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Gregorian v. Izvestia: Libel and the Foreign Sovereign Immunities Act

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Gregorian v. Izvestia: Libel and the Foreign Sovereign Immunities Act

As U.S. citizens become more involved with foreign nations, a consistent approach to settling international disputes becomes increasingly important. Aware of the delicacy and significance of international relations, a foreign state may seek to take advantage of an American plaintiff by invoking its privilege of sovereign immunity. Accordingly, it is imperative that United States courts apply the doctrine of sovereign immunity in a predictable manner, eradicating imposition of immunity simply for the sake of smoother international relations.

Sovereign immunity is governed by the Foreign Sovereign Immunities Act (FSIA),[1] which allows American citizens a domestic forum for settling international disputes[2] while establishing immunity for foreign nations subject to specified exceptions.[3] The FSIA provides federal courts with subject matter jurisdiction over foreign sovereigns whose allegedly unlawful actions fall within one of these exceptions. One such basis for jurisdiction, known as the commercial activity exception, provides jurisdiction over sovereigns who cause a "direct effect" in the United States as a consequence of their commercial dealings.[4]

Defining "direct effect" and determining what types of conduct between a plaintiff and a foreign state satisfy the definition of "commercial activity" have been sources of confusion for American courts. Further problems arise with respect to particular tort claims which appear to be exempt from the commercial exception to immu-

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[1] The FSIA or "Immunities Act," Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-11 (1982)), was enacted on October 21, 1976.

[2] Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U.L. REV. 474, 474 (1980).

[3] 28 U.S.C. §§ 1604, 1605 (1982). The statute states:

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

28 U.S.C. § 1604. The other exceptions are enumerated in 28 U.S.C. § 1605.

[4] Note, *supra* note 2, at 474.

nity. In a recent case, *Gregorian v. Izvestia*,[5] the U.S. District Court for the Central District of California held that subject matter jurisdiction did not exist in a libel action against a foreign state. Do such torts demand litigation when they arise out of claims involving foreign states in their commercial capacity? Recent appellate court decisions fail to dispel this confusion.

Gregorian arose when California International Trade Corporation (CIT), owned by plaintiff Raphael Gregorian, served as a sales representative for American manufacturers, exporting medical and laboratory equipment to the USSR.[6] After ten years of work and accreditation by the Ministry of Foreign Trade of the USSR, the CIT was granted the privilege of an office and personnel in Moscow. The accreditation of CIT symbolized the prestige and status Gregorian had attained. All business came to an abrupt halt, however, when the Soviet Union failed to pay for equipment it procured through V/O Licensintorg and V/O Medexport, two Soviet trading companies.[7] When Gregorian pressed the trading companies for payment of the debt, CIT's accreditation status was revoked, precisely one month short of its expiration date, taking from Gregorian the privilege of using a Moscow office and Soviet personnel. Eight days later, an article attacking Gregorian was printed in the Soviet newspaper *Izvestia*,[8] accusing Gregorian of "bribery, smuggling, and other unscrupulous business practices,"[9] and implying that he was an U.S. spy.[10] Plaintiffs Gregorian and CIT unsuccessfully tried to settle the matter with the Ministry of Foreign Trade of the USSR and subsequently filed suit against defendants *Izvestia*, V/O Licensintorg, V/O Medexport, the USSR Ministry of Foreign Trade, and the USSR, alleging libel and breach of contract.[11]

After being served with the summons and complaint, the Ministry of the USSR rejected service, claiming a right to sovereign immunity.[12] Upon plaintiffs' motion for entry of default judgment, the court determined that plaintiffs' claim was "sufficiently commercial that it justified an exception to immunity under [section] 1605(a)(2) of the FSIA."[13] A default judgment was enter-

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[5] 658 F. Supp. 1224 (C.D. Cal. 1987).

[6] 658 F. Supp. at 1226.

[7] *Id.*

[8] *Id. Izvestia* is a newspaper published by the "Presidium of the Supreme Soviet of the USSR" and distributed worldwide, including the United States. *Id.*

[9] *Id.*

[10] *Id.* Because the article alleged that Gregorian had engaged in unscrupulous business activities, it significantly hurt Gregorian's business with Soviet manufacturers and businesses worldwide. The court awarded damages of $163,165.17 on the contract claim and general damages of $2,500,000 on the libel claim. *Id.* at 1227.

[11] *Id.* at 1226-27.

