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Foreign Sovereign Immunity: Restrictive Immunity Up Against Constitutional Due Process (Notes)

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FOREIGN SOVEREIGN IMMUNITY: RESTRICTIVE IMMUNITY UP AGAINST CONSTITUTIONAL DUE PROCESS

INTRODUCTION

International law is a province of jurisprudence which is very much in a state of flux and development today. One concept which has undergone significant change during the last century is that of the legal immunity, grounded in principles of sovereignty,[1] of one nation from the jurisdiction of the courts of another. United States domestic law has long reflected the law of nations. The interaction between American municipal law and international law is close and substantial. The legal concepts governing sovereign immunity are no exception.

The evolution of the law of sovereign immunity has coincided with the development of emerging centralized governments of the nation-states of the 18th and 19th centuries into the complex and far-reaching mechanisms of the modern state.[2] Early case law established the principle of absolute sovereign immunity as an ex-

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1. The notion of "sovereignty," in the abstract, is a concept which strongly implies immunity from suit. *See, e.g.,* Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907), in which Justice Holmes said that "there can be no legal right as against the authority that makes the law on which the right depends."

2. T. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY 3-8 (1970).

ception to the "full and absolute territorial jurisdiction" of states.[3] Foreign states could not be sued in United States courts under any circumstances because of the "perfect equality and absolute independence of sovereigns."[4] This principle was closely followed, but became subject to increasing criticism and debate.

SOVEREIGN IMMUNITY IN AMERICAN COURTS

The law of sovereign immunity in American courts has been dominated by two major developments. The first was Chief Justice John Marshall's opinion in *The Schooner Exchange v. M'Faddon*,[5] which established the principle of absolute sovereign immunity. Allowing United States courts to assume jurisdiction over claims against foreign states would be offensive to the dignity of sovereign powers.[6] The doctrine that a state is the sole arbiter of its own rights, and therefore cannot be sued in foreign courts without its consent, has persisted into the twentieth century.[7] Under this doctrine a private individual or corporation would have no recourse against a foreign sovereign without its consent.

While the principle of absolute immunity fell into disfavor, the courts developed the practice of deferring to executive determinations of sovereign immunity.[8] The judiciary believed that because of

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3. The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 137 (1812). The case involved a French warship libeled and arrested in the port of Philadelphia. *The Schooner Exchange* Court reversed the circuit court's decision in McFaden v. The Exchange, 16 F. Cas. 85 (C.C.D. Pa. 1811) (No. 8786) which had upheld the "general rule of the law of nations" that all property within a national territory is subject to that nation's authority and jurisdiction.

4. 11 U.S. (7 Cranch) at 137.

5. 11 U.S. (7 Cranch) 116 (1812).

6. *Id.* at 137, 144.

7. *See* Mexico v. Hoffman, 324 U.S. 30 (1945); Ex Parte Peru, 318 U.S. 578 (1943); Berizzi Bros. v. S.S. Pesaro, 271 U.S. 562 (1926); Mason v. Intercolonial Ry. of Canada, 197 Mass. 349, 83 N.E. 876 (1908); Hassard v. Mexico, 29 Misc. 511 (1899), *aff'd mem.*, 46 App. Div. 623 (1st Dept. 1899), *aff'd mem.*, 173 N.Y. 645, 66 N.E. 1110 (1903).

8. *See, e.g.*, Ex Parte Peru, 318 U.S. 578, 588-89 (1943), in which Chief Justice Stone concluded that it was the judiciary's "duty" to accept the executive branch's determination as to sovereign immunity:

> This practice is founded upon the policy, recognized both by the Department of State and the courts, that our national interest will

the delicate political issues involved and the potential for embarrassment to the United States in the conduct of its foreign affairs, decisions concerning the amenability to suit of foreign states were properly left to the State Department.[9]

The principle of absolute immunity was renounced in the United States by the Tate letter, written by the acting legal advisor to the Department of State, Jack B. Tate, in 1952.[10] The Tate letter marks the second major development of the law of sovereign immunity in the United States—the adoption of the restrictive theory of sovereign immunity. Stated simply, this theory restricts the immunity of a foreign state to suits involving foreign states' public acts (*acta jure imperii*) and does not extend immunity to suits based on

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> be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings.

