
Benjamin Eric Lovell

Follow this and additional works at: https://scholarship.law.unc.edu/ncilj

Recommended Citation
Available at: https://scholarship.law.unc.edu/ncilj/vol21/iss2/6

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Cover Page Footnote
International Law; Commercial Law; Law

This note is available in North Carolina Journal of International Law: https://scholarship.law.unc.edu/ncilj/vol21/iss2/

I. Introduction

Th[e] perfect equality and absolute independence of sovereigns, and [the] common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

- Chief Justice John Marshall

Since its inception, the principle of sovereign immunity has been a confusing and poorly drafted area of American law. For decades, American courts were reluctant to exercise jurisdiction over foreign states, instead deferring to the recommendations of the State Department on sovereign immunity issues. This reluctance made the granting of sovereign immunity a political choice rather than a judicial exercise. However, in 1976, Congress dramatically changed the United States' approach to sovereign immunity by enacting the Foreign Sovereign Immunities Act (FSIA).

In the twenty years since the FSIA became law, courts have struggled to interpret the nebulous language of the statute, with varying degrees of success. Most recently, the Ninth Circuit Court of Appeals attempted to explain the language and scope of the statute in *Export Group v. Reef Industries, Inc.* The main issue before the court in *Export Group* was whether the commercial activity exception to sovereign immunity under the FSIA includes tortious activities for which immunity is retained under section 1605(a)(5)(B) when foreign states act in their noncommercial, sovereign capacity. The Ninth Circuit held that the commercial activity exception does include tortious activities, so long as these activities are not performed by a

---

3. See infra notes 60-84 and accompanying text.
5. 54 F.3d 1466 (9th Cir. 1995).
6. *Id.* at 1471. The commercial activity exception is one of the exceptions to immunity of foreign states to suit in American courts. See 28 U.S.C. §1605(a)(2) (1976); Havkin, *supra* note 2, at 463.
foreign entity acting in its sovereign capacity.\textsuperscript{7}

The Ninth Circuit’s decision is significant for two reasons. First, it is one of the initial instances in which a court has attempted to reconcile the inconsistencies presented when comparing the “commercial activity exception” to immunity, section 1605(a)(2) of the FSIA, with the “noncommercial torts exception” of immunity, section 1605(a)(5) of the Act.\textsuperscript{8} Furthermore, it provides an opportunity for the Supreme Court to finally clarify the language of the Act, particularly the exceptions to immunity found in sections 1605 through 1607.\textsuperscript{9}

This Note will examine the Foreign Sovereign Immunities Act of 1976 and the Ninth Circuit’s interpretation of this Act. First, the Note will discuss the facts, procedural history and holding of the Ninth Circuit Court of Appeals in \textit{Export Group v. Reef Industries, Inc.}\textsuperscript{10} Second, the Note will examine the confusing history of the FSIA, including the various interpretations the courts have given to the commercial activity exception.\textsuperscript{11} Third, the Note will attempt to analyze the Ninth Circuit’s decision in light of the background of the FSIA. It will examine whether the Ninth Circuit’s understanding of the FSIA’s exceptions to immunity is correct, as well as the logic of the court’s reasoning.\textsuperscript{12} Finally, the Note will conclude that the Ninth Circuit’s interpretation of the FSIA is proper and will discuss the ramifications of this interpretation for international relations and global unity.\textsuperscript{13}

II. \textbf{Statement of the Case}

A. \textit{The Facts}

The Export Group, a general partnership engaged in international

\textsuperscript{7} \textit{Export Group v. Reef Industries, Inc.,} 54 F.3d at 1477 (holding that section 1605(a)(5)(B) does not restore immunity to a foreign sovereign who has committed a commercial activity, but that section 1605(a)(5)(B) applies only to noncommercial torts).

\textsuperscript{8} Few courts have wrestled with the issue of whether the restrictions found in section 1605(a)(5)(B) of the Act actually restrict the scope of the commercial activity exception in subsection 1605(a)(2). \textit{See United Eura\c{m} v. U.S.S.R.,} 461 F. Supp. 609 (S.D.N.Y. 1978) (the noncommercial torts exception in no way interferes with or restricts the commercial activity exception, section 1605(a)(2)); \textit{see also Yessenin-Volpin v. Novosti Press Agency,} 443 F. Supp. 849 (S.D.N.Y. 1978) (the commercial activity exception and the noncommercial torts exception should be construed sequentially).

\textsuperscript{9} 28 U.S.C. §§ 1605-1607 (1976). The interpretations of the noncommercial tort and the commercial activity exceptions are imbued with confusion and inconsistency, which seems to come largely from the broad phrasing of the exceptions and the vague wording of the FSIA. Havkin, \textit{supra} note 2, at 495.

\textsuperscript{10} \textit{See infra} notes 15-59 and accompanying text.

\textsuperscript{11} \textit{See infra} notes 60-145 and accompanying text.

\textsuperscript{12} \textit{See infra} notes 146-84 and accompanying text.

\textsuperscript{13} \textit{See infra Part V.}
trade, reached an agreement with a commercial supplier, Reef Industries (Reef), whereby The Export Group would serve as Reef's exclusive representative in bidding on a contract from a Mexican government agency, Almacenes Nacionales De Deposito, S.A. (ANDSA), for four hundred tarpaulins to cover grain storage bins. While this bid by The Export Group was under consideration by ANDSA, a corrupt ANDSA employee divulged the details of the bid to the international director of Instituto Mexicano del Cafe (INMECAFE), as part of an alleged conspiracy to prepare a competing bid on the contract. INMECAFE then submitted a bid to sell Reef tarps to ANDSA under another company name, NEUERO. The result of this competing bid was that ANDSA awarded the contract to NEUERO, and The Export Group suffered a loss of approximately two million dollars in profits anticipated from its exclusive representation agreement with Reef.

B. Procedural History

The Export Group filed suit against NEUERO and Reef in Orange County Superior Court on June 24, 1983. Asserting diversity jurisdiction, the defendants removed the case to the district court for the Central District of California. On November 19, 1984, The Export Group amended its complaint to add as defendants INMECAFE, ANDSA, and the international director of INMECAFE, Javier Mora. The amended complaint alleged causes of action for interference with prospective business advantage, interference with business and contractual relations, negligent interference with prospective business advantage, inducing breach of contract, and conspiracy.

