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SOVEREIGN IMMUNITY-AN ANALYSIS OF THE NONCOMMERCIAL TORT Ex- CEPTION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976 (Olsen ex rel. Sheldon v. Government of Mexico)

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SOVEREIGN IMMUNITY—AN ANALYSIS OF THE NONCOMMERCIAL TORT EXCEPTION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976—*Olsen ex rel. Sheldon v. Government of Mexico*

INTRODUCTION

In *Olsen ex rel. Sheldon v. Government of Mexico*,[1] the Court of Appeals for the Ninth Circuit held that subject matter jurisdiction over Mexico existed by virtue of the noncommercial tort exception[2] to the broad immunity granted foreign states by the Foreign Sovereign Immunities Act of 1976 (FSIA).[3] In making the crucial determination that the parameters of the FSIA tort section extended to Mexico, the court provided insight into the workings of the provision. The Ninth Circuit's analysis was of importance because prior to *Olsen* no court had based its immunity decision solely on the tort section.[4] In addi-

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1. Olsen *ex rel.* Sheldon v. Government of Mexico, 729 F.2d 641 (9th Cir.), *cert. denied*, 105 S. Ct. 295 (1984). The case of Sanchez *ex rel.* Cernie was consolidated with the Olsen cause of action at both the trial and appellate levels. Sheldon and Cernie were the respective guardians of the minor children Olsen and Sanchez. *Id.*

2. 28 U.S.C. § 1605(a)(5)(a) (1982). The section states:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case—
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> (5) not otherwise encompassed in paragraph (2) above, [the commercial activity exception] in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
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> (a) 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 . . . .

Id.

The other four exceptions to sovereign immunity are: (1) waiver of immunity; (2) commercial activity; (3) rights in property taken in violation of international law; and (4) immovable property. 28 U.S.C. § 1605(a)(1)-(4) (1982). These four exceptions will not be discussed in this comment.

3. 28 U.S.C. §§ 1330, 1332(a)(2), (4), 391(f), 1441(d), 1602-1611 (1982).

4. For cases using a combination of FSIA exceptions, see DeSanchez v. Banco Central de Nicaragua, 515 F. Supp. 990 (E.D. La. 1981); *In re* SEDCO, Inc., 543 F. Supp. 561 (S.D. Tex. 1982); Association de Reclamantes v. United Mexican States, 735 F.2d 1517 (D.C. Cir. 1984); *see also* Skeen v. Republic of Brazil, 566 F. Supp. 1414 (D.D.C. 1983) (analyzing portions of the Geneva Convention and the doctrine of respondeat superior in addition to the "scope of employment" portion of the noncommercial tort exception);

tion, the court's interpretation is significant because foreign nations usually decide immunity issues based upon reciprocity of reasoning.[5] The court's decision could, therefore, be applied against the United States in a foreign jurisdiction facing similar facts.[6]

I. BACKGROUND

The *Olsen* decision arose out of a plane crash which killed the parents of the plaintiff-appellants.[7] The appellants, Olsen and Sanchez,[8] were minor children who sought reversal of the trial court order denying them United States jurisdiction for their wrongful death action against Mexico.[9] Mexico owned and operated the plane that transported the appellants' parents,[10] prisoners of Mexico.[11] The parents were being transferred to authorities in Tijuana for eventual incarceration in the United States pursuant to a prisoner exchange treaty between the United States and Mexico.[12] Mexico claimed that its sovereign immunity[13] warranted the dismissal of the action due to a lack of

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Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980); Frolova v. Union of Soviet Socialist Republics, 558 F. Supp. 358 (N.D. Ill. 1983), *aff'd*, 761 F.2d 370 (7th Cir. 1985) (both *Letelier* and *Frolova* discuss the act of state doctrine in conjunction with the noncommercial tort exception).

5. G. BADR, STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW (1984):

> Reciprocity is an integral part of the mechanism by which rules of international law are created. In a world order still lacking a central law making authority, states are both the makers and subjects of international law. In a sense, reciprocal treatment is one facet of the equality of states. Every state wants to be treated no worse than it treats others and can expect no better treatment than what it affords other states.

Id. at 101.

6. *Id.* at 101-03. *See also* 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 580-82 (1968); Persinger v. Islamic Republic of Iran, 729 F.2d 835, 841 (D.C. Cir.) *cert. denied*, 469 U.S. 881 (1984).

7. *Olsen*, 729 F.2d at 643.

8. *Id.* at 641.

9. *Id.* at 643. The appellants specifically alleged that Mexico was negligent in maintaining, directing, and piloting the airplane. *Id.* at 647.

