COMMERCIAL TERRORISM: A COMMERCIAL ACTIVITY EXCEPTION UNDER § 1605(a)(2) OF THE FOREIGN SOVEREIGN IMMUNITIES ACT

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Iran financed the confinement and upkeep of the American hostages who were held in Lebanon and also paid their captors $1 million to $2 million for each hostage released, according to Bush administration officials who have studied the long ordeal and eventual liberation of the captive Americans.[1]

I. INTRODUCTION

On September 12, 1986, a group of Muslim fundamentalists, under the direction and control of Iran, abducted Joseph J. Cicippio, deputy controller of American University, in Beirut, Lebanon.[2] During the 1,908 days of Cicippio's captivity, the terrorists routinely beat and tortured him. Finally, on December 2, 1991, Joseph J. Cicippio was freed.[3] In exchange for the release of Cicippio and other hostages held by the terrorists, the United States government released $262 million in Iranian assets frozen since 1979 in United States banks.[4] On October 14, 1992, Joseph Cicippio filed suit, arguing that by its conduct, control, promotion, direction and financing of the hostage abductions in Beirut, Iran engaged in a form of "commercial terrorism"[5] for profit. Cicippio alleges

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1. Dan Oberdorfer, *Iran Paid for Release of Hostages: Tehran Gave Captors Up To $2 Million For Each, Officials Say*, WASH. POST, January 19, 1992, at A1. Not only were the terrorists financed by Iran, they were also "provided with Iranian travel documents and conferred frequently with Iranian diplomats." *Id.* In fact, the hostages were released only because they had outlived any possible usefulness. *Id.* at 21. "Iran concluded that the continued captivity of the hostages was a serious detriment to the Islamic republic's efforts to win economic access to the West at a time when the Soviet alternative had collapsed." *Id.*

2. *2 Americans Who Were Beirut Hostages Sue Iran*, N.Y. TIMES, October 15, 1992, at A20.

3. David Reyes, *2 Former Hostages Sue Iran; Courts: David Jacobsen and Joseph Cicippio Seek $600 Million From Country They Claim Sponsored "Commercial Terrorism,"* L.A. TIMES, October 15, 1992, at A3.

4. *Id.* The Carter administration froze the Iranian assets in 1979 in response to the hostage taking at the United States Embassy in Tehran. *Executive Order 12170*, issued by President Jimmy Carter, November 14, 1979. Iran repeatedly demanded the return of the assets before it would intervene on behalf of any hostages abducted in Beirut.

5. The term "commercial terrorism" was first utilized by Cicippio in the original complaint filed in his suit on October 14, 1992 in the Federal District Court for Washington, D.C. The theory of commercial terrorism used in this case was first developed by Professor

that, under the commercial activity exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605 (a)(2), the United States Federal Courts retain jurisdiction over matters related to the kidnappings.[6]

This Note explores whether the terrorism engaged in by Iran can be considered a commercial activity as defined by 28 U.S.C. § 1605(a)(2) of the Foreign Sovereign Immunities Act. Additionally, this Note gives a brief background on the relevant history of foreign sovereign immunity;[7] discusses the codification of the restrictive theory of immunity by the Foreign Sovereign Immunities Act of 1976;[8] and defines the commercial activity exception.[9] This Note concludes that state-sponsored terrorism of a commercial nature, or commercialized terrorism, should qualify as an exception to the Foreign Sovereign Immunities Act.

A. History Of Sovereign Immunity

Sovereign immunity originated as a judicial doctrine which precluded bringing suit against any government without its consent.[10] Based upon the ancient premise that "the King can do no wrong",[11] the doctrine of sovereign immunity was traditionally accorded to foreign countries and their agencies and instrumentalities. In its pristine form, the doctrine of sovereign immunity was absolute, but as governments increasingly entered the marketplace and became involved in commercial undertakings, the doctrine began to erode.[12]

The United States Supreme Court first recognized the international doctrine of sovereign immunity in *The Schooner Exchange v. M'Faddon.*[13] Chief Justice Marshall concluded that while jurisdiction of a nation within its own territory "is susceptible of no limitation not imposed by itself," the United States impliedly waived jurisdiction over certain activities of Foreign sovereigns.[14] Thus, in *Schooner,* the United States Supreme Court adopted the common law doctrine of Foreign Sovereign Immunity, noting that the doctrine rests on the principles of comity between nations.[15]

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6. *See, e.g.,* 28 U.S.C. §§ 1602 through 1611 (1988).
7. *See infra* notes 10–24 and accompanying text.
8. *See infra* notes 25–34 and accompanying text.
9. *See infra* notes 35–124 and accompanying text.
10. *See* 28 U.S.C. §§ 1602 through 1611 (1988).
11. BLACK'S LAW DICTIONARY at 1396 (6th ed. 1990).
12. Weltover, Inc. v. Republic of Argentina, 941 F.2d 145, 148 (2d Cir. 1991), *aff'd,* 112 S. Ct. 2160 (1992) (discussing the history of sovereign immunity).
13. 11 U.S. (7 Cranch) 116 (1812) (American citizens attacked a French warship near Philadelphia, claiming she had been unlawfully seized from their custody by persons acting under orders of the Emperor Napoleon).
14. *Id.* at 136. Although the narrow holding was only that the courts of the United States lack jurisdiction over an armed ship of a foreign state found in a United States port, this opinion came to be regarded as extending virtually absolute immunity to all foreign sovereigns. *See, e.g.,* Berizzi Brothers Co. v. S.S. Pesaro, 271 U.S. 562 (1926) (jurisdictional protection extended to commercial ships owned by foreign states, since the independence of each sovereign requires recognition of their independence by other sovereign states).
15. *Schooner Exchange, supra* note 13, at 135–36. *See also,* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983), *aff'd on other grounds* , 647 F.2d 320 (2d Cir. 1981), *rev'd on other grounds,* 461 U.S. 480 (1983) ("foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution.").

Over time, the United States Supreme Court moved away from judicial application of sovereign immunity, deferring instead to the Executive Branch determinations of immunity.[16] Until 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns.[17] However, in 1952, the State Department, in a document known as the "Tate Letter",[18] announced its adoption of the "restrictive theory" of sovereign immunity.[19] The adoption of the "restrictive theory" set forth a policy to which the State Department would adhere in situations in which foreign sovereigns were involved. Under this theory, immunity is confined to those acts which involve a foreign state's public acts, or *jure imperii*, and does not extend immunity to suits based upon a state's commercial or private acts, or *jure gestionis*.[20] Originally, "private acts" were defined as acts of industrial, commercial, financial, or any other business enterprises in which private persons may engage, or an act connected with such an enterprise.[21] "Public acts", on the other hand, are those acts arising from internal administrative acts of a government, legislative acts, acts involving armed forces, acts involving diplomatic activity, and public loans.[22]

The Tate Letter, however, contained few guidelines for distinguishing between public and private acts. The State Department and the courts struggled to distinguish the two categories.[23] Determinations of sovereign immunity by the State Department were made on a case by case basis with no clear standards governing their decisions.[24] However, even in the absence of a State

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16. Robert B. von Mehren, THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976, 17 COLUM. J. TRANSNAT'L L. 33, 39–40 (1978). Two cases which exemplify this notion are Ex Parte Republic of Peru, 318 U.S. 578 (1943), and Mexico v. Hoffman, 324 U.S. 30 (1945). In *Ex Parte Republic of Peru*, the Supreme Court concluded that it was the judiciary's duty to accept the Executive's determination as to sovereign immunity. The Court cited United States v. Lee, 106 U.S. 196, 209 (1882), in stating, "[i]n such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." *Ex Parte Republic of Peru, supra* note 16, at 588. In *Hoffman*, the Court considered the political question doctrine and determined that a decision to confer or waive immunity could embarrass the United States in foreign relations and therefore was best left up to the Executive Branch. *Hoffman, supra* note 16, at 35.

17. Robert B. Hagedorn, *The Foreign Sovereign Immunities Act: Defining Commercial Activity and Direct Effects Jurisdiction*, 25 SANTA CLARA L. REV. 105, 107 (1985).

18. Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Phillip B. Perlman, May 19, 1952, reprinted in Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711 (1976) (appendix 2 to opinion of White, J.).

19. "[I]t will hereafter be the 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." *Alfred Dunhill of London, supra* note 18, at 716.

20. *See* Rex v. CIA Pervana De Vapores, S.A., 660 F.2d 61 (3d Cir. 1981), *cert. denied*, 456 U.S. 926 (1982) (discussing the State Department policy of restrictive theory of sovereign immunity following requests for consideration of this policy from foreign governments, despite the fact that federal courts had expressed general dissatisfaction with these distinctions).

21. *See* Edward D. Re, Judicial Developments In Sovereign Immunity and Foreign Confiscations, 1 N.Y. L. FORUM 160, 167 (1955).

22. Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

23. Frederic A. Weber, THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976: ITS ORIGIN, MEANING AND EFFECT, 3 YALE STUDIES IN WORLD PUB. ORD. 1, 16 (1976).

24. *See* Andreas F. Lowenfeld, CLAIMS AGAINST FOREIGN STATES - A PROPOSAL FOR REFORM OF UNITED STATES LAW, 44 N.Y.U. L. Rev. 901 (1969) (discussing the problems with the theory of restrictive immunity as created by the Tate Letter and problems of

Department determination, the courts often applied the theory of restrictive immunity in those cases involving foreign sovereigns. The indecision and ambiguities presented by this divergent application in cases involving foreign sovereigns made the enactment of the Foreign Sovereign Immunities Act timely.

B. The Foreign Sovereign Immunities Act Of 1976

The Foreign Sovereign Immunities Act ("the Act") codifies the restrictive theory of sovereign immunity.[25] The broad purpose of the Act is to provide parameters for actions against a foreign sovereign in the courts of the United States.[26] The Act sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before federal and state courts in the United States and preempts any other state or federal law.[27]

The Act conforms with the restrictive theory of sovereign immunity. Thus, the Foreign Sovereign Immunities Act only allows immunity for public acts, *jure imperii*.[28] Additionally, the Act clarifies earlier ambiguities by distinguishing private acts and public acts and by enumerating specific exceptions to foreign sovereign immunity.[29] Foreign Sovereign Immunity does not apply to waiver,[30] commercial activities,[31] expropriation,[32] and torts.[33] The Act also includes an exception from immunity in admiralty cases.[34] This Note focuses on the commercial activity exception, invoked in the case of commercialized terrorism.

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administration between the State Department and the courts in awarding or denying sovereign immunity).

