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Individual Protection Crumbles While Sovereignty Reigns: A Comment on Saudi Arabia v. Nelson

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COMMENT

INDIVIDUAL PROTECTION CRUMBLES
WHILE SOVEREIGNTY REIGNS:
A COMMENT ON SAUDI ARABIA v. NELSON

I. INTRODUCTION

In an ever expanding global economy and in an era of high unemployment at home, United States citizens have the opportunity and, perhaps more importantly, the need to seek employment abroad. It is well established that when a United States citizen accepts a job offer in the United States, that person is certain to receive statutory protections developed over the years by Congress. Even a governmental employee has the right to avail himself or herself of numerous legal protections. However, according to the United States Supreme Court and Congress, the rules of the game change when a United States citizen is employed abroad by a privately owned foreign corporation or by a foreign sovereign. These rules become even more stringent when the suit involves a foreign sovereign because of the concept of sovereign immunity. Even United States citizens employed abroad by U.S. companies risk losing vital human rights and employment protections.

3. In EEOC v. Arabian American Oil Co., the Supreme Court held that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." 499 U.S. 244, 248 (1991). That canon of construction "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." Id. The Supreme Court affirmed the District Court and Court of Appeals decisions that the United States courts do not have subject matter jurisdiction over the suit because Title VII does not apply to the employment practices of U.S.
Basic human rights violations committed by sovereign states in response to U.S. employees working in their employment capacity, however, should not go unnoticed by U.S. courts.¹ I do not contend that United States courts should effectively usurp the sovereignty of foreign nations by subjecting foreign businesses and sovereigns to United States laws.² Still, there are appropriate moments in which United States courts have the right and the duty to accept jurisdiction.³ Based upon the current policy, however, the following disclaimer should be posted in every foreign recruitment office in the United States: "BEWARE! Uncle Sam may be watching but is reluctant to protect you!"

The Department of State, under the Bush administration, advocated for the current policy of limiting the subject matter jurisdiction of the federal courts in actions against foreign sovereigns. It filed an amicus curiae brief with the Supreme Court in support of granting certiorari to the Saudi Arabian government’s appeal of Nelson v. Saudi Arabia⁴ to review the Eleventh Circuit’s finding of subject matter jurisdiction. This Supreme Court case dealt with the issue of whether a state-run enterprise’s transaction qualifies as a commercial activity and thus gives United States courts subject matter jurisdiction over the foreign sovereign. The Supreme Court has made a dangerous

employers that employ American citizens abroad. See id. at 259.

Congress overruled this decision when it amended § 701(f) of the Civil Rights Act of 1964 and § 101(4) of the ADA. See infra notes 160-67 and accompanying text.


5. However, "where human rights begin, the pretended cloak of sovereignty ends." International Human Rights, supra note 4, at 328. "Indeed, human rights instruments also contain an express right to an effective remedy in domestic tribunals for violations of human rights at the hands of the state — a point relevant also to the international agreements exception to immunity built into sections 1330(a) and 1604 of the FSIA.” Id. (citing Jordan Paust, Suing Saddam: Private Remedies for War Crimes and Hostage-Taking, 31 VA. J. INT’L L. 351 (1991)).


error in failing to properly analyze the "commercial activity" exception of the Foreign Sovereign Immunities Act. Therefore, the above warning should be posted for the United States citizens who accept positions of employment overseas, in a private capacity, with foreign governments.

When suit is brought in United States courts against sovereign states, the procedural issue is whether the court has subject matter jurisdiction. According to the United States Supreme Court, the sole basis for obtaining jurisdiction over a foreign state, in the courts of this country, is the Foreign Sovereign Immunities Act ("FSIA").

The most significant aspect of the FSIA exceptions is the "commercial activity" exception of Section 1605(a)(2). The FSIA denies

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9. Texas Trading & Milling Corp. v. Federal Republic of Nig., 647 F.2d 300, 308 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982). There are actually five questions that must be answered favorably for the plaintiff for the court to assume jurisdiction:

1. Does the conduct the action is based upon or related to qualify as "commercial activity?"

2. Does that commercial activity bear the relation to the cause of action in the United States described by one of the three phrases of [Section] 1605(a)(2), warranting the court's exercise of subject matter jurisdiction under [Section] 1330(a)?

3. Does the exercise of this congressional subject matter jurisdiction lie within the permissible limits of the "judicial power" set forth in Article III (of the Constitution)?

4. Does subject matter jurisdiction under [Section] 1330(a) and service under [Section] 1608 exist, thereby making personal jurisdiction proper under [Section] 1330(b)?

5. Does the exercise of personal jurisdiction under [Section] 1330(b) comply with the due process clause, thus making personal jurisdiction proper?

Id.

10. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989). A noncommercial tort action, under the noncommercial tort exception of 28 U.S.C. § 1605(a)(5), was brought against the Argentine Republic to recover damages for an oil tanker destroyed by its armed forces. Id. at 443. The Court held that this exception "covers only torts occurring within the territorial jurisdiction of the United States." Id. at 441.

11. 28 U.S.C. §§ 1602-1611 (1988). Title 28 grants subject matter jurisdiction for "any nonjury civil action against a foreign state as defined in Section 1603(a) [of the FSIA] as to any claim for relief in personam with respect to which [a foreign state is not entitled to immunity either under Sections 1605-1607 [of the FSIA] or under any applicable international agreement." 28 U.S.C. § 1330(a) (1988).

28 U.S.C. § 1330(b) (1988) grants personal jurisdiction if the court has jurisdiction under Section 1350(a) and service of process has been made under 28 U.S.C. § 1608 (1988).

12. There are other exceptions found in § 1605 and § 1607 of the FSIA which limit the immunity of a foreign sovereign to be sued. For example, § 1605(a)(1) excepts sovereigns which have explicitly or implicitly waived immunity, § 1605(a)(5) excepts sovereigns when money damages are sought against the foreign sovereign for personal injuries or death, or
immunity in actions arising out of the foreign state’s commercial activities. The threshold question, then, is whether the sovereign state, if it is declaring sovereign immunity, is immune from suit.

Although the rationale behind the FSIA was to empower the courts to determine subject matter jurisdiction over foreign sovereigns (in a sense, depoliticize the issue), the courts are reluctant to exercise this power when potential conflicts exist between the granting of jurisdiction and United States foreign policy or the laws of sovereign states. The inevitable risk in granting jurisdiction is that the United States courts would impose federal fair employment laws (e.g., the ADEA, the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, and the ADA) upon sovereign states, which have their own employment laws, and could directly interfere with an inherent right of a sovereign state to proscribe and enforce its own laws. On the other hand, there is a danger of preventing United States citizens from availing themselves of the United States court system and forcing them into a situation like forum non conveniens for plaintiffs.

This comment discusses the controversy created by the Supreme Court’s decision in Saudi Arabia v. Nelson and the potential conse-

13. 28 U.S.C. § 1605(a)(2). Section 1605(a)(2), provides that a foreign state is not immune from the jurisdiction of domestic courts in any case in which the action is based upon a commercial activity carried on 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.


19. See infra notes 162-72 and accompanying text.
quences it poses for United States citizens employed abroad by foreign entities.

