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Stuart F. Clayton Jr.

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NOTES

Foreign Exchange Controls and Public Policy: Strange Bedfellows of United States Law

Plaintiffs seeking redress for injuries arising from the actions of foreign governments and their instrumentalities have traditionally encountered imposing barriers. The age-old maxim that "the king can do no wrong" has retained remarkable vitality in cases involving foreign sovereigns. Congress attempted to establish uniformity of U.S. policy in this area with its 1976 enactment of the Foreign Sovereign Immunities Act (FSIA).¹ The case law of the intervening decade, however, has demonstrated both inadequacies of omission in the FSIA statutory scheme and a somewhat inconsistent pattern of interpretation by U.S. courts of certain of its provisions. *De Sanchez v. Banco Central de Nicaragua*,² a recent decision of the Fifth Circuit Court of Appeals, is one of a growing number of cases arising under the FSIA which involve the liability of foreign banks to individual plaintiffs in the United States. In deciding these cases, courts are invariably hampered in their attempts to define the scope of the FSIA's exceptions to sovereign immunity by the Act's own ambiguity, especially in situations involving the imposition by foreign governments of exchange control legislation.

This Note focuses on the *De Sanchez* decision as a particularly illustrative example of the alternative theories of recovery available to a plaintiff pursuing an action against a foreign bank through the FSIA, and the corresponding limitations on each. It further attempts to define the role played by exchange control regulations, especially as those regulations pertain to the Act's commercial activities exception.³ Finally, the Note offers a discussion of the likely effects of proposed revisions to the FSIA on cases involving foreign banks and

¹ Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(2)-(4), 1391(f), 1441(d), 1602-1611 (1982)).

² 770 F.2d 1385 (5th Cir. 1985).

³ 28 U.S.C. § 1605(a)(2) (1982) provides an exception to 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. . . .

more generally suggests other possible means of increasing the reliability of U.S. policy on foreign sovereign immunity.

Josefina Najarro de Sanchez, plaintiff in the present case, is the wife of General Herberto Sanchez, former Minister of Defense under the Nicaraguan government of President Antonio Somoza.⁴ Her difficulties arose in the context and as an indirect result of the deposition of the Somoza regime by the presently ruling Sandinistas. In September 1978 Ms. Sanchez purchased a certificate of deposit (CD) in the amount of \$150,000 from Banco Nacional de Nicaragua, a then privately-owned commercial Nicaraguan bank.⁵ In June of the following year, with the collapse of the Somoza government imminent, Ms. Sanchez left the country with plans to settle in the Miami area. Shortly thereafter, she instructed her husband, still in Nicaragua, to have the certificate redeemed. Banco Nacional was unable to comply with the request due to a shortage of dollars.⁶ Fortunately for the plaintiff, however, Dr. Roberto Incer, President of the Nicaraguan Central Bank (Banco Central de Nicaragua) was also a cousin of General Sanchez. Dr. Incer intervened and subsequently instructed Banco Central to issue a check to Sanchez in the amount of \$150,000 and to debit the account of Banco Nacional in a like amount.⁷ The check, drawn on Banco Central's account with Citizens and Southern International Bank (C&S) of New Orleans and immediately forwarded to Ms. Sanchez, is at the center of the present controversy.

When Ms. Sanchez presented the check at the C&S main office in mid-July, she discovered that she faced difficulties. Pursuant to its rights under the Uniform Commercial Code,⁸ C&S refused to honor the check pending a resolution of the political conflict in Nicaragua. On July 23, 1979, C&S received a telex from the new government of that country confirming an earlier telephoned instruction that the assets of Banco Central's account be frozen. Soon thereafter, the new government of Nicaragua enacted provisions regulating the allocation of the country's remaining foreign exchange resources.⁹ As a

⁴ *De Sanchez*, 770 F.2d at 1387.

⁵ *Id.* The certificate, made payable in U.S. dollars, was to mature on October 6, 1982. It specified that redemption could not occur before this date. *Id.*

⁶ *Id.* President Somoza himself wrote Banco Nacional requesting that plaintiff's certificate be redeemed as a "special case." *Id.*

⁷ *Id.* at 1388. Dr. Arturo Cruz, president of Banco Central under the new regime, described this transaction as an "outright violation" of Nicaraguan foreign exchange law. *Id.* at 1389 n.2.

⁸ U.C.C. § 4-403 (1978) provides in pertinent part

- (1) A customer may by order to his bank stop payment of any item payable for his account but the order must be received at such time and in such a manner as to afford the bank a reasonable opportunity to act on it . . .
- (2) An oral order is binding upon the bank only for fourteen calendar days unless confirmed in writing within that period. . . .

⁹ All sales of foreign exchange were temporarily halted in late August while the government compiled a list of priorities for imports. 1980 INT'L MONETARY FUND ANN. REP. ON EXCHANGE ARRANGEMENTS AND EXCHANGE RESTRICTIONS 290.

result, the bank's obligation to Ms. Sanchez was determined to be of insufficient priority to warrant payment.¹⁰

Ms. Sanchez thereafter brought suit for payment of the check in the United States District Court for the Eastern District of Louisiana alleging breach of duty, misrepresentation, conversion, and breach of contract, and claiming \$150,000 in damages plus interest. Banco Central moved to dismiss the action based on lack of jurisdiction.¹¹ The motion was denied, and Banco Central appealed.

