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De Sanchez v. Banco Central de Nicaragua: An Extension of the Restrictive Theory of Foreign Sovereign Immunity

Recognizing that American citizens increasingly are coming into contact with foreign states,¹ Congress passed the Foreign Sovereign Immunities Act of 1976² (hereinafter "FSIA" or "the Act"). The purpose of the Act is twofold. First, to provide when and how a lawsuit can be maintained against a foreign state or its entities in the courts of the United States. Second, to specify the circumstances under which a foreign state is entitled to sovereign immunity.³ In *De Sanchez v. Banco Central de Nicaragua*⁴ (hereinafter "Sanchez") the defendant's motion to dismiss forced a Federal court in Louisiana to interpret the substantive provisions of the FSIA. The issue in *Sanchez* centered upon whether certain actions of the central bank of Nicaragua fell within the FSIA's general grant of sovereign immunity⁵, or whether such actions were within one of the Act's exceptions to sovereign immunity.⁶ The court held that, regardless of their "governmental" rather than "commercial" character, the actions of the foreign bank were encompassed by two exceptions to the grant of sovereign immunity and that, therefore, jurisdiction was properly based in the American courts.⁷ The decision furnishes an important judicial interpretation of the terms "commercial" and "governmental" as they pertain to the immunity provisions of the Act. Moreover, the decision is illustrative of the difference between the jurisdictional reaches of the FSIA and the restrictive theory of immunity that the FSIA was meant to codify.

On July 12, 1979 Ms. Josefina Najarro de Sanchez sought to redeem a certificate of deposit in the amount of \$150,000 with Banco Nacional de Nicaragua ("Banco Nacional"), a commercial bank in Nicaragua. Having insufficient American dollars on hand, Banco Nacional re-

¹ H.R. Rep. No. 1487, 94th Cong. 2d Sess. 6, reprinted in 1976 U.S. Code Cong. & Ad. News 6604, 6605 [hereinafter cited as House Report].

² Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a)(2), (3), 1391(f), 1441(d), 1601-1611 (1976)).

³ House Report, *supra* note 1, at 6, reprinted in 1976 U.S. Code Cong. & Ad. News at 6604.

⁴ 515 F. Supp. 900 (E.D. La. 1981).

⁵ *Id.* at 901. See Foreign Sovereign Immunities Act § 4(a), 28 U.S.C. § 1605 (1976).

⁶ 515 F. Supp. at 902. See Foreign Sovereign Immunities Act § 4(a), 28 U.S.C. § 1605 (1976).

⁷ 515 F. Supp. at 914.

quested the dollars from the defendant, Banco Central de Nicaragua ("Banco Central"), with which it held an account. Banco Central issued a check to the plaintiff, Sanchez, for \$150,000 drawn on Banco Central's account with the Citizens & Southern International Bank (C&S) in the United States and debited Banco Nacional's account for the equivalent in Nicaraguan Cordobas. Sanchez then left for the United States during the Nicaraguan civil war. The Nicaraguan civil war ultimately resulted in the ouster of the regime of Anastasio Somoza Debayle.⁸

On July 17, 1979, Sanchez presented the check to the C&S branch in New Orleans but was refused payment. Although only a few days had passed since Sanchez left Nicaragua, the government had changed hands and a revolutionary junta had been installed. C&S ultimately informed Sanchez that the new president of Banco Central had instructed it to stop all payments from the C&S account. Banco Central continued to refuse payment at the time of the suit.⁹

Sanchez brought an action against Banco Central for breach of the duty to honor the check, breach of contract, misrepresentation, and conversion.¹⁰ Jurisdiction over Banco Central was based upon the Foreign Sovereign Immunities Act. Banco Central claimed immunity and filed a motion to dismiss.

The FSIA extends a general grant of immunity to a foreign state, but also creates exceptions under which the district courts have jurisdiction over certain activities of the foreign state.¹¹ The district court in *Sanchez* examined the activity of Banco Central and determined it to be "governmental" rather than "commercial" in nature, thereby precluding jurisdiction based on the "commercial activities" exception to sovereign immunity. The court held, however, that Banco Central's actions fell within the exception concerning property taken in violation of international law¹² as well as the exception relating to the noncommercial torts of the foreign state.¹³

The doctrine of sovereign immunity was first recognized by the American courts in *The Schooner Exchange v. M'Faddon* in 1812.¹⁴ There, the Supreme Court upheld a plea of immunity, supported by an executive branch suggestion, as consistent with the law and practices of nations.¹⁵ In the early part of this century, the American courts began to rely upon and treat as conclusive the immunity determinations of the

⁸ *Id.* at 901.