II. THE CASE: SAUDI ARABIA V. NELSON

A. The Facts

In 1983, Scott Nelson responded to a printed advertisement recruiting employees for the King Faisal Specialist Hospital ("Hospital") in Riyadh, Saudi Arabia. The recruitment was conducted by an independent corporation which had contracted with the Kingdom of Saudi Arabia to recruit employees for the Hospital. In November 1983, he entered into a contract of employment, signed in Miami, Florida, with the Hospital as a monitoring systems engineer.

In December 1983, Nelson went to Saudi Arabia and began work at the Hospital monitoring all "facilities, equipment, utilities and maintenance systems to insure the safety of patients, hospital staff, and others." In the course of his duties at the Hospital, he discovered certain safety hazards, and repeatedly advised Hospital officials. He eventually reported the defects to an investigative commission of the Saudi government. Nelson alleged that, on September 27, 1984, he was summoned to the Hospital's security office, and from there he was moved to a jail cell where he was imprisoned for thirty-nine days and neither informed of any charges against him nor accused of a crime. Furthermore, he alleged that he was "shackled, tortured,\[21. \text{id. at 1474. The advertisement stated, “Persons interested in this position will be employed by, have a contract with, and work directly for the government of the Kingdom of Saudi Arabia.” Interested persons were directed to contact the Hospital Corporation of America (“HCA”) in Nashville, Tennessee. Respondent’s Brief at *8, Saudi Arabia v. Nelson, 113 S. Ct. 1471 (No. 91-522) (LEXIS, Genfed library, Briefs file).}
\[22. \text{Saudi Arabia v. Nelson, 113 S. Ct. 1471, 1474 (1993). The Royal Cabinet is the arm of the Saudi Arabian government that contracted out the recruiting process with the HCA — an independent corporation. Id.}
\[23. \text{id. at 1475. He also satisfied personnel processing requirements and attended an orientation session that HCA conducted for Hospital employees in the United States. Id. “Prior to his departure for Saudi Arabia on December 7, 1983, Nelson completed various application, processing and medical screening requirements in the United States and traveled to Nashville for a Hospital employee ‘orientation’ program.” Respondent’s Brief at *8.}
\[24. \text{Nelson, 113 S. Ct. at 1475. The Hospital defined his “principal duties” to include maintaining Hospital systems in “compliance with safety regulations,” “troubleshoot[ing] problems and implement[ing] corrective action.” Respondent’s Brief at *8.}
\[25. \text{Respondent’s Brief at *9.}
\[26. \text{id. at *10.}
and beaten" by agents/employees of the Saudi government. Nelson alleged that his imprisonment was directly attributable to his reporting of the safety hazards — a required employment duty for the position which he was recruited and hired in the United States. The Saudi Arabian government, however, asserted that its actions against Nelson were the result of his submission of a false diploma from M.I.T. in his application for employment.

B. The Issue and Prior History

The issue raised in Saudi Arabia v. Nelson is whether a foreign state-owned enterprise’s activity in managing a hospital and disciplining employees qualifies as commercial activity and causes a direct effect in the United States satisfying the FSIA exception and thus subjecting the Saudi Arabian government to jurisdiction in federal court. Subject matter jurisdiction would be based upon the initial recruitment in the United States, even though the acts complained of may occur years into the employment relationship.

The United States District Court of Florida concluded that Nelson’s claims were not based upon the “commercial activities” carried on by Saudi Arabia in the United States, as required by the FSIA, and granted Saudi Arabia’s motion to dismiss for lack of subject matter jurisdiction. On appeal, Nelson contended that the district court erred. He asserted that his detention and torture were based upon his recruitment and hiring in the United States by an agent of the Saudi government; therefore, the district court had sub-

28. Id.
29. Id. at 1475 n.1. If indeed this was the reason for the arrest, and if the analysis survived the "commercial activity" inquiry, then the U.S. courts would certainly have jurisdiction over this action. This is so because the alleged false representation occurred when Nelson applied for the position with HCA in the United States. The recruitment activity would satisfy the "commercial activities" exception of the FSIA. The analysis, then, shifts to the second prong of the FSIA jurisdiction requirement, that is, "substantial contacts" with the United States. Clearly, this prong is satisfied because the cause of action occurred in the United States.
ject matter jurisdiction under the FSIA.³³

In its February 1991 decision, reversing the district court’s dismissal for lack of subject matter jurisdiction,³⁴ the United States Court of Appeals for the Eleventh Circuit held that the district court erred in determining that there was no subject matter jurisdiction over actions filed by a United States citizen employed overseas by a foreign government as governed by the FSIA under the so-called “commercial activity” exception.³⁵ The Court of Appeals also held that

(1) recruitment and hiring of the engineer in the United States was “commercial activity” of Saudi Arabia under the FSIA; and (2) detention and torture of the engineer in Saudi Arabia in retaliation for his reporting of safety violations at the hospital were “based upon”³⁶ his recruitment and hiring in the United States as a monitoring systems engineer.³⁷

C. The Reality of the Eleventh Circuit Decision

“American Worker Can Sue Saudi Arabia For Job-Related, Retaliatory Torture”³⁸ read one headline. “U.S. Worker Can Sue Saudis For Job-Related Imprisonment”³⁹ read another. Still another read “U.S. Wants Saudi Torture Suit Settled.”⁴⁰ These headlines represent a strong indication of the controversy and political considerations that

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³³. Id.
³⁴. Id.
³⁶. The Eleventh Circuit stated that “[t]he nexus requirement implies a bond or link that connects the foreign state to the wrongful act for which it is sought to be held liable.” Id. at 1534. See Santos v. Compagnie Nationale Air France, 934 F.2d 890, 893 (7th Cir. 1991) (“A claim is ‘based upon’ events in the United States if those events establish a legal element of the claim.”); Joseph v. Office of the Consulate General, 830 F.2d 1018, 1023 (9th Cir. 1987) (“In determining whether the commercial activities exception applies, the courts focus only on those specific acts that form the basis of the suit.”), cert. denied, 485 U.S. 905 (1988); Callejo v. Bancomer, S.A., 764 F.2d 1101, 1109 (5th Cir. 1985) (“The emphasis should be on the elements of the cause of action itself” in determining jurisdiction under the Immunities Act); Gilson v. Republic of Ir., 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982) (stating that jurisdiction would be present if the plaintiff could show conduct in the United States that would be “an element of the cause of action under whatever law governs his claims”).
³⁷. Nelson, 923 F.2d at 1534.
surrounded this decision, specifically the effect of subjecting a foreign sovereign to jurisdiction in U.S. courts upon United States' foreign relations. Also, a debate ensued as to whether Nelson's human rights had been violated and thus, on that basis, was entitled to avail himself of the United States' court system. The dilemma created by this issue, which requires the insurmountable task of balancing the employment rights of a United States citizen and the law making rights of a sovereign state, is inherent in Saudi Arabia v. Nelson.41

The Department of State's amicus curiae brief to the Supreme Court, in favor of granting certiorari, stated that Mr. Nelson "should not be allowed to sue for what is a police activity of the Saudi Government."42

This position has been sharply criticized by some members of Congress. Senator Arlen Specter43 said,

I'm of a firm view that the appeals court ruling was a correct one and we ought not use State Department pressure to get it reversed. It is so plain as not to be arguable that someone who claims to have been tortured should be allowed to state his claim in court.44