The ability to bring suit against a foreign sovereign has long been limited by the principle of foreign sovereign immunity and the act of state doctrine.¹² In its 1812 resolution of *Schooner Exchange v. McFaddon*¹³ the Supreme Court was offered its first opportunity to enunciate U.S. policy in this area.¹⁴ Chief Justice Marshall, writing for a unanimous Court, set forth a rule of sovereign immunity based on an interpretation of the common law, which was sensible in its parameters.¹⁵ That decision, however, was subsequently relied on

¹⁰ 770 F.2d at 1388. The check was placed in the category of "[s]ales of foreign exchange to the National Guard . . . and to those who are associated or friends of the National Guard." *Id.* at 1388 (citing Deposition of Arturo Cruz at 30).

¹¹ *De Sanchez v. Banco Central de Nicaragua*, 515 F. Supp. 900 (E.D. La. 1981), *aff'd*, 770 F.2d 1385 (5th Cir. 1985).

Banco Central filed an additional motion to dismiss following the Second Circuit's decision in *Verlinden B.V. v. Central Bank of Nigeria*, 647 F.2d 320 (2d Cir. 1981), *rev'd*, 103 S. Ct. 1962 (1983), which held there is no federal subject matter jurisdiction in a controversy between aliens. The district court proceedings were stayed pending the Supreme Court ruling in that case.

In *Verlinden* a Dutch corporation brought suit in U.S. district court for anticipatory breach of a letter of credit by the Federal Republic of Nigeria. On appeal, the Second Circuit Court of Appeals ruled that neither the diversity clause nor the "arising under" clause of article III is broad enough to confer jurisdiction over actions by foreign plaintiffs against foreign sovereigns. *Verlinden*, 647 F.2d 320. The Supreme Court reversed, ruling that the "jurisdictional grant is within the bounds of Article III, since every action against a foreign sovereign necessarily involves application of a body of substantive federal law, and accordingly arises under federal law, within the meaning of Article III." 103 S. Ct. at 1973. After this Supreme Court reversal, the stay on the *De Sanchez* proceeding was lifted.

¹² The "act of state" doctrine, on which ground the district court ultimately dismissed Ms. Sanchez' action, precludes U.S. courts from "inquiring into the validity of governmental acts of a recognized foreign sovereign committed within its own territory." BLACK'S LAW DICTIONARY 32 (5th ed. 1979); *See Banco Central de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

¹³ 11 U.S. (7 Cranch) 116 (1812).

¹⁴ In *Schooner Exchange* shipowners alleged wrongful confiscation of their vessel by Napoleon's navy. Chief Justice Marshall, in explaining the particular necessity of granting immunity in cases involving foreign war vessels, wrote:

She [the vessel] constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity.

Id. at 144.

¹⁵ The holding of *Schooner Exchange* was expressly limited to cases involving military property. Mr. Dallas, the U.S. Attorney for the District of Pennsylvania, anticipated even then the need for a commercial exception by conceding that "if the sovereign descend

for the United States' adoption of the "absolute doctrine" which interprets international law as precluding the courts of one state from acquiring jurisdiction over the person or property of a foreign state.¹⁶

Some mitigation of the harsh results of the absolute doctrine was accomplished over the years through the adoption of a number of judicial exceptions.¹⁷ Otherwise, the doctrine remained virtually intact until the middle part of this century. As the United States finally began abandoning its self-proclaimed post-World War I policy of isolationism, it became increasingly apparent to both the executive and judicial branches that the absolute doctrine had lost its vitality. Courts increasingly came to rely on the State Department's judgment in making sovereign immunity determinations¹⁸ due both to the Department's presumed expertise in the area of foreign affairs and to avoid embarrassing conflicts among the governmental branches. Formal adoption of this policy of executive intervention came with the issuance of the Tate Letter by the U.S. State Department in 1952.¹⁹ No longer would foreign sovereigns enjoy absolute immunity from suit in the United States. Under the newly adopted restrictive theory, implemented jointly by the executive and judicial branches, immunity presumably would only be granted to sovereigns and their instrumentalities "in respect of governmental acts (acts *iure imperii*), not in respect of commercial acts (acts *iure gestonis*)."²⁰

State Department involvement in these jurisdictional determinations resulted in a number of decisions based upon political rather than strictly legal considerations.²¹ Thus, one of Congress' primary purposes in its 1976 enactment of the FSIA was to "depoliticize" sovereign immunity decisions by transferring the entire decision

from the throne and become a merchant, he submits to the laws of the country. If he contract private debts, his private funds are liable." *Id.* at 123.

¹⁶ M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 110 (4th ed. 1982).

¹⁷ See, e.g., *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945) (if action is *in rem*, immunity will be refused under certain circumstances); *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922) (no immunity for sovereign instrumentality incorporated under state law).

¹⁸ See *Compania Espanola de Navegacion Maritima v. The Navemar*, 303 U.S. 68, 74 (1938) ("If the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction.").

