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I. INTRODUCTION

The Foreign Sovereign Immunities Act of 1976[1] ("FSIA") is confusing even in its title. While the title suggests that the FSIA is meant to grant immunity for foreign sovereigns, in fact the FSIA was enacted with the opposite intent. The FSIA was designed to codify when sovereign immunity is *not* applicable.[2] The FSIA does begin with the enactment of the traditionally accepted premise that ordinarily foreign governments are immune from the jurisdiction of the United States.[3] However, that general grant of immunity is then subject to crucial qualifications.[4] As with so much statutory law,[5] the key to the meaning and intent of the FSIA is in its exceptions.[6]

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1 Foreign Sovereign Immunities Act, Pub L No 94–583, 90 Stat 2891 (1976), codified as amended at 28 USC §§ 1330, 1391(b), 1441(d), 1602–11 (2000) (hereinafter FSIA).

2 More specifically, the FSIA was passed to codify the restrictive theory of sovereign immunity which generally limited immunity to situations where the state was acting in its unique capacity as a government and was not engaged in activities that were of the sort that private parties might undertake. See House Judiciary Committee, Jurisdiction of United States Courts in Suits Against Foreign States, HR Rep No 94–1487, 94th Cong, 3d Sess (1976), reprinted in 1976 USCCAN 6604, 6605.

3 28 USC § 1604.

4 28 USC §§ 1605–07.

5 Compare the Foreign Corrupt Practices Act of 1977, 15 USC §§ 78dd-1–dd-3 et seq (2000). That act sets forth the general rule that foreign corrupt practices are not to be tolerated, but a

The most important of the exceptions to sovereign immunity is the commercial activities exception.[7] The commercial activities exception basically states that a foreign sovereign is not immune from the jurisdiction of United States courts (including both federal and state courts) where: (i) such foreign sovereign engages in the kinds of commercial activities that a private party might undertake; and (ii) that activity has a sufficient connection with the United States.[8]

The first part of this analysis—determining when a foreign sovereign is engaged in commercial activities that a private party might undertake—has proven problematic for courts.[9] The statute itself gives little guidance in this regard, stating that activities are "commercial" if they represent "either a regular course of commercial conduct or a particular commercial transaction or act."[10] The circularity of this definition has vexed courts.[11] The statute, however, does state that commercial activity should be evaluated with regard to the nature of the activity in question and not its purpose.[12] This distinction has proved helpful in many circumstances. For example, under the "nature of the activity" analysis,

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significant exception to that general rule specifically authorizes a certain amount of bribery. See § 78dd-1(b).

6 Those exceptions include the following situations: (a) where a foreign state has waived immunity, (b) where a foreign state engages in commercial activity like a private party, (c) where a foreign state violates international law, (d) claims regarding immovable property in the US, (e) claims for certain "non-commercial" torts, (f) claims regarding arbitral awards, (g) claims regarding certain types of torture or terrorism, and (h) claims in admiralty. These exceptions are contained in 28 USC § 1605.

7 The commercial exception is codified at 28 USC § 1605(a)(2). The House Report describing the FSIA explained that its purpose was to protect private parties who engage in commercial transactions with foreign sovereigns. The House Report also described the commercial activities exception of § 1605(a)(2) as "probably the most important instance in which foreign states are denied immunity." HR Rep No 94–1487, reprinted in 1976 USCCAN at 6617 (cited in note 2). In addition, the most recent landmark Supreme Court case described the commercial activities exception as "[t]he most significant of the FSIA's exceptions . . . ." *Republic of Argentina v Weltover*, 504 US 607, 611 (1992).

8 28 USC § 1605(a)(2).

9 See, for example, *Texas Trading & Milling Corp v Federal Republic of Nigeria*, where the court criticizes the FSIA, stating that "[u]nfortunately, the definition of 'commercial' is the one issue on which the Act provides almost no guidance at all." 647 F2d 300, 308 (2d Cir 1981). See generally Joan E. Donoghue, *Taking the "Sovereign" out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 Yale J Intl L 489 (1992) (detailing the problems of identifying when a foreign sovereign is engaged in commercial activities for purposes of the FSIA).

10 28 USC § 1603(d).

11 See, for example, *Weltover*, where the Supreme Court stated that the definition of commercial activity in the FSIA left "commercial" largely undefined. 504 US at 612.

12 28 USC § 1603(d).

government procurement would be considered commercial activity even if the procurement were for a governmental purpose such as military development.[13]

Still, courts seem better prepared to analyze when activity is commercial than to confront the second portion of the analysis—determining whether the activity has a sufficient connection with the United States. Ironically, the FSIA gives far more guidance on the latter point, but is still confusing.[14] The FSIA states that the connection between the cause of action and the United States is sufficient for jurisdiction if the suit against the foreign sovereign is based on: (i) commercial activity of the foreign sovereign that has occurred in the United States; (ii) an act performed in the United States in connection with a commercial activity of the foreign sovereign elsewhere; or (iii) an act outside of the United States in connection with a commercial activity of the foreign state elsewhere, which causes a direct effect in the United States.[15]

Unfortunately, that framework has proven confusing to courts applying it.[16] The first two scenarios are relatively straightforward. Suits based on actions that actually occur in the United States clearly have the requisite connection to the United States to allow courts in the United States to take jurisdiction over the matter. It is the interpretation of the third clause (the "direct effect clause") that has resulted in an unclear Supreme Court decision[17] and a subsequent split among the federal courts of appeals.[18]

Following the Supreme Court case, several of the circuits have insisted that there must be some *legally significant act* in the United States in order for a "direct effect" to be felt.[19] Others have stuck closer to the "direct effect" words of the statute and find a direct effect where the effect complained of is the *immediate consequence* of the sovereign's actions abroad.[20]

Further complicating the FSIA are the questions of subject matter and personal jurisdiction. The FSIA states that if an exception to immunity exists in

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13 HR Rep No. 94–1487, reprinted in 1976 USCCAN at 6615 (cited in note 2).

14 28 USC § 1605(a)(2).

15 Id.

16 See, for example, *Weltover*, 504 US at 612, and its progeny. See Section III.C.

17 Id at 617–20.

18 See Section III.B.

19 See, for example, *Antares Aircraft, LP v Federal Republic of Nigeria*, 999 F2d 33, 36 (2d Cir 1993) (requiring that a legally significant act occur in the United States before a direct effect could be found to have occurred).

