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Persinger v. Islamic Republic of Iran: Iran Granted Immunity Under the Noncommercial Tort Exception of the Foreign Sovereign Immunities Act of 1976

In *Persinger v. Islamic Republic of Iran*¹ the United States Court of Appeals for the District of Columbia Circuit decided whether foreign states may claim sovereign immunity in suits by American citizens injured by the states' tortious acts occurring at United States embassies. The *Persinger* court held in favor of immunity and clarified ambiguities in the language of the Foreign Sovereign Immunities Act of 1976 (FSIA).² It decided that a United States embassy is not "in the United States" within the meaning of the FSIA,³ and that both the tortious act or omission and the injury must occur within the United States for a foreign state to be subject to jurisdiction under the non-commercial exception to immunity in the FSIA.⁴ The decision offers an important judicial interpretation of sections of the FSIA, the meanings of which had been left unclear by earlier cases.

On November 4, 1979 Iranian militants seized the United States embassy in Tehran, Iran. The embassy's personnel, including Gregory Alan Persinger, a United States Marine, were held hostage in violation of international law for over fourteen months. Iran freed the hostages on January 20, 1981 pursuant to an executive agreement obligating the United States to terminate all legal proceedings, nullify all judgments in American courts involving Iran, and settle all such claims by arbitration.⁵ Sergeant Persinger and his parents brought suit in the district court of the District of Columbia against Iran for injuries suffered during Persinger's captivity. The court granted the United States motion to dismiss based on President Carter's executive order implementing the terms of the agreement

¹ 729 F.2d 835 (D.C. Cir.), *cert. denied*, 105 S. Ct. 247 (1984).

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 (1982).

³ *Persinger*, 729 F.2d at 839.

⁴ *Id.* at 842.

⁵ The terms of the agreement are embodied in two documents, The Declaration of the Government of the Democratic and Popular Republic of Algeria and The Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran. See *American International Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 434-35 (D.C. Cir. 1981).

and held that, in the alternative, Iran would be immune from suit under the FSIA.⁶

The Court of Appeals originally affirmed the district court's dismissal but held that the sovereign immunity defense did not apply.⁷ On rehearing, the court reversed itself on the immunity question, noting that it was without authority to decide whether the executive order extinguished Persinger's claims.⁸

The *Persinger* court granted Iran immunity based on its interpretation of the FSIA's section 1605(a)(5),⁹ read in light of the definition provided in section 1603(c).¹⁰ It reasoned that Congress, in drafting section 1603(c), had included the words "continental or insular" to modify the phrase "all territory and waters . . . subject to the jurisdiction of the United States" in an attempt to restrict the Act's application to the continental United States and its islands.¹¹ Such a definition would exclude United States military bases, embas-

⁶ *Persinger*, 729 F.2d at 837. Relying on *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the district court held that "the President may dispose of private claims against foreign states to resolve, or avoid, international crises." *Persinger v. Islamic Republic of Iran*, No. 81-00230, slip op. at 2 (D.C. Cir. Aug. 21, 1981).

⁷ See *Persinger*, 729 F.2d at 837.

⁸ *Id.* at 838. The court, citing Fed. R. Civ. P. 12(h)(3), reasoned it would be exercising authority "illegitimately" if it decided the merits of the case before addressing the jurisdictional issue. *Id.* at n.4. See *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). For discussions of the relationship between personal jurisdiction, subject matter jurisdiction, and availability of sovereign immunity as a defense in a suit against a foreign state, see *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 306-07 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982). See generally Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 402-04 (1982).

⁹ 28 U.S.C. § 1605(a)(2) & (5) (1982) provides that:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

(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—

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

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

Id.

