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Precarious Employment? Varying Approaches to Foreign Sovereign Immunity in Labor Disputes

RICHARD GARNETT*

I. Introduction

In 1998, I completed the first major article in the United States on the application of the rules of foreign sovereign immunity in employment disputes.[1] Typically, immunity is pleaded by a foreign state as a defense to a claim for unfair dismissal, unpaid wages, or sex discrimination by an employee of the state. A successful plea of immunity will result in the employee's case being dismissed without the merits being investigated. Immunity can, therefore, be a powerful weapon in the hands of a foreign state in thwarting the vindication of employee rights.

In the 1998 article, it was found that U.S. courts have taken varying approaches to the question of foreign sovereign immunity with occasionally inconsistent results on similar facts. The aim of the present article is to review the decisions of the past two decades to assess whether a clearer position has emerged on the rights of foreign state employees. While the earlier article examined disputes arising from employment in all foreign state-owned enterprises, both within and outside the United States, the present discussion focuses predominantly on employment taking place in the United States in embassies, consulates, and other foreign state organizations responsible for implementing government policy. Disputes arising from these types of employment are not only the most common but also often the most controversial.

II. The Legislative Regime

Before considering the recent decisions, the relevant legislation must first be examined. In the United States, foreign sovereign immunity is governed by the Foreign Sovereign Immunities Act of 1976 (FSIA), which gives a general grant of immunity to foreign states subject to exceptions. For the purposes of this study, the key exception is found in Section 1605(a)(2)(1) of the FSIA which removes immunity where the action is "based upon a commercial activity carried on in the United States" by the foreign state.[2]

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* Richard Garnett is Professor of Law at the University of Melbourne, Australia and Consultant in international litigation and arbitration at Herbert Smith Freehills.

1. Richard L. Garnett, *The Perils of Working for a Foreign Government: Foreign Sovereign Immunity and Employment*, 29 CAL. W. INT'L L. J. 133 (1998).

2. Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1605(a)(2) (1976).

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In considering whether the commercial activity exception is satisfied in an employment situation, U.S. courts have relied upon four approaches, which are also noticeable in the jurisprudence of other countries.[3]

The first approach involves situations where courts and legislative bodies have focused on the context or location of the employment. Where a person is employed in a highly sovereign context such as an embassy, regardless of the employee's level or capacity, the forum state should grant immunity to the foreign sovereign. The basis for such immunity is that any inquiry into activities at such a place necessarily would intrude upon the foreign state's sovereignty. By contrast, where a person is employed in an organization whose nature and functions are identical to corporations in the private sector, a plea of foreign sovereign immunity rarely should be available because no sensitive governmental concerns are implicated.

A second approach to employment claims by foreign states has paid particular attention to the status and duties of the employee. A finding of immunity should be more likely where the plaintiff employee is in a senior, policy-oriented position because he or she is closer to the sovereign "core" of the foreign state. But where an employee is engaged in routine, purely operational duties, or in work that is highly similar to that performed by persons in private corporations, a grant of immunity would not be appropriate. This analysis, focusing on the functions and role of the employee, is advocated in this Article as the best method for protecting the rights of *both* employer and employee and because it arguably now represents the customary international law standard applied in the majority of nation states.[4]

A third approach to resolving immunity pleas in employment actions focuses on the territorial connection between the forum, the employee, and the employment contract. A number of national immunity statutes, including the FSIA, expressly require a territorial connection between the claim and the forum of adjudication before jurisdiction can be exercised.[5] In

3. For analyses of the position in other jurisdictions, *see* Julia Brower, *State Practice on Sovereign Immunity in Employment Disputes Involving Embassy and Consular Staff*, CENTER FOR GLOBAL LEGAL CHALLENGES (Dec. 19, 2015), https://law.yale.edu/system/files/state_immunity_in_employment_disputes.pdf; Richard L. Garnett, *The Precarious Position of Embassy and Consular Employees in the United Kingdom*, 54 INT'L & COMP L. Q. 705 (2005); Richard L. Garnett, *State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?*, 64 INT'L & COMP. L. Q. 783 (2015); Richard L. Garnett, *State Immunity in Employment Matters*, 46 INT'L & COMP. L. Q. 81 (1997); Richard L. Garnett, *State Immunity and Employment Relations in Canada*, 18 CANADIAN LAB. & EMP. L. J. 643 (2014), http://heinonline.org/HOL/Page?handle=hein.journals/canlemj18&div=25&g_sent=1&casa_token=&collection=journals. The issue has particularly attracted the attention of European scholars. *See, e.g.*, Philippa Webb, *The Immunity of States, Diplomats and International Organisations in Employment Disputes: The New Human Rights Dilemma?*, 27 EUROPEAN J. INT'L L. 745 (2016); Andrew Sanger, *State Immunity and the Right of Access to a Court under the EU Charter of Fundamental Rights*, 65 INT'L & COMP. L. Q. 213 (2016).

4. *See* Brower, *supra* note 3, at 784.

5. *See* 28 U.S.C.A. § 1605(a)(2).

addition, the nationality of the employee, in particular, whether he or she is a citizen of the foreign state, the United States, or a third country, has been considered a relevant criterion.

The fourth tendency perceptible in the case law and legislation of countries dealing with employment disputes with foreign states has been the isolation and characterization of the particular claim brought by the employee in order to ask whether such an action excessively implicates the sovereignty of the foreign state. For example, where an employment action involves an investigation into the conduct of a state's security services, a court should deny jurisdiction, granting immunity. But where the claim merely requires an examination of conduct typically performed by persons situated in the private sector, immunity should not be granted.

All these approaches represent attempts to reconcile a number of competing interests at work in a foreign sovereign employment case. While there is a plaintiff employee's interest in obtaining redress, there is also a foreign state employer's interest in protecting its governmental functions from the scrutiny of other states. Similarly, while the forum state has an interest in protecting its nationals and residents employed by the foreign state, it also has a conflicting concern to maintain good diplomatic and commercial relations with the foreign state defendant.

The legislative history of the FSIA on the commercial activity exception should also be considered. The history indicates that commercial activity is conduct that is not public or governmental in nature.[6] Further, "the employment of diplomatic, civil service, or military personnel" would be public or governmental in nature, but not the employment of United States citizens or third country nationals by the foreign state within the United States.[7] The "engagement of laborers, clerical staff or public relations or marketing agents" would also be considered commercial activity.[8] Such history arguably focuses principally on the second and third of the two approaches above, namely the status and duties of the employee and the territorial nexus in the immunity determination. The suggestion that the employment of diplomatic or civil service personnel would be sovereign activity while employment of laborers, clerical staff, public relations, or marketing agents would be commercial appears to emphasize the different role and duties performed by such staff. The reference to the employee having United States or third country nationality also implies that the foreign state's interest in precluding adjudication should be given less weight in such cases.