10. The appellants' parents were imprisoned in Mexico on a charge of possession of marijuana. The appellant Erin Olsen was born while her mother was imprisoned in Mexico. The minor Olsen was subsequently brought back safely to the United States. Brief for Appellant at 2, Olsen *ex rel.* Sheldon v. Government of Mexico, 729 F.2d 641 (9th Cir. 1984) [hereinafter Appellant's Brief].

11. *Olsen*, 729 F.2d at 643.

12. *Id. See also* Treaty Between the United Mexican States and the United States of America on the Execution of Penal Sentences, November 25, 1976, 28 U.S.T. 7400, 7401, T.I.A.S. No. 8718.

13. Sovereign immunity is an affirmative defense which must be specially pleaded, as Mexico did in this case. *See* H.R. REP. No. 1487, 94th Cong., 2d Sess. 17 (1976) [hereinaf-

FSIA subject matter jurisdiction.[14] The specific facts of the disaster must be discussed in order to fully understand the jurisdictional arguments set forth.[15]

On a night in October, 1979, a plane carrying guards, pilots and the appellants' parents left Monterey, Mexico for Tijuana.[16] During the trip, the pilot was advised of thick fog and decreased visibility at Tijuana.[17] These conditions prompted the pilot to request an instrument landing, meaning that he needed landing guidance, in the form of altitude and location data, from air traffic controllers in order to land the plane.[18] In this instance, the instrument landing is significant because such a landing at Tijuana airport required the plane to enter United States airspace.[19] Consequently, following procedures set forth in a Letter of Agreement (the "Letter") between the aviation authorities of the United States and Mexico, Tijuana air control received permission for the plane to enter United States territory.[20] The Letter also provided for American air controller aid.[21] The United States aid was necessary in this situation because Tijuana air control's radar and navigational systems were inoperative.[22] Thus, the Tijuana air control asked its counterpart in San Diego to radio the instrument landing data to

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ter HOUSE REPORT], *reprinted in* 1976 U.S. CODE CONG., & AD. NEWS 6604, 6616 [hereinafter U.S. CODE]. The absence of sovereign immunity is also a jurisdictional requirement. *See infra* note 37 and accompanying text.

14. *Olsen*, 729 F.2d at 643.

15. *See* Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849, 851 (S.D.N.Y. 1978). There the court explained:

> The Act's central feature is its specification of categories of actions for which foreign states are not entitled to claim the sovereign immunity from American court jurisdiction otherwise granted to such states. These exceptions are contained not in the sections of the Act which describe the grounds on which jurisdiction may be obtained, however, but are phrased as substantive acts for which foreign states may be found liable by American courts. This effects an *identity between substance and procedure* in the Act which means that a court faced with a claim of immunity from jurisdiction must engage ultimately in a *close examination of the underlying cause of action* in order to decide whether the plaintiff may obtain jurisdiction over the defendant.

Id. (emphasis added).

16. *Olsen*, 729 F.2d at 643.

17. *Id.*

18. WEBSTER'S NEW COLLEGIATE DICTIONARY 594 (1981).

19. *Olsen*, 729 F.2d at 643.

20. *Id. See also* Letter of Agreement between Tijuana Approach Control and Miramar (California) Radar Air Traffic Control Facility on Coordination Procedures and Airspace Utilization, April 1, 1979. Appellant's Brief, *supra* note 10, at Appendix.

21. Appellant's Brief, *supra* note 10, at Appendix.

22. *Olsen*, 729 F.2d at 643.

the airplane.[23] Neither the San Diego controllers nor the plane's pilot were bilingual.[24] Consequently, the San Diego controllers telephoned the data to Tijuana air control, which then radioed the information to the pilot.[25]

Under these conditions, the plane penetrated almost twelve miles into United States airspace before beginning its initial descent.[26] The pilot was off course though, and safely abandoned the descent.[27] The San Diego controllers then advised the pilot to proceed to other airports where visibility would be better, but the pilot declined the suggestion and attempted a second descent.[28] While still using the navigational data provided by San Diego, the pilot properly aligned the aircraft and descended on course, but did not maintain the correct altitude.[29] The plane crashed three-quarters of a mile inside the United States, killing all of its occupants.[30]

The trial court, after hearing the foregoing facts, granted Mexico's motion dismissing the wrongful death suit.[31] The court held that the general contacts between the defendant and the forum state did not provide a basis for personal jurisdiction.[32] The district court also held that personal jurisdiction would be unreasonable because it would violate due process.[33] The court did not discuss the subject matter jurisdiction issue because its personal jurisdiction holding made such an analysis unnecessary.[34]

The Ninth Circuit on appeal wholeheartedly disagreed with the district court's treatment of the subject matter jurisdiction issue. Circuit Court Judge Nelson's opinion made the resolution of the subject matter jurisdiction issue determinative of the entire controversy.[35] The court based its decision with regard to subject matter jurisdiction on the FSIA mandate that personal jurisdiction could not exist unless

