The Foreign Sovereign Immunities Act: Defining Commercial Activity and Direct Effects Jurisdiction

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THE FOREIGN SOVEREIGN IMMUNITIES ACT: DEFINING COMMERCIAL ACTIVITY AND DIRECT EFFECTS JURISDICTION

I. INTRODUCTION

The Foreign Sovereign Immunities Act (FSIA or Act)\(^1\) was enacted by Congress in 1976 because "American citizens are increasingly coming into contact with foreign states and entities owned by foreign states."\(^2\) The Act codifies the restrictive principle of sovereign immunity.\(^3\) The FSIA is intended to ensure that United States citizens "will have access to the courts in order to resolve ordinary legal disputes"\(^4\) that arise from their business interactions with foreign entities. This access is attained by providing state and federal courts jurisdiction over any foreign sovereigns and their entities which have engaged in "commercial activities"\(^5\) with Americans. Among the most important substantive requirements under the Act is determining what constitutes a commercial activity.

The determination of what constitutes commercial activity is crucial because a foreign sovereign's immunity is "restricted" to those acts which are noncommercial, governmental actions. Therefore, a plaintiff's cause of action must arise out of a foreign sovereign's commercial activities in order for the sovereign to be amenable to suit in the United States.

In addition, the Act provides for the exercise of jurisdiction by the state and federal courts in all claims "based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere . . . [which] causes a direct effect in the United States."\(^6\) This clause operates as a type of

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3. See infra text accompanying notes 6-10.
4. H.R. REP., supra note 2, at 6605.
5. See infra text accompanying note 13.
jurisdictional long-arm statute in actions against foreign states. The United States Supreme Court has not defined what constitutes a "commercial activity" or a "direct effect" for purposes of the Act. This comment will attempt to define these terms.

First, this comment will address the courts' sometimes confused application of the term "commercial activity" and will propose a concise analytical approach to characterize what constitutes the "commercial activity" of a foreign state which would deprive it of its sovereign immunity under the Act. Second, this comment will explore the various interpretations adopted by courts in their applications of the term "direct effect" and will examine the relationship of the Act to traditional due process jurisdictional standards. The analysis will propose a new synthesized test for "direct effects" jurisdiction. Finally, this comment will attempt to elucidate the distinction

Section 1605(a)(2) provides three exceptions to the jurisdictional immunity of a foreign state. The third exception concerns direct effects caused by extraterritorial acts. The first two clauses concern a foreign state's activities within the territory of the United States. These first two clauses are not addressed by this comment.

Section 1605(a)(2) provides:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Id.

In addition to these commercial exceptions, a foreign state may explicitly or implicitly waive its immunity in other ways. For example, a foreign state may waive its immunity by treaty or by violating international law. For a complete list of statutory exceptions, see 28 U.S.C. § 1605 in its entirety.

7. A long-arm statute extends the reach of a state court's jurisdiction beyond the territorial limits of the state. See infra notes 73 and 75 for a discussion of the due process limitations on the extraterritorial reach of long-arm statutes.

8. The United States Supreme Court had its first opportunity to address the terms "commercial activity" and "direct effect" in Texas Trading & Milling Corp. v. Federal Rep. of Nigeria, 647 F.2d 300 (2d Cir. 1981), but the Court denied certiorari. 454 U.S. 1148 (1982). See infra text accompanying notes 66-69 for a discussion of Texas Trading.

The Court had another opportunity to define these terms in Verlinden B.V. v. Central Bank of Nigeria, 103 S. Ct. 1963 (1983). However, in Verlinden, the Court limited its discussion to the constitutionality of the FSIA. The Court held that the Act's authorization of jurisdiction over actions by foreign plaintiffs against foreign sovereigns on nonfederal claims was constitutional. 103 S. Ct. at 1973.

between the Act's exceptions to immunity jurisdiction and "minimum contacts" analysis.⁹

In order to examine these issues it is necessary to begin with a brief discussion of sovereign immunity and the FSIA.

II. SOVEREIGN IMMUNITY AND THE FSIA

Sovereign immunity is a doctrine of international law under which the domestic courts of one sovereign state refuse to exercise jurisdiction over another sovereign state. The courts of the United States first recognized the international doctrine of sovereign immunity in *The Schooner Exchange v. McFadden.*¹⁰ In *Schooner,* Chief Justice Marshall upheld a plea of sovereign immunity which was supported by the executive branch. The immunity provided to foreign states,¹¹ and recognized by the United States, was virtually absolute until the "Tate Letter" of 1952.¹²

The "Tate Letter" marks the Department of State's adoption of the so-called "restrictive principle" of sovereign immunity. This principle "restricts" a foreign state's immunity to those suits which involve the foreign state's public acts (*jure imperii*) and it does not extend immunity to suits based on the state's commercial or private acts (*jure questionis*).¹³ After 1952, sovereign entities were held immune from the judicial review of the United State's courts whenever the Department of State so instructed a court.¹⁴ Under this proce-

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⁹. The exceptions to immunity provide for jurisdiction over a foreign state, while the "minimum contacts" analysis addresses jurisdiction over individuals in domestic cases. Many courts applying the FSIA have confused and intertwined these two jurisdictional concepts. See infra notes 72-82, 91-96 and accompanying text. See also text accompanying notes 131-32.

¹⁰. 11 U.S. (7 Cranch) 116 (1982).


In this comment, the term "foreign state" is used interchangeably with "foreign sovereign."