The defendants were personally served with the complaint and failed to respond, prompting the district court judge to enter

---

14 The Export Group was formed to specialize in representing North American companies on an exclusive basis in the sale of commercial and industrial products to agencies of the Mexican Government. Export Group, 54 F.3d at 1468.
15 Id.
16 INMECAFE is a branch of the Mexican Ministry of Agriculture and Cattle, and is short for Instituto Mexicano del Cafe (the Mexican Coffee Institute). Id.
17 Id.
18 Id.
19 Id.
20 Id.
21 Id.
22 Id.
23 Id. at 1468-69. The merits of the case have not yet been reached by the courts. At the present time, only the jurisdictional question has been addressed. Id. at 1469.
24 Id. at 1469. One argument that has been made, that was not raised in this case, is that a foreign country waives its immunity by not defending the claim. See 28 U.S.C. §1605(a)(1) (1976) (the waiver exception to sovereign immunity). This argument has not been kindly received in the past. See Frovola v. U.S.S.R., 761 F.2d 370, 378 (7th Cir. 1985)
default judgments against them on May 22, 1985.\textsuperscript{25} On September 5, 1986, the Consul of the United Mexican States filed a motion on behalf of INMECAFE to set aside the default judgment.\textsuperscript{26} The motion was based on lack of personal service and lack of subject-matter jurisdiction, under the FSIA, over an instrumentality of the Mexican Government.\textsuperscript{27} The district court denied this motion on April 21, 1987.\textsuperscript{28}

The Export Group settled its claims with all the defendants to the suit, with the sole exception of INMECAFE.\textsuperscript{29} Once the other defendants were dismissed, the plaintiff applied for a default judgment against INMECAFE on May 5, 1991.\textsuperscript{30} This application was granted by the district court, which awarded Export Group over two million dollars in compensatory damages plus costs.\textsuperscript{31} INMECAFE promptly filed a motion to set aside the default judgment on the grounds that the judgment was obtained through fraud, misrepresentation, or misconduct.\textsuperscript{32} In the alternative, INMECAFE argued that the judgment was void because the district court lacked subject-matter jurisdiction to hear the claim, pursuant to FSIA section 1605(a)(5)(B).\textsuperscript{33} After oral argument, the district court granted INMECAFE's motion on the grounds that "the default judgment is void because the court lacks" subject-matter jurisdiction to hear the claim pursuant to the FSIA, section 1605(a)(5)(B).\textsuperscript{34}

In granting INMECAFE's motion to set aside the default judgment, the district court ruled that the exceptions to the waiver of

\textsuperscript{25} Export Group, 54 F.3d at 1469.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Id. The motion to set aside the default judgment on the grounds of fraud, misconduct or deceit is governed by FED. R. CIV. P. 60(b)(3).
\textsuperscript{33} Export Group, 54 F.3d at 1469. Section 1605(a)(5) states in relevant part:
(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (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.
\textsuperscript{34} Export Group, 54 F.3d at 1469.

sovereign immunity contained in section 1605(a)(5)(B) were not limited to the noncommercial torts exception recited in section 1605(a)(5), but instead extended to restore sovereign immunity for any such tort claims, even if committed in the course of a "commercial activity," as defined in section 1603(a)(2) of the Act. \(^5\) Thus, even though INMECAFE's acts that formed the basis of The Export Group's complaint were deemed "commercial activities" falling under section 1605(a)(2), the court ruled that it was entitled to sovereign immunity under section 1605(a)(5)(B) of the FSIA. \(^6\) The Export Group appealed the district court's decision to the Ninth Circuit Court of Appeals.\(^7\)

C. The Ninth Circuit Court of Appeals Decision

The Ninth Circuit began its analysis by recognizing that the FSIA provided the "sole basis" for federal jurisdiction over The Export Group's claim of interference with the contract against INMECAFE. \(^8\) The court noted that "the FSIA creates a statutory presumption that a foreign state and its instrumentalities are immune from suit unless one of the specific exceptions enumerated in section 1605 through 1607 of the Act applies." \(^9\) After stating these rules of law, the court proceeded to address the various contentions of The Export Group.

The court first considered the argument by The Export Group that INMECAFE was not an "agency or instrumentality" of the Mexican

---

\(^5\) Id. at 1470. Section 1603(d) of the FSIA defines "commercial activity" as: "[E]ither 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." 28 U.S.C. § 1603(d) (1976).

\(^6\) Export Group, 54 F.3d at 1470.

\(^7\) Id. at 1469.

\(^8\) Id. (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 433-35 & n.3 (1989)). Section 1350 lists the jurisdictional requirements of the Act. Concerning subject-matter jurisdiction, it 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 1605-07 of this title or under any applicable international agreement.


\(^9\) Export Group, 54 F.3d at 1469. The statutory presumption of immunity is found in section 1604 of the Act, which provides:

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 through 1607 of this chapter.

government and thus did not deserve the presumption of immunity. 40 The court rejected this contention, reasoning that INMECAFE met its burden of proving its entitlement to sovereign immunity 41 by submitting official Mexican government documents and a sworn affidavit of INMECAFE’s counsel that established INMECAFE as “a dependency of the [Mexican] Ministry of Agriculture and Cattle.” 42 In rejecting The Export Group’s argument, the court noted that “[t]his is a novel position for Export Group to take on appeal, since it repeatedly and consistently argued below that INMECAFE was ‘an agency or representative of the Mexican Government.’” 43

The court next addressed The Export Group’s most forceful contention: that the district court erred in ruling that the exceptions to the waiver of sovereign immunity for noncommercial torts listed in section 1605(a)(5)(B) of the FSIA restrict the scope of the commercial activity exception to immunity, found in section 1605(a)(2) of the Act. 44 In considering this issue, the court recognized that the district court had relied heavily on a footnote in a prior Ninth Circuit decision, Gregorian v. Izvestia, 45 implying that the commercial activity exception is subject to section 1605(a)(5)(B) of the Act. 46 Refusing

40 Export Group, 54 F.3d at 1470. Agencies of a foreign government can be immune from suit in the same manner that a foreign government itself can. The FSIA’s definition of “foreign state” includes “an agency or instrumentality of a foreign state . . . .” 28 U.S.C. § 1603(a) (1976).

41 Sovereign immunity is an affirmative defense which must be specially pleaded; thus the burden of establishing applicability of immunity lies with the foreign state. House Report, supra note 39, at 6616; see also Olsen v. Gov’t. of Mexico, 729 F.2d 641 (9th Cir. 1984) (cert. denied, 469 U.S. 917 (1984)).

42 Export Group, 54 F.3d at 1470. Id. The court addressed as a side matter Export Group’s contention that it may contest this issue on appeal because the court had recognized before that a plaintiff is not limited to the statutory basis for subject matter jurisdiction stated in its complaint. Id.; see also Gerritsen v. de la Madrid Hurtado, 819 F.2d 1511, 1515 (9th Cir. 1987) (a plaintiff is not limited to the statutory basis of its complaint when attempting to raise an issue on appeal). The court in Export Group ruled that Gerritsen does not apply because the Export Group was attempting to plead facts different from those in their complaint, without explanation for their failure to discover these facts earlier. Export Group, 54 F.3d at 1471; see also Int’l Union of Bricklayers & Allied Craftsmen v. Martin Jaska, Inc., 752 F.2d 1401, 1404 (9th Cir. 1985) (stating that before this court will address such an issue “the proponent ‘must’ show exceptional circumstances why the issue was not raised below”).

43 Export Group, 54 F.3d at 1471. The commercial activity exception provides, in relevant part:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based 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.