Id. at 589. *See also* Mexico v. Hoffman, 324 U.S. 30, 35-36 (1945), where the Court enunciated a political question restriction on courts' jurisdiction; the determination of whether a foreign sovereign had immunity might embarrass U.S. foreign relations and therefore had to be left to the executive branch. *See also* Banco Nacional de Cuba v. Sabbatino. 376 U.S. 398, 427-28 (1964).

9. *Ex Parte Peru* and *Mexico v. Hoffman* represent the high water mark of judicial deference to the executive branch in sovereign immunity questions. In the former case, the Court held that the State Department's

> certification and the request that the vessel owned and operated by Peru and libeled for an alleged failure to carry out a charter party be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations.

318 U.S. at 589. In the latter case, a ship owned by Mexico but operated by a private Mexican corporation was not given immunity. The Court said:

> We can only conclude that it is the national policy not to extend the immunity in the manner now suggested, and that it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize.

324 U.S. at 38.

10. 26 DEP'T STATE BULL. 984 (1952). *See also* GIUTTARI, *supra*, note 2 at 188-95.

its private acts (*acta jure gestionis*).[11] The acceptance of the restrictive doctrine is a response to the increasing global interaction between different states and individuals of different states. The increasing involvement of national governments in commercial enterprises has resulted in an increase in occasions upon which private citizens require access to courts in order to resolve disputes involving their contacts with foreign states.[12]

Although the Tate letter contributed greatly to the establishment of the restrictive theory in American law, the determination of sovereign immunity remained under the control of the executive branch of government. However, it was recognized that the State Department is often responsive to political exigencies rather than to the enunciated principle of the justiciability of government actions in a private commercial context.[13] Also, there is a certain danger

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11. *See* von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 33-34 (1978).

12. Note, *Sovereign Immunity—Limits of Judicial Control—The Foreign Sovereign Immunities Act of 1976*, 18 HARV. INT'L L. J. 429 (1977). Interestingly, it was Chief Justice Marshall who voiced the justification for the restrictive doctrine:

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself . . . of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs . . . to the business which is to be transacted. . . . The government, by becoming a corporator lays down its sovereignty.

Bank of the United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat) 904, 906-08 (1824). Similarly, in Ohio v. Helvering, 292 U.S. 360, 369 (1934), the Court said: "[w]hen a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader . . ."

13. The inadequacy of executive-determined sovereign immunity is illustrated in the vehement dissenting opinion of Justice Musmanno of the Pennsylvania Supreme Court in Chemical Natural Resources, Inc. v. Venezuela, 420 Pa. 134, 215 A.2d 864, *cert. denied*, 385 U.S. 822 (1966):

> The sovereign immunity doctrine . . . is no longer a healthy manifestation of society. It is, in fact, an excrescence on the body of law, it encourages irresponsibility to world order, it generates resentments and reprisals. Sovereign immunity is a stumbling block in the path of good neighborly relations between nations, it is a sour note in the symphony of international concord, it encourages

in leaving the determination of legal questions to the State Department, which lacks established procedures for taking evidence, hearing witnesses, applying precedent, or affording an opportunity for appellate review.[14]

FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

The latest significant development in this threshold area of the law is the Foreign Sovereign Immunities Act[15] (FSIA), which purports to give conclusive statutory effect to the competence of United States courts to adjudicate controversies involving foreign sovereigns.

The FSIA was enacted in part to remedy the legal defects of leaving the determination of sovereign immunity to the State Department. Section 1602 of the FSIA declares as a purpose of the Act that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States . . ."[16]

The FSIA follows the generally accepted rule that foreign states shall be immune from the jurisdiction of United States courts.[17] However, this immunity is not absolute and the FSIA codifies those exceptions which make certain claims against foreign states justiciable. Chief among those exceptions are claims arising from the commercial activities of foreign states.[18] The FSIA thus clarifies the

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government towards chicanery, deception and dishonesty. Sovereign immunity is a colossal effrontery, a brazen repudiation of international moral principles, it is a shameless fraud.

Id. at 194, 215 A.2d at 893.

14. Note, *supra* note 12, 18 HARV. INT'L L. J. at 435-36.

15. 28 U.S.C. §§ 1330(d), 1391, 1441(d), 1602-1611 (1976).

16. 28 U.S.C. § 1602 (1976). This section provides that:

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts.

17. 28 U.S.C. § 1604 (1976) provides:

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

18. *See* 28 U.S.C. § 1602 which provides that "[u]nder international law,

occasions upon which sovereign immunity may not be successfully pleaded in American courts.

