



4-1-1995

Cicippio v. Islamic Republic of Iran: Putting the Foreign Sovereign Immunity Act's Commercial Activities Exception in Context

Kevin Leung

Follow this and additional works at: <https://digitalcommons.lmu.edu/ilr>



Part of the [Law Commons](#)

Recommended Citation

Kevin Leung, *Cicippio v. Islamic Republic of Iran: Putting the Foreign Sovereign Immunity Act's Commercial Activities Exception in Context*, 17 Loy. L.A. Int'l & Comp. L. Rev. 701 (1995).
Available at: <https://digitalcommons.lmu.edu/ilr/vol17/iss3/7>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

CICIPPIO V. ISLAMIC REPUBLIC OF IRAN: PUTTING THE FOREIGN SOVEREIGN IMMUNITY ACT'S COMMERCIAL ACTIVITIES EXCEPTION IN CONTEXT

I. INTRODUCTION

On September 12, 1986, an Islamic fundamentalist terrorist group called the Revolutionary Justice Organization ("RJO") kidnapped Joseph James Cicippio, chief accountant and deputy controller at the American University of Beirut.¹ During his captivity, Cicippio was "chained to a radiator in a pitch-black room,"² routinely beaten and tortured with metal rods, rubber hoses and sticks, striking about his head, feet, and stomach.³ He was also starved, being fed only "rice and beans, old cheese and stale bread."⁴ At the direction of the Iranian government, the RJO held Cicippio captive until the United States agreed to release Iranian assets worth \$262,000,000, frozen in U.S. banks. The money was frozen pursuant to Executive Order 12170,⁵ issued by President Jimmy Carter "as a response to the hostage taking at the United States Embassy in Tehran" in 1979.⁶

On December 2, 1991, Cicippio was finally set free, "dumped by the side of a dusty road just outside [Beirut],"⁷ after 1908 days of captivity. In addition to his wounds from beatings, Cicippio also suffered "frostbite on his hands and feet from being chained outdoors during two winters."⁸ In exchange for Cicippio's release, the United States released \$278,000,000 in Iranian assets, substantially fulfilling Iran's demands.⁹

1. William Tuohy, *5 Others Still 'in Hell,' Says Freed Captive*, L.A. TIMES, Nov. 4, 1986, at A1.

2. Eva M. Rodriguez, *Court Bars Suit by Forder Hezbollah Hostage*, THE RECORDER, Aug 11, 1994, at 2.

3. Dana Priest, *Anderson Last U.S. Hostage is Freed, Ex-Captives Describe Beatings, Deprivation*, WASH. POST, Dec. 5, 1991, at A1.

4. *Id.*

5. 44 Fed. Reg. 65729 (1979); 50 U.S.C.A. § 1701 (1993).

6. See Margot C. Wuebbels, *Commercial Terrorism: A Commercial Activity Exception Under § 1605(A)(2) of the Foreign Sovereign Immunities Act*, 35 ARIZ. L. REV. 1123, 1150 (1993).

7. Rodriguez, *supra* note 2, at 2.

8. Priest, *supra* note 3, at A1.

9. Emily Baker, *Targeting Iran for Terrorists' Profit*, AM. LAW., Dec. 1992, at 83.

On October 14, 1992, Cicippio filed a lawsuit in a federal district court in Washington, D.C. against Iran, "seeking six hundred million in damages for claims that include false imprisonment and torture."¹⁰ Despite the fact that the Foreign Sovereign Immunities Act ("FSIA") generally grants foreign nations immunity in federal courts, Cicippio claimed that the kidnapping was a "commercial transaction for profit," thus falling under the FSIA's "commercial activity" exception.¹¹

The U.S. District Court for the District of Columbia rejected this argument, granting Iran's motion to dismiss for lack of subject matter jurisdiction.¹² The U.S. Court of Appeals for the District of Columbia also rejected Cicippio's argument and affirmed the lower court's decision.¹³

This Note examines the D.C. Circuit's decision to reject the argument that "commercial terrorism," or terrorism-for-money, fails to qualify as a commercial activity exception to the FSIA. Part II of this Note presents an overview of the problem and describes the historical development of foreign sovereign immunity. Part III presents the FSIA, its interpretation by federal courts, exceptions to the FSIA, and the federal courts' interpretation of the exceptions. Part IV discusses the D.C. Circuit's decision in the Cicippio case, analyzing the reasoning, arguments, and justifications for the decision. This section also discusses the D.C. Circuit's adoption of the commercial context requirement. Part V analyzes the commercial context requirement. Part VI criticizes the Cicippio decision and discusses what the court might have been able to accomplish. Finally, this Note concludes that the D.C. Circuit's decision was based on considerations foreclosed by the statute and criticizes the D.C. Circuit's adoption of a new barrier—the commercial context requirement—for denying sovereign immunity in human rights suits.

10. *Id.*

11. *Id.*

12. *Cicippio v. Islamic Republic of Iran*, No. 9202300, 1993 WL 730748 (D.D.C. 1994).

13. *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 726 (1995).

II. AN OVERVIEW

A. Subject Matter Jurisdiction

A federal court must have subject matter jurisdiction before it can hear a case. Under 28 U.S.C. § 1330(a), federal courts have subject matter jurisdiction over claims against foreign nations when the foreign state is not entitled to immunity.¹⁴ Thus, when the foreign state defendant is entitled to foreign sovereign immunity, subject matter jurisdiction is lacking.

B. Historical Development of Foreign Sovereign Immunity

Sovereign immunity is grounded on the premise that “the King can do no wrong.”¹⁵ Traditionally, the doctrine provides a sovereign government, or its political subdivisions, total immunity from tort liability incurred by its officers or agents.¹⁶ This immunity is not absolute, however, and may be waived statutorily.¹⁷

The doctrine of sovereign immunity, as applied under international law, provides foreign nations with immunity from judgments in foreign courts. Justice Marshall, in *Schooner Exch. v. McFaddon*,¹⁸ set out the basic structure for sovereign immunity analysis in the international context. Although the decision was written in 1812, his formulation of foreign sovereign immunity is still very influential and is frequently cited.¹⁹

In granting in rem jurisdictional immunity to a French schooner,²⁰ Justice Marshall argued that foreign sovereign immunity is based on the host country’s consent to not exercise jurisdiction over the foreign country.²¹ The starting point of Marshall’s argument is the principle that “[t]he jurisdiction of the nation

14. 28 U.S.C. § 1330(a) (1988).

15. BLACK’S LAW DICTIONARY 1396 (6th ed. 1990).

16. *Id.*

17. The U.S. federal government has generally waived its sovereign immunity for non-tort and tort claims. See Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491 (1988); see also Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674 (1988).

18. 11 U.S. (1 Cranch) 116 (1812).

19. Thomas H. Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 FORDHAM L. REV. 155, 162-63 (1982).

20. *Schooner Exch.*, 11 U.S. (1 Cranch) at 146.

21. *Id.* at 136.

within its own territory is necessarily exclusive and absolute . . . and susceptible of no limitation not imposed by itself."²² Thus, all exceptions to absolute jurisdiction within a nation's territory, such as foreign sovereign immunity, "must be traced up to the consent of the nation itself."²³ Furthermore, the consent to waive a portion of the sovereign's absolute jurisdiction may be express or implied and may be revoked by the host nation.²⁴

Policy reasons for the voluntary extension of immunity, according to Marshall, generally rest on principles of mutual respect for a nation's sovereignty. "[P]erfect equality and absolute independence of sovereigns, and . . . [a] common interest impelling [different nations] to mutual intercourse, . . . 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."²⁵

Early applications of this doctrine in the United States provided foreign nations with absolute immunity. In *Berizzi Bros. Co. v. S.S. Pesaro*,²⁶ the Supreme Court, relying heavily on *Schooner Exch.*, expressly adopted the theory of absolute foreign sovereign immunity.

[A]s a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every court should decline to exercise, by means of its Courts, any of its territorial jurisdiction over any sovereign or ambassador of any other state.²⁷

The absolute immunity theory granted immunity to foreign sovereigns for all of their activities, failing, however, to distinguish between public and private acts.²⁸ The distinction between a foreign sovereign's public and private acts became increasingly vital as nations began to increase their involvement in commercial activities. Absolute immunity deprived a legal remedy for private

22. *Id.*

23. *Id.*

24. *Id.* at 137.

25. *Schooner Exch.* 11 U.S. (1 Cranch) 116, 137 (1812).

26. 271 U.S. 562 (1926).

27. *Id.* at 574.

28. David A. Brittenham, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440, 1452 (1983).

citizens doing business with foreign governments.²⁹ Moreover, the Court “ignored the views of the State Department, which favored restricting the privilege of sovereign immunity to a foreign state’s noncommercial activities.”³⁰

Eventually, two Supreme Court cases in the 1940s eroded the absolute immunity theory. In both *Ex parte Peru*³¹ and *Mexico v. Hoffman*,³² Chief Justice Stone declared that the judiciary should defer decisions regarding foreign sovereign immunity to the Executive branch. “[W]hen the executive branch, through the Department of State, determine[s] that a claim of sovereign immunity should be allowed in the interests of foreign relations, courts must accept and follow the executive determination.”³³ Thus, the power to determine foreign sovereign immunity effectively shifted from the judiciary to the State Department.