[12] *Id.* at 1227. When service of process was made to defendants, they were each advised of the Foreign Sovereign Immunities Act. *Id.*

[13] *Id.* at 1233.

ed.[14] In satisfaction of the judgment debt, the U.S. magistrate issued plaintiffs a writ of execution on two bank accounts, prompting defendants V/O Licensintorg and V/O Medexport to file motions with the court to vacate the judgment, stay execution, and dismiss the case.[15] On February 2, 1987, an order was issued staying execution on the judgment until the court could decide defendants' motions.[16]

Plaintiffs alleged that this libel arose out of a commercial contract claim, and, as the FSIA grants no immunity for commercial disputes, U.S. courts had subject matter jurisdiction over the libel action.[17] The court disagreed and, finding its prior decision regarding the libel claim to be lacking for subject matter jurisdiction pursuant to section 1605 of the FSIA, set aside the decision as void and dismissed the libel claim.[18] In granting the defendants absolute sovereign immunity the court relied upon an interpretation of the Immunities Act based on legislative intent and international policy.

The *Gregorian* court began its analysis of the sovereign immunities issue by considering the essential nature of the defendants' activity.[19] Because under the FSIA a grant of immunity depends on whether the nature of the sovereign's activity was commercial, the court must examine the act which forms the basis of the suit.[20] Focusing on *Izvestia*, the court determined that all aspects of a newspaper contribute to its characterization as commercial or public, noting that a government's conduct would not be held public based on its manifestation in a government-owned newspaper.[21] Further, the court recognized that Congress' goal in distinguishing between the public and private character of an act was to keep foreign states from enjoying absolute sovereign immunity.[22] Thus, the court acknowledged the significance of restrictive sovereign immunity.

At this point, the *Gregorian* court abandoned its quest for distinguishing between commercial and public acts and based its analysis on legislative intent. The court acknowledged the likelihood that the nature of the Soviet Union's activities was commercial and recognized the possibility of the libel claim arising out of plaintiffs' con-

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[14] *Id.* at 1227.

[15] *Id.*

[16] *Id.* at 1228.

[17] *Id.* at 1231-32. Plaintiffs assert that the Soviet defendants libeled Gregorian in order to avoid the ensuing contract action against them. *Id.*

[18] *Id.* at 1234. The court set aside its decision as void pursuant to Fed. R. Civ. P. 60(b)(4). The libel claim was dismissed pursuant to Fed. R. Civ. P. 12(b)(1). *Id.*

[19] *Gregorian*, 658 F. Supp. at 1232. An activity's commercial character "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." *Id.* at 1232 n.5 (quoting 28 U.S.C. § 1603(d)).

[20] Callejo v. Bancomer, 764 F.2d 1101 (5th Cir. 1985). *See infra* notes 89-92 and accompanying text.

[21] *Gregorian*, 658 F. Supp. at 1232-33.

[22] *Id.* at 1233.

tract claim,[23] but gave these factors little weight in its analysis. The court emphasized that an interpretation of the commercial activity exception as including the immunities listed in subsection (a)(5)(B)[24] would subject foreign states to jurisdiction in circumstances under which the United States government enjoys immunity.[25] This analysis was supported by relying on the legislative history of the Act which states that the claims found in sections 1605(a)(5)(A) and (B) "correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act."[26] Because the Federal Torts Claims Act (FTCA)[27] bars all libel claims against the United States government, the court determined that Congress also meant to grant absolute immunity with respect to libel to foreign sovereigns.[28]

The *Gregorian* court acknowledged a basic difference in the two Acts, however, which makes its case tenuous. Unlike the FSIA, the FTCA does not include ambiguous language that connects the immunities section of the Act to other provisions which fail to protect the government from suit.[29] This appears to weaken the connection between the two Acts. While the court admitted that the FSIA left room for interpretation, it insisted that it was "unlikely that Congress wished to create a double standard" under which the United States government is immune from tort claims such as libel, but foreign states are exposed to suit.[30]

The doctrine of sovereign immunity has a long history in American courts. The importance of the immunities doctrine was first emphasized and introduced into U.S. courts in the nineteenth-century opinion of *Schooner Exchange v. McFadden*.[31] Chief Justice Marshall,

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[23] *Id.* at 1231. *See supra* note 17 and accompanying text.

[24] The other exceptions to foreign sovereign immunity are discussed *infra* at notes 45-50.

[25] *Gregorian*, 658 F. Supp. at 1234-35.

[26] *Id.* at 1233 (quoting House Judiciary Comm., *Jurisdiction of United States Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 21, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6620).