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23. *Id.*
24. *Id.* at 644.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 643.
32. *Id.*
33. *Id.*
34. Olsen *ex rel.* Sheldon v. Government of Mexico, 729 F.2d 641 (9th Cir.), *cert. denied sub nom.*, 105 S. Ct. 295 (1984); Sanchez *ex rel.* Cernie v. Republic of Mexico, No. 81-1067, slip op. at 1 (S.D. Cal. Jan. 17, 1983).
35. *Olsen*, 729 F.2d at 644.

subject matter jurisdiction was first established.[36] Subject matter jurisdiction, in turn, cannot exist unless it is established that a foreign state is not entitled to immunity pursuant to an FSIA exception.[37] The district court inexplicably reversed the process required by the FSIA and the appellate court clearly follwed the acknowledged statutory procedure[38] in correcting the lower court.

In using the proper FSIA structure, the *Olsen* court first determined that Mexico was not immune under the tort section, thereby granting subject matter jurisdiction and clearing the way for a personal jurisdiction analysis.[39] The court's finding of subject matter jurisdiction necessitated that it grapple with the major ambiguities in the language of the provision. The court's reading of the FSIA led it to an announcement of a new test for determining the extent to which the tortious conduct must occur in the United States.[40] The court also clarified the definition of the main proviso to the section, the discretionary function exception.[41] In addition, the court endorsed and refined the theory that the FSIA had, indeed, modified the restrictive theory of immunity with respect to the noncomercial tort exception.[42] The court's attempt to clarify these three areas must be scrutinized in light of the FSIA policy of maintaining international congruity of reasoning in foreign sovereign immunity decisions.[43]

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36. 28 U.S.C. § 1330(a) (1982). *See also* HOUSE REPORT, *supra* note 13, at 13; U.S. CODE, *supra* note 13, at 6612.

37. 28 U.S.C. § 1330(a). *See also* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 489 (1983); Texas Trading and Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981).

38. *See* Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunity Act in Practice*, 33 SW. L.J. 1009, 1014 (1979); Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 389 (1982); Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff his Day in Court*, 46 FORDHAM L. REV. 543 (1977).

39. The *Olsen* court also held that personal jurisdiction was consistent with due process requirements. This comment will not discuss the *Olsen* court's analysis of the personal jurisdiction issue except to note that the court engaged in a "minimum contacts" examination as first set forth in International Shoe v. Washington, 326 U.S. 310 (1945). *See Olsen*, 729 F.2d at 648-50.

40. *Olsen*, 729 F.2d at 645-46.

41. *Id.* at 646-48. The other proviso to the tort exception exempts claims for libel, slander, misrepresentation and contractual interference from the operation of the tort statute. 28 U.S.C. § 1605(a)(5)(B). For cases dealing with this section, see Carey v. National Oil Corp., 453 F. Supp. 1097 (S.D.N.Y. 1978), *aff'd on other grounds*, 592 F.2d 673 (2d Cir. 1979) (per curiam); Yessenin-Volpin, 443 F. Supp. 849 (S.D.N.Y. 1979).

42. *Olsen*, 729 F.2d at 645.

43. See supra notes 5 and 6 and accompanying text. *See also* HOUSE REPORT, *supra* note 13, at 13; U.S. CODE, *supra* note 13, at 6611.

II. ANALYSIS OF OLSEN'S APPLICATION OF PRECEDENT

A. The Restrictive Theory of Sovereign Immunity

The restrictive theory of sovereign immunity—the concept that the public or governmental acts of a foreign sovereign are immune, but acts of a private or commercial nature are not—embodies the overriding policy of the FSIA today.[44] This has not, however, always been the primary theory of United States foreign sovereign immunity law.[45] Historically, foreign sovereigns were accorded absolute immunity in United States courts.[46]

By the mid-twentieth century, the courts, while retaining the absolute theory, transferred the determination of the foreign immunity issue from the judiciary to the executive; in particular to the State Department.[47] The major State Department proclamation came shortly thereafter with the release of the Tate letter, which announced a strict

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44. *See* HOUSE REPORT, *supra* note 13, at 7; U.S. CODE, *supra* note 13, at 6605. *See also* G. BADR, *supra* note 5, at 63-70 (the author sets forth the typical tests for differentiating between a public and private act. He advocates the use of an objective distinction which focuses on the nature of the act). *See generally* McKeel v. Islamic Republic of Iran, 722 F.2d 582, 583 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 243 (1984); *Frolova*, 558 F. Supp. at 361.

