HOLDEN v. CANADIAN CONSULATE: A CORRECT AFFIRMATION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT?

Arlene Holden, a commercial officer for the Canadian government, lost her job in February 1993 when Canada closed its Consulate in San Francisco.[1] The Canadian government subsequently opened a satellite office in San Francisco, staffed with only one commercial officer, a male who was younger and less experienced than Holden.[2] The male officer and Holden had competed for the position at the new office.[3] Holden then filed a complaint against the Consulate in the Northern District of California, alleging sex and age discrimination, as well as breach of an implied contract to terminate for cause, breach of the covenant of good faith and fair dealing, and a violation of California public policy.[4] The Canadian Consulate moved to dismiss Holden's complaint based on the sovereign immunity granted to them by the Foreign Sovereign Immunities Act (FSIA).[5] After the District Court denied the Consulate's motion, the Consulate filed an interlocutory appeal of the order.[6] The Ninth Circuit Court of Appeals reviewed the jurisdictional challenge de novo, *holding* that Holden's claims were based on a commercial activity, and thus fell into the commercial activity exception to the FSIA,[7] giving jurisdiction to the District Court. *Holden v. Canadian Consulate*, 92 F.3d 918 (9th Cir. 1996).

Absolute sovereign immunity[8] for foreign states was first recognized by the United States Supreme Court in 1812 in *The Schooner Exchange v. McFaddon*,[9] although many scholars trace its history to

1. *See* Holden v. Canadian Consulate, 92 F.3d 918, 919 (9th Cir. 1996).
2. *See id*. at 920.
3. *See id.*
4. *See id.*
5. *See id.* (citing Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1601-1611 (1976)).
6. *See id.*
7. 28 U.S.C. § 1605(a)(2).
8. Sovereign immunity is defined as "[a] judicial doctrine which precludes bringing suit against the government without its consent. . . . [I]t bars holding the government or its political subdivisions liable for the torts of its officers or agents unless such immunity is expressly waived by statute or by necessary inference from legislative enactment." BLACK'S LAW DICTIONARY 1396 (6th ed. 1990). Foreign immunity is defined as "[t]he immunity of a foreign sovereign, its agencies or instrumentalities, from suit in United States courts." *Id*. at 647.
9. 11 U.S. (7 Cranch) 116 (1812) (holding that a public vessel of a foreign state is not subject to the jurisdiction of U.S. courts).

Roman Law and subsequent English monarchical law.[10] In 1952, Jack B. Tate, the Acting Legal Advisor of the State Department, announced in a letter (the Tate Letter) to the Acting Attorney General that the State Department was adopting a more "restrictive" view of foreign sovereign immunity.[11] According to the Tate Letter, "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*)."[12] However, the Tate Letter did not give the courts any guidelines for subsequent decisions on this new restrictive immunity, and the courts still looked toward the executive branch in determining questions of foreign sovereignty jurisdiction.[13]

Early in 1976, the Supreme Court decided *Alfred Dunhill of London, Inc. v. Cuba*,[14] a precursor to the FSIA.[15] In *Alfred Dunhill*, the Supreme Court adopted what would later become the commercial activity exception of the FSIA, even though the case was not decided on foreign sovereign immunity grounds.[16] The Court noted that "the United States has adopted and adhered to the policy declining to extend sovereign immunity to the commercial dealings of foreign governments."[17]

Later in 1976, Congress enacted the FSIA,[18] which provided a framework to help courts determine jurisdiction in foreign sovereignty cases.[19] Congress enacted the FSIA to achieve several objectives, including "facilitating the method whereby plaintiffs could institute suits in U.S. courts against non-United States governments for acts arising out of commercial activity, and providing a uniform statutory procedure for establishing subject matter and personal jurisdiction over non-U.S.