Despite these observations in the legislative history, U.S. courts—in decisions both before and after 1998—have also relied on the other two criteria referred to above in immunity determinations, namely the place of

6. *See* FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976, H.R. REP. NO. 94-1487, 16 (1976), *reprinted in* UNITED NATIONS LEGISLATIVE SERIES MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY 107 (1982).

7. *Id.*

8. *Id.* at 108.

employment and the nature of the claim. A brief appraisal of the pre-1999 decisions will first be made in order to provide a background to the recent cases.

III. Pre-1999 Decisions: Diplomatic and Consular Employment

Embassies and consulates are arguably the most sovereign locations of a foreign state in another country's territory where matters of important and sensitive national policy are considered. Consequently, disputes concerning employment at such missions have always been difficult and controversial. In 1996, the 9th Circuit gave a resounding endorsement of the employee's rights and duties approach to immunity in such cases in *Holden v. Canadian Consulate*.[9] There the court held that a U.S. citizen employed as a commercial officer within the trade and investment section of a consulate was entitled to sue her employer for sex and wage discrimination.[10]

The distinction in the legislative history to the FSIA between the employment of diplomatic or civil service personnel and clerical staff, public relations, or marketing agents was relied upon, with the court noting that it required an assessment of the duties of the employee. The claimant was not a civil servant because she completed no examination prior to being hired and was not entitled to tenure or any benefits provided to foreign service officers from her employer.[11] Nor was she a member of the diplomatic personnel; although employed in the consulate and not in a separate trade office her activities were not those of a diplomat.[12] She was engaged in promoting and marketing products of the foreign state, which was the type of work regularly done by private persons. The employee was not involved in policy determination, lobbying activity, or legislative work for the government and could not speak on its behalf. As a U.S. citizen, she could not enter the consulate unless in the company of a foreign service officer.

Holden, therefore, is a very clear case of a court resolving the immunity determination by reference to the role and duties of the employee, but such an approach was not universally adopted in embassy/consulate cases prior to 1999. For example, in *Ferdman v. Consulate Gen. of Israel*,[13] immunity was imposed in a suit by a public affairs officer for sex discrimination on the basis that because a consulate was a highly sovereign workplace; no investigation of its affairs or activities was permissible.[14] As is apparent, an approach that focuses on the nature of the employee's workplace can be particularly harsh on employees in sovereign location cases, where the worker is engaged in

9. Holden v. Canadian Consulate, 92 F.3d 918 (9th Cir. 1996).

10. *See id.* at 922.

11. *Id.* at 921.

12. *Id.* at 922.

13. Ferdman v. Consulate Gen. of Isr., 997 F. Supp. 1051 (N.D. Ill. 1998).

14. *Id.* at *4 (saying, "[c]onsulate activities are of course the epitome of 'sovereign or public acts'").

menial or routine duties. Such an analysis also appears inconsistent with the legislative history to the FSIA above.

IV. Pre-1999 Decisions: State-Owned Marketing, Cultural, and Tourism Bodies

Distinct from embassies and consulates are organizations established by foreign states to carry out broad policy aims such as the dissemination of cultural material or assistance in the marketing of the home country's products or tourism. There was one pre-1999 decision where the governmental nature of such a body was instrumental in an employee's claim being dismissed on immunity grounds. In *Iacobelli*,[15] a secretary was not permitted to sue to recover unemployment benefits after her employment at the Japanese Development Bank ended because the court found that the nature of the activities undertaken by the organization was governmental. Despite the use of the term "bank" in the employer's title, it was, in fact, an instrument of government policy with responsibility for gathering governmental, financial, and economic information for the foreign state.[16]

By contrast, in other pre-1999 decisions involving marketing and cultural bodies, commercial activities were found to be present by reference to the status and duties of the employee. In *Segni v. Commercial Office of Spain*,[17] a claimant was permitted to sue his employer, an agency of the Spanish Government responsible for promoting Spanish exports to the United States. What was important in the immunity determination was not the nature of his employer's activities—which was found to be governmental—but rather the position and duties of the employee. His role was to provide services in product marketing, and he was not involved in either the creation or implementation of government policy. A similar approach was taken in allowing suits by a marketing executive of a foreign state-owned tourist authority[18] and a receptionist switchboard operator at a foreign government owned institution "for cultural, educational and informational exchange."[19] Also significant in those decisions decided similarly to *Holden*, was that the employee did not hold the nationality of the foreign state employer.

By contrast, in another pre-1999 cultural bodies case, *Goethe House New York, German Cultural Ctr. v. N.L.R.B.*,[20] a U.S. court resolved the question of commercial activity by referencing the nature of the employee's claim before the court. Specifically, immunity was denied in the context of a claim for union certification on behalf of U.S. nationals employed at a foreign-

15. In re Claim of Iacobelli, 484 N.Y.S.2d 318 (App. Div. 1985).

16. *Id.*

17. Segni v. Commercial Office of Spain, 835 F.2d 160 (7th Cir. 1987).

18. Elliott v. British Tourist Auth., 986 F. Supp. 189, 194 (S.D.N.Y. 1997), *aff'd* 172 F.3d 37 (2d Cir. 1999).

19. EEOC Decision no. 85-11, 38 Fair Empl. Prac. Cas. (BNA) 1876 (1985).

20. Goethe House New York, German Cultural Ctr. v. N.L.R.B., 869 F.2d 75, 81 (2d Cir. 1989).

state subsidized cultural center because the court's entertaining the claim would not involve an intrusion into the sovereign functions of the foreign state.

V. Post-1999 Decisions: Embassies and Consulates

A. The Nature of the Employee's Duties as Commercial Activity

In the majority of cases since 1999 involving embassy and consular employment, courts have favored the second approach mentioned above, namely, resolving the immunity question by reference to the status, role, and duties of the employee. The leading decision comes from the District of Columbia Federal Circuit Court of Appeals in *El-Hadad v. U.A.E.*.[21] *El-Hadad* involved an action for breach of employment contract and defamation by an Egyptian citizen against the UAE. The claimant had been employed as an auditor and supervising accountant in the cultural attaché office at the UAE Embassy.[22]

The court began by quoting the legislative history to the FSIA, noting that a foreign government's civil servants and diplomats "do not qualify for the commercial activity exception."[23] Yet at the same time, the court noted, the reverse does not apply; merely because an employee is not a civil servant or diplomat does not mean that such a person cannot "still be engaged in quintessentially governmental work–like, for example, a judge."[24] Hence, if the court finds the claimant to be a civil servant, immunity will be imposed, but if he or she is not within that category, the court must still proceed to examine the nature of the person's employment and duties to determine if they are sovereign in nature.

