sedco*, 543 F. Supp. at 565 (exploration agency); *De Sanchez*, 515 F. Supp. at 902 (commercial bank); *Gilson*, 517 F. Supp. at 480 (corporations); *Carey*, 453 F. Supp. at 1100 n.2 (oil corporation); *Yessenin-Volpin*, 443 F. Supp. at 852-54 (press agency, telegraphic agency).

64. *See supra* notes 53-63 and accompanying text.

C. *The Situs of the Act and Injury*

Since the enactment of the FSIA, the situs of the tortious act has become crucial to establishing jurisdiction under section 1605(a)(5).⁶⁵ Although the statute itself is silent on this issue and seems only to require that the injury occur within the United States, the legislative history of the Act states that "the tortious act or omission must occur within the jurisdiction of the United States."⁶⁶ Further, at least one circuit, the District of Columbia, has unequivocally stated that both the act and resultant injury must occur in the United States,⁶⁷ and several other circuit and district courts are beginning to follow this trend.⁶⁸

65. It is clear from the statutory language of the noncommercial torts exception that the injury, death, or loss or damage of property complained of must occur in the United States. The torts exception applies to "any case . . . in which 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 a tortious act or omission of that foreign state. . . ." 28 U.S.C. § 1605(a)(5) (emphasis added); see *Berkovitz*, 735 F.2d at 331; *Persinger*, 729 F.2d at 839-40; *Perez*, 652 F.2d at 188-89; *Tel-Oren*, 517 F. Supp. at 549 n.3. This includes all territory and waters subject to United States jurisdiction. 28 U.S.C. § 1603(c); *McKeel*, 722 F.2d at 587; see *Perez*, 652 F.2d at 188. However, unlike the injury provision of the FSIA, the situs of the tortious act or omission is less clear on the face of the statute. See *infra* notes 66-74 and accompanying text.

66. HOUSE REPORT, *supra* note 28, at 6619.

67. *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1751 (1985); *Persinger*, 729 F.2d at 842-43; *Perez*, 652 F.2d at 189.

Although the statutory provision is susceptible of the interpretation that only the effect of the tortious action need occur here, where Congress intended such a result elsewhere in the FSIA it said so more explicitly. See 28 U.S.C. § 1605(a)(2) (immunity withheld for acts "outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States"). The legislative history makes it clear that for the exception of § 1605(a)(5) to apply "the tortious act or omission must occur within the jurisdiction of the United States."

Asociacion, 735 F.2d at 1524 (quoting HOUSE REPORT, *supra* note 28, at 6619).

The requirement that both act and injury occur in the United States is consistent with the old "Act of State" doctrine. See *supra* note 38. Because the Act of State doctrine applies to those actions of a foreign sovereign which occur within the territory of the foreign sovereign, the FSIA and the common law Act of State doctrine will neither conflict nor overlap.

68. *Accord Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379 (7th Cir. 1985) (U.S.S.R. denial of immigration to plaintiff's spouse did not occur in the United States); *McKeel*, 722 F.2d at 588, (former hostages of Iran brought suit and the Ninth Circuit held that United States embassies are not to be considered part of the United States for FSIA purposes; thus both the act and the injury did not occur in

Only one holding, *Letelier v. Republic of Chile*,⁶⁹ has been completely contrary to this view, but this occurred in the United States District Court for the District of Columbia in 1980, prior to the District of Columbia circuit's present adherence to the prevailing view.⁷⁰ In *Letelier*, a Chilean dissident leader and his secretary were assassinated in Washington D.C. when a bomb placed in their car exploded.⁷¹ Even though the assassination order presumably took place in Chile, not the United States,⁷² the district court permitted jurisdiction under the noncommercial torts exception.⁷³ The court held that a foreign country was not entitled to engage in conduct so outrageous as an assassination attempt, an action clearly contrary to established principles of humanity as recognized in both national and international law.⁷⁴ Because the circumstances of the case so offended the court, it was sufficient that only the death or injury occurred in the United States.