Attorney Bruce Fein, a partner at Blaustein & Fein of Great Falls, Virginia, who specializes in advising foreign governments on drafting constitutions, presents an alternative view. He writes that "the Foreign Sovereign Immunities Act [should be refined to include] a dispute mechanism more sensitive to the incumbent [P]resident's foreign policy."45 He believes that the most troublesome "commercial activity" exception to the ordinary jurisdictional immunity of a for-

41. See infra notes 149-54 and accompanying text.
42. Lewis, supra note 40.
44. Lewis, supra note 40. There is case law that affirms Senator Specter's opinion. See infra notes 88-89 and accompanying text. But see notes 82-87 and accompanying text.
45. Bruce Fein, A Strategy For Restraining International Suits, THE RECORDER, June 11, 1992, at 7 [hereinafter Fein, A Strategy]. The President should unilaterally terminate private litigation brought against foreign states which challenges the national interest and diplomatic goals. Id. "As Benjamin Franklin would have warned, when foreign policy is at stake, 'we must all hang together, or assuredly we shall all hang separately.'" Bruce Fein, Points of View: Don't Let Lawsuits Cloud Foreign Policy, LEGAL TIMES, June 15, 1992, at 23.

This proposal would essentially reject the very reasons why the FSIA was enacted. See Letter from Robert S. Ingersoll and Harold R. Tyler, Jr. to Hon. Carl O. Albert, supra note 14. If this occurred the issue of subject matter jurisdiction would be repoliticized which is alarming because sensitive political situations would result in a rejection of subject matter jurisdiction without a proper analysis as prescribed by the FSIA.
eign state — the one at issue here — lifts immunity for lawsuits founded on acts of a foreign state in the United States “in connection with a commercial activity of the foreign state elsewhere.”

D. The Supreme Court Decision

On March 23, 1993, the Supreme Court held that Nelson’s action was not “based upon a commercial activity” within the meaning of Section 1605(a)(2) of the FSIA, and accordingly reversed the Court of Appeals decision. This result may unfortunately set a dangerous precedent that should be called to the attention of all United States citizens employed abroad by foreign government owned and/or operated businesses, for it represents a short-sighted analysis of “commercial activities.”

Justice Souter, writing for the Court, stated inter alia that although the employment recruitment led to the conduct, it was not the basis for the suit because the Nelsons alleged personal injuries and not a breach of contract. Justice Souter characterized the allegations of abuse in retaliation for persistence in reporting the Hospital’s safety violations as an abuse of police power which is purely sovereign in nature and thus immune from subject matter jurisdiction of the United States courts under the FSIA. The Court maintained that whatever the motivation for the government’s allegedly abusive treatment, its activity was sovereign in nature. This is a very perilous conclusion because it greatly narrows the definition of “commercial activities.” The Court also ignored the possible human rights violations committed by the government by simply stating that such an argument did not alter the fact that the powers allegedly abused were those of police and penal officers.

Justice White’s concurring opinion seized upon the majority’s narrow interpretation of “commercial activities.” While he reached the same conclusion as the majority, it is a better reasoned opinion and thus, a more acceptable one. Justice White correctly determined that

46. Mr. Fein concludes that the Eleventh Circuit “imaginatively concluded that Nelson’s tort claims were ‘based upon’ the commercial actions of the Saudi government to recruit and hire him for hospital employment in Saudi Arabia.” Fein, A Strategy, supra note 45, at 7.
48. Joining Justice Souter were Chief Justice Rehnquist and Justices O’Conner, Scalia and Thomas.
49. Nelson, 113 S. Ct. at 1478.
50. See id. at 1479-80.
51. See id.
the alleged torture was commercial in nature. Ultimately, he concluded that the alleged activity fell short of the FSIA requirements because it was not "carried on in the United States." What must naturally be implied from this opinion is that if the recruitment was related to the suit, then Justice White would find that the United States courts would have subject matter jurisdiction.

Justice White classified the running and operating of a hospital as engaging in commercial activity. "[W]arning an employee when he blows the whistle and taking retaliatory action, such as harassment, involuntary transfer, discharge, or other tortious behavior, although not prototypical commercial acts, are certainly well within the bounds of commercial activity." Justice White makes a convincing point; "had the Hospital retaliated against Nelson by hiring thugs to do the job, I assume the majority — no longer able to describe this conduct as 'a foreign state’s exercise of the power of its police,' . . . — would consent to calling it ‘commercial.’" Therefore, the majority’s conclusion appears misguided for it fails to capture the respondents’ claim in full.

Ultimately, Justice White sided with the majority determining that the commercial activity carried on in the United States (employment recruitment) did not constitute the commercial activity upon which the Nelsons’ action was based. Therefore, the conduct in

52. Id. at 1481 (White, J., concurring). Justice White was joined by Justice Blackmun.
53. Id.
54. Id.
56. Id. at 1482.
Saudi Arabia (i.e., the employment practices and the disciplinary procedures) lacked sufficient nexus to the United States. 58

Justice Kennedy's concurring opinion fell short of discussing the "commercial activity" step of the analysis as contemplated by the FSIA. He was correct in writing that when activities are not of a sort that a private party conducts they must not be classified as commercial for if these activities were classified as such, then "the commercial activity exception would in large measure swallow the rule of foreign sovereign immunity that Congress enacted in the FSIA." 59 However, he failed to recognize what Justice White so perceptively noted which was that if the alleged activity were carried out by thugs, it would be classified as a commercial activity.

Justice Kennedy believed that the recruitment activity carried on in the United States qualified as a commercial activity exception and thus was within the jurisdiction of the federal courts. 60 The Nelsons alleged, inter alia, that the Hospital negligently failed to warn Mr. Nelson during its recruitment of him of foreseeable dangers. This claim concerns activity which has substantial contact with the United States. 61 Justice Kennedy stated that the "[o]mission of important information during employee recruiting is commercial activity as we have described it." 62 The rest of the justices did not view the failure to warn during the recruitment as part of the action and thus irrelevant for nexus purposes. 63

The dissent, written by Justice Stevens, adopted Justice White's characterization of the operation of the Hospital and employment practices and disciplinary procedures as commercial activities within the meaning of the statute. 64 Justice Stevens also argued that the fact

58. Id.
59. Id. at 1485 (Kennedy, J., concurring).
60. Id.
61. Id.
62. Id. "Locating and hiring employees implicates no power unique to the sovereign. In explaining the terms and conditions of employment, including the risks and rewards of a particular job, a governmental entity acts in 'the manner of a private player within' the commercial marketplace." Id. (citing Republic of Arg. v. Weltover, Inc., 112 S. Ct. 2160 (1992)).
63. Id. at 1480. The failure to warn claim is "merely a semantic ploy."

For aught we can see, a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it. To give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity.

Id.

64. See id. at 1488 (Stevens, J., dissenting).
that the Hospital’s American agent maintained an office in the United States and regularly engaged in the recruitment of personnel in this country provided sufficient contacts with the United States. Finally, but for the recruitment activity, Nelson would never have been allegedly tortured by the Saudi Arabian officials, for it was Nelson’s performance of the job-related responsibilities that led to the Hospital’s alleged retaliatory actions against him.