Before considering whether the employee was a civil servant on the facts, the court in *El-Hadad* made other important comments about the commercial activity exception in employment disputes. First, it specifically rejected the nature of the claim approach for determining whether commercial activity exists, for example, where a court focuses simply on the circumstances underpinning the employee's action (such as the employer's acts of discrimination). Application of such a test may mean that the "case might entirely defy analysis"[25] in the sense that it would be difficult to determine whether commercial activity was present at all. Instead, it was necessary for the court to look at the employment relationship "as a whole."[26] The nature of the claim approach is discussed in more detail at

21. El-Hadad v. U.A.E., 496 F.3d 658, 662 (D.C. Cir. 2007) (substantially affirming its earlier decision), *aff'g* 216 F.3d 29 (D.C. Cir. 2000).
22. *Id.*
23. *Id.* at 663-664.
24. *Id.* at 664.
25. *Id.* at 663, n.1.
26. *Id.*

Section VI.B below. Secondly, the court, while endorsing the employee's duties and responsibilities approach from the *Holden* and *Segni* cases (above), nevertheless departed from the courts in those decisions' analysis of the legislative history. Specifically, in those cases, the courts suggested that once an employee was found not to be a civil servant a finding of commercial activity must follow. However, the court in *El-Hadad* said that this approach misread the legislative history because the description of diplomatic or civil service personnel was meant to be illustrative, not exhaustive, and would not preclude a court from finding immunity even where the employee was not a civil servant or diplomat.[27]

The court in *El-Hadad* then articulated the following criteria for determining whether an employee was a civil servant of the foreign state.[28] First, how does the law of the foreign country define its civil service, and did the employee's "job title and duties come within that [description]?"[29] Second, what is the nature of the claimant's relationship with the foreign state; is it purely contractual, or is it based solely upon the civil service laws of the foreign country? Third, was there any connection between the claimant's prior working history in the foreign state and his or her subsequent employment at the embassy? Specifically, was the embassy role a new job or a continuation of domestic civil service?[30] Fourth, what is the nature of the claimant's work at the embassy? Finally, what is the relevance of the claimant holding a nationality other than that of the foreign state and, in particular, is the foreign state a country that would employ non-nationals in governmental positions? The foreign state employer has the burden of proof of establishing the above criteria.

Applying the above guidelines to the facts, first, while the law of the UAE had no definition of civil service, the employee in *El-Hadad* was not eligible for civil service benefits.[31] Second, the employee fell within the definition of a local employee of a mission abroad that expressly excluded civil servants.[32] Third, there was no doubt that the employment at the embassy was separate and "unrelated to his prior employment in the UAE."[33] Fourth, it was clear that the claimant "had no role in the creation of UAE government policy and was not" a party to UAE political decisions and "performed only the ordinary auditing duties of any commercial accountant" with no discretion in his duties.[34] While the plaintiff had supervisory authority over other accountants in his office, his exclusion from policy formulation and lack of

27. El-Hadad v. U.A.E., 496 F.3d 658, 664 n.2 (D.C. Cir. 2007) (substantially affirming its earlier decision), *aff'g* 216 F.3d 29 (D.C. Cir. 2000).

28. *See id.* at 665.

29. *Id.*

30. *See id.*

31. *See id.* at 665–67.

32. *See id.* at 666.

33. El-Hadad v. U.A.E., 496 F.3d 658, 662 (D.C. Cir. 2007) (substantially affirming its earlier decision), *aff'g* 216 F.3d 29 (D.C. Cir. 2000).

34. *Id.*

discretion were more compelling factors. Finally, the fact that the claimant held the nationality of a third country was irrelevant given that "small countries like the UAE [ ] at times employ non-nationals in high governmental positions."[35] Where, by contrast, a state "rarely if ever hires non-citizens for its civil service . . . non-citizenship strongly indicates that someone is *not* a civil servant."[36] Yet, in all cases, the fact that an employee has the citizenship of the foreign state will support a finding that the person is a civil servant.

Therefore, the applicant was found not to be a civil servant, and the court then had to consider next whether his duties nevertheless involved the exercise of governmental power for which immunity should attach.[37] According to the court, a "distinctive mark of governmental work is discretionary involvement with sovereign law or policy."[38] Since, as noted above, the claimant had no role in the creation of government policy, his duties were not discretionary and he "did standard accounting work . . . of a character easily found in commercial enterprise," the commercial activity exception applied.[39]

El-Hadad is a compelling affirmation of the employee's role and duties approach both in its analysis of the meaning of "civil servant" and its assessment of the status of a foreign state employee who is not a civil servant.[40] Given the highly sovereign context of employment involved in that case—an embassy—this is a significant step in favor of protecting the rights of foreign state employees.

A similar approach has been taken in other embassy/consulate cases. In *Mukaddam v. Permanent Mission of Saudi Arabia to the U.N.*, a plaintiff who was employed to write speeches for Saudi government officials, draft correspondence, public statements, and reports to the foreign ministry, and establish a data bank classification system was held entitled to sue her employer for wrongful termination of employment.[41] The court found that that the employee was not a civil servant. First, there was no evidence of Saudi law being followed on the question, and second, the facts showed that she did not complete a competitive examination prior to being hired, did not have tenure, and did not receive the same benefits as foreign service officers or the more general civil service protections. The plaintiff's employment contract showed that she "was a contract employee hired to conduct research and perform [ ] clerical duties."[42] The employee was also not a member of

35. *Id.* at 667.

36. *Id.*

37. *See id.*

38. *Id.* at 668.

39. El-Hadad v. U.A.E., 496 F.3d 658, 662 (D.C. Cir. 2007) (substantially affirming its earlier decision), *aff'g* 216 F.3d 29 (D.C. Cir. 2000).

40. *See id.* at 665–66.

41. Mukaddam v. Permanent Mission of Saudi Arabia to U.N., 111 F. Supp. 2d 457, 464 (S.D.N.Y. 2000).

42. *Id.*

the state's diplomatic personnel as she was not involved in the "administration of government policy, privy to [ ] policy deliberations," engaged in legislative and lobbying activities, or authorized to speak on behalf of the foreign state.[43] At most, the claimant "drafted speeches and statements that set forth [the foreign state's] governmental policy and positions."[44] Once the court established that the employee was neither a civil servant nor a diplomat, it proceeded to find, again by reference to her above duties and responsibilities, that her action was based upon commercial activity.[45] The plaintiff's U.S. citizenship was another factor in support of denying immunity. *Mukaddam* is, therefore, another emphatic statement of the employee role and duties approach.