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10. *See* Mark B. Baker, *Whither* Weltover: *Has the U.S. Supreme Court Clarified or Confused the Exceptions Enumerated in the Foreign Sovereign Immunities Act?*, 9 TEMP. INT'L & COMP. L.J. 1, 3. (1995) (quoting the axiom "the king could do no wrong" from WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 458-69 (5th ed. 1942)).

11. *See* Siderman de Blake v. Argentina, 965 F.2d 699, 705 (9th Cir. 1992) (citing 26 Dep't of State Bull. 984 (1952)).

12. *Id. See* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711 (1976).

13. *See Siderman*, 965 F.2d at 705.

14. *Alfred Dunhill*, 425 U.S. at 705-06 (holding that the act of state doctrine did not apply to acts that were of a commercial nature rather than of a political nature).

15. *Alfred Dunhill* was decided on May 24, 1976. *See id.* at 682. However, Congress did not pass the FSIA until several months later, on Oct. 21, 1976. *See* Pub. L. 94-583, § 4(a), 90 Stat. 2892 (codified as 28 U.S.C. §§ 1601-1611).

16. *See Alfred Dunhill*, 425 U.S. at 694-98.

17. *Id.* at 701.

18. *See id.* at 694-98.

19. *See* Siderman de Blake v. Argentina, 965 F.2d 699, 705 (9th Cir. 1992).

sovereigns."[20] The FSIA was basically the codification of the "restrictive" view of sovereign immunity previously enacted by the State Department, and discussed by the Court in *Alfred Dunhill*.[21]

In section 1602 of the FSIA, Congress stated that allowing "the claims of foreign states to immunity from the jurisdiction of [U.S.] courts would serve the interests of justice and would protect the rights of both foreign states and litigants in the United States courts."[22] Congress also noted in the same section that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned."[23] In section 1605(a)(2), Congress specifically codified what is commonly known as the "commercial activity exception."[24] This section states that a foreign state loses its immunity 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.[25]

After the passage of the FSIA, both lower courts and the Supreme Court faced difficulties in determining what Congress meant by "commercial activity."[26] Gradually the courts developed case law that

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20. Avi Lew, Comment, Republic of Argentina v. Weltover, Inc.*: Interpreting the Foreign Sovereign Immunity Act's Commercial Activity Exception to Jurisdictional Immunity*, 17 FORDHAM INT'L L.J. 726, 736 (1994).

21. *See id.* at 738.

22. 28 U.S.C. § 1602.

23. *Id.*

24. *Id.* § 1605 (a)(2).

25. *Id.* (emphasis added). This section of the FSIA is commonly referred to by the three individual clauses contained within it because each defines a different situation for a commercial activity exception to foreign sovereign immunity. *See, e.g.*, Siderman de Blake v. Argentina, 965 F.2d 699, 708 (9th Cir. 1992) (referring to activities that come within the "first clause of the exception"); Argentina v. Weltover, 504 U.S. 607, 617 (1992) (discussing the meaning of the words "direct effect" from the third clause).

26. For the purposes of the FSIA, commercial activity is described in section 1603(d) as a "regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). In addition, the statute directs courts to look to the "nature of the course of conduct" rather than its "purpose." *Id.*

defined standards which formed the modern jurisprudence of the FSIA.[27] Courts have made extensive use of the legislative history of the FSIA contained in House Report 94-1487,[28] which discusses some of the ambiguities of the statute.[29] However, the development of clear-cut standards has been a long and difficult process since many of the ambiguities in the statute are both helped and hindered by House Report 94-1487, which provided guidelines as well as a "great deal of latitude" for the courts to determine what constitutes a commercial activity.[30]

Shortly after the enactment of the FSIA, courts such as the Southern District Court of New York, in *United Euram Corporation v. U.S.S.R.*,[31] interpreted the statute. The *United Euram* court held that when a sovereign state is engaged in the "sale of a service," regardless of its public purpose, suit for breach of such contract is within the commercial activity exception to the FSIA.[32] The court examined the nature of the activity and determined that contracts which require the payment of a fee and salaries to a foreign state constitute commercial activity, despite the public purpose behind them.[33]