44 Export Group, 54 F.3d at 1471. The Gregorian footnote reads, in relevant part: [C]ontrary to plaintiffs’ contention, the bar against ‘libel claims’ contained in
to acknowledge the *Gregorian* footnote as an alternative ground for the decision, the court concluded that the footnote was dictum with "no binding or precedential impact in the present case." The court supported this conclusion by observing that "no case in this circuit has cited the contested footnote as binding precedent, and, in fact, subsequent cases have contradicted its interpretation of section 1605." After disposing of these preliminary issues, the court began to interpret the FSIA, particularly the exceptions to sovereign immunity embodied in sections 1605(a)(2) and 1605(a)(5) of the Act. It first recognized the confusing nature of the language and structure of the FSIA, but still attempted to ascertain the legislative purpose from the ordinary meaning of the language.

The clear statutory language of section 1605(a)(5) indicates that both this exception and the restrictions upon this exception are intended to apply only to torts "not otherwise encompassed in [section 1605(a)(2)]. . . ." Similarly, the phrase that establishes the two sets of restrictions on the waiver of sovereign immunity established by section 1605(a)(5) (subsection (A) for discretionary functions and subsection (B) for enumerated torts) states that in those cases "this paragraph shall not apply." Thus, by its plain and unambiguous terms, section 1605(a)(5) limits the reach of those restrictions only to noncommercial torts.

The Ninth Circuit also considered the interpretations given to the FSIA by other appellate and district courts. The court noted that the district court in *Gregorian* is "the only court to rule that foreign states and their agents are immune from claims for torts listed in section 1605(a)(5)(B) when those claims arise from the foreign actor's commercial activities." Furthermore, the court recognized that the Supreme Court and other circuit courts have yet to decide the question of the interrelationship between the commercial activity exception and the exemptions to the noncommercial torts except-

---

section 1605(a)(5)(B) must be construed to include claims of 'trade libel.' . . . Foreign sovereign immunity is expressly retained in section 1605(a)(5)(B) for claims of 'interference with contract rights' as well as for libel claims. . . . Contract rights cases will almost always involve commercial activity, and it would have been odd for Congress . . . to have retained immunity for such claims only in the unusual situation in which entirely non-commercial activity was involved.

*Gregorian*, 871 F.2d at 1522 n.4.

47 *Export Group*, 54 F.3d at 1472.

48 *Id.; see* e.g., *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 710 (9th Cir. 1992) (holding that the plaintiffs' claims for fraud and interference with business relations are not subject to immunity because they "fall squarely within . . . the commercial activity exception"). *Export Group* 54 F.3d at 1472.

49 *Id. at* 1473.

50 *Id.*

tion. Thus, the court concluded that other courts have not found section 1605(a)(5)(B) to provide “across-the board” immunity from torts, like the ones complained of by the Export Group, that can be classified as “commercial” in nature.

The court then considered the legislative history of the Act to aid in its interpretation of the statutory language. The court first recognized Congress’ intention in promoting the restrictive theory of sovereign immunity; namely, that “the sovereignty of foreign states should be ‘restricted’ to cases involving acts of a foreign state which are sovereign . . . in nature, as opposed to acts which are either commercial in nature or those that private persons usually perform.” The court then reasoned that it must be Congress’ intention that courts interpret the plain language of section 1605(a)(2) as not restricted by other clauses that establish separate and alternative exceptions to sovereign immunity applicable to actions of foreign governments performed in a noncommercial capacity. Finally, the court concluded that the House Report, in its “Section-by-Section Analysis” of the Act, explicitly indicated that “Congress intended the ‘commercial activity exception’ to encompass those tort claims from which foreign states acting as sovereigns are immune under section 1605(a)(5)(B).” Thus, the court reversed the district court’s order setting aside the default judgment and remanded the case for further proceedings consistent with its opinion.

III. The History of Sovereign Immunity and the FSIA

The House Committee on the Judiciary defined sovereign immunity as “a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign

---

52 Export Group, 54 F.3d at 1474. But see Letelier v. Republic of Chile, 748 F.2d 790, 795 (2d Cir. 1984) (construing statutory language of two clauses and finding that “[t]he language suggests that the commercial activity exception to jurisdictional immunity under (2) and the tort exception under (5) are mutually exclusive”), cert. denied, 471 U.S. 1125 (1985); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 759 F. Supp. 855, 859 (D.D.C. 1991) (stating that “the clear language of the statute declares that section 1605(a)(5) does not apply to section 1605(a)(2)”).
53 Export Group, 54 F.3d at 1475.
54 Id. Codification of the restrictive theory of sovereign immunity is one of the principal objectives of the FSIA. See House Report, supra note 39, at 6605. The theory was first adopted by the United States in 1952. See Letter from Jack B. Tate, Acting Legal Advisor to the Dept. of State, to the Acting Attorney General Perlman, 26 Dep’t St. Bull. 984 (May 1952) [hereinafter Tate Letter].
55 Export Group, 54 F.3d at 1476.
56 Id.
57 Id. at 1477. The court instructed the district court, on remand, to examine INMECAFE’s motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b)(3). The district court had expressly reserved a ruling on this motion, and the Ninth Circuit Court of Appeals expressed no opinion on the merits of this claim. Id. at 1477 n.12.
However, prior to the enactment of the FSIA in 1976, the idea of sovereign immunity was more of a diplomatic concept than a judicial one. The doctrine upheld the principle of "perfect equality and absolute independence of sovereigns." The doctrine developed in the interests of international comity and the promotion of relations among nations. From its beginnings to the present day, sovereign immunity has passed through three distinct stages in American jurisprudence: the early principle of "absolute immunity," the adoption of the restrictive theory of immunity by the State Department, and the codification of the restrictive theory of immunity in the FSIA.

A. The Early Days of Sovereign Immunity

The origins of the American doctrine of sovereign immunity are somewhat unclear. Some scholars trace it to medieval domestic doctrines of "the King can do no wrong" and "the sovereign cannot be a defendant in its own courts." "Others trace [the doctrine] to Roman legal concepts such as 'equals do not have jurisdiction of [sic] each other.'"

"Initially, [American] courts interpreted sovereign immunity to furnish absolute immunity to a foreign sovereign regardless [of the nature] of its activities." This idea was first recognized in the landmark case, The Schooner Exchange v. M'Faddon. In that case, "Chief Justice Marshall upheld a plea of immunity, supported by an executive branch recommendation, by noting that a recognition of immunity was supported by the law and practice of nations."