45. *See* Williams v. Shipping Corp. of India, 653 F.2d 875 (4th Cir. 1981); T. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY (1970); Kahle and Vega, *Immunity and Jurisdiction: Toward a More Uniform Body of Law in Actions Against Foreign States* 18 COLUM. J. TRANSNAT'L L. 211 (1979); von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 39 (1978); Weber, *The Foreign Sovereign Immunities Act*, 3 YALE STUD. WORLD PUB. ORDER 1 (1976) (all provide excellent histories of the absolute and restrictive theories of sovereign immunity in the United States). International law has also adopted the restrictive theory. *See, e.g.*, State Immunity Act, 1978, ch. 33 (United Kingdom); European Convention on State Immunity, art. 4 (1972) (Council fo Europe). *See generally* G. BADR, *supra* note 5 (the author analyzes the similarities among seven major countries' foreign immunity acts).

46. Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812). Although this landmark decision heralded the policy of absolute immunity, Chief Justice Marshall had the foresight to perceive that this theory could be repealed. As Weber points out: "[Marshall expressly stated that the American Sovereign (apparently meaning the executive and legislative branches) could legitimately revoke the immunity it otherwise would be presumed to have granted by announcing its intention to do so." Weber, *supra* note 45, at 8.

In actuality, the first mention of the restrictive theory in a United States court came almost a century later when District Judge Mack advocated its use. *See* von Mehren, *supra* note 45, at 39. *See also* The Pesaro, 227 Fed. 473 (S.D.N.Y. 1921). The Supreme Court, however, overruled Mack's opinion. Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926).

47. *See Ex Parte* Republic of Peru, 318 U.S. 578 (1943); Mexico v. Hoffman, 324 U.S. 30 (1945). *See also* von Mehren, *supra* note 45, at 40.

adherence to the restrictive theory.[48] Unfortunately, the State Department could not consistently follow its own edict because the edict failed to provide clear guidelines to implement the restrictive policy.[49] The State Department also felt political pressure from foreign countries seeking immunity.[50] As a result, judicial deference faded during the ensuing years and one court even formulated its own examples of what constituted a public act of a foreign country and what should be considered a private act.[51] In fact, the Supreme Court barely asserted its recognition of the restrictive theory.[52] In late 1976, the FSIA was passed so as to "create some semblance of order out of the chaos and to unburden the Department of State from the judicial function and political pressures."[53]

Two of the main purposes of the FSIA were directed at the inconsistent application of the restrictive theory by the State Department. The drafters understood the adverse consequences of a disparate treatment of foreign immunity cases.[54] To avoid such a crisis, they first made the judiciary the sole arbitrator of immunity claims.[55] Second, they codified, for the most part, the restrictive theory by setting forth the exclusive provisions to be used in making the public-private distinction.[56] These provisions, which are the aforementioned exceptions to the FSIA, delineate which foreign acts are private and thereby actionable.[57] These exceptions, although preclusive, were phrased in a broad manner in recognition of the court's role as the exclusive adjudicator of immunity cases and the judiciary's resulting need for latitude

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48. 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 DEPT. STATE BULL. 984 (1952). *See also* Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 HARV. L. REV. 608 (1954) (the author gives a contemporary reaction to the restrictive theory).

49. *See* Note, *supra* note 38, at 548-49.

50. *Id.*

51. Victory Transports, Inc. v. Comisaria General, 336 F. 2d 354 (2d Cir. 1964) *cert. denied*, 381 U.S. 934 (1965). The court set forth five specific classifications describing public, and, therefore, immune acts. These were: (1) internal administrative acts, such as expulsion of an alien; (2) legislative acts; (3) acts concerning the armed forces; (4) acts regarding diplomatic activity; and (5) public loans. *Id.* at 360.

52. Alfred Dunhill, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (only a plurality of the Court agreed that the restrictive theory had been adopted by the United States).

53. Sklaver, *Sovereign Immunity in the United States: An Analysis of § 566*, 8 INT'L LAW 408 (1974).

54. *See* HOUSE REPORT, *supra* note 13, at 13; U.S. CODE, *supra* note 13, at 6611.

55. *See* HOUSE REPORT, *supra* note 13, at 7; U.S. CODE, *supra* note 13, at 6605-06.

56. *See* HOUSE REPORT, *supra* note 13, at 7; U.S. CODE, *supra* note 13, at 6605-06.

57. *See* HOUSE REPORT, *supra* note 13, at 18; U.S. CODE, *supra* note 13, at 6616.

in interpreting them.[58] Unfortunately, the same broad language has often led to confusion.[59]

The courts have interpreted the tort section as applying to all noncomercial torts subject to the section's own exceptions.[60] The primary exception to the section, the discretionary function provision, allows immunity for acts involving governmental policy decisions.[61] The two courts that have interpreted the section, and its discretionary function exception, have been met by the arguments of foreign sovereigns that public acts, as defined by the restrictive theory, are automatically immune under the noncommercial tort exception.[62] In response, the courts have indicated that both public and private acts are included in the tort exception.[63] These courts have suggested that the discretionary function exemption does not significantly limit the sweeping effect of this section, but merely indicates the Congressional intent that "some governmental decisions should not be subject to judicial review."[64] In short, these courts espouse the theory that the tort section and its exception are not subject to the public-private dichotomy of the restrictive principle.[65]