In 1980, the District of Columbia Court of Appeals discussed the commercial activity exception in *Broadbent v. O.A.S.*[34] In *Broadbent*, the court stated that the purpose of the restrictive immunity doctrine is to "accommodate the legal interests of citizens doing business with foreign governments on the one hand, with the interests of foreign states in avoiding the embarrassment of defending the propriety of political acts before a foreign court."[35] The court held that the relationship between an international organization and its internal staff is not commercial in nature, and that actions arising out of this relationship are not justiciable in U.S. courts, regardless of whether international organizations enjoy absolute or restrictive immunity.[36]

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27. *See Weltover*, 504 U.S. at 610-17; Saudi Arabia v. Nelson, 507 U.S. 349, 356-63 (1993).

28. H.R. REP. NO. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604.

29. *See, e.g.*, Segni v. Commercial Office, 835 F.2d 160, 163 (7th Cir. 1990) (citing H.R. REP. NO. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615).

30. H.R. REP. NO. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615.

31. 461 F. Supp. 609 (S.D.N.Y. 1978).

32. *See id.* at 611.

33. *See id.* at 610-11.

34. 628 F.2d 27 (D.C. Cir. 1980).

35. *Id.* at 33.

36. *See id.* at 35. The court referred to House Report 94-1487 in coming to its conclusion since the intent behind the statute was to grant immunity to sovereignties when employing

The Ninth Circuit established more guidelines for interpreting the FSIA in *Joseph v. Office of the Consulate General*,[37] a case which arose out of a lease dispute.[38] In *Joseph*, the court explicitly stated that a Consulate was considered a separate legal person as well as a "foreign state" under the FSIA.[39] The court utilized the "private person" test,[40] which required the court to determine the commercial nature of an activity by whether a private individual could engage in that activity.[41] The court held that as a renter of property, the Consulate "entered the marketplace as a commercial actor."[42]

In *Segni v. Commercial Office*,[43] the Seventh Circuit examined the employment issue addressed in *Broadbent.*[44] The *Segni* court discussed an employment contract breach in terms of the commercial activity exception to the FSIA.[45] Using Congress's direction in section 1603(d) of the FSIA, the court looked at the nature rather than the purpose of the activity.[46] Although the distinction between nature and purpose was not easily made,[47] the court held that an employee who has "no role in the creation of the government policy or its administration" is not a civil servant or diplomatic personnel.[48] Thus, foreign sovereign immunity was not applicable.

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diplomatic, civil service or military personnel. H.R. REP. NO. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615.

37. 830 F.2d 1018 (9th Cir. 1987) (holding that neither the Nigerian Consulate's rental agreement, nor its breach of that agreement are sovereign activities).

38. *See id.* at 1022.

39. *See id.* at 1021 (citing Gerritsen v. de la Madrid Hurtado, 819 F.2d 1511 (9th Cir. 1987)).

40. This standard was first mentioned by Congress in House Report 94-1487, which referred to a contract which could be "made by a private person" as commercial in nature. H.R. REP. NO. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615. The Seventh Circuit, in *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, also adopted the private person standard, holding that paying for health services is not uniquely governmental, since private citizens can engage in identical activities. 877 F.2d 574, 581 (7th Cir. 1989). Additionally, the *Rush-Presbyterian* court noted that the Second Circuit had already adopted this standard. *See id*. at 578 n.4.

41. *See Joseph*, 830 F.2d at 1024.

42. *See id.*

43. 835 F.2d 160 (7th Cir. 1987).

44. *See id.* at 165.

45. *See id.* at 163.

46. *See id.*

47. *See id.* The court quoted the Fifth Circuit, stating that "commercial acts themselves are defined largely by reference to their purpose." *Id.* (quoting DeSanchez v. Banco Central, 770 F.2d 1385, 1393 (5th Cir. 1985)).