25. *See* 28 U.S.C. §§ 1602 through 1611 (1988). The Act serves three other objectives. It depoliticizes the issue of sovereign immunity and places upon the judiciary the responsibility of deciding whether a foreign sovereign is entitled to immunity in a given case. It provides a statutory "long-arm" procedure for obtaining *in personam* jurisdiction over foreign sovereigns, while eliminating *quasi in rem* jurisdiction based on the attachment of a foreign state's property. Finally, it provides judgment creditors specific remedies for the satisfaction of judgments against a foreign state and disposes of traditional absolute immunity from execution. In addition, while the Act enhances a party's ability to sue in a United States court, it does not revive all claims that existed against foreign governments at any time before its passage. Schmidt v. Polish People's Republic, 742 F.2d 67, 71 (2d Cir. 1984).

26. The broad purpose, as stated by the House Committee on the Judiciary, is "to provide when and how *parties* can maintain a lawsuit against a foreign state or its entities" in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity. *Verlinden B.V., supra* note 15, at 490.

27. 28 U.S.C. § 1610 (1988). *See also Verlinden B.V., supra* note 15 (by reason of Congress's authority over foreign commerce and foreign relations, the Congress has the undisputed power to decide when a foreign nation is amenable to suit in the United States).

28. H.R. REP. NO. 1487, 9th Cong., 2d Sess. (1976),*reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6605 [hereinafter HOUSE REPORT].

29. 28 U.S.C. § 1605 (1988) (general exceptions to the jurisdictional immunity of a foreign state).

30. 28 U.S.C. § 1605(a)(1) (1988).

31. 28 U.S.C. § 1605 (a)(2) (1988).

32. 28 U.S.C. § 1605(a)(3) (1988).

33. 28 U.S.C. § 1605(a)(5) (1988).

34. 28 U.S.C. § 1605(b) (1988).

II. DEFINING THE COMMERCIAL ACTIVITY EXCEPTION

Congress enacted the Foreign Sovereign Immunities Act to depoliticize determinations of foreign states' claims of immunity.[35] The Act states that under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned. Thus, commercial property may be attached for the satisfaction of judgments rendered against foreign states in connection with these commercial activities.[36] Additionally, the Act effectively removes the resolution relating to foreign sovereign immunity issues from the executive branch to the judicial branch of government,[37] thereby assuring litigants that sovereign immunity decisions will be based on legal rather than political grounds.[38]

The primary purpose of the Act is to restrict the immunity of a foreign state to suits involving a foreign state's *public* acts.[39] If the activity is not commercial, then it satisfies none of the three commercial activity exceptions found in § 1605(a)(2),[40] and thus the foreign state is immune from suit. Unfortunately, the Act itself offers little guidance in defining the word "commercial". 28 U.S.C. § 1603(d) defines commercial activity as either a *regular course* of commercial conduct *or* a *particular* commercial transaction or act. The commercial character of an activity is determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.[41] The Act further states that commercial activities carried on in the United States by foreign states mean commercial activity carried on by such states having substantial contact with the United States.[42] However, no provision explicitly defines "commercial activity." Congress deliberately left the exceptions ambiguous to allow the courts discretion in determining whether the conduct was commercial or governmental.[43]

The legislative history of the Act, however, provides some assistance in its interpretation. Bruno Ristau, former Chief of the Foreign Litigation Section of the Civil Division, Department of Justice stated, before the Subcommittee on Claims and Governmental Relations of the House Committee on Jurisdiction that "[i]f a government enters into a contract to purchase goods and services, that is considered a commercial activity. It avails itself of the ordinary contract

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35. 28 U.S.C. § 1602 (1988).
36. *Id.*
37. Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 372 (7th Cir. 1985), *citing* HOUSE REPORT at 6606, *see supra* note 28.
38. National Airmotive Corp. v. Government & State of Iran, 499 F. Supp. 401, 406 (D.C. 1980).
39. *Id.*
40. 28 U.S.C. § 1605(a)(2) (1988).
41. 28 U.S.C. § 1603(d) (1988).
42. 28 U.S.C. § 1603(e) (1988).
43. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 309 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), *citing* 1976 *Hearings on H.R. 11315 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 94th Cong., 2d Sess. 28 (1976) [hereinafter *1976 Hearings*]. Congress "put [its] faith in the [United States] courts to work out progressively, on a case-by-case basis ... the distinction between commercial and governmental." (testimony of Monroe Leigh) *Texas Trading* at 309, *citing 1976 Hearings* at 53.

machinery."[44] Thus, a contract or series of contracts would be *per se* a "commercial activity."[45]

Additionally, the large body of case law which existed when Congress passed the Act in 1976 assists in the Act's interpretation. The legislative intent of the Foreign Sovereign Immunities Act was to codify the existing practice of restrictive immunity followed by the State Department since the 1952 "Tate Letter." The legislation made it clear that immunity *cannot* be claimed with respect to acts or transactions that are commercial in nature, regardless of their underlying purpose.[46]

Finally, current standards of international law were incorporated into the Act.[47] The drafters intended to bring American sovereign immunity practice into line with that of other nations.[48] There is widespread acceptance in the international community that immunity should be restricted to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial, or those acts which private persons normally perform.[49] Thus, international law also follows the restrictive theory of sovereign immunity.[50]

The commercial activity exception is the most frequently contested of the foreign sovereign immunity exceptions.[51] To determine if the commercial activity exception applies, courts engage in a three-step analysis. First, the court must define with precision the relevant activity.[52] This requires focusing on the named defendant's acts and not on other acts which may have an indirect connection with the suit.[53] Second, the court must determine whether the relevant activity is sovereign or commercial in nature.[54] Finally, if the activity is com-

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44. *Texas Trading, supra* note 43, at 309, *citing 1976 Hearings , supra* note 43, at 51.
45. HOUSE REPORT,*supra* note 28, at 6615..
46. *Texas Trading, supra* note 43, at 309, *citing 1973 Hearings on H.R. 3493 Before the Subcommittee on Claims and Governmental Relations of the House Committee on the Judiciary,* 93rd Cong., 1st Sess. 15 (1973) (testimony of Charles N. Brower, Legal Advisor, Department of State) [hereinafter *1973 Hearings*].
47. HOUSE REPORT,*supra* note 28, at 6613.
48. Texas Trading, *supra* note 43, at 310, *citing 1976 Hearings* at 25, 32.
49. HOUSE REPORT, *supra* note 28, at 6613.
50. *Id.* at 6613.
51. De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385 (5th Cir. 1985) (commercial activity predates the Foreign Sovereign Immunities Act and embodies the "restrictive theory" of sovereign immunity; when a suit arises from a foreign state's commercial acts the state's interest in immunity is much weaker; thus, a suit based on a commercial claim is more likely to succeed because in their commercial acts foreign state's do not exercise powers peculiar to sovereigns). Commercial activity is defined in 28 U.S.C. § 1603(d) as either a regular course of commercial conduct or a particular commercial transaction or act. 28 U.S.C. § 1603(d) (1988). A court may subject a foreign state's property to measures of constraint if that property is specifically in use or intended for use by the State for commercial (non-governmental) purposes and has a connection with the object of the claim. *De Sanchez, supra..*
52. *De Sanchez, supra* note 51, at 1108.
53. Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985). The court sustained the plaintiff's cause of action which arose from a breach of contract related to the defendant's commercial banking activities. The court held that the claim was not entitled to immunity because it was not related to the defendant's status as an instrumentality of the Mexican government. *Id.* at 1110.
54. This refers to the nature versus purpose test discussed *infra at* notes 65–82 and accompanying text.

mercial in nature, the court must determine whether it has the required jurisdictional nexus with the United States.[55]

The jurisdictional nexus is met if (1) the action is based upon a commercial activity carried on in the United States by the foreign state; or (2) the acts are performed in the United States in connection with commercial activity elsewhere; or (3) the acts are performed outside the territory of the United States in connection with a commercial activity elsewhere, and cause a direct effect in the United States.[56] If a "commercial activity" under 28 U.S.C. § 1605(d), is present and if it bears the relation to the United States required by § 1605(a)(2), then the foreign state is not entitled to immunity.[57] In addition, the exercise of jurisdiction must fall within the judicial power set forth by Article III of the Constitution.[58]

To bring a suit under the Act, the relevant activity must be analyzed to determine the inherent nature of the action as well as the purpose for which it was undertaken.[59] In addition to considering an act's nature versus its purpose, the relevant activity can also be criticized based on a series of tests applied by the federal circuit courts. These tests include the literal test,[60]the nexus test, [61]

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55. *De Sanchez, supra* note 51, at 1107.

56. 28 U.S.C. § 1605(a)(2) (1988). The full text reads:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ...
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> (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 commercial activity of the foreign state elsewhere; or upon the act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

57. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). The court further explains that

> a '§ 1605(a)(2) case' calls for the resolution of a series of five questions: (1) Does the conduct the action is based on or related to qualify as "commercial activity"? (2) Does that commercial activity bear the relation to the cause of action and to the United States described by one of the three phrases of § 1605(a)(2), warranting the Court's exercise of subject matter jurisdiction under § 1330(a)? (3) Does the exercise of this congressional subject matter jurisdiction lie within the permissible limits of the "judicial power" set forth in Article III? (4) Do subject matter jurisdiction under § 1330(a) and service under § 1608 exist, thereby making personal jurisdiction proper under § 1330(b)? (5) Does the exercise of personal jurisdiction under § 1330(b) comply with the due process clause, thus making personal jurisdiction proper?

Id.

58. In Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983), the Court discussed whether Congress exceeded the scope of Article III of the Constitution by granting federal courts subject matter jurisdiction over civil actions by foreign plaintiffs against foreign sovereigns, where the rule of decision may be provided by state law. The Court determined that the "arising under" clause provides an appropriate basis for the statutory grant of subject matter jurisdiction to actions by foreign plaintiffs under the Act. In addition, a suit against a foreign state under the Foreign Sovereign Immunities Act necessarily raises questions of substantive federal law at the very outset and hence clearly "arises under" federal law as the term is used in Article III.

59. *See infra* notes 65–82 and accompanying text.

60. *See infra* notes 83–87 and accompanying text.