⁹ *Id.*

¹⁰ Sanchez also asserted claims against C&S for breach of duty to honor the check, misrepresentation, and negligence. These claims were not the subject of the motion before the court. *Id.* at 903 n.2.

¹¹ See Foreign Sovereign Immunities Act § 4(a), 28 U.S.C. § 1605 (1976) (listing commercial and other exceptions to general sovereign immunity).

¹² 515 F. Supp. at 910-12. See *infra* notes 66, 67 and accompanying text.

¹³ *Id.* at 912-14. See *infra* notes 73, 78 and accompanying text.

¹⁴ 11 U.S. (7 Cranch) 116 (1812).

¹⁵ *Id.* at 145-46.

State Department.¹⁶ This practice reached its zenith in *Ex Parte Republic of Peru*¹⁷ in which the Supreme Court declared it the "duty" of the judiciary to accept and follow the executive's determination of sovereign immunity.¹⁸ In *Republic of Mexico v. Hoffman*¹⁹ the Court stated: "It is, therefore, not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."²⁰

In an effort to clarify its position on sovereign immunity and to bring the immunity determinations of the United States into conformity with other nations, the State Department adopted the restrictive theory of immunity in the Tate letter.²¹ Under the restrictive theory, a foreign state is entitled to immunity for its public acts, but not for its private or commercial acts.²² Prior to this time, the United States followed the classical or absolute theory of immunity under which a sovereign must consent in order to be made defendant in the courts of another country regardless of the nature of the act in question.²³

Recognizing that governments were engaging in commercial activities with greater frequency, the State Department felt it necessary to adopt the restrictive theory to insure that the rights of persons doing business with a foreign government would be determined by U.S. courts.²⁴ For the period subsequent to the Tate letter, U.S. courts continued to defer to the immunity determinations of the State Department.²⁵

However, the position taken by U.S. courts created a number of difficulties. First, the State Department was not structured to take evidence, hear witnesses, or afford appellate review of its immunity determinations.²⁶ Second, foreign states were left with the initiative to decide which sovereign immunity determinations they would take before the State Department, as well as determining when to exert diplomatic and political influences. The strong pull of diplomatic and political influence made it difficult for the State Department to apply the doctrine of the Tate letter consistently.²⁷ Last, the courts found themselves

¹⁶ House Report, supra note 1, at 8, reprinted in 1976 U.S. Cong. & Ad. News at 6606.

¹⁷ 318 U.S. 578 (1943).

¹⁸ Id. at 588-89.

¹⁹ 324 U.S. 30 (1944).

²⁰ Id. at 35.

²¹ Letter from State Dep't Legal Advisor Jack B. Tate to Acting Attorney General Phillip B. Perlman (May 19, 1952), reprinted in 26 Dep't St. Bull. 984 (1952).

²² Id.

²³ Id.

²⁴ Id. at 985.

²⁵ See *Victory Transp., Inc., v. Comisaria Gen.*, 336 F.2d 354, 358 (2d Cir. 1964) (formulating a test for determining whether an act is public or private and commercial, absent any official State Department Communication), cert. denied, 381 U.S. 934 (1965).

²⁶ House Report, supra note 1, at 8, reprinted in 1976 U.S. Code Cong. & Ad. News at 6607.

²⁷ Id.

outside the mainstream of international law, because virtually every other country considered the question of sovereign immunity as one for the courts, and not the executive branch to decide.²⁸

In response to these problems, Congress passed the Foreign Sovereign Immunities Act of 1976.²⁹ Its purpose was to "provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity."³⁰ The purpose of the FSIA is to codify the restrictive theory³¹ and to insure its application in U.S. courts by transferring the determinations of sovereign immunity from the executive branch to the judiciary; thereby assuring that immunity decisions will not be subject to political or diplomatic pressures.³² The Act also makes it clear that it is the "sole and exclusive standard" for the resolution of sovereign immunity decisions.³³