In the early part of this century, courts began to place less emphasis on Marshall's notion of immunity being supported by the law and practices of nations, and instead relied on the practices, policies and recommendations of the State Department. The will of the executive branch ultimately determined whether courts granted

---

58 House Report, supra note 39, at 6606.
60 The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 137 (1812).
61 Id. at 136.
62 See supra note 1 and accompanying text.
64 See also Havkin, supra note 2, at 455 n.1.
65 Havkin, supra note 2, at 458.
66 11 U.S. (7 Cranch) 116 (1812).
67 See supra note 39, at 6606.
68 See Spacil v. Crowe, 489 F.2d 614 (5th Cir. 1974) (noting that for 160 years the courts have granted sovereign immunity without review when requested to do so by the executive branch); see also Kimberly D. Reed, Note, Foreign Sovereign Immunity—Foreign Sovereigns are Immune From Claims of Libel Under the Foreign Sovereign Immunities Act Even if the Allegedly Libelous Statements Were Printed in Connection With a Commercial Activity, 28 VA. J. INT'L L. 251 (1987).
sovereign immunity because courts were "reluctant to exercise jurisdiction over an area that had traditionally been the province of the executive." Consequently, "foreign nations usually asked the State Department to intervene in the judicial process," and by the 1940s, the Supreme Court mandated judicial deference to such requests.

In subsequent years, the courts became increasingly disturbed with the principle of absolute sovereign immunity. The application of the principle specifically "deprived private citizens conducting business with foreign governments of a legal remedy in any court." Furthermore, the Supreme Court began to recognize that "granting absolute immunity to sovereigns [had the effect of giving] foreign nations a commercial advantage" in the global market over private firms. These concerns and inequities led to the development and adoption by the State Department of a new theory of immunity: the restrictive theory.

B. The Restrictive Theory of Immunity

The increased participation of governments in commercial activities after World War II prompted the State Department in 1952, to announce its acceptance of the restrictive theory of sovereign immunity. This announcement, contained in the "Tate Letter," accorded foreign sovereigns immunity for claims resulting from sovereign or public acts, but refused immunity for claims arising from private or commercial activities.

In practice, however, litigation of the issue of sovereign immunity was not always confined to the directives of the Tate Letter policy. Unfortunately, the Tate Letter posed a number of difficulties. Until 1976, foreign states still had the option of seeking the State Department's support for their assertion of sovereign immunity, and the courts regularly deferred to the executive branch's recommendation. In addition, the State Department occasionally yielded to

69 Reed, supra note 68, at 253.
70 McGuire, supra note 59, at 389.
71 See Ex parte Republic of Peru, 318 U.S. 578 (1943); Republic of Mexico v. Hoffman, 324 U.S. 30 (1945).
72 Havkin, supra note 2, at 459.
73 Id.
74 Reed, supra note 68, at 252.
75 See supra note 56 and accompanying text.
77 House Report, supra note 39, at 6607. Although the Tate Letter may have represented a willingness on the part of the State Department to adopt a more judicial approach to evaluating immunity claims, the practical reality of the matter was that the State Department was a political body administering a judicial doctrine. McGuire, supra note 61, at 389.
78 House Report, supra note 39, at 6607.
diplomatic and political pressure from foreign states and recommend-
ed immunity where, under the restrictive principle, immunity should have been denied.79 Thus, inconsistent application of the policies announced in the Tate Letter had the effect of confusing judges and litigants dealing with the issue of sovereign immunity. Judges were usually forced to rely upon a variety of inconsistent State Department recommendations,80 which were often "contingent upon the identity and power of the sovereign defendant."81 Private litigants were faced with an equally difficult situation because they could never be certain that their legal disputes with a foreign state would be decided on the basis of legal considerations and not through the "foreign government's intercession with the State Department."82 Furthermore, there was no published case law to guide them in challenging a State Department recommendation, because the State Department generally did not specify its rationale for reaching a decision.83 It was this state of affairs that eventually led to the enactment of the FSIA in 1976.

C. The Foreign Sovereign Immunities Act of 1976

In 1976, Congress enacted the Foreign Sovereign Immunities Act, which codified the restrictive theory of immunity and vested the judiciary with the authority over immunity decisions to "depoliticize" the process.84 Congress' stated goals in enacting the FSIA were: (a) to codify the principle of restrictive sovereign immunity; (b) to ensure that sovereign immunity decisions were judicial rather than executive; (c) to provide a method for service of process on foreign state defendants; and, (d) to establish a method for satisfying in personam judgments.85

The FSIA began with the presumption that the foreign state was immune from suit in United States courts86 but allowed for exceptions to this immunity.87 The most important and widely used exception

---

80 Id.; see also Reed, supra note 68, at 252.
81 Havkin, supra note 2, at 461.
82 House Report, supra note 39, at 6607.
83 Havkin, supra note 2, at 462. Furthermore, "no appellate review process was available within the State Department or the judiciary to give parties recourse once immunity had been granted." Id.
84 House Report, supra note 39, at 6606; Reed, supra note 68, at 252.
85 House Report, supra note 39, at 6605-06; see also Havkin, supra note 2, at 462.
86 House Report, supra note 39, at 6616.
87 See 28 U.S.C. §§1605(a)(2) & (a)(5) (1976). Since this Note concerns only two of the exceptions to immunity, the commercial activity exception and the noncommercial torts exception, the other FSIA exceptions will not be discussed. These exceptions include: explicit or implicit waiver of immunity, §1605(a)(1); actions concerning property in the United States, §1605(a)(3), (4); and actions involving suits in admiralty brought to enforce
to immunity is the commercial activity exception, at section 1605(a)(2) of the Act. The FSIA defined "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." It also required that the inquiry into the commercial character of an activity focus on the "nature" of the activity, rather than its purpose. Indeed, the issue of whether an activity is "commercial" for purposes of section 1605(a)(2) has been extensively litigated since the FSIA's enactment.

In addition to providing jurisdiction for "commercial activities" cases, the FSIA provides for jurisdiction in cases involving noncommercial torts which occurred in the United States and were caused by the tortious conduct of the foreign state or its officials or employees. Congress stated that this "noncommercial torts exception," section 1605(a)(5), was to apply to "all tort actions for money damages, not otherwise encompassed by section 1605(a)(2) relating to commercial activities." Congress further explained in the legislative history of the Act that the commercial activity exception and the noncommercial torts exception were to be construed by the courts as "mutually exclusive" of one another. Additionally, Congress enumerated certain exemptions to the noncommercial torts exception for which immunity would be reinstated, including libel, slander and interference with contract rights.