The *Olsen* court refined this hypothesis when confronted with Mexico's argument that public acts are automatically immune under section 1605(a)(5).[66] The court perceptively realized that, in terms of affording a foreign nation immunity for its governmental acts, the tort provision with its discretionary function exception was tantamount to the public-private distinction of the restrictive theory.[67] It recognized that the underlying purpose of both tests—the protection of the foreign sovereign's governmental acts from United States jurisdiction—usually leads to the same result.[68] The court, therefore, rejected Mexico's argument on the ground that only discretionary functions are immune.[69]

The Ninth Circuit also set forth, by means of a statutory analysis,

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58. *See* HOUSE REPORT, *supra* note 13, at 18; U.S. CODE, *supra* note 13, at 6616.

59. *See* Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navagation, 730 F.2d 195, 205 (5th Cir. 1984) (Higginbotham, J., dissenting in part) (The dissent criticizes the intended vagueness and ambiguity of these sections).

60. *Letelier*, 448 F. Supp. at 672; *SEDCO*, 543 F. Supp. at 567.

61. *See infra* text accompanying notes 73-101.

62. *Letelier*, 488 F. Supp. at 671; *DeSanchez*, 515 F. Supp. at 914.

63. *Letelier*, 488 F. Supp. at 671-72; *DeSanchez*, 515 F. Supp. at 914.

64. *De Sanchez*, 515 F. Supp. at 914.

65. *Id.*; *Letelier*, 488 F. Supp. at 673.

66. *Olsen*, 729 F. 2d at 645.

67. *Id.*

68. *Id.*

69. *Id.*

an additional and practical reason for rejecting the restrictive theory. The court noted that the drafters would not have inserted the discretionary function exception in the tort section if they had wanted the restrictive theory applied.[70] According to the court, Mexico's reading of the section made the discretionary function language superfluous because if all public torts were automatically read out of the section, there would be no need for the discretionary function test.[71] The court apparently also considered the traditional canon of statutory interpretation that parts of a statute cannot be rendered nugatory in rejecting Mexico's argument.[72]

B. *The Discretionary Function Exception*

The drafters of the FSIA intended the discretionary function exception to mirror its counterpart in the Federal Tort Claims Act (FTCA)[73] both in form and in interpretation.[74] It accomplished the former by making the provision identical to the FTCA exception[75] and left the latter goal to the courts. The Supreme Court set forth its definition of discretionary function in *Dalehite v. United States*.[76] In *Dalehite*, the Court held that discretion "includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision, there is discretion. It *necessarily follows* that acts of *subordinates* in carrying out the operations of government in accordance with official directions cannot be actionable."[77] Thus, *Dalehite*

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70. *Id.*

71. *Id.*

72. *Id.* The *Olsen* court did not explicitly state that it was using this rule of statutory interpretation, but its result clearly implied the use of this maxim. *See also* 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4801 (1943). "[A]ny attempt to segregate any portion of an act and exclude arbitrarily from consideration any other portion of the act is almost certain to achieve a result other than that which the legislature intended." *Id., cited with approval in* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 233 (1975).

73. 28 U.S.C. §§ 1346, 2671-2678, 2680 (1982).

74. *See* HOUSE REPORT, *supra* note 13, at 21; U.S. CODE, *supra* note 13, at 6620.

75. *See* 28 U.S.C. § 2680(a).

76. 346 U.S. 15 (1953). *Dalehite* was an action against the United States under the Federal Tort Claims Act to recover damages for a death resulting from an explosion at a nitrate fertilizer plant. The plaintiffs alleged that the Government was negligent in its supervision of manufacturing, packaging and shipping the fertilizer. The United States pleaded sovereign immunity. The Supreme Court agreed with the Government and held that the decisions that led to the death were made in the exercise of judgment at a planning level. Thus, these acts were discretionary functions and the United States was immune from prosecution. *Id.* at 15-16.

77. *Id.* at 35-36 (emphasis added).

interprets discretionary function in accord with its legislative purpose in that it protects the government against tort liability for errors in policy decisions and for the carrying out of those decisions.[78]

Dalehite remains good law, but the overwhelming majority of subsequent decisions have narrowed the scope of its discretionary function definition. Today, most courts do not include the acts of subordinates in carrying out executive plans as part of the definition.[79] The circuits have formulated a test which asks whether the act was on the "planning" or "operational" level of governmental conduct.[80] Acts on the operational level are "day to day activities," which perhaps include a small amount of discretion.[81] These acts are appropriate for court review.[82] On the other hand, planning level acts basically correspond to the immune policy judgments discussed in *Dalehite*.[83] These planning level acts, thus, are discretionary functions.