[27] 28 U.S.C. §§ 1346, 2671-2680 (1982). The FTCA bars recovery against the United States government for any claim arising out of libel. The statute provides that:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2674. There are several exceptions to this provision, however, granting the government immunity for tort claims including:

> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C. § 2680(h).

[28] *Gregorian*, 658 F. Supp. at 1233-34.

[29] *Id.*

[30] *Id.*

[31] 11 U.S. (7 Cranch) 116 (1812). American citizens alleged in federal district court that a French warship docked in Philadelphia belonged to them and had been unlawfully

writing for an unanimous court, upheld an immunity claim by France on the basis of grace and comity recognizing that most other nations practiced the doctrine of absolute foreign sovereign immunity.[32] Marshall explained that each nation has exclusive jurisdiction within its own territory, but that "all sovereigns impliedly engaged not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity has placed in their hands."[33] Although this opinion held only that United States courts lacked jurisdiction over public warships of a foreign nation, *Schooner Exchange* has been interpreted as granting absolute sovereign immunity to foreign nations.[34]

In the first half of the twentieth-century the courts began to chip away at the doctrine of absolute foreign sovereign immunity. The courts slowly adopted the principle of restrictive sovereign immunity under which immunity was granted only for the public acts of a sovereign.[35] Disputes regarding the private act of a sovereign were appropriate matters for a U.S. court's resolution.[36] The State Department formalized the policy in the "Tate Letter,"[37] which expressly adopted the restrictive theory of sovereign immunity,[38] allowing immunity for a foreign state's public acts and excluding from immunity claims based on commercial actions.[39] In practice, however, the courts looked to the State Department, whose case-by-case determinations were usually based on foreign policy considerations.[40]

The FSIA, enacted in 1976, is the last link in the history of sov-

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taken. The court held that a distinction must be made between a foreign state's sovereign and private acts when determining whether or not to subject that foreign sovereign to United States jurisdiction. *Id.* at 117-47.

[32] *Id.* at 135-47. The absolute theory of sovereign immunity grants immunity to a foreign nation in all suits brought against it. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 34 (1978).

[33] *Id.* at 138.

[34] Verlinden, B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983); von Mehren, *supra* note 32, at 33, 39-40 (1978).

[35] HOUSE JUDICIARY COMM., *Jurisdiction of United States Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 8 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6607 [hereinafter HOUSE REPORT, with pages cited to 1976 U.S. CODE CONG. & ADMIN. NEWS].

[36] *Id.* This policy was consistent with the Western European countries' policy of restrictive sovereign immunity, under which the United States was consistently denied immunity. *Id.*

[37] Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEP'T STATE BULL. 984 (1952). According to the theory of absolute sovereign immunity, a sovereign cannot be subject to the jurisdiction of another sovereign. The restrictive theory of sovereign immunity limits the doctrine of immunity to those actions of a sovereign that are public, but not actions that are private. *Id.*

[38] HOUSE REPORT, *supra* note 35, at 6606.

[39] Tate, *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Sovereigns*, 26 DEP'T ST. BULL. 984, 984 (1952).

[40] HOUSE REPORT, *supra* note 35.

ereign immunity. The Act was designed to codify the "restrictive" theory of sovereign immunity.[41] To ensure that courts would apply the restrictive principle, rather than bow to State Department pressure, Congress removed the executive branch from determinations of immunity.[42] By transferring such power to the judicial branch, the FSIA sought to relieve the State Department of any coercion from foreign governments.[43] The legislative history of the Act supports this theory, recognizing the need to reduce the emphasis on foreign policy considerations and assure American litigants that immunity decisions are based on purely legal grounds and with due process protection.[44]

The Act's grant of foreign sovereign immunity is subject to several enumerated exceptions.[45] The immunity defense is withheld in cases where there is a waiver of immunity[46] or where a foreign nation engages in commercial activity which has a direct impact in the United States.[47] Further, where the issue concerns the rights to property which is situated in or has sufficient connections to the United States and is siezed in violation of international law, sovereign immunity will not be granted.[48] Finally, no immunity is provided if tort damages are sought from the foreign state[49] or a suit in admiralty is brought against the foreign state.[50] A nation whose conduct falls within one of these exceptions is subject to the jurisdiction of the U.S. courts.

The Immunities Act is plagued with ambiguities[51] and as such has been the source of much litigation.[52] Although purporting to follow precedent, courts which largely depend upon foreign relations and strict construction of the language of the FSIA are more likely to afford foreign defendants immunity.[53] In contrast, those courts which are devoted to assuring fair and predictable litigation

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41 *Id.* at 6605.