The FSIA grants to the district courts original jurisdiction, without regard for amount in controversy, over any *in personam* nonjury civil action against a foreign state³⁴ in which it is determined that the foreign state is not entitled to immunity.³⁵ Section 1604 of the Act sets forth the general grant of immunity to a foreign state from the jurisdiction of the U.S. courts,³⁶ subject to certain exceptions within the act.³⁷ Congress clearly contemplated that the requirements of minimum contacts and adequate notice be observed.³⁸ The claim of immunity is an affirmative defense which must be specially pleaded and when it is utilized the bur-

²⁸ *Id.* at 9, reprinted in 1976 U.S. Code Cong. & Ad. News at 6608.

²⁹ Foreign Sovereign Immunities Act of 1976, *supra* note 2.

³⁰ House Report, *supra* note 1, at 6, reprinted in 1976 U.S. Code Cong. & Ad. News at 6604.

³¹ *Id.* at 7, reprinted in 1976 U.S. Code Cong. & Ad. News at 6605.

³² *Id.* at 7, reprinted in 1976 U.S. Code Cong. & Ad. News at 6605-06.

³³ *Id.* at 12, reprinted in 1976 U.S. Code Cong. & Ad. News at 6610. For a further discussion of the development of sovereign immunity, see Von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 *Colum. J. Transnat'l L.* 33, 36-43 (1978).

³⁴ A "foreign state" is defined within the statute to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." Foreign Sovereign Immunities Act § 4, 28 U.S.C. § 1603(a). A central bank, such as Banco Central, is considered an "agent or instrumentality" of a foreign state. House Report *supra* note 1, at 16, reprinted in 1976 U.S. Code Cong. & Ad. News at 6614.

³⁵ Foreign Sovereign Immunities Act § 2, 28 U.S.C. § 1330 (1976), provides:

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

³⁶ Foreign Sovereign Immunities Act § 4(a), 28 U.S.C. § 1604 (1976), provides:

Subject to existing international agreement to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

³⁷ See Foreign Sovereign Immunities Act § 4(a), 28 U.S.C. §§ 1605-1607 (1976).

³⁸ House Report, *supra* note 1, at 13, reprinted in 1976 U.S. Code Cong. & Ad. News at 6612.

den of proof lies with the foreign state to support its claim of immunity.³⁹

The court in *Sanchez* focused on the interpretation of three pertinent exceptions to the foreign state's immunity:⁴⁰

- (a) A foreign state shall not be immune from the jurisdiction of the United States or of the States in any case- . . .
 - (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
 - (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;
 - (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to- . . .
- (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.⁴¹

Since these exceptions are phrased as substantive acts committed by a foreign state, a "court faced with a claim of immunity from jurisdiction must engage ultimately in a close examination of the underlying cause of action in order to decide whether the plaintiff may obtain jurisdiction over the defendant."⁴² This required the court in *Sanchez* to examine the issuance of the check by Banco Central to Sanchez, to determine if it fell within one of the three applicable exceptions.⁴³

³⁹ *Id.* at 17, reprinted in 1976 U.S. Code Cong. & Ad. News at 6616.

⁴⁰ Two other possible exceptions under section 1605 are those involving waiver of immunity and property acquired by gift or succession. Foreign Sovereign Immunities Act § 4(a), 28 U.S.C. § 1605(a)(1)(4) (1976). Neither were alleged to be applicable to the facts before the court.

⁴¹ Foreign Sovereign Immunities Act § 4(a), 28 U.S.C. § 1605(a)(2), (3), (5), (5)(B) (1976).

⁴² *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 851 (S.D.N.Y. 1978).

⁴³ The court never addressed the issue of whether the existence of a foreign plaintiff, Ms. Sanchez, affected the court's jurisdiction under the FSIA. While the Act was aimed primarily at contacts between American citizens and foreign states, nowhere does the statute expressly allow or preclude a suit brought by a foreign citizen. Only four days prior to the decision in *Sanchez*, the Second Circuit had determined:

Congress formed no clear intent as to the citizenship of plaintiffs under the Act. It probably did not even consider the question. In the absence of determinative—