¹⁹ Letter from Jack B. Tate, Acting Legal Advisor of the Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 DEP'T ST. BULL. 984 (1952). According to Mr. Tate, "the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." *Id.*

²⁰ M. AKEHURST, *supra* note 16, at 110.

²¹ See *Rich v. Naviera Vacuba*, 295 F.2d 24 (4th Cir. 1961) (State Department recommends immunity for Cuban merchant vessel while at the same time conducting delicate negotiations with Cuban government over hijacked commercial airliner).

making process back to the judicial branch.²² Central to the structure of the Act is section 1604, setting forth the general rule of immunity of foreign states from jurisdiction.²³ Section 1605 provides a number of exceptions to this general grant of immunity, the most significant being section 1605(a)(2), directed at governmental entities engaged in essentially commercial endeavors.²⁴

One of the alternative grounds for exercising jurisdiction over Banco Central was its possible lack of immunity pursuant to this commercial exception to the FSIA.²⁵ In short, plaintiff argued that Banco Central is by nature²⁶ a commercial institution, and similarly, that the transaction in question, the issuance and nonpayment of the check, was a commercial act. The defendant bank refuted this allegation, claiming that all determinations of proper allocation of foreign exchange reserves are made within the framework of governmentally enacted exchange control regulations, making the determinations themselves governmental.²⁷ A threshold question to resolving the present controversy would thus seem to be the proper characterization of exchange control restrictions, an issue which the *De Sanchez* court chose to ignore.²⁸

Modern nations faced with a shortage of foreign exchange seem almost automatically to resort to some form of exchange control regulation. These measures are, in general, "designed to maintain the international value of a nation's own currency and improve its balance of payments position by regulating the purchase and sale of foreign currency."²⁹ The adoption of such controls may be prompted by any one or a combination of economic exigencies including: a decline in the price of export commodities, capital flight induced by a deteriorating exchange rate, or a refusal by foreign lending institutions to continue liberal payment rescheduling policies due simply to

²² *National Airmotive Corp. v. Iran*, 499 F. Supp. 401 (D.D.C. 1980).

²³ 28 U.S.C. § 1604 (1982) reads

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

²⁴ 28 U.S.C. § 1605(a)(2), *supra* note 3. Other exceptions to immunity include § 1605(a)(1) (express or implied waiver of immunity), § 1605(a)(4) (rights in property acquired by succession or gift), and § 1605(b) (certain suits in admiralty). 28 U.S.C. § 1605 (1982).

²⁵ *Id.* § 1605(a)(2).

²⁶ *Id.* § 1603(d) states:

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.

²⁷ *De Sanchez*, 770 F.2d at 1393.

²⁸ An account of the initial imposition of exchange controls and the economic considerations which prompted the move is provided in the district court disposition. *De Sanchez*, 515 F. Supp. at 908-09.

²⁹ C. AMMER & D. AMMER, *DICTIONARY OF BUSINESS AND ECONOMICS* 157 (1979).

a lack of confidence.³⁰ The growing debt problems of the lesser developed countries have resulted in an increase in litigation involving foreign exchange law.³¹ Nonetheless, courts confronted with conflicts in this area, especially regarding the issue of jurisdiction under the FSIA, often tend to overlook significant considerations.

Regardless of the tendency of exchange controls to operate to the detriment of foreign creditors, they are not generally declared in violation of public policy by the courts of foreign jurisdictions.³² As F.A. Mann, a noted commentator on the legal aspects of exchange restrictions, has explained:

The reason does not lie so much in the fact that very many States have been compelled from time to time to adopt them [exchange controls] and that, consequently, it is not open to the courts to condemn foreign legislation that is not different from the legislation of their own country. The real reason is that exchange control is merely an aspect or a ramification of a system of physical control to which the modern world has become used, which it does not in general abhor, and to which it applies established principles of law.³³

Therefore, public policy offers little protection to the foreign creditor when controls are necessary and properly limited.³⁴

This does *not* mean, however, that public policy may not assert itself against exchange control restrictions which are not necessary or which are unfairly implemented. Again, as Mann states:

The legislation of foreign countries may be so oppressive or discriminatory in character or application or so inconsistent with treaty obligations . . . or so contrary to the fundamental rights of man's personal freedom or otherwise so opposed to the policy of English law that it may have to be denied recognition in this country.³⁵

Thus, it might be said that exchange controls carry with them merely a presumption of validity.³⁶

³⁰ See W. CLINE, *INTERNATIONAL DEBT AND THE STABILITY OF THE WORLD ECONOMY* 22, 62-63 (1983).

A significant body of commentary and case law on the consequences of exchange legislation arose in the wake of the Mexican economic crisis of 1982. See, e.g., *Wolf v. Banco Nacional de Mexico*, 739 F.2d 1458 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 784 (1985); *Braka v. Bancomer*, 589 F. Supp. 1465 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 222 (2d Cir. 1985). See generally *Symposium on Doing Business in Mexico: The Impact of Its Financial Crisis*, 18 INT'L LAW. 285 (1984).