48. *Id.* at 165. The court noted that the plaintiff's job description was most like that of a marketing agent, and the act of hiring a marketing agent is an activity in which a private citizen could engage. *See id.* House Report 94-1487 specifically stated that the employment of marketing

In 1989, the Ninth Circuit spoke on the distinction between sovereign acts and commercial activity in *Gregorian v. Izvestia*.[49] In *Gregorian*, the court held that a Soviet newspaper was entitled to sovereign immunity from libel claims, since the nature of the commercial activity was "clearly governmental."[50] The court found that *Izvestia* articles were "official commentary of the Soviet government."[51] In addition, the court noted that the United States itself wrote an amicus curiae brief in favor of granting immunity to the U.S.S.R.[52]

Further analyzing the FSIA's requirements for obtaining jurisdiction over foreign sovereigns, the Ninth Circuit, in *America West Airlines, Inc. v. GPA Group, Ltd.*,[53] concluded that under the first clause of section 1605(a)(2) of the FSIA, the finding that a foreign state was engaged in commercial activities in the United States was not sufficient to create jurisdiction.[54] The court stated that a "nexus" was required between the defendant foreign sovereign's commercial activity and the claims of the plaintiff.[55] Thus, the court found that the fact that Ireland carried on commercial activities unrelated to the plaintiff's claim within the United States was insufficient to create jurisdiction.[56]

The Second Circuit, in *Shapiro v. Bolivia*,[57] used the first clause of section 1605(a)(2) of the FSIA to hold that Bolivia's issuing of public debt in the form of a negotiable promissory note to a U.S. corporation was a commercial activity as defined by the FSIA.[58] The court reasoned that the claim was based upon the issuing of public debt in the United States,

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agents would be within the definition of a commercial activity. H.R. REP. NO. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 6615.

49. 871 F.2d 1515 (9th Cir. 1989).

50. *See id.* at 1521.

51. *Id.* (quoting Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849, 856 (S.D.N.Y. 1978)).

52. *See id.* at 1522 (citing Statement of Interest of the United States, at 24).

53. 877 F.2d 793 (9th Cir. 1989).

54. *See id.* at 796. The nexus requirement is also mentioned in House Report 94-1487 regarding jurisdiction for suits against foreign states. H.R. REP. NO. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615. Under 28 U.S.C. § 1330(a), U.S. courts can obtain jurisdiction over foreign states as defined in § 1603(a) of the FSIA, as long as no exceptions to the FSIA apply.

55. *See America West*, 877 F.2d at 796 (citing Compania Mexicana de Aviacion, S.A. v. United States District Court, 859 F.2d 1354, 1360 (9th Cir. 1988); Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 452 (6th Cir. 1988)).

56. *See id.*

57. 930 F.2d 1013 (2d Cir. 1991).

58. *See id.* at 1018.

thus establishing the required "nexus" between the plaintiff's grievance and the defendant's activity.[59]

The Ninth Circuit, in *Schoenberg v. Exportadora de Sal, S.A.*,[60] further refined the nexus requirements for the FSIA exception.[61] The court stated that two components were necessary for this exception: "(1) that the foreign entity be engaged in commercial activity, and (2) that that commercial activity have 'substantial contact with the United States.'"[62] Since transporting people between the United States and a foreign country was a commercial activity in which private citizens could engage, and the plaintiff's claim was based on this activity, the court held that the Mexican government's acts fell within the commercial activity exception to the FSIA.[63]

The Ninth Circuit, in *Siderman de Blake v. Argentina*,[64] examined the first clause of section 1605(a)(2) of the FSIA, and found that an Argentinean hotel's receipt of payment and reservations in the United States was a commercial activity.[65] The court also held that the plaintiff's claim was sufficiently "based upon" this activity to form the required nexus for the exception to the FSIA.[66]