The State Department seized this opportunity to influence the development of foreign sovereign immunity and issued a policy committed to the “restrictive” theory of sovereign immunity.³⁴ The “restrictive” theory of sovereign immunity provides that “the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).”³⁵ Thus, under the restrictive theory of sovereign immunity, a sovereign nation may lose its immunity when either the State Department or the courts decides that the sovereign’s acts, for which the claim arises, are equivalent to private acts.

The distinction between private and public acts was elusive, however. With few guidelines, the State Department and the courts “struggled to distinguish between the two categories.”³⁶ This struggle led to inconsistent results, ad hoc determinations of immunity on a case by case basis, and no clear standards governing immunity decisions. This result prompted Congress to act: “[t]he indecision and ambiguities presented by this divergent application

29. *Id.*

30. *Id.*

31. 318 U.S. 578 (1943).

32. 324 U.S. 30 (1945).

33. Brittenham, *supra* note 28, at 1452.

34. See Letter from Jack B. Take, Acting Legal Adviser of the U.S. Dep’t of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711 (1976).

35. *Id.*

36. Wuebbels, *supra* note 6, at 1125.

in cases involving foreign sovereigns made the enactment of the Foreign Sovereign Immunities Act timely.”³⁷

III. FOREIGN SOVEREIGN IMMUNITIES ACT (“FSIA”)

A. Purpose of the FSIA

The FSIA’s stated purpose is to “provide when and how parties can maintain a lawsuit against a foreign state . . .” in the U.S. federal courts.³⁸ This statute is the “sole and exclusive standard to be used in resolving questions of sovereign immunity raised by foreign states” and “pre-empt[s] any other State or Federal law.”³⁹

Courts recognize that the FSIA’s chief objectives are to codify the “restrictive” theory of sovereign immunity, to transfer the ability to determine immunity back to the judiciary, to set up a procedure for service of process, and to create a remedy for a foreign nation’s failure to pay judgments entered against it.⁴⁰

B. Operation of the FSIA

Under 28 U.S.C. § 1604, a “foreign state shall be immune from the jurisdiction of the courts of the United States,”⁴¹ unless such immunity is contrary to an existing international agreement or except as provided by § 1605.⁴² Courts construe both § 1604 and § 1605 as granting foreign nations immunity from suit in U.S. courts unless a plaintiff clearly shows that the foreign nation’s acts fall within one of the exceptions.⁴³ Thus, once the foreign state

37. *Id.*

38. H.R. REP. NO. 1487, 94th Cong., 2d Sess. 1 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604.

39. *Id.*

40. *See Frolova v. U.S.S.R.*, 558 F. Supp. 358, 361 (D.C. Ill. 1983) (granting sovereign immunity to Soviet Union because the tort exception did not apply); *National Airmotive Corp. v. Iran*, 499 F. Supp. 401, 406 (D.C. Cir. 1980) (denying U.S. request that the court stay all proceedings for a indefinite period); *Jet Line Serv, Inc. v. M/V Marsa El Hariga*, 462 F. Supp. 1165, 1170 (D.C. Md. 1978) (granting motion to release a vessel attached by plaintiff because it violated the FSIA).

41. 28 U.S.C. § 1604 (1988).

42. *Id.*

43. *See Bahsoon v. Pezetel, Ltd.*, 768 F. Supp. 507, 509 (E.D.N.C. 1991) (denying immunity to the agent of a foreign government who was a U.S. citizen because the FSIA does not apply to U.S. citizens); *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1106 (D.D.C. 1982) (holding that subject matter jurisdiction exists under the commercial activities exception of the FSIA).

establishes that it is a foreign state and that the claim relates to a public act, the foreign state is presumed to have immunity unless the plaintiff rebuts the presumption by offering evidence to prove that an exception applies.⁴⁴

C. *Exceptions to the FSIA*

The general exceptions to foreign sovereign immunity are described in 28 U.S.C. § 1605. Exceptions in this section include, but are not limited to, waiver,⁴⁵ suits regarding property situated in the United States,⁴⁶ suits in admiralty to enforce maritime liens,⁴⁷ and commercial activities.⁴⁸

The most important and widely used exception is the commercial activity exception.⁴⁹ The theory underlying the exception is that when the government is engaged in an activity that is commercial in nature, the sovereign “divests itself . . . of its sovereign character, and takes that of a private citizen . . . descend[ing] to [an equivalent] level with those with whom it associates.”⁵⁰

Whether the commercial activity exception will strip a foreign sovereign of immunity depends upon a finding of three elements. First, the court must characterize the foreign sovereign’s activities as “commercial” in nature.⁵¹ Second, the court must determine that the lawsuit is “based on” that particular commercial activity.⁵² Finally, the court must find a nexus between those commercial activities and the United States.⁵³

44. *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 255 (7th Cir. 1983) (holding that the activities of a Nicaraguan corporation did not fall within the FSIA’s commercial activity exception).

45. 28 U.S.C. § 1605(a)(1) (1988).

46. *Id.* § 1605(a)(4).

47. *Id.* § 1605(b).

48. *Id.* § 1605(a)(2); see generally *id.* § 1605 for other exceptions.

49. *Id.* § 1605(a)(2); see generally *Brittenham*, *supra* note 28, at 1140 (“Perhaps the most significant exception permits suit to be brought for claims that arise from the commercial activity of a foreign state.”); *Wuebbels*, *supra* note 6, at 1128 (“The commercial activity exception is the most frequently contested of the foreign sovereign immunity exceptions.”).

50. *Saudi Arabia v. Nelson*, 113 S. Ct. 1471, 1483 (1993) (White, J., concurring) (quoting Justice Marshall in *Bank of United States v. Platers’ Bank of Georgia*, 22 U.S. 904, 907 (1824)).

51. *Wuebbels*, *supra* note 6, at 1128.

52. *Id.*

53. *Id.*; see also *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985).

1. Characterizing Activity as Commercial Activity

“Commercial activity” is defined in 28 U.S.C. § 1603 as “either a regular course of commercial conduct or a particular commercial transaction or act.”⁵⁴ Additionally, the statute mandates that determination of whether an activity is commercial should be made by “reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”⁵⁵

Commercial conduct is generally defined as conduct that “relates to or is connected with trade and traffic . . . [and] business or activity which is carried on for a profit.”⁵⁶ Thus, a sovereign’s act should be deemed a commercial activity if its nature is to carry on trade, traffic, business, or profit as opposed to some governmental interest.

Complications arise, however, when courts attempt to distinguish commercial activity from government activity in characterizing the activity’s nature. It is often difficult to distinguish acts that are connected with trade, traffic, and business from acts that further some governmental interest.⁵⁷ For example, in the situation in which Mexico is sued by U.S. citizens for damages caused by nuclear bomb testing commissioned and paid for by a Canadian corporation near the Mexico/U.S. border, Mexico’s activity is arguably both a commercial activity—because it was executing a contract with Canada for services rendered—and a

54. 28 U.S.C. § 1603(d) (1988).

55. *Id.*; This purpose-versus-nature distinction was specifically placed in the statute to prevent a finding of sovereign immunity if the foreign government argues that the purpose of its activity is for the public. *Id.* The distinction is important because a foreign government can always argue that certain commercial activities are for the purpose of furthering a governmental interest. One commentator argues that purpose test would tend to increase the potential for abusive, subjective interpretation, and would produce a “chilling” effect on the formation of contracts between private parties and foreign governments, because the contracts may not be enforceable due to immunity. Gary Jay Greener, *The Commercial Exception to Foreign Sovereign Immunity: To Be Immune or Not to Be Immune? That Is the Question*, 15 LOY. L.A. INT’L & COMP. L.J. 173, 198-99 (1992).

56. BLACK’S LAW DICTIONARY, *supra* note 15, at 270 (defining “commercial” and “commercial activity”).

57. This is especially true when the activity meets several requirements: it is noncontractual in nature; it exhibits both commercial and governmental characteristics; it had a direct effect in the United States but no other territorial contracts with the forum; and it occurred in the defendant state’s territory. Brittenham, *supra* note 28, at 1444-45.

governmental activity—because a country's military activities are normally considered a sovereign act.⁵⁸

To distinguish between a commercial and a non-commercial activity, the courts commonly ask whether a private party could have engaged in a similar activity.⁵⁹ This "private person test" was first used by the Second Circuit Court of Appeals in *Texas Trading & Milling Corp. v. Nigeria*.⁶⁰ In *Texas Trading*, the Nigerian government was sued for breaching a contract to purchase cement.⁶¹ The court reasoned that a private person can engage in the activity engaged in by Nigeria, namely purchasing cement, and concluded that no immunity should be granted.⁶²

In *Argentina v. Weltover*,⁶³ the Supreme Court adopted this "private person" test to distinguish between sovereign and commercial acts. In *Weltover*, the Argentinean government unilaterally extended the repayment period for debt owed to two Panamanian corporations and a Swiss bank.⁶⁴ The creditors filed suit in New York Federal District Court for breach of contract.⁶⁵ Argentina argued that it was immune under the FSIA. The creditors claimed that Argentina's actions fell within the commercial activity exception.⁶⁶

The Court, noting the lack of guidance from Congress in defining commercial activity under the FSIA, stated that courts should look to caselaw applying the restrictive theory of foreign sovereign immunity. The Court reasoned that definitions of sovereign immunity used by courts that have applied the restrictive theory of sovereign immunity probably reflect Congress' under-

58. Greener, *supra* note 55, at 199 (noting that there is authority supporting the idea that military activity does not merit automatic immunity).