As set out above, section 1605(a)(2) establishes three exceptions to a foreign state's immunity based upon the commercial activities of the foreign state. Jurisdiction under this section can be exercised only upon a finding that the foreign state engaged in some type of commercial activity and that the suit is based upon that activity. With this in mind, the court in *Sanchez* centered its discussion of section 1605(a)(2) on whether the actions of Banco Central were "commercial" or "governmental" in nature.⁴⁴

Although the FSIA contains a definition of "commercial activity,"⁴⁵ this definition is broadly worded and, therefore, the courts are given a great deal of latitude in determining whether the act in question is a commercial act.⁴⁶ Section 1603(d) defines a "commercial activity" as either "a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."⁴⁷ In sum, the purpose of the activity is irrelevant; it is the nature of the activity that is critical.⁴⁸

In *Sanchez*, the act which formed the basis of the suit was the issuance of the check by Banco Central to Sanchez. The court determined that the nature of this act was governmental not commercial and, therefore, no basis for jurisdiction existed under section 1605(a)(2).⁴⁹ Relying primarily on sworn statements of Banco Central officials, the court rea-

or even persuasive—guidance from the legislative history, the words of the statute control. Section 1330(a) is not limited to suits brought by Americans. It applies to 'any nonjury civil action against a foreign state' (emphasis in original). Accordingly, we hold that a suit brought in a federal court by an alien against a foreign state is properly filed—at least under the terms of the Act.

Verlinden v. Central Bank of Nigeria, 647 F.2d 320, 324 (2d Cir. 1981). In *Verlinden*, however, the court went on to dismiss the action for lack of subject matter jurisdiction. *Id.* at 330. While a foreign plaintiff could bring an action under section 1330 of the FSIA, the court noted that jurisdiction could only exist if the action was also within either the diversity or federal question jurisdiction which the Constitution grants to the courts in Article III. *Id.* at 325. Any action outside of this jurisdictional grant would be beyond the court's constitutional power to decide. In *Verlinden*, the applicable law was the Uniform Customs and Practices for Documentary Credits of the International Chamber of Commerce or New York law, not federal law, and therefore, no federal question existed. *Id.* at 326. Since both the plaintiff and the defendant were foreigners, no diversity existed either. *Id.* at 325. Consequently, the action was beyond the court's powers.

In *Sanchez*, however, an American, C&S bank, was also a named defendant. This fact, while not discussed by the court, would bring the case within the court's constitutional grant to hear cases between "a State, or Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2. Hence, the action brought by Sanchez fell within both the legislative and Constitutional grants of jurisdiction.

⁴⁴ See 515 F. Supp. at 903-10.

⁴⁵ Foreign Sovereign Immunities Act § 4(a), 28 U.S.C. § 1603(d) (1976).

⁴⁶ House Report, *supra* note 1, at 16, reprinted in 1976 U.S. Code Cong. & Ad. News at 6615.

⁴⁷ Foreign Sovereign Immunities Act § 4(a), 28 U.S.C. § 1603(d) (1976).

⁴⁸ House Report, *supra* note 1, at 16, reprinted in 1976 U.S. Code Cong. & Ad. News at 6615.

⁴⁹ 515 F. Supp. at 907.

soned that the issuance of the check to Sanchez was performed only in the interests of maintaining foreign exchange rates;⁵⁰ that Banco Central was obligated to issue the check under Nicaraguan law;⁵¹ and that Banco Central's role "was no different than the role any government plays in facilitating business transactions between its citizens though regulation or licensing."⁵²

Prior decisions interpreting the meaning of a "commercial activity" support the holding in *Sanchez*. In *Yessenin-Volpin v. Novosti Press Agency*,⁵³ the district court for the southern district of New York faced the issue of whether the allegedly libelous publications of two Soviet press agencies fell within the commercial activities exception to immunity under section 1605(a)(2). The court held that the inquiry must focus on whether the specific activity at issue was a commercial act of a foreign state or whether it is governmental in nature.⁵⁴ The general commercial or governmental nature of the foreign entity is not dispositive of the issue since the Act contemplates that a given entity may engage in commercial activities at times and in governmental activities at other times.⁵⁵ In *Yessenin*, the court concluded that the acts were not done in connection with any commercial activity, but rather were part of the "intra-governmental cooperation" in which these press agencies often participated.⁵⁶ Put more simply, although the press agencies engaged in commercial activities at times (and perhaps even a majority of the time), the particular act complained of was done solely to aid the Soviet government and must be regarded as the official commentary of that government. Consequently, the acts were "governmental" in nature and, therefore, entitled the defendants to immunity under section 1605(a)(2). Similarly, in *Arango v. Guzman Travel Advisors Corp.*,⁵⁷ the Fifth Circuit determined that certain acts of an airline, wholly-owned by the government, were entitled to immunity because the defendant had been impressed into duty pursuant to the laws of that country and was, therefore, acting merely as an "arm or agent" of the government in carrying out this role.⁵⁸ Again, the court emphasized that the general commercial or governmental nature of the defendant is not at issue. Rather, the focus is on whether the particular conduct in question "actually constitutes or is in connection with commercial activity."⁵⁹