After the Circuit Courts had spent over fifteen years refining the standards to facilitate the correct interpretation of the FSIA, the Supreme Court finally gave its interpretation of section 1605(a)(2) in *Argentina v. Weltover, Inc.*[67] In *Weltover*, the Court examined the three clauses of section 1605(a)(2) of the FSIA, and concluded that "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA."[68] In addition, the Court stated that the commercial activity is determined as such, not by looking for a profit motive or a "uniquely sovereign objective," but by whether the activity is the type in "which a private party engages in 'trade and traffic or commerce.'"[69] Thus, the Court held that the issuing of bonds was a

59. *See id.* (quoting *America West*, 877 F.2d at 796).
60. 930 F.2d 777 (9th Cir. 1991).
61. *See id.*
62. *Id.* at 780 (quoting 28 U.S.C. § 1603(e)).
63. *See id.*
64. 963 F.2d 699 (9th Cir. 1992).
65. *See id.* at 709.
66. *See id.*
67. 504 U.S. 607 (1992).
68. *Id.* at 614.
69. *Id.* (quoting BLACK'S LAW DICTIONARY 270 (6th ed. 1990)).

commercial activity under the FSIA.[70] In addition, the Court examined the "direct effect" of the commercial activity in the United States, rejecting the requirement that a direct effect be both substantial and foreseeable.[71] The Court held that the only requirement is that a "direct effect" must be one that is "an immediate consequence" of the defendant's commercial activity.[72]

Following *Weltover*, the Southern District of Florida, in *AMPAC Group Inc. v. Honduras,*[73] held that the privatization of a national cement industry is an activity such that a private party engaged in commerce could do.[74] In addition, the court interpreted the *Weltover* Court's "direct effect" holding to mean that the contact with the United States need only be "a tangential one" in order to have a direct effect in the United States.[75] In *AMPAC*, the court found that the financial loss of AMPAC, in Florida, had a direct effect in the United States.[76]

In 1993, the Supreme Court again addressed the commercial activity exception to the FSIA in *Saudi Arabia v. Nelson.*[77] In this seminal case, the Court held that the plaintiff's claim of unlawful detention and torture by the Saudi Arabian government was "not 'based upon a commercial activity' within the meaning of the Act."[78] The *Nelson* Court found that the Saudi Arabian government's recruitment of the plaintiff in the United States was not the gravamen of the plaintiff's complaint, and that the nexus requirement under the FSIA was not satisfied.[79] The Court noted that Congress made an express differentiation between suits "based upon" commercial activities and suits "based upon" acts performed "in connection with" such activities, and concluded that the first reading requires something more than a "mere connection."[80] The Court also reaffirmed the validity of the private person standard, stating that if a private person engaging in commerce

70. *See id.* at 617.
71. *See id.* at 618.
72. *Id.* (quoting Weltover v. Argentina, 941 F.2d 145, 152 (2d Cir. 1991)).
73. 797 F. Supp. 973 (S.D. Fla. 1992), *aff'd*, 40 F.3d 389 (11th Cir. 1994).
74. *See id.* at 977.
75. *See id.*
76. *See id.*
77. 507 U.S. 349 (1993).
78. *Id.* at 351.
79. *See id.* at 356. Although the recruitment was a commercial activity, the plaintiff's claims of torture and imprisonment were based on a sovereign act by Saudi police. *See id.* at 357.
80. *Id.* at 357.

could do such acts, then the acts are not sovereign and the foreign state is not entitled to immunity under the FSIA.[81]

The employment of U.S. citizens was again discussed in *Gates v. Victor Fine Foods.*[82] The *Gates* court stated that the employment of U.S. citizens or residents is "well established as constituting a commercial activity."[83] In *Gates*, the court held that although the defendant foreign state was engaged in the commercial act of selling hogs to the United States, the plaintiff-employees' claim was unrelated to this activity.[84] The court stated that the mere fact that a foreign sovereign engages in commercial activities in or with the United States does not mean that the foreign government automatically loses its immune status under the restrictive immunity policy; the required nexus must still exist between the commercial activity and the plaintiff's claims.[85]