¹⁰ 28 U.S.C. § 1603(c) (1982) provides that "for purposes of this chapter . . . the 'United States' includes all territory and waters, continental or insular, subject to the jurisdiction of the United States." *Id.*

¹¹ *Persinger*, 729 F.2d at 839.

sies, and other possessions located in foreign territory.¹² The court concluded, therefore, that Iran's tortious conduct did not occur "in the United States" and was not excepted from immunity by section 1605(a)(5).¹³ The court further reasoned that its interpretation was supported by the legislative history of the FSIA and would bring the United States into conformity with other nations and international organizations.¹⁴ It also noted the possible "unhappy consequences" that might result from a different interpretation of the statute as evidence that Congress intended a restrictive application of the Act.¹⁵

Addressing the parents' claims, the court held that both the tortious act and injury must occur in the United States for section 1605(a)(5) to apply.¹⁶ Noting a passage in the legislative history explicitly stating that "the tortious act or omission must occur within the jurisdiction of the United States," the court reasoned it would be anomalous to find that Congress intended to deny jurisdiction where a hostage dies in Tehran and yet allow it where one dies after returning to the United States.¹⁷ Furthermore, the court contrasted the language of section 1605(a)(2), which provides for suit against a foreign sovereign for its tortious commercial activities having a "direct effect" in the United States, with that of section 1605(a)(5) and concluded that Congress used different language to effect a different meaning.¹⁸ The dissent believed the "plain language" of the statute clearly requires that only the injury occur in the United States and saw no reason to rely on the legislative history for a different interpretation.¹⁹

A look at the history of sovereign immunity in the United States is helpful to explain the significance of *Persinger*. The United States first recognized the doctrine of sovereign immunity in the early nineteenth century in *The Schooner Exchange v. M'Fadden*.²⁰ Chief Justice Marshall found that a foreign state's plea of immunity was consistent with the general law and practice of nations.²¹ Gradually, however, courts began to place less emphasis on general principles of international law in favor of following the policies of the State Department.²² In 1952 these policies were enunciated in a letter from

¹² *Id.* at 839, 841.

¹³ *Id.* at 842.

¹⁴ *Id.* at 839-40. See H.R. REP. NO. 1487, 94th Cong., 2d Sess. 12, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6604, 6610 [hereinafter cited as "HOUSE REPORT"].

¹⁵ *Persinger*, 729 F.2d at 841.

¹⁶ *Id.* at 843.

¹⁷ *Id.* at 842-43 (citing HOUSE REPORT, *supra* note 14, at 21, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 6619).

¹⁸ *Id.* at 843.

¹⁹ *Id.* at 844.

²⁰ 11 U.S. (7 Cranch) 116 (1812).

²¹ *Id.* at 136.

²² *E.g.*, *Mexico v. Hoffman*, 324 U.S. 30, 35-36 (1945); *Ex parte Peru*, 318 U.S. 578, 587-89 (1943); *Letelier v. Republic of Chile*, 488 F. Supp. 665, 670 (D.D.C. 1980).

Legal Advisor Jack Tate.²³ The letter suggested use of a restrictive theory of sovereign immunity that provided for immunity only when the acts of a foreign state were of a public or sovereign nature rather than simply private or commercial.²⁴ This restrictive theory replaced the absolute theory of immunity, which had required a sovereign's consent to assert jurisdiction on any issue.²⁵

The distinction between a state's public actions and its private or commercial ones was often difficult to make and was frequently influenced by diplomatic as well as legal considerations.²⁶ To reduce the foreign policy implications of sovereign immunity decisions and to assure that such findings were made on a strictly legal basis, Congress passed the Foreign Sovereign Immunities Act of 1976.²⁷ The Act specifies the instances in which a party may take legal action against a foreign state, the circumstances under which a foreign state is entitled to immunity, and the available remedies if a state fails to pay a judgment against it. The FSIA sets forth the requirements for personal jurisdiction over a foreign state and grants the district courts original jurisdiction of civil actions against a state not entitled to immunity.²⁸

Section 1604 of the Act grants foreign states immunity from the jurisdiction of United States courts subject to the exceptions in sections 1605-1607.²⁹ Section 1605(a)(5) provides that a foreign state is not immune from suits for money damages arising out of the tortious conduct causing "personal injury or death or damage to or loss of property, occurring in the United States."³⁰ Section 1603(c) defines "United States" as "all territory and waters, continental or insular, subject to the jurisdiction of the United States."³¹

