THE PERILS OF WORKING FOR A FOREIGN GOVERNMENT: FOREIGN SOVEREIGN IMMUNITY AND EMPLOYMENT

RICHARD L. GARNETT*

I. INTRODUCTION

An increasingly-observed phenomenon in the employment field is the recruitment of persons from developed countries, particularly the United States, to work for foreign governments and their instrumentalities. Such employment may take place in the United States, in the foreign country itself, or in a third country. Employees may work in highly commercial enterprises such as national airlines or shipping companies, or in entities more closely connected with government policy such as diplomatic or consular missions.

One issue that has arisen in regard to this employment is whether the employee should have the same rights of redress as any other worker under the law of the United States in the event, for example, of termination. Initially, the response would seem to be in the affirmative as the identity of the responsible employer would seem to matter little from the point of view of the employee whose rights have been infringed. However, principles of international law, in particular the doctrine of foreign sovereign immunity, may dictate a different result. This doctrine provides, in essence, that a foreign government (or its entities) may be subject to the jurisdiction of another country's courts only under certain conditions.[1] Until the 1970s, it was generally accepted as a matter of international law that a foreign State enjoyed absolute immunity; it never could be impleaded involuntarily before the courts of another State. The principle underlying this absolute immunity was that of sovereignty, namely, that subjecting a State to a foreign court's jurisdiction without consent would unduly compromise a State's sovereignty.[2]

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* B.A., LL.B., University of New South Wales, Australia; LL.M., Harvard Law School; Senior Lecturer in Law, Monash University, Australia.

1. An obvious example of where a foreign State would be amenable to the jurisdiction of another country's courts is where it has submitted to that jurisdiction.

2. A United States citizen brought one of the earliest United States cases involving an employment claim against a foreign sovereign entity for unpaid wages. There, the court stated that immunity would not bar the action only if it could be shown that the employer was an "autonomous, corporate body" as opposed to "an agency or instrumentality of the Hungarian

However, particularly after the Second World War, the jurisprudence of a number of European countries suggested it was no longer appropriate for a State to enjoy total immunity from jurisdiction where it was acting in a manner similar to a private entity, for example, where it entered a commercial transaction. The interests of the private parties with whom the State dealt also had to be taken into account. In particular, those interests included the right to redress in the event of a breach of undertaking by the State.

As a result, a new rule of "restrictive immunity" appeared, based on a distinction between acts *jure imperii* and acts *jure gestionis*. Acts *jure imperii* were those of an especially sovereign or governmental nature which no private person would ordinarily perform; whereas acts *jure gestionis* were those acts which, although performed by governments, were, or equally could be, performed by private persons. The United States was influenced by these developments and first judicially recognized the sovereign/private distinction in 1976.[3] More significantly, Congress enacted the Foreign Sovereign Immunities Act (FSIA) in that year to codify the doctrine of restrictive immunity. As will be discussed later, the FSIA contains a number of provisions of relevance to employment disputes, including one that provides a United States court may exercise jurisdiction over a claim against a foreign State who has engaged in "commercial activity."[4]

Government exercising a government function." *See* Telkes v. Hungarian Nat'l Museum, 38 N.Y.S.2d 419, 424 (N.Y. App. Div. 1942). This approach represents a clear application of the absolute immunity doctrine.

3. *See* Alfred Dunhill of London Inc. v. Republic of Cuba, 425 U.S. 682 (1976). However, a form of restrictive immunity was pioneered in the United States in *Victory Transp. Inc. v. Comisaria General de Abastecimiento y Transportes,* 336 F.2d 354 (2d Cir. 1964). In that case, a distinction was drawn between the "private" and "public" acts of a foreign State with the following listed as "strictly public and political" and so entitled to immunity: (1) internal administrative acts; (2) legislative acts; (3) acts concerning the armed forces; (4) diplomatic acts; and (5) public loans. *Id.* at 360. The New York Supreme Court applied this test to a foreign sovereign employment dispute in *Gittler v. German Info. Ctr.,* 408 N.Y.S.2d 600 (N.Y. App. Div. 1978), where a claim was lodged to recover payments for work performed on documentary films for a foreign government-owned information center. The court held that the claim was barred by immunity on the basis that it involved employment of an individual to perform services in connection with public relations, which was a "diplomatic act" in the terms of *Victory Transport. See id.* at 602. The court reached this conclusion by reference to the 1961 Vienna Convention on Diplomatic Relations (to which the United States is a party) in which the promotion of friendly relations and the development of cultural relations generally were regarded as diplomatic functions. *See id.* It is suggested that the Second Circuit Court in *Victory Transport* did not intend for such a wide interpretation of "diplomatic acts" or else foreign States in an excessively-wide range of situations would retain immunity. Instead, "diplomatic acts" was intended only to refer to activities (such as employment) at *consular and diplomatic missions.* In any event, the result in *Gittler* is unlikely to be repeated after the enactment of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. §§ 1602-1611 (1976).

4. *See* Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1605(a)(2) (1976). Under section 1603(a), "foreign state" is defined to include "an agency or instrumentality of a foreign state." Under section 1603(b), "agency or instrumentality of a foreign state" is defined as an entity: "(1) which is a separate legal person, corporate or otherwise and (2) which is an organ of a foreign state . . . or a majority of whose shares or other ownership interest is owned by a

The focus of this article will be determining whether there is any recognizable pattern by which United States courts have dealt with pleas of sovereign immunity by foreign States in actions relating to employment. When dealing with the case law of domestic (national) courts of other countries,[5] four approaches are noticeable in the judicial and legislative treatment of employment claims against foreign States.

The first approach involves situations where courts and legislative bodies have focused on the context or location of the employment. Where a person is employed in a highly sovereign context such as an embassy, regardless of the employee's level or capacity, the forum State should grant immunity to the foreign sovereign. The basis for such immunity is that any inquiry into activities at such a place necessarily would intrude upon the foreign State's sovereignty. By contrast, where a person is employed in an organization, the nature and functions of which are identical to corporations in the private sector, a plea of foreign sovereign immunity rarely should be available because no sensitive governmental concerns are implicated. This approach has been relied-upon to some extent in the U.S. decisions on foreign sovereign employment.[6]

A second approach to employment claims by foreign states has paid particular attention to the status and duties of the employee. A finding of immunity should be more likely where the plaintiff employee is in a senior, policy-oriented position because he or she is closer to the sovereign "core" of the foreign State. However, where an employee is engaged in routine, purely "operational" duties, or in work that is highly similar to that performed by persons in private corporations, then a grant of immunity would not be appropriate. This analysis, focusing on the functions and role of the employee, has been a common feature of United States decisions.[7]

A third approach to resolving immunity pleas in employment actions focuses on the territorial connection between the forum, the employee, and the employment contract. A number of national immunity statutes, including the FSIA, expressly require a territorial connection between the claim and the forum of adjudication before jurisdiction can be exercised. This territorial view has its origins in the doctrine of adjudicatory jurisdiction and reflects the influence of the due process clause in the United States Constitution. Due process has been interpreted to require a United States court to have an adequate connection with the subject matter of the claim ("minimum contacts") before jurisdiction can be exercised.[8]

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foreign state . . . and (3) which is neither a citizen of a State of the United States . . . nor created under the laws of a third country." 28 U.S.C.A. § 1603(b).

5. *See* Richard Garnett, *State Immunity in Employment Matters,* 46 INT'L & COMP. L.Q. 81, 83-85 (1997).

6. *See infra* notes 22-40 and accompanying text.

7. *See infra* notes 42-65 and accompanying text.

8. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945). The territorial approach to foreign sovereign immunity is supported by a number of writers on the basis that it provides

The fourth tendency perceptible in the case law and legislation of countries dealing with employment disputes with foreign States has been the isolation and characterization of the particular claim brought by the employee in order to ask whether such an action excessively implicates the sovereignty of the foreign State. For example, where an employment action involves an investigation into the conduct of a State's security services, a court should deny jurisdiction, granting immunity. However, where the claim merely requires an examination of conduct typically performed by persons situated in the private sector, immunity should not be granted.[9]

All these approaches represent attempts to reconcile a number of competing interests at work in a foreign sovereign employment case. While there is a plaintiff employee's interest in obtaining redress, there is also a foreign State employer's interest in protecting its governmental functions from the scrutiny of other States. Similarly, while the forum State has an interest in protecting its nationals and residents employed by the foreign State, it also has a conflicting concern to maintain good diplomatic and commercial relations with the foreign State defendant.[10] This article focuses on how these balances are drawn and how satisfactory the results are from the perspective of each of the parties. The four approaches described above will provide a framework for analyzing the United States law of foreign sovereign immunity in the employment context.

II. THE "COMMERCIAL ACTIVITY EXCEPTION" TO IMMUNITY AND FOREIGN SOVEREIGN EMPLOYMENT

The provision of the FSIA most frequently invoked in employment claims is section 1605(a)(2), known as the "commercial activity exception" to immunity.[11] Before considering its terms in detail, it should be noted that the subject matter of the provision is "commercial activity." The significance

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certainty and predictability, particularly when compared to the more nebulous public/private acts distinction. *See, e.g.*, James Crawford, *A Foreign State Immunities Act for Australia?*, 8 AUST. Y.B. INT'L L. 71, 90 (1983) [hereinafter Crawford I]; James Crawford, *International Law and Foreign Sovereigns: Distinguishing Immune Transactions*, 54 BRIT. Y.B. INT'L L. 75, 102-13 (1983) [hereinafter Crawford II]; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 333 (4th ed. 1990); Michael Singer, *Abandoning Restrictive Sovereign Immunity: An Analysis In Terms of Jurisdiction to Prescribe*, 26 HARV. INT'L L.J. 1 (1985).

9. *See infra* notes 66-73 and accompanying text.

10. A number of commentators have identified the need to examine the competing interests in a foreign sovereign immunity dispute. *See, e.g.*, Thomas H. Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 FORDHAM L. REV. 155, 209 (1981); David A. Brittenham, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440, 1466-67 (1983); Crawford I, *supra* note 8, at 106.

11. Writers on the FSIA commonly have used this shorthand expression. *See, e.g.*, Joan E. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 YALE J. INT'L L. 489 (1992); Richard Wydeven, *The Foreign Sovereign Immunities Act of 1976: A Contemporary Look at Jurisdiction Under the Commercial Activity Exception*, 13 REV. LITIG. 143 (1993).

of this is that, unlike other national statutes and international conventions on sovereign immunity, no specific provision has been made in the FSIA for employment matters. For example, Section 4 of the U.K. State Immunity Act of 1978 provides that a foreign State will not be immune where an entity of that State is a party to an employment contract made, or to be performed, in the United Kingdom. The contrasting greater generality of section 1605(a)(2) in applying to "commercial activity" rather than "employment" has several implications for the resolution of labor disputes by United States courts.

First, while it is necessary under section 1605(a)(2) for courts to resolve a preliminary question as to whether an employment claim even falls within the scope of "commercial activity"[12] under the U.K. provision and its progeny, no such inquiry is needed given the specific reference to employment contracts.[13] Second, given the broad nature of the term "commercial activity" in section 1605(a)(2), this section has been invoked in contexts other than employment disputes. The principles derived from such cases then have been applied to labor cases. Whether courts' views on the scope and interpretation of the commercial activity exception in non-employment situations should be applied automatically to the employment context is questionable, given the disparity in subject matter. To remedy this situation and to create a coherent body of foreign sovereign employment precedent, the best solution ultimately may be to amend the FSIA to include a provision dealing specifically with employment matters, similar to that in the U.K. immunity statute.[14] However, it is first necessary to consider the law as it now stands.

Section 1605(a)(2) provides that:

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12. As will be seen, the legislative history to the FSIA does provide some guidance as to the content of "commercial activity" but, in the specific context of employment matters, the precise meaning of the concept remains unclear.

13. One reason for this difference is that the drafters of the FSIA chose to adopt the broad *jure imperii/jure gestionis* distinction from the civil law countries as their basis for resolving sovereign immunity questions, whereas the drafters of the U.K. legislation were influenced by the writing of Lauterpacht who, twenty years earlier, had pioneered the idea that immunity law should be defined in a series of specific, narrowly-defined categories. *See* Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 221, 239 (1951). The "categorization" approach to immunity now has some strong adherents. *See, e.g.*, Crawford II, *supra* note 8, at 94; BROWNLIE, *supra* note 8, at 333. Other writers also have expressed sympathy with this view. *See* Peter Trooboff, *Foreign State Immunity: An Emerging Consensus of Principles*, 200 RECUEIL DES COURS 235, 300-03 (1986). Supporters of the categorization approach argue that it greatly simplifies the immunity inquiry and is therefore a better method of representing the various interests at stake. It is interesting to note that the approach to immunity taken in *Victory Transp.*, *supra* note 3, is closer to the specific category approach than the public/private distinction adopted in the FSIA.

14. American writers support this view. *See, e.g.*, Joan E. Donoghue, *Taking the Sovereign Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 YALE J. INT'L L. 489, 528-29 (1992); Amelia L. McCarthy, *The Commercial Activity Exception-Justice Demands Congress Define a Line in the Shifting Sands of Sovereign Immunity*, 77 MARQ. L. REV. 893, 916-17 (1994).