The determination of sovereign immunity was specifically transferred from the Executive to the Judiciary. As stated in an early case interpreting the FSIA,[19] the Act serves primarily to provide "a unitary rule for determination of claims of sovereign immunity in legal actions in the United States, thereby eliminating the role of the State Department in such questions."[20] Determination of sovereign immunity by the Judiciary is meant to serve the interests of justice by assuring litigants that access to the courts will be granted or denied on consistently applied legal grounds.[21]

The FSIA has been increasingly invoked by private litigants seeking to have their rights against foreign sovereigns determined by American courts. Thus far the Act has received a narrow interpretation manifesting the courts' inclination to tread lightly in exercising their power to decide the merits of claims against foreign governments.

PROCEDURAL DUE PROCESS

Where the foreign sovereign has not waived its immunity,[22] a private litigant seeking to enforce rights or remedies must invoke

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states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." *See also* 28 U.S.C. § 1605(a)(2) (1976).

19. Martropico Compania Naviera S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 428 F. Supp. 1035 (S.D.N.Y. 1977).

20. *Id.* at 1037.

21. The legislative history of the FSIA specifically recognized that an objective of the Act would be to insure that the restrictive principle of immunity would be applied in litigation before U.S. courts. Congress intended the transfer of the determination of sovereign immunity to the judiciary to diminish the foreign policy implications of immunity determinations. [1976] U.S. CODE CONG. & AD. NEWS 6605.

22. 28 U.S.C. § 1605(a)(1) provides as the first exception to the jurisdictional immunity of a foreign state any case "in which the foreign state has waived its immunity either explicitly or by implication . . ." Although five exceptions to jurisdictional immunity are enumerated in § 1605, courts have treated the basis of jurisdiction as lying either in waiver or minimum contacts of

the "commercial activities" exception to immunity. Even where the activities giving rise to the lawsuit are clearly commercial,[23] courts have been reluctant to confer jurisdiction on constitutional grounds of due process. The courts justify their narrow reading of the Act by their findings of insufficient minimum contacts or lack of "direct effect."

Carey v. National Oil Corp.,[24] an early case interpreting the FSIA, presented interesting issues because of the lack of precedent in interpreting the Act and because of the political circumstances that were inextricably bound up with the commercial activities of the defendant, the Libyan Arab Jamahirya. Plaintiffs Carey and New England Petroleum Corp. (Nepco) invoked the FSIA in an effort to sue the government of Libya and its oil producing and marketing arm, the Libyan National Oil Corp. (NOC), alleging breach of contract and other violations. Nepco, through its Bahamian subsidiary, had contracts with NOC for the supply of Libyan crude. Libya, in response to the Yom Kippur war of October 1973, imposed an embargo on all exports of crude oil to the United States, the Caribbean Islands and the Netherlands. Other Arab oil-producing countries imposed similar embargoes resulting in a dramatic rise in the world market price of oil. When oil supply resumed in early 1974 it was under newly-negotiated contracts at more than triple the previous price. Difficulties over payments due to NOC by Nepco's Bahamian subsidiary resulted in a further cessation of supply. Nepco then instituted a lawsuit against NOC claiming breach of contract and extortion by duress.

In asserting the jurisdiction of the district court over the defendants, plaintiffs invoked section 1605(a)(2) of the FSIA which provides as follows:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any

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the foreign state with the American forum. For further development of this theme *see* Note, *Waiver of Foreign Sovereign Immunity: The Scope of 28 U.S.C. 1605(a)(1)*, 1 N.Y.J. INT'L & COMP. L. 159 (1980).

23. Commercial activity is defined as "either a regular course of commercial conduct or a particular commercial transaction or act. 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." 28 U.S.C. § 1603(d) (1976).

24. 453 F. Supp. 1097 (S.D.N.Y. 1978), *aff'd per curiam*, 592 F.2d 673 (2d Cir. 1979).

> case . . . in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[25]

Defendant NOC falls within the definition of a foreign state by virtue of the fact that it is an entity wholly owned by the government of Libya.[26] Thus under § 1604 of the FSIA both NOC and Libya can claim immunity from the jurisdiction of the courts of the United States.[27]

It is clear that the activity giving rise to the lawsuit was commercial in nature. Thus the restrictive theory, denying immunity to the commercial activities of foreign states, was brought into play. Although Libya and NOC might have argued that the reason for imposing the embargo on oil exports (thereby breaching their contracts) was public (to manifest their opposition to Western supporters of the State of Israel) and therefore immune from the jurisdiction of United States courts, it is clear from the wording of the FSIA that it is the nature of the activity and not its purpose which governs.[28] It is undisputed that Libya and NOC, in executing contracts for the supply of oil, were engaging in commercial or proprietary activity.