42 *Id.* at 6606.

43 *Id.*

44 *Id.*

45 28 U.S.C. §§ 1604, 1605 (1982).

46 *Id.* § 1605(a)(1).

47 *Id.* § 1605(a)(2). *See infra* note 67 and accompanying text.

48 *Id.* § 1605(a)(3), (4).

49 *Id.* § 1605(a)(5). *See infra* note 67 and accompanying text.

50 *Id.* § 1605(b).

51 Courts have difficulty defining the terms "direct effect" and "in the United States." Another source of confusion is categorization of a cause of action as either sovereign or commercial.

52 *See, e.g.*, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); DeSanchez v. Banco Central De Nicaragua, 770 F.2d 1385 (5th Cir. 1985); Texas Trading v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981); Frolova v. USSR, 558 F. Supp. 358 (N.D. Ill. 1983); Rio Grande Matter of Rio Grande Transport, Inc., 516 F. Supp. 1155 (S.D.N.Y. 1981); United Euram v. USSR, 461 F. Supp. 609 (S.D.N.Y. 1978); Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849 (S.D.N.Y. 1978).

53 *See, e.g., Gregorian*, 658 F. Supp. 1224 (C.D. Cal. 1987).

with foreign defendants base their analyses on precedent and congressional intent, and these courts often bar immunity.[54] Criteria for categorizing foreign states' actions as public and thus immune from suit in American courts were developed by the court in *Victory Transport, Inc. v. Comisaria General*,[55] a pre-FSIA landmark case. The 1976 Immunities Act differed significantly from and superceded this appellate decision, recognizing "commercial acts" which, if involved in the action, bar sovereign immunity under most circumstances.[56] While *Victory Transport* considered both the nature and purpose of the act, the Immunities Act focused mainly on the nature of the foreign state's action in determining whether the conduct is commercial or public.[57]

In 1976 the U.S. Supreme Court decided the case of *Alfred Dunhill of London Inc. v. Republic of Cuba*,[58] which focused on foreign states in their commercial capacities. *Dunhill* involved the Cuban government's seizure of cigar manufacturing businesses and assignment of "interventors" to occupy the business. When importers, including American companies, mistakenly paid the interventors for preintervention debts, they were forced by law to pay the former owners.[59] The importers claimed their entitlement to reimbursement from the interventors. The interventors, on the other hand, argued that the debt was quasi-contractual, with its situs in Cuba, and therefore their refusal to pay was an act of state, not subject to American courts.[60] Distinguishing between commercial and public acts, the Court's plurality opinion determined that the act of state doctrine should not extend to commercial acts of sovereign states.[61]

The Supreme Court in *Dunhill* recognized the importance of

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[54] *See, e.g., Dunhill*, 425 U.S. 682 (1976); *Callejo*, 764 F.2d 1101 (5th Cir. 1985); *DeSanchez*, 770 F.2d 1385 (5th Cir. 1985); *Texas Trading*, 647 F.2d 300 (2d Cir. 1981); *Rio Grande*, 516 F. Supp. 1155 (S.D.N.Y. 1981); *United Euram*, 461 F. Supp. 609 (S.D.N.Y. 1978); *Yessenin*, 443 F. Supp. 849 (S.D.N.Y. 1978).

[55] 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 361 U.S. 934 (1965). Strictly political acts are categorized as follows: "(1) internal administrative acts, such as expulsion of an alien; (2) legislative acts, such as naturalization; (3) acts concerning the armed forces; (4) acts concerning diplomatic activity; (5) public loans." *Id.* at 360.

[56] von Mehren, *supra note* 32, at 53.

[57] *Id.* Note that *Victory Transport* should no longer be relied upon as a determinant of jurisdictional immunity since it preceded the FSIA. *Id.*

[58] 425 U.S. 682 (1976) (plurality opinion). The Court recognized that the adoption of the restrictive doctrine of sovereign immunity suggests that commercial dealings between sovereign states should be governed by established rules of international law. *Id.* at 704-05. Justice Stevens' concurrence, while agreeing that the case was not appropriate for invocation of the act of state doctrine, did not join the Majority opinion's adoption of the commercial activities exception. *Id.* at 715.

[59] *Id.* at 684-86. The Cuban manufacturers, upon losing their businesses, fled to America. *Id.*

[60] *Id.* The act of state doctrine "[p]recludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964).