The Central District of California discussed the immunity of a consulate under the FSIA in *Berdakin v. Consulado de El Salvador*.[86] The court held that a consulate is the equivalent of a "foreign state" as defined by the FSIA.[87] Finding it "irrelevant that the defendant is a consulate rather than a company," the court held that when a consulate terminates a lease in breach, it does not matter that only a sovereignty can lease a land for a consulate, because the nature, not the purpose, should be considered.[88] Thus a breach of a lease is a commercial activity that a private party could engage in, leaving the consulate without immunity.[89]

In the noted case, the Ninth Circuit undertook a de novo review of the defendant's claim for sovereign immunity under the FSIA.[90] Noting that one of the FSIA's exceptions was the "sole basis" for obtaining jurisdiction over a foreign state, the court examined section 1605(a)(2) of the FSIA to determine if the defendant Canadian Consulate was entitled

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81. *See id.* at 362.

82. 54 F.3d 1457 (9th Cir.), *cert. denied*, 116 S. Ct. 187 (1995).

83. *Id.* at 1463 (citing H.R. REP. NO. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615).

84. *See id.* at 1465.

85. *See id.* at 1466.

86. 912 F. Supp. 458 (C.D. Cal. 1995).

87. *See id.* at 461 (quoting Gerritsen v. de la Madrid Hurtado, 819 F.2d 1511, 1517 (9th Cir. 1991)).

88. *Id.* at 462.

89. *See id.* at 463.

90. Holden v. Canadian Consulate, 92 F.3d 918, 920 (9th Cir. 1996). The court noted that it had jurisdiction under the "collateral order doctrine." *Id.* at 919 (citing Schoenberg v. Exportadora de Sal, S.A., 930 F.2d 777, 779 (9th Cir. 1991)).

to sovereign immunity or if jurisdiction existed for the lower court.[91] In examining the activity in question, the court looked at the nature of the activity rather than its purpose, to determine whether it was essentially a commercial activity.[92] The court referred to the legislative history of the FSIA, as well as to guidelines provided by the Supreme Court to make this determination.[93]

The Ninth Circuit noted that even after determining that the activity in question was commercial, the court must still find that the plaintiff's suit for wrongful termination is "based upon the commercial activity in question."[94] Before beginning its analysis, the court observed that the Consulate claimed that the activity in question was the closing of the Consulate, a clearly sovereign act requiring immunity.[95] The court found that since the plaintiff's claims of sex and age discrimination were based on the fact that she was fired while a younger man kept his job, the Consulate's defense of sovereign immunity had no merit.[96]

Finding that the activity in question was the termination of the plaintiff and not the closing of the Consulate, the court began its analysis of the act of employment within the definition and meaning of "commercial activity."[97] Since the FSIA's language does not give a clear definition of "commercial activity," the court turned to the legislative history for a review of the intent behind the statute.[98] House Report 94-1487 states that the employment of civil servants, military or diplomatic personnel is governmental in nature, but that the employment of American citizens, laborers, clerical staff and marketing agents falls within the commercial activity definition.[99]

Referring to the Seventh Circuit's decision in *Segni*, the court noted that the plaintiff in that case was hired to "develop the marketing of the Spanish wines in the midwest area of the United States," and sued for breach of contract after he was fired.[100] The *Segni* court held that the commercial activity exception applied, which denied immunity to

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91. *See id.* at 920.
92. *See id.*
93. *See id.*
94. *Id.* (quoting Gates v. Victor Fine Foods, 54 F.3d 1457, 1463 (9th Cir.), *cert. denied*, 116 S. Ct. 187 (1995)).
95. *See id.*
96. *See id.* at 920-21.
97. *See id.* at 920.
98. *See id.*
99. *See id.* (citing H.R. REP. NO. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615).
100. *See id.* (quoting Segni v. Commercial Office, 835 F.2d 160 (7th Cir. 1987)).