59. Wuebbels, *supra* note 6, at 1131; *see also* Joan E. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 YALE J. INT'L L. 489, 500 (1992). Donoghue notes that Second Circuit Judge Kaufman "relied on the House Report, which defined a commercial activity as one of the same character as might be made by a private person." *Id.* at 500 n.52. Donoghue also argues that there are serious flaws in using the "private person test" to determine commercial acts. *Id.*

60. 647 F.2d. 300, 309 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

61. *Id.* at 306

62. *Id.* at 310.

63. 112 S. Ct. 2160 (1992).

64. *Id.* at 2165.

65. *Id.* at 2164.

66. *Id.* at 2165.

standing of sovereign immunity because Congress was trying to codify the restrictive theory of foreign sovereign immunity.⁶⁷

Citing *Alfred Dunhill of London, Inc. v. Cuba*,⁶⁸ a case that applied the restrictive theory of foreign sovereign immunity, the Court in *Weltover* concluded that a sovereign's acts should be characterized as commercial activity if that particular act is something in which private parties can also engage.⁶⁹ The Court stated that "a foreign state engaging in 'commercial activities' do[es] not exercise powers peculiar to sovereigns; rather, it exercise[s] only those powers that can also be exercised by private citizens."⁷⁰ Thus, where a private person is able to engage in similar activity, it is not peculiar to sovereigns, and sovereign immunity is extinguished.

2. Action "Based on" the Particular Commercial Activity

The second requirement necessary to strip a foreign sovereign of immunity—action "based on" the particular commercial activity—focuses on the commercial activity and its relationship to the cause of action. The defendant must show some relationship between the commercial activity and the cause of action to satisfy this requirement. The key question, however, is the extent of the relationship necessary to satisfy this requirement. For example, would an accident in a meat factory owned and operated by a foreign government be sufficiently related to the commercial activity for the government to lose its immunity? Or is a closer relationship between the activity and the cause of action necessary? Because Congress gave little guidance for determining the type of relationship necessary to satisfy this requirement, a wide variety of tests has been developed.⁷¹

In *Gibbons v. Udaras*,⁷² the New York District Court considered the "literal test." This test employs a literal reading of the "based upon" requirement and requires that the cause of action be

67. *Id.*

68. 425 U.S. 682 (1976).

69. *Argentina v. Weltover*, 112 S. Ct. 2160, 2166 (1992).

70. *Id.*

71. Greener, *supra* note 55, at 182.

72. 549 F. Supp. 1094 (S.D.N.Y. 1982) (holding that subject matter jurisdiction existed under the commercial activities exception of the FSIA for two U.S. citizens suing the Republic of Ireland for breach of contract, fraud, tortious interference with contractual relations, and a taking of property).

based directly on the defendant's commercial activities in the United States.⁷³ In *Gibbons*, the court rejected this test, however, and it has not gained much acceptance.⁷⁴

In *Sugarman v. Aeromexico*,⁷⁵ the Third Circuit Court of Appeals adopted a "nexus test." This test requires only "some connection between the plaintiff's grievance and the foreign entity's commercial activity in the United States."⁷⁶ This approach has gained some acceptance and is regarded by other courts as a "more effective way of carrying out the goal of requiring a connection between the lawsuit and the United States."⁷⁷

The "causal connection test," adopted by the D.C. Circuit Court of Appeals in *Gilson v. Ireland*,⁷⁸ states that the "standard is met if the plaintiff can show a causal connection between the foreign state's commercial activity and the plaintiff's cause of action or an element in the cause of action [and seems to] fall between the literal test and the nexus test."⁷⁹ The Fifth Circuit rejected this test as "requiring a tighter connection between the United States and the lawsuit in question" than is necessary, however.⁸⁰

The "doing business test" focuses on the connection between the defendant and the United States.⁸¹ This test was applied by the District Court for the Southern District of New York in *In re Rio Grande Transport*.⁸² The "doing business test" requires "no specific connection between the lawsuit and the United States . . . it is only necessary that the broad course of conduct be connected

73. Wuebbels, *supra* note 6, at 1132; *see also* *Gibbons v. Udaras*, 549 F. Supp. 1094, 1109 (S.D.N.Y. 1982).

74. Wuebbels, *supra* note 6, at 1132.

75. 626 F.2d 270 (3d Cir. 1980) (denying immunity to a national airline of Mexico for tortious injury suffered by passenger in a Mexican airport as he was waiting for a delayed flight to New York City).

76. Wuebbels, *supra* note 6, at 1132; *see also* *Sugarman v. Aeromexico*, 626 F. 2d 270, 272-73 (3d Cir. 1980).

77. Wuebbels, *supra* note 6, at 1132.

78. 682 F.2d 1022 (D.C. Cir. 1982) (denying immunity to Republic of Ireland for commercial misdeeds under the FSIA).

79. Wuebbels, *supra* note 6, at 1133; *see also* *Gilson v. Ireland*, 682 F.2d at 1027-28.

80. Wuebbels, *supra* note 6, at 1133.

81. *Id.* at 1133-34.

82. *In re Rio Grande Transport*, 516 F. Supp. 1155 (S.D.N.Y. 1981) (denying immunity to Algerian shipping company in suit for damages due to a collision in the Mediterranean Sea).

to the United States.”⁸³ This position, however, seems to eliminate the “based upon” requirement and may contradict Congressional intent.⁸⁴ Like the “Literal Test,” however, the “doing business test” has not gained much acceptance.⁸⁵

The “jurisdictional nexus test,” the most widely used test, requires “a bond or link that connects the foreign state to the wrongful act, for which it is sought to be held liable and is comparable to the requirement that there be a causal connection in order to impose liability in the civil law of torts.”⁸⁶ The “jurisdictional nexus test” has also been expressed as a nexus between the plaintiff’s grievance and the sovereign’s commercial activity.⁸⁷

Finally, the Supreme Court adopted a more stringent “based on” requirement. In *Saudi Arabia v. Nelson*,⁸⁸ the Supreme Court required the relationship between the commercial activity and the cause of action to be more than a mere connection.⁸⁹ Although the Court suggests that every element of a claim does not have to be a commercial activity,⁹⁰ it is clear that this is preferable to the Court.⁹¹ This more stringent requirement, however, appears to apply only in connection with the first clause of 28 U.S.C. § 1605(a)(2),⁹² which describes one of the three nexus requirements.⁹³ Justice Souter justified this more stringent

83. Wuebbels, *supra* note 6, at 1134.

84. *Id.*

85. *Id.*

86. *Id.* at 1134-35.

87. *Id.*

88. 113 S. Ct. 1471 (1993).

89. *Id.* at 1478.

90. *Id.* at 1478 n.4.

91. Analogizing to tort law, it seems that the Court was not satisfied with a mere “but for” causal relationship between the commercial activity and the cause of action, but instead required something like “proximate causation.” One commentator argued that the Supreme Court requires the commercial activity to actually inflict the injury, which is more analogous to “direct causation.” See Deirdre E. Whelan, *The Commercial Activity Exception in the Foreign Sovereign Immunities Act: Saudi Arabia v. Nelson*, 27 CREIGHTON L. REV. 1069, 1094 (1994).

92. Clause one of § 1605(a)(2) states that: “a foreign state is not immune from jurisdiction . . . in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state.” 28 U.S.C. § 1605(a)(2) (1988).

93. All three elements—the nexus requirement, characterization of the activity as commercial in nature, and satisfaction of the “based on” requirement—are necessary for the commercial activity exception to strip a foreign sovereign of immunity. See *supra* notes 51-53 and accompanying text; see also *infra* notes 97-122 and accompanying text for a discussion of the nexus requirement.

“based on” requirement for the first clause of 28 U.S.C. § 1605(a)(2) by arguing that the first clause was worded differently than the other two clauses.⁹⁴ Souter noted that the “in connection” wording, found in the second and third clauses of § 1605(a)(2), was absent from the first clause.⁹⁵ He then argued that “distinctions among descriptions juxtaposed against each other are naturally understood to be significant.”⁹⁶ From this analysis, Souter concluded that “the only reasonable reading of the former term calls for something more than a mere connection with, or relation to, commercial activity.”⁹⁷

3. Finding a Nexus Between the Commercial Activity and the United States

The third element necessary to strip sovereign immunity from a foreign sovereign is the nexus requirement. The nexus required between the commercial activity and the United States is similar to the “based on” requirement. In both instances, a relationship is required to justify the exercise of jurisdiction over the claim. Whereas the “based on” requirement focuses on the relationship between the cause of action and the commercial activity, the nexus requirement focuses on the relationship between the commercial activity and the United States.

There are three situations, described in 28 U.S.C. § 1605, when a foreign state’s “commercial activity” satisfies the required nexus with the United States. A nation would lose its sovereign immunity if (1) the “action is based on a commercial activity carried on in the United States by the foreign nation,”⁹⁸ (2) the action is based upon an “act performed in the United States in connection with a commercial activity of the foreign state elsewhere,”⁹⁹ or (3) the action is based upon an act outside U.S.

94. Clauses two and three of § 1605(a)(2) state that:

foreign state shall not be immune from the jurisdiction of courts of the United States in which the action is based upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or based 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.

95. *Saudi Arabia v. Nelson*, 113 S. Ct. 1471, 1477 (1993)

96. *Id.*

97. *Id.*

98. 28 U.S.C. § 1605(a)(2) (1988).

99. *Id.*

territory in connection with commercial activity of the foreign state elsewhere that causes a direct effect in the United States.¹⁰⁰ Each situation varies slightly, as illustrated below.