For a discussion of the meaning of the term "foreign state" as reflected in the case law, see Rubenstein, *Alienage Jurisdiction in the Federal Courts,* 17 INT'L LAW 283 (Fall 1983).

¹². See 26 DEPT. ST. BULL. 984 (1952).

In the "Tate Letter," Jack B. Tate, the State Department's acting legal advisor, informed the Attorney General that international adherence to the theory of absolute immunity was to cease as a practice of the United States. Under the absolute theory, a foreign state would not be subject to judicial review without its expressed consent. In lieu of the old absolute theory, Tate announced the State Department's adoption of the most recent restrictive theory. *Id.*


dure, decisions pertaining to a foreign sovereign’s amenability to suit were necessarily premised on political decisions made by the executive branch of the federal government. Then in 1976, Congress enacted the FSIA.

The Act codifies the restrictive principle of sovereign immunity adopted by the “Tate Letter.” Moreover, through this legislation Congress intended to transfer from the State Department to the courts the decisional power as to whether or not a particular foreign state is immune from suit. The purpose of this transfer was to assure litigants that this crucial decision would be made by a neutral judge on purely legal grounds and removed from diplomatic pressures. Further, Congress intended that the Act should provide for the creation of a uniform body of law in actions against foreign sovereigns.

Numerous years have passed since the enactment of the FSIA. However, uniform application of “direct effects” jurisdiction has not been achieved. Also, access to the courts, vis-a-vis the amenability of a sovereign to suit, remains uncertain because of some confusion with regard to the determination of what constitutes a “commercial activity.”

III. COMMERCIAL ACTIVITY: THE NATURE OF THE ACTIVITY IS THE CRUCIAL DETERMINATION

A. The Plaintiff’s Role in the Activity is Indicative of the Activity’s Nature

The threshold question under the restrictive theory of sovereign immunity is whether or not the underlying transaction is commercial. This determination is “[p]robably the most important single issue” under the Act. If the transaction is commercial, then the analysis may proceed to determine whether the effect in, or contact with, the United States is that which is statutorily required by the Act to allow a court to assert its jurisdiction over a foreign state. A court cannot look simply at the character of the parties, and without consideration, proclaim that an act by a governmental body is always a

16. H.R. Rep., supra note 2, at 6631. In order to promote this goal, 28 U.S.C. § 1441(d) provides for removal from a state court to a federal court of any civil action involving a foreign state.
18. See supra note 6.
public act. Nor can jurisdiction be exercised indiscriminately over all entities. A given entity may at times engage in commercial activities, in which it would not be immune, and on other occasions it may take actions "whose essential nature is public or governmental." 19

Therefore, the Act provides that "the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 20 This characterization of the activity by its nature is the specifically prescribed mode of analysis. As a rule of thumb, if the activity is normally carried on for a profit, then its commercial nature may be assumed. 21 Also, the existence of a contractual relationship is often indicative of a commercial activity. 22

Conversely, if the activity is one in which only a sovereign entity can engage, then it is probably not commercial. 23 With these guidelines in mind, characterization of the nature of an activity as commercial or noncommercial ought to be fairly simple. However, some courts have misapplied the analysis. The most glaring misapplication of this test occurred in Gittler v. German Information Center. 24

Gittler involved a breach of contract action. The plaintiff, a widow, sought to recover unpaid compensation in connection with work which her late husband allegedly performed on documentary films while in the defendant's employ. The films were intended to foster cultural relations between the United States and West Germany. The purpose was clearly political—the enhancement of relations between two sovereign states. 25 On the other hand, the nature of the activity underlying the cause of action was private. There was a contractual relationship. However, the Gittler court noted that the contract arose initially from a public act—the political decision to

21. H.R. Rep., supra note 2, at 6615. "Virtually all commercial acts performed by private businessmen will be deemed commercial when performed by foreign states." G. Kahale & M. Vega, Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States, 18 COLUM. J. TRANSN'T'L L. 211, 243 (1979). The problem still remains, however, as to what constitutes a "commercial activity."
24. 408 N.Y.S.2d 600 (1978). Gittler is one of the very few state court cases applying the Act.
25. Id. at 602.
produce the films. Therefore, the court reasoned that the actual nature of the transaction was public. Accordingly, the action was dismissed for lack of jurisdiction. This result was grossly erroneous.

The specific activity in Gittler was employment and compensation and therefore it was commercial in nature. The overall purpose of the commercial activity was irrelevant under proper FSIA analysis. The decedent was employed in a private capacity. He was making documentary films, an activity which by its nature is commercial. Therefore, jurisdiction ought to have been upheld by the Gittler court.

Congress sought to create increased access to the courts by making it "difficult for defendants engaged in commercial activity . . . to invoke successfully sovereign immunity when sued for underlying commercial misdeeds." Initially, there is a presumption that jurisdiction exists. The defendant has the initial burden of showing that it is a foreign state and that its activities are sovereign in nature. Despite the legislative intent and the procedural burdens imposed, the Gittler court's error was to focus on the purpose of the overall activity, instead of the nature of the specific transaction at issue.

26. Id.
27. Gilson v. Republic of Ireland, 682 F.2d 1022, 1026 (D.C. Cir. 1982).

Sovereign immunity is an affirmative defense.