[61] *Dunhill*, 425 U.S. at 695.

healthy foreign relations, but concluded that this concern should not control when a suit arises out of a foreign sovereign's commercial dealings. After noting that foreign participation in international trade was increasing, the Court predicted a corresponding rise in injury to private businessmen.[62] The Court stressed that "subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts."[63] Having established that foreign states in their commercial capacities have only the standing of private citizens, the Court declared: "Subjecting them in connection with such [commercial] acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on 'national nerves.' "[64]

Following this policy declaration, the United States District Court for the Southern District of New York expanded on the Supreme Court's rationale in *Yessenin-Volpin v. Novosti Press Agency*.[65] There, an American businessman brought an action against two Soviet entities for writing allegedly defamatory articles and publishing them in four publications which were distributed worldwide.[66] Because section 1605(a)(5) of the FSIA[67] specifically exempts libel from the exceptions to immunity, the court considered subsection (a)(2)[68] which bars from immunity a foreign state whose act, performed outside the United States, is commercial and which "causes a direct effect in the United States."[69] The court in *Yessenin* found that a "direct effect" had been caused in the United States by the article having been written and published in the journals which were circulated in the U.S. The direct effect caused in the United States was the injury to plaintiff's reputation and consequently his business.[70]

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[62] *Id.* at 703.

[63] *Id.* at 703-04.

[64] *Id.* at 704.

[65] 443 F.Supp. 849 (S.D.N.Y. 1978).

[66] *Id.* at 854-55. One of the four publications was *Izvestia*.

[67] Section 1605 states in pertinent part that:

> (a) a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . .
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> (2) in which the action is based . . .
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> (iii) upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and the 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 . . . .
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

[68] *Yessenin*, 443 F. Supp. at 855.

[69] *Id.* (quoting 28 U.S.C. § 1605(a)(2)).

[70] *Id.* at 855. The writing and publication of the articles was done in the Soviet Union,

The court also discussed the legislative meaning behind the category of "commercial activity." Included in this definition is a "broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct."[71] Immunity was ultimately granted to the Soviet defendants in *Yessenin*, as the court determined that the foreign act must be "in connection with a commercial activity of the foreign state,"[72] and the publications were held to be "acts of intra-governmental cooperation."[73]

Although the court in *Yessenin* granted immunity, the decision implied that conduct of a foreign state, including libel arising out of commercial actions, could be subject to the jurisdiction of the U.S. courts. The court stated that the "relevant issue in this case is not whether [defendants] Novosti or TASS engage[d] in commercial activities but whether their alleged libels were in 'connection with a commercial activity.' "[74] In this case, it was held that the libel was not associated with commercial conduct but was rather "one instance of a cooperative arrangement with a governmental agency."[75] The court also noted that the libel did not arise out of a contractual relationship with a foreign party.[76]

Immunity was granted to the defendants not because the action was for libel, but rather because the libel had no connection to any commercial conduct of the sovereign state. Therefore, *Yessenin*, while reaching the same result as *Gregorian*, stands for the opposite proposition.

The *Yessenin* court's opinion was strengthened by the reasoning in *United Euram Corp. v. USSR*.[77] In that case, a claim was brought against the USSR, its Ministry of Culture, and the Soviet State Concert Society for breach of contract. The defendant's motion to dismiss, in reliance on section 1605(a)(5)(B) of the FSIA,[78] was denied. Though "interference with contract rights" is included in this provi-

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and the widespread distribution of the articles made a direct impact in the United States. *Id.*

[71] *Id.* at 856 (citing HOUSE REPORT, *supra* note 35, at 6614). Note that the Immunities Act does not provide that a sovereign whose conduct is commercial becomes a commercial entity. Rather it stands for the principle that when a sovereign nation engages in commercial activities, it will not be granted foreign sovereign immunity. *Id.* at 855.

[72] *Id.* (quoting 28 U.S.C. § 1605(a)(2)).

[73] *Id.* at 856.

[74] *Id.*

[75] *Id.* The court noted that this does not fall within a "regular course of commercial conduct" or "a particular commercial transaction or act." *Id.* (citing 28 U.S.C. § 1603(d)).

[76] *Id.* at 856. This is in contrast to *Gregorian*, where libel was alleged to arise out of the commercial contract claim. See *supra* note 17 and accompanying text.

[77] 461 F. Supp. 609 (S.D.N.Y. 1978). In *United Euram*, the Soviets breached their contract to perform at concerts organized by plaintiff. Plaintiff was to pay a cash fee for the service in addition to the artists' salaries and traveling expenses. The court held that this was a private service contract. *Id.* at 611.