Under 28 U.S.C. § 1603(e), the first situation¹⁰¹ that satisfies the nexus requirement is "a commercial activity carried on by a foreign state . . . and having substantial contact with the United States."¹⁰² Legislative history further clarifies this section:

[a] commercial activity carried on in the United States . . . would include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction or act having a "substantial contact" with the United States . . . [and] includes cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States, . . . and an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States.¹⁰³

For example, a plaintiff's breach of contract action against Colombia based upon a sale of coffee beans in the United States should satisfy this requirement. Moreover, a plaintiff's action for a breach of contract against Colombia based upon a sale of coffee beans to American traders, who pick up the beans in Colombia, might also satisfy this requirement because the transaction does not have to occur entirely in the United States. The nexus requirement is satisfied as long as there is some "substantial contact" with the United States.

The second situation that satisfies the nexus requirement is when the action is based upon an "act performed in the United States in connection with a commercial activity of the foreign state elsewhere."¹⁰⁴ This situation focuses on specific "conduct of the foreign state in the United States which relates either to a regular course of commercial conduct elsewhere or to a particular commercial transaction" conducted elsewhere.¹⁰⁵ Congress also

100. *Id.*

101. The first situation is a commercial activity carried on in the United States by a foreign government. 28 U.S.C. § 1605(a)(2) (1988).

102. *Id.* § 1603(e).

103. H.R. REP. NO. 1487, *supra* note 38, at 6615-16.

104. 28 U.S.C. § 1605 (1988).

105. H.R. REP. NO. 1487, *supra* note 38, at 6617.

notes that there might be overlap between the first and second situations.¹⁰⁶ Nevertheless, Congress concludes that "it . . . seem[s] advisable to provide expressly for the case where a claim arises out of a specific act in the United States which is commercial or private in nature and which relates to a commercial activity abroad."¹⁰⁷

In *Gilson v. Ireland*,¹⁰⁸ the D.C. Circuit Court of Appeals denied immunity to Ireland. The court ruled that enticing an American plaintiff to move his family, equipment, and technology to Ireland for the purpose of developing some quartz crystals and then breaching the employment contract was an act performed in the United States in connection with commercial activity performed elsewhere.¹⁰⁹

Other examples of this second situation which would be sufficient to deny immunity include an "act in the United States that violates U.S. securities laws or regulations; [and] the wrongful discharge in the United States of an employee of the foreign state who has been employed in connection with a commercial activity carried on in some third country."¹¹⁰

The third situation that satisfies the nexus requirement is when a law suit is based upon "an act outside the territory of the United States in connection with commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."¹¹¹ The key to this test is finding the direct effect in the United States.

Legislative history suggests that Restatement (Second) of Foreign Relations Law¹¹² should be used in defining direct effect.¹¹³ Section 18 of this Restatement, addressing the application of U.S. laws to foreign activity, states that the "effect within the territory [should be] substantial . . . and [a] foreseeable result of the conduct outside the territory."¹¹⁴ This interpretation of

106. *Id.* at 6618.

107. *Id.*

108. 682 F.2d 1022 (D.C. Cir. 1982), *on remand*, 606 F. Supp. 38 (D.D.C. 1984), *aff'd*, 787 F.2d 655 (D.C. Cir. 1986).

109. *Id.* at 1026-27.

110. H.R. REP. NO. 1487, *supra* note 38, at 6617-18.

111. 28 U.S.C. § 1605(a)(2) (1988).

112. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 18(b)(ii)-(iii) (1965).

113. H.R. REP. NO. 1487, *supra* note 38, at 6618.

114. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 18(b)(ii)-(iii) (1965).
See also Callejo v. Bancomer. S.A., 764 F.2d 1101, 1111 (5th. Cir. 1985); Greener, *supra*

direct effect is accepted by the Third, Fifth, Sixth, Seventh, Ninth, and D.C. Circuits.¹¹⁵ The Second Circuit, however, has "consistently held that courts need not be restrained by the Act's legislative history."¹¹⁶

Determining the precise scope of the substantial and foreseeable effect standard is difficult, however, and, according to one judge, is "an enterprise fraught with artifice."¹¹⁷ Although it is clear that mere contact with the United States as a result of U.S. citizenship or U.S. residency is not enough,¹¹⁸ the precise scope of the substantial and foreseeable effect standard remains unclear. A D.C. circuit court found a substantial and foreseeable effect when the United States detained a foreign ship for the purpose of demanding payment.¹¹⁹ Other courts have rejected a substantial and foreseeable effect argument when a U.S. corporation suffered a mere financial loss¹²⁰ and when a murder in a foreign country injured a victim's relatives in the United States.¹²¹

In addition to having a substantial and foreseeable effect, the effect must also happen "in" the United States to satisfy the third nexus requirement.¹²² Courts define an effect happening "in" the United States as "where the legally significant acts giving rise to

note 55, at 184.

115. Wuebbels, *supra* note 6, at 1139 n.144; *see also* America West Airlines, Inc. v. GPA Group, Ltd., 877 F.2d 793, 798 (9th Cir. 1989); Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic, 877 F.2d 574 (7th Cir. 1989), *cert. denied*, 112 S. Ct. 1657 (1992); Zedan v. Saudi Arabia, 849 F.2d 1511 (D.C. Cir. 1988); Zernicek v. Brown & Root, Inc., 826 F.2d 415 (5th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988); Harris Corp. v. National Iranian Radio & Television, 691 F.2d 1344, 1351 (11th Cir. 1982) (citing Texas Trading & Milling Corp. v. Nigeria, 64 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 114 (1982)).

116. Wuebbels, *supra* note 6, at 1139. *See also* International Hous. Ltd. v. Rafidain Bank Iraq, 893 F.2d 8, 11 n.2 (2d Cir. 1989); Texas Trading & Milling Corp. v. Nigeria, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 114 (1982); Martian v. South Africa, 836 F.2d 91 (2d Cir. 1987).

117. *See* Callejo v. Bancomer, S.A., 764 F.2d 1101, 1111 (5th Cir. 1988) (quoting Texas Trading & Milling Corp. v. Nigeria, 647 F.2d 300, 312 (2d Cir. 1981), *cert. denied*, 454 U.S. 114 (1982)).

118. Wuebbels, *supra* note 6, at 1139; *see also* H.R. REP. NO. 1487, *supra* note 38, at 6616.

119. Transamerican S.S. Corp. v. Somali Democratic Republic, 767 F.2d 998 (D.C. Cir. 1985).

120. Gregorian v. Izvestia, 871 F.2d 1515, 1526-27 (9th Cir. 1984), *cert. denied*, 493 U.S. 891 (1989).

121. Berkovitz v. Iran, 735 F.2d 329 (9th Cir.), *cert. denied*, 479 U.S. 1035 (1984).

122. 28 U.S.C. § 1605(a)(2) (1988).

the claim occurred [in the United States].”¹²³ For example, if a U.S. shareholder is injured by fraudulent transactions between a foreign state and a U.S. corporation doing business in the foreign state, the nexus requirement would be met because the significant act giving rise to the claim is the ownership of the stocks in the United States.

Combining all of these requirements, an example of a situation in which a foreign state could lose its immunity under the third nexus requirement might be where a person, who depends on his reputation to make money, suffers considerable monetary injuries by losing a very high paid job because of a loss of reputation. A person’s reputation could be damaged if a popular, state-owned newspaper with world-wide circulation printed—at the state’s direction—a false article accusing that person of molesting several children in that foreign country. The commercial activity in the foreign country is printing, selling, and distributing newspapers to the United States. The effect is foreseeable because such defamatory remarks, if untrue, would foreseeably cause serious harm to people who depend on their reputations to make money. The harm is substantial because the person in the United States will lose a high paying job and may be hindered from working in the future. Finally, the legally significant act giving rise to the claim is the distribution of the paper in the United States, giving the person a cause of action for defamation under U.S. law.

IV. *CICIPPIO V. ISLAMIC REPUBLIC OF IRAN*

A. *Procedural Background*

After his release on December 2, 1991, Joseph J. Cicippio, along with his wife and another former hostage, David Jacobsen, filed suit in a U.S. district court, seeking \$600,000,000 in Iranian frozen assets to compensate for injuries suffered due to the kidnapping.¹²⁴ The complaint alleged that Iran promoted, controlled, financed, and directed the kidnapping of Cicippio and Jacobsen in an attempt to force the United States to release frozen assets.¹²⁵ The plaintiffs claimed damages for false imprisonment,

123. Wuebbels, *supra* note 6, at 1140; *see also* Zedan v. Saudi Arabia, 849 F.2d 1511, 1515 (D.C. Cir. 1988).

124. *2 Ex-Hostages Sue Iran for \$600 Million*, L.A. TIMES, Oct. 15, 1992, at A16.

125. Wuebbels, *supra* note 6, at 1141.

kidnapping, physical abuse, inhumane medical treatment, loss of job opportunities, and pain and suffering.¹²⁶

Iran moved to dismiss the complaint for lack of federal subject matter jurisdiction.¹²⁷ Cicippio argued that subject matter jurisdiction was appropriate under 28 U.S.C. § 1605(a)(1), by which foreign sovereigns waive their immunity from suit, § 1605(a)(2), which exempts commercial activities from subject matter jurisdiction, and § 1605(a)(5), which exempts non-commercial tortious acts or omissions causing personal injury in the United States.¹²⁸

The district court quickly eliminated jurisdictional bases under 28 U.S.C. § 1605(a)(1)¹²⁹ and § 1605(a)(5),¹³⁰ based on the Supreme Court's holding in *Argentine Republic v. Amerada Hess Corp.*¹³¹ In *Amerada Hess Corp.*, the Supreme Court rejected arguments under both 28 U.S.C. § 1605(a)(1) and § 1605(a)(5) that were similar to Cicippio's arguments.¹³² The district court, however, could not resolve the question of whether subject matter jurisdiction exists under § 1605(a)(2), the commercial activities exception. The district court briefly considered 28 U.S.C.