29. The defendant has the burden of proving that one of the Act's exceptions to foreign sovereign immunity is applicable. De Letelier v. Republic of Chile, 567 F. Supp. 1490, 1499 (S.D.N.Y. 1983).
30. In its opinion, the court relied on Victory Transport, Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964). Victory was a pre-FSIA decision in which the court articulated its belief that focusing on the nature of the activity led to "astonishing results, such as the holdings . . . that purchases of bullets or shoes for the army, the erection of fortifications for defense, or the rental of a house for an embassy, are private acts." Id. at 359 (emphasis added). See also Heaney v. Government of Spain, 445 F.2d 501, 504 (2d Cir. 1971) (dictum) (foreign government's contract to purchase ammunition is governmental).

Interestingly, the legislative history of the Act addresses these very same issues and reaches quite different conclusions:

[It is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts [are] . . . commercial contracts, even if their ultimate object is to further a public function.

H.R. Rep., supra note 2, at 6615.

See Von Mehren, supra note 17, for a discussion of Victory and the FSIA. See also Dellapenna, Suing Foreign Governments and their Corporations: Sovereign Immunity, 85 Com. L.S. 228 (June-July 1980).
31. At the time even the Department of State indicated to the court that it believed that the activities were of commercial nature. 408 N.Y.S.2d at 602 (1978).
A more recent employment case reached the same result as in *Gittler*, and the action was dismissed. However, unlike *Gittler*, the dismissal was proper under the Act. That case points out how an employment situation can appropriately be held to be a public activity under the Act.

That case, *Broadbent v. Organization of American States (OAS)*[^32] involved an allegedly wrongful discharge of seven staff members of the international health organization's General Secretariat. The discharged employees were United States citizens and foreign nationals with permanent United States residency. The nature of the transaction concerned an employment relationship. However, the OAS court reasoned that an international organization is very much akin to a foreign state. Therefore, such an organization is a quasi-sovereign entity. Consequently, the internal employment and administrative affairs of the OAS correspond to the internal affairs of a government bureaucracy[^33]. In addition, despite the apparent private quality of an employer-employee relationship, the court held that the true nature of the activity in OAS was indeed governmental, or more aptly—public. Since the activity was found to be public, the OAS was immune to the judicial review of the courts of the United States[^34].

The differences between the *Gittler* and the OAS cases emphasize the paramount importance of a careful analysis. In *Gittler* the plaintiff helped in the production of documentary films. This employment is private in nature. The nature of the work product was private. Film production and employment are not unique activities of sovereign entities. The plaintiffs in OAS, however, were employed to aid in the formulation and implementation of policy for an international quasi-sovereign organization. In contrast with the *Gittler* case, the nature

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[^33]: In fact, the district court in the same action held that international organizations were indeed sovereign entities. However, since the FSIA makes no mention of or reference to international organizations, the court reached a questionable conclusion. The court determined that not only were international organizations sovereign entities, they were also absolutely immune from liability. Broadbent v. OAS, 481 F. Supp. 907, 908 (D.C.D.C. 1978), aff’d on other grounds, 628 F.2d 27 (D.C.Cir. 1980).

The OAS court of appeals declined to reach this question. Instead, it held that the activity was public in nature. Hence, OAS was immune from prosecution under both the absolute and restrictive theories of sovereign immunity. OAS, 628 F.2d at 32-33.

[^34]: For a discussion of the sovereign nature of an international organization see *supra* note 33.

[^35]: OAS, 628 F.2d at 35-36.
of the organization was governmental and the nature of the plaintiffs' employment functions were also governmental. The nature of the respective plaintiff's employment activities is the determining factor.

Discussion of commercial activity in a nonemployment situation ought to further clarify the "nature" and "purpose" distinctions which this analysis requires.

B. The Relationship of the Parties

The relationship of the parties indicates whether the nature of the activity is commercial or noncommercial as is demonstrated by the following cases. The claims in *Arango v. Guzman Travel Advisors Corp.*, 36 arose from an aborted package tour from the United States to the Dominican Republic. The plaintiffs purchased their tickets from and flew aboard the defendant state airline (Dominicana). 37 When the plaintiffs' plane arrived in the Dominican Republic, immigration officials denied their entry into the country. 38 On instructions from these officials, the employees of Dominicana forcibly returned the plaintiffs to the United States.

The *Arango* court reasoned that the nature of a tour and of an airline operation is on its face commercial. 39 Therefore, the court upheld the exercise of jurisdiction regarding the Arango's breach of warranty and breach of contract causes of action. However, with regard to their "involuntary re-routing" the court held that the entire cause of action could not lie because the immigration officials were enforcing the laws of the Dominican Republic when they instructed the Dominicana employees to return the Arangos to the United States. Consequently, the nature of this latter activity was political as it concerned governmental decisions by public officials. Accordingly, this cause of action was dismissed for lack of jurisdiction. 40

Finally, *Maritime International Nominees v. Republic of Guinea*, 41 concerned a contract dispute between a Liechtenstein corporation and the Republic of Guinea. The district court incorrectly approached the question of commercial activity. The court focused

36. 621 F.2d 1371 (5th Cir. 1980).
37. The full name of the state airline is Compania Dominicana de Aviacion. *Id.* at 1373.
38. Apparently the plaintiffs were included on an official list of undesirable aliens. *Id.*
39. *Id.* at 1379-80.
40. *Id.* at 1379.
on the *sum* of the parties's activities which were connected with the United States. The district court held that in the aggregate, numerous meetings in the United States, plus the defendant's retention of a United States shipping company, constituted commercial activity.\[4\] This court, however, looked to the wrong factors in reaching its determination.

Instead of focusing specifically on the nature of the activity underlying the cause of action, the *Maritime* court looked to the number of contacts which the defendant had with the United States. Yet, the quantity and/or quality of contacts with the United States is irrelevant at this juncture in the FSIA analysis.\[4\] The district court confused the first step of analysis with the second step; that of determining if the requisite nexus with the United States is present.\[4\] At this first point, characterizing the activity as commercial or noncommercial must be the only concern.