³¹ See generally *DEVELOPING COUNTRY DEBT* (L. Franco & M. Seiber eds. 1979).

³² F. A. MANN, *THE LEGAL ASPECT OF MONEY* 404-405 (4th ed. 1982). Mann also recognizes authority for the proposition that exchange controls are incapable of international recognition. *Id.* at 402 nn.5-7.

³³ *Id.* at 405 (the author goes on to analogize exchange controls to import and export restrictions which are given virtually universal recognition).

³⁴ There is case law, however, to the effect that Switzerland may refuse recognition of all foreign exchange controls as contrary to Swiss *ordre public*. The courts of Austria, Germany, and Norway have occasionally expressed similar views. *Id.* at 402-03 nn.8-16.

³⁵ *Id.* at 406.

³⁶ It must be stressed that a dearth of U.S. cases support the principle that foreign exchange controls may be incompatible with domestic public policy. See *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir. 1985); *Kassel v. N.V. Nederlandsch Amerikaansche Stoomvaart Maatschappij*, 261 A.D. 71, 24 N.Y.S.2d 450

The enforceability of a nation's exchange control restrictions may well be influenced by its status as a member of the International Monetary Fund (IMF).³⁷ This organization, created at the Bretton Woods International Monetary Conference of July 1944,³⁸ serves through various means to promote stability among the economies of its members.³⁹ Article VIII, section 2(B) of the Fund's Articles of Agreement is the pivotal provision on the issue of exchange controls.⁴⁰ This section provides that where exchange control regulations have been implemented pursuant to IMF guidelines, any exchange contract that is found to be inconsistent with those regulations is unenforceable in the courts of all Fund members.⁴¹ Even within the IMF framework, however, public policy considerations need not be overlooked.⁴² In a 1970 decision,⁴³ the Dutch Hoge Raad had the opportunity to consider whether Indonesian exchange controls implemented in violation of Netherlands' public policy must nonetheless be given effect due to IMF membership by both nations. The court concluded that the Bretton Woods agreement was no bar

(1940) (refusing recognition of internal exchange laws of the German Reich where contract sued on was substantially performed in New York). *But see* French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968) (pronouncing the widely accepted U.S. view that foreign exchange controls are to be accepted as a normal measure of government).

³⁷ Both the U.S. and Nicaragua are IMF members.

³⁸ Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1502, 2 U.N.T.S. 39, amended May 31, 1968, 20 U.S.T. 2775, T.I.A.S. No. 6748, 726 U.N.T.S. 226, amended Apr. 30, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937 [hereinafter cited as Articles of Agreement].

³⁹ The broad purposes of the IMF are "to promote international monetary cooperation, facilitate the expanded and balanced growth of international trade, promote exchange stability, help establish a multilateral system of payments for current transactions among members, and make available to members the fund's resources." C. AMMER & D. AMMER, *supra* note 29, at 239. *See also*, Articles of Agreement, *supra* note 38, at art. I.

⁴⁰ Articles of Agreement, *supra* note 38, art. VIII, § 2(b) provides:

Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measure and regulations are consistent with this Agreement.

⁴¹ International Monetary Fund, Doc. No. 446-4 (June 10, 1949).

⁴² On this issue, Mann has stated that

although exchange control regulations as a whole may be maintained consistently with the Fund Agreement, certain of their specific effects may be such as to require or permit the refusal to apply them in a given case on the ground of public policy. This may occur when their application would be discriminatory or penal in character or otherwise obnoxious. There is nothing in the Fund Agreement that would compel the courts in a given case to reach decisions which are offensive to their sense of justice; they are precluded only from ignoring a member State's exchange control regulations as a matter or principle of *a priori* reasoning.

F.A. MANN, *supra* note 32, at 376.

⁴³ Indonesian Corporation P.T. Escomptobank v. N.V. Assurantie Maatschappij de Nederlanden van 1845, 1965 N.J. 81, 40 INT'L L. REP. 7 (1970). The Hoge Raad is the highest court of the Netherlands.

to the action inasmuch as it concerns only "normal financial relations between states."⁴⁴ The majority international view is, admittedly, contrary to that of the Dutch case,⁴⁵ but at least the rationale of those nation's positions has received expression in the courts. In general, the approach of U.S. courts is to accept any action of a foreign state done within the framework of exchange control regulations as governmental, without ever *considering* whether the action might violate public policy.⁴⁶

Indeed, in one of the few cases in which U.S. public policy has been considered, the court did so on rehearing and only after intervention by the executive branch. *Allied Bank International v. Banco Credito Agricola*⁴⁷ involved a syndicate of U.S. banks which had found itself unable to recover the balance due on certain promissory notes from Costa Rican banks. Payment of the notes had been suspended when, in response to escalating national economic problems, the governmentally-run Costa Rican Central Bank issued regulations which had the effect of suspending the majority of external debt payments. A later executive decree made all payments of external debt subject to express approval by Central Bank.⁴⁸ When the U.S. syndicate failed to obtain this approval, it brought suit to accelerate the notes and recover their balance. Initially, the court held for the defendant stating that "the legislative and judicial branches of our government fully supported Costa Rica's actions and all of the economic ramifications."⁴⁹

Subsequently, the Justice Department joined the litigation as *amicus curiae* and disputed the court's reasoning. Despite Costa Rica's IMF membership, the Justice Department brief attacked Costa Rica's actions as a "unilateral restructuring of private obligations . . . inconsistent with United States policy."⁵⁰ Specifically, the Justice Department brief explained that the Costa Rican plan was inconsistent with the IMF strategy of debt resolution "grounded in the understanding that, while parties may agree to renegotiate conditions of payment, the underlying obligations to pay nevertheless remain valid."⁵¹ On the basis of the Justice Department's findings, the court

⁴⁴ *Id.* at 98, 40 INT'L L. REP. at 15.