D. *The Discretionary Functions Provision*

The discretionary functions provision⁷⁵ of the noncommercial torts exception is a modification of the restrictive theory of sovereign immunity. Although the Supreme Court recently held that "[f]or the most part, the Act codifies, as a matter of federal law, the restrictive theory,"⁷⁶ it is clear that the discretionary function provision both modifies and exceeds the scope of the old common law doctrine, within the context of

the United States); see *Sedco*, 543 F. Supp. at 567. However, the Ninth Circuit also seems more willing to accommodate this position to its needs. See *infra* notes 126-30 and accompanying text.

69. 488 F. Supp. 665 (D. D.C. 1980).

70. *Letelier*, 488 F. Supp. 665.

71. *Id.*

72. The district court determined that the acts complained of "may well have been carried out entirely within [Chile]." *Id.* at 674.

73. *Id.* at 673-74. The district court determined that even though the acts took place in Chile, the defendant foreign sovereign would not be permitted to defeat the purpose of the FSIA "through the back door, under the guise of the act of state doctrine." *Id.* at 674 (quoting HOUSE REPORT, *supra* note 28, at 6619); see *supra* notes 38 and 67.

74. *Letelier*, 488 F. Supp. at 673.

75. 28 U.S.C. § 1605(a)(5)(A). This states that the torts exception will not apply to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused. . . ." *Id.*

76. *Verlinden*, 461 U.S. at 488.

the torts exception.⁷⁷ The few decisions which have addressed the discretionary functions provision agree that in order to determine the scope of 1605(a)(5)(A), it is necessary to refer to the interpretation given the similar Federal Tort Claims Act⁷⁸ provision.⁷⁹

The Supreme Court set forth the basic test for discretionary functions in *Dalehite v. United States*.⁸⁰ The *Dalehite* court held that discretion means "more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion."⁸¹ That standard should be employed when determining whether the tortious act of a foreign sovereign was based on a discretionary function.⁸²

Only three reported cases have analyzed and discussed the discretionary functions provision of the torts exception to the FSIA.⁸³ In each case, the *Dalehite* standard of discretion guided the court.⁸⁴ In *Letelier*, the court stated the section

77. As the *De Sanchez* court noted, official conduct is no longer immune from suit simply because it is "governmental." *De Sanchez*, 515 F. Supp. at 914. The FSIA goes further than the public and private dichotomy of the restrictive approach. Congress intended that some governmental decisions should not be subject to judicial review, which is why it created an exception to the general waiver of sovereign immunity through the discretionary functions provision. *Id.*; see *Olsen*, 729 F.2d at 645.

Few reported decisions have actually reached and decided the discretionary functions issue, for the FSIA jurisdictional issue is often decided early in a court's analysis. See *Olsen*, 729 F.2d at 646-48; *Sedco*, 543 F. Supp. at 567; *De Sanchez*, 515 F. Supp. at 914; *Letelier*, 488 F. Supp. at 673.

78. 28 U.S.C. §§ 1346(b), 2401(b), 2402, 2671-80 (1976).

79. *Olsen*, 729 F.2d at 647; *Sedco*, 543 F. Supp. at 567; *Letelier*, 488 F. Supp. at 673. Compare 28 U.S.C. § 1605(a)(5)(A) with 28 U.S.C. § 2680(a).

80. 346 U.S. 15 (1953).

81. *Id.* at 35-36 (footnotes omitted). Thus, government executives would be able to make policy decisions without fearing suit for abuse of discretion. *Id.* at 32-33; see *Olsen*, 729 F.2d at 647.

82. However, this standard has been somewhat refined and qualified since the *Dalehite* decision. A discretionary function may be one made at the "planning" rather than the "operational" level, and decisions made at the latter level may be actionable even though they involve an element of discretion. *Olsen*, 729 F.2d at 647; *Lindgren v. United States*, 665 F.2d 978, 980 (9th Cir. 1982); *Thompson v. United States*, 592 F.2d 1104, 1111 (9th Cir. 1979).