There is also case law, however, that retains the entire holding of *Dalehite* as to discretion.[84] In *SEDCO*,[85] the court noted that the discretionary function definition had been debated by courts for decades, but it felt that the facts before it were similar enough to those in *Dalehite* for it to include the "acts of subordinates" reasoning in its discretionary function definition.[86] *SEDCO* has neither been followed nor reversed by other courts receiving this issue. Accordingly, it does appear to present a valid alternative to the majority test.

In addition to the aforementioned approaches, the Ninth Circuit has introduced two new tests to determine discretionary function.[87]

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78. *Id.* at 28.

79. *See, e.g.*, Lindgren v. United States, 665 F.2d 978, 980 (9th Cir. 1982); Payton v. United States, 636 F.2d 132, 137-38 (5th Cir. 1981); Bernitsky v. United States, 620 F.2d 948, 951 (3d Cir. 1980); Liuzzo v. United States, 508 F. Supp. 923, 924 (E.D. Mich. 1981).

80. *Lindgren*, 665 F.2d at 980; *Liuzzo*, 580 F. Supp. at 931; Estrada v. Hills, 401 F. Supp. 429, 430 (N.D. Ill. 1975).

81. *See, e.g., Lindgren*, 665 F.2d at 980.

82. *Id.*

83. *Dalehite*, 346 U.S. at 32.

84. *SEDCO*, 543 F. Supp. at 561.

85. *Id.* The *SEDCO* case involved a massive oil spill emanating from an oil drilling rig located in the territorial waters of Mexico. The spill polluted nearby Texas shores. The plaintiffs argued that Mexico was negligent in operating the rig under the noncommercial tort exception. Mexico defended by asserting sovereign immunity status. The court held that Mexico was immune because the acts were discretionary functions. *Id.* at 566-67. *See also* Comment, *The Bay of Campeche Oil Spill: Obtaining Jurisdiction over Petroleos Mexicanos Under the Foreign Sovereign Immunities Act of 1976*, 9 ECOL. L.Q. 341 (1981).

86. *SEDCO*, 543 F. Supp. at 567.

87. See Driscoll v. United States, 525 F.2d 136, 138 (9th Cir. 1975); *see also Lindgren*, 665 F.2d at 980.

The Ninth Circuit only applies these tests after it has performed its planning-operational level inquiry.[88] First, the court considers whether the judiciary can effectively evaluate the act. Second, they examine whether judicial inquiry would impair the smooth administration of the government.[89]

These general tests set forth by the courts have been somewhat helpful, but there have also been specific examples of what constitutes a discretionary act. For instance, an air controller's failure to observe standard operating procedures has been held to be non-discretionary.[90] Control tower operators were also deemed to be operational level jobs, and therefore nondiscretionary.[91] Surprisingly, there is no case law to date specifically interpreting the status of a pilot.[92]

The *Olsen* court followed the planning-operational level test and also adopted the two additional Ninth Circuit requirements discussed above.[93] In addition, the court cited case law classifying the job of air traffic controller as being nondiscretionary at an operational level.[94] The court held that none of Mexico's alleged negligence was discretionary because it all occurred in the process of carrying out the Mexican Government's plan of transferring the prisoners.[95] In short, the alleged negligence of Mexico in piloting, maintaining and directing the plane were all on the operational level.[96] The court regarded the "acts of subordinates" language of *Dalehite* as a dead letter and neglected to distinguish the recent *SEDCO* opinion, which followed that doctrine.[97] The court's failure to provide reasons for this omission leaves *Olsen* susceptible to attack by those courts finding approval in the language of *Dalehite*.

The court also failed to justify its use of the two additional Ninth Circuit tests. Its obvious affirmative responses to the inquiries of why

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88. *Driscoll*, 525 F.2d at 138; *Lindgren*, 665 F.2d at 980.

89. *Driscoll*, 525 F.2d at 138; *Lindgren*, 665 F.2d at 980.

90. Ingham v. Eastern Airlines, Inc., 373 F.2d 227, 238 (2d Cir. 1967).

91. United Air Lines, Inc. v. Weiner, 335 F.2d 379, 396 (9th Cir. 1964); Eastern Air Lines v. Union Trust Co., 221 F.2d 62, 78 (D.C. Cir. 1955).

92. Although there is no specific case law dealing with pilots, a few courts have discussed expert level positions. These courts have stated that an act that involved "administration of a mandatory duty" was not discretionary even though a professional expert was needed to carry out the duty. *Estrada*, 401 F. Supp. at 431; Strothman v. Gereh, 739 F.2d 515 (10th Cir. 1984). Thus, if a pilot is viewed as an expert who is performing a "mandatory duty," a finding of nondiscretionary function will result.