⁴⁵ See *Perutz v. Bohemian Discount Bank*, 304 N.Y. 533, 534, 110 N.E.2d 6, 7, 110 N.Y.S.2d 446, 447 (1953) ("the Czechoslovakian currency control laws in question cannot here be deemed to be offensive on that score [as against public policy], since our Federal Government and the Czechoslovakian Government are members of the International Monetary Fund. . .").

⁴⁶ Essential to remember in this context is that the burden of establishing FSIA immunity lies with the party claiming it. H.R. REP. NO. 94, 94th Cong., 2d Sess. 1, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604.

⁴⁷ 757 F.2d 516 (2d Cir. 1985).

⁴⁸ *Id.* at 519.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* Indeed, art. VIII, § 2(b) of the Articles of Agreement, which mandates enforce-

of appeals vacated its earlier judgment and ultimately held for the plaintiffs.⁵²

The *De Sanchez* court was faced with a foreign exchange control arrangement remarkably similar to that in *Allied Bank*. Banco Central de Nicaragua, like its Costa Rican counterpart, was given authority to determine what foreign debts would be paid.⁵³

Ms. Sanchez' check was categorized by the bank as "sales of foreign exchange to the National Guard . . . and to those who are associated or friends of the National Guard."⁵⁴ Debts in this category were ultimately determined to be of insufficient priority to warrant payment. Under the FSIA commercial activity exception, a sovereign or its instrumentality will be amenable to suit in the United States whenever the transaction giving rise to the complaint is commercial in nature.⁵⁵ The principal reason cited by the court for denying Ms. Sanchez' claim of commercial status was that Banco Central's actions were carried out in furtherance of its "responsibility for the control and management of Nicaragua's monetary reserves" pursuant to exchange regulations.⁵⁶

Two factors indicate that the *De Sanchez* court should, at a minimum, have considered possible policy implications of the Nicaraguan exchange regulations before making its commercial/governmental determination. First, as in *Allied Bank*, there is no evidence in *De Sanchez* that the Nicaraguan Central Bank's repayment plan was grounded in the broad IMF policy of attempting to renegotiate conditions of payment.⁵⁷ Instead, Ms. Sanchez, like the plaintiff bank syndicate, had been denied payment altogether. Need the executive branch intervene in every instance before a court will recognize that exchange controls violate public policy?⁵⁸ A primary purpose of Congress' enactment of the FSIA was to eliminate the necessity of just this type of executive involvement in sovereign immunity disputes.⁵⁹ No impediments exist preventing an accurate judicial assessment of whether foreign exchange controls are discriminatory, overly stringent, or otherwise unfair.⁶⁰

In addition, the explanation offered by Banco Central for refus-

ment of exchange controls within the IMF, is specifically limited to regulations "consistent with this agreement." Articles of Agreement, *supra* note 40.

⁵² 757 F.2d at 523.

⁵³ *De Sanchez*, 770 F.2d at 1388.

⁵⁴ *Id.*

⁵⁵ 28 U.S.C. § 1605(a)(2) (1982).

⁵⁶ 770 F.2d at 1393.

⁵⁷ See Articles of Agreement, *supra* note 40. See also *supra* note 51.

⁵⁸ For an affirmative answer see Remarks of Beverly Carl, 1980 AM. SOC. INT'L L. PROC. 77-78.

⁵⁹ See *Rich v. Naviera Vacuba*, 295 F.2d 24 (4th Cir. 1961).

⁶⁰ The burden of bringing forth evidence on the governmental character of the exchange controls would seemingly lie with the foreign sovereign. H.R. REP., *supra* note 46.

ing payment of Ms. Sanchez' check—her association with a particular group—has been cited as a rationale for invalidating such controls.⁶¹ In the decision of *Re Lord Cable*⁶² a British court, in declaring that it would recognize Indian exchange controls, posited that “[d]ifferent considerations might conceivably apply if the particular control legislation had been passed or was being used as an instrument of oppression or discrimination.”⁶³ Indeed, the logic of invalidating discriminatory exchange control provisions as inappropriate components of an economic policy is readily apparent.