83. See *Olsen*, 729 F.2d at 646-47; *Sedco*, 543 F. Supp. at 567; *Letelier*, 488 F. Supp. at 673.

84. See *Olsen*, 729 F.2d at 647; *Sedco*, 543 F. Supp. at 567; *Letelier*, 488 F. Supp. at 673.

1605(a)(5)(A) test by asking whether the act complained of, an assassination order, involved policy judgment and decision.⁸⁵ The court concluded that the act complained of was not discretionary.⁸⁶ Next, in *In Re Sedco, Inc.*,⁸⁷ the court compared the actions complained of, the planning of an exploration program, to those considered in *Dalehite*.⁸⁸ The *Sedco* court held that the acts were discretionary and that the defendant foreign sovereign would retain immunity under section 1605(a)(5)(A) of the FSIA.⁸⁹ Most recently, in *Olsen by Sheldon v. Government of Mexico*,⁹⁰ the court incorporated the *Dalehite* standard into its analysis and determined that the tortious acts and omissions which ultimately led to a plane crash were not discretionary.⁹¹ These three cases show that a court should measure an act or omission against the *Dalehite* standard when determining whether a particular act or omission is a discretionary function of a foreign state or its agents.

E. *Relief for a Tortious Wrong Under the FSIA*

Section 1605(a)(5) of the noncommercial torts exception

85. *Letelier*, 488 F. Supp. at 673.

86. *Id.* In *Letelier*, the court reasoned that there is no discretion to commit, or to have one's officers or agents commit, an illegal act. See *Hatahley v. United States*, 351 U.S. 173, 181 (1956); *Cruikshank v. United States*, 431 F. Supp. 1355, 1359 (D. Hawaii 1977).

87. 543 F. Supp. 561 (S.D. Tex. 1982).

88. *Id.* at 567.

89. *Id.*

90. 729 F.2d 641 (9th Cir.), *cert. denied*, 105 S. Ct. 295 (1984).

91. *Id.* at 647. The court also considered the Ninth Circuit distinction between planning and operational levels of government actions. The court stated:

Because decisions at the planning level establish governmental policy, they are not actionable. But where decisions occur at the operational level, the discretionary function exemption provides no protection from liability even though such decisions or acts may involve elements of discretion. . . . In addition to examining the level at which the conduct occurred, we also consider two other factors which are particularly important when determining the immunity of foreign states: The ability of United States courts to evaluate the act or omission of the state, and the potential impairing effects such an evaluation would have on the effective administration of the state's government. . . .

We conclude that of those alleged acts or omissions on the part of Mexico which contributed to the [plane crash], none was discretionary. . . . While the pilot and air controllers had considerable discretion in carrying out their assigned tasks, . . . it is clear they acted on the operational level, far from the centers of policy judgement.

Id.

refers only to money damages for personal injury, death and property damage.⁹² However, the legislative history of the FSIA indicates that other relief may also be appropriate.⁹³

Liability under the FSIA is provided for in section 1606.⁹⁴ The statute provides for compensatory damages, and also punitive damages in specified situations. Section 1606 does not provide for assessment of punitive damages against a foreign state itself, but rather, against an agency or instrumentality of that foreign state.⁹⁵ The *Letelier* court awarded compensatory damages only against the Republic of Chile, and both compensatory and punitive damages against its agents.⁹⁶

However, as the plaintiffs discovered in *Letelier*, the only

92. 28 U.S.C. § 1605(a)(5). Specifically with regard to individual and property damages, at least one case has determined that the tortious conduct need not result in physical damage. *De Sanchez*, 515 F. Supp. at 913. Although the defendant foreign state in *De Sanchez* contended that tort recovery ought to be limited to "casualty-type," that is, physical damage to property or to the person, the court held that this argument construed section 1605(a)(5) too narrowly. *Id.* at 913. The statutory language permits recovery for both *damage* and *loss* of property, indicating that Congress intended to allow plaintiffs to recover both pure monetary and casualty loss equally under the Act. *Id.* Moreover, certain non-physical damage torts such as libel, slander, deceit, misrepresentation, malicious prosecution, abuse of process, and interference with contract rights are expressly excluded by the noncommercial torts exception. 28 U.S.C. § 1605(a)(5)(B). However, other kinds of torts are not specifically excluded. For example, "loss of property" is provided for by the noncommercial torts exception. 28 U.S.C. § 1605(a)(5).