Spain.[101] Since the employment of a marketing agent is an activity that a private person could engage in, the court was justified in allowing the exception to apply.[102]

In the noted case, the Ninth Circuit examined Holden's job and the nature of her employment to determine if she would be classified as a civil servant or diplomatic personnel.[103] Finding that she did not take any examination before being hired, did not get tenure, did not receive foreign service benefits, and did not get civil service protection from Canada, the court concluded that she was not a civil servant.[104] In addition, the court found that Holden's work was not in the nature of what a diplomat would do, since she was primarily concerned with marketing and promoting, and was not a policy-maker nor privy to governmental policy deliberations.[105] In addition, the plaintiff was not allowed in the Consulate without a foreign service officer to accompany her.[106]

The court ultimately concluded that Holden's employment most closely resembled that of a marketing agent.[107] Even though the purpose of her work was to "promote trade solely for trade's sake, and not for commercial gain," the court noted that the nature of the act should be examined and not the foreign sovereign's stated purpose behind the act.[108] Thus, the court held that the commercial activity exception to the FSIA applied, denied immunity to the Canadian government, and gave subject matter jurisdiction to the district court.[109]

The noted case relied on the Seventh Circuit's decision in *Segni*, the Supreme Court's guidelines set forth primarily in *Nelson* and *Weltover*, and the legislative history behind the FSIA in order to determine that the Consulate's employment of an American citizen was a commercial activity.[110] Looking both at the legislative history of the FSIA as well as the jurisprudence concerning section 1605(a)(2), the Ninth Circuit's decision to deny immunity to the Canadian Consulate was correct.

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101. *See id.*
102. *See id.*
103. *See id.* at 921.
104. *See id.*
105. *See id.* at 920.
106. *See id.*
107. *See id.*
108. *Id.*
109. *See id.*
110. *See id.* at 920-21.

According to the FSIA's legislative history,[111] the hiring of marketing agents is a commercial activity, and Holden's employment most closely resembled that of a marketing agent.[112] Thus, her employment was a commercial activity. Since her claims were based on the termination of this employment, the required nexus between the defendant's commercial activity and the plaintiff's cause of action existed.[113] The Ninth Circuit had sufficient justification under section 1605(a)(2) to find jurisdiction for the lower court.[114]

However, by holding that the Canadian Consulate was not entitled to sovereign immunity, the court ignored the Consulate's claim that the closing of the Consulate itself was the activity to be examined.[115] The court readily agreed that the closing of the Consulate was a uniquely sovereign act, entitled to full immunity, but said that it was not in question since the plaintiff's claim was in regard to her termination while a fellow employee retained his job.[116]

At first blush this answer seems both logical and plausible, but further examination reveals flaws in the court's reasoning. It is misleading to assume that the plaintiff's claims will accurately pinpoint the cause of her injury. The Consulate's claim was an affirmative defense and was entitled to a full examination in relation to the facts.[117] In examining the cause of Holden's job loss, the court had to choose between two options: either Holden lost her job because the Consulate closed, or she lost her job because the Consulate terminated her without cause in favor of the younger man.[118] Although the court chose the latter option, the quick dismissal of the Consulate's claim was not appropriate because the crux of the matter was to make an informed and accurate determination on the immunity issue.[119]

The Supreme Court, in *Saudi Arabia v. Nelson*, found that the actual cause of the plaintiff's injury was sovereign in nature, even though

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111. *See* H.R. REP. NO. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615.

112. This determination is also supported by the Seventh Circuit's decision in *Segni v. Commercial Office*, 835 F.2d 160 (7th Cir. 1990).

113. *See Holden*, 92 F.3d at 920. See also *Schoenberg v. Exportadora de Sal, S.A.*, 930 F.2d 777, 780, *America West v. GPA Group, Ltd.*, 877 F.2d 793, 796 (9th Cir. 1989), and *Shapiro v. Bolivia*, 930 F.2d 1013, 1018 (2d Cir. 1991), for discussion on the "nexus" requirement of the FSIA.