Note that in *Mukaddam* the foreign state also sought to rely on Article 7 of the Vienna Convention on Diplomatic Relations (VCDR) to support its claim to immunity. Article 7 provides that the sending state may "freely appoint the members of the staff of [its] mission," but the court properly found that such provision, on its face, confers no "absolute grant of immunity" from "any legal challenge to the hiring and firing of [m]ission staff."[46] More fundamentally, while the VCDR provides rules on the immunities for diplomatic personnel, the instrument says nothing about foreign sovereign immunity, which is comprehensively dealt within the FSIA.[47] Hence, if jurisdiction over a foreign state is established under the FSIA, the VCDR cannot alter the conclusion.

A very recent decision by the District Court of the District of Columbia, with highly similar facts, confirms that where an embassy or consular employee is not a member of the foreign state's civil service and is performing generic administrative tasks with no involvement in governmental decision making, immunity will not be available. In *Ashraf-Hassan v. Embassy of France*,[48] the court stated that employment will be considered commercial "if an employee is contracted to work as a non-civil servant and has duties of a clerical nature."[49] Here, the plaintiff was engaged in "supervising the embassy's [ ] placement program and coordinating [its] partnership with the French-American Cultural Exchange in New York." As a result, commercial activity was found.[50] Her position was purely administrative with no involvement in governmental decisions.

Interestingly, in the appeal in *Ashraf-Hassan*, the foreign state conceded the question of commercial activity and instead argued (rather ambitiously)

43. *Id.*
44. *Id.*
45. *See id.* at 466.
46. *Id.* at 468 (quoting the Vienna Convention on Diplomatic Relations, art. 7, Apr. 18, 1961 23 U.S.T. 3227, 500 U.N.T.S. 95).
47. *See id.* at 469-70.
48. Ashraf-Hassan v. Embassy of Fr., 40 F. Supp. 3d 94 (D.D.C. 2014), *aff'd* 610 F. App'x. 3 (D.C. Cir. 2015).
49. *Id.* at 102.
50. *Id.* at 98.

that the claimant's case was not based upon such activity because her action on the merits would almost certainly fail.[51] The court quite properly rejected such an assertion, noting that it "erroneously conflates the question of subject matter jurisdiction with an inquiry into the merits. A plaintiff need not be successful on the merits for a court to have [subject matter] jurisdiction."[52]

In some decisions involving embassy and consular employees, the application of the role and duties approach has, by contrast, resulted in the imposition of immunity. *Sanchez-Ramirez v. Consulate of Mexico in San Francisco* concerned two consular employees, both nationals of the foreign state: G, who assisted Mexican nationals with issuing and renewing of passports and visas, and S, who was a lawyer and notary public responsible for authenticating legal documents.[53] G and S both sued for breaches of "the California Labor Code [for] failing to provide meal and rest breaks" and pay overtime.[54] Additionally, S brought an individual action for disability and sex discrimination.[55] The court noted that both G and S were Mexican nationals working in the United States under A2 visas, which are granted to persons travelling to the United States to engage in solely official and governmental activities of the foreign state (but who are not ambassadors, ministers, or diplomatic officers).

The court agreed with the foreign state that both G and S were civil servants and that the nature of both of their jobs were integral to the government because the services could not be provided to Mexican nationals without employees such as the plaintiffs. The work also could not be performed by a private party in commerce.[56] In the case of S, while he did not have final approval over the submission of documents to the government, he had primary drafting responsibility, and his role involved selection and filling out the correct forms. Similarly, G's role, in "verifying the identity of persons seeking government-issued identification" (passports) was a uniquely governmental position.[57] While the court noted some of the employees' tasks could be characterized as "clerical [and] administrative" in the terms of the legislative history, "almost any job involving documentation will have 'clerical' and 'administrative' aspects."[58] The court also noted that both employees received many of the same types of benefits that diplomatic and consular officers enjoyed, such as health benefits and relief from taxation.

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51. Ashraf-Hassan v. Embassy of Fr., 610 F. App'x. 3, 5–6 (D.C. Cir. 2015).

52. *Id.* at 6. For another recent decision involving an embassy employee (a receptionist) where the French government conceded that commercial activity existed, *see* Jouanny v. Embassy of Fr. In the U.S., 220 F. Supp. 3d 34 (D.D.C. 2016).

53. Sanchez-Ramirez v. Consulate of Mex. in San Francisco, 2013 WL 4013947 *1 (N.D. Cal. 2013), *aff'd.* 603 Fed. App'x. 631 (9th Cr. 2015).

54. *Id.*

55. *Id.* at *2.

56. *Id.* at *9.

57. *Id.*

58. *Id.*

The decision in *Sanchez-Ramirez*, while a disappointing result for the employees in question, appears to be a defensible application of the duties and responsibilities approach to define commercial activity. While neither party was in a senior, policy-oriented role, their work was uniquely governmental in that the tasks performed had no private sector counterpart, and both employees were citizens of the foreign state who enjoyed civil service benefits. Therefore, it is understandable that a foreign state would not want public adjudication of matters that could reveal its policies and practices regarding immigration and the benefits provided to its civil service.

A more contentious category of embassy and consulate employment cases concerns persons employed as chauffeurs. While the courts in such cases have purported to apply an employee duties test, in reality, they excessively defer to the interests of foreign states. In *Crum v. Kingdom of Saudi Arabia*, a chauffeur at the Saudi Embassy—responsible for transporting embassy officials, their families, and guests—was not permitted to sue his employer because his work was not commercial as it involved the securing the safety of the state's officials.[59] This result was reached despite the employee being a U.S. citizen and not a member of the Saudi civil service. The court also bolstered its conclusion by referencing Article 7 of the VCDR, but as noted above by the court in *Mukaddam*, neither this provision, nor the VCDR, as a whole, has any relevance to foreign sovereign immunity in employment cases.[60]

In a more recent decision, *Figueroa v. Ministry of Foreign Affairs of Sweden*, it was confirmed that a chauffeur, responsible for transporting the ambassador of a foreign state, his or her family, and other diplomatic staff, was not permitted to sue for workplace claims.[61] Again, it was noted by the court that:

> The safe transport of [foreign state] dignitaries, [is] an activity integral to effecting the governmental function of the Mission. A sovereign's decisions on how best to address the safety concerns of government officials are peculiarly sovereign because [a] failure to protect or safeguard a sovereign representative, such as an ambassador or a titular head of state, can have extremely adverse consequences for the sovereign nation.[62]

While the court acknowledged that a chauffeur stands closer to a clerical worker than a civil servant in terms of the FSIA legislative history, such

59. Crum v. Kingdom of Saudi Arabia, 2005 WL 3752271 at *4 (E.D. Va. 2005); *See also* Martinez v. Consulate Gen. of Alg. in N.Y., 2016 WL 6808227 (S.D.N.Y 2016) (where *Crum* was recently applied—with minimal reasoning—to another case involving a chauffeur at a consulate).

60. *Id.* at *4.