Finally, in *Carey v. National Oil Corp.*,⁶⁰ an action was brought against

⁵⁰ *Id.* at 909.

⁵¹ *See id.* at 910.

⁵² *Id.*

⁵³ 443 F. Supp. 849 (S.D.N.Y. 1978).

⁵⁴ *Id.* at 855.

⁵⁵ *Id.*

⁵⁶ *Id.* at 856.

⁵⁷ 621 F.2d 1371 (5th Cir. 1980).

⁵⁸ *Id.* at 1379.

⁵⁹ *Id.*

⁶⁰ 453 F. Supp. 1097 (S.D.N.Y. 1978), *aff'd*, 592 F.2d 673 (2d Cir. 1979).

the nation of Libya for inducing its oil companies to breach contracts with other oil companies. Libya had ordered a reduction in oil production and an embargo of certain oil shipments during the Yom Kippur War. The district court for the southern district of New York held that Libya was immune from suit because it was "beyond cavil that these actions by Libya were no part of a commercial undertaking; rather, they were deliberate weapons of foreign policy, aimed at influencing the conduct of other nations, or at least punishing undesirable conduct."⁶¹

The decision in *Sanchez* is consistent with these prior decisions. Banco Central, regardless of its commercial or governmental character, acted under a legal obligation to supply dollars to Nicaraguan banks. The check was issued as part of Banco Central's role as an "arm or agent" of the Nicaraguan government. The dollars were supplied with no mercantile interest in mind. It was part of the inter-governmental cooperation in which Banco Central participated. Being governmental in nature, these acts fell outside the jurisdictional grasp of section 1605(a)(2). While on the surface the issuance of a check by a bank would appear to be a commercial transaction, the facts underlying Banco Central's actions indicate that, in this particular instance, the actions were governmental in nature. The national civil war and dwindling supplies of foreign currencies forced the government of Nicaragua to protect the nation's wealth by controlling the flow of dollars. Banco Central was merely the instrumentality used to carry out that policy decision.

Other actions of a central bank, however, have been held commercial in nature and, therefore, within the exceptions of section 1605(a)(2). In *Texas Trading and Milling Corp. v. Federal Republic of Nigeria*,⁶² the central bank of Nigeria was charged with breach of a letter of credit. The letter of credit was established as part of an agreement on the part of Nigeria to purchase cement from the defendant. Although the breach occurred in the face of a national economic disaster,⁶³ the Second Circuit held that the bank was subject to the jurisdiction of the American courts because the activity upon which the suit was based, the issuance of the letter of credit, arose out of a commercial activity. The court stated that "if the activity is one in which a private person could engage, it is not

⁶¹ 453 F. Supp. at 1102.

⁶² 500 F. Supp. 320 (S.D.N.Y.), rev'd, 647 F.2d 300 (2d Cir. 1980).

⁶³ In the spring of 1975, the Republic of Nigeria contracted with 68 suppliers to purchase twenty million metric tons of cement to be delivered in one year to the port of Lagos. Payment was to be made through a letter of credit established by the Central Bank of Nigeria with a New York bank in favor of the supplier. Within months, the port became congested with ships delivering the cement and delivery of vital consumer goods was threatened. Demurrage claims rose dramatically as ships waited to unload. Facing an economic crisis, Nigeria placed an embargo on all shipping into the port and ordered the Central Bank to alter the terms of the letters of credit. See *Nat'l Am. Corp. v. Fed. Republic of Nigeria*, 448 F. Supp. 622, 627 (S.D.N.Y. 1978), aff'd, 597 F.2d 314 (2d Cir. 1979). These facts have given rise to a number of suits under the FSIA. See, e.g., *Verlinden v. Cent. Bank of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980), aff'd, 647 F.2d 320 (2d Cir. 1981).

entitled to immunity."⁶⁴

The stop payment order in *Sanchez* is similar to the breach in *Texas Trading* in that both were part of a governmental response to a potential economic disaster. Yet the results are different. This is because the act which formed the basis of the action in *Texas Trading* was commercial in nature while in *Sanchez* the act was governmental in nature, that is, an act which a private person could not have engaged in.