20 See, for example, *Weltover*, 504 US at 618 (finding a direct effect where the effect is the immediate consequence of the actions that are the subject of the suit); *Voest-Alpine Trading USA Corp v Bank of China*, 142 F3d 887, 896 (5th Cir 1998) (also using the immediate consequence analysis); see also *Antares Aircraft*, 999 F2d at 36 (requiring that a legally significant act occur in the United States before a direct effect could be found to have occurred).

the statute, then the courts of the United States will have subject matter jurisdiction over the suit.[21] If service of process is made in accordance with the statute, then personal jurisdiction is also established.[22] In fact, the FSIA seems to make the inquiry into subject matter and personal jurisdiction regarding a foreign sovereign very straightforward. Courts applying the FSIA, however, have been unsure about whether the statute satisfies the constitutional demands of due process ordinarily contained in a personal jurisdiction analysis.[23] Thus, several courts, including the Supreme Court, have inquired whether or not the traditional requirements of the Due Process Clause (namely the minimum contacts analysis of *International Shoe*[24]) have been met before asserting jurisdiction against a foreign sovereign.[25]

This Article will first argue that the FSIA has greatly overcomplicated the matter and will then offer a proposed solution. Essentially, the statute should simply state that where a foreign sovereign is engaged in commercial activities like a private party, it should be treated like one. Under this scheme, once this threshold determination has been made (establishing subject matter jurisdiction under the FSIA), the courts would simply use the familiar minimum contacts test they have relied on for decades in order to find personal jurisdiction (or not) over foreign private party defendants.[26] In addition, personal jurisdiction would not be proper unless service of process was made in accordance with the statute, as is currently the case.

This proposal would ensure that the conduct complained of in a lawsuit against a foreign sovereign does have a sufficient connection to the United States such that due process concerns are not raised. This solution also would

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21 28 USC § 1330(a).

22 28 USC § 1330(b).

23 The *Texas Trading* court insisted that due process scrutiny must be made in every case before jurisdiction over a foreign sovereign may be granted under the FSIA. 647 F2d at 308. However, the Supreme Court spoke to this issue in *Weltover* and specifically refused to address whether a foreign sovereign should be deemed to be a person entitled to the protections of the Due Process Clause of the United States Constitution. *Weltover*, 504 US at 619.

24 *International Shoe Co v Washington*, 326 US 310 (1945).

25 *Weltover*, 504 US at 619–20; *Texas Trading*, 647 F2d at 313–14; *Vermeulen v Renault, USA, Inc*, 985 F2d 1534, 1545 (11th Cir 1993).

26 As will be developed further, it is important that the personal jurisdiction inquiry with respect to a foreign sovereign be limited to whether specific jurisdiction exists—jurisdiction based on the activities alleged in the specific complaint. If general jurisdiction—jurisdiction based on the general contacts of the defendant to the United States—were allowed then most foreign sovereigns would always be subject to suit in the United States since most sovereigns have substantial connections to the United States. See generally Carlos M. Vázquez, *The Relationship between the FSIA's Commercial-Activities Exception and the Due-Process Clause*, 85 Am Socy Intl L Proc 257 (1991).

end the confusion and complexity involved with attempting to apply the current FSIA framework and would make sure that sovereigns acting like private parties are treated as such.

This Article will begin in Section II by giving an overview of the development and structure of the FSIA. Section II will explain how the United States moved from its position in the nineteenth century of absolute sovereign immunity to the more appropriate restrictive theory of immunity that is embodied in the FSIA. Section III will then explain in detail why the current framework of the commercial activities exception to the FSIA is problematic. In this Section, the leading cases that have attempted to interpret the commercial activities exception to the FSIA will be analyzed. Finally, Section IV will present and support an argument for an alternative structure to the commercial activities exception of the FSIA, a more rational approach that simply treats a foreign sovereign like a private party when and if it acts like one. While the alternative structure could and should be introduced by way of a statutory amendment to the FSIA, this Article will also argue that pending such an amendment, courts should interpret the language of the current FSIA in a way that leads to the same results.

II. THE FSIA: ITS DEVELOPMENT AND STRUCTURE

Any history of the evolution of the sovereign immunity doctrine in the United States must begin with *The Schooner Exchange v M'Faddon*,[27] the landmark Supreme Court case decided in 1812. *The Schooner Exchange* held specifically that the United States did not have jurisdiction over a particular armed ship that was owned by a foreign sovereign (France) and found in a US port.[28] Chief Justice Marshall delivered the opinion of the Court and explained the Court's view that every nation has "exclusive and absolute" jurisdiction over everything in its own territory.[29] The Court, however, reasoned that any sovereign within the territory of another sovereign could only be there under an express or implied license of immunity from jurisdiction granted by the host nation.[30] Were this not the case, then such a sovereign would "degrade the dignity of his nation, by placing [itself] . . . within the jurisdiction of another," and that was deemed unfeasible.[31] Accordingly, the Court held that the sovereign owner of the vessel was

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27 11 US 116 (1812).

28 Id at 147.

29 Id at 136.

30 Id.

31 Id at 137.

protected by an implied grant of immunity from the jurisdiction of the courts of the United States.[32]

Ironically, however, *The Schooner Exchange* opinion contained dicta that certain exceptions to sovereign immunity should exist. Chief Justice Marshall acknowledged, without holding, that the private property of a sovereign acquired in a host nation would likely not be immune to suit.[33] Under this analysis, Marshall concluded that a prince acting as a private party in this situation "may be considered as so far laying down the prince, and assuming the character of a private individual."[34] In other words, where a sovereign acts like a private party, it may be considered to waive its immunity as a sovereign and subject itself to those laws that would govern a private party. Nonetheless, *The Schooner Exchange* has been repeatedly cited for the general principle of absolute sovereign immunity.[35] Absolute immunity for sovereigns thus generally became a part of the law of the United States.[36]

Absolute immunity gradually became an anachronism. As governments increasingly participated in commerce, it seemed inappropriate to relieve those governmental entities of the obligations and responsibilities that accompanied private parties engaged in those transactions. By the 1920s, the United States Supreme Court began to question the principle of absolute immunity. In the 1926 case of *Berizzi Brothers Co v Steamship Pesaro*,[37] the Supreme Court stated that *The Schooner Exchange* did not extend immunity to merchant vessels owned by foreign sovereigns. The Court reasoned that because there were no such government owned merchant vessels in 1812, *The Schooner Exchange* opinion could not have contemplated immunity for them.[38] Nonetheless, despite questioning whether sovereign immunity should be granted in suits concerning such government owned merchant vessels, the *Berizzi* Court did conclude that even merchant ships of foreign sovereigns were entitled to immunity.[39]

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32 Id at 147.