Because the specific issues raised in *Persinger* rarely have been litigated, it is useful to examine decisions on similar issues under the

²³ Letter from State Department Acting Legal Advisor Jack B. Tate to Acting Attorney General Phillip B. Perlman (May 11, 1952), *reprinted in* 26 DEP'T. STATE BULL. 984 (1952).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Letelier*, 488 F. Supp. at 670. For discussions of the principle of sovereign immunity prior to the Foreign Sovereign Immunities Act, see generally *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); Note, *Sovereign Immunity in the Supreme Court: Using the Certiorari Process to Avoid Decision-Making*, 16 VA. J. INT'L L. 903, 904-09, 920-24 (1976).

²⁷ FSIA, *supra* note 2. For an excellent discussion of the FSIA, see von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33 (1978).

²⁸ 28 U.S.C. § 1330 (1982).

²⁹ 28 U.S.C. § 1604 provides:

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

Id.

³⁰ See *supra* note 9 and accompanying text.

³¹ See *supra* note 10 and accompanying text.

Federal Tort Claims Act (FTCA).³² The FTCA waives sovereign immunity previously enjoyed by the United States and its employees with respect to certain tort claims that give rise to private liability.³³ Congress apparently chose to pattern the FSIA after the FTCA.³⁴ Section 1605(a)(5) of the FSIA, providing for liability of foreign governments for their noncommercial torts, closely parallels the FTCA section providing for consent to suit by the United States for the same acts.³⁵ Both statutes preserve immunity with respect to the same torts, such as malicious prosecution, abuse of process, and libel.³⁶ These parallels indicate the FTCA may serve as a guide for interpreting the FSIA.

Cases involving sections 1346(b) and 2680(k) of the FTCA further shed light on whether the exercise of jurisdiction over a foreign state under section 1605(a)(5) of the FSIA requires that the tortious conduct as well as the injury occur in the United States. Section 1346(b) grants district courts original jurisdiction of claims against the United States for injuries to persons or property,³⁷ but its applicability is limited by section 2680(k) to claims "arising in a foreign country."³⁸ For example, in *Richards v. United States*³⁹ the Supreme Court held that government liability for negligence under section 1346(b) should be determined by the law of the place where the negligent act occurred and not where the act had its "operative effect."⁴⁰ Similarly, the court in *Roberts v. United States*⁴¹ determined that, under section 2680(k), a tort claim arises where the negligent act or omission occurs.⁴² In *Manemann v. United States*⁴³ the court held that

³² Federal Tort Claims Act, ch. 753, 60 Stat. 842 (codified at 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80 (1982)).

³³ *Id.*

³⁴ See Dellapenna, *Suing Foreign Governments and Their Corporations: Sovereign Immunity: Part III*, 85 COM. L.J. 298 (1980).

³⁵ See *id.* at 299.

³⁶ See *id.*

³⁷ 28 U.S.C. § 1346(b) provides:

Subject to the provisions of Chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id.

³⁸ 28 U.S.C. § 2680(k) provides that "the provisions of this chapter and section 1346(b) of this title shall not apply to . . . any claim arising in a foreign country." *Id.*

³⁹ 369 U.S. 1 (1962).

⁴⁰ *Id.* at 10.

⁴¹ 498 F.2d 520 (9th Cir.), *cert. denied*, 419 U.S. 1070 (1974).

⁴² *Id.* at 522 & n.2.