93. *Olsen*, 729 F.2d at 647-48.

94. *Id.*

95. *Id.*

96. *Id.*

97. *See supra* text accompanying notes 84-86.

the United States judicial system can evaluate the negligence of Mexico and whether this evaluation would diminish the effective administration of the Mexican Government[98] indicate that the court viewed these tests as unnecessary. For example, the court stated that it was well-equipped to adjudicate the negligence issues of this case.[99] Because United States courts have presided over negligence issues for well over a century,[100] the court's question answered itself. Moreover, the court's answers could not have been material because the dispositive issue—the planning-operational level determination—of the discretionary function analysis had already been decided. If there is no policy judgment involved, as decided here, then there can only be tort liability issues to be adjudicated by United States tribunals. A similar analysis proves the second inquiry unnecessary.[101] Perhaps the court included these tests as a way of assuring Mexico that its invocation of jurisdiction would not seriously prejudice Mexico. Even if these tests were resorted to as a sign of diplomacy, however, the court's cursory treatment of them renders the gesture meaningless.

C. The Location of the Tortious Conduct

The language of the noncommercial tort exception regarding the location of the tort has given rise to two related uncertainties in the judicial interpretation of the section. First, the provision itself, although requiring the injury or death complained of to occur in the United States, does not state whether the tort or torts causing the injury or death must also take place in this country.[102] Second, assuming that the tort(s) must occur in the United States, the provision does not contemplate an *Olsen* situation in which multiple torts, possibly occurring on both sides of the border have caused the death or injury complained of. At the time of the *Olsen* decision, the case law had almost resolved the general location of the tort issue,[103] but there had been

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98. *Olsen*, 729 F.2d at 648.

99. *Id.*

100. PROSSER, LAW OF TORTS 139-40 (4th ed. 1971).

101. It is difficult to conceive of a tort situation in which denying immunity will impede the "effective administration of a foreign government." Unless the tort is a disaster of the greatest proportions involving thousands of workers, it is doubtful that summoning those workers involved to testify will significantly impair a foreign state's day-to-day administration. The *Olsen* court summarily recognized that it would not cause a problem. *See Olsen*, 729 F.2d at 648.

102. *See supra* note 2.

103. *See SEDCO*, 543 F. Supp. at 567 (tort, in whole, must occur in the United States); *Frolova*, 558 F. Supp. at 362 (tortious act or omission must occur in the United States); *Persinger*, 729 F.2d at 842 (tort and injury must occur in the United States); *but see Letelier*, 488 F. Supp. at 674 (only injury need occur in the United States);

only one prior decision addressing the multiple tort situation.[104]

The majority of the case law concerning the tort location problem has followed the legislative history of the section which asserts that the "tortious act or omission must occur within the jurisdiction of the United States."[105] The minority has not accepted the logical proposition that the legislative history controls the section, believing instead that the language of the provision itself clearly requires only that the injury occur in the United States.[106] The *Olsen* court resoundingly adopted the majority rule by strictly adhering to the legislative history of section 1605(a)(5) without alluding to the minority position.[107] Indeed, *Olsen* signals the end of the minority position by definitively reaffirming the rule that the tort must occur in the United States.[108]

Prior to *Olsen*, only *SEDCO*[109] had set forth a rule regarding the multiple tort problem. The plaintiffs in that case sought to defeat Mexico's sovereign immunity defense by arguing that a tort occurs in the United States if it affects the United States.[110] The situs of the tort issue is satisfied, the plaintiffs in *SEDCO* argued, if the tort occurred partially or totally in the United States.[111] The court, however, rejected the plaintiff's arguments and held that the entire tort sequence must occur in the United States.[112]

The court distinguished the facts in *SEDCO*, in which none of the tortious conduct occurred in the United States, from the facts involved herein, in which the alleged negligent piloting of the aircraft occurred in the United States.[113] The *Olsen* court also asserted that the *SEDCO*

DeSanchez, 515 F. Supp. at 913 (citing *Letelier*).

104. *See SEDCO*, 548 F. Supp. at 567. *See also* Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517, 1525 (D.C. Cir. 1984). Because the *Asociacion* decision was handed down at approximately the same time as the *Olsen* decision, the Olsen court could only rely on *SEDCO*.

105. *See* HOUSE REPORT, *supra* note 13, at 21; U.S. CODE, *supra* note 13, at 6619.

106. *Letelier*, 488 F. Supp. at 674; *DeSanchez*, 515 F. Supp. at 913; *Persinger*, 729 F.2d at 844 (Edwards, J., dissenting).

107. *Olsen*, 729 F.2d at 645.

108. Post-*Olsen* decisions have strongly affirmed its position that the tortious conduct must occur in the United States. *See* Kline v. Republic of El Salvador, 603 F. Supp. 1313 (D.C. Cir. 1985); *Frolova*, 761 F.2d 370.