61. *See infra* notes 88–91 and accompanying text.

the causal connection test,[62] the doing business test,[63] and the jurisdictional nexus test.[64]

A. Exploring the Nature of the Act Versus the Purpose of the Act

When the State Department first announced its theory of restrictive immunity in the "Tate Letter," it stated it would look to the "*nature*" of the activity and not the foreign state's "*purpose*" for undertaking the activity or the character of the instrumentality performing the activity.[65] This standard was not intended to bar courts completely from considering the purposes of different types of activities.[66] Indeed, it is impossible in some cases to separate the ontology from the teleology of an act.[67] Congress' intent was for courts to focus on the nature of an activity.[68] The fact that goods and services procured through a contract are used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical.[69]

However, courts have experienced difficulty in determining where the nature of an activity ends and the purpose begins.[70] Often, the essence of an act is defined by its purpose, and unless there is an inquiry into the purpose of such acts, their nature cannot be determined. In *De Sanchez v. Banco Central de Nicaragua,*[71] the Fifth Circuit determined that a national bank's sale of United States dollars was governmental in nature.[72] The purpose of the sale, to regulate the national currency reserves itself, defined the conduct's nature rather than

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62. *See infra* notes 92–94 and accompanying text.
63. *See infra* notes 95–102 and accompanying text.
64. *See infra* notes 103–111 and accompanying text.
65. Weber, *supra* note 23, at 16.
66. HOUSE REPORT, *supra* note 28, at 6615. Congress recognized that by not defining "commercial activity" with precision, the courts would have a "great deal of latitude" in interpreting the exception.
67. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, New College Edition, (1981), defines ontology as the philosophy that deals with being. Teleology is the philosophy of the study of manifestation of design or purpose in natural processes or occurrences, under the belief that natural processes are not determined by mechanism, but rather by their utility in an overall natural design. Essentially, the court is differentiating between the physical nature of act, for example a contract to buy grain, and the philosophical purpose behind an act, for example, the desire of a government to feed its people.
68. 28 U.S.C. § 1603(d) states "the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction of the act, rather than by reference to its purpose." *Id.*
69. HOUSE REPORT, *supra* note 28, at 6615. The report cites as examples that contracts by a foreign government to buy provisions or equipment for its armed services, or to construct or make repairs on a government or embassy building should be considered commercial contracts even if their ultimate objective is to further a public function.
70. The Fifth Circuit commented on the difficulty in separating these concepts in De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385 (5th Cir. 1985). The court remarked that the difficulty in application of the nature versus purpose distinction would not bar them from considering the purposes of different types of activities. Commercial acts themselves are often defined by reference to their purpose. What makes these acts commercial is not some ethereal essence inherent in the conduct itself, but generally because they are engaged in the act for a *profit. Id.* (emphasis added).
71. 770 F.2d 1385 (5th Cir. 1985).
72. *Id.* The bank's actions in selling foreign exchange reserves were not the same as those of a private bank because they were done in connection with the fall of the Samozan government in Nicaragua.

serving as an ancillary factor.[73] However, in *Practical Concepts, Inc. v. Republic of Bolivia,*[74] the D.C. Circuit found a contract for consulting services to be commercial in nature despite the fact that the purpose of the contract was to develop Bolivia's rural areas.[75] The court concluded that at its heart the contract was one for services, and therefore, commercial.[76] The Eighth Circuit in *McDonnell Douglas Corporation v. Islamic Republic of Iran,*[77] in considering the nature versus purpose test, stated that a transaction retains its commercial nature even though the purchasing government proposes to use the goods for military purposes.[78] These cases clearly illustrate the problems inherent in the use of the nature versus purpose test.

Many courts, in determining the nature of a transaction for purposes of the Act, ask whether a private party could have entered a similar agreement.[79] However, the Seventh Circuit in *Segni v. Commercial Office of Spain*[80] recognized an inherent problem in this standard was that any governmental action, including the paradigmatically commercial purchase of goods, can be defined as the execution of some governmental policy or purpose.[81] The *Segni* Court concluded that any consideration of purpose should be closely confined, and that the purpose of an activity should only be considered to the extent absolutely necessary to define the nature of the act in question.[82] Despite the classification problems courts encounter, the nature versus purpose test is useful to aid courts in precluding foreign governments from continual claims of sovereign immunity.

B. The Applicable Tests to Determine Whether an Action Is Based Upon a Commercial Activity[83]

1. The Literal Test

Courts have announced widely varying formulations of the jurisdictional scope of 28 U.S.C. § 1605(a)(2). In *Gibbons v. Udaras,*[84] the court considered

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73. *Id.* at 1393–94.
74. 811 F.2d 1543 (D.C. Cir. 1987).
75. *Id.*
76. *Id.*
77. 758 F.2d 341 (8th Cir.), *cert. denied,* 474 U.S. 948 (1985).
78. *Id.* Iran sued McDonnell Douglas for breach of contract and the court determined that since the transaction was essentially commercial in nature, it was not barred by the Foreign Sovereign Immunities Act.
79. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 at 309 (2d Cir. 1981), *cert. denied,* 454 U.S. 1148 (1982) ("If the activity is one in which a private person could engage, it is not entitled to immunity.").
80. 835 F.2d 160 (7th Cir. 1987).
81. *Id.* The issue in this case was a breach of employment contract claim. When the Plaintiff tried to sue the Commercial Office, it claimed sovereign immunity by characterizing the plaintiff's employment as "diplomatic activity". The court held that the plaintiff's employment, to develop marketing of Spanish wines in the midwestern United States, was best described as a contract to provide product marketing services and denied the Commercial Office sovereign immunity.
82. *Id.*
83. Although these tests have been used by courts to construe the first clause of § 1605(a)(2), they are also applicable to the determination of "commercial activity" as defined by the Act.
84. 549 F. Supp. 1094 (S.D.N.Y. 1982).

a literal test. The *Gibbons* Court noted that a literal reading of the first clause requires the cause of action be directly *based upon* defendant's activity in the United States and in connection with a commercial activity.[85] Thus, there would only be jurisdiction if the act was performed in the United States, not if there was an act performed abroad in connection with that activity.[86] However, the *Gibbons* Court rejected a literal reading of the first clause of § 1605(a)(2). Furthermore, in the rare instances where the literal test has been applied by the district courts, it has been repudiated by the circuits on appeal.[87]

2. The Nexus Test

The Third Circuit adopted the nexus approach in *Sugarman v. Aeromexico*.[88] The nexus test represents a broad judicial construction of § 1605(a)(2). The nexus test requires only *some* connection between the plaintiff's grievance and the foreign entity's commercial activity in the United States.[89] In adopting the nexus test, the *Sugarman* Court specifically rejected the literal test, reasoning that if Congress had desired the literal approach, it would have drafted the Act to reflect that intent.[90] Other courts regard the nexus approach as simply a more effective way of carrying out the goal of requiring a connection between the lawsuit and the United States which the language of the clause appears designed to ensure.[91]

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85. *Id.* at 1109 n.5. The court stated in full:
> [r]ead literally, 'clause 1' requires that the cause of action be directly 'based upon' the defendant foreign state's commercial activity in the United States, not merely 'based upon' an act by the defendant 'in connection with' that commercial activity. Thus, it is arguable that, where the defendant foreign state has carried on a commercial activity in the United States, clause 1 confers subject matter jurisdiction over a cause of action based upon an act performed *in the United States* in connection with that activity, but not over a cause of action based upon an act performed *abroad* in connection with that activity." *Id.* (emphasis in the original).

86. *Id.*

87. *See, e.g.*, Sugarman v. Aeromexico, Inc., 626 F.2d. 270 (3d Cir. 1980); Gemini Shipping v. Foreign Trade Organization for Chemical & Foodstuffs, 647 F.2d 317 (2d Cir. 1981). In *Sugarman*, the Third Circuit held that the first clause was clearly not intended to be read literally and thus construed the first clause as limiting jurisdiction. The court stated "[w]hen Congress intended to limit the acts subjected to liability to acts carried out ... in the United States, the statute makes that limitation clear." Sugarman, 626 F.2d at 273. The Second Circuit in *Gemini* stated "the drafters of the FSIA intended no such niggardly construction." Gemini Shipping, 647 F.2d at 319.

88. 626 F.2d 270 (3d Cir. 1980).

89. *Id.* The plaintiff alleged that an extended delay at the Acapulco airport before the departure of his Aeromexico flight back home caused him heart problems. The court found jurisdiction under the first clause of § 1605(a)(2), by finding a nexus between the plaintiff's claim and Aeromexico's commercial activity from the fact that the delayed flight that was bound for New York City was the return portion of a round trip flight in which tickets had been purchased in New Jersey. *Id.* at 272–73.

90. *See supra* note 88.

91. Vencedora Oceanica Navigacion v. Compagnie Nation, 730 F.2d 195 (5th Cir. 1985). The *Vencedora* Court used the nexus approach to determine that there was no nexus between commercial activity carried on in the United States by an Algerian instrumentality and the vessel owner's claim that the instrumentality tortiously deprived the owner of the vessel.

3. The Causal Connection Test

The causal connection test, as set forth by the D.C. Circuit Court of Appeals, appears to fall between the literal test and the nexus test. In *Gilson v. Ireland*,[92] the court stated that the *based upon* standard is met if the plaintiff can show a causal connection between the foreign state's commercial activity and the plaintiff's cause of action or an element in the cause of action. [93] The Fifth Circuit, however, has found that this test, while requiring a tighter connection between the United States and the lawsuit in question, is unnecessary.[94]

4. The Doing Business Test

Under the doing business test, applied by the District Court for the Southern District of New York, in the *Matter of Rio Grande Transport*,[95] the court focused on the connection between the defendant and the United States.[96] By definition the doing business test requires no specific connection between the lawsuit and the United States.[97] The *Rio Grande* Court held that Congress' broad definition of "commercial activity," including a "regular course of commercial conduct," meant there was no Congressional intent that the commercial activity occur in the United States or have substantial contact with the United States. It is only necessary that the broad course of conduct be connected to the United States.[98] The court reasoned that a broad interpretation of "regular course of commercial conduct" was consistent with the Congressional goal of providing access to court for those aggrieved by the commercial acts of a

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92. 682 F.2d 1022 (D.C. Cir. 1982).

93. *Id.* at 1027 n.22. The court stated:

> [s]ection 1605's 'based upon' standard is satisfied if plaintiff can show a direct causal connection between [the foreign entity's commercial activity in the United States] and the [acts] giving rise to his claims ..., or if he can show that [the commercial activity] is an element of the cause of action under whatever law governs his claims.

Id.

94. *Vencedora*, 730 F.2d at 203. The Fifth Circuit adopted the nexus test interpretation for the first clause of § 1605 (a)(2), stating it would be unnecessary to require a tighter connection between the United States and the lawsuit under clause one of the Act than is required under clause two. The court stated the "Third Circuit's nexus test better serves the purpose of simply requiring a connection between the lawsuit and the United States." *Id.* at 203.