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .
> (2) in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . .[15]

The first question to consider in relation to section 1605(a)(2) is what constitutes "commercial activity." The legislative history indicates that it is activity that is not "public or governmental in nature."[16] It then states that "the employment of diplomatic, civil service or military personnel would be public or governmental in nature but not the employment of United States citizens or third country nationals by the foreign state in the United States."[17] The "engagement of laborers, clerical staff or public relations or marketing agents" would also be considered a "commercial activity."[18]

Once a "commercial activity" has been identified, the plaintiff employee must show a territorial connection between the claim and the United States forum in which he or she wishes to sue. The claim must be based upon (1) a commercial activity carried on in the United States, (2) an act performed in the United States in connection with a commercial activity elsewhere, or (3) an act outside the United States having a direct effect on the United States. The following are observations that can be made as to the approach taken by the drafters of the FSIA to employment claims against foreign sovereigns.

In creating the commercial activity exception, the drafters of the FSIA have relied upon a combination of the aforementioned factors, namely, the context of employment, the status of the employee, and the territorial connection between the action and the United States forum. First, reference is made to "diplomatic, civil service or military personnel."[19] This suggests that employment at embassies, consulates, or military bases is sensitive for a foreign State because of the nature of activities usually undertaken there. Therefore, rarely should this be the subject of jurisdiction by a United States court.

Secondly, in stating that "the engagement of laborers, clerical staff or public relations or marketing agents"[20] (as opposed to "diplomatic, civil service or military personnel") may constitute "commercial activity," Con-

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15. U.S.C.A. § 1605(a)(2) (1976).

16. Legislative History of Foreign Sovereign Immunities Act of 1976, H.R. REP. NO. 94-1487, *reprinted in* UNITED NATIONS LEGISLATIVE SERIES, MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY 107 (1982).

17. *Id.*

18. *Id.* at 108.

19. *Id.* at 107.

20. *Id.* at 108.

gress seems to be suggesting first, that more routine or menial employment, even possibly in a sovereign location, may not give rise to immunity. Second, it suggests that duties similar to those performed in the private sector also should be subject to adjudication. In this respect, the legislative history appears to accord weight to the status and duties of the employee.

The principle of territorial nexus also is relevant according to the drafters of the provision. Not only must the action be connected with the forum in one of the three specified ways before a United States court will accept jurisdiction, but also the courts are to take a more sympathetic approach to exercising jurisdiction where the employment of United States citizens (or "third country nationals") is involved.[21] The implication here is that a foreign State's sovereignty would be more heavily involved were a United States court to adjudicate upon an employment claim brought by one of the foreign State's own citizens.

The greater part of this article considers how courts have applied the commercial activity exception in the employment context, starting with their attempts to define the term "commercial activity," an issue which has been particularly relevant to those claims in which plaintiffs have sought to come within the first clause of section 1605(a)(2). Important to note is the extent to which the courts have relied upon the factors mentioned above in their analyses of commercial activity: namely, the nature of the employing organization, the position and duties of the employee in the organization, the territorial nexus between the employee, the claim and the United States forum, and finally, the nature of the claim, that is, the degree to which the particular pleading impinges upon the sovereignty of the foreign State. Attention will also be drawn to other attempts to define commercial activity by the courts in foreign sovereign employment cases, such as, by reference to recruitment activities in the United States. A consideration will then be made of how United States courts have placed great obstacles on employee recovery where the employment has taken place outside the United States by restrictive interpretations of a number of terms in section 1605(a)(2). In particular, the requirements that the action be "based upon" a commercial activity in the United States (to come within the first limb of section 1605(a)(2)) and that an act outside the United States have a direct effect in that country (to come within the third limb of the section) will be discussed. Finally, consideration will be made of the position of an employee not directly hired by a foreign State but working for a United States company which has contracted to provide services to the State.

21. *Id.* at 107.

A. The First Clause of Section 1605(a)(2): "Commercial Activity Carried on in the United States"

1. The Nature of the Organization as Commercial Activity

A number of actions involving employees of foreign State-owned trading or commercial organizations who were performing duties in the United States have been allowed to proceed in United States courts under the first clause of section 1605(a)(2). This has been permissible because the nature of the enterprise's operations amounts to a "commercial activity carried on in the United States."[22]

United States nationals employed in the United States may find an example in the context of employment claims against foreign State-owned airlines. There, courts consistently have held that the employer is not entitled to immunity under the FSIA because the foreign State-owned organization is no different from airlines operating in the private sector. As a result, United States national employees have been entitled to bring claims for wrongful discharge under (1) the *Age Discrimination In Employment Act* (ADEA),[23] (2) Title VII of the *Civil Rights Act* (Title VII),[24] (3) the *Employee Retirement Income Security Act* (ERISA),[25] and (4) state law.[26]

The courts in those cases were influenced strongly by the policy that all persons employed in the United States should have the same rights of redress. Further, no entity should be able to escape its obligations as an employer under United States law by virtue of any special status as an organ of a foreign government where its activities were not materially different from those of private companies.[27]

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22. U.S.C.A. § 1605(a)(2) (1976).

23. *See* Starrett v. Iberia Airlines, 756 F. Supp. 292 (S.D. Tex. 1989); Helm v. South African Airways, No. 84 Civ. 5404, 1987 WL 13195 (S.D.N.Y. June 25, 1987); Kraikeman v. Sabena Belgian World Airlines, 674 F. Supp. 136 (S.D.N.Y. 1987); Gazder v. Air India, 574 F. Supp. 134 (S.D.N.Y. 1983). A foreign national who is a permanent resident of the U.S. is also covered by this rule. *See* Rao v. Kenya Airways Ltd., No. 94 Civ. 6103, 1995 WL 366305 (S.D.N.Y. June 20, 1995); Carponcy v. Air France, No. 84 Civ. 3072, 1985 WL 2511 (S.D.N.Y. Sept. 9, 1985).

24. *See* Starrett v. Iberia Airlines, 756 F. Supp. 292 (S.D. Tex. 1989); Lewis v. Air France Corp., 88 Civ. 4136, 1990 WL 49053 (S.D.N.Y. Apr. 18, 1990); Rao, No. 94 Civ. 6103, 1995 WL 366305; *E.E.O.C.*, EEOC Decision No. 86-8, 1986 EEOC LEXIS 1 (Apr. 25, 1986).

25. *See* Brown v. Austrian Airlines, No. CV-97-3798, 1997 WL 913334 (E.D.N.Y. Dec. 9, 1997).

26. *See* Grappo v. Alitalia Linee Aeree Italiane, 56 F.3d 427 (2d Cir. 1995); Hesse v. Air France, 902 F.2d 39 (9th Cir. 1990); Faycurry v. Yanni, No. 92-CV-71547-DT, 1993 WL 328168 (E.D. Mich. Mar. 8, 1993); Bajaj v. Air-India Airlines, No. 90 Civ. 1122, 1990 WL 138977 (S.D.N.Y. Sept. 19, 1990). *See also* Irish Int'l Airlines v. Levine, 369 N.Y.S.2d 24 (N.Y. App. Div. 1975).

27. After resolving the immunity question, the courts in a number of these cases then had to consider whether, although the entity was subject to United States domestic jurisdiction, United States employment protection legislation was intended to apply to foreign government

A similar approach has been taken in claims against other foreign State-owned commercial enterprises where the employment took place in the United States. Courts have assumed that because of the commercial nature of the enterprises in question, no question of immunity can arise. Consequently, in actions by employees of (1) banks for wrongful discharge,[28] (2) railway companies for personal injury or wrongful death,[29] and (3) a hospital for discriminatory hiring,[30] jurisdiction was exercised over the foreign State entity in each case.

Close reliance upon the commercial nature of a foreign State organization was evident in another type of labor case in which immunity was denied. The case involved a collective application by a trade union for certification of persons (usually United States residents or nationals) employed in the United States by a foreign State, rather than an action by an individual against his or her foreign State employer. In *State Bank of India v. National Labor Relations Board*,[31] a certification claim was brought against a foreign State-owned bank on behalf of the employees and the bank pleaded immunity. The court upheld jurisdiction because the bank had engaged in commercial activity in the United States. Examination of the character of the bank's activities revealed that the bank furnished "the same full range of commercial banking services usually provided by American banks"[32] and that it employed "American residents in furtherance of these commercial activities."[33]

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instrumentalities as a matter of statutory construction. Not surprisingly, the view was taken that a finding of non-immunity for an employee of a foreign state entity would be a hollow victory if its action were then to fail because of a narrow interpretation of the applicable U.S. statutory law. *See* Starrett v. Iberia Airlines, 756 F. Supp. 292 (S.D. Tex. 1989); Gazder v. Air India, 574 F. Supp. 134 (S.D.N.Y. 1983).

28. *See* Awan v. Bank Bumi Daya, No. 95 Civ. 6630, 1996 WL 248946 (S.D.N.Y. May 27, 1996); Raji v. Bank Sepah-Iran, 495 N.Y.S.2d 576 (N.Y. App. Div. 1985).

29. *See* Campbell v. Canadian Nat'l Ry., 684 F. Supp. 14 (D. Me. 1988); Bailey v. Grand Trunk Lines New England, 805 F.2d 1097 (2d Cir. 1986).

30. *E.E.O.C.*, Decision No. 85-11, 1985 WL 32785 (E.E.O.C. July 16, 1985).

31. 808 F.2d 526 (7th Cir. 1986).

32. *Id.* at 535. The court gave as examples of such services: checking and deposit accounts, commercial loans, letters of credit, foreign currency exchange, and time deposits.

33. *Id. State Bank of India*, however, has been criticized on the basis that the court allowed a suit to be brought which was "unrelated" to the sovereign's commercial activities. *See* Kevin M. McGinty, *Opening the Courts to Protect Interests Abroad: The Effect of the Foreign Sovereign Immunities Act on Litigation With Developing Countries*, 10 B.C. THIRD WORLD L.J. 63, 84 (1990). In McGinty's view, it is an incorrect application of the commercial activity exception to the FSIA for "a sovereign's commercial acts in the U.S. [automatically to] expose it to NLRB jurisdiction of its labor disputes," simply so as to "encourage compliance with U.S. labor laws." This objection has force and it is interesting that, in later cases involving foreign sovereign employment, some courts have not been content to find the commercial activity exception satisfied simply on the presence of such activity, but have drawn attention to the requirement in the first clause that the claim be "based upon" such activity. While in early cases the phrase "based upon" was ignored or liberally interpreted, more recently it has received a stricter construction which has had the effect of significantly increasing the grant of immunity to foreign sovereigns in employment cases. *See, e.g.*, Saudi Arabia

Apart from commercial enterprises which are highly similar to those found in the private sector, foreign States often will have establishments in other countries designed to carry out certain broad policy aims, such as the dissemination of cultural material or assistance in the marketing of the home country's products. Such establishments are different in legal form from the diplomatic or consular missions of a foreign State in that they have their own legal personality and are generally not staffed by career civil servants.

The position of employees of such organizations who wish to sue their employer is not as clear as that of those employed in State corporations. In one case discussed below,[34] a court found that there was no "commercial activity" present in a claim against a government trade office. In reaching this conclusion, the court relied upon the nature of the organization's activities, which it considered to be "governmental" rather than "commercial."

In that case,[35] a New York court had to consider a secretary's claim for unemployment benefits under a New York statute after her employment with the Japan Development Bank (JDB) had been terminated. Under the statute, benefits were only payable to a person in "covered" employment. The court, however, took the view that because the JDB was entitled to immunity under the FSIA, it was not a covered employer within the terms of the enactment.[36]

The court found the JDB entitled to immunity because there was no "commercial activity" present in the case; the nature of the activities undertaken by the organization was governmental. As the Court noted, JDB's activities were limited to gathering governmental, financial and economic development information, and acting as liaison in connection with the capital-raising activities of its main office or related governmental ministries. Although the word "Bank" appeared in the name "Japan Development Bank", its office did not "exercise any powers of a commercial bank."[37] It was, in effect, an instrument of government policy. Therefore, the court resolved the immunity question in this employment case by reference to the nature of the employer.

Another situation in which the nature of the employing organization has been relevant to determining "commercial activity" is in the context of actions by employees of foreign sovereign military enterprises. Here, United States courts have taken the view that these actions, even those undertaken by United States citizens employed by foreign military forces, should be barred by immunity because the highly sensitive nature of the workplace precludes any finding of commercial activity. In *Friedar v. Government of Israel,*[38] a United States citizen was unable to sue the Israeli Government for injuries suffered while serving in the Israeli army. The court said that service

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v. Nelson, 507 U.S. 349 (1993), discussed *infra*, notes 94-101 and accompanying text.