What must be recognized when analyzing any FSIA issue is the underlying principle of the statute, which is that “when a foreign nation sheds its uniquely sovereign status and seeks out the benefits of the private marketplace, it must, like any private party, bear the burdens and responsibilities imposed by that marketplace.” Yet, prudent inquiry requires that the analysis include a determination as to whether the “commercial activity” has a sufficient nexus or a “direct effect” in the United States. Neglecting to make this determination, to borrow a phrase, “would swallow” the commercial activity exception of the FSIA.

The Supreme Court analysis can be broken down into a number of issues all of which are related to the FSIA. First, was this a “commercial activity?” Second, if it was, then is there a nexus between the cause of action and Saudi Arabia’s business in the United States or

65. Id.
66. Id. “The position for which the respondent was recruited and ultimately hired was that of a monitoring systems manager, a troubleshooter, and, taking respondent’s allegations as true, it was precisely respondent’s performance of those responsibilities that led to the hospital’s retaliatory actions against him.” Id.
67. Id. at 1489.

[W]hen the foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of [the agreements which it may breach or] the accidents which it may cause . . . . The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties.

Id. at 1482 n.2 (White, J., concurring) (citing Hearing on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 24, 27 (1976) (testimony of Monroe Leigh, Legal Adviser, Department of State) [hereinafter Leigh Testimony]).

68. A foreign state is not immune from the jurisdiction of domestic courts in any case 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.

III. THE FOREIGN SOVEREIGN IMMUNITIES ACT

In 1976, Congress enacted the FSIA to facilitate bringing actions, arising out of commercial activity, against foreign governments in United States courts by leaving to the discretion of the courts, rather than the Executive branch, the determination of whether the court should hear a case. The FSIA provides a uniform statutory procedure for establishing subject matter and personal jurisdiction over sovereign entities, so that the seizure of property situated in this country is no longer necessary to secure jurisdiction. The overriding congressional purpose behind the FSIA was to codify the principle of international law known as “restrictive” sovereign immunity.

According to the restrictive theory of sovereign immunity, the immunity of the sovereign is recognized in regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis). Consequently, the presence of a private act (e.g., commercial activity) is the crucial exception to sovereign immunity under the FSIA.

70. Section 1602 states:

The Congress finds that the determination by the United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in [the Act].

72. Id. The doctrine was articulated in the Tate Letter, drafted by the then Acting Legal Advisor to the Department of State, Jack B. Tate. Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments, 26 Dep’T St. BULL. 984 (1952) [hereinafter Tate Letter].
73. Tate Letter, supra note 72. Compare this with the classical or absolute theory of sovereign immunity which says that a sovereign cannot, without its consent, be made a respondent in the courts of another sovereign. Id.
74. See 28 U.S.C. § 1603(d) which states,
Since the FSIA is the sole basis for obtaining jurisdiction over a foreign state in the United States courts, Nelson (the plaintiff) is required to prove that (1) he was involved in a commercial activity with the Saudi Arabian government; and (2) there is a jurisdictional nexus between the harm and the commercial activity in the United States or the harm had a direct effect in the United States.

In reversing the district court, the Eleventh Circuit found that Nelson's detention and torture were "so intertwined with his employment at the Hospital that they [were] 'based upon' his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia." While the detention and torture may have been "intertwined with [Nelson's] employment," the punishment, the Saudi Arabian government argued, is clearly within the sovereign state's right to exercise its police powers. Therefore, any interference with the Saudi government's actions would be a serious breach of its sovereignty.

However, the Supreme Court, which was ultimately persuaded by the police powers argument and unconvinced that the Saudi government was engaged in a "commercial activity," subsequently reversed the Eleventh Circuit decision.

[a] "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

Id. See 28 U.S.C. § 1605(a)(2) which states that a foreign state is not immune from the jurisdiction of domestic courts in any case in which the action is based upon a commercial activity carried on 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.


77. Nelson, 923 F.2d at 1535. Nelson alleged that, in the course of his duties, he discovered safety hazards at the Hospital and reported them to the proper authorities. Id.

78. Id.

79. Id. at 1534.

80. See infra notes 82-87 and accompanying text. But see notes 88-89 and accompanying text.

81. See supra notes 47-51 and accompanying text.
A. State Police Powers: A General Background

What is this notion of "police powers" and how has it been analyzed in other cases? One of the rights attached to sovereignty is the right to proscribe and enforce laws. Each state has its own reasons and means to punish people. The importance of respecting a state's enforcement of its laws is based on the notion of reciprocity, i.e., if the United States accepts jurisdiction of a case and declares another state's method of enforcement improper then the United States risks similar discourtesy to its enforcement of its laws.

Traditionally, the United States courts have sought to preserve this concept. In *Rosado v. Civiletti*, the United States Court of Appeals for the Second Circuit ruled that the Bill of Rights "does not and cannot protect our citizens from the acts of a foreign sovereign committed within its territory." Where the foreign police have acted not as United States agents but merely on behalf of their own government, the imposition of a penalty would not deter any illegal conduct.

International decisions which threaten the integrity of the sovereign state are often politically motivated. Despite this threat, how-

82. *Cf. The Cutting Case Letter, Secretary of State to United States Ambassador to Mexico*, 1887 FOREIGN REL. U.S. 751. The November 1, 1887 letter from the Department of State in Washington, D.C. stated: "When a citizen of the United States commits in his own country a violation of its laws, it is his right to be tried under and in accordance with those laws . . . . To say that he may be tried in another country for his offense simply because its object happens to be a citizen of that country would be to assert that foreigners coming to the United States bring hither the penal laws of the country from which they come, and this subjects citizens of the United States, in their own country, to an indefinite criminal responsibility." *Id.*

83. The basic rule of comity is "[t]he recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws." BLACK'S LAW DICTIONARY 267 (6th ed. 1990).


85. *Id.* at 1189. See United States v. Lira, 515 F.2d 68 (2d Cir. 1975) (stating that relief from acts of torture by foreign agents could be granted only upon a showing of direct United States governmental involvement in order to serve a deterrent function and vindicate a constitutionally recognized right), *cert. denied*, 423 U.S. 847 (1975); Neely v. Henkel, 180 U.S. 109 (1901)

86. *Lira*, 515 F.2d at 71.


[T]he United States does assert . . . other interests in upholding the validity of [the Mexican law enforcement agents'] . . . [T]he Government's substantial inter-
ever, there has been a recent trend by the courts to accept jurisdiction of politically sensitive cases and determine the validity of the enforcement. In Committee of United States Citizens Living in Nicaragua v. Reagan, the District of Columbia Circuit Court held that certain acts are recognized by commentators as heinous actions that are prohibited by the law of nations.

This analysis was designed to be an introduction into the grey area of international law and the role of municipal courts and is by no means an exhaustive study of U.S. Courts’ treatment of foreign sovereign police power defenses. The area becomes more clouded when a contract/tortious action is brought in connection with a “commercial activity” of a sovereign state, such as in Saudi Arabia v. Nelson. What may be facially perceived as a sovereign state merely exercising its police powers may, in fact, be a commercial activity as defined by the FSIA wrapped in the cloak of sovereign immunity.