Bypassing any consideration of public policy implications, the court's unanimous opinion in *De Sanchez* applied the accepted FSIA analytical approach to resolve the commercial/governmental question. The first step under section 1605(a)(2) is to “define with precision the activity, and the act in connection with that activity, that gave rise to plaintiff's claim.”⁶⁴ In *De Sanchez* the issuance of the check was determined to be the crucial activity and the failure to honor it the crucial act.⁶⁵ The next step is to determine whether the defendant's actions were “commercial.” Congress left to the courts the interpretation of this relatively vague designation on which a party's entitlement to immunity may depend.⁶⁶ Perhaps the best means derived for making the determination is the rule of thumb that an act will be deemed commercial if it is “one in which a private person could engage, . . .”⁶⁷ The difficult delineation in *De Sanchez* did not involve the character of the bank⁶⁸ but the character of its dealings with Ms. Sanchez. Federal courts confronted with cases involving the Mexican government's imposition of exchange controls generally characterized the failure of Mexican banks to honor CDs as commercial, even where those failures were induced by the exchange control restrictions.⁶⁹ Significantly, however, those banks had entered the market to sell CDs for a profit, an activity generally carried

⁶¹ A number of courts involved with restitution of property following World War II invalidated German exchange controls in light of provisions that discriminated against Jews. *Deklo v. Levi*, 12 *Pisket-Din* 745 (1958), cited in F.A. MANN, *supra* note 32, at 406 n.25.

⁶² [1976] 3 All E.R. 417.

⁶³ *Id.* at 435.

⁶⁴ *Braka v. Bancomer*, 589 F. Supp. 1465, 1469 (S.D.N.Y. 1985), *aff'd*, 762 F.2d 222 (2d Cir. 1985).

⁶⁵ 770 F.2d at 1391.

⁶⁶ *Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 28 (1976) (testimony of Monroe Leigh, Legal Adviser, Department of State).

⁶⁷ *Texas Trading & Milling Corp. v. Nigeria*, 647 F.2d 300, 309 (2d Cir. 1981).

⁶⁸ Plaintiff never contested that Banco Central was an instrumentality of the Nicaraguan government. 770 F.2d at 1390 n.5.

⁶⁹ *See Braka*, 589 F. Supp. at 1469-70; *Callejo v. Bancomer*, 764 F.2d 1101, 1108 (5th Cir. 1985). *But see Frankel v. Banco Nacional de Mexico*, No. 82-6457 (S.D.N.Y. May 31, 1983) (promulgation of exchange controls amounts to a breach of contract between the parties to a CD).

on by commercial entities. A crucial distinction thus becomes clear. The purpose of an act is irrelevant under 1605(a)(2), the key is its nature.⁷⁰

The *De Sanchez* court chose not to delineate between the purpose and nature of Banco Central's actions, concluding that no obvious distinction could be made.⁷¹ Was the conclusion, however, well-founded? While the *purpose* of Banco Central's refusal to honor the check was to preserve foreign exchange reserves, admittedly a governmental interest, the nature of the activity of issuing the check was arguably commercial, because the issuance came in response to the request of a commercial bank unable to meet a clearly commercial obligation. In *Braka v. Bancomer*,⁷² which involved the sale of CDs by a Mexican bank, the court employed a similar rationale in characterizing such sales. It ruled that the bank's breach

was no more a sovereign act than that of any other debtor, private or public, that had contracted to repay an obligation in dollars rather than pesos. That it was prevented from complying with its contract by a governmental decree flatly prohibiting the use of dollars as legal tender does not make it immune from suit as an agent of the Republic of Mexico.⁷³

Judge Goldberg, however, in *De Sanchez* chose not to view issuance of the check as relating back to the original commercial obligation of Banco Nacional to redeem the CD. Under this construction the decision appears just. Courts confronted with a national bank's implementation of exchange restrictions, where no commercial venture is at issue, have generally treated the actions as governmental.⁷⁴ In the final analysis, the *De Sanchez* court had little problem dealing with the typically troubling commercial/governmental distinction but may have erred by overly confining the scope of the activity in question.

While there is a significant body of case law construing section 1605(a)(2) of the FSIA, the same cannot be said of the other exceptions to immunity set out in the Act. Ms. Sanchez also sought to establish jurisdiction over Banco Central under section 1605(a)(3), relating to suits involving rights in property taken in violation of international law where "such property is present in the United States in connection with a commercial activity carried on in the United States."⁷⁵ Judge Goldberg reversed the lower court's determination that the defendant's action constituted such a taking. The district court focused on whether Nicaragua engaged in commercial activities through its C&S account, an admittedly valid issue under section 1605(a)(3). Little consideration, however, was given to the threshold

⁷⁰ 28 U.S.C. § 1603(d) (1982).

⁷¹ 770 F.2d at 1393.

⁷² 589 F. Supp. 1465.

⁷³ *Braka*, 589 F. Supp. at 1470.

⁷⁴ *Id.* at 1465.

⁷⁵ 28 U.S.C. § 1605(a)(3) (1982).

inquiry as to whether any violation of international law had occurred. Admittedly, a taking of property without payment of fair consideration is exactly the type of activity that section 1605(a)(3) is intended to exempt from immunity.⁷⁶ International law, however, requires more. The opposing parties must be of different nations. As stated by the district court in *Palicio v. Brush*,⁷⁷ "confiscations by a state of the property of its own nationals, no matter how flagrant and regardless of whether compensation has been provided, do not constitute violations of international law."⁷⁸ While there may be exceptions to this general rule,⁷⁹ Judge Goldberg's reliance on it, supported by the bulk of the case law,⁸⁰ seems justified on the facts of the present case.