34. Claim of Iacobelli, 484 N.Y.S.2d 318 (N.Y. App. Div. 1985).
35. *Id.*
36. *Id.* at 319.
37. *Id.*
38. 614 F. Supp. 395 (S.D.N.Y. 1985).

in the army did not constitute "commercial activity" because recruitment and training of an army and determining the eligibility of veterans' benefits were sovereign activities only conductible by governments. In this respect, it is worth recalling the legislative history to section 1605(a)(2) where it states that the employment of "military personnel" is public or governmental in nature.[39]

Another recent decision regarding employment at other "highly sovereign" enterprises, such as consulates and embassies, involved an employee at the Israeli Consulate. The employee, a public affairs officer, was prevented from bringing a sex discrimination claim due to the sovereign nature of her place of employment.[40] The court's approach is similar to that prevailing under the immunity legislation of other common law countries.[41]

2. The Status and Duties of the Employee as Commercial Activity

A different definition of "commercial activity," one that focuses on the status and duties of the employee, has been used in a number of other United States decisions. In a case involving foreign State-owned corporations,[42] a dual United States/Brazilian national was held entitled to bring a claim of sexual harassment against her employer, a shipping company. The court emphasized her employment status as a secretary, stating that the nature of her duties would be "hardly within the unique sphere of sovereign authority."[43] The legislative history to the FSIA, in which it was stated that the employment of "clerical staff" likely would be considered a commercial activity,[44]

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39. *See* H.R. REP. NO. 94-1487 (1976), *reprinted in* UNITED NATIONS LEGISLATIVE SERIES, MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY 107 (1982).

40. *See* Ferdman v. Consulate Gen. of Isr., No. 98 C 1555, 1998 WL 120230 (N.D. Ill. 1998). The court there described "[c]onsulate activities . . . [as] of course the epitome of 'sovereign or public acts' . . . ." *Id.* at *4. *But see* Holden v. Canadian Consulate, 92 F.3d 918 (9th Cir. 1996) (discussed *infra* notes 58-65 and accompanying text), where a claim by an employee at a consulate was said to be based upon "commercial activity" because the duties performed by the employee were routine in nature and insufficiently connected with the sovereign functions of the consulate.

41. See section 16(1)(a) of the State Immunity Act 1978 (U.K.), *reprinted in* UNITED NATIONS LEGISLATIVE SERIES, MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY 47 (1982), in which both members of the diplomatic and consular staff and the administrative and technical staff of missions are barred from suing their foreign State employer. Similar provisions exist in Pakistan and South Africa. Such an approach has effectively restored absolute immunity to foreign States in the context of employment disputes at missions.

42. Zveiter v. Brazilian Nat'l Superintendency of Merchant Marine, 833 F. Supp. 1089 (S.D.N.Y. 1993).

43. *Id.* at 1093.

44. In a motion for reargument, the defendant foreign State employer attempted to rely upon principles of territorial nexus to overcome the court's initial refusal to grant immunity. It referred to the legislative history of section 1605(a)(2) in which it was stated that "the employment of American citizens . . . by the foreign state in the United States" would be commercial activity, and then suggested that, because of the employee's dual Brazilian/U.S. na-

also was referenced by the court with approval.

A similar approach to defining commercial activity was taken in a claim by a United States citizen employed to market, sell, and distribute a foreign State entity's products in the United States.[45] Such a contract, in terms of the duties to be performed, was found to be "of the same character as that which can be entered into by a private player in the market."[46]

Courts also have made a finding of "commercial activity," relying on the status and duties of an employee, in disputes involving employment at trade and cultural offices of foreign governments. In *Segni v. Commercial Office of Spain*,[47] an Argentine national (and United States permanent resident) was entitled to sue his employer, an agency of the Spanish Government responsible for promoting Spanish exports to the United States. In finding that Segni's employment was a commercial rather than a sovereign activity, the court focused on the status and position of the employee rather than the nature of the employing organization: "[T]he mere fact that Segni was an employee of the Commercial Office will not, by itself, render his hiring commercial activity . . . . We must also examine the nature of Segni's activities in order to determine whether *they* are governmental or private."[48]

The court noted that although the Office had a number of sovereign tasks and its broad mission was governmental (namely to increase Spanish exports to the United States), the employee here was engaged in merely providing services in the area of product marketing. As such, "he had no role in the creation of government policy or its administration; rather, he simply carried it out."[49] He was not "privy to [the] political deliberations" of the office so "as to be considered a part of the Spanish Government as a civil servant or diplomat would be."[50] Immunity, therefore, was inappropriate. The court referred to the legislative history of section 1605(a)(2) to support this finding, where it was stated that "the employment . . . of . . . *public relations or marketing agents* . . ." was a commercial activity.[51]

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tionality, she was outside the protection of the provision. The court disagreed, stating that not only was the employee a U.S. national, but she had been recruited in the United States, entered into her employment agreement there, and carried out her duties in that country. Therefore, there was a close connection between her U.S. citizenship and the employment relationship. Had she been recruited in Brazil, worked for the defendant there, and then moved to the United States, the result "might [have] be[en] different." *See* Zveiter v. Brazilian Nat'l Superintendency of Merchant Marine, 841 F. Supp 111, 112 (S.D.N.Y. 1993).

45. Sakhrani v. Takhi Corp., 96 Civ. 2900, 1997 U.S. Dist. LEXIS 13812 (S.D.N.Y. Sept. 5, 1997).

46. *Id.* at *17.

47. 835 F.2d 160 (7th Cir. 1987).

48. *Id.* at 164 (emphasis in original).

49. *Id.* at 165.

50. *Id.*

51. *Id.* (emphasis in original). The court also referred to the fact that had the employee been a Spanish citizen rather than a "third country national," the case for immunity would have been stronger. In its view, "a person hired by his own country's government to work abroad should have a somewhat lesser expectation of suing his homeland in his host nation's

It is interesting to compare *Segni* with the case of *Iacobelli*,[52] discussed earlier. Despite being employed in an organization of at least equivalent "sovereign" character to the bank which employed Iacobelli, Segni, in contrast to the latter, was entitled to sue his employer. The *Segni* court focused upon Segni's specific duties and their connection with the sovereignty of the foreign State rather than looking at the broader abstract nature of the organization as a whole. The result in *Segni* is even more remarkable compared with *Iacobelli*, given that Segni was in a relatively senior position, whereas Iacobelli was a secretary.[53]

Most recently, the approach in *Segni* was applied to allow a marketing executive at a foreign State-owned tourist authority to sue his employer for wrongful termination due to age discrimination.[54] Again, in defining "commercial activity," the court placed emphasis on the employee's position and role, as well as the fact that he did not hold the nationality of the foreign State employer.[55]

The position of the employee was also used to define "commercial activity" in a race discrimination action brought by a receptionist-switchboard operator at a foreign government-owned institution for cultural, educational, and informational exchange.[56] The tribunal noted that the House Report stated that "the employment . . . of . . . clerical staff . . ." was considered a commercial activity, and so rejected the institution's plea of immunity.[57] Interestingly, the institution had argued that immunity should be granted because it, as an organization, was engaged in the sovereign activity of cultural relations. The status and duties of the employee, therefore, were given priority over the nature of the organization in resolving the immunity question.

In another recent case, the court concentrated on the position of the employee in a dispute involving employment at a consular mission.[58] Once again, it may be that the House Report encouraged this view in its statement that employment of "diplomatic [or] civil service personnel" would be considered a governmental activity whereas "clerical staff, laborers, public relations and marketing agents" would be deemed commercial.[59] The clear im-

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courts." *Id.* at 165. In this respect, territorial nexus principles were used to support the court's conclusion on the immunity issue.

52. Claim of Iacobelli, 484 N.Y.S.2d 318 (N.Y. App. Div. 1985).

53. In a more recent case involving an employee action against a trade office of a foreign government, the Ninth Circuit Court allowed a number of claims to be brought on the basis that employment at such an establishment was a commercial activity. *See* Campbell v. Com. of Austl., 912 F.2d 468 (9th Cir. 1990) (unpublished table decision). Although the court did not give clear reasons for this conclusion, it is possible that the duties performed by the employee were a material factor. Nevertheless, *Campbell* is consistent in its result with *Segni*.

54. Elliott v. British Tourist Auth., 986 F. Supp. 189 (S.D.N.Y. 1997).

55. *Id.* at 194.

56. *E.E.O.C.*, Decision No. 85-11, 1985 WL 32785 (E.E.O.C. July 16, 1985).

57. *Id.* at 9.

58. Holden v. Canadian Consulate, 92 F.3d 918 (9th Cir. 1996).

59. *See* H.R. REP NO. 94-1487 (1976), *reprinted in* UNITED NATIONS LEGISLATIVE SERIES, MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY 108

plication from this distinction is that employees at consulates and embassies, apart from diplomats and foreign service officers, for example, those in more routine or menial positions, may be entitled to bring claims. Although employed in a sovereign location, their actual work is indistinguishable from that performed by persons in equivalent positions in the private sector. It is interesting to note, however, that if an approach focusing on the status and duties of the employee were to be adopted in disputes involving employment at missions, United States law would not be in accord with the position taken in most other common law countries where, effectively, all employees at diplomatic and consular missions are barred by immunity from bringing claims.[60]

Holden,[61] however, suggests that an employee-focused approach will be taken. There, a United States citizen employed as a commercial officer within the trade and investment section of a consulate brought claims for sex and age discrimination and breach of an employment contract against the Canadian Government. The claims arose after the foreign State decided to close the consulate and open a smaller office in its place without rehiring the employee.

After referring to the distinction drawn in the House Report between diplomatic and civil service personnel and other employees, the court then referred with approval to the *Segni* case, in particular its approach of determining whether commercial activity existed by reference to the status and duties of the employee.

The court in *Holden* then considered whether the employee came within the category of a "civil servant." It concluded in the negative on the basis that she had not competed for any examination prior to being hired, was not entitled to tenure, and received no benefits or civil service protection from the Canadian Government.[62]

The next issue was whether the employee formed part of the Consulate's diplomatic personnel. Again, the court found that she did not. Although Holden, unlike Segni, was employed as part of the Consulate's staff and not in a separate trade office, her *activities* were not those of a diplomat. She was engaged in "primarily promoting and marketing and she was not involved in any policy-making and was not privy to any governmental policy

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(1982).

60. *See* discussion at *supra* note 41. *But see* Ferdman v. Consulate Gen. of Isr., No. 98 C 1555, 1998 WL 120230 (N.D. Ill. 1998), where a claim by a public affairs officer at a consulate was rejected on the basis that nature of the workplace was sovereign. No regard was had for the position of the employee or the duties she performed. It is suggested that the approach in *Holden* is more consistent with the directions in the House Report. Interestingly, in Australia, under section 12(5) of the Foreign States Immunities Act of 1985, an approach is taken similar to that in the House Report, where administrative and technical staffs are permitted to sue their foreign State employer, at least where they are nationals or permanent residents of Australia. Diplomatic staff, however, have no rights of action.

61. Holden v. Canadian Consulate, 92 F.3d 918 (9th Cir. 1996).

62. *Id.* at 921.

deliberation."[63] Furthermore "she did not engage in any lobbying activity or legislative work for Canada, and she could not speak for the government."[64] Finally, as a United States citizen, she was not allowed inside the Consulate unless in the company of a foreign service officer.[65] As a result, the court found her employment was "more analogous to a marketing agent," in which she promoted various Canadian products. As this is work "regularly done by private persons," her employment was a commercial activity and so the Consulate was not entitled to immunity.

Accordingly, this is a very clear case of a court resolving the immunity issue in an employment case by reference to the status and duties of the employee; it also is interesting given that the place of employment (a consulate) is one of a foreign State's most sovereign locations.

3. The Nature of the Employee's Claim as Commercial Activity

By contrast, there have been cases where courts have found "commercial activity" in an employment dispute by reference to the nature of the particular claim brought by the employee on the basis that that it does not involve an intrusion into the sovereign affairs of a foreign State. This approach is evident in claims against foreign State-owned corporations and cultural institutions. In *LeDonne v. Gulf Air*,[66] a United States citizen once employed in the air freight sales office of Gulf Air, an airline owned jointly by a number of foreign States, brought a number of claims against her former employer. The plaintiff alleged that, while employed, she received permission from a senior officer in Gulf Air to sign his name when requesting complimentary air tickets for travel with another airline. Some months later, the officer told investigators from the other airline and the FBI that: (1) he had given no such authority to sign his name; (2) he had no knowledge of her request for tickets; and (3) the plaintiff was not an employee of Gulf Air. As a result of such testimony, the plaintiff was charged with fraud offenses. After the charges were dropped, the employee brought claims against Gulf Air for malicious prosecution, slander, and libel, and the airline pleaded immunity from jurisdiction.

The court found that Gulf Air was not entitled to immunity as the facts underlying the employee's claim amounted to "commercial activity." In its view, the unlawful conduct alleged against the airline, that is, the making of maliciously false statements to the effect that an employee had authority to use its name for the purposes of obtaining complimentary air tickets, was "manifestly private and commercial; it is activity in which a private person or airline can engage."[67] Therefore, because the claims here did not impinge

63. *Id.* at 922.
64. *Id.*
65. *Id.*
66. 700 F. Supp. 1400 (E.D. Va. 1988).
67. *Id.* at 1409.

upon the sovereignty of the foreign State owners of Gulf Air, there could no justification for imposing immunity. This was a case, consequently, in which the *nature of the particular claim* brought by the employee was used as a criterion to resolve the immunity issue rather than the status of the employee or the nature of the employer.