33 Id at 145.

34 Id.

35 See, for example, *Oliver American Trading Co v Mexico*, 5 F2d 659, 663 (2d Cir 1924).

36 See Letter from Jack Tate, Acting Legal Adviser to the Secretary of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), in 26 Dept St Bull 984, 984 (1952) (hereinafter Tate Letter). In the Tate Letter, the State Department affirmed that "[t]he classical or virtually absolute theory of sovereign immunity has generally been followed by the courts of the United States . . . ."

37 271 US 562, 573 (1926).

38 Id at 573–74.

39 Id at 574.

In *Compania Espãnola de Navegación Maritima, SA v The Navemar*,[40] decided in 1938, the Supreme Court pronounced that sovereign immunity was no longer absolute; instead, it was a prerogative extended by the executive branch of the United States government.[41] The judiciary would defer to decisions of the executive branch regarding whether a foreign sovereign should be entitled to immunity in any given case.[42] *Compania Espãnola* also involved a suit against a merchant ship allegedly owned by a foreign sovereign—this time the Spanish government.[43] The Court stated that if the executive branch of the United States government instructed it to grant the defendant immunity in that case, then it would, but that otherwise the court was fully competent and authorized to proceed on the matter.[44]

In 1945, the Supreme Court again addressed the subject of sovereign immunity in *Republic of Mexico v Hoffman*.[45] The *Hoffman* Court discussed the political sensitivities of an immunity decision and firmly stated that the judiciary needed to defer to decisions of the executive branch concerning questions of sovereign immunity.[46] Only in the absence of a decision from the executive branch regarding immunity in any particular case, would the judiciary consider the question on its own.[47] Even then, the *Hoffman* Court cautioned that previous decisions of the executive branch regarding immunity for the given sovereign should be given great weight and that "the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs."[48] In *Hoffman*, the Executive Branch did not advise the Court as to whether the defendant in that case should be immune from suit, and the Court did in fact deny immunity.[49]

Finally, in 1952, the Department of State declared its outright rejection of the principle of absolute immunity and its adoption of a restrictive theory of immunity.[50] This declaration occurred in a letter written to the Department of Justice by Jack Tate, a legal advisor to the State Department. In this renowned missive (known as the "Tate Letter") Tate explained that granting absolute immunity to foreign sovereigns was no longer appropriate because foreign

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40 303 US 68 (1938).

41 Id at 74.

42 Id.

43 Id.

44 Id at 76.

45 324 US 30 (1945).

46 Id at 34.

47 Id.

48 Id at 35.

49 Id at 38.

50 Tate Letter at 985 (cited in note 36).

sovereigns were so often engaged in private commerce and that people doing business with those sovereigns needed and deserved a venue for dispute resolution.[51] Additionally, Tate argued that it had become common practice around the globe for countries to use this restrictive theory of immunity.[52] In sum, this new restrictive theory of immunity adopted by the Executive Branch resulted in foreign sovereigns being deemed immune in suits related to their governmental acts, but not in suits related to their acts in the private commercial arena. Tate further supported the State Department's shift in position by explaining that since the United States no longer claimed immunity when sued in foreign courts for contract or tort claims, it was unfair for foreign sovereigns to do so.[53]

The restrictive theory of sovereign immunity enunciated by Tate in that famous letter constitutes the basis for the FSIA. Enacted in 1976, the FSIA first sets forth the general rule that foreign sovereigns are ordinarily immune from suit in the courts of the United States: "[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."[54]

The FSIA then sets forth exceptions to the general rule that are the core of the statute.[55] Chief among the exceptions is the commercial activities exception,[56] which is at the heart of the restrictive theory of immunity.[57] That theory is based on the premise that when a foreign sovereign engages in private commercial activities—essentially when a foreign sovereign acts like a private party—it should be accountable for its actions the way a private party would be, and so immunity is not appropriate.[58] The commercial activities exception, however, is not the only exception embodied in the FSIA. Foreign sovereigns also will be denied immunity in cases where: (a) a foreign state has waived immunity; (b) a foreign state has violated international law; (c) immovable property in the United States is at stake; (d) certain "non-commercial" torts have been committed; (e) arbitral awards are concerned; (f) certain types of torture or terrorism are

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51 "[T]he widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." Id.

52 Id.

53 Id.

54 28 USC § 1604.

55 28 USC §§ 1605–07.

56 28 USC § 1605(a)(2).

57 Tate Letter at 984 (cited in note 36).

58 Id.

involved; and (g) admiralty issues are present.[59] Nonetheless, the most important exception, and the reason the FSIA was enacted, is the commercial activities exception.[60]

III. THE PROBLEM: CONFUSION WITH THE COMMERCIAL ACTIVITIES EXCEPTION

The commercial activities exception to the FSIA has created great confusion and inconsistency in the years since its passage. In particular, courts have wrestled with how to apply the framework set forth that describes when the exception should apply. Further, courts do not seem to know whether an independent analysis under the Due Process Clause is necessary to make sure that jurisdiction is not taken in violation of the United States Constitution.

A. COMMERCIAL ACTIVITIES EXCEPTION OF SECTION 1605(A)(2)

As noted above, the commercial activities exception denies immunity to a foreign sovereign where: (i) the foreign sovereign engages in commercial activities; and (ii) those commercial activities have the requisite nexus to the United States.[61] More specifically, the commercial activities exception provides:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case . . . in which the action is based
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> [i] upon a commercial activity carried on in the United States by the foreign state; or
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> [ii] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or
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> [iii] 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.[62]

Courts have struggled with the first step of the analysis demanded by this provision: defining what constitutes commercial activity. This struggle seems to

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59 28 USC §§ 1605–07.