114. *See Holden*, 92 F.3d at 920.

115. *See id.*

116. *See id.* at 921.

117. *See id.*

118. *See id.*

119. *See id.* at 920-21.

the foreign state's commercial activity led to the plaintiff's injury.[120] Using this as an example, it follows that the court in the noted case could have concluded that the claims of the plaintiff might be based on a commercial activity that was not the actual cause of her injury.[121] The loss of the plaintiff's job could be a result of the closing of the Canadian Consulate, and not a result of her employment by the Canadian government.[122]

In *Segni v. Commercial Office*, a case cited extensively by the court in the noted case, the Seventh Circuit found that the employee who filed the claim was a marketing agent, whose termination was covered by the FSIA.[123] In contrast to the noted case, the defendant foreign state in *Segni* claimed that the plaintiff was a diplomatic employee who could be fired at will, but did not claim that an overshadowing political decision caused the termination of several employees.[124] Although the fact patterns of *Segni* and the noted case are similar, the Canadian Consulate's defense cannot be found within *Segni*, indicating that the Canadian government's defense should have been given more than a cursory glance.[125]

Although the plaintiff was not challenging, per se, the Canadian government's right to close the Consulate, the result of this jurisdictional inquiry reduces her claim to just that.[126] The closing of a large office in the name of efficiency often results in the loss of jobs to many employees, some chosen without adequate justification. However, in this case the large office happens to be the Canadian Consulate, the closing of which is an undeniably sovereign act.[127]

Even though courts have consistently applied the "nature over purpose" standard in examining whether an activity is a commercial one, the distinction is often blurred.[128] In the noted case, the "purpose" behind

120. *See* Saudi Arabia v. Nelson, 507 U.S. 349, 358 (1993).
121. *See Holden*, 92 F.3d at 920-21.
122. *See id.* at 920.
123. *See* Segni v. Commercial Office, 835 F.2d 160, 161 (7th Cir. 1987).
124. *See id.* at 164.
125. *See Holden*, 92 F.3d at 920.
126. *See id.* at 921.
127. *See id.* at 920-21.
128. *See Segni*, 835 F.2d at 163-64 (holding that a governmental policy to increase imports of Spanish wines still fell within the commercial activity exception of the FSIA); Berdakin v. Consulado de El Salvador, 912 F. Supp. 458, 462 (C.D. Cal. 1995) (holding that the purpose of leasing land for a Consulate had no bearing on the Consulate's immunity because the nature of the transaction in question was commercial).

the termination of the plaintiff is the same as the nature.[129] The Canadian government's purpose was to close the Consulate, and the subsequent activity was the physical closing of the Consulate.[130] While it can be successfully argued that the closing of the Consulate is unrelated to the termination of the employees, it is intuitive that the closing of any office would result in the elimination or downsizing of the office staff.[131] Since the court has stated that closing the Consulate was a sovereign act, it follows that the release of employees is also a sovereign act.[132]

According to *Broadbent v. O.A.S.*, the purpose behind the enactment of the FSIA was to "accommodate the legal interests of citizens doing business with foreign governments on the one hand, with the interest of foreign states in avoiding the embarrassment of defending the propriety of political acts before a foreign court."[133] The policy behind the principle of sovereign immunity is granting foreign states the freedom to conduct business within the United States, with U.S. citizens, without having to justify each political, governmental or public act. By allowing this suit to proceed, the Ninth Circuit expanded the commercial activity exception of the FSIA to include the political decision of closing a consulate in the United States. The court removed the Canadian Consulate's sovereign immunity defense, and forced Canada to defend a suit on foreign soil for an activity that was political in nature.

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129. *See Holden*, 92 F.3d at 920-21.
130. *See id.* at 920.
131. *See id.*
132. *See id.*
133. Broadbent v. O.A.S., 628 F.2d 27, 33 (D.C. Cir. 1980).