The D.C. Circuit Court also defined commercial activity on the basis of the nature of the claim in an unfair dismissal action brought by a United States national who was employed as a professor at a foreign State-owned university.[68] The court noted that the basis of the employee's claim was the seeking of redress arising from the termination of his employment contract. As to whether commercial activity was involved, the court concluded that *the act of termination of an employment contract itself* by a foreign State employer may amount to such activity because "there is nothing 'peculiarly sovereign' about unilaterally terminating an employment contract. Private parties often repudiate contracts in everyday commerce and may be held liable therefor[e]."[69]

The court also said that the nature of and the reasons for termination were irrelevant. Therefore, even where the contract was abrogated by a sovereign act such as a formal decree of the foreign government or by the outbreak of military hostilities, the act of abrogation of an employment agreement itself remained commercial.[70]

Determining commercial activity by examining the nature of the plaintiff's claim also was undertaken in the context of a claim for union certification on behalf of United States nationals employed at a German government subsidized cultural center. In *Goethe House (German Cultural Center) v. National Labor Relations Bd.*,[71] the Second Circuit Court held that the claim by the union was admissible because it did not involve German workers and would not "interfere with the Goethe House's implementation of West German cultural foreign policy."[72] From the court's point of view, the nature of the union's claim centered upon economic issues—wages and conditions of employment—and so did not implicate any sovereign concerns of the foreign State.[73]

4. Recruitment in the United States as Commercial Activity

Another type of case in which "commercial activity" has been identified involves an employee, usually a United States citizen, who has been recruited in the United States by a foreign State for employment overseas and

68. Janini v. Kuwait Univ., 43 F.3d 1534, 1536 (D.C. Cir. 1995).
69. *Id.* at 1537.
70. *Id.*
71. 869 F.2d 75 (2d Cir. 1989).
72. *Id.* at 79.
73. "We also fail to see how the Board's assertion of jurisdiction would cause disturbances and embarrassment in international relations." *Id.*

he or she has successfully argued that *the act of recruitment itself* amounts to commercial activity for the purposes of the first clause of section 1605(a)(2). It will be recalled that this clause creates an exemption from immunity for foreign States where the claim is based upon a commercial activity carried on in the United States. In determining whether recruitment amounts to commercial activity under this provision, courts also have relied upon section 1603(e) of the FSIA, which requires that, for there to be an activity "carried on in the United States," the activity must have a substantial contact with that country.[74] Thus, while courts have generally accepted the view that acts of recruitment amount to "commercial activity," the issue of most contention here has been whether there exists a sufficient degree of connection between the activity and the United States. The criterion of territorial nexus, therefore, has been relevant in resolving the immunity issue in this type of case.

One of the earliest cases in which it was argued that recruitment in the United States amounts to commercial activity was *Zedan v. Saudi Arabia.*[75] There, a United States citizen residing in California received a telephone call from a representative of the Arab Service Office (ASO) inviting him to work in Saudi Arabia on a construction project. Zedan agreed and traveled to Saudi Arabia where he entered into an employment contract with ASO, which was not an instrumentality of the Saudi Government. Shortly after Zedan began work, the Saudi Government took over the project, guaranteeing him his salary under the earlier agreement. However, when Zedan was not paid, he sued the government for breach of contract, in response to which the Saudi government pleaded immunity.

The issue for the court was whether the recruitment phone call amounted to "commercial activity carried on in the United States" in the terms of section 1605(a)(2) and, in particular, whether it amounted to a "substantial contact" in the terms of section 1603(e).[76]

The court found the phone call too insignificant a contact to constitute commercial activity in the United States. As to what would amount to a substantial contact, the court thought that a contract, one part of which was to be performed in the United States, would certainly qualify or, potentially, entry into a contract in the United States involving performance of work duties elsewhere. However, in the present case, no contract was entered into during the invitation phone call. At most, the call amounted to a "preliminary step" leading to the conclusion of a contract. In the court's view, acts which are "merely precursors to commercial transactions" rather than transactions themselves (such as newspaper advertisements inviting job applicants to go abroad), do not amount to commercial activity carried on in the United

74. 28 U.S.C.A. § 1603(e) (1998).
75. 849 F.2d 1511 (D.C. Cir. 1988).
76. 28 U.S.C.A. § 1603(e) (1998).

States.[77]

Another case in which the issues of recruitment and "substantial contact" were considered was *Forsythe v. Saudi Arabian Airlines Corp.*[78] This case concerned an action for wrongful discharge against a foreign State-owned airline brought by a United States national employed as a pilot in Saudi Arabia. Basing his claim on commercial activity carried on in the United States, the employee argued that the airline was not entitled to immunity under the FSIA because it had recruited him by advertising and interviewing in the United States. The court rejected this argument, stating that because "[the commercial activity upon which the] [p]laintiff's claims are based . . . [is] a contract entered into in the Kingdom of Saudi Arabia and performed solely in that country,"[79] it could not be argued that any commercial activity was carried on in the United States. Therefore, mere advertisement and recruitment alone in the United States, without any formal conclusion of a contract or any contractual performance there, cannot amount to commercial activity having a substantial contact with the United States. This approach seems consistent with that of the 11th Circuit taken in *Zedan v. Kingdom of Saudi Arabia.*[80]

The requirement that a contract of employment be entered into in the United States before recruitment and hiring of a person by a foreign State entity can amount to a commercial activity carried on in the United States has been confirmed in more recent cases. *Nelson v. Saudi Arabia*[81] involved a claim by a United States citizen who had responded to a printed advertisement in the United States seeking persons to work in a foreign State-owned hospital in Saudi Arabia. A United States agent of the Saudi Government had placed the advertisement. After submitting an application, Nelson was interviewed in Saudi Arabia and, upon returning to the United States, entered into a contract of employment. He then commenced work in Saudi Arabia before suffering the injuries to which his claim related.

The 11th Circuit Court held it was "clear" that the recruitment and hiring of Nelson in the United States amounted to "commercial activity" carried on in the United States.[82] The court's reasoning was that, unlike the employee in *Zedan*, Nelson not only had been made an offer of a job in the

77. *Id.* at 1513.

78. No. H-88-3157, slip op. (S.D. Tex. filed Dec. 6, 1989).

79. *Id.* at 2.

80. 849 F.2d 1511 (D.C. Cir. 1988). In *Brewer v. Socialist People's Rep. of Iraq*, 890 F.2d 97 (8th Cir. 1989), claims by two U.S. citizens who were recruited to work in Iraq and entered into contracts of employment in the U.S. prior to departure were based upon "commercial activity." Although the court gave little reasoning for this conclusion, the result on the facts of this case is consistent with *Zedan* and *Forsythe*.

81. 923 F.2d 1528 (11th Cir. 1991), *rev'd on other grounds sub nom*; Saudi Arabia v. Nelson, 507 U.S. 349 (1993).

82. The Supreme Court, on appeal, did not dissent from this view, although it did reverse the Circuit Court's decision to accept jurisdiction for other reasons, namely that the employee's claim was not "based upon" commercial activity in the United States.

United States, but also had entered into his contract of employment there. The territorial connection between his recruitment and the United States was, therefore, stronger.[83]

The same result was reached in *Janini v. Kuwait Univ.*,[84] where pre-employment negotiations and conclusion of an employment contract in the United States were considered "commercial activity" carried on in that country. Similarly, in *Bybee v. Oper der Standt Bonn*,[85] the granting of an audition and offer of employment to a United States citizen for a position abroad with a foreign State-owned opera company sufficed. Arguably, the court in *Bybee* took a more expansive view of what amounts to commercial activity in the United States by apparently not insisting upon the formal conclusion of a contract there.

Under the first limb of section 1605(a)(2), United States courts have resorted to a variety of approaches to find "commercial activity" in employment cases. In general, there has been a tendency to define the concept broadly to assist persons employed in the United States to secure redress. In this respect, the interest of the employee has been given priority over that of the foreign State.

B. The First Clause of Section 1605(a)(2): That the Claim Is "Based Upon" a Commercial Activity

Under the first clause of section 1605(a)(2), for a plaintiff to overcome immunity, it is not only necessary to prove the existence of a "commercial activity," but also that his or her claim is "based upon" such activity. Prior to the decision of the Supreme Court of the United States in *Saudi Arabia v. Nelson*,[86] this requirement generally had been interpreted liberally so as to require only a nexus or "connection" between the acts for which redress was sought and the commercial activity.[87] In the context of employment claims against foreign States, the "connection" test proved to be relatively easy to satisfy, both in the case of actions arising out of employment in the United States, and in the case of claims concerning recruitment in the United States prior to employment elsewhere.

In the first category of claims, those involving employment in the United States, there was no reported case, prior to *Nelson*, in which a foreign State employer had been able to show that an employee's claim was not

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83. On another, though related point, the *Nelson* case, like *Zedan*, also shows that if the foreign State employer uses a United States company as its agent to conduct the recruitment, this does not affect the conclusion that the State was engaged in commercial activity in the United States.

84. 43 F.3d 1534, 1536 (D.C. Cir. 1995).

85. 899 F. Supp. 1217 (S.D.N.Y. 1995).

86. 507 U.S. 349 (1993).

87. *See, e.g.*, Vencedora Oceanica Navigacion S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 199-200 (5th Cir. 1984).

based upon such activity, once commercial activity was established. The key issue in those cases was the preliminary finding of commercial activity, which, once satisfied, effectively resolved the immunity question. Interestingly, it seems that the Supreme Court's holding in *Nelson* has not altered this position.[88]

However, in the second category of claims, those involving recruitment in the United States prior to employment in another country, the *Nelson* decision has had a much greater impact in restricting the scope of recovery by employees against foreign sovereigns. In the few cases decided before *Nelson*, courts generously construed the "connection" requirement in favor of employees. In *Brewer v. Socialist People's Rep. of Iraq*,[89] two United States citizens, recruited in the United States to work in Iraq, had their employment terminated after two years of work. They successfully argued that their claims for breach of employment contract and infliction of emotional distress were connected to their initial recruitment so as to be "based upon" commercial activity.[90]

To like effect was the 11th Circuit Court decision in *Nelson v. Saudi Arabia*.[91] In that case, a United States national had been recruited in the United States to work at a State-owned hospital in Saudi Arabia as a monitoring systems engineer. Saudi police later physically abused him after he complained of safety defects at the hospital. He sued the foreign State for personal injury, arguing that his action was based upon his initial recruitment in the United States. The court agreed, stating that "the detention and torture of Nelson . . . [was] so intertwined with his employment at the Hospital [as to be] based upon his recruitment and hiring in the United States . . . ."[92]

The court noted that Nelson's job description required him to undertake reports on equipment and ensure compliance with safety regulations at the hospital. Therefore, Nelson's act of detecting and reporting the violations, as a result of which he suffered injury, "was a required employment duty for the position for which he had been recruited and hired in the United States."[93] There was, therefore, a "connection" between his recruitment and claim.

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88. *See* Holden v. Canadian Consulate, 92 F.3d 918 (9th Cir. 1996), and *infra* notes 110-114 and accompanying text.

89. 890 F.2d 97 (8th Cir. 1989).

90. It should be noted that in *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988), the court held that even if the foreign State's telephone call had amounted to "commercial activity" in the United States, the plaintiff's claim was not based upon such activity because the connection between the call and the contract of guarantee entered into with the Saudi Government (some two and a half years later), upon which the employee was suing, was too tenuous. Even under the more liberal pre-*Nelson* "nexus" test, which was applied by the court in *Zedan*, this conclusion would seem to be correct. *Id.* at 1514.

91. 923 F.2d 1528 (11th Cir. 1991), *rev'd on other grounds sub nom*; Saudi Arabia v. Nelson, 507 U.S. 349 (1993).

92. 923 F.2d 1535 (11th Cir. 1991).

93. *Id.* at 1536.

The Supreme Court, however, reversed the 11th Circuit.[94] The Court found that although Nelson's recruitment in the United States and his employment in Saudi Arabia both were species of commercial activity, the basis of his claim here was intentional tort, arising from the abuse of power by the police of the Saudi Government. Because police powers of a State are unquestionably "sovereign" activities, Nelson's claim was barred by immunity. In the Court's view, for a claim to be "based upon" commercial activity, there must be more than a mere "connection" between the activity and the injury; the activity must, in effect, be the *cause* of the plaintiff's injury.[95] While the acts of recruitment and employment "led to the conduct that eventually injured him," it was the police abuse that caused his injury and was the basis of his claim. In addition, the Court found that because Nelson's claim, as pleaded, was not for breach of employment contract but for intentional tort, this further showed that the claim was not based upon commercial activity.[96]

The Supreme Court decision in *Nelson* almost universally has been condemned by United States commentators on the basis that it will impair significantly the rights of United States nationals employed by foreign governments abroad.[97] Certainly, the effect of the Court's view that for a claim to be based upon commercial activity, i.e., the activity must be the cause of the plaintiff's injury, will be to make it difficult for persons employed abroad to rely upon their initial recruitment in the United States as the basis of their claim. Very likely, it will be *an act in the foreign country* that is the cause of injury, given that such an act will be closer in point of time to the injury than any event occurring in the United States.