109. *SEDCO*, 543 F. Supp. 561.

110. *Id.* at 567. The effects argument of the plaintiff is definitely not applicable to the noncommercial tort exception. It is properly used with respect to the commercial activity exception. *See* 28 U.S.C. § 1605(a)(2) (1982). *See generally* Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and Due Process Clause*, 55 N.Y.U. L. REV. 474 (1977).

111. *SEDCO*, 543 F. Supp. at 567.

112. *Id.* at 567.

113. *Olsen*, 729 F.2d at 646.

rule would induce foreign states to allege that some tortious conduct occurred outside the United States and consequently escape United States jurisdiction.[114] The Ninth Circuit reasoned, therefore, that a key policy of the FSIA, namely to "serve the interests of justice . . . and protect the rights of both foreign states and litigants in the United States courts"[115] would be subverted by the *SEDCO* rule.[116] For this reason, the court set forth a new rule, but did not explicitly limit the rule to these facts or declare it to be all-encompassing. Specifically, the court held that if the plaintiffs (appellants here) alleged that one tort occurred in the United States, then the tort location requirements of the provision are satisfied.[117] In failing to discuss why its rule would better protect both foreign states and litigants than the *SEDCO* rule, however, the court did not adequately explain the significance of a single tort.

Apparently, the *Olsen* court had other motives in promulgating the new rule because its rule suffers from the same type of handicap as that in *SEDCO*. The *Olsen* court's rule encourages plaintiffs to allege that tortious conduct occurred inside the United States. This consequently deprives foreign nations of their rights under the FSIA.[118] Part of the motivation of the court, although never expressed in the opinion, could lie in "serving the interests of justice"[119] by not rejecting the claim of these two young United States orphans,[120] who sought to have their wrongful death suit adjudicated in a United States forum. The court probably felt that the overriding equitable concern in this case required the protection of the rights of the United States litigants, which, in turn, necessitated the court's adoption of a liberal one tort rule rather than the strict *SEDCO* rule.

CONCLUSION

The drafters of the FSIA sought to promote uniformity in the making of foreign sovereignty decisions. The courts can only achieve this uniformity by conforming to the exact statutory jurisdictional scheme set forth in the FSIA, and by interpreting its substantive exceptions in a consistent manner. Specifically, courts should follow the lead of the *Olsen* court in adhering to the FSIA jurisdictional plan. In

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114. *Id.*
115. 28 U.S.C. § 1602 (1982).
116. *Olsen*, 729 F.2d at 646.
117. *Id.*
118. 28 U.S.C. § 1602 (1982).
119. *Id.*
120. The Olsen girl was five years old at the time of the appellate argument, the Sanchez girl was eight years old. Appellant's Brief, *supra* note 10, at 2.

addition, courts should recognize the far-reaching substantive significance of the *Olsen* decision in clarifying both the restrictive theory and the scope of the discretionary function definition. On the other hand, the *Olsen* court's one tort rule must be interpreted in light of the unusual factual circumstances of this case,[121] and should not be applied blindly in every multiple tort situation. Also, courts should not adhere to unnecessary formalities, as the *Olsen* court did, in applying the extra discretionary function tests.[122]

In light of the *Olsen* decision, the United States judiciary must take note of the preeminent role it plays in making foreign sovereign immunity decisions. Consequently, it must draft opinions which do not contain biased or unjustified conclusions. Such decisions lead to inconsistent applications of the law that could have international immunity decisionmaking ramifications.[123] Such decisions could also jeopardize our nation's foreign relations.[124] The legal community and the general public would prefer to see the cooperation between countries that is demonstrated by the Letter of Agreement between the United States and Mexico[125] rather than witness a vindictive reciprocity of foreign immunity decisions. Unfortunately, such an exchange is likely in the event of a discriminatory treatment of foreign immunity cases by United States courts.

Michael A. Miranda

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121. The plane crash was only 1300 yards inside the United States. It would have been in Mexican territory within 30 seconds. Brief for Appellee at 6-7, Olsen *ex rel.* Sheldon v. Government of Mexico, 729 F.2d 641 (9th Cir. 1984). Of course, if the plane had not crashed on American soil, there would have been no jurisdiction because the wording of the tort section requires that the injury occur in the United States. *See supra* text accompanying note 102.

122. *See supra* text accompanying notes 98-101.

123. *See supra* text accompanying notes 54-55.

124. *See* HOUSE REPORT, *supra* note 13, at 45; U.S. CODE, *supra* note 13, at 6634: "The broad purpose of this legislation . . . [is] to minimize irritations in foreign relations arising out of such litigation." *Id. See generally* G. BADR, *supra* note 5.

125. *See supra* note 20 and accompanying text.