D. Judicial Interpretations of the FSIA

The case law surrounding the interpretation of the FSIA and its exceptions to immunity is confusing and vague. Workable legal standards and definitions that might add certainty to the vague language of the FSIA have not yet been developed by the courts. In order to understand the law with respect to the FSIA's exceptions to immunity, it is helpful to examine the judicial treatment of three issues:

---

88 See supra note 46.
90 Id. The courts have a great deal of latitude in determining what is a commercial activity for the purposes of the exception to immunity. House Report, supra note 41, at 6615.
91 See infra notes 97-116 and accompanying text.
92 See supra note 35; see also House Report, supra note 39, at 6619 (explaining that although section 1605(a)(5) is directed primarily at the problem of traffic accidents, it is cast in general terms as applying to all tort actions not encompassed by section 1602(a)(2)).
94 House Report, supra note 39, at 6619.
95 28 U.S.C. § 1605(a)(5)(B) (1976). This Note will not discuss the discretionary function exemption to the noncommercial torts exception, but this exemption is listed at 28 U.S.C. § 1605(a)(5)(A) (1976).
96 Havkin, supra note 2, at 482.
1996] RECONCILIATION OF FOREIGN SOVEREIGN IMMUNITIES ACT 455

(1) What constitutes a “commercial activity” sufficient to subject a foreign state to jurisdiction in our courts;
(2) What kind of tortious activity is covered by the noncommercial torts exception;
(3) What is the proper relationship between the commercial activity exception and the noncommercial torts exception, particularly with respect to the exemption listed at section 1605(a)(5)(B) of the FSIA. 97

1. The Courts and the Commercial Activity Exception

The issue of whether a type of activity falls under the commercial activity exception has been thoroughly litigated. Because Congress left the task of interpreting many of the Act’s terms to the courts, the commercial activity exception and its terms have been subject to varying interpretations and inconsistent application. 98 Even Congress’ attempts to clarify the term “commercial activity” in the legislative history of the Act have not been precise enough to stem the tide of contradictory and confusing opinions by the judiciary. 99

Fortunately, the Supreme Court recently addressed the issue. In Republic of Argentina v. Weltover, Inc., 97 Justice Scalia, writing for a unanimous Court, explained “commercial activity,” for purposes of the FSIA exception, as follows:

[W]e conclude that when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are “commercial” within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its “nature” rather than its “purpose,” the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in “trade and traffic

97 Export Group v. Reef Industries, Inc., 54 F.3d 1466, 1469 (9th Cir. 1995).
98 For example, ownership of an apartment building by the German government was considered a commercial activity in County Board of Arlington County v. Government of the German Democratic Republic, No. 78-293-A (E.D. Va. 1978). In contrast, alleged libel has been treated as a governmental rather than a commercial act when the publisher is a government newspaper. See Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849 (S.D.N.Y. 1978).
99 The House Report states the following with respect to the definition:
The courts would have a great deal of latitude in determining what is a “commercial activity” for purposes of this bill. . . . Activities such as a foreign government’s sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition.
House Report, supra note 39, at 6615.
The specific issue in Weltover was whether the issuance of certain bonds by the Argentine government to private investors was a commercial activity when the government's purpose for the plan was to stabilize its currency. In holding that the issuance of the bonds was a commercial activity, the Court pointed to the fact that the government bonds "are in almost all respects garden-variety debt instruments: they may be held by private parties; they are negotiable and may be traded on the international market . . . and they promise a future stream of cash income." The Court also dismissed the sovereign's argument that its bonds differ from ordinary debt instruments in that its bonds were created to address a national economic crisis, because "unless we can inquire into the purposes of such acts, we cannot determine their nature." The Court took the view that the sovereign's argument was squarely foreclosed by the language of the FSIA, which commanded the courts to separate the "nature" of a sovereign's act from its "purpose."

Other courts have attempted to explain the scope of the commercial activity exception with little success. In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria,* the Second Circuit held that Nigeria's contracting with the plaintiff to buy cement was a commercial activity within the meaning of the FSIA. The court rejected the Nigerian government's argument that the planned use of the cement, to build army barracks and roads, was governmental in nature and thus entitled it to sovereign immunity.

The Second Circuit was again faced with the question of whether a certain act by an instrumentality of a foreign sovereign was commercial in nature in *Letelier v. Republic of Chile.* In *Letelier,* the plaintiff sought execution against the assets of the Chilean national airline, LAN, for its involvement in the assassination of the Chilean Ambassador to the United States in Washington, D.C. The airline argued that it was immune from suit because the transport of the assassin from Washington to Chile constituted governmental action, not private

101 *Id.* at 614 (quoting BLACK'S LAW DICTIONARY 270 (6th ed. 1990)).
102 *Id.* at 609.
103 *Id.* at 615.
104 *Id.* at 616 (quoting *De Sanchez v. Banco Central de Nicaragua,* 770 F.2d 1385, 1393 (5th Cir. 1985)). The plaintiff had relied on *De Sanchez* for the view that the "essence of an act is defined by its purpose." *De Sanchez,* 770 F.2d at 1393.
105 *Wedover,* 504 U.S. at 616.
107 *Id.* at 310.
108 *Id.* at 309.
110 The complaint alleged, among other things, that LAN was party to the conspiracy to assassinate the Ambassador. *Id.* at 791-92.
action.\textsuperscript{111} The court held the commercial activity exception inapplicable to the specific conduct of LAN because "politically motivated assassinations are not traditionally the function of private individuals . . . . [T]hey can scarcely be considered commercial activity."\textsuperscript{112} In defining the term "commercial activity," the court noted that the "inquiry must be focused on whether the specific acts are those that private persons normally perform."\textsuperscript{113}

Several years after the decision of the Second Circuit in \textit{Letelier}, the Ninth Circuit Court of Appeals was presented with the opportunity to define the scope of the commercial activity exception in \textit{Gregorian v. Izvestia}.\textsuperscript{114} In that case, the plaintiffs argued that subject-matter jurisdiction over their libel claim was conferred by the commercial activity exception to foreign sovereign immunity because the Soviet newspaper’s article was published, sold and distributed in the United States and abroad, causing the plaintiffs great financial loss.\textsuperscript{115} The court disagreed with the plaintiffs and held that the publication of the article was governmental in nature.\textsuperscript{116} The court further noted that "Izvestia is the voice of an official Soviet agency, and the determination of its contents can be carried out only by a governmental entity; thus, publishing a particular article in Izvestia is a sovereign, governmental function."\textsuperscript{117}

\section*{2. Courts and the Noncommercial Torts Exception}

"The courts' interpretations of the language and the provisions of [the noncommercial torts] exception, as with the commercial activity exception, have not been uniform."\textsuperscript{118} Although the Act does provide that the noncommercial torts exception will cover neither commercial torts subject to the commercial activity exception nor the exempted torts of section 1605(a) (5) (B), the language of the statute is "so broad that it provides little guidance to the courts to determine what specific torts are covered."\textsuperscript{119}

The noncommercial torts exception has not been litigated very frequently. Most of the litigation has focused on whether the language of the exception required the tortious conduct to occur in the United

\begin{flushleft}
\textsuperscript{111} \textit{Id.} at 796.
\textsuperscript{112} \textit{Id.} at 797.
\textsuperscript{113} \textit{Id.; see also} \textit{Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 309 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982).}
\textsuperscript{114} \textit{Id.} at 1515 (9th Cir. 1989).
\textsuperscript{115} \textit{Id.} at 1521.
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.} at 1522 (quoting \textit{Statement of Interest of the United States at 24}).
\textsuperscript{118} Havkin, \textit{supra} note 2, at 472.
\textsuperscript{119} \textit{Id.}
\end{flushleft}
States. For example, in McKeel v. Islamic Republic of Iran, the Ninth Circuit adopted a narrow interpretation of the "situs of the tort" provision, holding that tortious acts which occurred at a United States embassy did not fall within the noncommercial torts exception requirement of a "tort occurring in the United States." In 1984, the Ninth Circuit Court of Appeals once again was presented with the opportunity to clarify the noncommercial torts exception. In Olsen v. Government of Mexico, the court held that the plaintiff's allegation of negligent piloting of an aircraft by a Mexican government employee, which occurred in the United States, was sufficient to bring the case within the noncommercial torts exception. The court concluded by noting that "[t]he claims asserted by appellants fall within the exception to immunity for noncommercial torts as provided by section 1605(a)(5) of the FSIA. Additionally, the conduct of Mexican personnel which may have led to the crash occurred at the operational level and was not discretionary."