93. See *infra* notes 108-10 and accompanying text.

94. 28 U.S.C. § 1606. This provides:

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

Id.

95. *Id.* Moreover, when the act or omission complained of has caused death, the statute notes that the law of the place where the act or omission occurred may provide for punitive damages only, rather than actual or compensatory damages as intended by the FSIA. Such law will not preclude the damage award; the foreign state will be liable for actual or compensatory damages measured by the plaintiff's pecuniary injuries. 28 U.S.C. § 1606. No tort case has discussed this provision thus far.

96. *De Letelier v. Republic of Chile*, 502 F. Supp. 259, 266-67 (D. D.C. 1980). Attorney expenses and fees were also awarded. *Id.* at 267-68.

case to discuss this relief issue, an award of damages was merely a symbolic victory. In a subsequent action, the plaintiffs attempted to execute the judgment by a levy on LAN Chile Airlines, a commercial airline owned by the Republic of Chile.⁹⁷ After determining that LAN's assets could be levied upon as assets of the Republic of Chile,⁹⁸ the court held that the FSIA tort and commercial claims sections were not mutually exclusive. Therefore, a plaintiff who asserted jurisdiction under the torts exception could also recover under the commercial claims provision.⁹⁹ In part, the court also based this finding on the common sense notion that, in the absence of express Congressional intent, a statute is not ordinarily interpreted to create a right without a remedy.¹⁰⁰

The United States Court of Appeals for the Second Circuit reversed the District Court,¹⁰¹ and held that sections 1605(a)(2) and 1605(a)(5) were in fact mutually exclusive.¹⁰² Because the initial denial of immunity was based on the non-commercial torts exception, the Court of Appeals held that it would have been inconsistent for the court to deny LAN's assets immunity from execution based on a finding that the activities were commercial in nature.¹⁰³ The court, ruling on the appeal of another case in the same matter,¹⁰⁴ reluctantly reversed,¹⁰⁵ and held that Congress did in fact create a right

97. *De Letelier v. Republic of Chile*, 567 F. Supp. 1490, 1493 (S.D.N.Y. 1983).

98. *Id.* at 1497-98.

99. *Id.* at 1499-1500. The commercial claims section of the FSIA states that:

(a) the property in the United States of a foreign state, . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(2) the property is or was used for the commercial activity upon which the claim is based. . . .

28 U.S.C. § 1610(a)(2).

100. *De Letelier*, 567 F. Supp. at 1500.

101. *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2656 (1985).

102. *Id.* at 795-99.

103. *Id.* at 795.

104. *De Letelier v. Republic of Chile*, 575 F. Supp. 1217 (S.D.N.Y. 1983) (judgment creditors moved for appointment of receiver), *rev'd*, 748 F.2d 790 (2d Cir. 1984).

105. *Letelier*, 748 F.2d at 791. Even though the court found in favor of the foreign state on this issue it said:

We reverse although we recognize that our decision may preclude the plaintiffs from collecting on their judgment. How one wishes to decide a case

without a remedy.¹⁰⁶ The holding in *Letelier* implies that the Foreign Sovereign Immunities Act has not solved pre-FSIA problems as well as had been anticipated.¹⁰⁷

In addition to, or instead of, money damages, the legislative history indicates that a plaintiff may request injunctive relief or specific performance.¹⁰⁸ No reported case has yet approached this issue. Moreover, if a foreign state failed to comply, it is doubtful that a court would be able to use its contempt power.¹⁰⁹ A plaintiff would again have to rely on political and executive pressure exerted by the State Department as in the days of the common law restrictive theory.¹¹⁰

III. APPROACH TO EVALUATING A SECTION 1605(a)(5) CLAIM

When evaluating a claim under the noncommercial torts exception to the FSIA, a step by step analysis that considers present trends in case law may be useful in determining whether jurisdiction will be granted.¹¹¹ An example of this analysis follows, illustrated by the recent case of *Olsen by Sheldon*

comes lightly to mind, on a wing; but often how one must decide it comes arduously, weighed down by somber thought. To rule otherwise here would only illustrate once again that hard cases make bad law.