Finally, Ms. Sanchez sought to have jurisdiction conferred on the basis of section 1605(a)(5) of the FSIA which involves noncommercial torts.⁸¹ Plaintiff argued that Banco Central's confiscation of her funds amounted to a tortious conversion. Again, the district court accepted her argument,⁸² and the appellate court reversed. Specifically, Judge Goldberg ruled that the taking involved "is not the type of tort claim that the exception was intended to cover. Ms. Sanchez' claim, although sounding in tort, is essentially a claim for an unjust taking of property. As noted, Congress has provided an exception in section 1605(a)(3) for takings of property that violate international law."⁸³ He goes on to cite several judicial interpretations of a similar provision of the Federal Tort Claims Act⁸⁴ rejecting attempts by plaintiffs to recharacterize contract and trespass actions as conversions.⁸⁵

⁷⁶ H.R. REP., *supra* note 47 at 19-20. See also *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1107 n.4 (S.D.N.Y. 1982).

⁷⁷ 256 F. Supp. 481 (S.D.N.Y. 1966). See also *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964).

⁷⁸ 256 F. Supp. at 487.

⁷⁹ Cases analyzing the bounds of international law are few. The most in depth recent analysis is probably that of Judge Kaufman in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d. Cir. 1980).

That controversy involved the alleged torture of a citizen of Paraguay by other citizens of that country. In granting jurisdiction under the Alien Tort Statute, 28 U.S.C. § 1350 (1982), Judge Kaufman stated that under current use and practice, international law "confers fundamental rights upon all people vis-a-vis their own governments." He added that "the ultimate scope of these rights will be a subject for continuing refinement and elaboration." 630 F.2d at 884-85. Subsequent decisions have, however, chosen to limit *Filartiga* to its facts. See *Hanoch Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.D.C. 1984), *cert. denied*, 105 S. Ct. 1354 (1985).

⁸⁰ *De Sanchez*, 770 F.2d at 1397 n.16.

⁸¹ 28 U.S.C. § 1605(a)(5) grants an exception to sovereign immunity in any case not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state. . . .

⁸² 515 F. Supp. at 912-14.

⁸³ 770 F.2d at 1398.

⁸⁴ 28 U.S.C. §§ 2674, 2680 (1982).

⁸⁵ 770 F.2d at 1398-99.

Judge Goldberg's rejection of the conversion claim, thus, rests on the ground that Congress did not intend section 1605(a)(5) to encompass such complaints. The legislative history, however, suggests otherwise. The report of the House of Representatives states that although the section was primarily aimed at the jurisdictional problem created by traffic accidents involving diplomats, it is nonetheless "cast in general terms as applying to *all* tort actions for money damages, not otherwise encompassed by section 1605(a)(2)."⁸⁶ Because the court earlier dismissed the plaintiff's commercial activities action, her claim is obviously not "encompassed" by section 1605(a)(2). Judge Goldberg, however, also stated that the existence of the section 1605(a)(3) exception of the FSIA (*i.e.*, takings in violation of international law) precluded a conversion action under the tort exception. The crucial difference between the two, however, is that the former requires a violation of international law while the latter does not. Significantly, the very deficiency in plaintiff's section 1605(a)(2) claim was that there had been no violation of international law.⁸⁷ It is simply illogical to allow the more specific requirement to preclude actions under the more general.⁸⁸

An even clearer construction problem with the court's analysis concerns subsection (a)(5)(B) of the statute. That provision sets out the specific types of tortious activity that Congress chose to exclude from the general tort exception to sovereign immunity. Conversion is *not* among them.⁸⁹ A fundamental rule of statutory construction is that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."⁹⁰ Thus, a broad rejection of conversion claims appears to be in contravention of both the legislative history and statutory language of the FSIA.

Perhaps even more importantly, an explicit, more limited basis existed for the disposal of the plaintiff's claim. As Judge Goldberg concluded in a lengthy footnote, "the discretionary function exemp-

⁸⁶ H.R. REP., *supra* note 46 at 20-21 (emphasis added).

⁸⁷ 770 F.2d at 1396-98.

⁸⁸ Judge Goldberg cited several cases refusing to apply the FSIA to causes of action alternatively categorizable. *Id.* at 1398-99. In each instance, however, the court recognized a different theory of recovery as obviously more appropriate. *Blanchard v. St. Paul Fire & Marine Ins. Co.*, 314 F.2d 351, 358 (5th Cir. 1965) ("the Tucker Act constitutes the sole basis for a suit against the United States sounding in contract"); *Myers v. United States*, 323 F.2d 580 (9th Cir. 1963) (taking of private property specifically prohibited by fifth amendment). In *De Sanchez* the jurisdictional grant was governed exclusively by the FSIA.

⁸⁹ Subsection (a)(5)(B) specifically exempts malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, and interference with contract rights. 28 U.S.C. § 1605(5)(B) (1982). Indeed, one of the alternative grounds in plaintiff's original complaint was for misrepresentation, and it was rejected pursuant to this subsection. 515 F. Supp. at 912.