Finally, in De Sanchez v. Banco Central de Nicaragua, the Fifth Circuit identified another tort that was not encompassed by the noncommercial torts exception. In De Sanchez, the plaintiff claimed that a Nicaraguan bank's failure to honor a check it had issued to her constituted conversion. The court ruled that "although nominally within the ambit of the exception, [it] is not the type of tort claim that the exception intended to cover." Because the court found the conversion claim to be a claim for unjust taking of property covered by section 1605(a)(3), the cause of action could not be maintained under the noncommercial torts exception.

---

120 722 F.2d 582 (9th Cir. 1983).
121 Id. at 589.
122 Id. at 589.
123 Significantly, Judge Nelson, who wrote the opinion in this case, also decided the Export Group opinion. In both cases, he found subject-matter jurisdiction to hear the claim.
124 729 F.2d 641 (9th Cir. 1984), cert. denied, 469 U.S. 917 (1984).
125 Id. at 646.
126 Id. at 648. The court discusses the "discretionary function" exemption of 1605(a)(5)(A) at great length, finally concluding that the section, which restores immunity to the sovereign acting at the discretionary level of decision-making, did not apply. Id.
127 770 F.2d 1385 (5th Cir. 1985).
128 Id. at 1398.
129 Id. at 1398. Section 1605(a)(3) provides, in relevant part: "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ... . (3) in which rights in property taken in violation of international law are in issue ... . 28 U.S.C. §1605(a)(3) (1976).
130 De Sanchez, 770 F.2d at 1998.
3. The Courts and the Relationship Between 1605(a)(2) & (a)(5)

Very few courts have attempted to reconcile the conflicting language of the two exceptions to immunity at issue in Export Group: the commercial activity exception and the noncommercial torts exception. Some courts have, however, stated their opinion that the provisions in sections 1605(a)(2) and (a)(5) should be construed as "mutually exclusive." Some courts also have indicated that if a plaintiff argued that a sovereign's activity fit within the requirements of both the noncommercial tort and commercial activity exceptions, it would likely find that the sovereign's activity fit neither exception.152

The only circuit court to pursue the issue of whether section 1605(a)(5)(B) restored immunity to commercial torts was the Ninth Circuit in Gregorian v. Izvestia.153 There the court held that the commercial activity exception did not apply to the actions of the Soviet newspaper in publishing an allegedly libelous article.154 In other words, the court found that the activity was not a commercial tort, subject to the commercial activity exception. Nevertheless, in a controversial footnote, the court recognized that "the bar against 'libel' claims contained in section 1605(a)(5)(B) must be construed to include claims of trade libel."155 The court then went on to suggest that it would be nonsensical for Congress to have retained immunity for claims like interference of contract and libel "only in the unusual situation in which entirely non-commercial activity was involved."156 Thus, the suggestion of the court in Gregorian was that Congress intended for section 1605(a)(5)(B) to deny jurisdiction over commercial tort claims that would otherwise be properly heard by the courts under the commercial activity exception.157

The viewpoint expressed in the Gregorian footnote has not been accepted by many district courts. For example, in Yessin-Volpin v. Novosti Press Agency,158 a federal district court sitting in New York held that the commercial activity and the noncommercial tort exception

153 871 F.2d 1515 (9th Cir. 1989).
154 See supra notes 115-119 and accompanying text.
155 Gregorian, 871 F.2d at 1522 n.4.
156 Id. (emphasis added).
157 Id.
158 443 F. Supp. 849 (S.D.N.Y. 1978) (statements by Soviet newspapers allegedly causing harm in the United States were not of a commercial nature simply because the publishing entity was engaged in other commercial activities).
should be construed sequentially. In an opinion contrary to Gregorian, the court acknowledged that the libel exception might preclude jurisdiction over a foreign state acting in a noncommercial capacity, but would not operate to deny jurisdiction if the activity were "trade libel," a commercially tortious activity.

The relationship between the two exceptions was at issue again in United Euram v. U.S.S.R. The federal district court held that the cultural exchange of musicians between the two parties was a commercial activity subjecting the USSR to suit in American courts. The defendant sovereign argued, however, that even if this were true, the plaintiff's claim of interference with contract rights would be barred by section 1605(a)(5)(B) of the FSIA, which expressly restores immunity from claims involving interference with contract rights. The court rejected this argument entirely, stating that the section 1605(a)(5)(B) exemption "was intended to cover noncommercial torts, ... and the restrictions embodied in subsection 1605(a)(5)(B) were not intended to restrict the scope of the commercial activity exception in subsection 1605(a)(2)." This conclusion was, once again, in conflict with the Ninth Circuit's reasoning in the Gregorian footnote.

VI. Analysis of the Export Group Decision

Even though the FSIA may be unclear on some points, the statute gives the sovereign the presumption of immunity. This presumption, however, is subject to several exceptions. Few courts have attempted to reconcile the language of section 1605(a)(5) with that of section 1605(a)(5)(B), waiting instead for Congress to clarify the language. The Ninth Circuit in Export Group made a good attempt

139 Id. at 855; see also Reed, supra note 68, at 254.
140 Yessin-Volpin, 443 F. Supp. at 855.
141 461 F. Supp. 609 (S.D.N.Y. 1978). Pursuant to a cultural exchange agreement, plaintiff and defendant agreed to have Soviet artists and musicians sent to the United States and Great Britain to give performances organized by the plaintiff. Id. Plaintiff sued for breach of contract and interference with contract rights, and defendants claimed sovereign immunity. Id.
142 Id. at 611.
143 Id. at 612.
144 Id.
146 For example, the language of section 1605(a)(5)(B) restored sovereign immunity in cases where the activity complained of is interference with contract rights. See 28 U.S.C. §1605 (a)(5)(B) (1976). However, it was unusual to find an instance where a sovereign had interfered with a contract right involving only noncommercial activity. The execution and performance of contract rights were inherently "commercial." See Gregorian v. Izvestia, 871 F.2d 1515, 1522 n.4 (9th Cir. 1989). Thus, when applying the language of section 1605(a)(5), stating that "this section applies only to activities not covered under section (a)(2)," to everyday reality, the courts are often left confused.
147 See Export Group v. Reef Industries, Inc., 54 F.3d 1466, 1473 (9th Cir. 1995).
to explain the structure and language of the FSIA's exceptions.\textsuperscript{148} The end result was an analysis of the Act consistent with the complex law surrounding the FSIA.