61. Figueroa v. Ministry of Foreign Affairs of Swed., 222 F. Supp. 3d 304, 306 (S.D.N.Y. 2016).

62. *Id.* at 315.

comments were only informative, not outcome determinative.[63] Also, while the chauffeur was unlikely to have been a civil servant under Swedish law, he was still subject to a special benefits scheme for locally engaged staff.[64]

It is relevant that the courts in *Crum* and *Figueroa* relied heavily on the 4th Circuit Court of Appeals decision in *Butters v. Vance Int'l* in support of their conclusion that a chauffeur was in a uniquely "sovereign" position.[65] *Butters* involved a security agent assigned to the Saudi Arabian royal family, with direct responsibility for securing the safety of its members, whose employment suit was also barred by immunity because it was not based upon commercial activity.

It is questionable, however, whether these decisions involve a correct application of the employee's role and duties criterion. The preferable rationale for this principle is that certain types of employment involve activities that simply cannot be performed by persons in the private sector because of their seniority, involvement in government policy, or proximity to sensitive information belonging to the foreign state. To say that a chauffeur and a security guard fall within such a category simply because the persons they are looking after happen to be senior officials of the foreign state seems an unreasonable extension of immunity. It is notable in *Figueroa* that the court referred to the "adverse consequences" that could be suffered by a foreign state because of harm to its leading representatives.[66] But what if the chauffeur had been transporting more junior officials of the foreign state or leading CEOs of major private corporations? There would be commercial activity in such cases, yet concerns about safety would still be present. Also, how does allowing a chauffeur to sue for discrimination in relation to his or her employment endanger the safety or security of the foreign state or its leaders? Lawsuits against state officials may be embarrassing, but that is a feature of any litigation; imposing immunity hardly deters such undesirable workplace practices in the future. The correct focus should instead be on the nature of the work involved, which is driving and transporting, an activity that can be equally performed in the private sector, rather than focusing on the persons for whom the job is being done. A concentration on the employer in this context is, therefore, effectively an application of the first criterion for defining commercial activity discussed above—the nature of the workplace or the employer—which will almost always lead to absolute immunity where the worker is employed at an embassy or consulate. Arguably, it is the employee who suffers the greater adverse consequences of such a test, particularly when they are U.S. citizens and residents with effectively one forum in which to seek redress.

A much more defensible grant of immunity in the state security context can be seen in the decision of the 9th Circuit Court of Appeals in *Eringer v.*

63. *Id.* at 315–16.
64. *See id.*
65. Butters v. Vance Int'l, 225 F.3d 462, 467 (4th Cir. 2000).
66. *Figueroa*, 222 F. Supp. 3d at 315.

Principality of Monaco.[67] There, an acknowledged "spymaster," employed as the Director of Monaco Intelligence Services, was precluded from suing his foreign state employer.[68] The claimant here was engaged in liaising with other intelligence agencies, investigating potential government appointments, investigating suspicions of corruption and other illegal activity in Monaco, and protecting the Prince of Monaco from improper foreign influence.[69] Obviously, these are tasks and activities unique to government, with the employee here operating at a high level of sensitive national security. Not only could such conduct not be performed in the private sector, but also there are compelling reasons of comity and inter-state relations why a U.S. court should not be placed in the position of reviewing such matters.

B. The Nature of the Employer as Commercial Activity

Having considered the decisions which purported to apply the employee duties and responsibilities criterion for defining commercial activity, it is worth mentioning one case involving embassy employment where the first approach—that is, the nature of the employer—was explicitly relied upon to resolve the issue. *Hijazi v. Permanent Mission of Saudi Arabia to the U.N.* involved a Jordanian claimant employed at the Saudi Arabian Mission who sued for workplace discrimination.[70] The claimant was an adviser whose role included taking notes at diplomatic meetings, conducting research, writing memoranda, and on one occasion, speaking on behalf of the mission.[71] In essence, this case presented highly similar facts to *Mukaddam* (above), yet the court reached the opposite conclusion on the issue of commercial activity and upheld the plea of immunity.[72]

The court was heavily influenced by the decision in *Kato*[73] (discussed at Section VI.A below) which shifted the focus in defining commercial activity in employment immunity cases to "whether particular actions that the *foreign state* perform[s] [are the] type of actions by which [a] private party engage[s] in trade and traffic or commerce."[74] Once the foreign state is found to engage in sovereign activities at a particular workplace, the question becomes whether the plaintiff employee's duties form part of such state's functions.[75] The practical effect of such a test is that where a highly

67. Eringer v. Principality of Monaco, 533 F. App'x. 703 (9th Cir. 2013).
68. *Id.* at 705.
69. *See id.* at 704–05.
70. *See* Hijazi v. Permanent Mission of Saudi Arabia to U.N., 689 F. Supp. 2d 669 (S.D.N.Y.), *aff'd*, 403 F. App'x 631 (2d Cir. 2010).
71. *See id.* at 669–75.
72. *See id.* at 669; *but cf. Mukaddam*, 111 F. Supp. 2d at 469–70 (denying defendant immunity where plaintiff's employment was considered commercial activity in accordance with the exception to the Foreign Sovereign Immunities Act).
73. Kato v. Ishihara, 360 F.3d 106 (2nd Cir 2004).
74. *Id.* at 106 (emphasis added).
75. *See id.* at 107.

sovereign workplace is involved, it will be difficult for the employee to show that his or her tasks are not part of the state's functions. The *Hijazi* court almost admits as much by saying that "the focus of the inquiry ought to be on the employer's general actions rather than the specific employment contract at issue."[76]

Such a test effectively reinstates absolute immunity for embassy and consular employees, and in *Hijazi*, the court had little difficulty finding that the employee's duties were so "sufficiently intertwined with the diplomat's governmental functions" that they fell outside the commercial activity exception.[77] On appeal, the Second Circuit Court of Appeals[78] affirmed, noting that the claimant's duties were "in service of the [m]ission's governmental function."[79] Again, the point must be made: once a foreign sovereign's workplace is used as a starting point for determining whether a commercial activity exists, the inquiry into the employee's duties inevitably becomes secondary or incidental, and the result being that it will be difficult to show that such duties are not part of the state's governmental functions. The contrast with the second criterion above is stark; instead of considering whether the employee's role is uniquely sovereign and cannot be performed by a comparatively placed employee in the private sector, the court simply considers whether the employee is part of the apparatus of government, which will almost always be so in the case of an embassy or consular employee. It is suggested that such an approach is excessively protective of foreign state interests at the expense of legitimate claims for redress by routine employees.[80]