The underlying transaction in *Maritime* was a contract to ship bauxite from the Republic of Guinea.\[4\] The nature of this contractual relationship was commercial.\[4\] Guinea was selling its bauxite to competitive purchasers. Therefore, if the requisite nexus with the United States existed, the court should have exercised jurisdiction over the Republic of Guinea.

C. *An Approach to Commercial Activity*

As these cases illustrate, despite the apparent simplicity of the "nature of the underlying activity" standard, many courts have misunderstood their role in a FSIA analysis. The court's proper function is to first focus on the specific activity or transaction which underlies the cause of action. The defendant's general organizational nature, whether commercial or governmental in character, is irrele-

\[42.\] 505 F. Supp. at 143.

\[43.\] A discussion of the quality and/or quantity of contacts with the United States is relevant to a discussion of the "minimum contacts," personal jurisdiction component of the FSIA analysis. *See infra* notes 73, 75 and accompanying text.

\[44.\] *See supra* note 6.

\[45.\] The plaintiff brought the action in order to confirm a previous arbitration award made on the contract to ship bauxite. 505 F. Supp. at 142.

\[46.\] The court of appeals reached this same conclusion without reviewing the district court's analysis. Instead, it held that the injury/loss of expected profits was not foreseeable. Therefore, the defendant arguably would not have expected to be haled into a U.S. court. The action was dismissed on this basis. *Maritime Int'l Nominees v. Republic of Guinea*, 693 F.2d 1094, 1111-12 (D.C. Cir. 1982). For a discussion of this court's misapplication of the direct effects standard, *see infra* notes 70-77 and accompanying text.
Moreover, the existence of or absence of any contacts with the United States is also irrelevant at this stage.

The proper judicial approach to commercial activity characterization begins with an analysis of the specific underlying activity. If the activity can be performed by a private person for a profit and/or if it concerns some kind of contractual relationship, then its nature is presumptively private. Conversely, if the activity is uniquely sovereign, such as nationalization, then it is presumptively governmental.

Next, a court should focus on the respective parties to the action. The various parties' functions in the carrying on of the activity are important. If the plaintiff's role is administrative or policy-oriented, then despite the existence of a contract, the activity's actual nature is public.

Neither a more comprehensive analysis nor a static definition of what constitutes a commercial activity has been put forth because to do so would be unwise. Congress intended that the FSIA be flexible and adapt to changing international relationships. Therefore, this analysis is intended to be applicable to all commercial activity questions. A more rigid analysis would very likely stifle access to the courts.

If each of the above steps in the analysis indicates that the activity is commercial, then the foreign state has no immunity from suit in the United States. Consequently, if the activity bears the necessary nexus with the United States; for instance, if it causes a direct effect in the United States, then a court may exercise jurisdiction over the foreign sovereign.

IV. DIRECT EFFECTS JURISDICTION UNDER THE FSIA

A. The Restatement of Law's Approach to Effects Jurisdiction

1. The Locus of the Injury Determines the Magnitude of the Effect

Section 1605(a)(2) of the Act provides that a foreign sovereign is not immune from suit if the act associated with the commercial activity outside of the United States causes a direct effect in the

47. 621 F.2d at 1379.
48. See supra text accompanying note 20.
49. See supra note 45.
United States. Thus, once a court has determined that the foreign entity was involved in a commercial activity, it must then determine if the sovereign’s act had a direct effect in the United States. The Act itself does not provide any guidelines as to what constitutes a direct effect. The legislative history to the Act, however, provides some interpretive assistance.

The Act’s history indicates that this direct effects clause is to be interpreted with regard to the principles set forth in section 18 of the Restatement (Second) of Foreign Relations Law of the United States. Section 18 provides that:

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if . . . the effect within its territory is substantial . . . [and] it occurs as a direct and foreseeable result of the conduct outside the territory.

Several courts have greatly relied on this restatement. The Restatement indicates that the effect of the sovereign’s actions must be “substantial, direct and foreseeable” in order to exercise jurisdiction over a foreign sovereign. Once again facially simple criteria are provided. Unfortunately, however, several divergent applications of the “substantial, direct and foreseeable” test have emerged.

One line of cases emphasizes the “substantial” component of the test. This line of cases looks to the locus of the injury to determine how direct or substantial the effect is. In fact, the place of the immediate injury is dispositive of jurisdiction in these cases. The locus of the injury tends to outweigh any discussion of the Act’s effects in the United States. In a recent case, Verlinden B.V. v. Central Bank of Nigeria, Nigeria had contracted with over seventy cement suppliers. Nigeria needed the cement as part of a major national develop-
Verlinden B.V., a Dutch corporation, was one of the numerous cement suppliers. Pursuant to a contract, Central Bank of Nigeria established a letter of credit through Morgan Guaranty of New York, in favor of the plaintiff. However, when deliveries of the cement began, the incoming shipments clogged the Nigerian ports. This kept out more necessary commodities so Nigeria took steps to cut the flow of cement deliveries into the ports.

Central Bank of Nigeria advised Morgan Guaranty to unilaterally amend the letter of credit. The amendment required that Verlinden B.V. receive prior approval before entering a Nigerian port. Plaintiff had contracted to purchase cement from a third party and thereby exposed itself to potential liability if Nigeria refused to tender payment, so this action was brought for the alleged anticipatory breach of the letter of credit. The Verlinden trial court held that the repudiation by Central Bank of the letter of credit was insufficiently direct to confer jurisdiction over the defendant.