In *Sanchez* the issuance of the check was part of the procedure developed by the Nicaraguan government to regulate the flow of money and to maintain a constant foreign exchange rate. The regulation of monetary funds during a time of social unrest is an action in which only a sovereign may engage. As the court in *Sanchez* points out, while Banco Central's act was a necessary part of a commercial activity between Banco Nacional and Sanchez, it was not of itself performed as part of any commercial function. Banco Central's role was "no different than the role any government plays in facilitating business transactions between its citizens through regulation or licensing."⁶⁵

There remained, however, the possibility that jurisdiction might be based upon two other exceptions to the general grant of immunity. Section 1605(a)(3) relates to property taken in violation of international law.⁶⁶ For jurisdiction to exist under this section, the property taken must be either (1) present in the United States in connection with a commercial activity carried on by the foreign state in this country or (2) owned by an agency or instrumentality of the foreign state which is engaged in a commercial activity in the United States.⁶⁷ In light of the finding that Banco Central's use of the C&S account to regulate foreign currency exchanges was governmental and not commercial, jurisdiction could not be based upon the first exception.

However, the legislative history makes it clear that under the second exception, unlike the requirements of section 1605(a)(2), the property need not be present in connection with a commercial activity of the agency or instrumentality.⁶⁸ Therefore, the *Sanchez* court concluded, "[I]f Banco Central conducts commercial activities in the United States, it may be sued on a theory of confiscation in violation of international

⁶⁴ 647 F.2d at 309.

⁶⁵ 515 F. Supp. at 910. For a further discussion of the "commercial" versus "governmental" dichotomy, see Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 Sw. L.J. 1009, 1031-35 (1979).

⁶⁶ Foreign Sovereign Immunities Act § 4(a), 28 U.S.C. § 1605(a)(3) (1976). The term "taken in violation of international law" includes the nationalization or expropriation of property without prompt adequate and effective consideration and takings which are arbitrary or discriminatory in nature. House Report, *supra* note 1, at 19-20, reprinted in 1976 U.S. Code Cong. & Ad. News at 6618.

⁶⁷ Foreign Sovereign Immunities Act § 4(a), 28 U.S.C. § 1605(a)(3) (1976). In addition, any property exchanged for property owned by a foreign state or by its agency or instrumentality can serve as a basis for jurisdiction. *Id.*

⁶⁸ House Report, *supra* note 1, at 19, reprinted in 1976 U.S. Code Cong. & Ad. News at 6618.

law even though the dollars for which Sanchez's certificate of deposit was exchanged are not held in connection with such commercial activities."⁶⁹

The legislative history and the plain meaning of the statute support the court's conclusion that this second exception requires only a finding that the foreign agency be engaged in *any* commercial activity within the U.S., regardless of its relationship to the acts giving rise to the action. Unlike section 1605(a)(2), this exception does not limit the court's inquiry to the act at issue. Rather it allows the court to examine *all* of the foreign agency's activities and contacts with the United States in order to determine if it engaged in a "commercial activity" in this country. Since the evidence indicated that Banco Central used the C&S account for a number of commercial purposes,⁷⁰ the *Sanchez* court properly found Banco Central subject to the jurisdiction of the American courts.

The legislative history of section 1605(a)(3), however, states that the section deals only with the issue of immunity and in no way affects the applicability of the "act of state" doctrine.⁷¹ The "act of state" doctrine prohibits inquiry by an American court into the propriety of governmental acts committed by a foreign sovereign within its own territory. The doctrine does not, however, extend to confiscation of property within the United States. Since Sanchez asserted that the wrongfully confiscated property was in the C&S account, the court in *Sanchez* reasoned that the act of state doctrine was inapplicable⁷² and jurisdiction was properly asserted.