⁹⁰ *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

tion [§ 1605(a)(5)(A)] provides an additional ground for holding that the tortious activity exception does not apply."⁹¹ The judge continued with a persuasive argument that Banco Central's actions fall under the language of the section.⁹² Indeed, the argument contained in the footnote is more persuasive and certainly more straightforward than the one chosen by the court for the text of its opinion.

Since the enactment of the FSIA in 1976, various provisions of the Act as well as omissions of the drafters have been subject to criticism.⁹³ Of the existing provisions, none has given rise to more commentary than the most frequently utilized exception, that for commercial activities. Suggestions have ranged from those advocating a more extensive consideration of policy,⁹⁴ to those favoring a complete revision of the "nature of the act" test.⁹⁵ Even greater concern has been expressed over the drafter's omission of provisions ensuring the enforcement of arbitration agreements with foreign states.⁹⁶

A recently adopted resolution of the American Bar Association's House of Delegates⁹⁷ suggests revising the FSIA to remedy both of these shortcomings. In response to this resolution, Senator Charles McC. Mathias (R, Md.) recently introduced legislation to amend and revise the Act.⁹⁸ Extensive alterations are proposed to help ensure that foreign states and their instrumentalities will no longer use the FSIA to extract themselves from arbitration agreements that have become disagreeable. More importantly in the context of the *De Sanchez* decision, the legislation proposes broadening the existing definition of commercial activity to include "any promise to pay made by a foreign state . . . and any guarantee by a foreign state of a

⁹¹ 28 U.S.C. § 1605(a)(5)(A) (1982) specifically exempts from the tortious exception any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused.

⁹² Judge Goldberg stated:

Here, the decision to stop payment on the check was, in my view, clearly discretionary. Under Nicaraguan law, Banco Central had general supervision of Nicaragua's currency and foreign exchange. . . . Given this broad authority, I believe that Banco Central had the discretionary power, under Nicaraguan law, to preserve Nicaragua's foreign exchange reserves by stopping payment on checks drawn on its United States dollar accounts.

770 F.2d at 1399 n.19.

⁹³ See Remarks of Beverly Carl, *supra* note 58.

⁹⁴ See generally Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 *FORDHAM L. REV.* 155 (1981); Comment, *Foreign Sovereign Immunity and the Act of State: The Need for a Commercial Act Exception to the Commercial Act Exception*, 17 *U.S.F.L. REV.* 763 (1983).

⁹⁵ See 28 U.S.C. § 1603(d) (1982); see also Comment, *Commercial Activity Under the Foreign Sovereign Immunities Act of 1976: Toward a More Practical Definition*, 34 *BAYLOR L. REV.* 295 (1982).

⁹⁶ See Sullivan, *Implicit Waiver of Sovereign Immunity by Consent to Arbitration: Territorial Scope and Procedural Limits*, 18 *TEX. INT'L L.J.* 329 (1983).

⁹⁷ Copies of the ABA proposals are available from the American Bar Association, Section of International Law, 1800 M Street, N.W., Washington, D.C. 20036.

⁹⁸ S. 1071, 99th Cong., 1st Sess., 131 *CONG. REC.* S5363 (daily ed. May 3, 1985).

promise to pay made by another party.”⁹⁹ This language would seemingly encompass acts such as those of the defendant Banco Central. The issuance of the check to Sanchez certainly would seem to be a promise to pay. The nature of the government’s motive for breaching that promise, whether governmental or commercial, would apparently no longer be deemed relevant. Thus, foreign banks are apt to find it more difficult to evade jurisdiction under the FSIA in those borderline situations where formerly their actions would have been deemed governmental.

No longer is the issue of foreign sovereign immunity limited primarily to maritime controversies. The demands of the modern world economy necessitate a consistent national policy in the area. Worldwide external indebtedness now exceeds \$825 billion, with \$350 billion of that in Latin America alone.¹⁰⁰ As expressed by one author: “The current and increasing magnitude of developing countries’ external indebtedness has become an important international policy issue with major implications for both developed and developing countries.”¹⁰¹ Increasingly, these developing nations are coming to rely on exchange controls to stabilize their economies. Their proliferation demands that courts undertake to apply them only in situations where their enactment and revision is grounded on valid economic necessity and where their implementation is unbiased. The *De Sanchez* decision, it is hoped, serves to illustrate this necessity and some of the other difficulties that can arise in the application of the FSIA. It may well be that the Mathias bill, if enacted, will contribute to the resolution of these problems. Continued legislative scrutiny is nonetheless imperative to promote a consistent U.S. policy to deal with an increasingly complex and turbulent world political and economic scene.

STUART F. CLAYTON, JR.

⁹⁹ *Id.* For the text of the proposed amendments, see 79 AM. J. INT’L L. 770, 784-89 (1985).

¹⁰⁰ 1985 INTERNATIONAL MONETARY FUND, WORLD ECONOMIC OUTLOOK 60, 262.

¹⁰¹ DEVELOPING COUNTRY DEBT, *supra* note 31, at xi.