VI. Post-1999 Decisions: State-Owned Marketing, Tourism, and Cultural Bodies

It was noted above that a general trend in the pre-1999 authorities on marketing, tourism, and cultural bodies, especially the *Segni* case, was to determine the issue of commercial activity by referencing the status and duties of the employee.[81] In more recent decisions, a serious divide has emerged in U.S. case law between courts that continue to apply an employee role and duties approach, others that focus on the nature of the employer and its activities, and still others that give primacy to the particular claim or action that forms the basis of the suit. As will be argued, while the nature of the employer test unduly privileges foreign states at the expense of employee rights, the nature of the claim analysis goes in the opposite direction, making

76. *Hijazi*, 689 F. Supp. 2d at 674.
77. *Id.* at 669.
78. *Hijazi*, 403 F. App'x at 631.
79. *Id.* at 632.
80. In *Jimenez v. United Mexican States*, a court dismissed on immunity grounds a workplace claim by a consulate employee simply on the basis that there was "no evidence" of commercial activity. No reasoning was given for this conclusion. *See* Jimenez v. United Mexican States, 978 F. Supp. 2d 720 (S.D. Tex. 2013).
81. *See Segni*, 835 F.2d at 164–65.

it almost impossible for a state to claim immunity. The employee role and duties approach, by contrast, is an appropriate middle ground that allows for a balancing and weighing of the competing interests.

A. The Nature of the Employer as Commercial Activity

The leading case from the Second Circuit is the decision of the Federal Court of Appeals in *Kato v. Ishihara*.[82] *Kato* involved a Japanese citizen employed by the Tokyo Metropolitan Government (TMG) in New York who sued for gender discrimination.[83] Kato was employed under the terms of a Japanese law applicable to "local public servants," which included qualification by competitive examination, guaranteed life tenure, and rotation of employment placements.[84] The claimant's tasks included "promotional activities on behalf of Japanese companies, such as manning booths at trade shows to promote specific products," and preparing marketing reports for Japanese companies.[85]

After referring to the legislative history of the FSIA, the court noted that although the claimant was "employed in activities relat[ing] to marketing and business, [she] was concededly a 'civil servant' under Japanese law and subject to many of the protections afforded the Japanese civil service."[86] The court, therefore, made the important point that despite the apparently separate references to "civil servant" and "marketing agent" in the legislative history, in practice they are not always wholly distinct categories.[87] Instead, according to the court, the key inquiry was "whether TMG's activities in New York were typical of a private party engaged in commerce."[88] In one swoop, the court shifted the focus away from the employee's duties and responsibilities to the nature and functions of the employer or workplace. Applying this test to the facts, it was found that "TMG performed actions that were only superficially similar to actions typically undertaken by private parties."[89] Its role was "product promotion for Japanese companies, general business development assistance, [and] participation in trade shows on behalf of the companies to promote those companies' products for sale."[90] While "a private Japanese business might engage in those activities on its own behalf . . . such a business will not typically undertake the promotion of other Japanese businesses, or the promotion of Japanese business interests in general."[91] Hence, the court concluded that where an entity engages in "the promotion of commerce," as opposed to simply "commerce," it is

82. *Kato*, 360 F.3d at 109.
83. *See id.*
84. *Id.* at 109.
85. *Id.*
86. *Id.* at 111.
87. *Id.*
88. Kato v. Ishihara 360 F.3d 106, 111 (2nd Cir 2004).
89. *Id.*
90. *Id.*
91. *Id.* at 112.

performing a "quintessential governmental function."[92] Because TMG was not involved in commercial activity, the claimant's "involvement in such activities on TMG's behalf" must also necessarily be governmental.[93] The conclusion that TMG was engaging in governmental activity and Kato was doing so on its behalf also meant that Kato was a civil servant.[94]

Kato is a highly significant decision in that it almost has the effect of bringing absolute immunity back to many foreign sovereign employment disputes. The reality is that apart from the most obviously commercial places of employment, such as private corporations and banks engaged in profit making activities, an employee's rights will now be dependent on the activities performed by his or her employer. Such a result can be highly unjust, especially where the employee's own duties are routine and generic, with no policy dimension. Hence, for any employees of organizations engaged in policy implementation or formulation, the position is bleak after *Kato*. While the result in *Kato* could possibly be justified on the ground that the employee there was a Japanese citizen who was a civil servant under Japanese law, her duties were nonetheless of a low-level nature that would be unlikely to implicate the sovereignty and security concerns of the foreign state.

The impact of *Kato* has already been seen in the *Hijazi* case discussed in Section V.B above. Its influence is also apparent in other recent decisions such as *Kim v. Korean Trade Promotion Investment Agency* (KOTRA)[95] and *Salman v. Saudi Arabian Cultural Mission*.[96]

Kim concerned a U.S. citizen responsible for researching and identifying potential buyers of goods and services in the United States for Korean exporters and linking up exporters and buyers, with his job title being marketing manager and consultant.[97] KOTRA was an entity established for the "purpose of promoting development of the Korean economy by providing services to Korean industries and enterprises," specifically to act as a local office to assist Korean enterprises in selling goods and services in the United States.[98] The court applied the approach in *Kato* based on "the nature of the employer" to find that no commercial activity existed in this case.[99] After noting that KOTRA's activities were "virtually indistinguishable from the services offered by TMG [in *Kato*]" the court found that the organization's "sole purpose was the furtherance of Korean government policy in facilitating Korean trade and economic interests."[100] Furthermore,

92. *Id.*
93. *Id.*
94. *See id.* at 109.
95. Kim v. Korea Trade Promotion–Inv. Agency, 51 F. Supp. 3d 279 (S.D.N.Y. 2014).
96. Salman v. Saudi Arabian Cultural Mission, No. 1:16 CV1033, 2017 WL 176576, at *1 (E.D. Va. Jan. 17, 2017).
97. *See Kim*, 51 F. Supp. 3d 279.
98. *Id.* at 281.
99. *See id.* at 284; *See Kato*, 360 F.3d at 111.
100. *Kim*, 51 F. Supp. 3d at 287–88.

the claimant's employment was "closely intertwined" with KOTRA's government role of promoting Korean companies.[101]

As argued above, the "intertwined" test may at first blush appear to be a middle ground between the nature of the workplace and the employee's role and duties tests in defining commercial activity, but ultimately in its application, it gives great weight to the activities of the employer. This conclusion flows from the fact that in every case where the employer was found to be engaged in sovereign acts (for example, *Kato*, *Kim*, and *Hijazi* discussed above), the "intertwined" test has always been satisfied. Again, it is clear that where an employee happens to work in a "sovereign" location it will be almost impossible for them to show that their duties were somehow extraneous or peripheral to their employer's functions.