B. What Is Commercial Activity?

If the court determines that the activity of a sovereign state does not reach to the level of “commercial activity” (jure gestionis), then based on sovereign immunity the plaintiff loses the opportunity for his or her “day in court” in the United States. The inquiry is essential in promoting good relations with Mexico by honoring its criminal convictions and recognizing the integrity of its criminal justice system. Since Mexico is a sovereign nation in no sense subject to the judgments of this Court, we could neither deter its officials from committing similar cruelties in the future, nor vindicate the individual interests of those still incarcerated in Mexican prisons, by invalidating these [Mexican Law Enforcement agents'] actions. At most, we would simply complicate our delicate relations with Mexico.

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88. 859 F.2d 929 (D.C. Cir. 1988).
89. Id. at 941. These actions include, at a minimum, bans on governmental “torture, summary execution, genocide, and slavery.” Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791 n.20 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985) (emphasis added).
90. “A ‘commercial activity’ means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.” 28 U.S.C. § 1603(d) (1988).

[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. Rather, the issue is whether the particular actions that the foreign state performs (whatever motive behind them) are the type of actions by which a private party engages in “trade and traffic or commerce.

because "[a] foreign state engaging in 'commercial' activities do[es] not exercise powers peculiar to sovereigns; rather, it exercis[e[s] only those powers that can also be exercised by private citizens." 91

The issue of whether the activity is "commercial" as defined by Section 1603(d) of the FSIA is resolved through determining the "nature" of the act and not, as some believe, by the "purpose" of the act. The "nature" test limits immunity of sovereigns to those acts which could not be done by individuals whereas the "purpose" test limits immunity of sovereigns to those acts which have as their object a public character. The nature test means, for example, that a foreign state's purchase of grain from a private dealer would always be regarded as commercial, even if the grain were to serve some important governmental purpose, such as replenishing government stores or feeding an army. 92 Clearly, the "nature" test makes it difficult for a sovereign to disguise its activity as purely sovereign. This is important because it provides appropriate guidance to define a commercial activity. Courts, however, have run into problems with analyzing activities in the face of the "purpose" and "nature" tests. 93 Nevertheless, the Supreme Court has asserted that "[h]owever difficult it may be in some cases to separate 'purpose' (i.e., the reason why the foreign state engages in the activity) from 'nature' (i.e., the outward form of the conduct that the foreign state performs or agrees to perform), . . . the statute unmistakably commands that to be done." 94

The admitted difficulty in determining whether an activity is indeed commercial in nature highlights an issue that cuts to the heart of the FSIA. The Court in Saudi Arabia v. Nelson clearly had a difficult time properly characterizing the Hospital's activity. The issue is whether the definition provided in the FSIA adequately permits consistent analyses by the courts in determining whether an action by a sovereign is indeed a "commercial activity." There are two cases

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92. Leigh Testimony, supra note 67.

93. "Often, the essence of an act is defined by its purpose [therefore unless] we can inquire into the purposes of such acts, we cannot determine their nature." Weltover, 112 S. Ct. at 2167 (quoting De Sanchez v. Banco Cent. de Nicar., 770 F.2d 1385, 1393 (5th Cir. 1985)). Some people argue, then, that "the line between 'nature' and 'purpose' rests upon a 'formalistic distinction [that] simply is neither useful nor warranted." Id. However, the Supreme Court maintains that such argument is "squarely foreclosed by the language of the FSIA." Id.

94. Id.
that, at first blush, seem to warrant a similar finding based upon the
definition of "commercial activity;" however, because the courts uti-
лизировали the "nature" test as opposed to the "purpose" test, the proper
outcomes were reached. The two cases presented for the discussion
are Jones v. Petty Ray Geophysical Geosource, Inc.\(^9\) and Zedan v.
Kingdom of Saudi Arabia.\(^6\)

In Jones v. Petty Ray Geophysical Geosource, Inc., a wrongful
death action was brought for the murder, by anti-government rebels,
of a Texas resident who was employed as an engineer by Geophysical
Geosource, Inc. in the Republic of Sudan.\(^9\) The administratrix of
the estate alleged the defendants "negligently failed to provide the
decedent with a safe place to work, adequate military/police protection
or failed to move him from the area or warn him of danger from
nearby insurgents.\(^9\)

The District Court applied Section 1603(d) of the FSIA\(^9\) to the
facts to determine whether the Sudan’s activity could have been con-
sidered “commercial activity.”\(^10\) The court correctly decided that
“[a] sovereign’s conduct with respect to its natural resources is pre-
sumptively a governmental function.”\(^10\) Under these circumstances,
the court concluded that the Sudan’s granting of its mineral conces-
sions was essentially governmental and non-commercial in nature;\(^10\)
therefore, Section 1605(a)\(^10\) could not be used to abrogate the

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95. 722 F. Supp. 343 (S.D. Tex. 1989), reh’g denied, 954 F.2d 1061 (5th Cir.), cert.
96. 849 F.2d 1511 (D.C. Cir. 1988).
98. Id.
99. "A 'commercial activity' means either a regular course of commercial conduct or a
particular commercial transaction or act. The commercial character of an activity shall be
determined by reference to the nature of the course of conduct or particular transaction or
101. Id. "The production sharing agreement indicates that Sudan was exercising its so-
vereign control over its natural resources when it granted drilling concessions to . . ." the
exploration companies. Id. at 347.
102. Id. The restrictive theory of sovereign immunity enshrined in the FSIA adopts the
threshold test as the "nature of the transaction" rather than "the purpose of the transaction."
103. A foreign state is not immune from the jurisdiction of domestic courts in any case
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 con-
nection 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
Sudan's immunity. This decision left one option available to the plaintiff, the "non-commercial tort" exception to the FSIA found in Section 1605(a)(5). However, the facts of the case did not fulfill the requirements of Section 1605(a)(5) because the alleged non-commercial tort was not committed by the Sudan in the United States.

In Zedan v. Kingdom of Saudi Arabia, an engineer was recruited in the United States, by a representative of the royal overseer of the Arab Service Office, to work as an engineer on the Outer Ring Road Project. The Ministry of Communications, an agency of Saudi Arabia, assumed control of the project, placed Zedan in charge of the whole project, and guaranteed payment of salary and share of profits due Zedan under his contract with the Establishment. Upon completion of the project, Saudi Arabia breached the contract by failing to honor payment to the engineer for work on the roadway.

The District of Columbia Court of Appeals' analysis does not even question the validity of the claim that the activity to be considered in this action is a "commercial activity" under the FSIA. Rather, it is presumed because it is clear that the outward form (or nature) of the conduct is of the type by which a private party engages in "trade and traffic or commerce." Had this been analyzed through the "purpose" test, then it would not have been held to be a commercial activity because the reason for the project was to build a road for the country. This conclusion is inconsistent with the FSIA because such an endeavor is nothing unique to the power of a sovereign; therefore, the sovereign immunity must be removed.