The effect in the United States was found by the court to be "at most speculative and remote." No harm occurred in the United States. Moreover, the district court concluded that no evidence proved that Morgan Guaranty had acted as the defendant's agent. In addition, that court found that Nigeria had not availed itself of the protections of New York law. Thus, in regard to this activity, Nigeria had practically no contacts with the United States. The trial court, in fact, stated that the only contact with the United States was a letter of credit, established through an American bank, which was never issued. All other aspects of the transaction took place outside of the United States. Finally, because the letter of credit was repudiated by Nigeria in Nigeria, there was not a direct effect in the United States.

56. 488 F. Supp. at 626.
60. Id. at 1298.
61. Id.
62. Id. at 1299. Morgan Guaranty merely "advised" the letter of credit. It did not confirm the letter of credit. A confirmed letter of credit would have required that Morgan Guaranty pay the face amount itself in any instance in which Nigeria failed to pay. Id.
63. Nigeria did not avail itself of New York law because neither it nor its agents had entered the United States with regard to the specific transaction. The sole contact with New York, the letter of credit with Morgan Guaranty, was too remote to constitute a purposeful availment. 488 F. Supp. at 1298. See infra notes 73, 75.
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States. All effects occurred elsewhere; there was no United States plaintiff, citizen or resident, who arguably could have been injured.

Conversely, Texas Trading & Milling Corp. v. Federal Republic of Nigeria, a case quite similar to Verlinden, reached the opposite conclusion. The plaintiffs in Texas Trading were United States companies which had contracted to sell cement to Nigeria. The facts underlying the cause of action are identical to those in Verlinden. The United States residency of the plaintiffs, however, enabled the Texas Trading court to uphold jurisdiction over the foreign sovereign. The Texas Trading court supported its decision by noting in dicta, that Nigerian officials made frequent visits to Morgan Guaranty in New York and that, in its opinion, Morgan Guaranty was an agent of Central Bank.

This dicta contained in the Texas Trading opinion is in keeping with Congress' desire that "a degree of contact beyond that . . . [of mere] U.S. citizenship or U.S. residence of the plaintiff" be found before a court exercises jurisdiction. The supplemental findings of the court, which were also noted in dicta, provided the additional contacts that the court needed in order to assert jurisdiction.

2. The Foreseeability of the Injury is Dispositive

Another line of cases applying the Restatement's "substantial, direct and foreseeable" test, emphasizes the "substantial and foreseeable" aspects of the test. Maritime International Nominees v. Republic of Guinea is the most recent case which applies this mode of analysis. As was noted above, the Maritime court dismissed the action for lack of jurisdiction.

The plaintiff had sought to have a prior arbitration award for loss of expected profits confirmed by the court. The Maritime court reasoned, however, that a suit on this cause of action was not foreseeable. Had the action been one for compensation for services ren-
dered, then the cause of action would have been foreseeable because the defendant would reasonably have expected the plaintiffs to seek some redress for their lack of remuneration. The court of appeals impliedly concluded, that if the type of cause of action had been foreseeable to the defendant, the action would have been maintainable. This reasoning is premised on the belief that if the injury is foreseeable, then the effect is substantial.

It is not clear that this belief has any legal or practical foundation. Assuming arguendo that it does indeed have merit, it still is not appropriate to a “direct effects” analysis. Such analysis places too much emphasis on the due process “minimum contacts” requirements of *International Shoe Co. v. Washington* and its progeny. *Maritime*, and the cases applying the *Maritime* reasoning, lost sight of the rationale behind the “direct effect” language of the Act. These courts merely examine the number of United States contacts, and then, from the quality and quantity of the contacts, they determine the degree of foreseeability that the defendant would have of being haled before a United States court. If the traditional due process components are present, then these courts assert jurisdiction. These courts fail to consider whether or not the foreign defendants “purposely availed” themselves of the “protections and privileges” of


73. 326 U.S. 310 (1945). *International Shoe* permitted a state court to exercise personal jurisdiction over an out-of-state (foreign) corporation that did not make contracts, maintain an office, or deliver goods in the state. *Id.* at 313. The Supreme Court held that under the due process clause, jurisdiction may be exercised over a foreign defendant if the defendant has established certain “minimum contacts” within the state such that maintenance of the suit does not offend “notions of fair play and substantial justice.” *Id.* at 316.

This due process concept of minimum contacts serves two functions. “It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns.” World-Wide Volkswagen v. Woodson, 444 U.S. 286, 292 (1980). Moreover, it “gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” *Id.* at 297. See Kane, Suing Foreign Sovereigns: A Procedural Compass, 34 STAN. L. REV. 385, 386-90 (1982).


75. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Due process requires that in order
United States law.

The analysis of these courts, however, is inapposite. The sovereign immunity and due process determinations should be distinct. Section 1605 of the FSIA provides for exceptions to a foreign state's immunity. If a court determines that a foreign state has waived its jurisdictional immunity, then components of the traditional due process analysis should be interjected at that time and not before.

Sovereign immunity addresses whether or not the court is empowered to exercise its authority over a foreign sovereign. The due process determination concerns personal jurisdiction in a domestic matter, and is determined by a "minimum contacts" analysis. The statutory standard for determining non-immunity is not co-extensive with the due process standard governing personal jurisdiction.