[78] *Id.* at 612.

sion,[79] the court declared, "[s]ubsection (a)(5) was intended to cover noncommercial torts . . . and the restrictions embodied in subsection (a)(2)."[80] Because the *Gregorian* court did restrict the scope of the commercial activity exception,[81] this language relates directly to the *Gregorian* decision.

Other courts considering the issue of sovereign immunity have focused on the "direct effect" language of the FSIA. In *Texas Trading v. Republic of Nigeria*,[82] the United States Court of Appeals for the Second Circuit held that subject matter jurisdiction existed under the Immunities Act over claims involving the Nigerian government's breach of contract to purchase cement and breach of letters of credit.[83] The court in *Texas Trading* held that the breach of both contracts had direct effects in the United States.[84] The court stressed congressional intent, stating that "[c]ourts construing either term[85] should be mindful more of Congress' concern with providing 'access to the courts' to those aggrieved by the commercial acts of a foreign sovereign than with cases defining 'direct' or locating effects under state statutes passed for dissimilar purposes."[86] The court added that Congress did not pass the FSIA to restrict jurisdiction, but rather to regularize it.[87] Such a broad construction of the Act[88] signifies the court's interest in providing private citizens with a forum for business grievances involving foreign states.

In an effort to assist the sovereign immunity analysis, courts continue to clarify the distinction between the private and the public conduct of a foreign sovereign. The United States Court of Appeals for the Fifth Circuit further developed the "commercial activities exception" in *Callejo v. Bancomer*.[89] *Callejo* arose when plaintiffs brought action against a Mexican bank, Bancomer, for breach of contract when, after selling plaintiffs' certificates of deposit, the bank repaid all deposits in Mexican pesos.[90] The court, in denying defendant's immunity claim, focused on whether the material element of the

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[79] *Id.*

[80] *Id.*

[81] *See Gregorian*, 658 F. Supp. at 1233. The Gregorian court limited the scope of the commercial activity exception in order to afford foreign nations the absolute immunity granted the U.S. government in libel actions.

[82] 647 F.2d 300 (2d Cir. 1981).

[83] *Id.* at 303-06.

[84] *Id.* at 312; *see* Carey v. National Oil Corp., 592 F.2d 673, 676-77 (2d Cir. 1979) (per curiam).

[85] The terms referred to include "direct" and "in the United States."

[86] *Texas Trading*, 647 F.2d at 312-13 (quoting HOUSE REPORT, *supra* note 35, at 6605).

[87] *Id.* at 313 (quoting HOUSE REPORT, *supra* note 35, at 6605-06).

[88] *See* Matter of Rio Grande Transport, Inc., 516 F. Supp. 1155 (S.D.N.Y. 1981). Citing the court's analysis in *Texas Trading*, this court held that the term "regular course of commercial conduct" should be broadly construed. *Id.* at 1162.

[89] 764 F.2d 1101 (5th Cir. 1985).

[90] *Id.* at 1105-06. The bank acted pursuant to new Mexican exchange control regulations. *Id.*

complaint was a sovereign activity by the defendant.[91] In finding the bank's action commercial, the court stated that Bancomer did not "acquire any derivative immunity by virtue of the fact that, in breaching the terms of the certificates of deposit, it was merely complying with sovereign decrees of the Mexican government."[92]

It has been well established that foreign sovereign immunity will not be granted merely because the conduct in question was based on the foreign government's decree. The Fifth Circuit used such reasoning in deciding *DeSanchez v. Banco Central de Nicaragua*,[93] a case involving the Nicaraguan government's order to stop payment on a check that the Nicaraguan Central Bank issued to plaintiff.[94] The action underlying the suit was issuance of the check to plaintiff, and the particular grievance was nonpayment of the check.[95] The court echoed the view of *Callejo*, stating that if the defendant's actions were commercial, then defendant had no immunity, despite the fact that its actions were based on a sovereign decision of the Nicaraguan government.[96] The court relied on congressional intent as the basis for its decision, reasoning that "Congress' intent in instructing us to focus on the nature of the activity rather than on its purpose was to preclude foreign governments from always being able to claim sovereign immunity."[97]

In contrast to such suits against foreign states, libel actions against the U.S. government are more straightforward. The *Gregorian* court relied heavily on the absolute grant of immunity to the U.S. government with respect to tort claims. As seen in *Bosco v. U.S. Corps of Engineers*,[98] the FTCA precludes action against the United States for any claim arising out of libel.[99] Because the language is unambiguous, this case engendered no questions regarding the application of the FTCA, and the United States government enjoyed sovereign immunity.[100]

The *Gregorian* court's grant of immunity to the Soviet defendants is blatantly inconsistent with the above precedent, particularly with

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[91] *Id.* at 1109. The activities at the heart of the suit were the sale of the certificates of deposit and payment to plaintiffs in Mexican pesos, both private in nature. *Id.*

[92] *Id.*

[93] 770 F.2d 1385 (5th Cir. 1985).