Since 1952 the United States has embraced a policy declining to extend sovereign immunity to the commercial dealings of foreign governments.[29] This policy has been based in part on the fact that this approach has been accepted by a large and increasing number of foreign states in the international community.[30] A more compelling reason for this approach, however, is the increasing involvement of foreign sovereigns in international trade, making essential "a practice

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25. 28 U.S.C. § 1605(a)(2) (1976).

26. 28 U.S.C. § 1603 (1976).

27. 28 U.S.C. § 1604 (1976). *See* note 24 and accompanying text *supra.*

28. 28 U.S.C. § 1603(d) (1976) provides that "[t]he 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."

29. Tate Letter, 26 DEP'T STATE BULL. 984 (1952).

30. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, n. 15 at 702 (1976). The footnote cites cases from Austria, Greece, Hong Kong, Italy, Pakistan, Philippines and Yugoslavia evidencing the policy of these states which declines to extend sovereign immunity to the commercial activities of foreign governments.

which will enable persons doing business with them to have their rights determined in the courts."[31]

The district court, in dismissing the complaint in *Carey*, based its decision on the lack of any direct effect in the United States sufficient to support the assertion of jurisdiction under § 1605(a)(2). As is specified in its legislative history, the fundamental "minimum contacts" requirements of due process are embodied in the FSIA.[32] Thus, in order to satisfy due process requirements, the standard set out in *International Shoe Co. v. Washington*[33] would have to be met. In order to have been subject to the jurisdiction of our courts, Libya and NOC must have had "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."[34] The district court, affirmed by the Court of Appeals, held that the standard had not been met.[35] The district court stated that "[t]here has been absolutely no attempt by Libya nor NOC to avail itself of any of the protections or privileges afforded by the United States —rather, in fact, the reverse."[36] The court relied on *Hanson v. Denckla*[37] in determining that the due process requirements for jurisdiction had not been met. The *Hanson* Court recognized the trend of expanding personal jurisdiction over nonresidents first noted in *McGee v. International Life Insurance Co.*[38] The Court expressed the trend clearly in terms of technological progress increasing the flow of commerce between States and the resulting greater need for jurisdiction over nonresidents.[39] The Court also

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31. 26 DEP'T STATE BULL. 785. The Court in *Dunhill* states "that subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts." 425 U.S. at 703-04.

32. H.R. REP. No. 1487, 94th Cong., 2d Sess. 13 (1976).

33. 326 U.S. 310 (1945).

34. *Id.* at 316.

35. 453 F. Supp. at 1101.

36. *Id.*

37. 357 U.S. 235 (1953). *Hanson v. Denckla* is viewed by commentators as the stopping place in the law of minimum contacts analysis. Under *Hanson*, state boundaries have not lost all meaning. Even under the expansionist doctrine of *International Shoe*, the power of a State to assert personal jurisdiction over nonresidents has certain limits.

38. 355 U.S. 220 (1957).

39. 357 U.S. 235, 250-51 (1958).

noted the progress in communications and transportation which has made the defense of suits in foreign tribunals less burdensome.[40] These developments are equally applicable to the international arena and particularly to the facts in *Carey*. An enlightened view could conclude that large parts of the global oil industry have an impact upon the United States' economy and any serious legal violation occurring in that industry would satisfy the due process requirements enunciated in *International Shoe*.[41] The district and appeals courts declined to adopt such an expansionist view however. The Supreme Court in *Hanson v. Denckla* pointed out that the trend in relaxed restrictions on the personal jurisdiction of state courts by no means destroys all restrictions on jurisdiction. There are still those restrictions which exist as a consequence of the territorial limitations on the power of States.[42] The Second Circuit in *Carey*, recognizing these territorial restrictions, emphasized that the contracts at issue were executed solely by Bahamian and Libyan corporations. Although Nepco's Bahamian subsidiary was wholly owned, it was nevertheless a separate corporate entity.[43] The court therefore refused to "'pierce the corporate veil' in favor of those who created that veil" and deemed the effect in the United States to be indirect.[44]

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40. *Id.* at 251. The Court goes on to conclude that as a result of these changes, the rigid rule of Pennoyer v. Neff, 95 U.S. 715 (1877), which required defendant's presence in the forum state for jurisdiction, has evolved into the flexible standard of International Shoe Co. v. Washington, 326 U.S. 310 (1945). *Id.*

41. *See* McDougal, *The Impact of International Law Upon National Law: A Policy Oriented Perspective*, 4 S.D. L. REV. 25 (1959).