⁴³ 381 F.2d 704 (10th Cir. 1967).

where negligent acts in Taiwan resulted in injury in the United States, the claim arose in a foreign country for the purpose of section 2680(k).⁴⁴

Courts interpreting the FSIA have reached differing conclusions. In *In re Sedco, Inc.*⁴⁵ the court held that the tortious act "in whole" must occur in the United States for section 1605(a)(5) to apply.⁴⁶ The decision turned on a sentence included in the House Judiciary Committee's Report on the FSIA, explicitly stating that "the tortious act or omission must occur within the jurisdiction of the United States."⁴⁷ As further evidence of the limited applicability of section 1605(a)(5), the *Sedco* court noted that the House Report states that the primary purpose of this exception is to cover the problem of traffic accidents of foreign embassy and governmental officials in the United States.⁴⁸

In *Harris v. Vao Intourist, Moscow*⁴⁹ the court noted that the legislative history indicates that section 1330(b) of the FSIA,⁵⁰ the federal long-arm statute extending jurisdiction over foreign states, is patterned after the District of Columbia's long-arm statute.⁵¹ The *Harris* court found that causing injury to American citizens abroad was an insufficient nexus by itself to justify the exercise of jurisdiction under the District of Columbia statute.⁵²

The court in *Letelier v. Republic of Chile*⁵³ allowed suit under section 1605(a)(5) even though the alleged acts by the defendant state to assassinate a United States citizen occurred in Chile. The court said that to hold otherwise "would totally emasculate the purpose and effectiveness of the Foreign Sovereign Immunities Act by permitting a foreign state to reimpose the so recently supplanted framework of sovereign immunity as defined prior to the Act 'through the back door, under the guise of the act of state doctrine.'"⁵⁴

⁴⁴ *Id.* at 705. See also *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975). In that case, the court found plaintiff's claim, based on injuries suffered in an airplane crash in France caused by alleged governmental negligence in California, did not arise in a foreign country.

⁴⁵ 543 F. Supp. 561 (S.D. Tex. 1982).

⁴⁶ *Id.* at 567.

⁴⁷ HOUSE REPORT, *supra* note 14, at 21, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 6619.

⁴⁸ *Sedco*, 543 F. Supp. at 567.

⁴⁹ 481 F. Supp. 1056 (E.D.N.Y. 1979).

⁵⁰ 28 U.S.C. § 1330(b) provides:

Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

Id.

⁵¹ See *Harris*, 481 F. Supp. at 1061. See also HOUSE REPORT, *supra* note 14, at 13, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 6612; *Upton v. Empire of Iran*, 459 F. Supp. 264, 266 (D.D.C. 1978).

⁵² *Harris*, 481 F. Supp. at 1062.

⁵³ 488 F. Supp. 665 (D.D.C. 1980).

⁵⁴ *Id.* at 674 (quoting Amicus Brief of United States at 41, Alfred Dunhill of London,

Court decisions interpreting the FTCA are also useful to clarify the meaning of section 1603(c) of the FSIA. By its terms, the FTCA does not apply to any claim "arising in a foreign country."⁵⁵ In *Kuhn v. United States*⁵⁶ the court denied jurisdiction over plaintiff's claim that he was injured while on the Marshall Islands by exposure to radiation from nuclear testing by the United States. The court said the Marshall Islands is a "foreign country" even though the United States exercises significant authority over the islands, according to a trust agreement with the United Nations.⁵⁷

In *Meredith v. United States*⁵⁸ the court rejected plaintiff's contention that her claim did not "arise in a foreign country" because the wrongful acts occurred at the American embassy in Thailand.⁵⁹ The court said Congress intended liability under the FTCA to be determined by the law of the state where the tortious act occurred.⁶⁰ Therefore, Congress excluded from the FTCA claims arising abroad to prevent the United States from being subject to the laws of other nations that have claims arising in the United States.⁶¹ The court concluded that a United States embassy must be regarded as "in a foreign country" to accord with congressional intent. The *Meredith* court noted other reasons for excluding claims arising in foreign countries: "absence of United States courts in such countries, difficulty of bringing defense witnesses from the scene of the alleged torts, and reluctance to extend the FTCA's benefits to foreign populations."⁶²