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94. Saudi Arabia v. Nelson, 507 U.S. 349 (1993).

95. *Id.* at 356. This conclusion follows from the statement by the Supreme Court that the phrase "based upon" means "those elements of a claim, that, if proven, would entitle a plaintiff to relief under his theory of the case."

96. *Id.* at 358.

97. *See generally* McCarthy, *supra* note 14, at 917; Robert H. Wood, Saudi Arabia v. Nelson: *Roll Over Weltover, Tell Scott Nelson the News,* 2 TUL. J. INT'L & COMP. L. 175, 190-91 (1994); John Hart Stevenson, *A License to Kill: A Look at* Saudi Arabia v. Nelson, 17 HOUS. J. INT'L L. 177, 186-87 (1994); Steven Weisman, *Individual Protection Crumbles While Sovereignty Reigns; A Comment on* Saudi Arabia v. Nelson, 11 HOFSTRA LAB. L.J. 429, 430-31 (1994). The decision also has been criticized on more general human rights grounds. *See, e.g.,* Keith D. Bodoh, *The Routine Torture Practices of the Saudi Arabian Government As "Commercial Activity" Within the Foreign Sovereign Immunities Act 1976 In the Wake of* Saudi Arabia v. Nelson, 23 GA. J. INT'L & COMP. L. 559, 571 (1993); Tom Lininger, *Recent Development: Overcoming Immunity Defenses To Human Rights Suits In U.S.,* 7 HARV. HUM. RTS. J. 177, 183-84 (1994); David J. Bederman, *Dead Man's Hand: Reshuffling Foreign Sovereign Immunities In U.S. Human Rights Litigation,* 25 GA. J. INT'L & COMP. L. 255, 256, 267 (1995-96). *But see,* Everett C. Johnson, Jr., Saudi Arabia v. Nelson; *The Foreign Sovereign Immunities Act In Perspective,* 16 HOUS. J. INT'L L. 291 (1993), who argues that *Nelson* is "a testament to judicial restraint" in areas in which the courts "are ill suited to act" such as foreign relations and diplomacy. *Id.* at 304. It may be noted that the last mentioned author represented the Saudi Arabian Government in the *Nelson* case. Also in support of the Supreme Court's decision in *Nelson,* see J.H. Trotter, *Narrow Construction of the FSIA Commercial Activity Exception:* Saudi Arabia v. Nelson, 33 VA. J. INT'L L. 717, 732-33 (1993).

As to why the Court reached this result, it was influenced by an excessive desire to defer to the interest of the foreign State in preventing intrusions upon its sovereignty. Additionally, the fact that the United States government intervened as an *amicus curiae* on behalf of the Saudi government may also have been decisive. This indicated to the court that the executive, in this case, saw its interest in preserving relations with the foreign State as taking priority over any concern for its injured nationals.[98]

Some commentators have applauded the opinion of Justice White who, while concurring in the result, argued persuasively that the action arose out of performance of Nelson's employment contract at a commercial enterprise given that his injuries were suffered as a result of complaints about the quality of his workplace. In this judge's view, this was a straightforward "whistleblower" case, and it should not matter whether it was the police or the hospital administration (his employer) that inflicted the injuries upon him.[99] The action, therefore, was based upon commercial activity, namely his employment duties at a commercial enterprise.

While this reasoning is preferable to that of the majority in that it rejects as simplistic the proposition that Nelson's claim arose out of police brutality rather than his employment, Justice White's opinion offers no greater consolation for United States employees abroad as to whether their claims could be connected to recruitment, so as to satisfy the first limb of section 1605(a)(2). The effect of Justice White's view would be that while it may not be difficult for an employee to show that his or her employment in the foreign country was the cause of injury there, showing that *the recruitment in the* United States was the cause is likely to be much more difficult.

Nelson brought an alternative claim for "failure to warn" before the Supreme Court in an effort to show that his action was "based upon" commercial activity in the United States. The basis of this plea was that the Saudi Government negligently failed to warn him at the time of recruitment of the possibility of retaliation in the event of his disclosing safety defects. The Court dismissed this argument as "a semantic ploy," noting that virtually any claim of intentional tort could be recast as one of failure to warn.[100] Justice Kennedy did, however, accept this submission and articulated a principle that would provide much greater protection for United States persons employed abroad. He suggested that a foreign government, when recruiting a United States citizen for employment in its country, owes a duty to that person to warn of possible dangers arising during the course of employment,

98. The court may have been keen to grant immunity because, in not doing so, the effect would have been to apply U.S. labor laws extraterritorially to events occurring abroad, and so interfering with the foreign government's right and capacity to apply its own laws. This suggests that the court was motivated by considerations of due process and its views on the legitimate reach of U.S. laws. *See* Weisman, *supra* note 97, at 432. It is questionable whether these matters are appropriate for consideration at the time of resolving the immunity issue.

99. *See* Saudi Arabia v. Nelson, 507 U.S. 349, 366-67 (1993) (Blackmun, J., concurring).

100. *Id.* at 363.

and a grant of immunity should be made conditional upon execution of this duty.[101] Of course, such a requirement would place a great obligation on a foreign State employer and may even deter recruitment of United States nationals. However, it is suggested that this view is a justified response to the majority's overly restrictive interpretation of "based upon," which leaves United States employees recruited to work abroad with too little protection.

It may be noted that the inquiry into whether a claim was "based upon commercial activity" may be as seen as another example of the "nature of the claim"-type approach to resolving immunity questions. The court is assessing the extent to which a claim is connected with a foreign State's commercial activities, and, if not, whether the claim intrudes upon its sovereign functions. Arguably, the Supreme Court, in its strict definition of when a claim is "based upon" a commercial activity, was seeking to minimize interference with sovereign acts.

As might have been expected, in requiring a much closer link between the claim and the commercial activity before immunity claims can be barred, the effect of *Nelson* has been to limit seriously the scope for employees to bring actions against foreign States in relation to employment undertaken outside the United States. In *Janini v. Kuwait Univ.*,[102] the court held that a plaintiff's claim for unpaid wages after termination of his employment in Kuwait was not "based upon" his recruitment in the United States for the purposes of the first clause of section 1605(a)(2). Applying the approach of the Supreme Court in *Nelson* in determining whether an action is based upon certain activity, such activity must be the cause of the plaintiff's injury or loss. Here, the court reasoned, it was the termination of his employment in Kuwait, rather than his initial recruitment in the United States, which was the cause of Janini's loss.

In *Good v. Aramco Serv. Co.*,[103] a United States citizen, Good, was recruited in the United States to work in Saudi Arabia with an instrumentality of the Saudi government, Saudi Aramco. At the time of recruitment, Good's wife was pregnant, so Good obtained assurances from Saudi Aramco that the medical facilities in Saudi Arabia were equal to or better than those in the United States. A term was included in Good's employment contract providing for medical care at those facilities. The Goods subsequently arrived in Saudi Arabia and, a short time afterward, Mrs. Good went into labor. She was admitted to the hospital where, after a complicated birth, their son was born with brain damage. Claims were brought for misrepresentation and breach of employment contract with damages claimed both for personal injury and economic loss.

The issue for the court was whether the recruiting and hiring activities

101. *Id.* at 372-73 (concurring/dissenting opinion). One writer has supported this view. *See* Deirdre E. Whelan, *The Commercial Activity Exception in the Foreign Sovereign Immunities Act*: Saudi Arabia v. Nelson, 27 CREIGHTON L. REV. 1069, 1100 (1994).

102. 43 F.3d 1534, 1536 (D.C. Cir. 1995).

103. 971 F. Supp. 254 (S.D. Tex. 1997).

of Saudi Aramco in the United States formed the basis of the plaintiff's claims so as to satisfy the first clause of section 1605(a)(2). Affirming *Nelson*, the court stated that in order to determine whether a claim was "based upon" commercial activity, it was necessary to ask not merely whether a vague connection existed between the two, but whether the commercial activity was the *actual* cause of the plaintiff's alleged injuries.[104]

In *Good*, the court found that the recruitment of Good in the United States was not the basis of the injuries to himself, his wife, and his son, but rather it was the alleged medical negligence on the part of the Saudi doctors and staff that was responsible.[105] Unlike in *Nelson*, Good brought a claim for breach of employment contract. However, this was a difference without substance for the plaintiff's characterization of his claim in this way was an example of "artful pleading" and a "semantic ploy," rather similar to Nelson's alternative claim for failure to warn.[106] The court still had to consider whether the claim, in substance, was based on his recruitment. In the court's view, however:

> [t]he essential nature of the claim . . . is for negligence, i.e., medical malpractice or intentional misrepresentation that occurred in Saudi Arabia and had nothing to do with Good's arrangements for employment that occurred in the United States. In essence, the plaintiff's claims sound in tort, not in contract, as reflected in the nature of the damages they seek.[107]

The court also suggested that there must be some reasonable limits to the circumstances surrounding a person's employment in the foreign State that are attributable to a person's initial recruitment in the United States. Otherwise, immunity for foreign sovereigns effectively will be eliminated in the context of employment abroad. Here, the effect of finding that the claim was based upon recruitment would mean that "[a] provision in an employment agreement to provide adequate medical services can [ ] be read as a guarantee that a government-owned and operated hospital will not perform tortious acts . . . [and] that it will be responsible in perpetuity for a catastrophic medical condition . . . ."[108] Clearly, such an outcome was indefensible and beyond what normally would be encompassed within an employ-

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104. *Id.* at 257-58.

105. *Id.* at 259. In this respect, the court appeared to be drawing a parallel with *Nelson* where the actual cause of the plaintiff's injuries did not to lie in his recruitment, but in the physical abuse by the Saudi police.

106. *Id.*

107. *Id.* The damages sought by the plaintiffs were under a number of headings, for example, for physical pain and mental anguish. While the court's argument has force, the myriad of situations which can arise in employment relationships can themselves give rise to a variety of possible types of damages claims, as can be seen from some of the cases already considered. *See, e.g.*, LeDonne v. Gulf Air, Inc., 700 F. Supp. 1400 (E.D. Va. 1988); Nelson v. Saudi Arabia, 923 F.2d 1528 (11th Cir. 1991). It is not as if employees only sue for economic loss arising from unpaid wages, for example.

108. *Good*, 971 F.Supp. at 259.

ment claim.[109]

This case confirms the view expressed in *Janini* that the Supreme Court's interpretation of "based upon" in *Nelson* has had the effect of dramatically widening the scope for foreign States to claim immunity in cases where a person employed outside the United States brings a claim against the State and seeks to base it upon his or her recruitment in the United States. It now seems likely that the only situation in which a claim would satisfy this test is when, for example, a plaintiff enters into an employment contract in the United States which provided for certain conditions such as salary, etc., these terms are not honored, and then the employee sues for breach. Only in this context would there be a sufficiently direct link between the claim and the recruitment to satisfy the *Nelson* requirement that the commercial activity be the cause of the plaintiff's injuries and so bring the action within the first limb of section 1605(a)(2).

In most cases, however, there will be little chance of showing the required link between the recruitment and the injury because, in the case of a claim involving employment outside the United States, the immediate events leading to the plaintiff's injury almost certainly will have occurred there. In *Janini*, where the plaintiff's employment contract was terminated by foreign government decree and he sued for unpaid earnings, the court felt that the cause of his injury was the act of termination, which was the last event to occur in the employment relationship. Such an approach makes it very difficult for a person employed outside the United States to show that his or her claim is "based upon" his recruitment in the United States, as this is the first link in the employment chain and so, in temporal terms, is the element furthermost removed from the injury.

The issue of whether a foreign sovereign employment claim was "based upon" a commercial activity also arose in *Holden v. Canadian Consulate*.[110] Unusually, this was a case involving employment in the United States. A submission made by the Canadian Government was that even if Holden's employment amounted to a commercial activity, her action was based, not on such activity, but on the government's action in closing the Consulate for efficiency reasons, a political and thus "sovereign" act. It argued that this was not a case where the person's individual employment was terminated, but where the job ceased to exist because of the closure of the workplace. This argument, therefore, was an attempt to invoke the *Nelson* principle that for the plaintiff to show that his or her claim is "based upon" a commercial activity, it must show that the actual cause of injury was due to a commercial, not a sovereign act. The Canadian Government's argument, therefore,

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109. The court also felt that the same criticism could be made about the plaintiff's alternative claim for misrepresentation in the United States, which had alleged that adequate medical services would be provided in Saudi Arabia. This plea was another "semantic ploy" which "seeks to recast a straightforward tort claim that arose in Saudi Arabia into a misrepresentation that arose in the U.S." *Id.*

110. 92 F.3d 918 (9th Cir. 1996).

was that Holden's actual cause of injury was the sovereign act of closing the Consulate.[111]

Although the 9th Circuit Court in *Holden* agreed that the closure of the Consulate was a sovereign act, it nevertheless found that Holden's claim was based on "commercial activity," namely the termination of her employment contract.[112] The court did not distinguish between termination of an individual's employment in an *ongoing* enterprise and termination arising from the *dissolution* of an organization. The failure to draw this distinction has been the subject of scholarly criticism.[113] From the point of view of an employee who has just lost her job, however, the two situations are not so different.[114] What can be deduced from this case is that the *Nelson* "based upon" defense is unlikely to be available to a foreign sovereign employer in the context of a claim arising out of employment which has taken place in the United States. In the context of employment claims, the defense may well be limited to those cases involving recruitment in the United States for employment abroad.