95. 516 F. Supp. 1155 (S.D.N.Y. 1981), *appealed on other grounds*, 770 F.2d 262 (2d Cir. 1985) (collision in the Mediterranean between a vessel owned by CNAN, and an American-owned ship, where the CNAN vessel maintained a regular service between northern European ports and Algeria; and on this particular voyage the CNAN vessel was bound from Algeria to West Germany. Since there was no particular nexus with the United States, jurisdiction could only be applied if it was based on CNAN's worldwide shipping activities, which had substantial contact with the United States. The *Rio Grande* Court held that this was enough to confer subject matter jurisdiction over CNAN. The Second Circuit has also used the "doing business" interpretation of the clause as one ground for jurisdiction under the Act. *See also* Ministry of Supply Cairo v. Universe Tankships, 708 F.2d 80, 84 (2d Cir. 1983) (no immunity for acts if they comprise an integral part of the state's regular course of commercial conduct or a particular commercial transaction having substantial contact with the United States).

96. 516 F. Supp. 1155 (S.D.N.Y. 1981).

97. *Id.*

98. 516 F. Supp at 1162. The court stated: "Congress apparently did not intend to require that the specific commercial transaction or act upon which an action is based ... occurred in the United States or have had [any] substantial contact with the United States; only the broad course of conduct must be so connected," *quoting* Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 313 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

foreign sovereign.[99] The doing business test is more controversial than the nexus test, and many courts have rejected the doing business test[100] on the basis that the restrictive wording of the Act makes clear the limited case where Congress intended a doing business test to apply.[101] Thus, it appears Congressional intent excludes the application of the doing business test to the commercial activity exceptions.[102]

5. The Jurisdictional Nexus Test

Among the various tests employed by courts when construing the first clause of § 1605(a)(2), the most widely accepted test is the jurisdictional nexus test. The nexus requirement of the Foreign Sovereign Immunity Act implies a bond or link that connects the foreign state to the wrongful act for which it is sought to be held liable and is comparable to the requirement that there be causal connection in order to impose liability in the civil law of torts. The jurisdictional nexus finds a domestic parallel in the minimum contacts requirement for the application of long arm statutes.[103]

The jurisdictional nexus test has been expressed in various ways by different courts. The Fifth Circuit noted that it adopted the nexus test, first set out by the Third Circuit, in part because of a desire to promote uniformity among the circuits.[104] In addition, the Ninth Circuit in *America West Airlines, Inc. v. CPA Group. Ltd.*[105] held that there is subject matter jurisdiction under the first clause of § 1602(a)(2) if there is a "nexus between the defendant's

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99. 516 F. Supp. at 1162.

100. *Vencedora,* 730 F.2d 195 (5th Cir. 1984). *See also* Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056 (E.D.N.Y. 1979).

101. 28 U.S.C. § 1605(a)(3) (1988). The expropriation exception states "in the United States in connection with a commercial activity carried on in the United States by a foreign state; or ... is engaged in a commercial activity in the United States." *Id.* This section of the Act clearly defines where and how *doing business* meets the standard necessary to establish commercial activity and thus become subject to United States jurisdiction.

102. *Vencedora,* 730 F.2d 195 (5th Cir. 1984). Using this test would arguably open a floodgate of litigation in the United States against any foreign entity "doing business" in the United States, and create an unprecedented assertion of jurisdiction over a foreign state which was clearly not the Congressional intent of the Act. The *Vencedora* Court noted the statements of Bruno A. Ristau, Chief of the Foreign Litigation Section of the Civil Division of the United States Department of Justice, in making its determination of Congressional intent. Mr. Ristau stated that:

> [T]he bill will insure that only those disputes which have a relation to the United States are litigated in the courts of the United States . ... The bill is not designed to open up our courts to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.

Vencedora, 730 F.2d at 202–03, *citing 1976 Hearings, supra* note 43, at 31 (statement of Bruno Ristau, then Chief of the Foreign Litigation Section of the Civil Division of the U.S. Department of Justice.). The Iranian government has retained Mr. Ristau to defend it against the suit brought by Mr. and Mrs. Cicippio and Mr. Jacobsen.)

103. American Express International v. Mendez-Capellan, 889 F.2d 1175 (1st Cir. 1989) (holding that the district court lacked personal jurisdiction under Puerto Rican long arm statutes over a Dominican citizen because the cause of action did not arise from the agency's contacts with Puerto Rico).

104. *Vencedora,* 730 F.2d 195 (5th Cir. 1984). *See also* De Sanchez V. Banco Central de Nicaragua, 770 F.2d 1385 (5th Cir. 1985).

105. 877 F.2d 793 (9th Cir. 1989).

commercial activity in the United States and the plaintiff's grievance." [106] The Third Circuit held that "[i]t is essential that there be a nexus between the plaintiff's grievance and the sovereign's commercial activity."[107] The Sixth Circuit stated that subject matter jurisdiction under § 1605(a)(2), requires "a connection" between the commercial activity and the act complained of in the suit.[108]

To prevail under the jurisdictional nexus test, a plaintiff must identify a "regular course of commercial conduct or a particular commercial transaction or act."[109] The activity must involve "substantial contact with the United States"[110] and the cause of action must be "based upon" that commercial activity.[111]

C. Determining Factors In The Classification Of A Commercial Activity

Activities that have been classified as "commercial" include a foreign government's sale of a service or product; its leasing of property; its borrowing of money; its employment or engagement of laborers, clerical staff or public relations or marketing agents; or its investment in a security of an American corporation.[112] In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,[113] the court set out a general rule of thumb that if the activity is one in which a private person could engage, it is not entitled to immunity.[114] Yet, not

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106. America West Airlines, Inc. v. CPA Group, Ltd., 877 F.2d 793, 796 (9th Cir. 1989). The court held that there was no nexus in this case between the cause of action and any activities carried on by the foreign sovereign in the United States. The sovereign's national airline and its subsidiary serviced an aircraft engine which later malfunctioned, causing an emergency landing. Carrying on of commercial activities in the United States, in and of itself, is insufficient to create jurisdiction under the Act. *Id.*

107. Velidor v. L/P/G Benghazi, 653 F.2d 812, 820 (3d Cir. 1981), *cert. denied*, 455 U.S. 929 (1982). The plaintiffs, Yugoslavian seamen, sued the Algerian-Lybian owners of the vessel on which they worked for breach of an employment contract as well as for violations of the Seaman's Wage Act. The Foreign Sovereign Immunities Act also sets out the procedures fashioned by admiralty law for the protection of seamen when prosecuting claims against foreign states. The court concluded that since the case arose under the Seaman's Wage Act it was inextricably tied to the defendant's commercial activity and thus the jurisdictional nexus mandated by § 1605(a)(2) was satisfied. Even though the acts constituting the breach may have occurred outside the United States all that is required for jurisdiction is that the claim arise out of a course of commercial activity in the United States. *Id.*

108. Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 452 (6th Cir. 1988). The court noted that the commercial activity relied on by the plaintiff for jurisdictional purposes must also be the activity upon which the lawsuit is based. A mere finding of "doing business," while sufficient to meet personal jurisdiction requirements of long arm statutes, may not meet the nexus requirements of § 1605(a)(2).

109. 28 U.S.C. § 1603(d) (1988).

110. 28 U.S.C. § 1603(e) (1988).

111. 28 U.S.C. § 1605(a)(2) (1988). Congress never intended to bestow jurisdiction where the only contact with this country is United States citizenship or residency of the plaintiff. HOUSE REPORT, *supra* note 28, at 6616.

112. HOUSE REPORT, *supra* note 28, at 6614. Activities that have been defined as governmental include: internal administration acts, legislative acts, acts concerning armed forces, acts concerning diplomatic activity and public loans. *See also* Weber, *supra* note 23, at 16.

113. 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

114. Other courts have parted company with this notion, most notably, Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543 (D.C. Cir. 1987) (holding the rule of thumb too narrow because some contracts may contain terms that only a government could perform; thus, the court held that a foreign state is answerable in court when it acts in an essentially private rather than sovereign capacity).

every act of a foreign state that could be done by a private citizen in the United States is a "commercial activity."[115] Some courts have held that the relevant inquiry is whether the activity is customarily one carried on for profit.[116] However, there is no indication that Congress intended the profit motive of a sovereign as a threshold requirement for applying the commercial activity exception.[117]

The fact that a contract for services may have a "*public purpose*" is irrelevant. It is the *commercial nature* of an activity that is the critical factor.[118] Thus, contracts by a foreign government to buy equipment for its Armed Services constitutes a commercial activity to which sovereign immunity does not apply.[119] Furthermore, sales and authorization for issuance of sale in the United States, constitute "*commercial activities*" carried on in the United States by a foreign state.[120]

A transaction need not be made in connection with a business or commercial enterprise operated by the sovereign in order to be "*commercial*" for the purposes of the Act. Transactions between strictly governmental entities and commercial enterprises are covered by the commercial activity exception if the role of the sovereign is one which *might be played* by a private actor.[121] In addition, advertising and promotion of an industry are activities in which a private party *could* engage and which are customarily carried on for profit. Thus, these activities are within the meaning of the commercial activities exception.[122] Other activities that have been construed as commercial under the Act include a breach of contract action for an Argentine national hired by the Spanish government to develop marketing of Spanish wines in the Midwestern

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115. *See In Re* Sedco, Inc., 543 F. Supp. 561, 565 (S.D. Tex. 1982) (holding that the Mexican National Oil Company's drilling of the infamous IXTOC I well in the Gulf of Mexico was not a "commercial activity").

116. Gibbons v. Udaras, 549 F. Supp. 1094, 1110 (S.D.N.Y. 1982).

117. Joseph v. Office of Consulate Gen. of Nigeria, 830 F.2d 1018 (9th Cir. 1987), *cert. denied,* 485 U.S. 905 (1988). The court stated that profit motive and the connection of the transaction with a business or a commercial enterprise operated by a sovereign are not prerequisites to the application of the commercial activity exception. Therefore, a lease agreement executed by the Nigerian Consulate to provide residences for employees was a commercial activity for the purpose of a landlord's breach of contract claim.

118. United Euram Corp. v. Union of Soviet Socialist Republics, 461 F. Supp. 609, 611 (S.D.N.Y. 1978) (holding that a contract to pay salaries and expenses for artists involved in a "cultural exchange" tour was commercial despite the fact that the contracts were artistic and governmental in nature).

119. McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341 (8th Cir. 1985), *cert. denied,* 434 U.S. 948 (1985) (explaining that the intent of Iran to use the goods for military purposes did not take the transaction outside of the commercial activities exception). *See also* Behring Int'l Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383 (D.N.J. 1979), *aff'd*, 699 F.2d 657 (3d Cir. 1982) (use of the Iranian Air Force as transport for a commercial activity does not allow for immunity when a contract breach occurs since engagement in commercial activity constitutes a waiver of jurisdictional immunity).

120. Jackson v. People's Republic of China, 550 F. Supp. 869 (N.D. Ala. 1982), *aff'd,* 794 F.2d 1490 (11th Cir. 1986), *cert. denied,* 480 U.S. 917 (1987) (with respect to bearer bonds issued by the Imperial Chinese government in 1911, People's Republic of China not entitled to general immunity under the Foreign Sovereign Immunities Act). *See also* Sugarman v. Aeromexico, Inc., 626 F.2d 270 (3d Cir. 1980).

121. *See* Meadows v. Dominican Rep., 817 F.2d 517, 523 (9th Cir. 1987), *cert. denied,* 484 U.S. 976 (1987).

122. Tucker v. Whitaker Travel, Ltd., 620 F. Supp. 578 (D.C. Pa. 1985), *aff'd,* 800 F.2d 1140 (3d Cir. 1986) (unpublished opinion), *cert. denied,* 479 U.S. 986 (1986).

United States[123] and a lease agreement executed by the Nigerian Consulate to provide residences for employees.[124]

III. THE § 1605(A)(2) EXCEPTIONS TO THE ACT[125]

Once a classification determination is made, the act must fall under an exception to the Foreign Sovereign Immunity Act. Under §1605(a)(2) there are three exceptions under which a foreign sovereign loses immunity. Two of these exceptions require that an act be performed in the United States, while the third exception merely requires a direct effect in the United States. Thus, whenever a foreign sovereign acts outside the scope of its immunity, it may be sued.

A. Based Upon a Commercial Activity Carried on in the United States by the Foreign State

The first exception to sovereign immunity requires an act to be based upon a commercial activity carried on in the United States by the Foreign State.[126] Courts of appeals and district courts have announced widely varying formulations of the jurisdictional scope of this clause. These formulations may be divided into five categories: (1) the literal approach; (2) the nexus approach; (3) the causal connection; (4) the doing business approach; and (5) the jurisdictional nexus approach.[127] However, as previously discussed, the most widely accepted approach is the jurisdictional nexus approach.[128]

Jurisdictional nexus allows courts to start from a principle of immunity and then create exceptions to the general principle.[129] Jurisdictional nexus strikes a balance between those aggrieved by the acts of governmental entities and the sovereignty of foreign states,[130] in that the focus of the jurisdictional nexus approach is on the particular conduct giving rise to the claim and whether that conduct "actually constitutes" or is "in connection with" a commercial activity.[131] For example, conduct which "actually constitutes" or is "in connection with" a commercial activity would be the sale of airline tickets and tourist cards by a foreign sovereign in the United States.[132] But, the mere fact

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123. Segni v. Commercial Office of Spain, 835 F.2d 160 (7th Cir. 1987) (hiring of a marketing agent is certainly an activity in which a private person can engage, thus sovereign immunity is not available).

124. Joseph v. Office of Consulate Gen. of Nigeria, 830 F.2d 1018 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988). *See supra* note 117.

125. *See supra* note 56 for full text of this statute.

126. 28 U.S.C. § 1605(a)(2) (1989).

127. *See supra* notes 83–111 and accompanying text.

128. *See supra* notes 103–111 and accompanying text.

129. HOUSE REPORT, *supra* note 28, at 6616. *See also* Vencedora Oceanica Navigacion v. Campagnie Nationale Algerienne De Navigation, 730 F.2d 195 (3d Cir. 1984).

130. *Vencedora*, 730 F.2d at 202. *See also* remarks of Bruno Ristau, former Chief of Foreign Litigation section of Civil Division of the United States Department of Justice: "[O]ur courts are not [to be] turned into small 'international courts of claims'." *Id.*

131. Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1379–80 (5th Cir. 1980) (plaintiff's action for breach of contract was "based upon" the sale of airline tickets and tourist cards by the Dominican Republic in the United States and thus was not barred by foreign sovereign immunity).

132. *Id.* at 1380.

that a governmental entity *is* doing business in the United States is *insufficient* to establish jurisdiction under this clause.[133]

B. Based Upon an Act Performed in the United States in Connection with a Commercial Activity of the Foreign State Elsewhere

The second exception under § 1605(a)(2), considers "conduct of the foreign state in the United States which relates either to a regular course of commercial conduct elsewhere or to a particular commercial transaction concluded or carried out in part elsewhere."[134] The act, however, must be specific and performed in the United States by the foreign entity in order to invoke jurisdiction. The acts covered by this subsection are limited to those which independently "form the basis of a cause of action."[135] Thus, an act by a foreign state in the United States that violates United States securities laws or the wrongful discharge of the foreign state employee employed in the United States in connection with overseas commercial activity satisfies the requirement.[136]

Jurisdiction under this clause was found by the D.C. Circuit in *Gilson v. Republic of Ireland.*[137] In *Gilson,* an American citizen became involved in a commercial venture for the development of quartz crystals in Ireland. After the plaintiff moved his family, equipment and technology to Ireland, the defendant breached the employment contract.[138] In determining United States jurisdiction, the court stated that the "act performed in the United States" was the enticement of the plaintiff.[139] The "commercial activity of the foreign state elsewhere" was the quartz crystal business in which plaintiff and defendant were involved.[140] Thus, jurisdiction was obtained under the Act due to the actions of the defendant within the United States, even though the cause of action arose in Ireland.

C. Based Upon an Act Performed 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

Analysis under the third exception found in § 1605(a)(2) focuses on the words "*direct effect*" and "*in the United States.*" Since the Foreign Sovereign Immunities Act does not define "*direct effect*", courts have relied on the House Report to determine Congress' intent.[141] The House Report described the operation of the "*direct effect*" clause as applying to "commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, RESTATEMENT OF THE LAW, SECOND,

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133. *Vencedora,* 730 F.2d at 202.
134. HOUSE REPORT,*supra* note 28, at 6617.
135. *Id.* at 6618.
136. *Id.* at 6617.
137. 682 F.2d 1022 (D.C. Cir. 1982), *on remand,* 606 F. Supp. 38 (D.D.C. 1984), *aff'd,* 787 F.2d 655 (D.C. Cir. 1986).
138. *Id.* at 1026.
139. *Id.* at 1027.
140. *Id.*
141. *See* Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981), *cert. denied,* 454 U.S. 1148 (1982); America West Airlines, Inc. v. GPA Group, LTD., 877 F.2d 793 (9th Cir. 1989).

FOREIGN RELATIONS LAW OF THE UNITED STATES (1965)."[142] Section 18 of the RESTATEMENT provides that a state will have jurisdiction to proscribe a rule of law and attach legal consequences to conduct that occurs outside its territory and causes effects within its territory if the effect occurs as a *direct and foreseeable* result of the conduct performed outside the territory. [143]

Most judicial interpretation of the "*direct effect*" clause using section 18 for guidance has concluded that Congress intended this clause to reach *only* conduct causing an effect that is "*substantial*" and "*direct and foreseeable*".[144] However, the Second Circuit has consistently held that courts need not be restrained by the Act's legislative history.[145] Although courts have interpreted direct effects in numerous ways, mere United States citizenship or United States residence of the plaintiff is not enough.[146] But the D.C. Circuit held that a foreign agency's detention of a ship at its port and demand for payment in the United States, met both the direct and substantial requirements under § 1605(a)(2).[147]

However, to be *direct*, an effect must also be foreseeable. The Ninth Circuit held that injury to a murder victim's relatives in the United States was not a "direct effect" because the injury was not foreseeable.[148] Other courts

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142. HOUSE REPORT, *supra* note 28, at 6618.

143. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 18 cmt. f (1965). Comment (f) to § 18 succinctly states: "The effect within the territory must be substantial and occur as a direct and foreseeable result of the conduct outside the territory."

144. America West Airlines, Inc. v. GPA Group, LTD., 877 F.2d 793, 798 (9th Cir. 1989) (holding that a "foreign sovereign's activities must cause an effect in the United States that is substantial and foreseeable in order to abrogate sovereign immunity"). *Id.* at 799. This standard has also been accepted by the Third, Fifth, Sixth, Seventh, Ninth, and D.C. Circuits. *See also* Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic, 877 F.2d 574 (7th Cir. 1989), *cert. dismissed,* 112 S. Ct. 1657 (1992); Gould, Inc. v. Pechiney Ugine Kuhlman, 853 F.2d 445 (6th Cir. 1988), *cert. denied,* 490 U.S. 1065 (1989); Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511 (D.C. Cir. 1988); Zernicek v. Brown & Root, Inc., 826 F.2d 415 (5th Cir. 1987), *cert. denied,* 484 U.S. 1043 (1988); Harris Corp. v. National Iranian Radio & Television, 691 F.2d 1344, 1351 (11th Cir. 1982) (citing *Texas Trading* but applying the substantial and foreseeable consequences test).

145. International Hous. Ltd. v. Rafidain Bank Iraq, 893 F.2d 8, 11 n.2 (2d Cir. 1989). *See* Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981), *cert. denied,* 454 U.S. 1148 (1982) (rejecting view that the effect in U.S. must be "substantial" and "foreseeable" because § 18 concerns application of substantive American law abroad, not principles of extraterritorial jurisdiction). *See also* Martin v. Republic of S. Afr., 836 F.2d 91 (2d Cir. 1987) (reaffirming the Texas Trading view that courts construing the direct effect clause should not be constrained to follow the "substantial" and "foreseeable" factors).

146. HOUSE REPORT, *supra* note 28, at 6616. The report states that it will be up to the courts to determine whether a particular commercial activity has been performed in whole or in part in the United States. The definition is intended to reflect a degree of contact beyond that occasioned by citizenship or residence in the United States.

147. Transamerican S.S. Corp. v. Somali Democratic Republic, 767 F.2d 998 (D.C. Cir. 1985) (holding that this action met the requirements for jurisdiction under the Foreign Sovereign Immunities Act, since a significant transaction was effectuated in the United States at the Somali Shipping Agency's insistence, with an American corporation transferring $28,000 from a New York bank to the Somali government's D.C. bank).