Inc. v. Republic of Cuba, 425 U.S. 682 (1976)). The act of state doctrine was established in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), in which the Supreme Court held:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Id. Courts differ as to whether the FSIA applies to acts of a foreign state of public or sovereign nature as well as to those that are simply private or commercial. Relying on *Dunhill*, the court in *Frolova v. Union of Soviet Socialist Republics*, 558 F. Supp. 358 (N.D. Ill. 1983), said "there could be no doubt" that the act of state doctrine survived the enactment of the FSIA. *Id.* at 364. The *Letelier* court, however, found that the FSIA redefined "public acts" as those "not within the exceptions in sections 1605-1607," thereby overriding the act of state doctrine. 488 F. Supp. at 672 (quoting HOUSE REPORT, *supra* note 14, at 17, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 6616). The court held that the generality of the terms of the FSIA indicates it should apply to *all* tort claims for money damages.

⁵⁵ See *supra* note 38 and accompanying text.

⁵⁶ 541 F. Supp. 567 (C.D. Cal. 1982).

⁵⁷ *Id.* at 568. See also *Callas v. United States*, 253 F.2d 838 (2d Cir. 1958).

⁵⁸ 330 F.2d 9 (9th Cir.), *cert. denied*, 379 U.S. 867 (1964).

⁵⁹ *Id.* at 11. In *Cobb v. United States*, 191 F.2d 604 (9th Cir. 1951), the court held that the phrase "in a foreign country" should be used in section 2680(k) of the FTCA with the meaning dictated by "common sense" and "common speech." *Id.* at 612.

⁶⁰ *Meredith*, 330 F.2d at 10. See also *United States v. Spelar*, 338 U.S. 217 (1949).

⁶¹ *Meredith*, 330 F.2d at 10.

⁶² *Id.* at 10-11 (quoting *Burma v. United States*, 240 F.2d 720, 722 (4th Cir. 1957)).

In *United States v. Archer*⁶³ a foreign defendant was charged with having falsified an application for a nonimmigrant visa at the United States embassy in Mexico. In conflict with the *Meredith* reasoning, the court asserted jurisdiction, holding that a consulate or embassy is part of United States territory.⁶⁴ The court found that a consul becomes a magistrate insofar as the United States has authority to confer on him the power to administer an oath.⁶⁵ Similarly, in *Agee v. Muskee*⁶⁶ the court stated that “[t]he ground occupied by a United States embassy is not officially United States territory, but such premises are subject to the concurrent jurisdiction of the United States criminal laws and to the extent indicated by our laws and decisions.”⁶⁷

In *McKeel v. Islamic Republic of Iran*⁶⁸ twelve former hostages and two of their wives sued Iran for injuries resulting from the fourteen-month captivity. The Ninth Circuit held that section 1603(c) refers only to areas subject to the territorial jurisdiction of the United States and thus does not include foreign embassies.⁶⁹ The *McKeel* court concluded that a liberal reading of section 1603(c) would include United States embassies within the section 1605(a)(5) exception but believed that congressional intent was to the contrary. The court noted that the legislative history showed that section 1605(a)(5) was directed primarily at the problem of traffic accidents in the United States caused by cars operated by foreign embassy officials and, therefore, was meant to serve only a limited purpose.⁷⁰

The *McKeel* court also believed that the “principle of nationality” and the “protective principle” allow the United States to assert jurisdiction over individuals who commit torts at embassies abroad but not over those states in which the embassies are located. The principle of nationality provides that a state may punish its citizens for wrongful conduct no matter where the conduct takes place. The protective principle maintains that certain crimes against the sovereignty of a state may be punished regardless of the nationality of the actor or the location of the act.⁷¹ The *McKeel* court observed that jurisdiction over the forum state itself could hurt United States rela-

⁶³ 51 F. Supp. 708 (S.D. Cal. 1943).

⁶⁴ *Id.* at 709. See also *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir.), cert. denied, 392 U.S. 936 (1968). In that case, the Second Circuit held that Congress had the authority to give federal courts jurisdiction over a visa applicant who perjured herself at the American Consulate in Canada.