Another type of employment case presenting potential application of the *Nelson* principle is that involving claims by seamen against their foreign State employer shipowners. In a number of cases, the commercial activity exception has been pleaded to overcome immunity. For example, in *Velidor v. L/P/G Benghazi*,[115] the claimants were Yugoslavian seamen aboard a foreign State-owned vessel who made a claim for payment of wages upon the ship reaching the United States. The claim was lodged under a United States statute which imposes an obligation upon shipowners to pay mariners, who are non-United States nationals, where the ship enters a United States port.[116] While the shipowner conceded that it was engaged in commercial activity in the United States in that it had sailed a ship into a United States port and discharged cargo there, the court had to determine whether the seamen's claim was "based upon" such activity. The court found it was on the basis that the plaintiff's cause of action only arose because the vessel sailed into United States waters, such event constituting "commercial activity." Therefore, the provisions of the statute granting the substantive cause of action were used to establish the link between the claim and the foreign State's commercial

111. *Id.* at 918, 920-21.

112. *Id.* at 921.

113. *See* Alice K. Mulvaney, Holden v. Canadian Consulate: *A Correct Affirmation of the Foreign Sovereign Immunities Act?*, 5 TUL. J. INT'L & COMP. L. 535, 546-47 (1997).

114. It is interesting to note that in *Elliott v. British Tourist Auth.*, 986 F. Supp. 189 (S.D.N.Y. 1997), the foreign State employer also sought to argue that the employee's termination was the result of a "discretionary decision to cut . . . [the employer's] New York staff" and so his claim was based on a sovereign act. However, the court, applying the reasoning in the *Holden* case, rejected this argument, declaring that the employee's claim was based on commercial activity, namely the termination of his employment contract. *Id.* at 194.

115. 653 F.2d 812 (3d Cir. 1981).

116. *See* Penalty Wages Statute, 46 U.S.C. § 10313 (1988).

activity.[117]

It is interesting to consider whether the same result would be reached in this case after application of the *Nelson* view that for a claim to be based upon commercial activity, the activity must be the cause of the plaintiff's injury. It is possible that a court would take the view that the seamen's claims here had nothing, in substance, to do with the shipowner's discharging and loading of cargo in United States waters and that, similar to the cases mentioned earlier,[118] the harm suffered by them really only arose from the shipowner's breach of their employment contracts. Thus, while the commercial activity carried on in the United States was a required condition for a claim under the terms of the *Penalty Wages Act* in that no recovery would have been possible had the vessel not come into port, this Act was not the cause of the employees' loss in the instant case.

An approach and result more clearly consistent with *Nelson* was taken in *Castillo v. Shipping Corp. of India.*[119] That case involved a Dominican seaman who suffered injury on the high seas while employed aboard a vessel owned by an Indian State entity, SCI, whom he sued for negligence. While the court again found that the defendant carried on commercial activity in the United States because of having engaged in shipping operations there through calling at United States ports, it did not find that the employee's claim was "based upon" such activities. Here, the plaintiff's alleged injuries were caused by acts that occurred in a foreign country on a voyage "having no connection with the United States."[120]

The *Castillo* case was applied to deny jurisdiction once more in *Gugliani v. Shipping Corp. of India,*[121] where an Indian seaman was injured by shifting cargo while working aboard an Indian State-owned ship on the high seas. Prior to the plaintiff's injury, the ship had called into the port of New Orleans where the cargo alleged to have caused the injuries had been stowed. With little reasoning, the court dismissed the plaintiff's claim on the basis that it was not "based upon" any commercial activity in the United States by SCI. It saw the case as identical to *Castillo* in that it involved a tortious claim which lacked "the required nexus" with SCI's shipping business op-

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117. One writer has described this approach as "interpretive" in that it involves courts "read[ing] substantive policies into the statutory language of the FSIA . . . ." This is to be contrasted with the "mechanical" approach which "comports with typical statutory construction principles." *See* Eric D. Suben, *Contrasting Judicial Approaches to Seamen's Claims Under the Foreign Sovereign Immunities Act,* 18 TUL. MAR. L.J. 231, 249 (1994).

118. Janini v. Kuwait Univ., 43 F.3d 1534, 1536 (D.C. Cir. 1995); Good v. Aramco Serv. Co., 971 F. Supp. 254 (S.D. Tex. 1997).

119. 606 F. Supp. 497 (S.D.N.Y. 1985). Suben cites this case as an example of the "mechanical" approach; *see* Suben, *supra* note 117, at 252-53.

120. *Castillo,* 606 F. Supp. at 501. The court noted that the only link between the claim and the activity in the U.S. was that the injury occurred on one of the defendant's many vessels, "some of which occasionally call at United States ports." *Id.*

121. 526 So. 2d 769 (Dist. Ct. Fla. 1988).

erations in the United States.[122]

It is suggested that the court rather too quickly dismissed the plaintiff's claim in *Gugliani* and that the supposed similarity between this case and *Castillo* is deceptive. Although in both cases the defendant's commercial activity consisted of calling at United States ports and loading and unloading cargo, the plaintiff's claim in *Gugliani* was for negligence based on this very act of loading *in a* United States *port*. There was, therefore, a very close connection between the plaintiff's claim and the defendant's activity, a connection which would be likely to satisfy the *Nelson* test requiring activity to be the cause of the injury.[123]

To conclude on the issue of the nexus between the plaintiff's claim and commercial activity in the United States under the first limb of section 1605(a)(2), a clear difference in outcome has emerged between persons employed in the United States by foreign States and those employed outside the country. Whereas employees in the first category have had little difficulty in linking their claims to commercial activity in the United States because that was the center of the employment relationship, persons employed abroad have been forced to rely upon their initial recruitment in the United States Establishing a connection in this latter category has been far more difficult. In the context of disputes arising from employment abroad, therefore, courts have chosen to give priority to the interests of the foreign State over the employee.

C. Claims By Employees of Companies Providing Services to Foreign States

The broad scope of the "commercial activity" exception has led also to the lodging of employment-related claims against foreign States even where there is no direct employer-employee relationship between the plaintiff and the State. Typically, an individual employed by a United States corporation which has entered into a contract to provide services to the foreign State will have suffered injury in the course of performing duties related to the services agreement.

The idea that an employee of a United States corporation could sue a foreign State under the commercial activity exception, even in the absence of any direct employment relationship, had its genesis in the case of *Berkovitz v. Islamic Republic of Iran*.[124] In that case, the heirs of Berkovitz, a United States citizen murdered in Iran, brought a wrongful death action against the

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122. *Id.* at 771.

123. It may be that the court, in granting immunity to the shipowner in this case, was influenced by the fact that the employee seaman held the nationality of the defendant. In the legislative history to the FSIA, it was suggested that courts should be more willing to uphold immunity in such a case. *See* H.R. REP. NO. 94-1487, *reprinted in* UNITED NATIONS LEGISLATIVE SERIES, MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY 98, 107 (1982).

124. 735 F.2d 329 (9th Cir. 1984), *cert. denied*, 469 U.S. 1035 (1984).

State of Iran. Berkovitz was employed with a United States firm that contracted with the Iranian Government to assist with a project in Iran. The court was prepared to assume that Berkovitz's employment, through his company's contract with Iran, met the requirement of "commercial activity" within section 1605(a)(2).[125] In reaching this conclusion, the court relied upon the statement in the legislative history that "a foreign government's engagement or employment . . . of laborers" was an example of commercial activity.[126]

In relying upon this statement in the legislative history, the court suggests that the drafters of the FSIA did not intend to restrict the scope of "commercial activity" to employment related cases where a direct employer-employee relationship existed between the foreign State and the claimant. In fact, the court intimates that the phrase "a foreign government's engagement or employment of laborers" was also intended to encompass persons employed by a United States company engaged in providing services to the government.[127]

This principle, that an employee whose employer was engaged in providing services to a foreign State may sue the State for employment-related injuries, was also accepted in *Zernicek v. Petroleos Mexicanos.*[128] In that case, a United States employee of a United States subcontractor agreed to do work in Mexico for a Mexican government entity. A personal injury claim brought by the employee was conceded to be in connection with a "commercial activity" of the foreign State. So too was a more recent claim by a United States citizen employed by an English company that had contracted to provide services to a Syrian State-owned company in that country.[129]

However, a different result was reached in *Jones v. Petty Ray Geophysical Geosource Inc.*,[130] which, like *Zernicek*, involved a claim by the heirs of a United States citizen killed while employed by a United States subcontractor engaged in providing services to a French company which had entered into a concessionary agreement with the Sudanese Government. Here the claim was barred by immunity on the basis that Sudan had not engaged in any commercial activity for two reasons. First, it was not responsible for recruiting the workers. The fact that a clause in the concessionary agreement between the French company and Sudan allowed the use of foreign labor on the project was insufficient to amount to commercial activity.[131] Second, Sudan's conduct in entering the concession agreements was not "commercial," but constituted an exercise of sovereign control over natural resources,

125. *Id.* at 332.
126. *Id.*
127. *Id.*
128. 614 F. Supp. 407 (Dist. Ct. Tex. 1985), *aff'd on other grounds*, 826 F.2d 415 (5th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988).
129. Ebrahim v. Shell Oil Co., 847 F. Supp. 65 (S.D. Tex. 1994).
130. 722 F. Supp. 343 (S.D. Tex. 1989).
131. *Id.* at 346.

which is a recognized governmental activity.[132]

The *Jones* case suggests that some degree of proximity between the employee and the foreign State is required for a finding of commercial activity. In the cases discussed above, the courts appeared to accept that an employee's merely working on a project organized by a foreign State was enough to create a "commercial relationship" between the employee and the foreign State.

The most recent case in point, *Lane v. National Airmotive Corp.*,[133] suggests that this more restrictive approach seen in *Jones*, affecting claims by persons not directly employed by foreign States, may point the way for the future. The *Lane* case involved a claim by a United States citizen employed by a United States contractor, NAC, that had agreed to supply materials to Israel. After his employment was terminated by NAC because of alleged unlawful acts in relation to the contracts with Israel, he brought a number of claims against the foreign State arising from such termination. The court found that while Israel was likely to have engaged in commercial activity in the United States based on its contracts with NAC, this finding did not assist Lane because there was *no commercial activity carried on between him and Israel since he was not directly employed by the foreign State.*[134]

The effect of this decision is far reaching: it would mean that a person not in an employment contract with the State could never bring an employment-related claim against a foreign State under the commercial activity exception. In contrast to *Berkovitz*,[135] where the court's broad interpretation of "foreign government employment of laborers" included persons performing duties for a company that has contracted to provide services to a foreign State, the court in *Lane* suggests that a direct contractual relationship between employee and foreign State is required.[136]

Another type of case where persons not directly employed by the Sovereign have brought an employment claim against a foreign State has arisen where an organization representing employee interests has brought an action on behalf of a number of workers. The case of *Bowers v. Transnave*[137] involved a foreign State-owned shipping company (Transnave) that used

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132. *Id.* at 347.

133. 105 F.3d 665 (9th Cir. Jan. 3, 1997) (unpublished table decision), *cert. denied,* 117 S. Ct. 2409 (1998).

134. *Id.*

135. 735 F.2d 329 (9th Cir. 1984), *cert. denied,* 469 U.S. 1035 (1984).

136. A recent district court decision does suggest, however, that the issue may not be finally resolved against employees. See Napolitano v. Tishman, No. 96 CV 4402, 1998 WL 102789 (E.D.N.Y. Feb. 26, 1998), which involved an action by an employee of a U.S. company that had contracted with the Austrian Government to make repairs to its consulate. The employee was entitled to sue the foreign State on the basis that he had been "injured in the course of performing contractual duties for Austria." *Id.* at *10. This comment and decision suggest that a direct contractual link between employee and foreign State is not required in order to show that the State has engaged in actionable commercial activity.

137. 719 F. Supp. 166 (S.D.N.Y. 1989).

United States ports and paid dues to a pension fund set up to provide for longshore workers employed by local companies. Upon Transnave's withdrawal from the fund, the administrators brought a claim against it on behalf of the employees. The shipowner's plea of immunity was rejected on the basis that it was engaged in two species of commercial activity in the United States, first, through its discharging and receipt of cargo there and second, by retaining a company to service its vessels in port, including using longshore workers to load and unload the vessels.[138] It will be interesting to see whether the more restrictive approach in *Lane* has any impact on this type of case.