148. Berkovitz v. Islamic Republic of Iran, 735 F.2d 329 (9th Cir. 1984), *cert. denied,* 469 U.S. 1035 (1984). The wife and children of an American citizen murdered in Iran brought a wrongful death action against Iran. The court dismissed for lack of jurisdiction under § 1605(a)(2). The court held that the Act's exceptions were inapplicable because the act of murder did not occur in connection with the United States citizen's job and did not cause a direct effect in the United States. The *Berkovitz* Court cited the district court in Verlinden B.V. v. Central

have held that causing injury to an American citizen abroad does not cause a direct effect in the United States.[149]

The Second Circuit concluded in *Carey v. National Oil Corp.*[150] that a direct effect can arise not only from a tort,[151] but also from cancellation of an oil contract.[152] However, mere financial loss incurred by a United States corporation does not, in itself, constitute a direct effect for the purposes of § 1605(a)(2).[153] For the financial loss to be "direct," the corporate entity must be placed in financial peril as an immediate consequence of the defendant's unlawful activity.[154]

The latter part of the clause considers an act that causes a direct effect in the United States.[155] In determining where the effect is felt directly, courts often look to the place where the legally significant acts giving rise to the claim occurred.[156] However, there must be some "specific" act performed in the United States by the foreign entity in order to invoke jurisdiction. Courts also consider the Congressional concern with providing access to the courts to those aggrieved by the commercial acts of the foreign sovereign.[157] Thus, in determining jurisdiction, courts concern themselves with the extent of the contact with the United States and determine whether that nexus sufficiently implicates the interests of the forum's jurisdiction in controlling conduct within its borders.

Bank of Nigeria, 488 F. Supp. 1284, 1298 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd on other grounds*, 461 U.S. 480 (1983), which stated that "injury to the victim's bereaved relatives living in the United States is not sufficiently 'direct' or 'substantial' to support the assertion of Federal jurisdiction." *Berkovitz*, 735 F.2d at 332.

149. *See, e.g.*, Tucker v. Whitaker Travel, Ltd., 620 F. Supp. 578 (D.C. Pa. 1985), *aff'd*, 800 F.2d 1140 (3d Cir. 1986) (unpublished opinion), *cert. denied*, 479 U.S. 986 (1986). The plaintiff filed suit for injuries sustained while horseback riding in the Bahamas. The court held that the government's decision of how and when to regulate tourism and specifically horseback riding, were governmental and not subject to scrutiny in the United States courts. In addition, although advertising and promotion of tourism and horseback riding are commercial activities within § 1605(a)(2), they are too attenuated to satisfy requirements that claims be "based upon" commercial activity in the United States for purposes of jurisdiction. *Id.*

150. 592 F.2d 673 (2d Cir. 1979).

151. *See* Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056 (E.D.N.Y. 1979) (man lost his life in a hotel fire); Upton v. Empire of Iran, 459 F. Supp. 264 (D.D.C. 1978), *aff'd*, 607 F.2d 494 (2d Cir. 1979) (man injured when roof of building collapsed on him).

152. Carey v. National Oil Corp., 592 F.2d 673 (2d Cir. 1979). Although the court declined to invoke jurisdiction in this case because the cause of action failed the direct effects test, subsequent courts have used the *Carey* court's rationale to justify jurisdiction by United States courts in breach of contract claims. *See* Wyle v. Bank Melli of Tehran, Iran, 577 F. Supp. 1148 (N.D. Cal. 1983).

153. Gregorian v. Izvestia, 871 F.2d 1515, 1526–27 (9th Cir. 1989), *cert. denied*, 493 U.S. 891 (1989).

154. Weltover, Inc. v. Republic of Argentina, 941 F.2d 145 (2d Cir. 1991), *aff'd*, 112 S. Ct. 2160 (1992) (noting that courts should be mindful of Congress' concern with providing "access to the courts" to those aggrieved by the commercial acts of a foreign sovereign).

155. 28 U.S.C. § 1605(a)(2) (1989); *see supra* note 56 for full text of the statute.

156. *See* Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511, 1515 (D.C. Cir. 1988) (legally significant act must occur in the United States).

157. HOUSE REPORT, *supra* note 28, at 6605.

IV. IRAN'S ACTS CONSTITUTE "COMMERCIAL TERRORISM"

On October 14, 1992, Joseph J. Cicippio, his wife Elham, and former hostage David Jacobsen,[158] filed a civil suit based upon, *inter alia*, the commercial activity exception of the Foreign Sovereign Immunity Act, in the United States District Court in Washington, D.C.. The complaint seeks $600 million of Iran's frozen assets on the grounds that its government sponsored "*commercial terrorism.*" [159] The complaint alleged, *inter alia*, that Iran not only waived its immunity under the Act, but also acted outside the scope of immunity provided by the Foreign Sovereign Immunities Act, by engaging in a commercial activity—commercial terrorism—having a direct effect in the United States.[160]

Cicippio alleges that Iran engaged in "commercial terrorism" by promoting, controlling, financing, and directing the hostage taking in Beruit in an attempt, *inter alia*, to release frozen Iranian assets from United States banks.[161] Additionally, Iran, through its agents and servants promoted, controlled, financed, and directed commercial terrorism in order to further its commercial activities worldwide.[162] Cicippio further argues that since abduction of American citizens as hostages is not a normal or lawful activity in which governments engage, Iran cannot claim sovereign immunity for the acts.[163] Furthermore, Cicippio argues that Iran performed wrongful commercial acts of terrorism.

Commercial terrorism is *not* a protected activity under the Foreign Sovereign Immunities Act.[164] Nor are extra-governmental activities directed at citizens of other countries protected under the Act.[165] Thus, there is a difference when a foreign sovereign exposes its own citizens to terrorist activities and when a foreign sovereign abducts foreign nationals in other countries in order to obtain or to reclaim that to which it is not entitled.[166] In the former situation,

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158. Jacobsen was the director of the American University Hospital in Beruit who was taken hostage in 1985 and held for 17 months.

159. *2 Ex-Hostages Sue Iran for $600 Million,* L.A. TIMES, October 15, 1992, at A16. The plaintiffs are claiming damages for kidnapping, physical abuse, false imprisonment, inhumane medical treatment, loss of job opportunities, and pain and suffering.

160. Cicippio v. Islamic Republic of Iran (compl., § III, ¶ 1) [hereinafter Complaint]. "Defendant, Iran, is a foreign sovereign whose activities herein were outside the scope of immunity provided by the Foreign Sovereign Immunities Act." *Id.*

161. Bush Administration officials stated that Iran paid for the Beruit hostages imprisonment. The Bush administration gave the captors $2 million for each hostage released. *2 Americans Who Were Beruit Hostages Sue Iran,* N.Y TIMES, October 15, 1992, at A20. *See supra* note 3.

162. Complaint at § III, ¶ 5. "Defendant, Iran, through its agents and servants, promoted, financed, directed, controlled, supported, supplied and developed commercialized terrorism in order to further its commercial activities worldwide, pursuant to 28 U.S.C. §1605(a)(2)." *Id.*

163. *See supra* notes 112–24 and accompanying text.

164. 28 U.S.C. § 1605 (1989).

165. The purpose of sovereign immunity is to protect governments from claims arising out of its lawful activities. 28 U.S.C. §§ 1601–11 (1989) define the exceptions to this immunity, which include any commercial act performed by a foreign sovereign which causes a direct effect in the United States.

166. Interview with Kathleen G. Sumner, Esq., former Assistant Professor of Law at Campbell University, Norman A. Wiggins School of Law and currently with the firm of

United States courts have no jurisdiction under the Act. However, the latter situation is entitled to jurisdiction under the Act in order to ensure the safety of United States citizens abroad and guarantee that they will not be used for political leverage.[167]

Finally, the release of the hostages, conditioned upon the return of Iran's assets, arguably creates a "substantial contact" with the United States.[168] This "substantial contact" passes the jurisdictional nexus test, adopted by the *Sugarman* Court,[169] which requires only *some* connection between the plaintiff's grievance and the foreign sovereign's commercial activity.[170] The release of these assets constitutes a direct effect in the United States resulting from Iran's tortious acts against the hostages and the United States.[171] Thus, Cicippio alleges Iran's commercial terrorism was "carried on in the United States" within the meaning of the third clause of § 1605(a)(2) of the Act.[172]

A. Commercial Terrorism Fits Within the Commercial Activity Exception of the Foreign Sovereign Immunities Act

Cicippio alleges that Iran engaged in commercial terrorism, that is, terrorism undertaken for financial gain.[173] Cicippio charges that Iran directed the Beirut kidnapping so that it could, *inter alia*, help negotiate the hostage's release and gain, through that assistance, leverage to free Iranian assets frozen in United States banks.[174] Cicippio was abducted while walking on the American University campus in Beirut.[175] Cicippio was seized because of his high profile position of Deputy Controller at the American University and his United States citizenship.[176] The Iranians expected that the seizing of an important American University official, and other hostages, would spur the United States government to a quick response to their demands for the release of the Iranian assets.[177] The Iranians hoped that by orchestrating the abduction of

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Donaldson and Horsley, P.A., Greensboro, N.C., in Myrtle Beach, S.C. (September 30, 1992).

167. *Id.*

168. Evidence exists which clearly demonstrates that Iran not only ordered the taking of the hostages, in hopes of securing the release of the monies frozen in United States banks, but also exercised dominion and control over the acts of its terrorist agents, financed the activities of the terrorist agents, and fed the hostages meals from an American plane hijacked by terrorists and flown to Iran. Dan Oberdorfer, *Iran Paid For the release of Hostages: Tehran Gave Captors Up To 2 Million For Each, Officials Say,* WASH. POST, January 19, 1992, at A1.

169. Sugarman v. Aeromexico, Inc., 626 F.2d 270 (3d Cir. 1980).

170. *Id. See supra* notes 103–111.

171. *See* section III(C) for discussion of the direct effects clause of the Foreign Sovereign Immunities Act.

172. 28 U.S.C. §§ 1603(e), 1605(a)(2), *cited by* the Complaint at § III, ¶ 9. "The release of Joseph J. Cicippio and David Jacobson, conditioned upon the return of Defendant's assets frozen in the United States, had such a 'substantial contact with the United States' that Defendant's commercial terrorism was 'carried on in the United States' within the meaning of the Foreign Sovereign Immunities Act. 28 U.S.C. §§ 1603(e), 1605(a)(2)." Complaint at § III, ¶ 9.

173. Complaint at § III (5) and (6).

174. *2 Americans Who Beirut Hostages Sue Iran*, N.Y. TIMES, October 15, 1992, at A20.