42. 357 U.S. at 251.

43. 592 F.2d 673, 676 (2d Cir. 1979).

44. *Id.* A corporation, as a creature of law, is endowed with a separate and distinct personality, and the separate personality of parent and subsidiary is not lightly disregarded. Boise Cascade Corp. v. Wheeler, 419 F. Supp. 98 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 554 (2d Cir. 1977). The District Court in *Boise* went on to point out that under New York law, the corporate veil is never pierced for the benefit of the corporation or its stockholders; the procedure is permissible only against a purported stockholder who is using the corporate veil to defraud. 419 F. Supp. at 99. *See* Colin v. Altman, 39 A.D.2d 200, 202, 233 N.Y.S.2d 432, 433-34 (1972).

The 2d Circuit in *Carey* cited further cases for the proposition that one who chooses to conduct business by the corporate form may not ignore the existence of the corporation in order to avoid disadvantages. 592 F.2d at 676, *citing* Commissioner of Internal Revenue v. Shaefer, 240 F.2d 381 (2d Cir. 1957) (the Tax Commissioner sought review of a Tax Court determination re-

The Second Circuit applied a narrow interpretation of the term 'direct effect' as it is used in the FSIA.[45] The House Report, in discussing the jurisdiction of United States courts over the commercial activities of a foreign state which cause a direct effect in the United States, clearly indicates that the exercise of jurisdiction must be consistent with the requirement that the effect be substantial and occur as a direct and foreseeable result of the conduct of the foreign state.[46] That the effect in *Carey* was substantial is not disputed. Libya's refusal to deliver oil under the contracts caused Nepco to be unable to deliver fuel to its customers on the East coast. This contributed to the energy crisis of 1973-74 and the concomitant increase in the price of oil.[47] Nepco, though not itself

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jecting in part an asserted deficiency in the taxpayer's federal income tax for 1948). In another case, Schenley Distillers Corp. v. United States, 326 U.S. 432 (1946) the Supreme Court dealt with the issue of when corporate entities could be disregarded. They may be disregarded where they are made the implement for avoiding a clear legislative purpose. They will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person. 326 U.S. at 437. It is interesting to note the Court's tacit acknowledgement of the subjective standard which may influence the discretion of the court in determining whether to 'pierce the veil' would be appropriate in the particular case.

45. In Upton v. Empire of Iran, 459 F. Supp. 264 (D.D.C. 1978), 'direct effect' is defined as one "which has no intervening element, but, rather, flows in a straight line without deviation or interruption." The court dismissed plaintiff's claim for damages for injuries sustained at the Tehran airport, which, though endured here, were caused in Tehran. Because of the lack of a 'direct effect' the court dismissed the action for lack of personal and subject matter jurisdiction.

46. H.R. REP. No. 1487, 94th Cong., 2d Sess. 19 (1976). The Report refers to section 18, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) which provides:

> 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 . . .
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> (b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

47. *See* N.Y. Times, Jan. 8, 1974, § 1, at 33, col. 5; July 26, 1974, § 1, at 45, col. 1.

a party to the contracts, was a party to the negotiations and a known beneficiary of the contracts. Nevertheless, the court insisted on a strict interpretation of the Act and dismissed the suit.

A narrow construction of the FSIA is consistent with the majority of the cases arising under the Act and reflects the marked deference that the American judiciary holds toward sovereign states. In *East Europe Domestic International Sales Corp. v. Terra*,[48] plaintiff, a New York corporation, brought an action against Terra, a Romanian state-owned trading company falling within the definition of a foreign state (§ 1603(a)). Plaintiff alleged wrongful interference with his business which precluded him from concluding a favorable contract for the purchase of cement from a Romanian company. The district court dismissed the suit for lack of personal jurisdiction finding that the contact of Terra with the United States was insufficient to meet the standards of due process. The court concluded that certain telex communications between Terra and the plaintiff were not of the quality and nature in relation to the United States from which the court could infer that Terra had "projected itself" into the United States.[49] The court found that the dispatch of telexes to the United States did not constitute activity having a 'direct effect' in the United States and was therefore an insufficient basis for the assertion of jurisdiction. Arguably, Terra's communications frustrated certain business expectations of the plaintiff. Nevertheless, Terra had a substantial interest in regulating the transaction as far as the third-party Romanian company was concerned. In view of the circumstances, the court found it unfair to require Terra to defend its actions in a United States forum. The result is consistent with current international legal norms by virtue of the fact that Terra is a 'foreign state'. Were Terra merely a private corporation, it is conceivable that its activities would have satisfied the minimum contacts requirements for long arm jurisdiction.