A further obstacle to recovery for persons not directly employed by foreign States is the effect of the Supreme Court decision in *Saudi Arabia v. Nelson,*[139] already considered in another context above.[140] The Supreme Court in *Nelson* reinterpreted the phrase "based upon commercial activity" in the first clause of section 1605(a)(2) so as to require the activity to be the *cause* of the plaintiff's injury. Reliance on this holding has granted immunity in a number of cases involving employment-related claims against foreign States by persons not directly employed by them. In *Lane v. Ministry of Defense, State of Israel,*[141] the court, after finding that the plaintiff's claim must fail because of an absence of commercial activity between the plaintiff and the foreign State, further noted that the employee's claim was not "based upon" any activity of the State at all, but upon the termination by the United States company of his employment relationship with it.[142] It was, therefore, an act of a private party that caused the individual's injuries and such an act was *not* attributable to the State.

The influence of *Nelson* further can be seen in the case of *Gates v. Victor Fine Foods.*[143] This case concerned Alberta Pork (AP), a Canadian government-owned entity engaged in the marketing and promotion of hogs. As part of its business, it acquired companies which processed hogs, including

138. *Id.* at 169. The court assumed, without discussing the issue, that the action by the administrators of the fund was "based upon" such commercial activity. In a later case, however, involving a similar type of action, a court refused to allow another claim brought by administrators of a fund for longshore workers. *See* Bowers v. Garuda Indonesia, No. 91 Civ. 7113, 1993 WL 455113 (S.D.N.Y. Mar. 1, 1993), *aff'd,* 7 F.3d 35 (2d Cir. 1993). There, fund administrators had originally brought a withdrawal claim against an Indonesian State-owned shipowner. The claim was successful, but the shipowner refused to honor the judgment. *See* Bowers v. PT Djakarta Lloyd, 721 F. Supp. 481 (S.D.N.Y. 1989). The administrators then sought to implead other Indonesian State instrumentalities (such as Garuda Indonesia) relying on their trading operations in the United States as a form of "commercial activity" to overcome immunity. The court, however, upheld immunity because the claim was not "based upon" any commercial activity of the defendants, a result which seems indisputable.

139. 507 U.S. 349 (1993).

140. *See supra* notes 94-101 and accompanying text.

141. 105 F.3d 665 (9th Cir. Jan. 3, 1997) (unpublished table decision), *cert. denied,* 117 S. Ct. 2409 (1998).

142. *Id.*

143. 54 F.3d 1457 (9th Cir. 1995).

Golden Gates Fine Foods (GGFF), a United States company. After GGFF experienced financial difficulties, all its employees were dismissed. They brought a number of employment-related claims against AP, which pleaded immunity.

The issue for the court was whether the claims were based upon commercial activity for the purposes of the first clause of section 1605(a)(2). The court first found that AP was engaged in two types of commercial activity in the United States: first, in its sale of hogs; and second, in its stock ownership of GGFF. However, the court found that the plaintiff's claims were *based upon* neither activity. In the case of the hog sales, the employment claims were simply "unrelated" to this activity.[144] In the case of the ownership of the United States company at which the claimants had been employed, this would only be relevant to the claims if AP had been involved in the decision to terminate the employment contracts. As a matter of fact, it had not been.[145] "Mere stock ownership, [by a foreign State of a United States company] without more, does not create any relationship" to claims by employees of the subsidiary.[146]

The spectre of *Nelson* is again visible in this decision. The court in *Gates* stated that for the employees' claims to be based upon a commercial activity it is not enough that they were connected to any such activity of the foreign State, but the activity had to be the *direct cause* of their injuries. Unfortunately for the employees here, the cause of their injuries was the United States company's management decision to close down their plant. Thus, similar to *Lane*, it was an act by a private party (although admittedly here owned by the foreign State), not the foreign State itself, which caused the employees' injuries. As a result, the claims against the State were barred by foreign sovereign immunity.

To conclude on the issue of claims by persons not directly employed by foreign States, United States courts appear to have recently turned against allowing such claims to proceed. Whether the employment took place in the United States or elsewhere, this result has been reached through both a narrow definition of "commercial activity" in this context and also through the requirement that there be a strict nexus between the claim and such activity. A decision, therefore, may have been taken in this type of case to favor the interests of the foreign State employer over that of the employee.

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144. *Id.* at 1465.

145. "The record contains no evidence to suggest that Alberta Pork was involved in GGFF's decision . . . to close its plant . . . [n]or [even] that Alberta Pork participated in any decisions concerning GGFF's operations." *Id.*

146. *Id.*

D. The Third Clause of Section 1605(a)(2): The "Direct Effects" Principle[147]

Under the third clause of section 1605(a)(2), a foreign sovereign will lose its immunity for "an act outside the United States in connection with a commercial activity elsewhere . . . caus[ing] a direct effect in the United States."[148] Under this clause, the main issue for the courts to consider has been whether a "direct effect" has occurred in the United States as a result of a wrongful act abroad.[149] Further, the principle of territorial nexus has been of paramount significance in resolving the immunity issue. According to the legislative history of the FSIA, the "direct effects" clause is to be interpreted in line with section 18 of the Restatement (Second) of Foreign Relations Law of the United States.[150] Under this provision, United States laws are not to be given extraterritorial application except with respect to conduct that has, as a "direct and foreseeable result," a "substantial" effect within the United States.

In *Zernicek v. Brown & Root*,[151] a United States employee brought an action against a Mexican Government entity after exposure to radiation while working on a project for that entity in Mexico. The employee claimed that he was still suffering injury upon return to the United States.

Although the court first noted that a direct effect must be one which is "substantial" and which "occurs as a direct and foreseeable result from the conduct outside the territory," it found that there was no such effect on the alleged negligent conduct abroad. It based its conclusion principally on a series of decisions, most not involving employment claims, in which it was held that "subsequent physical suffering and consequential damages are in-

147. Under the second clause of section 1605(a)(2), immunity is removed where there is an act performed in the United States in connection with a commercial activity of the foreign State elsewhere. To date, there have been no employment cases in which this clause has been invoked, although the legislative history did suggest that it would cover the "wrongful discharge in the U.S. of an employee of the foreign State who has been employed in connection with a commercial activity carried on in some third country." *See* H.R. REP. NO. 94-1487, *reprinted in* UNITED NATIONS LEGISLATIVE SERIES , MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY 98, 110 (1982). Given the variety of territorial connections seemingly required by this statement, it is unlikely that the second clause of section 1605(a)(2) will be a fruitful source of jurisdiction for aggrieved employees of foreign States.

148. 28 U.S.C.A. § 1605(a)(2) (1976).

149. In almost all cases involving foreign sovereign employment abroad, it has been conceded that the claims have been "in connection with" a commercial activity. An exceptional case where a claim failed this test was *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329 (9th Cir. 1984), *cert. denied*, 469 U.S. 1035 (1984), where a U.S. national employed by the Iranian Government was killed by a mob not linked to the State. The court found that there was "[n]othing about his murder . . . related to his job, except to the extent his job brought him to Iran in the first place." *Id.* at 332. A closer relationship between the killers and the foreign State may have dictated a different result.

150. H.R. REP. NO. 94-1487, *reprinted in* UNITED NATIONS LEGISLATIVE SERIES, MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY 98, 110 (1982).

151. 614 F. Supp. 407 (Dist. Ct. Tex. 1985), *aff'd on other grounds*, 826 F.2d 415 (5th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988).

sufficient to constitute a 'direct effect in the United States.'"[152] The court in *Zernicek* then laid down the following important proposition:

> [T]he eventual effect in the United States of the personal injury or death of an American citizen while abroad is not direct within the meaning of the Act even if the foreign government might foresee that a United States citizen might be injured while . . . working in its territory.[153]

Although decided before *Zernicek*, the district court decision in *Jones v. Petty Ray Geophysical Geosource*[154] is consistent with the *Zernicek* court's interpretation of what amounts to a "direct effect." In *Jones*, a plaintiff's wrongful death action on behalf of a United States citizen killed while employed abroad failed on the basis that "emotional injury and stress caused to relatives in the United States are not direct consequences."[155] Additionally, the court in *Jones* made a significant *obiter dictum* comment, stating that where a United States citizen suffers *financial* injury in the United States resulting from a wrongful act committed against him by a foreign sovereign abroad, this too does not amount to a direct effect.[156] In the statement of the *Zernicek* court quoted above, there is a reference to both "physical harm and consequential damages."[157] These consequential damages likely would embrace subsequent financial, and physical and emotional harm. It is suggested, therefore, that both the decision and the *dictum* in *Jones* are consistent with this principle.

This issue of whether subsequent financial injury in the United States amounts to a direct effect was considered more fully in *Zedan v. Saudi Arabia*.[158] There, the D.C. Circuit Court approved the aforementioned statement from *Zernicek* and then extended it to encompass financial injury suffered in the United States following breach of an employment contract abroad. In the court's view, the financial loss suffered by the employee in the United States was not a direct effect of the breach of contract because this injury arose purely out of the plaintiff's return to the United States.[159] The plaintiff had incurred a financial injury from the moment his contract was terminated in Saudi Arabia. Just because the loss *continued* upon his return to the United States, this did not make that injury a direct effect of the breach. Rather, the injury only was sustained in the United States because of an "intervening

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152. *Id.* at 418. One of the cases referenced by the court did involve an employment action. See Berkovitz v. Islamic Rep. of Iran, 735 F.2d 329 (9th Cir. 1984), *cert. denied*, 469 U.S. 1035 (1984), where it was held that, in the context of the murder of a U.S. citizen employed in Iran, any direct effect of his death was limited to Iran and did not encompass loss suffered by his survivors in the United States. *Id.* at 332.

153. *Zernicek*, 614 F. Supp. at 419.

154. 722 F. Supp. 343 (S.D. Tex. 1989).

155. *Id.* at 347.

156. *Id.*

157. *Zernicek*, 614 F. Supp. at 418.

158. 849 F.2d 1511 (D.C. Cir. 1988).

159. *Id.* at 1514.

event"—the plaintiff's fortuitous return there.[160] Seemingly, such an approach would preclude any United States citizen employed abroad who suffers injury, of whatever kind, from satisfying the "direct effects" principle.

However, a possible liberalizing of the interpretation of the "direct effects" principle occurred in the Supreme Court's decision in *Republic of Argentina v. Weltover*.[161] *Weltover* was not an employment case, but involved a creditor's action against a foreign State who sought to reschedule certain payment obligations. New York was stipulated in the contract as the place of payment. The Supreme Court rejected the view that an effect must be "substantial and foreseeable" to be "direct." From now on, the Court said, an effect would be direct if "it follows as an immediate consequence of the defendant's activity."[162]

At question is the impact of this principle on cases involving employment outside the United States. It is suggested that *Weltover* does little to change the position for employees, who suffer either financial or physical injury upon returning from working abroad. For an injury to be an immediate consequence of a foreign State's activity, arguably, there would need to be a greater link with the United States. That the employee was a United States national who returned home and suffered injury there would not suffice. This conclusion seems supported by the facts of *Weltover* itself, where the Court found a direct effect in the United States because part of the foreign State's contractual obligations were to be performed there. In the employment cases considered so far, by contrast, all of the performance has taken place in the foreign State and, therefore, a direct effect in the United States was more difficult to demonstrate. Apparently, the decisions in *Zedan* and *Zernicek* have survived *Weltover*.[163]

The case of *Good v. Saudi Aramco*[164] confirms this view. There, the plaintiffs argued that the defendant's failure to provide proper medical care in Saudi Arabia resulting in serious permanent injuries to their son, caused a direct effect in the United States, namely, a great expense born by United States taxpayers (presumably in providing ongoing medical treatment for him). Not surprisingly, the argument was rejected, but more interestingly, the principles in *Zernicek*, *Zedan,* and *Weltover* were all cited with approval. This suggests that the court in *Good* thought them to be consistent, at least on the point of whether an employee who suffers injury outside the United States can ever avail himself or herself of the direct effects exception. In the

160. *Id.* at 1515.

161. 112 S. Ct. 2160 (1992).

162. *Id.* at 2168, finding that Argentina's rescheduling its repayment obligations resulted in an effect in the United States because the agreed place of payment was New York.

163. Justice White's concurrence in *Saudi Arabia v. Nelson*, 507 U.S. 349, 370 (1993), concluded that Nelson's claim for intentional tort was based upon his employment in a commercial enterprise in Saudi Arabia. Justice White then found that such commercial activity had no direct effect in the United States on the basis that it had no "apparent connection to this country." *Id.* at 370.

164. 971 F. Supp. 254 (S.D. Tex. 1997).

court's view, a negative response to this inquiry would result from the application of all three tests. This may finally close another avenue of overcoming immunity to employees of foreign sovereigns.[165]

Rather similar to the position under the first limb of section 1605(a)(2), the prospects of success under the third limb for a person employed by a foreign State abroad are now rather grim given the great difficulty in proving the requisite "effects" in the United States. Now, there seems an unmistakable pattern in the decisionmaking of United States courts in upholding the interests of a foreign State in almost any claim involving employment in its territory, regardless of the nature of the employment or the nationality of the employee.[166] This conclusion has serious implications for the rights of United States persons employed abroad.