175. Telephone interviews with Jim Godin and James Oliver, attorneys for Joseph Cicippio, with the firm Murphy and Oliver, Norristown, Pa. (January 28, 1993).

176. *Id.*

177. *Id.*

Cicippio, as well as the others,[178] they could force the United States government to release their assets frozen in United States banks in return for the Iranians help in gaining the hostages safe release.[179]

The Eleventh Circuit in *Nelson v. Saudi Arabia*[180] held that tortious conduct committed against a United States citizen in the course of his employment in Saudi Arabia was a "commercial activity" by Saudi Arabia under the Act. The court based its rationale on the fact that Nelson had been recruited and hired in the United States and these actions were commercial in nature and caused a direct effect in the United States.[181] However, the Supreme Court rejected Nelson's claim under the Act.[182] The Court held that the conduct alleged, that Nelson was falsely imprisoned and beaten 39 days; "boils down to an abuse of power of the police."[183] The Court further stated that a foreign state's exercise of that power is particularly sovereign in nature.[184] Nelson's argument that the mistreatment was a result of his reporting safety violations, which he uncovered during the course of his employment, does not constitute commercial activity. The Court reasoned that although retaliation may have been the purpose of the torts committed against Nelson, this is irrelevant in determination of an activity's commercial character.[185]

Cicippio can be distinguished from *Nelson* due to the nature of the activity undertaken by Cicippio's captors. Cicippio and the other hostages were abducted for profit and commercial gain. Cicippio was designated by his captors and their Iranians sponsors as a person of high stature in the United States. The Iranians and their agents believed that, due to his position at the American University in Beirut, he was important enough to the American government that they would agree to a quick release of Iranian assets. Unlike *Nelson*, where the actions of his captors were not commercial in nature, the commercial terrorism in which Cicippio's captors engaged was solely entered into for commercial gain and profit. But for the frozen assets in United States banks and the Iranian's need for a better bargaining position to retrieve those assets, Cicippio would have never been seized.[186]

Assuming that the plaintiffs can successfully prove that Iran controlled this act of commercial terrorism, in order fall within the commercial activities exception Cicippio must be able to prove that this action caused a "direct effect in the United States" under § 1605(a)(2) clause 3.

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178. David Jacobsen is also a party to the suit. *See supra* note 158.
179. Telephone interview with Jim Godin and James Oliver, *supra* note 175.
180. 923 F.2d 1528 (11th Cir. 1991), *rev'd* 113 S. Ct. 1471 (1993), *and opinion vacated*, 996 F.2d 270 (11th Cir. 1993).
181. *Id.*
182. Saudi Arabia v. Nelson, 113 S. Ct. 1471 (1993).
183. *Id.* at 1479.
184. *Id.*
185. *Id.*
186. The Supreme Court in *Nelson* states that in order to qualify for commercial activity it must be the type of action in which a private party engages which is distinct from those actions peculiar to sovereigns. Commercial terrorism can be performed by either private parties or terrorists. 113 S. Ct. 1471 (1993).

B. Iran's Acts Caused a Direct Effect in the United States

In order to meet the direct effects test, the plaintiffs must be able to show that a specific, direct and foreseeable act occurred in the United States.[187] Arguably, the removal of the frozen Iranian assets from United States banks constitutes a "direct effect in the United States". In *Wyle v. Bank Melli of Tehran, Iran,*[188] the court held that a demand on an American bank by an Iranian guarantor bank for payment on a letter of credit was an "act performed in the United States."[189] However, mere financial loss in the United States is not enough to satisfy the direct effects standard. The seminal case in this area is *Texas Trading & Milling Corp. v. Federal Republic of Nigeria,*[190] where the court held that the relevant inquiry is whether the financial loss suffered was "direct".[191] In *Texas Trading* the court stated that financial loss suffered from a foreign sovereign's breach of contracts to purchase cement, or from a breach of letters of credit issued in connection with those contracts, was "direct" for the purpose of the Act.[192]

In *Transamerica S.S. Corp. v. Somali Democratic Republic*[193] the court held that where a foreign sovereign caused an American corporation to transfer funds from its New York bank to the foreign sovereign's bank in Washington D.C. and caused the American corporation to incur debts in the United States, the foreign sovereign caused a direct effect in the United States.[194] In both the *Transamerica* and *Texas Trading* cases, something legally significant occurred in the United States. A bank refused to pay on a letter of credit, money was transferred, or a debt was incurred. Thus, the direct effects test was met.

Proving that Iran's acts meet the direct effects test will be the biggest obstacle in the *Cicippio* case. The only direct effects suffered in the United States are the loss of assets to United States banks and any pain and suffering to Cicippio's friends and family. In *Texas Trading* and *Transamerica* the courts indicate that mere financial loss is not enough.[195] In addition, the court in *Berkovitz* [196] refuted the notion that the death or injury of an American citizen abroad caused a direct effect in the United States.[197] Thus, the suffering of

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187. *See supra* notes 141–157 and accompanying text.
188. 577 F. Supp. 1148 (N.D. Cal. 1983).
189. *Id.* at 1159 n.5.
190. 647 F.2d 300 (2d Cir. 1981), *cert. denied,* 454 U.S. 1148 (1982).
191. In *Texas Trading*, the payment of money was to occur in the United States and the plaintiff was a United States corporation. These two factors alone were sufficient to establish an effect in the United States. *Id.* at 312.
192. *Id.* at 312. In addition the *Texas Trading* Court stated that the courts construing the "direct effects" clause are bound by legislative history suggesting that the effect must be both "substantial" and "foreseeable." *Id.* at 311 n.32. *See also,* Martin v. Republic of South Africa, 836 F.2d 91, 94 (2d Cir. 1987). However, this view has been expressly rejected by the Third, Fifth, Sixth, Seventh, Ninth and D.C. Circuits, all of which apply the substantial and foreseeable standards. *See also supra,* note 144 and accompanying text.
193. 767 F.2d 998 (D.C. Cir. 1985).
194. *Id.*
195. *See supra* notes 190 and 193. In both cases something in addition to financial loss was suffered by the parties.
196. Berkovitz v. Islamic Republic of Iran, 735 F.2d 329 (9th Cir. 1983), *cert. denied,* 469 U.S. 1035 (1984).
197. *Id.*

bereaved relatives living the United States is not sufficient to support the assertion of federal jurisdiction.[198]

However, if these arguments were coupled with the financial loss to the United States banks, Cicippio may be able to successfully meet the standard required in the direct effects test. A convincing public policy argument can be made that forcing the United States government to pay money to Iranian sponsored terrorists to gain the release of innocent United States citizens not only compromises the international integrity of the United States but also forces the United States government into a non-negotiable contract to which it is an unwilling party.

C. Terrorism Is Not an Inherently Sovereign Activity

The activity undertaken, rather than the purpose for undertaking the activity, is the critical focus of a majority of courts.[199] However, the essence of an act may be defined by its purpose, thereby requiring an inquiry into the purpose in order to determine an act's nature. When considering whether an act is commercial, courts inevitably focus on the nature of the act. Thus, if a government engages in a contract for an inherently sovereign activity, such as buying supplies for its country or people, the purpose of the activity—to provide for its people—is irrelevant. The key fact is that the nature of the transaction is inherently commercial because it involves a contract for services.

In identifying commercial terrorism, the nature versus purpose test presents a problem because the nature of the activity, abduction of hostages, while illegal, has more of a political nature than a commercial one. However, upon closer examination in the Cicippio case, the nature of the activity—kidnapping—was commercial and engaged in for profit. Although this is not an activity customarily carried on for profit, its profit motive can distinguish it from purely state political activities, which are protected under the Act. Indeed, terrorism is not a recognized sovereign activity peculiar to sovereigns. In this case a failure to recognize the nature of the activities of the Iranian government and their terrorist agents as commercial would result in a justification for other foreign governments to successfully engage in commercial terrorism.[200]

In *Letelier v. Republic of Chile*,[201] the court determined that an entire activity cannot be deemed "commercial" within the meaning of the commercial activity exception of the Act, simply because certain aspects are commercial.[202] Letelier was a former Chilean ambassador killed by a car bomb allegedly planted by agents of the Chilean government. Representatives for Letelier's estate instituted a civil tort action against Chile's national airline, alleging, *inter alia*, complicity.[203] The Court of Appeals held that the airline's assets were not

198. *Id.* at 332 (citing the district court in Verlinden, B.V. v. Central Bank of Nigeria, 488 F. Supp 1284, 1298 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd on other grounds*, 461 U.S. 480 (1983)).

199. *See infra*, the nature versus purpose test discussed at Section II (A) in the text.

200. *See supra* Section II(A).

201. 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985).

202. *Id.*

203. *Id.*

subject to a judgment obtained against the Chilean government.[204] The Court disregarded the plaintiffs' attempt to characterize the actions of the airline in aiding the assassins as "commercial activities", holding that the legislative history and case law construing this section compel a different finding. The court held that even if the airline acted in complicity with the Chilean secret police, as the trial court found, these activities had nothing to do with its place in commerce.[205] "The nature of its course of conduct could not have been as a merchant in the marketplace."[206] The *Letelier* Court held that an alleged "kidnapping" by a foreign state is not a "commercial activity" under the Foreign Sovereign Immunities Act because a private person cannot lawfully engage in that activity.[207]

A private person cannot legally engage in murder any more than he can in kidnapping or criminal assault. However, carriage of passengers and packages is an activity in which a private person can engage.[208] But it is not for those activities that the airline's assets were liable. Rather, the plaintiffs asserted that the airline was a co-conspirator or joint-tortfeasor. In other words, the airline was accused of engaging in state sponsored terrorism, the purpose of which was to assassinate the Chilean ambassador. Politically motivated assassinations are traditionally not the function of private individuals. Nor can they scarcely be considered commercial activities.[209]

Letelier may be clearly distinguished from *Cicippio* because Letelier was a Chilean citizen, who died as a result of clearly political acts by his *own* government. Cicippio, on the other hand, was an American citizen, employed at American University, and abducted by terrorists in Lebanon, under the direct control of Iran. No political act was performed by Cicippio. He was not an agent of the United States government. He held a civilian position, which was paid for and contracted for in the United States. The nature of Cicippio's abduction by the terrorists was not only because he was an American, but also because Iran required hostages to further their commercial activity, and to obtain leverage to demand the release of the frozen Iranian assets.