The privileged status enjoyed by foreign states was frankly recognized by the court in *Harris v. Vao Intourist, Moscow*.[50] Plaintiff's testator sought damages for wrongful death which occurred as a result of a fire in the Moscow National Hotel. The court read a more restricted standard of personal jurisdiction in the FSIA than might "constitutionally be afforded American courts under traditional concepts of fairness and due process."[51]

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48. 467 F. Supp. 383 (S.D.N.Y. 1979).
49. *Id.* at 388-90.
50. No. 78-2352 (E.D.N.Y., filed Nov. 9, 1979).
51. Harris v. Vao Intourist, Moscow, No. 78-2352, slip op. at 8

Because of the exclusion of the broad "doing business" concept from the enumerated exceptions in the FSIA, the court refused to find the activities of a Russian-owned travel agency in New York sufficient to satisfy due process requirements. The court reasoned as follows: "The commercial activity out of which plaintiff's claim arises is the operation of the Hotel in Moscow; despite the apparent integration of the Soviet tourist industry, the relationship between the negligent operation of the National Hotel and any activity in the United States is so attenuated that [the exception enumerated in the first clause of § 1605(a)(2)—commercial activity carried on in the United States] is not applicable."[52] Further, the court refused to find jurisdiction because the activity which occurred in Moscow did not have a direct effect in the United States. After a lengthy discussion of the meaning of the term 'direct effect' the court cited with approval *Upton v. Empire of Iran*[53] and held that a death occurring in a foreign jurisdiction, with no suffering of the decedent in this country and no utilization of our health facilities, caused only the indirect effect of grief and loss to the decedent's family. The court alluded to the unfair result reached in this case but placed the blame on Congress which restricted the protection offered United States citizens by express language in the FSIA.[54]

CONCLUSION

Thus, cases involving foreign sovereigns as defendants have required a higher standard of due process for the exercise of jurisdiction. The legislative history of the FSIA indicates that it was the intent of Congress to embody the jurisdictional standards of *International Shoe* and its progeny. However, the courts have interpreted the Act to require a higher standard. The principle that a foreign state should be accountable in its commercial dealings with private individuals thus loses some of its meaning. Because of the narrow reading the courts have given to the term 'direct effect', a foreign state can in many instances escape liability in its com-

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(E.D.N.Y. Nov. 9, 1979).

52. *Id.* at 13-14.

53. 459 F. Supp. 264 (D.D.C. 1978). *See* note 45 *supra.*

54. Harris v. Vao Intourist, Moscow, No. 78-2352, slip op. at 29-30 (E.D.N.Y. Nov. 9, 1979).

mercial dealings with U.S. citizens by deliberately avoiding any meaningful contacts with the United States. Thus, private business is faced with the same risks in dealing with foreign governments as prior to the passage of the Act. The purposes of the FSIA thus remain largely unrealized.

This is not due entirely to abdication by the courts. Rather it reflects a healthy sense of realism in viewing the world economic system. Governments, with their vast resources, enjoy a superior bargaining position and do not hesitate to avail themselves of the prerogatives of their privileged positions. Although the sentiment that governments should be held accountable when engaging in proprietary activities runs high, it is unrealistic to consider governments on a parity with individuals.

The competence of the courts to extend a greater jurisdictional reach over foreign governments can only be exercised under a clearer Congressional mandate than is presently expressed in the FSIA. Congress, in view of the jealously guarded sovereignty of nations, cannot broaden this mandate. Such a development can occur only at some time in the future when the nations in the world have achieved a greater measure of integration. In the meantime, those seeking to conduct business with foreign governments should not rely on the provisions of § 1605(a)(2) to obtain jurisdiction in the event of breach, but, if their bargaining position will allow, incorporate express waiver provisions in their contracts.

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