The impact of *Kato* can also be seen in the very recent decision of *Salman v. Saudi Arabian Cultural Mission*.[102] The claimant in that case, a U.S. citizen, was employed as an academic adviser with an organization "created by the Saudi government to administer programs and policies to meet the educational and cultural needs of Saudis studying in the United States."[103] The purpose of the organization was to provide services to students such as financial aid, accommodation, and advice on course selection and academic requirements.[104]

The claimant sued for sex discrimination and the court again endorsed the *Kato* approach to commercial activity, saying that "the question is not whether an individual employed by a foreign state performed job functions with an analogue in the private sector. Rather the inquiry centers on the nature of the conduct undertaken by the foreign state itself and the individual's role in that activity."[105] In this case, the court found that a free college education was a public benefit in Saudi Arabia, and the organization was, therefore, involved in the distribution of public benefits with the plaintiff being "tasked" with providing such public benefits to Saudi students in the United States.[106] The Saudi government "did not buy or sell anything or engage in any profit-driven activity" but "simply acted through [the organization] to effectuate its educational policy, ensuring that students studying abroad received precisely the same benefits as their domestic counterparts."[107] The manner in which the government conducts its educational policy "has political, cultural, and religious dimensions," and so it is clearly governmental in nature.[108] The government must, therefore, have free "choice of personnel [in] implementing [such] policy."[109] Again,

101. *Id.* at 289 n.4.
102. *Salman*, 2017 WL 176576 at *1.
103. *Id.*
104. *See id.*
105. *Id.* at *4.
106. *Id.* at *5.
107. *Id.*
108. *Id.*
109. *Id.*

the almost exclusive focus is on the employer, with little or no attention given to the position and status of the employee.

As mentioned above, the only situation in which the *Kato* test will work to the benefit of the employee is where the activities of the employer are found to be private or commercial in nature. An example arose in *Ghawanmeh v. Islamic Saudi Acad.*, where a U.S. citizen employed as a teacher at a Saudi school—in the United States—was allowed to sue the school for discrimination.[110]

The administration of a school was found to be "an activity that was routinely performed by private parties."[111] A similar case was *Islamic Saudi Acad. v. Islamic Saudi Acad. Emp. Prof'l Ass'n*, where an employee association was allowed to seek union certification on behalf of workers at an Islamic school in the United States.[112] The court found that the school had engaged in commercial activity by entering into contracts with teachers, suppliers, local cleaners, and security services, which was again conduct that could be performed by private parties.[113]

B. The Nature of the Claim as Commercial Activity

By contrast, in three other cases involving cultural and marketing organizations, courts found commercial activity to exist by focusing on the nature of the plaintiff's claim and whether it implicated or compromised the foreign state's sovereignty. The first of these cases is *Hansen v. Dutch Tourist Bd.*, where an action for age and gender discrimination was declared admissible.[114] The court found that "the actions that formed the basis of [the plaintiff's] complaint [for discrimination did] not reflect the exercise of powers particular to sovereigns."[115] Instead, the actions of the defendant were challenged as "basic employment decisions akin to those made by many small businesses."[116]

The "nature of the claim" approach was applied in another case involving the KOTRA, *Cha v. Korean Trade Ctr.*[117] The claimant was a U.S. citizen employed first as a secretary and then as a marketing manager/consultant by KOTRA, who complained of gender discrimination.[118] While the defendant employer sought to rely on the *Kato* principle to deny commercial activity, the court distinguished the case on the ground that the employee was both a Japanese national and civil servant.[119] While such facts were

110. Ghawanmeh v. Islamic Saudi Acad., 672 F. Supp. 2d 3 (D.D.C. 2009).
111. *Id.* at 9.
112. Islamic Saudi Acad., 2012 N.L.R.B. Reg. Dir. Dec. LEXIS 86 (2012).
113. *See id.*
114. Hansen v. Danish Tourist Bd., 147 F. Supp. 2d 142 (E.D.N.Y. 2001).
115. *Id.* at 151.
116. *Id.*
117. Jina Cha v. Korea Trade Ctr., No. 111678/08, 2009 N.Y. Misc. LEXIS 5165, at *1 (Sup. Ct. 2009).
118. *See id.*
119. *See id.*

present in *Kato*, as argued above, they were not the determinative elements of the decision. Rather, the main thrust of *Kato* was to emphasize the nature of the employer entity. The court then proceeded to hold that the employee's claim was based on commercial activity. First, applying *Hansen* above, the court determined that: (1) the nature of the employee's action did not implicate the sovereignty of the foreign state; (2) the employee was a U.S. citizen; and (3) the employee's duties were commercial in nature.[120] So approaches two, three, and four, as seen above, which define commercial activity (nature of the claim, nature of the employee's duties and territorial nexus), were all relied upon to provide a broader analysis of the immunity question.

Thirdly, in *Shih v. Taipei Econ. & Cultural Representative Office* (TECRO), a group of U.S. citizens were permitted to sue for age discrimination.[121] The case involved three employees; Shih, who was involved in answering phones and translating public documents and articles, having no contact with confidential government information or involvement in policy decisions; Yao, who performed bookkeeping and other clerical tasks; and Hu, who performed clerical tasks in the library.[122] The court first found (1) that the plaintiffs' claims for discrimination were based on "the adverse employment actions" and management of their employer; (2) that they allegedly suffered as a result of their age; and (3) that the employer's conduct in imposing such adverse employment actions was itself commercial activity.[123] The court further noted that "making decisions about what tasks employees perform, how much they are paid or how they are treated in the workplace does not implicate concerns peculiar to sovereigns."[124] While the court in *Cha* distinguished *Kato*, *Shih* appeared to reject the decision outright, saying that the correct approach in defining commercial activity was not to focus on the activities of the employer in an abstract sense, but rather to examine "the nature of the act" upon which the plaintiff's claim is based.[125]

While the above cases relying on the "nature of the claim" approach certainly produce more positive outcomes for employees of foreign states, this test is not recommended. The main problem is that it provides insufficient protection for foreign states because in almost every case commercial activity will be found. Where a plaintiff sues, for example, for discriminatory conduct, failure to pay wages or other benefits, or unlawful termination, the facts supporting such claims would be conduct that a private party could engage in, making it commercial. While it is conceivable that a U.S. court could conclude that a particular action seriously implicated the security or sovereignty concerns of a state (for example, if a state were

120. *Id.* at *16.
121. Shih v. Taipei Econ. & Cultural Representative Office, 693 F. Supp. 2d 805 (N.D. Ill. 2010).
122. *See id.*
123. *Id.* at 811.
124. *Id.*
125. *Id.* at 812, 815.

ordered to reinstate a high level official), such cases have not yet arisen in the United States. The far more common situation is a suit for damages arising from improper conduct in the workplace, which can and does occur in any employment location.