D. Iran's Acts of State Sponsored Terrorism Were Performed by the State or its Agents

By definition, state sponsored terrorism requires that the State incite groups or individuals to commit terrorist acts, direct acts of terrorism, recruit terrorists for their own programs, and carry out terrorist acts through their own agents.[210] Counsel for Cicippio assert that the Iranian government

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204. *Id.* The claim was based on the fact that the airline had been used to transport people and equipment necessary to carry out the assassination.

205. *Id.* at 795.

206. *Id.* at 795–6.

207. *Id.* at 797.

208. *Id. See also,* Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir. 1980). In *Arango* the plaintiffs sued the wholly owned national airline of the Dominican Republic after being expelled from a flight because that country's official would not permit entry. The court concluded that the airline's acts in re-routing the plaintiffs were non-commercial because the airline acted merely as an agent of the Dominican government.

209. 748 F.2d at 797.

210. Kenneth Abbot, *Economic Sanctions and International Terrorism,* 20 VAND. J. OF TRANSNAT'L L. 289 (1987).

controlled the entire process.[211] Whether the evidence will support the allegations made is an issue left to the trier of fact. Moreover whether commercial terrorism fits under the exceptions of the Act is a question of first impression. However, based upon the facts as proffered by counsel, it appears that there is a cause of action for state sponsored commercial terrorism.

VII. IRAN ARGUES THAT THE FSIA EXTENDS ABSOLUTE IMMUNITY TO ITS ACTS

Iran responded to the complaint filed by Ciccipio with a Motion to Dismiss for lack of subject matter and personal jurisdiction under the Foreign Sovereign Immunities Act of 1976.[212] Bruno Ristau, counsel for Iran, in his supporting memorandum argued that Iran was not subject to suit under the commercial activities exception to the FSIA.[213] Iran, while engaged in verbal rhetoric and fantasy devoid of legal authority,[214] argued that under Rule 12(b) of the Federal Rules of Civil Procedure, the court retains no personal or subject matter jurisdiction.

Under the Act, a defendant must specially plead immunity.[215] Thus, the burden of establishing immunity lies with the defendant claiming it.[216] However, once the Act is invoked and supporting motions and affidavits are filed in support of lack of subject matter and personal jurisdiction, the burden then shifts to the plaintiff to produce evidence that the defendants are not entitled to immunity.[217] Thereafter, the burden shifts back to the defendant to produce evidence in support of immunity.[218]

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211. One of the attorneys for Joseph Cicippio stated during a CNN interview on October 15, 1992:

> Well, ... it's as clear as a bell that the Iranians controlled this entire process. Whether it was from the moment of taking — at least, all the way through the time of the release, it was the Iranians in charge. We have a lot of evidence indicating that it's the Iranians .... The quarrel is the Iranians conducted this whole thing, and they've engaged in commercial terrorism. And if a government acts outside the bounds of laws and against treaties they sign at the United Nations, we think they can be sued in United States courts.

Reid Collins interview with Frank Murphy, attorney for Joe Cicippio, (CNN, October 15, 1992).

212. Pursuant to FED. R. CIV. P. 12(b), the defendant, the Islamic Republic of Iran, petitioned the court for an order dismissing the instant suit for lack of subject-matter and personal jurisdiction under the Foreign Sovereign Immunities Act.

213. Memorandum of Points and Authorities in Support of Defendant's Motion To Dismiss, Cicippio v. Islamic Republic of Iran (D.D.C.) (No. 92-2300) [hereinafter Memorandum].

214. The Memorandum, *supra* note 213, states "[p]laintiffs engage in some Alice-in-Wonderland verbal magic. They in effect say: 'if one were to call the activity with which we intend to charge Iran "commercial terrorism" and if one were to repeat this moniker often enough, the claims asserted ... are likely to fall within ... the Act." *Id.* at 11 (citations ommitted).

215. Sheldon v. Government of Mexico, 729 F.2d 641 (9th Cir. 1984).

216. De Letelier v. Republic of Chile, 567 F. Supp. 1490 (S.D.N.Y. 1983), *rev'd*, 784 F.2d 790, *cert. denied*, 471 U.S. 1125 (1985),

217. Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445 (6th Cir. 1988). In this case, Iran's motion was unsupported by affidavits. Argument on the defendant's motion was heard April 2, 1993.

218. *Id.*

Iran, in its motion, ignores the pleaded facts and rest upon a "shell game" in an attempt to cloud the definition of terrorism, evoking a contention that no agreement exists defining terrorism in international law.[219] In fact, in its supporting memorandum, the citation from Judge Edwards appears to condone the conduct of terrorists who are politically motivated.[220] Yet, in this case Iran refuses not only to answer the allegations as plead, they state that

> [t]hese are not allegations of fact; they are scandalous fiction that Iran need not, and does not, "admit"—not even for the limited purpose of the instant motion. It is almost trite to observe that if there were any truth to the claim that Iranian diplomatic representatives posted in the United States or other Iranian "operatives" (whatever that may mean) are engaged in a program of "terrorism" in the territory of the United States, the United States has ample means to detect and interdict such activities, and to remove the authors of such illicit activities from its territory. It is simply not rational for the plaintiffs to ask this Court to assume that the illicit activities by Iranian diplomats either escaped notice by the American authorities or that the American authorities deliberately kept the American public in the dark about the claimed terrorist activities of Iranian diplomats in the United States.[221]

The sole authority cited by Iran in its memorandum relating to § 1605(a)(2), defines "commercial" as those activities which a sovereign exercises which can also be exercised by private citizens.[222] Clearly, international terrorism directed and controlled by a foreign sovereign are exactly the type of acts in which a private party could engage and does engage. The criminal acts of a sovereign should always be outside the scope of immunity. Criminal acts by a sovereign make that sovereign a private player within the market, and thus, those acts are commercial acts.

VII. CONCLUSION

Cicippio's claim of commercial terrorism qualifies as a commercial activity under the Act. The nature of this terrorist act was inherently commer-

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219. In its memorandum in support of its motion, Iran states:

> We have canvassed the complaint with care to ascertain what acts of "worldwide terrorism" of a commercial nature that have a close nexus with the United States are supposed to have been committed by Iran in relation to these plaintiffs, so as to support a cause of action under the "commercial" exception to immunity. We have searched in vain. It is readily apparent that plaintiffs' use of the term "terrorism" is purely emotive; it does not aid legal analysis.
>
> We respectfully refer the Court to the incisive analysis of the term "terrorism" by Judge Edwards in his separate concurring opinion in *Tel-Oren v. Lybian Arab Republic*, 726 F.2d 774, 795–96 (D.C. Cir. 1984). As Judge Edwards' discussion makes clear, there is no agreement of what constitutes "terrorism" in international law. Judge Edwards concluded:
>
> The divergence as to basic norms of course reflects a basic disagreement as to legitimate political goals and the proper method of attainment. Given such disharmony, I cannot conclude that the law of nations—which, we must recall, is defined as the principles and rules that states feel themselves bound to observe, and do commonly observe—outlaws politically motivated terrorism, no matter how repugnant it might be to our own legal system.

726 F.2d at 796.

220. Memorandum, *supra* note 213, at 12-14 (footnote omitted).

221. Memorandum, *supra* note 213, at 14–15 (footnote ommitted).

222. Republic of Argentina v. Weltover, 112 S. Ct. 2610, 2166 (1992) (citing Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 698–705 (1976)).

cial and clearly undertaken for commercial gain and profit. Additionally, these activities caused a direct effect due to the combined effects of removing Iranian assets from United States banks, as well as pain and suffering incurred by Cicippio's family and friends. Terrorism is not an inherently sovereign activity, thereby ensuring immunity under the Act. Indeed, it is often engaged in by private persons. By proving the Iranian government controlled, conducted, promoted, directed and financed this sovereign undertaking, Cicippio can establish a claim under the commercial activity exception to the Act thereby achieving subject matter jurisdiction in the United States Federal District Court.

Countries that exceed their sovereign authority and thereafter engage in non-governmental activities such as commercial terrorism must be required to compensate their victims. Under the commercial activity exception of the Act, a foreign sovereign may be brought to justice and reparation may be paid to the hostage and/or his family. Congress intentionally drafted the commercial activity exception ambiguously in order to allow the courts to administer swift justice as required.[223] In the *Cicippio* case, no money will compensate Joseph J. Cicippio or his family for the 1,908 days of abuse. However, reparation under the Act will help correct the terrible injustice inflicted upon all the hostages.

Presumably now that has Iran moved to dismiss for lack of subject matter jurisdiction, the district court must interpret the Act. The court deferred judgment to the appellate court.[224] However, the prevailing party will undoubtedly be subjected to numerous appeals, and the issue will not be finally decided until such time as the United States Supreme Court either denies *certiorari* or enters a decision.

Since this will be an issue of first impression, counsel for Cicippio must confront the subject matter jurisdiction issue not only with legal logic but also with creativity. Furthermore, once the commercial terrorism theory is accepted by the court, counsel must prove that Iran did *in fact*, through its agents and servants, promote, finance, direct, control, support, supply, and develop commercialized terrorism in order to further its commercial activities worldwide. The public policy argument should succeed because of the prevalence of hostage taking and terrorist acts committed by Iranian sponsored terrorist within and without the United States in recent years. The multinational treaties against the abduction of hostages supports the jurisdictional commercial terrorism theory. The proper forum is *not* with the international court. In the international forum no binding authority exists.[225] By contrast, a civil trial in the United States allows the trier of fact to award reparation if the plaintiffs prove the facts alleged in their complaint. Thereafter, any judgment obtained may be executed upon the Iranian monies remaining in United States banks. If courts allow foreign sovereigns to escape justice, or at least civil liability, as a result of their

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223. *See supra* note 43.

224. The matter relating to jurisdiction is now pending before the appellate court.

225. James Oliver, one of the attorneys for Cicippio, stated that the International Court of Justice was not chosen as a forum for the action, because it has no jurisdiction to enforce a judgment. By contrast, the Foreign Sovereign Immunities Act provides for attachment of assets in the United States in order to satisfy a judgment rendered by a United States court. Mr. Oliver also noted the lack of success experienced by other hostage plaintiffs when they used the International Forum. Telephone Interview with James Oliver, Partner in the firm of Murphy and Oliver, Norristown, Pa. (January 27, 1993).

commercial terrorist acts, the United States creates an incentive for foreign sovereigns, or their agents, to abduct our citizens, without civil recourse for our citizens, while the foreign sovereign acts outside the scope of their governmental authority.[226]

226. A bill, H.R. 2357, was presented to the 102d Congress by Representative Smith from Florida. It not only discussed the need to create an exception to the Foreign Sovereign Immunities Act, but it would also allow United States courts to hear claims for torts committed in foreign countries.