60 HR Rep No 94–1487, reprinted in 1976 USCCAN 6604, 6617 (cited in note 2).

61 28 USC § 1605(a)(2).

62 Id (emphasis added).

be abating, with agreement developing among the courts that activity is commercial for purposes of this exception where its nature is commercial and where it is an activity capable of being undertaken by a private party.[63] Purpose is deemed irrelevant.[64] Still, ambiguities and challenges exist for the courts in this regard. Fact patterns abound—from expropriations to governmental trade in wildlife—involving activities that do not easily lend themselves to characterizations as either private or governmental.[65]

The focus of this Article, however, is on the second step of the analysis: whether the commercial activity has the requisite nexus to the United States. According to the statute, the requisite nexus does exist if the case satisfies one of three subsections. The first and second subsections have not proven so problematic as they require a relatively straightforward inquiry: whether or not the act that forms the basis of the complaint actually occurred in the United States. The problem has been with the third subsection (the "direct effect clause"), which requires determining whether an action that occurred outside the United States has created a direct effect inside the United States sufficient to warrant jurisdiction.

B. SUPREME COURT ADDRESSES THE COMMERCIAL ACTIVITIES EXCEPTION IN *WELTOVER*

In 1992, the United States Supreme Court addressed the question of how to determine when an act outside the United States causes a direct effect inside the United States in *Republic of Argentina v Weltover*.[66] However, the *Weltover* decision did not provide much clarity on the issue and there has been a split of opinion at the federal appellate court level about how to interpret *Weltover*. The split has yet to be resolved.

The *Weltover* case involved a conflict between Swiss and Panamanian holders of Argentinean bonds and the government of Argentina.[67] Argentina had unilaterally decided to reschedule repayment of those bonds and the

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63 See, for example, *Texas Trading*, 647 F2d at 309 (explaining that "commercial activities" under the FSIA are those that a private party might undertake); *Weltover*, 504 US at 614 (reiterating that commercial activity exists under the FSIA if the activity is of a nature that a private party might undertake it); *Keller v Central Bank of Nigeria*, 277 F3d 811, 816 (6th Cir 2002) (holding that activity is commercial under the FSIA if its nature is such that a private party might engage in it).

64 See, for example, *Weltover*, 504 US at 614; *Keller*, 277 F3d at 816.

65 See generally Donoghue, 17 Yale J Intl L 489 (cited in note 9) (detailing the problems of identifying when a foreign sovereign is engaged in commercial activities for purposes of the FSIA).

66 504 US 607 (1992).

67 Id at 609–10.

bondholders sued on the theory that there had been a breach of contract.[68] Importantly, the bond terms called for payment in New York.[69] Addressing whether Argentina was immune from suit under the FSIA, the Supreme Court held that the commercial activities exception did apply and thus denied immunity.[70] According to the Court, jurisdiction was proper under the commercial activities exception because: (i) the issuance of the bonds was commercial, given that private parties issue bonds regularly;[71] and (ii) the direct effect clause provided the requisite nexus between the action and the United States.[72] The Court ruled that the direct effect clause was satisfied because the suit was based on an *act that occurred outside of the United States* (the unilateral extension of repayment under the bond contract) that *caused a direct effect in the United States* because payment that was scheduled to be made in New York City was never actually made.[73] Hence, money that would have arrived in the United States did not.[74]

The Supreme Court took the *Weltover* case on an appeal from a decision of the US Court of Appeals for the Second Circuit.[75] The Supreme Court largely agreed with the Second Circuit's analysis of the case[76] but some significant differences in the two opinions have helped fuel the split amongst the courts of appeals subsequently attempting to follow *Weltover.*

The Second Circuit opinion rejected the requirement that some earlier courts had imposed: for an effect to be sufficiently "direct," it must be "substantial and foreseeable."[77] That language was the result of a House Report that is part of the legislative history of the FSIA. The report stated that conduct covered by the direct effect clause would be subject to the jurisdiction of American courts "consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965)."[78] The Second Circuit explained that Section 18 does not provide for extraterritorial application of American laws except with respect to conduct that has as a "direct

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68 Id at 610.

69 Id.

70 Id at 620.

71 Id at 614–15.

72 Id at 619.

73 Id.

74 Id.

75 See *Weltover, Inc v Republic of Argentina*, 941 F2d 145 (2d Cir 1991).

76 See *Weltover*, 504 US at 618–19.

77 *Weltover*, 941 F2d at 152 (internal citations omitted).

78 HR Rep No 94–1487 at 19, reprinted in 1976 USCCAN 6604, 6618 (cited in note 2).

and foreseeable result" a "substantial" effect within the United States.[79] The Second Circuit found that since that Section of the Restatement dealt with jurisdiction to *legislate* and not to *adjudicate*, it was totally inapplicable despite its inclusion in the House report.[80] The Supreme Court fully endorsed the Second Circuit on this point, going as far as to assert that "we reject the suggestion that § 1605(a)(2) contains any unexpressed requirement of 'substantiality' or 'foreseeability.'"[81] Subsequently, federal appellate courts would rely on this statement to support a strictly textual reading of the commercial activities exception.[82]

The Second Circuit then defined "direct effect" by reasoning that an effect is "direct" if it follows "as an immediate consequence of the defendant's . . . activity."[83] Again, the Supreme Court agreed entirely with the Second Circuit on this point.[84]

The Second Circuit, however, had stated in its opinion that courts "often look to the place where *legally significant acts*" occurred in order to determine whether the direct effect of any given action was in the United States.[85] According to the Second Circuit, in *Weltover* the "legally significant act" was Argentina's failure to make payment in New York.[86] Thus, the Second Circuit concluded that a legally significant act occurred in the United States and so a direct effect must have been felt there.[87] It is here that the Supreme Court diverged in an important way from the reasoning of the Second Circuit. In its *Weltover* opinion, the Supreme Court was silent regarding the legally significant act requirement.[88] The Supreme Court neither specifically required the search for a legally significant act in finding a direct effect, nor stated that such an inquiry was inappropriate.[89] Because the Supreme Court upheld the Second Circuit decision in finding that there was a direct effect in the *Weltover* case, federal appellate courts in several circuits have implied that the Supreme Court

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79 *Weltover*, 941 F2d at 152.