Id.

106. *Id.* at 798. The court based this reasoning on (1) the fact that neither the European Convention on State Immunity and Additional Protocol of 1972 nor The State Immunity Act of 1978 insures execution of judgment by attachment of the foreign state's property, even where jurisdiction is validly asserted, and (2) its conclusion that Congress did not intend to lift execution immunity wholly, especially in cases where the foreign state itself was the defendant.

Legislative history also reveals that the commercial claims section does not apply to actions predicated on the noncommercial torts exception. It states that immunity from execution will be denied "provided that the commercial activity gave rise to the claim upon which the judgment is based." HOUSE REPORT, *supra* note 28, at 6627 (emphasis added).

107. *See supra* text accompanying notes 25-27 (detailing pre-FSIA problems facing tort plaintiffs).

108. HOUSE REPORT, *supra* note 28, at 6621.

109. Further, in view of the finding by the Court of Appeals for the Second Circuit that there exists a right without a remedy, *see supra* notes 101-07 and accompanying text, it seems unlikely that a court would try to enforce an order for specific performance or an injunction.

110. *See supra* notes 13-18 and accompanying text.

111. This method of analysis may be approached on a step by step basis as follows:

A. Is the defendant foreign state a proper defendant within the meaning of the

v. Government of Mexico,¹¹² and offers a practical demonstration of this methodology.

In *Olsen*, the plaintiffs were minor children who claimed relief for the wrongful death of their parents.¹¹³ The plaintiffs' parents were killed in a plane crash while the Mexican government transported them from Mexico to the United States.¹¹⁴ The Court of Appeals for the Ninth Circuit determined that the defendant foreign sovereign could not be granted immunity under the noncommercial torts exception, and that subject matter and personal jurisdiction existed under the FSIA.¹¹⁵

The threshold inquiry of any evaluation of a section 1605(a)(5) claim should be whether the potential defendant is a proper defendant under the FSIA. For example, in *Olsen*, the named defendant was the Mexican government itself, owner and operator of the aircraft. Courts generally construe the is-

FSIA? If no, the analysis may quickly end here and foreign sovereign immunity will not be denied by the courts based on the FSIA. If yes,

- B. Is the nature of the tort proper under section 1605(a)(5)? If yes,
- C. Have both the 'act and injury' occurred within the United States? If yes,
- D. Are the tortious acts or omissions discretionary? If no,
- E. If jurisdiction may be properly granted under section 1605(a)(5), can plaintiff execute the judgment?

Thus, if the analysis fails at any step, the claim will not succeed under section 1605(a)(5) and it is unnecessary to go on to the remaining steps.

112. 729 F.2d 641 (9th Cir.), *cert. denied*, 105 S. Ct. 295 (1984).

113. *Id.* at 643.

114. *Id.* In October of 1979, a twin-engine plane owned and operated by the Mexican government departed from Monterrey, Mexico for Tijuana. The plane was carrying the plaintiffs' parents, who were prisoners of the Mexican government being transferred to the United States pursuant to the Prisoner Exchange Treaty between the United States and Mexico. *Id.* Due to thick fog and diminishing visibility at their destination, the pilots requested an instrument landing which would require the plane to temporarily enter United States airspace so it could approach the Tijuana runway from the west. *Id.* Tijuana air control sought and received permission for the airplane to cross the border. *Id.* Because its radar and instrument landing navigational system were inoperative, Tijuana air control requested that its counterpart in San Diego radio the data necessary for an instrument landing to the airplane. *Id.* Neither the San Diego air controllers nor the pilots were bilingual, so the information was relayed through a telephone "hotline" to Tijuana who passed the information along. *Id.* at 644. The aircraft then penetrated United States airspace, made a wide turn, and began to descend toward Tijuana Airport. *Id.* However, the plane strayed one mile off course and re-entered Mexican airspace. *Id.* At this point, San Diego advised that the plane try another airport where visibility would be better, but the pilot refused and re-entered United States airspace. *Id.* The pilots failed to maintain the proper altitude, struck a telephone pole, and crashed three-quarters of a mile inside the United States, killing all on board. *Id.*