A. \textit{INMECAFE's Involvement in Commercial Activity}

A major flaw in the Ninth Circuit's opinion was its refusal to discuss whether the actions of INMECAFE were "commercial activities" as defined in section 1603(d) of the Act. The court seemed content to assume this question away without probing the issue.\textsuperscript{149} Of course, this lack of discussion may have been intentional, since INMECAFE did not contest the finding of its activities as commercial in nature.\textsuperscript{150} Indeed, INMECAFE's only argument was that section 1605(a)(5)(B) restored immunity to a foreign sovereign that committed any tort listed in that section, regardless of whether it was commercial in nature.\textsuperscript{151}

Despite this lack of foresight by INMECAFE, the question of whether the Ninth Circuit was correct in holding that INMECAFE's activities were commercial still remains. In order to analyze this issue, one must recognize that through the enactment of the FSIA, Congress gave courts broad discretion in determining whether an activity by a foreign sovereign was commercial in nature.\textsuperscript{152} Although Congress provided several examples of commercial activities, these examples were provided only as guidance to the courts.\textsuperscript{153} Ultimately, the determination of whether an act was commercial in nature rests with the courts.

In \textit{Weltover}, the Supreme Court also attempted to provide guidance to the courts in their determinations of whether an act was commercial. The Court, in addressing the issue, renounced the "profit motive to the activity" test used by some courts.\textsuperscript{154} Instead, the Court simply reiterated Congress' focus in enacting the commercial activity exception: the courts must look to the nature of the act and not its

\begin{footnotesize}
\begin{enumerate}
\item The court never discussed which of the three prongs of the commercial activity exception the activities of INMECAFE met. The exception states that there are three types of activities that have the jurisdictional nexus required to pass muster under the commercial activities exception: (a) the action is based upon a commercial activity carried on in the United States by the foreign state; (b) the act is performed in the United States in connection with a commercial activity of the foreign state elsewhere; or (c) the act is outside the territory of the United States in connection with a commercial activity of the foreign state that is also outside of the United States, and that act causes a "direct effect" in the United States. \textit{See 28 U.S.C. §1605(a)(2) (1976).} \\
\item The finding that INMECAFE's activity is commercial was not contested on appeal. \textit{See Export Group, 54 F.3d at 1467.} \\
\item \textit{Id.} at 1474. \\
\item \textit{House Report, supra note 39, at 6615.} \\
\item \textit{See supra note 100; see also House Report, supra note 39, at 6615.} \\
\item \"[T]he question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives.\" \textit{Republic of Argentina v. Weltover, 504 U.S. 607, 614 (1992).}\n\end{enumerate}
\end{footnotesize}
purpose in determining whether it is a commercial activity by a foreign state.\textsuperscript{155} The Ninth Circuit in \textit{Export Group} ultimately had the authority to hold the activity of INMECAFE to be commercial. The transaction involved was the bidding on a contract, an activity that most courts would find to be of a commercial nature. Perhaps the court viewed the answer to the issue as self-evident because the bidding was taking place in the realm of international commerce and trade.\textsuperscript{156} Therefore, the Ninth Circuit was justified in determining that the activity of INMECAFE, interference with a bidding contract involving international trade, was a commercial activity as defined in section 1603(d) of the FSIA.

Concerning the specific question of whether the activity of INMECAFE was commercial, there is one issue that never arose in \textit{Export Group} but was present in previous cases. Unlike the defendants in \textit{Weltover} and \textit{De Sanchez}, INMECAFE did not claim that the purpose of the activity was governmental in nature.\textsuperscript{157} In \textit{Weltover}, the defendant sovereign explained that the necessity of the activity, issuing the bonds to private investors, arose from the fact that Argentina needed to stabilize its currency.\textsuperscript{158} In \textit{De Sanchez}, the Nicaraguan bank asserted a similar position, that the activity it was engaged in was governmental because the purpose of the activity was to improve the nation’s economy.\textsuperscript{159} However, INMECAFE’s failure to argue this point should not be deemed detrimental to its claim. It is unlikely, given the instructions of Congress in section 1603(d),\textsuperscript{160} that INMECAFE could have prevailed had it argued that it had a governmental purpose in interfering with the bidding contract and that such purpose should be considered in determining whether its activity is commercial in nature.

\textbf{B. The Central Issue: The Ninth Circuit’s Reconciliation of Sections 1605(a)(2) and (a)(5)(B)}

\textit{1. The Gregorian Footnote as Binding Precedent}

Before addressing the issue of whether section 1605(a)(5)(B) restores immunity to commercial torts, the Ninth Circuit was obligated to address the controversial footnote found in its opinion in Gregorian.

\textsuperscript{155} See \textit{supra} note 37.
\textsuperscript{156} See \textit{Export Group} v. Reef Industries, Inc., 54 F.3d 1466 (9th Cir. 1995).
\textsuperscript{157} Id. at 1467-69.
\textsuperscript{158} See \textit{supra} note 105 and accompanying text.
\textsuperscript{159} The specific argument was that Banco Central did not enter the marketplace as a commercial actor, nor did it earn any fee by issuing the check to Mrs. Sanchez. \textit{De Sanchez} v. Banco Central de Nicaragua, 770 F.2d 1385, 1393 (5th Cir. 1985).
\textsuperscript{160} See \textit{supra} note 37 and accompanying text.
INMECAFE argued that this footnote constituted an alternative ground for the court's decision, but the Ninth Circuit held otherwise. The court cast this footnote aside as dictum, stating that Gregorian held that there was no applicable exception to sovereign immunity under the FSIA for Gregorian's libel claim because Izvestia's activities were not commercial activities as defined by section 1605(a)(2). The footnote suggests that Gregorian's "trade libel" claim would fare no better because, given the court's holding that Izvestia's actions were not "commercial activities" as defined in section 1605(a)(2), the alleged tort of trade libel would be encompassed within the libel exception of 1605(a)(5)(B). The statement in the footnote, that "it is far more likely" that Congress intended section 1605(a)(5)(B) to apply to all claims of libel, is therefore dictum, as it is offered only to explain why section 1605(a)(5)(B) would encompass the "trade libel" claim if plaintiffs had attempted to rely upon that section to establish jurisdiction.

The Ninth Circuit was justified in disregarding the Gregorian footnote. The central issue contended in Gregorian was whether the commercial activity exception applied to the activities of the defendant. The court held that it did not apply, but then decided to discuss section 1605(a)(5) in the controversial footnote. The entire discussion in the footnote contained issues and suppositions which go beyond the facts presented to the court. In other words, because the discussion was not necessary to the court's decision in the contested matter before it, the discussion must be characterized as non-binding dictum.