III. THE TORT EXCEPTION TO FOREIGN SOVEREIGN IMMUNITY

In a number of cases, employees have brought claims in tort against foreign States. Where such claims arise out of commercial activity, they may fall within the exception in section 1605(a)(2), considered above. However, where a tortious claim does not fall within this provision and also involves "personal injury or death or damage to or loss of property," then an employee may have another basis for overcoming immunity under section 1605(a)(5).[167] An important limitation exists on recovery under this paragraph, however: the injury, death, damage, or loss, etc., must have occurred *in the United States*. This territorial restriction has proven to be a great obstacle to recovery for persons employed abroad. This restriction was vividly illustrated by the *Nelson* case, where the employee was forced to bring his claim under the commercial activity exception because his injuries occurred outside the United States.

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165. *Id.* at 260. *See also* Mendenhall v. Saudi Aramco, 991 F. Supp. 856 (S.D. Tex. 1998). While it is acknowledged that in another recent case, *Ebrahim v. Shell Oil Co.*, 947 F. Supp. 65 (S.D. Tex. 1994), a district court did not automatically dismiss an employee's attempt to invoke the direct effects exception based upon employment abroad, the facts made his case, in any event, a hopeless one. The employee relied upon two alleged "direct effects:" first, because 40% of oil consumed in the United States was imported meant that an injury incurred by an oil rig worker in Syria had the requisite effect in the U.S. and second, an injury to a American worker abroad "reduces the healthy American workforce." The court's response was to describe both these "effects" as "remote and contingent and imperceptible." *Id.* at 68.

166. *See* Mendenhall v. Saudi Aramco, 991 F. Supp. 856 (S.D. Tex. 1998), where the employee made another attempt to overcome the immunity hurdle in the context of sovereign employment overseas. The employee argued that the defendant company, by its business dealings in the U.S., had implicitly waived its immunity to U.S. jurisdiction under section 1605(a)(1) of the FSIA. The court rejected the argument, noting that the "implied waiver provision . . . [has been] construed quite narrowly." *Id.* at 858.

167. A "taking of rights in property in violation of international law" is another exception to immunity in section 1605(a)(3). The question has been raised as to whether a breach of employment contract amounts to such a taking. *See* Brewer v. Socialist People's Republic of Iraq, 890 F.2d 97, 101 (1989) (holding no taking of rights in property).

To make matters worse for employees, the drafters of the FSIA have also introduced a further restriction on recovery for certain types of torts in section 1605(a)(5)(B). This provision states that a foreign State shall retain immunity in any claim for malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. By specially reserving immunity for these types of actions, the drafters are determining the question of immunity by reference to 'the nature of the claim.' Nevertheless, the exact meaning of this provision is not clear. While the opening words of section 1605(a)(5) suggest that the entire paragraph (including (B)) does not apply where an action is based upon commercial activity, the 9th Circuit Court has held that an employee's claims for deceit, defamation, and infliction of emotional distress were barred under (B), notwithstanding that they arose out of such activity.[168] The court relied upon the legislative history to the FSIA to support this result, noting that the drafters had intended section 1605(a)(5)(B) to accord to foreign States the same level of immunity as that enjoyed by the United States government under the Federal Tort Claims Act (FTCA).[169] As a result, "just as the United States is immune from causes of action specifically enumerated [in the FTCA] so also are foreign States under the FSIA. . . ."[170]

The effect of this interpretation has been to erode further the rights of employees of foreign States, as claims for libel, misrepresentation, and interference with contract rights may commonly arise in an employment relationship, as seen earlier in the case of *Le Donne v. Gulf Air*.[171] However, it is heartening to note that in the *Le Donne* case the court took the view that once an employee's claims (for malicious prosecution and slander) were found to arise from commercial activity, the prohibition on suit in section 1605(a)(5)(B) had no operation.[172] From the point of view of employees of foreign sovereigns, it is hoped that this view (rather than that expressed in *Campbell*) prevails in the future.

Under section 1605(a)(5)(A), a foreign State is also granted immunity from "any claim based upon the exercise . . . or the failure to exercise . . . a discretionary function."[173] As yet, this provision has not been applied in the employment context. However, it is interesting to speculate whether this provision may allow arguments similar to the one attempted unsuccessfully by the Canadian Government in the *Holden* case, namely, that a decision to

168. *See* Campbell v. Com. of Austl., 912 F.2d 468 (9th Cir. Aug. 27, 1990) (unpublished table decision).

169. 28 U.S.C § 2680(h) (1974). Under this provision the United States Government is immune from any claim arising from "libel, slander, misrepresentation, deceit or interference with contract rights," language which was almost identically followed in section 1605(a)(5)(B) of the FSIA.

170. Campbell v. Com. of Austl., 912 F.2d 468 (9th Cir. Aug. 27, 1990) (unpublished table decision).

171. 700 F. Supp. 1400 (E.D. Va. 1988).

172. *Id.* at 1410-11.

173. 28 U.S.C.A. § 1605(a)(5)(A) (1976).

terminate a person's employment was one of policy, relating to the provision of government resources. It may be noted again that this provision is based upon a similar enactment in the FTCA, with the expression "discretionary function" having been interpreted to cover governmental "planning" or policy-type activity as opposed to "operational" acts which merely implement policy.[174] It is arguable that issues of staffing at government offices, particularly at the senior level, involve policy decisions. This may provide another argument for foreign States in employment actions.

IV. DIPLOMATIC AND CONSULAR IMMUNITY IN EMPLOYMENT CLAIMS

Earlier in this article, the case of employment at diplomatic and consular missions was considered where the individual employee entered into a contract of employment with the foreign State, sued the State for breach, and the defendant pleaded foreign sovereign immunity. This type of case should be distinguished from the situation where a person, such as a domestic servant, enters into a contract of employment with a diplomatic or consular officer personally and, upon the employee suing the officer, he or she relies upon *diplomatic or consular immunity* as a defense.

The United States legal rules governing diplomatic and consular immunity are not found in the FSIA, but in the 1961 Vienna Conventions on Diplomatic Relations and Consular Relations. Of most relevance to employment disputes is Article 31(1)(c) of the Diplomatic Relations Convention and Article 43 of the Consular Relations Convention. It is there provided that a diplomat or consular officer shall be immune from the civil jurisdiction of the receiving State except in the case of "an action relating to any professional or commercial activity exercised by the diplomat in the receiving State outside his official functions."[175]

On its face, such a provision could act as a form of absolute immunity from suit for diplomatic and consular officials in the context of an employment action because rarely would the conclusion of a contract of employment be considered outside the person's "official functions." Unfortunately for employees, this result has been reached in a recent decision of the 4th Circuit Court, where an action by a Filipino domestic servant against her employer, a Jordanian diplomat, failed.[176] The court held that because the provision of domestic help was a service "incidental to [the] daily life of a diplomat, it could not be considered as outside his official functions."[177]

Therefore, it seems that, as far as employees are concerned, if they have

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174. Dalehite v. United States, 346 U.S. 15 (1953). *See also* Olsen v. Government of Mexico, 729 F.2d 641 (9th Cir. 1984) (applying the "planning/operational" distinction in the FSIA context).

175. Vienna Conventions on Diplomatic Relations and Consular Relations, Diplomatic Relations Convention Article 31(1)(c) (1995).

176. *See* Talbion v. Mufti, 73 F.3d 535 (4th Cir. 1996).

177. *Id.* at 539.

the misfortune to be employed by diplomatic or consular officers personally, rather than the foreign State they represent, they may find it much more difficult to secure redress, given the absence of any equivalent to the FSIA commercial activity exception in the Conventions. Hence, it could be argued that, at least from the point of view of employee rights, the principles of foreign sovereign immunity and diplomatic and consular immunity should be unified. Some commentators have already suggested such an amalgamation.[178]

V. CONCLUSION

As the need of developing countries for specialist and professional labor from the United States increases, it may be expected that the number of disputes between foreign governments and their employees will also proliferate. Most United States national employees instinctively may consider that their prospects of obtaining redress in a United States court would be greater than in a tribunal of the foreign State employer. Because of this, it is likely that the amount of litigation in the United States concerning foreign sovereign employment will also not decline. The question, however, is to what extent are United States employees of foreign sovereigns likely to be frustrated in their efforts to secure redress before United States courts?

In this article, consideration has been made of a number of different types of foreign sovereign employment: work for commercial enterprises, diplomatic missions, and cultural offices. In some of the cases the employment took place in the United States, in others, abroad. An examination was then made of the United States courts' application of the doctrine of foreign sovereign immunity to such cases. The general picture which emerges from the United States approach to immunity in employment matters is that a distinct line has been drawn between claims arising from employment which took place in the United States, for which immunity should, in general, be denied, and those actions involving work abroad, for which immunity should be retained. Although courts have, on occasion, focused upon matters such as the nature of the employer organization, the type of duties to be performed by the employee, and the extent to which a particular claim intrudes upon a State's sovereignty, ultimately these factors have been of less relevance to the immunity inquiry than the territorial location of employment. To some extent, this outcome is attributable to the terms of the FSIA, in particular, the commercial activity exception which places a great emphasis on territorial nexus between the claim and the United States.

The question, however, is whether such a clear discrepancy in treatment should exist between employment taking place in the United States and that elsewhere and, consequently, whether an adequate balance has been struck

178. *See, e.g.*, Crawford et al. *in* PROCEEDINGS OF THE 66TH CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION 479-82 (1994).

between the interests of the foreign State employer and the aggrieved employee. While courts have felt that the interests of a foreign State in protecting its sovereignty should take priority over that of the employee's need for redress in the cases of employment abroad, it may be that this conclusion is based upon a false premise. If, as may be assumed, it is in the interest of a foreign State to attract highly qualified personnel from countries such as the United States to improve their local industries and infrastructure, surely it is in the interest of the foreign State that the terms and conditions of employment (including employee rights of redress) are sufficiently favorable to ensure such recruitment.

One solution, certainly, would be for foreign States to improve rights of redress for foreign employees under *their own law*. However, even if this were to occur on a more than piecemeal basis (which is unlikely), it is still probable that if prospective United States employees of foreign sovereigns abroad were to discover that their rights under United States law are negligible, they may well choose to forego such employment altogether. In such a situation, is it not the foreign State which suffers the most through lost expertise? Ironically, it may in fact be in the interest of foreign States themselves to enhance and simplify the procedure for employees to obtain relief under the FSIA.

How could the FSIA be amended to strengthen the rights of employees? The U.K. provision,[179] which has been adopted in a number of other countries,[180] may be a good example to follow. It provides that "[a] State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly to be performed there."[181] Had such a provision been included in the FSIA in 1976, a number of the cases mentioned above, in particular *Saudi Arabia v. Nelson*,[182] would not have resulted in a finding of immunity and greater protection would have existed for persons employed abroad.[183]

While it may be argued that the inclusion of such a provision in the FSIA may deter foreign States from employing Americans, there seems little

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179. *See* State Immunity Act, § 4(1) (Eng. 1978).

180. *See, e,g.*, State Immunity Act, § 6(1) (Sing. 1979); Foreign Sovereign Immunity Act, § 5(1)(a) (S. Afr. 1981); State Immunity Ordinance, § 6(1) (Pak. 1981); Foreign State Immunities Act, § 12(1) (Austl. 1985). *See also* Garnett, *supra* note 5.

181. State Immunity Act, § 4(1) (Eng. 1978).

182. 507 U.S. 349 (1993).

183. Realistically, the only employees who may be disadvantaged if a provision similar to section four of the U.K. Act were introduced into the FSIA would be those working on foreign State projects but not directly employed by the State itself. However, given the recent trend in decisions such as *Lane v. National Airmotive Corp.*, 105 F.3d 665 (9th Cir. Jan. 3, 1997) (unpublished table decision), *cert. denied*, 117 S. Ct. 2409 (1998), and *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), for U.S. courts to impose immunity in this type of case, such disadvantage may be more theoretical than real. In any event, if it were felt that these persons deserved the same rights of redress as persons directly contracted to a foreign State, a separate clause could be added to the FSIA to achieve this result.

evidence that such a result has occurred in the United Kingdom or in the other countries which have adopted this provision. In any event, it would be hoped that foreign States would realize that the existing position under the FSIA threatens their prospects for hiring Americans to work for them abroad and that, therefore, they would not resist such a move.[184]

184. However, it is not recommended that section 16(1) of the U.K. State Immunity Act be imported into the FSIA. That provision prohibits any employee at a diplomatic or consular mission from suing his/her foreign State employer, regardless of status or duties. It is suggested, instead, that section 12(5) of the Australian Foreign States Immunities Act, whereby administrative and technical staffs of a mission are entitled to sue their employer, at least where they are nationals or permanent residents of Australia, should be adopted. This accords with the decision of the 9th Circuit in *Holden v. Canadian Consulate,* 92 F.3d 918 (9th Cir. 1996), and strikes a fair balance between the interest of foreign state employers in protecting their sovereignty and employees in securing redress.