In summary, the locus analysis stresses the exact location where the injury occurred, rather than the resulting effect in the United States. Also, the foreseeability approach emphasizes the foreseeability of the defendant's being haled before a United States court by his activity, instead of the effect of his activity in the United States. Each of these analyses is oblivious of the FSIA's "direct effects" jurisdictional standard. Direct effects jurisdiction is statutorily exercised when an effect is felt within the territory of the United States. Residency of the plaintiff is irrelevant.

In fact, the effect need not affect a United States party in order for the courts to exercise jurisdiction. The United States Supreme Court has determined that under the Act the plaintiffs in the action may be United States residents or aliens. Thus an action may lie

for a court to exercise its jurisdiction over a foreign defendant, that defendant must have purposely availed himself of the protections and privileges of the forum state. This is required so that it will be foreseeable to the defendant that his "conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."  


76. See supra note 6.

77. See supra note 73.

78. Maritime, 693 F.2d at 1105. The Maritime court noted the difference between the two analyses, but then it went ahead and applied them simultaneously.

79. See supra note 6.

80. In Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983), a unanimous Court held that actions by foreign plaintiffs against foreign sovereigns, even on nonfederal claims, were constitutionally permitted by the Act. Id. at 1973.

The Court reached this conclusion by noting that the Act provided more than mere access to the courts. In fact, it regulated the types of actions to which foreign sovereigns are liable. Therefore, a court must apply the FSIA guidelines (e.g., commercial activity and direct effects jurisdiction), before any action against a foreign sovereign will be heard. This determination, the Court held, involves the application of substantive federal law (the FSIA) because it determines whether a cause of action is available against a foreign sovereign. Therefore, any action
between a foreign plaintiff and a foreign defendant. Consequently, these Restatement approaches place too great an emphasis on the minimum contacts/due process requirements at the expense of an appropriately applied "direct effects" standard. This serves to deprive some plaintiffs the access to the United States courts that Congress expressly intended to provide.

B. The District of Columbia's Long-arm Statute as a Guide to Interpretation of the Term "Direct Effects"

The FSIA "provides, in effect, a Federal long-arm statute over foreign states . . . patterned after the long-arm statute [which] Congress enacted for the District of Columbia." On the basis of this statement taken from the legislative history of the Act, some courts have based their direct effects analysis directly on the District of Columbia statute. That statute establishes that a "court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim of relief arising from the person's . . . transacting any business in the District of Columbia." Courts utilizing this statute in their FSIA analyses rely on prior constructions of the District's statute by the District of Columbia courts.

East Europe Domestic International Sales Corp. v. Terra is representative of the cases applying this approach. East Europe Sales concerned a New York corporation's action against a Romanian trading company. The plaintiff alleged that the foreign company had interfered with a contract for the purchase of cement between itself, a New York corporation, and a third party. The con-
tract was never actually entered into by the parties. The court found that prior cases construing the District of Columbia statute had held that negotiations alone were not a sufficient basis for "minimum contacts" jurisdiction. Consequently, because the Act's construction apparently parallels that of the statute, negotiations without more were insufficient to constitute a "direct effect" in the United States. The East Europe Sales court's analysis began and ended at this point.

The court applied a backward analysis to the Act. It reviewed what contacts were necessary for jurisdiction under the District of Columbia statute. Then it relied on District cases. This was inappropriate because the District of Columbia statute is a long-arm statute.

The District's statute provides for jurisdiction over a party who is "transacting any business in" the territory of the District of Columbia. On the other hand, effects jurisdiction is concerned with effects in the United States of business transacted outside of the United States. The purposes underlying each of these statutes is quite dissimilar. The statutes are neither identical in terminology nor in application. That these distinctions exist is not surprising, because the Act was merely "patterned after" the District of Columbia's statute. Additionally, it should be noted that the quoted language from the legislative history referred to section 1330(b) of the Act. Congress did not address this comment to the "direct effects" provision of the

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89. *East Europe Sales*, 467 F. Supp. at 385-86.

Section 1330 provides, in its entirety that:

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction upon subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

Consequently, this reliance by some courts on the District of Columbia long-arm statute is inappropriate to a direct effects analysis.95

C. A Direct Effect Does Not Have an Intervening Element

A third approach to the Act’s section 1605(a)(2) “direct effect” analysis looks to whether or not a superseding cause is present. Thus, as the court in Upton v. Empire of Iran98 stated, a direct effect is an effect “which has no intervening element, but, rather, flows in a straight line without deviation or interruption.”97 Upton involved a personal injury and wrongful death action between United States citizens and Iran.

Two United States citizens were killed and a third was injured when the roof of the terminal building at the Tehran airport collapsed. The action was brought by the survivors of the two persons killed and by the injured third person. Plaintiffs contended that “[d]efendant’s [failure to maintain the airport] . . . caused the deaths and injuries to Americans which caused direct effects in the United States.”98 The Upton court correctly concluded that the connection between the injuries sustained in Iran and the repercussions in the United States—that is, pain and suffering of American citizens—was too attenuated. The court dismissed the action for lack of jurisdiction.99 The district court found there was no direct effect in the United States.100

Any effect of the accident in the United States was caused by the surviving plaintiff’s return to the United States, and by the fortuity that those killed were survived by persons in the United States. United States residency alone is an insufficient basis for jurisdiction.101 The personal injuries and the deaths were the direct result of Iran's alleged negligence. Iran's negligence and the physical injuries