2. The Reconciliation of the Two Exceptions

The Ninth Circuit then attempted to interpret the language of the FSIA. First, the court stated that the "clear statutory language of section 1605(a)(5) indicate[s] that both this exception and the restrictions upon this exception are intended to apply only to torts 'not otherwise encompassed in [section 1602(a)(2)].'" Several courts have held this language to mean that the two exceptions are mutually exclusive of one another. In fact, only the district court in Gregorian has ruled to the contrary: that foreign states and their agents are

161 For discussion of this footnote, see supra note 48 and accompanying text.
162 Export Group v. Reef Industries, Inc., 54 F.3d 1466, 1471 (9th Cir. 1995).
163 Id. at 1472 (citations omitted).
164 See supra notes 115-119 and accompanying text.
165 See supra note 48.
166 Dictum is defined as "expressions in the court's opinion which go beyond the contested facts before the court". BLACK'S LAW DICTIONARY, 454 (6th ed. 1990).
168 See supra note 132 and accompanying text.
immune from claims for torts listed in section 1605(a)(5)(B) when those claims arise from the foreign actor's commercial activities.\textsuperscript{169}

The legislative history of the FSIA clearly indicates that Congress intended for section 1605(a)(5)(B) to apply only to noncommercial torts. The comments state that the subsection applies to "all tort actions for money damages, not otherwise encompassed by section 1605(a)(2) relating to commercial activities."\textsuperscript{170} This language indicates that any tort encompassed by section 1605(a)(2) never enters into the purview of section 1605(a)(5) or its restrictions. The court ruled in accordance with the legislative history of the Act.

One argument advanced by the court in support of its ruling was that the section 1605(a)(5)(B) exemption manifested Congress' intent to enumerate any exemptions from statutory coverage it viewed as necessary.\textsuperscript{171} Once Congress demonstrated this intention, established canons of statutory construction state that "generally exceptions are not to then be implied."\textsuperscript{172} In other words, there is a presumption that Congress did not enumerate specific exemptions in section 1605(a)(5) but leaves the exemptions in another section of the same statute to judicial interpretation.\textsuperscript{173} Therefore, the exemption in section 1605(a)(5)(B) should be considered only as a limitation upon the matter that directly precedes it, namely section 1605(a)(5), the noncommercial torts exception.\textsuperscript{174}

Finally, although the exact question presented to the Ninth Circuit has not been answered by the Supreme Court or any other circuit court,\textsuperscript{175} two district courts have attempted to reconcile the commercial activity exception with the exemption found in section 1605(a)(5)(B). In \textit{Yessin-Volpin}, a federal district court held that "commercial" libel would fall within the scope of the commercial activity exception and that section 1605(a)(5)(B) would not apply to restore immunity.\textsuperscript{176} This holding, however, was merely dictum since the sovereign's activity was held to be noncommercial in nature.\textsuperscript{177}

The case most factually similar to \textit{Export Group} is \textit{United Euram v. U.S.S.R.}\textsuperscript{178} Like \textit{Export Group}, this case involved a claim of interfer-

\begin{flushleft}
\textsuperscript{169} \textit{Export Group}, 54 F.3d at 1474.
\textsuperscript{170} See \textit{supra} notes 93-96 and accompanying text.
\textsuperscript{171} \textit{Export Group}, 54 F.3d at 1473; see also \textit{Reed}, \textit{supra} note 68, at 255.171
\textsuperscript{172} \textit{NORMAN J. SINGER, 2A SUTHERLAND STAT. CONST. § 47.11 (5th ed. 1992)} (stating that only if a contrary intent or meaning is clearly indicated will [an exception] operate as a general limitation on all provisions of the act).
\textsuperscript{173} \textit{Export Group}, 54 F.3d at 1474.
\textsuperscript{174} \textit{Id.} at 1473.
\textsuperscript{175} \textit{Id.} at 1474.
\textsuperscript{176} See \textit{supra} note 141 and accompanying text.
\textsuperscript{177} See \textit{Reed}, \textit{supra} note 68, at 254.
\end{flushleft}
ence with contract rights. The court held that the activity engaged in by the foreign defendant constituted a commercial activity. Significantly, the court then ruled that the restrictions embodied in section 1605(a)(5)(B) did not operate to restore immunity to a foreign sovereign engaged in commercial activity. Thus, all the relevant case law on the language of the exceptions, sections 1605(a)(2) and (a)(5), seems to support the holding of the Ninth Circuit in Export Group.

There are also significant policy reasons for refusing to blur the distinction between commercial activities and the noncommercial activities exception. Mixing the two exceptions might have the effect of frustrating private citizens who wished to engage in commercial activities with a foreign state but could not be sure whether a court would have jurisdiction to hear any disputes that might arise. Furthermore, mixing the two exceptions essentially would make the commercial activity exception a red herring, which, in turn, would run counter to the policy behind the restrictive theory of sovereign immunity, as stated by the Supreme Court:

[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. In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens. Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on "national nerves."]

If the commercial activity exception had been gutted by the Ninth Circuit in Export Group, there is little doubt that the policies behind the FSIA would not have been served.

V. Conclusion

The above analysis indicates clearly that the Ninth Circuit decided Export Group correctly. Its use of legislative history and established canons of statutory construction enabled the court to effectively reconcile the language of the FSIA exceptions to immunity. Whether one agrees with the final decision or not, the court had a tremendous amount of discretion, granted by Congress, to decide the scope of the commercial activity exception with respect to the facts of the case. It is obvious from the discussion in the opinion that the court did not

---

179 In United Euram, the U.S.S.R. breached its agreement to provide musicians and artists as part of an agreement to feature them in America and Great Britain. See supra note 142 and accompanying text.
181 Id.
182 Reed, supra note 68, at 256.
abuse this discretion but instead used reason, precedent and logic to decide whether to apply the commercial activity exception to the suit against INMECAFE.

It is now the responsibility of the Supreme Court to reconcile the Ninth Circuit’s decision with the controversial footnote in Gregorian that seeks to expand the scope of section 1605(a)(5)(B) of the FSIA. It seems very unlikely that the Court will overturn the decision of the Ninth Circuit in Export Group, especially since many of the members of the current Court are literalists with respect to statutory construction.\textsuperscript{184} If the Supreme Court examines the issues presented in Export Group, however, there may be far-reaching international effects. The decision of the court in Export Group is a statement that the United States will hear claims based on commercial torts of foreign sovereigns. Because of the interrelations between international actors with respect to global commerce, the frequency of claims involving these types of torts will continue to rise. The effect of the Export Group decision will be a long-term increase in litigation in our country involving foreign sovereign actors. This increase, unfortunately, could be a source of tension between the United States and other nations.

\textbf{Benjamin Eric Lovell}

\textsuperscript{184} Consider Justice Scalia’s opinion in Weltover, which was unanimously followed by the Court. The opinion is concerned with interpreting section 1603(d), the definition of “commercial activity,” in a strict, literal way. See supra notes 105-106 and accompanying text.