The case, then, turned on whether substantial contacts existed
between Saudi Arabia's conduct and the United States. Furthermore, what also needed to be considered was whether Saudi Arabia's conduct had a "direct effect" in the United States. These issues were ultimately answered in the negative and, therefore, Saudi Arabia was immune from suit.\footnote{111}

The procurement contract, in Zedan, seems similar to the granting of mineral concessions in Jones v. Petty-Ray Geophysical Geosource, Inc. because, in both cases, the contracts can only be created by governments; therefore, the District of Columbia Court of Appeals and the Federal Court of Appeals for the Fifth Circuit seem to create irreconcilable findings of what is a commercial activity. This would be a valid response had the "purpose" test been utilized, but if one examines the decisions in light of the "nature" test, it is clear that the courts' findings are, in fact, consistent.

This issue is the reason that the Supreme Court decision in Saudi Arabia v. Nelson should concern the public. It appears that the Supreme Court has gone astray by focusing on the "purpose" test instead of the "nature" test as consistently held by the courts. Consequently, the Court has narrowed the interpretation of the "commercial activities" exception.

C. Jurisdictional Nexus — Substantial Contacts

The case of Zedan v. Kingdom of Saudi Arabia offers a sufficient discussion of the issue of "substantial contacts with the United States."\footnote{112} The court maintained that in consideration of the legislative history of the FSIA\footnote{113} a single phone call to Zedan does not constitute "substantial contact with the United States."\footnote{114} To claim that the phone contact was a preliminary step in a chain of events leading to the contract guarantee entered into by Saudi Arabia is insufficient because nothing in the legislative history suggests that "Congress intended jurisdiction . . . to be based upon acts that are not themselves commercial transactions, but that are merely precursors to commercial transactions."\footnote{115}

\footnotetext{111}{Id. See infra notes 112-16 and accompanying text.}  
\footnotetext{112}{See 28 U.S.C. § 1605(a) (1988).}  
\footnotetext{113}{"This definition . . . is intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff." Zedan, 849 F.2d at 1513 (quoting H.R. REP. NO. 1487, 94th Cong., 2d Sess. 17 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6616).}  
\footnotetext{114}{Zedan, 849 F.2d at 1513.}  
\footnotetext{115}{Id.}
The court added that to satisfy the substantial contact requirement, "isolated or transitory contacts with the United States do not suffice." It is reasonable to glean from the court's statements that the minimum contacts actually required must be at least continuous business relations within the United States. However, establishing subject matter jurisdiction solely on the basis of business relations is inadequate because the action on which the complaint is based must be connected with the contacts to provide nexus as contemplated by the FSIA.

In *Saudi Arabia v. Nelson*, Justice White's analysis of the issue of substantial contacts is consistent with that of *Zedan* and as contemplated by Congress when it drafted the FSIA. For these reasons he properly concludes that the commercial activity lacks a sufficient nexus with the United States.117

D. Direct Effects

The alternative requirement of substantial contacts to satisfy the commercial activities exception to sovereign immunity is that such activity "causes a direct effect in the United States." Many actions against foreign sovereigns have been dismissed for lack of subject matter jurisdiction because the plaintiffs have been unable to satisfy this element of the analysis. The cases that follow provide sufficient analysis and interpretation of this element of the FSIA "commercial activity" exception.

The direct effects test has undergone a significant transformation in its interpretation. Some courts have relied upon the House Report on the FSIA to interpret the Direct Effects Clause which calls for a foreign sovereign to be subjected to United States jurisdiction consistent with principles set forth in Section 18 of the Restatement (Second) of Foreign Relations Law ("Restatement") of the United States.119

116. *Id.* (citing Maritime Int'l Nominees Establishment v. Guinea, 693 F.2d 1094, 1109 (D.C. Cir. 1982) (concluding that "the substantial contact requirement was not met even where a representative of the foreign sovereign engaged in two business meetings with the plaintiff in the United States"), *cert. denied*, 464 U.S. 815 (1983)).

117. *See supra notes 57-58 and accompanying text.*


In Zernicek v. Brown & Root, Inc., the United States citizen was employed by a U.S. subcontractor which contracted to do work in Mexico for Petroleos Mexicanos ("Pemex"), an agency of the government of Mexico. While on his tour of duty, Zernicek contends that he was exposed to excessive doses of radiation as a result of Pemex's negligence. He filed suit in the United States District Court for the Southern District of Texas, seeking damages and contending that he was still suffering from the effects of his exposure. Based upon its interpretation of "direct effects," the Fifth Circuit found that the personal injury suffered was not "direct" to constitute waiver of Mexico's sovereign immunity. The Fifth Circuit based its analysis on Section 18 of the Restatement, which requires the conduct abroad to cause an effect in the United States that is "substantial" and "occurs as a direct and foreseeable result of the conduct outside the territory." The court stated that "[a]lthough the concern evidenced by Section 18 is . . . legislative rather than judicial, the congressional reference to it has led many courts to find guidance in its requirements to interpret the FSIA." However, the Supreme Court in Republic of Argentina v. Weltover addressed this issue and dismissed reliance upon Section 18 of the Restatement. "Section 18 states that American laws are not given extraterritorial application except with respect to conduct that has, as a 'direct and foreseeable result,' a 'substantial' effect within the United States. Since this obviously deals with jurisdiction to legislate rather than jurisdiction to adjudicate, this passage of the House Report has been charitably described as 'a bit of a non sequitur.'"
The Court, looking to redefine direct effects, determined that an effect is “direct” if it follows “as an immediate consequence of the defendant’s . . . activity.”

The factual issue in *Weltover* was whether the Argentinean government’s assumption of the risk of currency depreciation in cross-border transactions involving Argentine borrowers and subsequent promise to pay the contracts when they came due constituted a “commercial activity.” The government lacked sufficient reserves of U.S. dollars to cover the contracts when they became due in 1982; therefore, they issued Argentine government bonds as a refinancing measure. Financial problems continued to face the government in 1986 so, among other things, they unilaterally extended the time for payment of the bonds. Bond holders brought a breach of contract action in the District Court in the Southern District of New York because New York was specified as the place where payment should be made. The Court concluded that because New York was the place of performance for Argentina’s ultimate contractual obligations, the rescheduling of those obligations necessarily had a “direct effect” in the United States.

The Supreme Court’s reinterpretation of the “direct effects” test in *Weltover* would not change the decision in *Zernicek*. The Fifth Circuit wrote, in *Zernicek*, that “[e]very court that has considered a claim for personal injury sustained in foreign territory has held that subsequent physical suffering and consequential damages are insufficient to constitute a ‘direct effect in the United States’ for purposes of abrogating sovereign immunity.”

rules which make such conduct and its effects constituent elements of activity which is either criminal, tortious, or subject to regulation.

*RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 18 cmt. f (1965).

128. *Id.* (citing Republic of Arg. v. Weltover, Inc., 941 F.2d 145, 152 (2d Cir. 1991)).

129. *Weltover*, 112 S. Ct. at 2163-64.

130. *Id.* at 2164.