Jurisdiction under the last exception, section 1605(a)(5), may be exercised over cases involving tortious conduct which causes "personal injury or death, or damage to or loss of property occurring in the United States."⁷³ Among Sanchez' claims against Banco Central were misrepresentation and conversion. While section 1605(a)(5)(B) expressly exempts misrepresentation from torts actionable under this section, the claim of conversion is allowed.⁷⁴

Banco Central contended that section 1605(a)(5) should be limited to torts which result in casualty-type damages and that the tort of conversion, which does not result in physical harm to persons or property, falls outside the exception in the Act. The court in *Sanchez* properly rejected this argument.

⁶⁹ 515 F. Supp. at 910.

⁷⁰ The evidence showed that Banco Central used the C&S account to pay for letters of credit issued through C&S, to pay interest and principal on loans to Banco Central made by C&S, to collect all American checks tendered to Banco Central, and to pay the expenses of Nicaraguan students in the U.S. *Id.* at 906-07, 910-11.

⁷¹ House Report, *supra* note 1, at 20 & n.1, reprinted in 1976 U.S. Code Cong. & Ad. News at 6618-19 & n.1.

⁷² 515 F. Supp. at 910 n.10.

⁷³ Foreign Sovereign Immunities Act § 4(a), 28 U.S.C. § 1605(a)(5) (1976). Two types of exceptions are identified: claims based on performance or omissions of governmental discretionary functions, and defamation and misrepresentation claims. *Id.* § 1605(a)(5)(A), (B).

⁷⁴ 515 F. Supp. at 912-13.

The D.C. Circuit Court of Appeals rejected a similar argument in *Letelier v. Republic of Chile*⁷⁵ in which the defendants argued that 1605(a)(5) should be limited to "private" torts. There, the defendants, the Republic of Chile and members of the Chilean Intelligence forces, were allegedly responsible for the deaths of the Chilean diplomatic officials in the District of Columbia which occurred when a bomb destroyed the car in which they were riding. The defendants asserted that a tort of a governmental nature, such as an assassination, was outside the scope of this section. The court held that the Act does not seek to limit which torts the section applies to.⁷⁶ In fact, the legislative history makes it clear that, although directed primarily at the problem of traffic accidents, the section is cast in "general terms as applying to *all tort actions* for money damages, not otherwise encompassed by section 1605(a)(2)."⁷⁷

Sanchez is further supported by the fact that subsection (B) of section 1605(a)(5) expressly excludes a number of torts which do not cause "casualty-type" damages.⁷⁸ If Banco Central's argument were correct, then it would have been unnecessary for Congress to exclude only certain non-casualty type torts. As *Sanchez* correctly reasons, "The fact that Congress deemed it necessary to exclude certain non-casualty torts, but not all such torts like conversion, indicates the scope of the general exemption created by section 1605(a)(5)."⁷⁹

The *Sanchez* court, therefore, was able to assert jurisdiction over the governmental acts of a foreign entity under sections 1605(a)(3) and 1605(a)(5). This fact illustrates the difference between the FSIA and the restrictive theory.⁸⁰ In a pre-FSIA decision, a determination by the State Department that the acts at issue were governmental in nature would have disposed of the issue and the foreign entity would be granted immunity. Under the particular facts before the court in *Sanchez*, however, the finding that the acts were governmental in nature did not result in a similar grant of immunity, but rather, by the very terms of the FSIA, these governmental acts were acts for which a foreign state is *not* immune.

Since the legislature expressly intended that the FSIA codify the restrictive theory, the *Sanchez* court, *sua sponte*, raised the issue of whether the Act could be read as granting jurisdiction over an act for which the

⁷⁵ 488 F. Supp. 665 (D.D.C. 1980). See also Note, The Letelier Case: Foreign Sovereign Liability for Acts of Political Assassination, 21 Va. J. Int'l L. 251 (1981).

⁷⁶ *Id.* at 671-73. Judgment was later entered against the defendants, including the Republic of Chile, in an amount in excess of \$5,000,000. See *Letelier v. Republic of Chile*, 502 F. Supp. 259 (D.D.C. 1980).