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94. H.R. Rep., supra note 2, at 6612.
95. Congress enacted both the FSIA and the District of Columbia long-arm statute. They are both jurisdictional statutes. Therefore, the convenience of patterning the Act after the prior statute is apparent, even though the aim of each statute is distinct.
97. 459 F. Supp. at 266.
98. Id. (emphasis in original).
99. Id. In reaching its conclusion to dismiss the action the court also relied in the alternative on the District of Columbia long-arm statute analogy (citing Leaks v. Ex Lax, Inc., 424 F. Supp. 413 (D.C.D.C. 1976)).
100. 459 F. Supp 264, 266.
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and deaths occurred in Iran. Therefore, there was not a direct effect in the United States. 102

Another, more recent case applied this same analysis to an action of a commercial nature. In re Rio Grande Transport, Inc. 103 involved a collision between two ships in the high seas. The plaintiff's cargo ship, the Yellowstone, sank after colliding with an Algerian ship in the Mediterranean Sea. 104 Plaintiff, a United States corporation, brought an action in admiralty for exoneration from or limitation of its liability. 105 Plaintiff asserted that subject matter jurisdiction existed since the loss of the Yellowstone created a direct effect in the United States.

The Yellowstone was plaintiff's only vessel; it was plaintiff's sole source of income. 106 Therefore, with the ship's sinking, plaintiff's income was terminated. This loss of income, the Rio Grande Transport court held, was a great and direct effect of the collision. 107 Therefore, jurisdiction existed under the direct effects clause of the Act. Moreover, the fact that plaintiff was a United States resident was not the only basis for jurisdiction. The Algerian government's shipping company had other contacts with the United States.

The defendant's ships made systematic calls at United States ports and defendant employed a United States agent to solicit business. 108 These contacts arose out of the same commercial activity and underlying transaction upon which the cause of action was premised. 109 The commercial activity was Algeria's commercial shipping. Consequently, this analysis satisfied the jurisdictional requirements of the Act. 110 The Algerian sovereign entity was held amenable to suit. The court concluded its analysis by applying the minimum contacts-due process standard for jurisdiction over the person, and found that the due process standard was satisfied. 111

The Texas Trading 112 case applied a similar analysis. That

102. This conclusion can also be supported by utilizing the Restatement's "substantial" language. Thus, any effect in the United States was de minimus and too remote to constitute a direct effect. See supra notes 52-54 and accompanying text.
104. Id. at 1157. The action was brought under Rule F of Supplemental Rules of Procedure for Certain Admiralty and Maritime Claims. Id.
105. Id. at 1163.
106. Id.
107. Id.
109. See supra text accompanying note 20.
110. See supra note 78 and accompanying text.
112. 647 F.2d 300 (2d Cir. 1981). For a discussion of the case see text accompanying
court noted that the letter of credit was established by Central Bank of Nigeria through Morgan Guaranty of New York.\textsuperscript{118} It was to be payable to the plaintiff in New York upon plaintiff's presentation of the requisite documents. Therefore, the Texas Trading court concluded that although the letter of credit was never issued, and although Nigeria's repudiation of the letter of credit was initiated in Nigeria, the effect of the repudiation was nevertheless directly felt in New York.\textsuperscript{114}

Morgan Guaranty would pay on the letter of credit only if the plaintiff satisfied Nigeria's new requirements. Plaintiff was to receive permission from Nigeria prior to shipping the cement. Satisfaction by plaintiff of this new requirement was impossible since the shipment was en route. As a result, the plaintiff suffered an immediate/direct loss of income in the United States because of Nigeria's actions.\textsuperscript{118}

D. A Working Definition of Direct Effect

This examination of direct effects jurisdiction has shown that a consensus currently does not exist in the courts as to the application of direct effects analysis. The term "direct effect" has been variously defined. In some courts it is viewed as an effect which is "substantial, direct and foreseeable."\textsuperscript{116} In others, the locus of the most immediate injury is considered to be dispositive of jurisdiction, apparently without regard to any effect.\textsuperscript{117} Yet another line of cases equates direct effects jurisdiction with traditional long-arm statutes.\textsuperscript{118} Finally, still another analysis defines the term as an effect which flows from an act in a straight line without any interrupting element.\textsuperscript{119} Each of these methods of inquiry are affirmative approaches in that they probe the rudimentary elements upon which each cause of action, brought under the Act, is premised. However, only one of these analyses, if any, properly examines each of the elements vis-a-vis direct effects jurisdiction.

Those courts which depend on the Restatement of Foreign Re-

\textsuperscript{113} For a discussion of the facts of this case, which are similar to those in Verlinden, see text accompanying supra notes 55-59.
\textsuperscript{114} Texas Trading, 647 F.2d at 312.
\textsuperscript{115} Id.
\textsuperscript{116} See supra text accompanying notes 51-69.
\textsuperscript{117} See supra text accompanying notes 53-83.
\textsuperscript{118} See supra text accompanying notes 84-95.
\textsuperscript{119} See supra text accompanying notes 96-115.
lations Law's terminology either focus on the locus of the injury or the foreseeability of the defendant being brought under the jurisdiction of a United States court. These factors are directed more toward questions of due process and minimum contacts than to exceptions to sovereign immunity. Certainly these factors are essential components to a direct effects examination; however, they ought not to be relied upon at the exclusion of other equally essential elements. Further, reliance on interpretations of the District of Columbia long-arm statute is subject to the same infirmities. This analysis is also directed solely at resolving due process issues. None of these approaches adequately address jurisdiction under the Act as it differs from traditional "minimum contacts" jurisdiction.