126. *Id.* at 1141 n.159.

127. *Cicippio v. Islamic Republic of Iran*, No. 92-2300, 1993 WL 730748 at *1 (D.D.C. 1993). The court did not consider Iran's objection to service of process and lack of personal jurisdiction.

128. *Id.*

129. This provision allows federal courts to exercise jurisdiction over a foreign government based on a waiver by the foreign state. 28 U.S.C. § 1605(a)(1) (1988).

130. This provision allows federal courts to exercise jurisdiction over a foreign government when a non-commercial 'tortious' act or omission of the foreign state causes personal injury or property damage in the United States. *Id.* § 1605(a)(5).

131. 488 U.S. 428 (1989) (holding that various international agreements did not represent "waivers" of Argentina's right to claim immunity from suit in U.S. courts for a military air strike that resulted in the destruction of a neutral oil tanker during the Falkland Islands War, and rejecting jurisdiction under 28 U.S.C. § 1605(a)(5) because the property damage did not occur in the United States, even though the tanker was heading for the United States).

132. *Cicippio v. Islamic Republic of Iran*, No. 92-2300, 1993 WL 730748 at *1 (D.D.C. 1993). Cicippio argued that certain compacts and accords between Iran and the United States waived Iran's right to claim immunity. *Id.* The Supreme Court rejected this proposition in *Argentine Republic v. Amerada Hess Corp.*, 488 U.S. 428 (1989). Cicippio also argued that the court had jurisdiction under 28 U.S.C. § 1605(a)(5) (1988), because his damages were inflicted in the United States because he was to be released back to the United States. *Id.* *Amerada Hess Corp.* also rejected this proposition. *Argentine Republic v. Amerada Hess Corp.*, 488 U.S. 428, 440 (1989).

§ 1605(a)(2), clause 3,¹³³ and concluded that a definitive resolution by an appellate court of whether hostage taking falls under the “commercial activity” exception, within the scope of the FSIA, was necessary.¹³⁴ Thus, the court dismissed the case on March 18, 1993.¹³⁵ On appeal, the D.C. Circuit Court of Appeals considered and rejected the argument that hostage taking falls under the “commercial activity” exception and affirmed the district court decision on July 29, 1994.¹³⁶ The U.S. Supreme Court denied Cicippio’s petition for writ of certiorari on January 9, 1995.¹³⁷

B. The District Court Decision

The district court briefly considered the possibility of using the commercial activity elsewhere causing a direct effect in the United States as the basis for subject matter jurisdiction.¹³⁸ The court recognized that trafficking captured persons,¹³⁹ as a means of *gaining money*, occurs within the international community.¹⁴⁰ The court also suggested that it might be possible to characterize hostage-taking for ransom as ‘commercial activity’ under recent Supreme Court analysis.¹⁴¹ Nevertheless, the court concluded that “state-supported kidnapping, hostage-taking, and similar criminal ventures were simply not the sorts of proprietary enterprises within the contemplation of Congress when it enacted the ‘commercial activity’ exception to [the] FSIA.”¹⁴²

The court was also concerned with the implications of a contrary holding and its effects on the scope of the FSIA, stating

133. Subject matter jurisdiction is appropriate when a lawsuit is based upon an act outside the United States in connection with a commercial activity elsewhere and the act causes a direct effect in the United States. *See supra* Part III.

134. *Cicippio v. Islamic Republic of Iran*, No. 92-2300, 1993 WL 730748, at *2 (D.D.C. 1993).

135. *Id.* at *1.

136. *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 726 (1995).

137. *Cicippio v. Islamic Republic of Iran*, 115 S. Ct. 726 (1995).

138. *Cicippio v. Islamic Republic of Iran*, No. 92-2300, 1993 WL 730748, at *2 (D.D.C. 1993).

139. For example, using hostages to gain valuable commodities from other countries should be considered trafficking captured persons.

140. *Cicippio v. Islamic Republic of Iran*, No. 92-2300, 1993 WL 730748, at *2 (D.D.C. 1993) (emphasis added).

141. *Id.*

142. *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 165 (D.C. Cir. 1994).

that “[t]he implications of a contrary ruling would extend far beyond the circumstances of this case.”¹⁴³

C. *The Court of Appeals Decision Focuses on the Definition of Commercial Activities*

The D.C. Circuit Court focused on whether Iran’s alleged activities can be considered “commercial” activities.¹⁴⁴ The court of appeals concluded that Iran’s alleged activities were not “commercial” activities under the FSIA, thus affirming the lower court decision.¹⁴⁵

The circuit court used a two step analysis to determine whether Iran’s activities were “commercial activities” under the FSIA. The court first identified the activities that were “relevant” to the analysis.¹⁴⁶ The court then applied the “private person test”¹⁴⁷ to those “relevant” activities to determine whether those “relevant” activities were commercial.¹⁴⁸

1. Identifying the Relevant Acts for Analysis

Attempting to identify the relevant acts for analysis, the appellate court noted that it was unclear as to which Iranian acts the plaintiffs alleged were the “commercial acts” appropriate for analysis. “We have not a little difficulty in understanding appellants’ precise theory of the case because they do not clearly identify which of the allegations is the ‘act’ which make[s] up the commercial activity.”¹⁴⁹ The court was unsure whether Cicippio claimed that kidnapping for money constituted the commercial act or whether unfreezing the assets constituted the commercial act.¹⁵⁰ Rather than considering the entire transaction, including the kidnapping, the demand for money, the receipt of the money,

143. *Cicippio v. Islamic Republic of Iran*, No. 92-2300, 1993 WL 730748, at *2 (D.D.C. 1993).

144. Under the framework established above in Part III.C, the court analyzed the first of three elements necessary to find a commercial activity exception to the FSIA.

145. *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 165 (D.C. Cir. 1994).

146. *Id.* at 166.

147. The private person test is used to determine whether activity is commercial or sovereign in nature by asking whether a private person can engage in a similar activity. *See supra* Part III.C.1.

148. *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 166-67 (D.C. Cir. 1994).

149. *Cicippio v. Islamic Republic of Iran*, No. 92-2300, 1993 WL 730748, at *2 (D.D.C. 1993).

150. *Id.*

and the release of the hostages, in analyzing the nature of the act, the court instead focused its inquiry on whether a “foreign sovereign’s alleged use of non-official agents to conduct hostage taking [for] economic advantages”¹⁵¹ can be characterized as a commercial activity.¹⁵²

Identifying the act in this manner may be crucial to the ultimate decision in this case, because the outcome of the “private person test”¹⁵³ depends largely on the acts that are analyzed.¹⁵⁴ For example, suppose that country *X* agreed to allow *Y*, a private person, to cut a certain number of trees from country *X*’s land for a fee. *Y* subsequently moved equipment to country *X* and built a lumber factory. When country *X* discovered that many endangered species lived among those trees, however, country *X* terminated the agreement. *Y* filed suit against country *X* in a federal court for damages due to the breach of contract. If the court decides that the relevant act is country *X*’s regulation or preservation of wildlife, application of the “private person test” will probably yield a “sovereign” activity result because regulation of wildlife is not something within a private person’s power. If the court decides that the relevant act is country *X* contracting with *Y* to use country *X*’s land, however, application of the “private person test” might yield a “commercial” activity result because contracting for the use of another’s land is within a private person’s power.¹⁵⁵

Thus, in the *Cicippio* case, the result might have been very different had the circuit court determined that the “relevant” act was kidnapping for ransom. If the act was so characterized, an argument could have been made that private persons can and do engage in this type of activity, making it a “commercial” act. Under the circuit court’s determination that the relevant act was

151. *Id.*

152. *Id.*

153. See *supra* note 147 for an explanation of the “private person test.”

154. Donoghue, *supra* note 59, at 501 (“immunity of the foreign state varies according to the court’s identification of the relevant activity”); see also *International Ass’n of Machinists v. OPEC*, 649 F.2d 1354, 1357 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (noting that a narrow or broad definition of the relevant activity may determine the immunity question).

155. One commentator identified this problem as a serious shortcoming for the “private person test.” “[B]oth the first and the second steps in this analysis [are] flawed, and cases applying the [private person test] reach conflicting and unpredictable results.” Donoghue, *supra* note 59, at 501.

Iran's alleged use of non-official agents to conduct hostage taking, it is much more difficult to make the argument that a private person can engage in this type of activity.

2. Analysis of the Circuit Court's Identification of the Relevant Act

Because the result of the "private person test," and the eventual determination of sovereign immunity, depends largely on the identification of the relevant act,¹⁵⁶ whether or not the circuit court's selection of the "relevant" acts is correct in this case is important to the understanding of the circuit court's decision. A court's only restriction in selecting the "relevant" act is the statutory command of 28 U.S.C. § 1603(d), which requires that a court only consider the "nature" of the activity.¹⁵⁷

In the Cicippio case, the nature of the activity could be described as "hostage-taking for economic gain." Essentially, Iran kidnapped Cicippio to coerce the United States to release assets frozen in the United States to Iran. While the circuit court's identification of the "nature" of the act seems to be similar to "hostage-taking for economic gain," they added "a foreign sovereign's alleged use of non-official agents to conduct" to the basic definition of hostage-taking for economic gain. This addition is unnecessary because the type of actor that conducts the activity is not relevant in determining the nature of the activity. Furthermore, the addition goes beyond the scope of considering only the nature of the activity. By considering the type of actor conducting the activity, the court's focus is no longer just on the essence of the activity in its isolated form. This seems to violate the command of 28 U.S.C. § 1603(d) to focus only on the "nature" of the activity. A contrived selection of the relevant act allows the circuit court to manipulate the outcome of the "private person test."