⁶⁵ *Archer*, 51 F. Supp. at 709.

⁶⁶ 629 F.2d 80 (D.C. Cir. 1980).

⁶⁷ *Id.* at 111. See also G. Hackworth, IV INTERNATIONAL LAW 564 (1942).

⁶⁸ 722 F.2d 582 (9th Cir. 1983).

⁶⁹ *Id.* at 589. The court noted that territory is a primary basis for jurisdiction, and United States embassies remain part of the territory of the receiving state. See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 77 (1965).

⁷⁰ *McKeel*, 722 F.2d at 587.

⁷¹ *Id.* at 588.

tions with other governments and, under the principle of reciprocity,⁷² could make the United States subject to foreign jurisdiction for the actions of its employees at foreign embassies in the United States.⁷³

The *Persinger* ruling that the tortious act must occur in the United States for an immunity exception to apply is consistent with most cases that have dealt with the issue. The court rejected a literal reading of the FSIA in favor of an interpretation which, in its opinion, reflects the true intention of Congress.⁷⁴ As in *Sedco*, the *Persinger* court relied heavily on the passage in the House Report, which states that the tortious act must occur within the jurisdiction of the United States.⁷⁵ Although the dissent found no reason to favor the report's language over the "plain language of the statute," the majority chose to follow the admonition of the Supreme Court in *United States v. American Trucking Associations, Inc.*⁷⁶ to construe the language so as to give effect to the intent of Congress.⁷⁷ The *Persinger* court noted that Congress intended the FSIA to conform to the prevailing practice in international law.⁷⁸ The general rule is that a state loses its sovereign immunity only when its tortious acts occur within the territory of the forum state.⁷⁹

Other bases for the *Persinger* holding as to section 1605(a)(5) are not as sound. Although Congress may have intended different meanings by wording sections 1605(a)(2) and 1605(a)(5) differently, the dissent rightly suggests that Congress could just as easily have intended to restrict jurisdiction more in cases involving commercial torts than in cases involving noncommercial ones.⁸⁰ The dissent also correctly contends that Congress could have chosen to restrict juris-

⁷² See M. WHITEMAN, 6 DIGEST OF INTERNATIONAL LAW 580-82 (1968). The author notes that the Polish Supreme Court, applying the principle of reciprocity, refused to assert jurisdiction over the Republic of France in a 1958 suit arising from an accident in Poland that involved a car owned by the French Consulate. The Court stated:

The jurisdictional immunity of foreign states is based on principles universally accepted in international intercourse, among which the most essential one is the principle of reciprocity between states, springing from the fundamental principle of their equality. The principle of reciprocity consists in the recognizing or denying of jurisdictional immunity by one state with respect to another state to the same extent as the latter recognizes or denies immunity in relation to other states.

Id.

⁷³ *McKeel*, 722 F.2d at 589.

⁷⁴ *Persinger*, 729 F.2d at 843-44.

⁷⁵ See HOUSE REPORT, *supra* note 14, at 21, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 6619.

⁷⁶ 310 U.S. 534 (1940).

⁷⁷ *Id.* at 542. The court added that "when aid to the construction of the meaning of words as used in the statute is available, there certainly can be no 'rule of law' which forbids its use, however clear the words appear on superficial examination." *Id.* at 543-44.

⁷⁸ *Persinger*, 729 F.2d at 840. See *supra* note 14 and accompanying text.

⁷⁹ 722 F.2d at 588. See, e.g., European Convention on State Immunity, Arts. 7, 11, Council of Europe, No. 74 (1972).