131. *Id.*

132. *Id.*

133. *Zernicek*, 826 F.2d at 418. See also Berkovitz v. Islamic Republic of Iran, 735 F.2d 329 (9th Cir.) (holding that even if the activity of an Iranian agency charged with murdering a U.S. citizen in Iran was commercial, the “direct effect” of his death was in Iran, not in the loss that his survivors suffered in the United States), *cert. denied*, 469 U.S. 1035 (1984); Sugarman v. Aeromexico, Inc., 626 F.2d 270 (3d Cir. 1980) (causing injury to American citizens abroad is simply not a direct enough effect); Upton v. Empire of Iran, 459 F. Supp. 264, 266 (D.D.C. 1978) (holding that the continuing effect in the United States of an injury caused to a U.S. citizen by the collapse of the roof of an airport in Tehran, Iran was not the kind of direct effect required by the Act), *aff’d mem.*, 607 F.2d 494 (D.C. Cir. 1979).
In Antares Aircraft v. Federal Republic of Nigeria, the Second Circuit analyzed the activity in question in light of the "direct effects" test stated in Republic of Argentina v. Weltover, Inc. The activity outside the territory of the United States was the allegedly wrongful detention of a plane in Nigeria. The detention of the aircraft and collection of fees were "in connection with a commercial activity of the foreign state." Therefore, based upon the rule in Weltover that "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity,'" the court held that the complaint satisfied the direct effects test.

IV. THE SUPREME COURT'S DECISION: AN ANALYSIS

According to the definition of a "commercial activity" — "[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." The nature of the activity in Nelson, the general administration of a hospital, is very similar to the nature of the activity in Zedan v. Kingdom of Saudi Arabia. Therefore, it is reasonable to characterize the activity in this case as "commercial activity" because the activity is clearly something that may be performed by private parties.

The next step is to determine whether the "commercial activity" is part of the course of conduct from which the cause of action arose. It is apparent that this issue is satisfied in this case. The employment recruitment led to Nelson's position in the Hospital which required

There is a proposed bill before the House (H.R. 934), however, which would grant jurisdiction to United States courts to hear claims against a foreign state for personal injury or death of a United States citizen caused by torture or extrajudicial killing. Aziz Abu-Hamad, Recourse for Americans Abused Abroad, N.Y. TIMES, Apr. 2, 1993, at A32.

134. 999 F.2d 33 (2d Cir. 1993), cert. denied, 114 S. Ct. 878 (1994).
136. Id. (citing Weltover, 112 S. Ct. 2160). See also Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534 (11th Cir. 1993) (finding plaintiff's accident and injury in Georgia to be an "immediate consequence" of French carmaker's allegedly defective design and manufacture).
139. The activity in Zedan was managing a roads project which is commercial in nature. Supra notes 106-10 and accompanying text.
140. See supra notes 52-56 and accompanying text.
him to report safety violations for which he was allegedly tortured. Clearly the "commercial activity" here, despite the insistence of the Court's majority, led to the basis for the suit.

Nelson was recruited for the job in the United States and signed his employment contract in the United States and the cause of action followed from his employment obligations at the Saudi Arabian hospital. Based upon the authority which states what is insufficient for nexus, it is clear that the activities in this case do not reach a level sufficient for nexus between the cause of action (the alleged torture) and Saudi Arabia's business in the United States (the contract). The reason is that the dispute is not a breach of contract action but a personal injury action.

Lastly, on a "direct effect" in the United States analysis, Nelson would also lose his case. Based upon past courts' decisions it is difficult to say that the harm had "direct effects" in the United States. Under either the Weltover rule or the old Zernicek rule, the cause of action in Nelson would not satisfy the direct effects test.

The Nelson Court is consistent with either interpretation. Under the Zernicek decision the claim would fail because the complaint was for a personal injury sustained in Saudi Arabia which has been held to be an insufficient basis to abrogate sovereign immunity. Under Weltover it would also fail because there was no immediate consequence of Saudi Arabia's alleged conduct (torture) in the United States. However, if this case were categorized as a breach of contract case, then the inquiry would survive the direct effects threshold as defined either in Weltover or Zernicek.

A breach of contract action would be classified as a financial injury rather than a personal injury, thus opening the door, under Zernicek, for a direct effects analysis. A good case could be made that the breach of a contract executed in the United States would have a substantial effect in the United States. Under the current test propagated in Weltover, however, it is unlikely that Nelson would prevail. Unlike the activity in Weltover, the place of performance for Saudi Arabia's ultimate contractual obligations was in Saudi Arabia and not in the United States; therefore, there was no immediate consequence of the government's activity in the United States — no direct effect.

142. See supra notes 57-58, 61-63 and accompanying text.
143. See supra notes 118-36 and accompanying text.
Finally, policing power is an area that defines and preserves the sovereignty of any state.\footnote{144} The Courts of Appeals have held that where foreign police have acted not as United States agents but merely on behalf of their own government, the imposition of a penalty would not deter any illegal conduct.\footnote{145} However, the courts may accept jurisdiction over certain acts that are recognized as heinous actions by the general law of nations.\footnote{146} The consequences of a court granting subject matter jurisdiction in such an instance are a risk of discourtesy to sovereign nations and subsequently the United States’ ability to enforce its own penal laws.\footnote{147} In \textit{Nelson}, however, it is inaccurate to characterize the Saudi government’s actions against Nelson as merely an exercise of its police power. Rather, its alleged torture arises out of the commercial activity — operation of the Hospital, thus bringing the actions complained of within the course of conduct of the commercial activity.

Based upon this analysis, it is clear that Justice White’s concurring opinion, joined by Justice Blackmun, in \textit{Saudi Arabia v. Nelson} is the most sensible one.\footnote{148} While I agree with the majority that this case should not have been granted subject matter jurisdiction, I disagree with its narrow interpretation and application of the “commercial activities” exception as defined by Section 1605(a) of the FSIA.

\section*{V. THE HUMAN RIGHTS PERSPECTIVE}

As mentioned above, this case sparked a debate about the United States courts’ role in human rights violations committed by foreign states. The Human Rights Interest Group of the American Society of International Law sponsored a panel discussion to address this issue.\footnote{149} This discussion occurred prior to the Supreme Court decision (but after certiorari was granted) and dealt with the issue of sovereign immunity and the FSIA. Also debated was the extent to which the FSIA should protect sovereigns from suits against certain activities.

The following analogy clearly explains the effects of “commer-
cial activity”: “if a foreign ship, departing voluntarily from her appropriate character, chooses to adopt that of a merchant . . . she must . . . be subject to all the consequences of such adoption, and to be treated . . . as a merchant . . . .”\textsuperscript{150}

Edward Gordon, a Professor of Law at Albany Law School, stated that

\begin{quote}
[a]ctions of states in violation of well-accepted international standards can be viewed as acts neither sovereign nor public in nature. The purpose of governmental activity in a free and democratic society cannot be interpreted to include the violation of human rights; it must, rather, be interpreted so as to protect and preserve them . . . . The victims of international human rights abuses have legitimate expectations that they should be provided with a remedy.\textsuperscript{151}
\end{quote}

Yet, it is difficult for the state to manifest that interest or fulfill the obligation\textsuperscript{152} when it is widely accepted that

\begin{quote}
[e]ven if a state has an interest in another state’s violation of a well-established human rights norm, or of a human rights standard deeply rooted in its own public policy, its courts do not thereby incur an obligation, so far as international law is concerned, to hear a case presenting an opportunity to compensate the victim of the violation.\textsuperscript{153}
\end{quote}

Some argued that the Eleventh Circuit decision in \textit{Nelson} provided a spark of hope to human rights victims by providing the United States courts as a forum to afford them at least a limited remedy when they can link their wrong with a commercial activity.\textsuperscript{154} The Supreme Court, though, has doused the spark of hope lit by the Eleventh Circuit. It has danced around the issue by declaring an insufficient nexus between the recruitment activity and the alleged torture. Furthermore, by restricting the application of the commercial activity exception to the FSIA, it has substantially limited the employees’ right of redress in the U.S. courts.