156. See *supra* notes 154-55 and accompanying text.

157. "[T]he 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) (1988). See *supra* note 65 and accompanying text for a discussion of the difference between nature and purpose; see also *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 166 (D.C. Cir. 1994) (recognizing the nature and purpose distinction as a limitation of what it could consider).

3. The Court of Appeals' Adoption and Application of the Private Person Test

The circuit court recognized that, under *Argentina v. Weltover, Inc.*,¹⁵⁸ the accepted test to distinguish a commercial activity from a sovereign activity is whether the government activity is one in which commercial actors typically engage for trade and traffic or commerce.¹⁵⁹ This is essentially the private person test. If the government activity is not an act typically engaged in for trade or commerce by private actors, the government activity is considered a sovereign act.

Complications arise, however, when the activity is illegal. Theoretically, all private parties are not permitted to engage in illegal activities because all such actions are prohibited by law. Thus, strict adherence to the *Weltover* test requires a grant of immunity to *all* sovereign actors who engage in illegal activity because private parties are not able to engage in illegal activities such as kidnapping and fraud.

a. *The Second Circuit Approach*

The Second Circuit has demonstrated strict adherence to the *Weltover* test by granting immunity to foreign sovereigns who engage in illegal activity.¹⁶⁰ In *Letelier v. Chile*,¹⁶¹ the Second Circuit Court of Appeals held that "kidnapping and assassinations could not be considered commercial activities under FSIA because a private person could not engage in such activity lawfully."¹⁶²

This rather simplistic approach, however, is nonsensical. Because all tortious acts are in one way or another unlawful,¹⁶³ under the Second Circuit approach, all foreign tortious actors enjoy immunity under the FSIA because their acts cannot lawfully be done by private individuals. The FSIA could not possibly contemplate granting immunity to all foreign sovereigns who engage in some form of tortious act. Because many cases brought against foreign sovereigns involve some sort of tort liability,

158. 112 S. Ct. 2160 (1992).

159. *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 166 (D.C. Cir. 1994).

160. *Letelier v. Chile*, 748 F.2d 790, 797 (2d Cir. 1984).

161. *Id.*

162. *Id.*

163. Tortious acts are unlawful in the sense that persons who commit such acts are subject to liability under tort law.

adherence to the Second Circuit's rule would nearly eliminate the exception.

b. The U.S. Supreme Court Approach: Character of Perpetrator Test

The D.C. Circuit noted the weakness of the Second Circuit's categorical rule, stating that the U.S. Supreme Court declined an opportunity to apply the Second Circuit rule in a recent case.¹⁶⁴ In *Saudi Arabia v. Nelson*,¹⁶⁵ the plaintiff, an American hired in the United States to work in Saudi Arabia, claimed that he was wrongly imprisoned and tortured by Saudi police.¹⁶⁶ Because the imprisonment and torturing of Nelson constitute illegal actions that cannot be done by private persons, the Supreme Court could have sustained the immunity for Saudi Arabia under the Second Circuit rule. Even though it was "the most obvious line of analysis,"¹⁶⁷ however, the Supreme Court did not use the Second Circuit's approach. The Supreme Court appeared to ignore the illegality problem and instead proceeded to use the *Weltover* analysis, regardless of the legality or illegality of the action. The Court concluded that the sovereign activity could not be considered commercial because private parties could not exercise the police power used to capture and torture Nelson. "[P]rivate parties cannot exercise that 'sort' of power while engaging in commerce [thus] the activity could not be thought 'commercial.'"¹⁶⁸

In *Nelson*, the Supreme Court seemed to focus on the status of the perpetrators, whether they are sovereign or non-sovereign in nature, to determine whether private parties can conduct this type of activity. Because the Court focused on the perpetrator's status, the door is open for the argument that such government activity could fall under the commercial activity exception when the perpetrators are not sovereign in nature. This argument might succeed because private parties could hire other private parties to conduct this type of illegal action, thus meeting the private person test. In the *Nelson* case, for example, if the government had hired private persons to detain and beat Nelson, instead of using police

164. *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 166-67 (D.C. Cir. 1994).

165. *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993).

166. *Id.*

167. *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 167 (D.C. Cir. 1994) (discussing the finding in *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993)).

168. *Id.*

to do so, the result should be different under the *Nelson* analysis. Because the perpetrator's status in this hypothetical would be "a private actor" and not "a public actor," it is no longer a sovereign act.

Cicippio made this argument, but it was rejected by the D.C. Circuit Court.¹⁶⁹ While the circuit court conceded that this is a valid argument under *Saudi Arabia v. Nelson*, the court maintained that acceptance of this argument contradicts congressional intent.¹⁷⁰ The court argued that "to accept appellants' claim would be to declare that all such acts, regardless of context, sponsored openly or covertly by a sovereign power are outside the immunity granted by the FSIA, unless conducted directly . . . [by] government officials, . . . we think that cannot be what Congress intended."¹⁷¹ The court cited no support for this assertion, merely reasoning that Cicippio's interpretation would lead to a conclusion unintended by Congress when fashioning the FSIA.¹⁷²

c. Adopting the Commercial Context Requirement

Although the D.C. Circuit Court agreed that the activity's illegal character is irrelevant in determining whether the activity is commercial in nature, and that Cicippio's argument was not precluded by *Saudi Arabia v. Nelson*,¹⁷³ the court refused to conclude that the commercial activity exception strips sovereign immunity from a foreign nation whenever a sovereign hires a private party to engage in what would usually be considered sovereign acts. It appears that the court felt compelled to avoid this conclusion, but lacked some analytic tool to do so.

In order to avoid concluding that the commercial activities exception strips sovereign immunity from a foreign nation whenever a sovereign hires a private party to engage in sovereign acts, the D.C. Circuit Court adopted the commercial context requirement. The court argued that it must first determine that the sovereign act was conducted in a commercial context¹⁷⁴ in order to more

169. *Id.* at 167-68.

170. *Id.*

171. *Id.*

172. *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir. 1994).

173. 113 S. Ct. 1471 (1993); *see also* discussion *supra* Part IV.C.2.b.

174. *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 168 (D.C. Cir. 1994).

accurately judge the commercial nature of an act when applying the *Weltover* test.¹⁷⁵

Although the purpose and perhaps the illegal character of the alleged acts are irrelevant in judging their commercial character, . . . the context in which the acts take place must be germane. Unless an act takes place in a commercial context, it would be impossible to determine whether it is conducted in the manner of a private player in the market.¹⁷⁶

The court justified this additional requirement by arguing that the alternative conclusion—stripping away sovereign immunity whenever a state hires a private party to engage in the state's acts—could not be what Congress intended when it fashioned the commercial activity exception.¹⁷⁷ The court cited no evidence of congressional intent on this issue, however.

Thus, the D.C. Circuit Court's interpretation of the definition of a "commercial activity" depends on the circumstances giving rise to a claim or the context in which the claim arises; such circumstances or context must be commercial in nature.¹⁷⁸ For example, this requirement was satisfied in *Saudi Arabia v. Nelson* because the context or circumstances giving rise to the claim involved Nelson's employment in a hospital. In contrast, this requirement was not satisfied in the *Cicippio* case because the use of non-official agents to gain economic advantages for Iran through hostage-taking did not arise out of a commercial context. Presumably, using non-official agents to conduct hostage-taking, to gain some kind of business advantage for a state-owned business, satisfies the commercial context requirement because such an act occurs in, or arises out of, a commercial context.

The court explained that this distinction is acceptable because the latter situation is a commercial activity, not because the hostage is being exchanged for some commercial commodity, such as money or other business advantage, but because it takes place in the commercial context. The court is concerned with converting acts that are normally non-commercial, such as murder, into

175. The *Weltover* test is used to determine whether a sovereign act may be characterized as a commercial act and is essentially the same as the "private person test." See *supra* notes 63-66 and accompanying text.

176. *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 168 (D.C. Cir. 1994).

177. *Id.*

178. *Id.*

commercial acts simply by showing that the murderer was paid to commit the murder.¹⁷⁹

V. ANALYSIS/CRITICISM OF THE “COMMERCIAL CONTEXT” REQUIREMENT

The court’s reliance on the commercial context requirement is problematic because: (1) it appears to violate the congressional prohibition against considering “purpose” when judging an activity’s commercial nature; (2) it fails to give clear definitions for the term “commercial context”; and (3) it embodies political considerations in the determination of immunity, which is a mode of analysis Congress clearly wanted to steer away from with the enactment of the FSIA. Each criticism will be individually discussed below.