C. The Nature of the Employee's Duties as Commercial Activity

The final case to consider under the heading of employment at marketing and cultural bodies involves a clear application of the employee duties and responsibilities approach to commercial activity. *Lee v. Taipei Econ. and Cultural Representative Office (*TECRO) was another case involving a suit for age discrimination at TECRO.[126] In *Lee*, the plaintiff was a chauffeur who was a member of the service staff of TECRO.[127] The court first rejected the argument that the employee was a civil servant for a number of reasons. First, the foreign state, Taiwan, had failed to establish this status under its law.[128] Second, nothing about the plaintiff's role as a chauffeur had recognized markers of civil service (such as involvement with political deliberations) or indicated that the plaintiff was part of the Taiwanese government.[129] Third, the plaintiff's employment did not have to go through official channels or receive approval from the foreign ministry. Additionally, the plaintiff did not take any exam at the time of his employment or receive civil service benefits.[130] In effect, the plaintiff was performing "a civil service staff job that any laborer could have fulfilled."[131] Fourth, he was a dual Taiwanese–U.S. citizen who was locally recruited in the United States to work only in that country.[132] Finally, "the strongest evidence" of non-civil service status lay in the plaintiff's responsibilities as chauffeur: he "had no role in political deliberations and policymaking" and "performed menial tasks around the office, waited outside at events, and had no discretionary authority."[133]

Once the court found that Lee was not a civil servant, it also, similar to *El-Hadad*, again relied on the nature of his duties to conclude that his employment was commercial.

> His tasks as a driver, maintenance and repairman, and errand runner are standard in the commercial world. His duties involved no discretionary duties or involvement with sovereign law or policy. He participated in

126. Lee v. Taipei Econ. & Cultural Representative Office, No. 4:09-CV-0024, 2010 WL 786612, at *1 (S.D. Tex. Mar. 5, 2010).
127. *See id.* at *3.
128. *See id.*
129. *See id.*
130. *Id.* at *5.
131. *Id.*
132. *Id.* at *6.
133. Lee v. Taipei Econ. & Cultural Representative Office, No. 4:09-CV-0024, 2010 WL 786612, at *6 (S.D. Tex. Mar. 5, 2010).

> official events only in the capacity of a service staff member, driving officials to events and waiting outside. . . . [His] job is one that is commonplace in a commercial enterprise . . . . [with] the outward form . . . indisputably resembl[ing] service jobs in the commercial sphere.[134]

This case is an emphatic vindication of the "status and duties of the employee" test and a clear riposte to the decisions in *Crum*, *Figueroa*, and *Butters*, discussed above, that treated any job where the "safety" of the employer was involved, as beyond review. As argued above, this test is the best method for balancing the protection of employee rights against the security interests of foreign states, as it aims to assess the nature of the employee's work compared to similarly situated persons in the private sector. Obviously, an employee tasked with handling and analyzing sensitive government materials or making high level policy decisions has no counterpart in the commercial world, and a U.S. court litigating such a case would pose serious risks to the foreign state's security and sovereignty. But an employee whose tasks differ little from those in an equivalent role working for a non-foreign state entity should not be denied justice simply because of his or her possibly fortuitous choice of a foreign sovereign employer.

The *Lee* decision in the area of cultural and marketing entities, when coupled with the compelling and well-reasoned opinion of the DC Circuit Court of Appeals in *El-Hadad* in the context of embassy and consulate work, point the correct way forward to resolving foreign sovereign employment disputes. As noted above, the employee role and duties approach does not automatically lead to a finding of commercial activity, and hence, no immunity in every case. Where an employee is in a uniquely governmental position, a court will properly decline to adjudicate to protect the foreign state's interests, as can be seen from the *Sanchez-Ramirez* and *Eringer* decisions. The "nature of the claim" approach should, however, be rejected for going too far in favor of employee interests. The decision in *Kato*, by contrast, leaves employees of most all foreign state organizations with policy dimensions that have no scope for recourse. A more balanced approach is required.

VII. Implied Waiver of Immunity

An alternative argument raised by some foreign state employees, with varying success, has been to assert that the foreign state has implicitly waived its immunity to U.S. jurisdiction. In the legislative history to the FSIA, it was noted that prior to the promulgation of sovereign immunity rules, U.S. courts found implied waivers in cases where a foreign state had agreed that

134. *Id.* at *7; *see also* Lasheen v. Embassy of the Arab Republic of Egypt, 485 F. App'x 203 (9th Cir. 2012) (holding that a professor employed at a public university in Egypt, who was studying in the U.S. on a scholarship, was not a civil servant).

the law of a particular country should govern a contract.[135] Such an approach has been endorsed in subsequent decisions, although courts have taken slightly different approaches to the issue of whether an employment contract is governed by U.S. law.

Where there is a clause in the contract that expressly states that it is to be "governed by U.S. law" or "U.S. legislation" then an implied waiver will be found, see, for example, *Ashraf-Hassan v. Embassy of France*, *Ghawanmeh v. Islamic Saudi Academy*, or *Ewald v. Royal Norwegian Embassy*.[136] Where, however, reference is merely made in the contract to the application of U.S. laws on employment, discrimination, or harassment, such statements, by themselves, will be insufficient for a waiver[137] particularly where the contract also contains a provision stating that the foreign sovereign employer does not intend to waive sovereign immunity.[138] The rationale for such an approach is that the foreign sovereign lacked an "unmistakable" or "unambiguous" intention to waive immunity.

VIII. Conclusion

This article has considered a number of important and recent U.S. decisions involving the rights of employees of foreign states where the commercial activity exception to foreign sovereign immunity in the FSIA has arisen. While no uniform and consistent approach can be discerned from those decisions as to the definition of commercial activity in employment cases, it suggests that an approach that focuses on the employee's precise role and responsibilities is the preferable model. Foreign states and their employees often have competing interests; while states want no review or exposure of their sensitive, sovereign matters by a foreign court, employees simply want just redress for their grievances. An approach that balances these often-opposing objectives and, in particular, provides justice to employees whose work is largely indistinguishable from that in the private or commercial spheres, is surely the best way forward. Further, the inclusion of an express choice of U.S. law in an employment contract, so as to establish an implied waiver of immunity by the state, may be the best strategy for a foreign state employee. It is, however, recognized that there will often be inequality of bargaining power between such a person and their employer, which may in practice make insertion of such a clause unrealistic.

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135. H.R. Rep. No. 94-1487, at 18–19 (1976).

136. *See* Ashraf–Hassan v. Embassy of Fr., 40 F. Supp. 3d 94, 101 (D.D.C. 2014), *aff'd*, 610 F. App'x 3 (D.C. Cir. 2015); Ghawanmeh v. Islamic Saudi Acad., 672 F. Supp. 2d 3 (D.D.C. 2009); Ewald v. Royal Norwegian Embassy, No. 11-CV-2166, 2013 WL 6094600, at *4 (D. Minn. Nov. 20, 2013).

137. *Kim*, 51 F. Supp. 3d at 285–86.

138. *Salman*, 2017 WL 176576, at *3.