80 Id.

81 *Weltover*, 504 US at 618.

82 See, for example, *Voest-Alpine Trading*, 142 F3d at 893.

83 *Weltover*, 941 F2d at 152.

84 *Weltover*, 504 US at 618.

85 *Weltover*, 941 F2d at 152 (emphasis added).

86 Id at 153.

87 Id.

88 *Weltover*, 504 US 607 (1992).

89 Id.

implicitly adopted the legally significant act test.[90] Other circuits point out that since the Supreme Court did not so much as mention a legally significant act in its *Weltover* decision, its opinion cannot possibly be construed to require one.[91]

C. THE CIRCUIT SPLIT DEVELOPS REGARDING THE DIRECT EFFECT CLAUSE

The *Weltover* decision ignited confusion and controversy over whether the direct effect clause mandates a finding of a legally significant act in the United States. As a result, various federal appellate courts used different modes of analysis to interpret the direct effect clause.

In the immediate wake of the Supreme Court's *Weltover* decision, the Second Circuit repeated in *Antares Aircraft, LP v Federal Republic of Nigeria* that it was necessary to find a legally significant act.[92] The *Antares* Court insisted that in order to find a "direct effect" under the commercial activities exception, there had to be a "legally significant act[]" in the United States—the same stance it had taken in *Weltover*.[93] *Antares* originally had been decided by the Second Circuit just before the *Weltover* Supreme Court case. The case was appealed to the Supreme Court, which then remanded it to the Second Circuit for a decision in accordance with the Supreme Court's *Weltover* ruling.[94] In *Antares*, the Second Circuit reasoned that although the Supreme Court had not expressly adopted the legally significant acts test, the Supreme Court did use a similar analysis and therefore endorsed the test.[95]

As late as 1998, in *Filetech SA v France Telecom SA*, the Second Circuit reiterated its position that a legally significant act test is required.[96] "This test requires that the conduct having a direct effect in the United States be legally significant conduct in order for the commercial activity exception to apply."[97]

Despite the language of *Antares* and *Filetech,* even the Second Circuit has not consistently used the legally significant act test. In a 1994 ruling, *Commercial*

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90 See, for example, *Antares Aircraft*, 999 F2d at 36; *United World Trade v Mangyshlakneft Oil Production Assn*, 33 F3d 1232, 1239 (10th Cir 1994); see also *General Electric Capital Corp v Grossman*, 991 F2d 1376, 1385 (8th Cir 1993).

91 See, for example, *Voest-Alpine Trading*, 142 F3d at 894; see also *Keller*, 277 F3d at 818.

92 See *Antares Aircraft*, 999 F2d at 36.

93 Id.

94 *Antares Aircraft, LP v Federal Republic of Nigeria*, 505 US 1215 (1992).

95 *Antares*, 999 F2d at 36. The Supreme Court denied certiorari when the case again was appealed. *Antares Aircraft, LP v Federal Republic of Nigeria*, 510 US 1071 (1994).

96 157 F3d 922, 931 (2d Cir 1998).

97 Id.

Bank of Kuwait v Rafidain Bank,[98] the court deemed that the direct effect test was applicable without ever mentioning whether there was a legally significant act in the United States that gave rise to the direct effect.[99]

Both the Eighth and Tenth Circuits also ruled on this issue in the immediate aftermath of *Weltover*.[100] Both courts cited to the legally significant acts test as being useful, but neither specifically stated that it was required.[101] Rather, both courts referred to the language used by the Second Circuit in *Weltover*, observing that "courts often look to the place where legally significant acts" occurred in order to determine where a direct effect occurred.[102] Based on this language, it seems that the Eighth and Tenth Circuits view the legally significant act test as one way of finding a direct effect, but not the only way.

However, other federal appellate courts have cited these Eighth and Tenth Circuit cases as precedent for the proposition that a legally significant act is required in order to find a direct effect under the FSIA.[103] For example, in 1997, the Ninth Circuit, in *Adler v the Federal Republic of Nigeria*,[104] noted that the Second Circuit still required the legally significant acts test.[105] The Ninth Circuit also observed that the Tenth Circuit "has followed the Second [Circuit] in applying the 'legally significant acts' test" and that the Eighth Circuit has "acknowledged the test's survival."[106] The Ninth Circuit may have been wrong in its characterization of the Eighth and Tenth Circuits' analyses of the legally significant act test—reading those cases as requiring the test rather than just suggesting that the analysis could be helpful if used—but the cases are somewhat ambiguous, and the Ninth Circuit's confusion is understandable.

In any event, the *Adler* court cited precedent from its own jurisdiction that contained specific language saying that a legally significant act is indeed required in order to find a direct effect under the FSIA.[107] In the 1989 case *Gregorian v Izvestia*,[108] the Ninth Circuit had stated that "to establish a 'direct effect' in the United States resulting from an act occurring abroad, a plaintiff must establish

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98 15 F3d 238 (2d Cir 1994).

99 Id at 241.

100 *United World Trade*, 33 F3d at 1239; *General Electric*, 991 F2d at 1385.

101 *United World Trade*, 33 F3d at 1239; *General Electric*, 991 F2d at 1385.

102 *United World Trade*, 33 F3d at 1239 (internal citations omitted); *General Electric*, 991 F2d at 1385, quoting *Weltover*, 941 F2d at 152.

103 See, for example, *Adler v Federal Republic of Nigeria*, 107 F3d 720, 727 (9th Cir 1997).

104 Id.

105 Id.

106 Id at 727 n 4, citing *United World Trade*, 33 F3d at 1239; *General Electric*, 991 F2d at 1385.

107 *Adler*, 107 F3d at 727, citing *Gregorian v Izvestia*, 871 F2d 1515, 1527 (9th Cir 1989).

108 *Gregorian*, 871 F2d at 1527.

that 'something legally significant actually happened in the U.S.'"[109] That precedent, however, predated the Supreme Court's decision in *Weltover*. The 1997 *Adler* court cited to *Gregorian* and to the Eighth and Tenth Circuit precedents, but never did go so far as to specifically rule again that the legally significant acts test was required—nor did it even specifically employ the test in its analysis.[110] However, it also did not expressly overrule *Gregorian*.[111] So, it seems that the test survives as a requirement in the Ninth Circuit. The *Adler* court's hesitancy to specifically reaffirm the test as a requirement, however, may indicate the Ninth Circuit's uncertainty regarding the issue.