⁷⁷ House Report, *supra* note 1, at 21, reprinted in 1976 U.S. Code Cong. & Ad. News at 6619 (emphasis added).

⁷⁸ Foreign Sovereign Immunities Act § 4(a), 28 U.S.C. § 1605(a)(5)(B) (1976) expressly excludes: "any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

⁷⁹ 515 F. Supp. at 913.

⁸⁰ House Report, *supra* note 1, at 7, reprinted in 1976 U.S. Code Cong. & Ad. News at 6605.

foreign state would have been immune under the restrictive theory. The court found that the words of the statute controlled. The legislative history, in discussing the requisite evidence needed to support a grant of immunity, states that the defendant must show "that the plaintiff's claim relates to a public act of the foreign state—that is, an act not within the exceptions in sections 1605-1607."⁸¹ The logical conclusion is that the term "public act", an act for which immunity will be granted, is not synonymous with the term "governmental act" and therefore, certain situations will arise where an act will be governmental and yet still under the jurisdiction of the FSIA. Such an act was found in *Sanchez*.

Support for the exercise of jurisdiction over the governmental acts of a foreign state may also be implied from the fact that section 1605(a)(3) is expressly directed at noncommercial torts. The Act clearly contemplates that American courts will exercise jurisdiction over acts that are governmental in nature and, therefore, as the *Sanchez* court noted, "[T]he FSIA goes further than the governmental/commercial dichotomy of the 'restrictive' approach."⁸² Despite their governmental nature, the court reasoned that certain acts are actionable because of their grievous nature and their connection to the United States.⁸³

The decision in *Sanchez* is significant in two major respects. First, it provides further judicial interpretations of the terms "commercial" and "governmental" as they apply under the Act, especially under the important "commercial activities exception" to sovereign immunity.⁸⁴ The act requires an analysis which focuses on the particular action in question and a close examination of the facts underlying that action. The governmental or commercial character of the action itself is controlling and not the governmental or commercial character of the foreign defendant. *Sanchez* is a step toward uniformity of immunity decisions.

Second, and more importantly, *Sanchez* illustrates how the FSIA, which was meant to codify the restrictive theory of immunity, extends the jurisdiction of American courts beyond the limits imposed under the restrictive theory. Prior to the enactment of the FSIA, the American courts could not have heard a case involving the governmental acts of a foreign state. Under the FSIA, however, governmental as well as commercial acts fall within the jurisdiction of the court.

The *Sanchez* decision does, however, leave an important question unanswered. Now that the American courts are empowered to decide some cases involving the governmental acts of a foreign state, what contacts with the United States will be necessary to meet the minimum contacts requirement? For example, under section 1605(a)(3) (property taken in violation of international law), an American court can decide a case in-

⁸¹ House Report, *supra* note 1, at 17, reprinted in U.S. Code Cong. & Ad. News at 6616.

⁸² 515 F. Supp. at 914.

⁸³ *Id.*

⁸⁴ See Foreign Sovereign Immunities Act § 4(a), 28 U.S.C. § 1605(a)(2) (1976).

volving the property owned by an agency of a foreign state so long as that agency is engaged in a commercial act in the United States.⁸⁵ If the property in question is outside the United States, will the single unrelated commercial act of the foreign agency in the United States be enough to satisfy the minimum contacts requirement?⁸⁶ The answer to this question will significantly influence the jurisdictional reaches of the American courts over a foreign state. In *Sanchez*, however, the departure from the restrictive theory is clear. No longer will immunity be granted solely because an act is governmental in nature and no longer can the concepts of "restrictive theory" and immunity under the FSIA be considered synonymous.⁸⁷

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⁸⁵ See Foreign Sovereign Immunities Act § 4(a), 28 U.S.C. § 1605(a)(3) (1976).

⁸⁶ One commentator who examined this question has concluded that more than a single, unrelated commercial act will be required before minimum contacts is achieved, but that the point at which such contacts are achieved is unclear under the Act. See Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 *Colum. J. Transnat'l L.* 211, 255-56 (1979).

⁸⁷ Assuming that Ms. Sanchez can prove her claims against Banco Central, her ability to collect a judgment is severely impaired by the fact that property of a foreign central bank is immune from attachment and execution. See Foreign Sovereign Immunities Act § 4(a), 28 U.S.C. § 1611(b)(1) (1976).