115. *Id.* at 648-49.

sue of the proper defendant broadly, and for the benefit of both parties.¹¹⁶ A foreign state has never been denied immunity at this initial stage of inquiry simply because it was not the proper defendant for the action.¹¹⁷

A second consideration for the courts is whether the nature of the tort at issue falls under section 1605(a)(5) of the FSIA. On the face of the statute, certain actions are strictly forbidden and will never result in denial of immunity.¹¹⁸ Additionally, certain property actions, personal injury actions, and wrongful death actions have been well received by the courts as proper tort claims under section 1605(a)(5).¹¹⁹ To illustrate, the action in *Olsen* was for wrongful death.¹²⁰ The statute explicitly provides for this tort;¹²¹ in fact, wrongful death actions constitute the majority of tort claims under the FSIA.¹²² The plaintiffs in *Olsen* did not allege any claims for consequential damages, such as mental distress, which, in any case, has never been well received by the courts.¹²³ Because the courts interpret narrowly the appropriateness of a tort claim in a section 1605(a)(5) action,¹²⁴ the plaintiffs in *Olsen* did well to restrict themselves to the best-established cause of action.

In determining whether the nature of the tort is acceptable under section 1605(a)(5), courts have emphasized that only those torts which have occurred in the United States are actionable.¹²⁵ The *Olsen* court recognized the accepted rule¹²⁶ that both the act and the injury must occur in the United States.¹²⁷ Straining to fit the case to this established rule, the court declared that many potentially tortious acts and omis-

116. See *supra* text accompanying notes 51-64 (the proper defendant for a section 1605(a)(5) case).

117. See *supra* text accompanying notes 51-64 (the proper defendant for a section 1605(a)(5) case).

118. See *supra* note 39 and accompanying text (libel, slander, deceit, misrepresentation, interference with contract, malicious prosecution, and abuse of process are prohibited causes of action).

119. See *supra* notes 41-47 and accompanying text.

120. *Olsen*, 729 F.2d at 643.

121. 28 U.S.C. § 1605(a)(5).

122. See *supra* note 44 and accompanying text.

123. See *supra* note 47 and accompanying text.

124. See *supra* notes 65-74 and accompanying text.

125. See *supra* notes 39-50 and accompanying text.

126. See *supra* notes 65-74 and accompanying text.

127. *Olsen*, 729 F.2d at 646.

sions occurred in both the United States and Mexico.¹²⁸ The court reasoned that requiring every aspect of the tortious conduct to occur in the United States would only encourage foreign defendants to allege that some tortious conduct occurred outside the United States.¹²⁹ The court concluded therefore that the accepted rule would be satisfied if at least one entire tort occurred in the United States.¹³⁰ Consequently, every tortious act or omission will be placed under court scrutiny regardless of the situs of the act or omission, even though only one of the torts alleged occurred wholly in the United States. This coat-tail interpretation has yet to be followed by any other court.

The next step to consider is whether the tortious acts or omissions complained of are discretionary.¹³¹ This requires the application of the *Dalehite* standard.¹³² Recognizing the *Dalehite* standard as applying equally to Federal Tort Claims Act and FSIA cases, the *Olsen* court determined that none of the alleged acts or omissions were discretionary.¹³³ The court stated that the negligent acts alleged by the plaintiffs were not implicated as discretionary in the instant case, though the broad policy of prisoner exchange may have been discretionary.¹³⁴ The negligent acts in question were the acts of transportation and of piloting, acts which were clearly operational and far from the centers of policy and judgment.¹³⁵

Finally, should the court not grant immunity and the plaintiff prevail, the proper remedy for the plaintiff can be considered. This final step has no firm precedent to guide it, because this issue has only been examined once, in *Letelier*.¹³⁶ In *Olsen*, the plaintiffs were not actually awarded damages because the case at hand merely conferred jurisdiction on a California court.¹³⁷ Assuming *arguendo*, however, that the plaintiffs were awarded damages, they might not be able to recover if the

128. *Id.* at 645.