Other federal appellate courts, namely those of the Fifth and Sixth Circuits, have ruled categorically that identifying a legally significant act in the United States is not required by the FSIA's direct effect clause.[112] In *Voest-Alpine Trading USA Corp v Bank of China*,[113] the Fifth Circuit reasoned that inasmuch as the Supreme Court did not mandate such an inquiry in *Weltover*, it is not required.[114] Further, the *Voest-Alpine* court pointed to the language from the Supreme Court in *Weltover* where the Court rejected the injection of any unexpressed terms into the language of the statute.[115]

The *Voest-Alpine* court also went through a careful structural analysis of the commercial activities exception to show that if a legally significant act were to be required under the direct effect clause, then the direct effect clause would merge into the second clause of the commercial activities exception.[116] The second clause allows for jurisdiction where the lawsuit is based on an act performed in the United States in connection with commercial activity of the defendant outside of the United States.[117] If a legally significant act in the United States were to be required for the direct effect clause, then the direct effect clause would only be triggered where the action was based on an act that occurred *outside* the United States that caused another legally significant act to occur *inside*

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109 Id, quoting *Zedan v Kingdom of Saudi Arabia*, 849 F2d 1511, 1515 (DC Cir 1988).

110 Ultimately, the *Adler* court's analysis was based on an analogy between its fact pattern and the fact pattern of *Weltover*. Both cases involved payments that should have been made in New York under contract but that were never made. Since the facts were similar, the result was the same. *Adler*, 107 F3d at 727.

111 Id.

112 *Voest-Alpine*, 142 F3d at 894; *Keller*, 277 F3d at 818.

113 142 F3d 887 (5th Cir 1998).

114 Id at 894.

115 Id.

116 Id at 895.

117 28 USC § 1605(a)(2).

the United States.[118] The Fifth Circuit reasoned that this reformulation of the direct effect clause makes it merely a more stringent version of the second clause.[119] Under both clauses, the lawsuit would require some act that occurred in the United States that was connected to commercial activity abroad.[120] The Fifth Circuit reasoned that the FSIA would not have been written in such a way as to render one clause redundant of another.[121]

The Sixth Circuit ruled on this point in 2002 in *Keller v Central Bank of Nigeria*.[122] The *Keller* court reviewed various federal appellate courts' positions on the legally significant act test and found that the Second, Ninth, and Tenth Circuits had adopted the legally significant acts test,[123] while the Fifth Circuit had rejected the test in *Voest-Alpine*.[124] The Sixth Circuit joined the Fifth Circuit, agreeing that "the addition of unexpressed requirements to the statute is unnecessary, and . . . declin[ing] . . . to adopt the 'legally significant acts' test."[125]

In sum, in the wake of *Weltover*, federal appellate courts have taken various approaches to interpreting the direct effect clause of the commercial activities exception to the FSIA. The Second Circuit has affirmed the legally significant act test as a requirement in order to find a direct effect.[126] The Ninth Circuit seems to agree.[127] The Eighth and Tenth Circuits have stated that the test can be helpful in finding a direct effect but have not gone so far as to specifically require the test (notwithstanding the Ninth Circuit's characterization of cases from those circuits as requiring the test).[128] Finally, the Fifth and Sixth Circuits clearly have ruled that the test is not required.[129]

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118 *Voest-Alpine Trading*, 142 F3d at 895.

119 Id.

120 Id.

121 Id.

122 277 F3d 811, 818 (6th Cir 2002).

123 Id at 817, citing *Antares Aircraft*, 999 F2d at 36; *Adler*, 107 F3d at 727; and *United World Trade*, 33 F3d at 1239. Again, it is arguable whether the Tenth Circuit required the legally significant acts test or simply acknowledged that it can be helpful when trying to determine whether a direct effect in the United States exists. See Section III.C.

124 Id at 818.

125 Id.

126 See *Antares Aircraft*, 999 F2d at 35.

127 See *Adler*, 107 F3d at 727.

128 See *General Electric*, 991 F2d at 1385; see also *United World Trade*, 33 F3d at 1239.

129 See *Voest-Alpine*, 142 F3d at 894; *Keller*, 277 F3d at 818.

D. DUE PROCESS CONCERNS COMPLICATE THINGS FURTHER

Complicating matters even further is the question of whether foreign sovereigns should be given the due process protections of the United States Constitution. Personal jurisdiction over a private party defendant is not proper in the United States if such jurisdiction would violate the private party's due process rights.[130] Those rights are protected by the due process protections of the United States Constitution, which affirm that no state shall "deprive any person of life, liberty, or property, without due process of law."[131]

The classic case regarding the due process concerns embodied in personal jurisdiction is *International Shoe*.[132] In that case, the Supreme Court explained that a court's jurisdiction over a person was traditionally grounded on the fact that the person could be physically found within the geographical jurisdiction of the court, and therefore should expect to be held accountable to that court.[133] But where the defendant is not actually located within a court's geographical jurisdiction, the constitutional guarantee of due process of law requires only that such person have minimum contacts with that jurisdiction such that the suit "does not offend 'traditional notions of fair play and substantial justice.'"[134] Accordingly, personal jurisdiction questions regarding private parties routinely entail a minimum contacts analysis to ensure that due process concerns have been addressed.[135]

The due process minimum contacts analysis of personal jurisdiction can be satisfied in one of two ways: either by establishing (i) general jurisdiction, or (ii) specific jurisdiction.[136] General jurisdiction is established when a defendant has sufficient minimum contacts with the United States such that summoning that defendant into court in the United States would not offend traditional notions of fairness.[137] Specific jurisdiction, on the other hand, is established where the subject matter of the alleged complaint has sufficient contacts with the United States to justify jurisdiction.[138] With private party defendants, a finding of either

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130 *International Shoe*, 326 US at 316. Note that this case involved the due process protections of the Fourteenth Amendment, which takes the due process protections of the Fifth Amendment and makes them applicable to the states.

131 US Const, amend XIV, § 1; see also US Const, amend V.

132 *International Shoe*, 326 US at 316.