A. *The Context Requirement and the “Purpose” Clause*

The first problem with the context requirement is the specific congressional prohibition against considering “purpose” when judging an activity’s commercial character.¹⁸⁰ Considering an activity’s commercial context is really just a euphemism for considering its purpose. The focus is on *why* the activity takes place, not just on *what* activity takes place. In *Cicippio*, for example, the circuit court’s whole argument depended on the fact that the kidnapping occurred *because* Iran was trying to coerce the United States into releasing money, not *because* a private company was trying to coerce a competitor into giving up some business advantage.¹⁸¹ A focus on *why* the activity occurs ignores the distinction between purpose and nature and clearly violates the language of 28 U.S.C. § 1603, which specifically provides that “the commercial 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.”¹⁸²

179. *Id.*

180. Statutory language in 28 U.S.C. § 1603 (1988) specifically prohibits consideration of purpose when determining whether a certain activity is commercial.

181. *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 168 (D.C. Cir. 1994). The court suggested that a kidnapping in a commercial context could be considered a commercial activity: “perhaps a kidnapping of a commercial rival could be thought to be a commercial activity.” *Id.*

182. 28 U.S.C. § 1603(d) (1988).

The circuit court recognized this problem and attempted to avoid it by arguing that this provision "prevent[s] the foreign sovereign from casting a governmental purpose, which always can be found, as a cloak of protection over typical commercial activities."¹⁸³ In other words, this provision attempts to prevent the foreign sovereign from evading commercial contracts simply by claiming that they were made for a governmental purpose, which would allow the foreign sovereign to immunize itself from U.S. jurisdiction. Thus, the court argued that the purpose/nature distinction only applies if invoked to prevent a government from avoiding commercial contracts.¹⁸⁴

Although it is probably true that the "purpose" provision's main objective is to prevent the sovereign from hiding behind sovereign immunity to escape contractual liabilities, whether Congress may have constructed this provision for other reasons is unclear. Because the legislative history does not clearly state the "purpose" provision's objective, other objectives are not precluded. Furthermore, Congress' command to avoid consideration of purpose is clearly expressed without limitations on its operation.¹⁸⁵

One could argue, however, that the purpose provision was not intended to completely bar a court from considering purpose when evaluating the character of a sovereign's activity, because Congress specifically gave wide latitude for the courts to define commercial activity. "The courts would have a great deal of latitude in determining what is a commercial activity . . . it seems unwise to attempt an excessively precise definition of this term."¹⁸⁶ This argument is especially true when one considers the difficulty of separating the nature and the purpose of a given activity. The Fifth Circuit Court commented on this difficulty in *DeSanchez v. Banco Central de Nicaragua*.¹⁸⁷ The court held that the problems with separating purpose and nature would force the court to consider the purposes of certain activities.¹⁸⁸ "Commercial acts themselves are often defined by reference to their purpose. What makes these acts commercial is not some ethereal essence inherent

183. *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 168 (D.C. Cir. 1994).

184. *Id.*

185. 28 U.S.C. § 1603(d) (1988).

186. H.R. REP. NO. 1487, *supra* note 38, at 6605.

187. 770 F.2d 1385 (5th Cir. 1985).

188. *Id.* at 1385-86.

in the conduct itself, but generally because they are engaged in . . . for a profit.”¹⁸⁹

Despite such difficulty, the D.C. Circuit’s justification for refusing to follow the statutory command to avoid purpose analysis is unpersuasive. The court’s justification for deviation is based not on confusion or an inability to differentiate between purpose and nature, but instead is based on avoiding a certain result that strikes discord with the court. Any issue involving statutory interpretation begins with the premise that the ordinary meaning of the language of the statute is to be used.¹⁹⁰ Further, when the statutory language is clear and unambiguous, courts must give effect to the unambiguously expressed language.¹⁹¹ In *Cicippio*, the statutory language clearly states that “purpose” is not to be considered.¹⁹² Thus, the circuit court’s adoption of the commercial context requirement is clearly erroneous.

In addition, the commercial context requirement was argued and implicitly rejected in the *Weltover* case by the U.S. Supreme Court. The Petitioner’s Brief to the Supreme Court argues that the commercial context should properly be used in order to determine the nature of the activity.¹⁹³ The Respondent’s Brief argues that the commercial context requirement is equivalent to consideration of purpose, in violation of 28 U.S.C. § 1603.¹⁹⁴ The issue was also argued before the Supreme Court during oral argument.¹⁹⁵ The Court implicitly rejected the commercial context requirement. The Court noted that “although the FSIA bars consideration of ‘purpose,’ a court must *nonetheless* fully consider the context of a transaction.”¹⁹⁶ Implicit in this statement is the Court’s acknowledgement that considering context is equivalent to considering purpose. If purpose is not the same as context, the Court would not have written “*nonetheless* fully

189. Wuebbels, *supra* note 6, at 1130 n.71.

190. *Demarest v. Manspeaker*, 498 U.S. 184, 187 (1991).

191. *Mobil Oil Exploration v. United Distribution Co.*, 498 U.S. 211, 222 (1991).

192. 28 U.S.C. § 1603(d) (1988).

193. Petitioner’s Opening Brief at 17-24, *Argentina v. Weltover*, 112 S. Ct. 2160 (No. 91-763) (1992).

194. Respondent’s Brief at 8-11, *Argentina v. Weltover*, 112 S. Ct. 2160 (No. 91-763) (1992).

195. United States Supreme Court Official Transcript (Oral Argument) at 21-24, *Argentina v. Weltover*, 112 S. Ct. 2160 (No. 91-763), available in Westlaw, SCT-ORALARG Database.

196. *Argentina v. Weltover*, 112 S. Ct. 2160, 2167 (1992) (emphasis added).

consider the context”¹⁹⁷ The term “nonetheless” suggests that if context is considered it would violate the FSIA bar against consideration of purpose. The Supreme Court ultimately decided not to use petitioner’s context analysis and denied immunity to petitioner.¹⁹⁸

B. Problems Regarding the Definition of Commercial Context

Another problem with the commercial context requirement, as a prerequisite to determining when a commercial activity exists, is one of definition. The circuit court fails to give clear guidance regarding how the set of acts or surrounding circumstances that make up the particular activity’s context should be determined. For example, whether courts should consider all acts and surrounding circumstances that contribute to the particular activity or only consider the pertinent acts or surrounding circumstances that strongly contribute to a particular activity is unclear. The court does not limit what may be considered.

Further, problems could arise when the particular activity arises out of both a commercial and a non-commercial context. Presumably, there are activities that are commercial in nature but are conducted in both commercial and non-commercial contexts; those activities should fall under the commercial activities exception. This additional “context” requirement creates more confusion because it is unclear which “context” to use in this situation. For example, if the Iranian government refused to honor a contract to pay an individual in the United States to rescue officers of a very powerful corporation, in which the government of Iran is a partner, who are being held hostage in Iraq, it is arguable that this transaction happens in both a commercial context, because of the contract to pay and because a foreign corporation is involved, and a non-commercial context, because the foreign sovereign hired another to rescue hostages. It is unclear how the court will deal with this situation or which “context” should be used to determine whether the situation falls under the commercial activity exception. This example shows that the context requirement is not helpful in analyzing certain situations, and even further confounds analysis.

197. *Id.*

198. *Id.*

C. Political Concerns Behind the New Requirement

It is clear that concern for international politics constituted at least part of the basis for the D.C. Circuit Court's decision in *Cicippio*, because the court went out of its way to find a new requirement to block jurisdiction, justifying its decision on a vague, uncitable notion of congressional intent. Perhaps the D.C. Circuit Court judge was concerned with the decision's effects on international relations with Iran or the possibility of reciprocal revocation of immunity in Iranian courts. Whatever the concern, this new requirement clearly embodies the policy of restricting federal courts' subject matter jurisdiction in adjudicating international disputes, by adding another barrier to obtaining subject matter jurisdiction.

It is interesting to note, however, that aversion to this type of "political" consideration was one of the reasons the FSIA was enacted in the first place.¹⁹⁹ "It was clear that the central structural purpose was separation of the judicial and executive powers in international cases."²⁰⁰ Prior to the enactment of the FSIA, decisions regarding sovereign immunity were delegated to the State Department.²⁰¹ This delegation of authority resulted in severe criticism charging that the "Department's internal methods were deficient; suggestions of immunity were thought to be issued in accordance with political expediency, without regard for consistency and principle."²⁰²

Furthermore, because of the State Department's influence in other areas of international relations, there was a "natural inclination to exert its influence [in the area of foreign immunity] for political ends; [consequently] sovereign immunity increasingly became an instrument of foreign policy."²⁰³ Congress sought an end to political considerations through enactment of the FSIA, explaining "that the purpose was to excise foreign policy considerations from the courts' consideration of sovereign immunity issues, and to depoliticize immunity decisions by vesting them exclusively

199. Jack Garvey, *Judicial Foreign Policy-Making in International Civil Litigation: Ending the Charade of Separation of Powers*, 24 LAW & POL'Y INT'L BUS. 461, 462-68 (1993); see also Hill, *supra* note 19, at 173-78.