[94] *Id.* at 1386-89.

[95] *Id.*

[96] *Id.* The bank sold dollars to regulate Nicaragua's foreign exchange reserves. *Id.*

[97] *Id.* at 1343.

[98] 611 F. Supp. 449 (D.C. Tex. 1985). In *Bosco* the United States Corps of Engineers (Corps) turned down the low bidder on a lake embankment project because the record of his subcontractor (Bosco) "lacked integrity." The Corps subsequently informed the press of its decision. Claiming that this report tarnished his reputation as a businessman, Bosco sued the Corps for libel. The libel claim was dismissed by the court pursuant to the FTCA. *Id.* at 451-53.

[99] *Id.* at 452 (citing 28 U.S.C. § 2680(h) (1982)); *see supra* note 7 and accompanying text.

[100] *Id.*

Yessenin and *United Euram*. These cases stand for the proposition that the commercial activity of a sovereign state is subject to U.S. jurisdiction and the commercial activities exception of the Immunities Act should not be restricted by the scope of the noncommercial tort restriction.[101] Although the *Yessenin* court did allow the foreign defendants immunity, the decision was based on the fact that the alleged libel was not "in connection with a commercial activity."[102] *Gregorian* differs in that the libel action did appear to arise out of a commercial contract action against the Soviet defendants.[103] Rather than address this point, the *Gregorian* court abandoned the commercial versus public acts issue and embraced a policy argument.[104] The *United Euram* court specifically stated that the restrictions on noncommercial torts were "not intended to restrict the scope of the commercial activity exception."[105] The *Gregorian* court, after referring to this case, admitted that the court should apply the same analysis to the libel claim as to the commercial contract claim.[106]

Rather than use the decisions in *Yessenin* and *United Euram* as bases for its decision, the *Gregorian* court ignored such analysis and hinged its argument on a congressional intent perspective. The court stated that since the FTCA allows the United States government immunity in noncommercial tort actions, it is unlikely that Congress would have wished to expose foreign states to suit for the same action.[107] This argument, based on diplomatic considerations and alleged congressional intent, in no way distinguishes *Gregorian* from *Yessenin* or *United Euram*, but simply disregards the law as interpreted in those two cases.

By focusing only on what the court perceived to be the legislature's intent, this decision evades several points. First, it is well documented that Congress, in passing the FSIA, was interested in giving American citizens a domestic forum for international disputes.[108] In *Texas Trading* the court stressed that the purpose of the FSIA was to restrict immunity to actions arising from a foreign state's public acts.[109] The court further emphasized the importance of providing American litigants "access to the courts."[110] By declining to discuss this important point, the *Gregorian* court denies American litigants

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[101] *United Euram*, 461 F. Supp. at 612; *Yessenin*, 443 F. Supp. 849 (S.D.N.Y. 1978). Both courts favored broad construction of the term "commercial activity."

[102] *Yessenin*, 443 F.Supp. at 856.

[103] *See supra* note 17 and accompanying text.

[104] *See Gregorian*, 658 F. Supp. at 1233-34.

[105] *United Euram*, 461 F. Supp. at 612.

[106] *Gregorian*, 658 F. Supp. at 1231.

[107] *Id.* at 1233.

[108] 647 F.2d at 312-13; HOUSE REPORT, *supra* note 35, at 6605.

[109] *Texas Trading*, 647 F.2d at 308.

[110] *Id.* at 312.

"access to the courts" in contravention of expressed congressional intent.

Also, as noted by the *Gregorian* court, the result of this decision could encourage foreign states to make commercial disputes more serious impediments to foreign relations, simply to avoid being haled into U.S. courts.[111] This result could undermine the holdings in *Callejo* and *DeSanchez*, which state that merely because a commercial action is based on a sovereign decision of a foreign state, that does not afford the foreign state immunity.[112] Such a bold proposition can be eluded when courts like the *Gregorian* court recognize precedent but decline to follow it in order to avoid sensitive foreign policy matters. The risk of foreign states taking advantage of such a position is inevitable.