133 Id at 316.

134 Id, quoting *Milliken v Meyer*, 311 US 457, 463 (1940).

135 Id; see also *Helicópteros Nacionales de Colombia, SA v Hall*, 466 US 408, 414 (1984).

136 *Helicópteros*, 466 US at 414 nn 8, 9.

137 Id at 414.

138 Id at 414 n 8.

general or specific personal jurisdiction suffices to satisfy constitutional due process concerns.[139]

The distinction between general and specific jurisdiction is crucial to consider when contemplating a due process minimum contacts analysis with respect to foreign sovereigns. Foreign sovereigns, by their very nature, virtually always maintain general diplomatic and economic contacts with other sovereigns, including the United States. General jurisdiction over a foreign sovereign would thus virtually always exist (the rare exception would be a country that did not have any diplomatic or other relationship with the United States). Therefore, to allow for general jurisdiction over a foreign sovereign to satisfy due process concerns would thus be the equivalent of not requiring the test at all.[140] Under this analysis, any foreign sovereign who engaged in commercial activities could be called into a United States court. The United States would become the world court for commercial disputes against sovereigns. This result is one that the FSIA was trying to prevent in the first place by describing the very limited circumstances in which the United States could appropriately exercise jurisdiction against a foreign sovereign—in other words, when the specific action complained of in a suit against a foreign sovereign has a sufficient nexus to the United States. To allow for jurisdiction over a sovereign without a connection between the action complained of and the United States would surely undermine the United States' relationship with sovereigns around the world.[141] Accordingly, where a due process minimum contacts analysis is performed regarding a foreign sovereign, the analysis should be confined to whether specific jurisdiction exists.

E. AMBIGUITY OVER WHETHER THE FSIA REQUIRES A DUE PROCESS ANALYSIS

The Supreme Court in *Weltover,* and at least two federal appellate courts, undertook a personal jurisdiction due process analysis of whether it is permissible under the commercial activities exception of the FSIA to exert jurisdiction over a foreign sovereign.[142] Only one of these courts actually stated that the due process analysis is required, and none of the courts addressed the

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139 Id at 414.

140 See generally Vazquez, 85 Am Socy Intl L 257 (cited in note 26).

141 In this regard, it should be remembered that many nations around the world engage in a broad array of commercial activities that the United States does not. Controlled economies of the developing world are just one example where the government provides commercial services that the United States would typically deem to be of the sort that a private party would undertake.

142 *Weltover*, 504 US at 619; *Texas Trading*, 647 F2d at 308; *Vermeulen*, 985 F2d at 1545.

important distinction between applying general versus specific jurisdiction over a foreign sovereign.

In the 1981 *Texas Trading* case, the Second Circuit commented that the FSIA seems to make subject matter and personal jurisdiction a simple matter of satisfying the statute.[143] Subject matter jurisdiction is appropriate if an exception to immunity applies, while personal jurisdiction is said to exist if subject matter jurisdiction and service of process has occurred under the statute.[144] However, the *Texas Trading* court stated that even the FSIA "cannot create personal jurisdiction where the Constitution forbids it."[145] The court went on to explain that personal jurisdiction affords the due process safeguards of the Constitution to any person brought before a United States court.[146] The question was whether a foreign sovereign should be considered a *person* for the sake of this analysis.[147] The *Texas Trading* court ruled that it should be, without much discussion other than to say that there was not much precedent on point.[148]

The *Texas Trading* court then proceeded with its due process analysis—a minimum contacts analysis under the *International Shoe* case.[149] Noticeably absent from the court's due process analysis, however, was any discussion of, or distinction between, general and specific jurisdiction.[150] The Second Circuit's analysis seemed to be based on the foreign sovereign defendant's general contacts with the United States.[151] The *Texas Trading* court found minimum contacts to exist between the foreign sovereign and the United States in that case because the foreign sovereign sent employees to New York for training, kept cash in New York and maintained a custody account there.[152] None of these contacts were specifically relevant to the claim under consideration (breach of a cement supply contract).[153]

Armed with the Second Circuit's decision regarding due process and foreign sovereigns in *Texas Trading*, the Supreme Court addressed the question head-on in *Weltover* by specifically refusing to decide the issue.[154] In *Weltover,* the

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143 *Texas Trading*, 647 F2d at 308.

144 28 USC § 1330.

145 *Texas Trading*, 647 F2d at 308.

146 Id.

147 Id at 313.

148 Id.

149 Id at 314.

150 Id.

151 Id.

152 Id.

153 Id.

154 *Weltover*, 504 US at 619.

Supreme Court declined to rule on whether foreign sovereigns would be covered by the protections of the Constitution, but went through the due process analysis anyway just to make sure that due process was not offended *assuming* that the protections did apply.[155] The *Weltover* Court then did a quick minimum contacts analysis of that case to find that due process would not be offended if jurisdiction were asserted.[156] As in *Texas Trading*, however, the *Weltover* Court never made any mention of the distinction between finding general and specific personal jurisdiction over a foreign sovereign under the Due Process Clause.[157] It did, however, confine its analysis to contacts that were specific to the transaction in question, citing that in the bond transaction, Argentina issued debt denominated in US dollars payable in New York, and had a financial agent in New York.[158] All of these contacts were, according to the Court, sufficient to maintain personal jurisdiction under the Due Process Clause.[159]

Post-*Weltover*, the Eleventh Circuit performed the same due process analysis in *Vermeulen v Renault, USA, Inc.*[160] Relying on *Weltover*, the *Vermeulen* court stated that since the direct effects analysis "might be" construed as embodying the constraints of due process, the court should go through the analysis just to be sure that such an analysis was satisfied.[161] Unlike the courts in *Texas Trading* and *Weltover* before it, the *Vermeulen* court did specify that it was undertaking a due process analysis to establish specific personal jurisdiction.[162] Still, it gave no explanation for why it proceeded to establish specific jurisdiction instead of general jurisdiction.[163] In addition, just like the Supreme Court in *Weltover*, the Eleventh Circuit in *Vermeulen* went through a due process analysis without answering the question of whether such an analysis was necessary.[164]

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155 Id ("Assuming without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause . . . .").