⁸⁰ *Persinger*, 729 F.2d at 844. (Edwards, J., concurring in part and dissenting in part.)

diction over claims prompted by acts outside the United States "as a policy matter," despite any anomalous results it might create.⁸¹

The decision in *Persinger* nevertheless helps clarify the meaning of section 1603(c). Although the court's conclusion that the words "continental or insular" modify "all territory and waters . . . subject to the jurisdiction of the United States" lacks supporting legislative history or case law, it is logical. As in *McKeel*, the court referred to the House Report's statement that section 1605(a)(5) was directed primarily at the problem of traffic accidents as evidence that Congress was primarily concerned with torts committed in the United States.⁸²

The *Persinger* court's most persuasive reasons for refusing to exercise jurisdiction are the "unhappy consequences" that might result. Eliminating immunity for torts committed in United States embassies would virtually make those embassies United States territory for jurisdictional purposes.⁸³ That designation could make foreign states reluctant to provide services to those embassies because they might be subject to suit in United States courts for negligent acts.⁸⁴ Furthermore, such a result could make the United States vulnerable to suits abroad for torts committed on the premises of embassies located in the United States.⁸⁵ The *Persinger* court observed that United States military and naval bases around the world could be similarly affected.⁸⁶

Expansion of jurisdiction would also likely increase the amount of litigation between Americans and foreign states at great cost and inconvenience to the litigants and the courts, and would damage foreign relations. On the other side of the scale, the benefits of expanded jurisdiction include assurance to United States citizens of a forum for litigating claims against foreign states and the United States Government's ability to hinder the actions of nations of which it disapproves.

The *Persinger* court's reluctance to interpret the FSIA to deny immunity likely stems from traditional notions that liability of foreign states is, in some instances, a political and not a judicial question. That idea is embodied in the act of state doctrine,⁸⁷ which requires courts to defer to legislative and executive branches when the latter can best resolve a politically sensitive issue.⁸⁸ The act of

⁸¹ *Id.*

⁸² *Id.* at 840.

⁸³ *Id.* at 841.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See *supra* note 54 and accompanying text.

⁸⁸ See *Int'l Ass'n of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981). See also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423-25 (1964).

state doctrine, unlike the FSIA, is not jurisdictional and applies only to questions concerning the legality of governmental or public acts⁸⁹ of a foreign sovereign, and not to private or commercial ones.⁹⁰ Nevertheless, the *Persinger* court appears to have proceeded with the primary objective of the doctrine in mind—avoidance of ill-timed judicial decisions on the validity of acts of foreign sovereigns that could embarrass the United States and disrupt its international diplomacy.⁹¹ Judicial interference could often render ineffective legislative and executive use of protocol, economic sanction, delay, and other means of persuasion to resolve disputes with foreign states.⁹²

The *Persinger* opinion carefully balances the interests of the United States and its citizens in having their rights protected by United States courts against the interests of protecting the independence and sovereignty of foreign states and preserving diplomatic relations with them. *Persinger* emphasizes that while the United States and its citizens may have claims against private foreign parties for acts committed within that country, and against foreign states for acts committed in the United States, United States citizens may not sue foreign states for noncommercial torts committed within the boundaries of those states. Unlike the court in *Letelier*, which refused to allow the act of state doctrine to emasculate the FSIA, *Persinger* wisely interprets the FSIA in a cautious manner, and restricts its application in instances that are more appropriately dealt with by administrative or diplomatic means or by special legislation.

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⁸⁹ Courts have had difficulty determining what acts are "acts of state" and governmental in nature for purposes of the act of state doctrine. Furthermore, it is not clear whether the holding of hostages in *Persinger* should be regarded as an "act of state" by Iran. For decisions on whether particular acts are such "acts of state," see Annot., 12 A.L.R. FED. 707, 741-50 (1972). Courts have applied the doctrine even though a foreign state's act violated its own laws or took place before that government received de jure recognition from the United States. Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 HARV. L. REV. 1607, 1609 (1962).

⁹⁰ See *Machinists*, 649 F.2d at 1359. For an excellent discussion of the relationship between the FSIA and the act of state doctrine, see Note, *Adjudicating Acts of State in Suits Against Foreign Sovereigns: A Political Question Analysis*, 51 FORDHAM L. REV. 722 (1983).

⁹¹ See *Machinists*, 649 F.2d at 1358-59.

⁹² See *id.* at 1358.