129. *Id.* at 646.

130. *Id.*

131. *See supra* note 75 and accompanying text.

132. *See supra* text accompanying notes 81-82.

133. *Olsen*, 729 F.2d at 646-47.

134. *Id.* at 647.

135. *Id.*

136. *Letelier*, 748 F.2d 790; *see supra* notes 92-107 and accompanying text.

137. *Olsen*, 729 F.2d at 649.

Ninth Circuit follows the Second Circuit opinion in *Letelier*.¹³⁸

CONCLUSION

The Foreign Sovereign Immunities Act codified the restrictive theory of sovereign immunity and provided a means for plaintiffs to bring suit against a defendant foreign state in a United States court. Since that time, a body of law intended to provide consistency and conformity of foreign sovereign immunity law has evolved. The federal courts have established certain trends of statutory interpretation of the noncommercial torts exception to the FSIA. The choice of a proper defendant under this statute is an issue open to a broad construction; any foreign state and many of its agencies and instrumentalities may be sued under section 1605(a)(5).¹³⁹ However, these courts have narrowly interpreted which torts will provide a valid cause of action under the FSIA.¹⁴⁰ Only those acts or omissions that cause personal injury, death, or loss of or damage to property may give rise to a permissible cause of action.¹⁴¹ Moreover, both the tortious act or omission and the resultant injury or death must occur in the United States.¹⁴² In addition, torts attributable to discretionary functions are not actionable under the FSIA.¹⁴³ Finally, one court has held that the noncommercial torts section of the FSIA has created a right without any effective remedy, suggesting that judgments entered in favor of a plaintiff may be unenforceable.¹⁴⁴

Not only is it difficult to execute a judgment in cases where section 1605(a)(5) is used, but it is indeed a rare occurrence for a plaintiff to obtain jurisdiction over a foreign sovereign through section 1605(a)(5). Since the FSIA was enacted in 1976, only three reported cases have conferred jurisdiction on the plaintiff.¹⁴⁵ In two¹⁴⁶ of these three, the action was for

138. See *supra* notes 96-107 and accompanying text.

139. See *supra* notes 51-64 and accompanying text (detailing the choice of a proper defendant under the torts exception).

140. See *supra* notes 43-47 and accompanying text.

141. See *supra* notes 39-50 and accompanying text.

142. See *supra* notes 65-74 and accompanying text.

143. See *supra* notes 75-91 and accompanying text (detailing the scope of the discretionary functions provision).

144. See *supra* notes 94-107 and accompanying text.

145. *Olsen*, 729 F.2d 641; *Letelier*, 488 F. Supp. 665; *De Sanchez*, 515 F. Supp. 900.

146. *Olsen*, 729 F.2d 641; *Letelier*, 488 F. Supp. 665.

wrongful death, and the other was for conversion.¹⁴⁷

A plaintiff does not have a favorable chance of obtaining jurisdiction over a foreign sovereign who has committed a tortious act or omission, even with the aid of the FSIA. Moreover, the United States Supreme Court has declined to clarify this growing body of law, denying certiorari in every instance that an appeal has been made.¹⁴⁸

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147. *De Sanchez*, 515 F. Supp. 900.

148. *Letelier*, 748 F.2d 790; *Asociacion*, 735 F.2d 1517; *Tel-Oren*, 726 F.2d 774; *Persinger*, 729 F.2d 835; *Olsen*, 729 F.2d 641; *Berkovitz*, 735 F.2d 329; *McKeel*, 722 F.2d 582; *Perez*, 652 F.2d 186.