The approach which was first articulated by Upton and applied by the court in Rio Grande Transport, most clearly approximates the requirements of the Act. These cases focus on the causal relationship between the activity abroad and its effects in the United States. These courts looked to both the requirements of statutory immunity and to the requirements of due process. However, they did so on an ad hoc basis. They did not develop a uniform analytical procedure to structure their analysis.

Furthermore, the Upton court reached its conclusion on a seemingly intuitive foundation. The causal relationship was facially too attenuated. Thus, there was not a direct effect. Moreover, to buttress its intuition, the court employed the long-arm statute minimum contacts mode of analysis. Thus, although the Upton court first stated this causal approach, it was unclear as to the proper mode of inquiry. Consequently, the court in Rio Grande Transport is the only court which has actually utilized and relied on the causal approach.

The Rio Grande Transport court properly noted that through the Act, Congress desired to provide access to the courts. On this
basis, the court held that the collision abroad caused a loss of income to a United States plaintiff which was sufficiently direct to provide the plaintiff with access to a United States court.\textsuperscript{127} Unfortunately, the \textit{Rio Grande Transport} court neglected to provide any other basis for its decision. The \textit{Rio Grande Transport} court, like the \textit{Upton} court, reached a seemingly instinctive decision without any specific legal basis. Moreover, courts citing the \textit{Rio Grande Transport} decision continue to rely on alternative modes of analysis.\textsuperscript{128} Hence a uniform approach to direct effects jurisdiction does not exist.

A direct effects test which is sensitive to the distinctions between the jurisdictional evaluation required under section 1605(a)(2)\textsuperscript{129} and the due process requirements necessary for minimum contacts jurisdiction is needed in order to adequately approach direct effects jurisdiction issues. The following inquiry procedure is suggested:

\begin{itemize}
\item Is the effect in the United States direct?
\item a) Is the effect felt immediately by an aggrieved party in the United States?
\item b) Are there any intervening elements or causes?
\item c) Is the effect in the United States substantial, or is it merely \textit{de minimus}?
\end{itemize}

If the answer to any of the questions above is negative, then a foreign sovereign is not subject to the judicial review of the American courts. If the response to each of these inquiries is affirmative, then a court has jurisdiction over the action as provided in FSIA section 1605(a)(2). However, despite the finding that a foreign sovereign's commercial activity caused a direct effect in the United States, a court may still not exercise jurisdiction unless the due process requirements for minimum contacts jurisdiction are satisfied.\textsuperscript{130}

A court with statutory jurisdiction must also determine whether the effect in the United States was merely fortuitous. In this determination the following inquiries must be addressed:

\begin{itemize}
\item a) Is the sole basis for jurisdiction the United States residence or citizenship of the plaintiff?
\item b) Does the cause of action arise out of a purposeful contact by the defendant with the United States?
\end{itemize}

\begin{itemize}
\item \textsuperscript{127} \textit{Rio Grande}, 516 F. Supp. 1163.
\item \textsuperscript{128} See \textit{Gibbons v. Udaras na Gaeltachta}, 549 F. Supp. 1094 (S.D.N.Y. 1982). In \textit{Gibbons} the plaintiff alleged that the Republic of Ireland had taken property in violation of international law. \textit{Id.} at 1104. In reaching its decision, the court cited \textit{Rio Grande Transport}, but relied on the District of Columbia long-arm statute. \textit{Id.} at 1113.
\item \textsuperscript{129} See supra note 6.
\item \textsuperscript{130} See supra notes 73, 75.
\end{itemize}
c) Does the cause of action arise out of an activity which systematically brings the defendant into contact with the United States?

This analysis combines the foreseeability component of the Restatement's test with the nonintervention, no-superseding-causes approach. In this way, the "directness" of the effect is analyzed. Then the due process/minimum contacts concepts are applied to the particular set of facts.

This approach is intended to be flexible in order to effectuate the congressional purpose to provide aggrieved citizens with access to American courts and to promote uniformity of approach in actions against foreign sovereigns.

V. CONCLUSION

Americans are increasingly in contact with foreign states and their sovereign entities. Whether for business or pleasure, for the sale or purchase of some commodity or service, citizens and residents make international transactions on a daily basis. In light of this growing international interaction, a comprehensive provision of law was "urgently needed." The FSIA is that comprehensive provision.

The Act was intended to codify the restrictive principle of sovereign immunity and thereby to remove the issue from diplomatic pressures, and to provide access to the courts. This access was to be provided by the Act's creation of an uniform system of federal law in actions against foreign sovereigns. In this way, potential plaintiffs would be on notice as to when they can have recourse to the courts, and foreign states would be on notice as to when they may be subject to the jurisdiction of an American court.

In order to effectuate these purposes, the courts must begin to uniformly define the terms in the Act. It has been eight years since the Act became effective. In that time no uniform analysis regarding the terms "commercial activity" and "direct effect," two prerequisites to establishing jurisdiction over a sovereign, has been articulated or applied. For this reason, an approach to identify each of these terms has been suggested by this comment. No rigid definitions have been put forth because such rigid definitions would be impractical to apply. Moreover, a rigid definition would very likely impede the access to judicial review which Congress desired that the Act provide. This approach is not intended as the definitive mode of analysis.

131. See supra note 2 and accompanying text.
132. H.R. REP., supra note 2 at 6605.
Rather, it has been suggested in the hope that it will stimulate judicial re-evaluation of the meaning of the terms "commercial activity" and "direct effect." This will thereby enable the courts to focus on the congressional intent underlying the Act and to maintain and understand distinctions between jurisdiction under the Act and minimum contacts jurisdiction.

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