Finally, predictability of immunity determinations is lost when each court can grant immunity based purely on public policy and its interpretation of legislative intent. The *Texas Trading* court held that Congress did not intend the FSIA to restrict jurisdiction, but rather to regularize it.[113] It further held that "[n]o rigid parsing of [section] 1605 should lose sight of that purpose."[114] Rather than discuss this documented legislative intent, the *Gregorian* court analyzed the issue in terms of its belief regarding Congress'.purpose in enacting the FSIA. The language of the FSIA,[115] along with the exceptions to the exceptions,[116] make the statute unclear in its own right. By imposing its analysis, the *Gregorian* court has rendered the Immunities Act even more ambiguous.

The preceding points illustrate that the "legislative intent" upon which the court relied distorts the function of the FSIA and further complicates the task of predicting under what circumstances a foreign state can invoke immunity. The *Gregorian* court's decision could lead to the erosion of the restrictive doctrine of sovereign immunity. Although the court never determined that the Soviet defendants acted in a sovereign capacity, it compared such defendants to the U.S. government in its public capacity. If defendants' libelous actions were not based on commercial activity, then the *Gregorian* court could have followed the reasoning of the *Yessenin* and *United Euram* courts without causing such confusion. If, however, the defendants' actions were commercial, they acted in the capacity of a private party[117] and

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[111] *Gregorian*, 658 F. Supp. at 1231.

[112] *See Callejo*, 764 F.2d at 1162; *DeSanchez*, 770 F.2d at 1391.

[113] *Texas Trading*, 647 F.2d at 313 (citing HOUSE REPORT, *supra* note 35, at 6605-06).

[114] *Id.*

[115] *See supra* note 51.

[116] *See supra* note 67. The *United Euram* court held that although noncommercial torts (including libel) were exceptions to sovereign immunity, the noncommercial restrictions did not limit the scope of the commercial activity exception. *Id.*

[117] *Dunhill*, 425 U.S. at 704.

pursuant to the FSIA and should not be held to the same standards as the United States government.

According to established precedent,[118] the court, in determining whether immunity exists under the FSIA, should initially decide whether the nature of the defendant's activity is commercial or sovereign. Only then can the court determine whether or not the foreign state should be subject to U.S. jurisdiction. The *Gregorian* court discussed the status of the defendants in light of *Yesssenin* and *United Euram* and without drawing any logical conclusions, or making any significant distinctions, made a determination based on completely different rationale. The court's reasoning is incomplete and leaves room for a myriad of interpretations.

How then should a court deal with the doctrine of foreign sovereign immunity? First, courts should rely on documented legislative intent and legal precedent unless other factors are clearly relevant. Second, courts should follow Congress' lead and broadly construe the term "commercial activity," as did the courts in *Yessenin*, *United Euram*, *Callejo*, and *DeSanchez*, thereby providing American litigants with more predictable access to the courts.[119] One commentator has argued that if policy considerations in particular circumstances demand imposition of immunity, the State Department should be required to compensate plaintiffs who are unjustly defeated.[120] Such a policy might deter the State Department from advocating immunity when it is not clearly required and this in turn would take pressure off the courts.[121] Few would support this measure, however, as application of such a policy would inevitably become too subjective.

In conclusion, it appears that the District Court erred when it granted the Soviet defendants immunity. Although it is necessary to prevent judicial intrusion upon another nation's power, Congress codified the FSIA to restrict the doctrine of sovereign immunity to public actions.[122] The *Gregorian* court ultimately gave this little weight in its analysis of the immunity issue. Rather than follow prior development of the law, the court stretched legislative intent to an extreme, yielding an objectionable result. The *Gregorian* court succeeded in taking from private citizens a predictable domestic forum for international disputes, Congress' goal in enacting the FSIA. By focusing on the nature of the conduct in determining subject matter jurisdiction over foreign states, rather than bowing to diplomatic

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118 *See supra* note 54.

119 *Texas Trading*, 647 F.2d at 315; *see* Atkeson, *H.R. 11315: The Revised State Justice Bill on Foreign Sovereign Immunity: Time for Action*, 70 AM. J. INT'L L., 298, 311 (1976).

120 Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin; Meaning and Effect*, 3 YALE J. WORLD PUB. ORD. 1, 47 (1976).

121 *Id.*

122 von Mehren, *supra* note 32, at 33.

pressure, future courts could further the goal of justice and predictability desired under the FSIA.

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