200. Garvey, *supra* note 199, at 462.

201. See *supra* Parts II.B and III.A.

202. Hill, *supra* note 19, at 175.

203. *Id.* at 178.

in the courts operating within the limitations of defined, objective legal criteria."²⁰⁴

Scholars have recognized, however, that the evils of political considerations²⁰⁵ in the immunity decision may still lurk, even when determination of foreign sovereign immunity is taken from the executive branch and transferred to the judiciary. The argument is that political considerations creep back into the analysis through subtle manipulations by judges "to accommodate their personal perceptions of foreign relations."²⁰⁶ Furthermore, it has been noted that judges commonly use the commercial activity exception as a device for such subtle manipulations.²⁰⁷

The commercial/public act distinction could become a device for concealing political evaluations in politically charged cases. In practical effect, [Congress] substituted . . . the direct pressure from foreign governments and the State Department [on immunity decisions], [for a more] subtle and deceptive means by which the courts' own consideration of foreign policy would control [immunity decisions].²⁰⁸

The manifestation of this type of subtle manipulation may explain the D.C. Circuit Court's decision in this case. This case was highly publicized and politically charged.²⁰⁹ The court cleverly concocted a confusion regarding which acts made up the "commercial activity."²¹⁰ The selection of the act to be considered as a commercial activity has been recognized as a principle method used by judges to manipulate the granting of sovereign immunity.²¹¹ "Manipulation occurs through judicial selection of which acts, in the collection of identifiable acts upon which the action is based, will be used to characterize the action as commercial or non-commercial."²¹²

Finally, the court reached too far to find a new commercial context requirement to deny subject matter jurisdiction, when the

204. Garvey, *supra* note 199, at 462.

205. Evils of political considerations may include inconsistent, unprincipled, unpredictable results in granting sovereign immunity.

206. Garvey, *supra* note 199, at 463.

207. *Id.*

208. *Id.*

209. The court itself noted the well-publicized nature of the case; see *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir. 1994).

210. See *supra* Part V.C.1.

211. Garvey, *supra* note 199 at 463.

212. *Id.*

court itself recognized that accepting jurisdiction would be consistent with the most recent Supreme Court decision, *Saudi Arabia v. Nelson*.²¹³ Such private political considerations contradict the purpose of the FSIA and reduce foreign sovereign immunity analysis to a court's speculation on the political impact of the decision to grant or deny immunity.

VI. CRITICISM OF THE *CICIPPIO* DECISION TO GRANT IMMUNITY TO IRAN

A. Policy Reasons for Not Granting Immunity

At the heart of deciding whether to grant or deny foreign sovereign immunity is the balance of two competing interests: (1) the private interest of individuals in having their claims against the foreign state adjudicated; and (2) the need for mutual protection of governments, both foreign and domestic, from harassing litigation.²¹⁴ As one competing interest becomes more important than the other, the granting or denying of immunity changes.²¹⁵ For example, as more individuals contract with foreign states and depend on these contracts to conduct business, it becomes more likely that states will develop rules that except this type of activity from immunity. The commercial activity exception can be seen as a manifestation of this type of analysis.

In the context of the *Cicippio* case, there is a strong private interest in having *Cicippio's* case against Iran adjudicated. Kidnapping and torture are serious violations of human rights and breaches of international law,²¹⁶ for which *Cicippio* suffered considerable damages. Additionally, the chances of finding an

213. See *supra* Part V.C.2.b-c for a discussion of *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993).

214. Hill, *supra* note 19, at 165. Hill noted that, although the major policy underlying foreign sovereign immunity, when this concept first developed, was equality and mutual respect among nations, scholars have recently noted that such underlying policy no longer drives modern foreign sovereign immunity. *Id.* The current policy driving foreign sovereign immunity is the mutual protection of essential governmental functions from harassing and interfering litigation. *Id.* See also Comment, *Judicial Adoption of Restrictive Immunity or Foreign Sovereigns*, 51 VA. L. REV. 316, 321-24 (1965); W. Friedmann, *Some Impacts of Social Organization on International Law*, 50 AM. J. INT'L L. 475 (1956).

215. Hill, *supra* note 19, at 172.

216. The right to be free from official torture is considered a norm of *jus cogens* which are considered the highest form of international law. Christopher W. Haffke, *The Torture Victim Protection Act: More Symbol Than Substance*, 43 EMORY L.J. 1467, 1478 (1994).

alternate forum for a fair trial are slim. Surely, the case could not be fairly adjudicated in Iran. The type of loss that Cicippio suffered is clearly more important than any economic loss suffered by a breach of contract, for which an exception to immunity is clearly granted under FSIA. Finally, deterring this type of activity is far more important than deterring a foreign country from breaching its business contracts. Thus, the individual interest in adjudicating this claim far outweighs the need to mutually protect the governments from harassing lawsuits.

B. Granting Immunity in Light of the Torture Victim Protection Act ("TVPA")²¹⁷

Granting immunity to Iran under the FSIA also appears to contradict Congress' recent efforts to give victims of torture a chance to present their claims. The TVPA was passed in March 1992, creating a cause of action for acts of torture occurring outside of U.S. territory.²¹⁸ This statute was enacted in response to an "international outcry for all nations to take affirmative measures to end the practice of torture."²¹⁹ The TVPA has also been recognized as a symbol of the United States' "unequivocal contempt for torture."²²⁰ Given this recent enactment, it is clear that Congress would agree with an expansion of the FSIA to cover torture victims like Cicippio.

C. How the Circuit Court Could Have Denied Immunity to Iran in the Cicippio Case

Under the current analysis, the circuit court could have held that kidnapping hostages in exchange for money falls under the commercial activities exception. Using the *Weltover* test, the court could have held that kidnapping is not an activity solely reserved for sovereigns, because private parties can also engage in kidnapping hostages, and thus kidnapping hostages for money is a

217. 28 U.S.C. § 1350 (1993).

218. Haffke, *supra* note 216, at 1471 (providing a critical analysis of the TVPA). See Pub. L. No. 102-256, 106 Stat. 73, 28 U.S.C. § 1350 (1993).

219. Haffke, *supra* note 216, at 1471.

220. *Id.* at 1472 (concluding that the TVPA is merely symbolic of the U.S. position against torture and really does not permit more than what is already permitted under existing statutes).

commercial activity for the purposes of the FSIA. Further, consistent with *Saudi Arabia v. Nelson*, as long as the sovereign itself is not engaged in this type of activity, kidnapping hostages for money can be considered a commercial activity for the purposes of the FSIA. The court could have held that Cicippio's claims were based on that particular activity because his damages arose out of the kidnapping.²²¹ Finally, the court could also have held that there was a nexus between the United States and the foreign state's activities. The third situation for finding a nexus would probably apply in this case.²²²

Instead of taking advantage of an opportunity to carefully address Cicippio's arguments and advance the important policies discussed above, the D.C. Circuit Court merely engaged in political speculations regarding foreign relations, a mode of analysis that Congress specifically attempted to avoid when crafting the FSIA. The court could have evaluated whether Cicippio's arguments violated any existing judicial doctrine, instead of striking down his argument based on a new, unpredictable judicial doctrine not supported by any congressional intent or policy.

VII. CONCLUSION

As one of the more influential circuits in the U.S. courts of appeals,²²³ the D.C. Circuit Court in *Cicippio* strikes a blow to all innocent victims of terrorism and foreign countries' hostage-taking. The policies and justifications are compelling for a course different than the one taken by the D.C. Circuit Court. Absent an effective international forum, exclusion from federal courts could mean that the damages and loss suffered as a result of terrorism and hostage taking will go unvindicated, the victim permanently and unjustly bearing all of the costs. Additionally, the FSIA provides tools, given by Congress, with which to take this different course.²²⁴ The commercial activities exception is flexible enough

221. The D.C. Circuit Court did not consider this alternative holding because the case was dismissed for failure to meet the first element of commercial activity. *Cicippio v. Islamic Republic of Iran*, 30 F. 3d 164, 168 (1994); *see also* Part III.C.

222. *See supra* Part III.C.3.; The D.C. Circuit Court did not consider this possibility because it dismissed the case on the first element, focusing on the definition of commercial activity.

223. *Almanac of the Federal Judiciary*, Vol 2, D.C. Circuit, Prentice Hall Law & Business, 1994 ("This court is deservedly the second most important court in the country").

224. *See supra* Part VI.

to allow for this course without undermining the statutory framework for consistent, predictable adjudication of sovereign immunity.

The clear result in this case, however, is not that the D.C. Circuit Court was unable to chart this new course, but that it was *unwilling* to do so based on its own speculation regarding international politics. Moreover, in the process of carrying out its own agenda on foreign relations, the court placed an obstacle in the way of other courts that will attempt to chart this new course. The D.C. Circuit Court's justifications for failing to take this new course are weak because it argues that congressional intent mandates its decision, even though the court is unable to find such intent—written or implied—anywhere. Its justification for creating the obstacle of an added requirement is even weaker because it seems to deviate from the recent Supreme Court case, *Saudi Arabia v. Nelson*.

The battle is not over, however. Senator Arlen Specter of Pennsylvania and Representative Romano Mazzoli of Kentucky have both introduced bills to amend the FSIA.²²⁵ Each bill amends the FSIA such that it would allow U.S. citizens who are the victims of genocide or state-sponsored terrorism to sue foreign governments in U.S. district courts. So far, these bills have cleared the respective judiciary committees of both houses of Congress.²²⁶ The fate of these bills remains to be seen. In the interim, however, Cicippio continues to be held captive, now by the FSIA and his own government.

Kevin Leung*

225. Senator Specter presented a bill to the Senate, and Congressmen Mazzoli presented a bill to the House. See *Amending the Foreign Sovereign Immunities Act of 1976, Hearing before the Subcomm. on International Law, Immigration, and Refugees of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 3 (1992).

226. Rodriguez, *supra* note 2, at 2.

* I'd like to sincerely thank all journal editors and staff members for their help and input on this note. I'd also like to thank all the partners, associates, and of counsels at the Law Offices of S&G for their support, creative input and help on this note and in law school generally. This note is dedicated to my family and Nancy Ho.