\textsuperscript{150}. \textit{International Human Rights}, supra note 4, at 326.
\textsuperscript{151}. \textit{International Human Rights}, supra note 4, at 337.
\textsuperscript{152}. The obligation referred to is that of protecting and preserving human rights.
\textsuperscript{153}. \textit{International Human Rights}, supra note 4, at 329.
\textsuperscript{154}. \textit{International Human Rights}, supra note 4, at 329.
VI. WHICH COUNTRY'S EMPLOYMENT LAWS APPLY?

At first glance it is reasonable to believe that the Court's decision all but prevents a U.S. citizen's right to avail himself or herself of the many protections provided by the United States employment laws. However, the following discussion makes it clear why even if United States courts properly take jurisdiction over a foreign sovereign, such defendant may not be subjected to any enforceable liability under United States laws.

When attempting to pass judgment over foreign countries' employment practices, the United States courts must heed caution so as to not violate the situs country's sovereignty by interfering with that country's internal affairs. Employment activities have been traditionally characterized as "predominantly local." Nations have a legitimate interest in maintaining control over employment practices as a means of minimizing interference with local customs or economic regulations. For example, a defendant United States company may escape liability under the United States law if it shows that its actions, although in violation of United States law, complied with the directives of a foreign government under the defense of foreign compulsion. Therefore, the employer's resulting liability should arise from harm caused to its employees for its failure to follow the host country's government orders in good faith. Such a failure may exist when a company fails to notify its employees of the operational law. The foreign compulsion defense, properly applied, insures that, to the extent possible under the law of the host country, employers treat employees fairly but does not protect the employee from unfair or discriminatory practices of the host country itself.

158. See infra notes 162-72 and accompanying text.
160. Id. at 509.
instance, commentators have recognized that under principles of international law, foreign compulsion would protect discriminatory employment activity mandated by apartheid in South Africa (when it existed), as long as the activity occurred completely within South Africa.\(^{161}\)

A. Extraterritorial Application of Title VII

The concept of foreign compulsion discussed above is explained in *EEOC v. Arabian American Oil Co.*\(^{162}\) ("ARAMCO"). The United States Supreme Court held "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."\(^{163}\) That canon of construction "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."\(^{164}\) The Supreme Court affirmed the District Court and Court of Appeals decisions that the United States courts do not have subject matter jurisdiction over the suit because Title VII does not apply to the employment practices of U.S. employers that employ American citizens abroad.\(^{165}\)

The Congress, clearly concerned about the limited reach of Title VII as indicated by this decision, amended Section 701(f) of the Civil Rights Act of 1964\(^ {166}\) and Section 101(4) of the ADA.\(^ {167}\) The relevant change to the Acts was the amendment to the definition of employee to include citizens of the United States employed in foreign countries.\(^ {168}\) At first blush it seems that the amendment overturns the *ARAMCO* decision; however, Congress qualified the amendment to preserve the concept of foreign compulsion. Congress exempted ac-

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tions "with respect to an employee in a workplace in a foreign country if compliance with such Section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located."169

B. The Age Discrimination in Employment Act

Another example of Congressional concern for the protection of U.S. citizens employed abroad while maintaining its appreciation for the sovereign nature of local customs or economic regulation is found in the amended language of the ADEA.170 This statute defers to the authority of a host-country's laws: non-compliance with the ADEA is not unlawful "where such practices involve an employee in a workplace in a foreign country, and compliance with . . . [the ADEA] . . . would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which the workplace is located."171 Such clear statutory language has provided consistent decisions in the courts.172

VII. CONCLUSION

In an ever-shrinking world in which the walls of oppression are crumbling and the halls of market economies are expanding, economic integration is very real. Integration includes everything from an integrated capital market to an integrated labor market. Citizens of one country (e.g., the United States) can more easily locate better investments and employment opportunities in foreign countries thereby


best applying the principle of comparative advantage. Furthermore, participation by foreign sovereigns in the international commercial market has increased substantially in recent years. This climate has the potential to create a number of problems for U.S. citizens employed abroad. The decision in *Saudi Arabia v. Nelson* strikes at the core of securing the rights of U.S. citizens working abroad for the commercial interests of foreign governments.

This decision has heightened the potential for irreversible injury to people in private business — and ultimately to international trade — by facilitating a system in which some of the participants in the international commercial marketplace are not subject to the same rule of law as others. Some cry "foul" because "[i]n 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." Therefore, "[s]ubjecting 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.'" The possibility of one sovereign's laws interloping upon another sovereign, then, becomes much less threatening.

Our international legal world, based upon reciprocity and comity, preserves a government's right to proscribe its own laws without the concern of encroachment upon them by other governments. This principle was recognized by Congress when it adopted amendments to Title VII and the ADA in the wake of the Supreme Court decision in *ARAMCO* by limiting the reach of the amendments. As a result, a foreign employer of a United States citizen outside the United States has a duty to treat its American employees fairly, but may not be obligated to observe the United States employment laws as would be an American employer. Therefore, United States citizens employed abroad may not always avail themselves of the employment protection laws established by the United States Congress.

174. Id. at 704. "[S]ubjecting 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." Id. at 703-04.
175. Alfred Dunhill, 425 U.S. at 704.
176. See supra notes 162-72 and accompanying text.
177. Street, supra note 155, at 359.
Had the Supreme Court affirmed the Eleventh Circuit's decision, it would not have increased the ability of United States courts to enforce its laws on foreign entities because to do so requires the express intent of Congress. In fact, because the activities complained of lacked sufficient nexus with or direct effects in the United States, granting subject matter jurisdiction in this case would have been improper. Still, an appropriate interpretation of the "commercial activities" exception to the FSIA would have provided United States citizens with a more equitable opportunity to seek restitution for their claims which satisfied the final prongs of the exception.

Others would argue that such a decision would have enabled courts to unfairly affix jurisdiction to sovereign states and foreign corporations, thus making it easier to and unfairly expand the reach of United States employment laws. Furthermore, affirming the Eleventh Circuit's decision could have affected foreign corporations' decisions about whether or not to hire United States citizens to work abroad. One management consideration of the employer is always whether it can function without undue influence from the United States and its laws. Therefore, opening the U.S. court system to any action against a foreign employer whether it be a government or a private entity creates a risk of chilling these employers from hiring U.S. citizens.

The primary risk of this decision is that it will cause the courts to inadequately balance the interests of a sovereign state and the alleged harm done to a United States citizen in the scope of his or her employment abroad. What is haunting about the Nelson decision is that the Supreme Court's narrow interpretation of the "commercial activities" exception to sovereign immunity limits the U.S. citizens' right to avail themselves of the United States court system. While a different construction of the "commercial activities" exception to the FSIA would not have changed the outcome of Saudi Arabia v. Nelson, the result of this construction of the "commercial activities" exception of the FSIA is the protection of the reign of sovereigns over the protection of individuals in "commercial activity" settings.

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179. See supra notes 162-72 and accompanying text.