156 Id at 619–20.

157 Id.

158 Id.

159 Id at 619.

160 985 F2d 1534, 1545 (11th Cir 1993).

161 Id.

162 Id.

163 Id.

164 Id. The Second Circuit also addressed the due process concerns of the FSIA subsequent to *Weltover* in *Hanil Bank v PT Bank Negara Indonesia*, 148 F3d 127, 134 (2d Cir 1998). In that case the Second Circuit stated that it was unclear whether their *Texas Trading* case was still good law with respect to considering a foreign sovereign a person for purposes of the due process clause. Like the *Vermeulen* Court, the *Hanil* Court went through the analysis anyway, assuming that it was required and found due process concerns to have been met.

F. CONFUSION AND AMBIGUITY PERSISTS

As the foregoing discussion has shown, confusion and ambiguity are still rampant in the interpretation of the commercial activities exception of the FSIA. *Weltover* attempted to answer the question of when an action outside of the United States causes a direct effect inside the United States sufficient to warrant jurisdiction in any given case.[165] Nonetheless, because the Court did not directly address whether finding a legally significant act to have occurred in the United States is required in order to find a direct effect, confusion persists. Subsequent federal circuit court decisions indicate dissatisfaction with the guidance given by *Weltover* and confusion about how to apply the standard. Some require a legally significant act to have occurred in the United States before a direct effect can be found.[166] Others insist that such a requirement is not part of the statutory analysis.[167]

Additionally, in 1981 the Second Circuit indicated in *Texas Trading* that a due process analysis was required in order to make sure that jurisdiction was constitutional.[168] However, the Supreme Court in *Weltover* specifically declined to say whether such an inquiry was required, but then undertook the inquiry anyway.[169] This led courts to avoid the inquiry, although at least two federal circuit cases decided after *Weltover* followed the Supreme Court and undertook the inquiry just in case it was necessary.[170] None of the cases undertaking the due process minimum contacts analysis explained the importance of the distinction between finding general versus specific jurisdiction over foreign sovereigns.

Moreover, under the current FSIA rules, foreign sovereigns acting like private parties are subjected to a different analysis than their private party counterparts. In fact, in cases against a foreign sovereign where the court does not insist on a due process inquiry, the standards being applied to sovereigns are potentially more lax than those being applied to private parties. The FSIA "direct effect" analysis—whether actions abroad have a "direct effect" in the United States[171]—could be answered differently than the constitutional analysis applied to private parties—whether the foreign private party or the action complained about has such minimum contacts with the United States that to

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165 *Weltover*, 504 US at 618–19.

166 See, for example, *Antares Aircraft*, 999 F2d at 36; *Adler*, 107 F3d at 727.

167 See, for example, *Voest-Alpine*, 142 F3d at 894; *Keller*, 277 F3d at 818.

168 *Texas Trading*, 647 F2d at 308.

169 *Weltover*, 504 US at 619–20.

170 *Vermeulen*, 985 F2d at 1545; *Hanil*, 148 F3d at134.

171 28 USC § 1605(a)(2).

maintain a suit would not offend traditional notions of justice.[172] The former "direct effect" requirement may be easier to satisfy than the minimum contacts analysis.[173] Accordingly, a foreign sovereign might actually be subjected to jurisdiction where a private party would not be.[174] Inasmuch as the theories of sovereign immunity have attempted to treat sovereigns deferentially in the interest of international relations, to have a statutory scheme that treats sovereigns with less deference than private parties seems absurd.

IV. THE SOLUTION: TREAT SOVEREIGNS ENGAGED IN COMMERCE LIKE PRIVATE PARTIES

Given the confusion that still exists with respect to the commercial activities exception to the FSIA and the political sensitivity involved with its analysis, a new framework is necessary. The FSIA should provide clear and coherent instructions so that courts can objectively and consistently apply the law to provide immunity when it is appropriate, but deny immunity when it is inappropriate. This Article proposes a solution that would drop the confusing framework set forth currently in the commercial activities exception and use the more familiar minimum contacts analysis that courts have used for decades with respect to foreign private parties. This solution would be best implemented by amending the FSIA. However, pending any legislative amendment, courts can and should bring a similar analysis to the FSIA, even as it is currently worded.

A. LEGISLATIVE REFORM

The FSIA should state preliminarily that in order to exert jurisdiction over a foreign sovereign, US courts need to establish both subject matter and personal jurisdiction. This is only different from the current statute in that it would specifically state that such an analysis must be satisfied with respect to foreign sovereigns. It also establishes the two-step inquiry into whether jurisdiction over a sovereign is proper.

The first step of the analysis would be whether subject matter jurisdiction exists. The FSIA would continue to state that in order to find subject matter jurisdiction over a foreign sovereign, one of the exceptions set forth in the FSIA

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172 *Helicópteros*, 466 US at 414.

173 This position relies on the crucial assumption that the appropriate minimum contacts analysis regarding a foreign sovereign would be a specific jurisdiction inquiry into whether the specific actions that are the subject of the lawsuit have such minimum contacts that exerting jurisdiction would not offend traditional notions of justice. To allow for a general jurisdiction analysis regarding foreign sovereigns makes the inquiry useless since virtually every foreign sovereign in the world has certain general minimum contacts with the United States.

174 This concept will be illustrated through the use of examples in Section IV.C.

must apply. This is the way the FSIA currently works so it will not affect analyses under the other exceptions to the FSIA. The revised commercial activities exception proposed here, however, would specifically state that it would apply to a foreign sovereign—indicating that subject matter jurisdiction is appropriate—where that sovereign engages in either a regular course of commercial conduct or a particular commercial transaction or act. Those activities would continue to be evaluated with reference to their nature, rather than their purpose, and should be such that a private party might engage in them. That is also similar to the way the FSIA works now.[175] If a foreign sovereign engages in private commercial activities, then subject matter jurisdiction under the exception would be satisfied.

In the second step of the analysis, a court would need to establish personal jurisdiction. The commercial activities exception would be revised so that personal jurisdiction would not merely require service of process under the FSIA, as is currently the case.[176] Instead, under the revised commercial activities exception, courts would have personal jurisdiction over a foreign sovereign only if a specific jurisdiction minimum contacts analysis is satisfied *and* service of process is correctly made under the statute. This revised scheme would do away with the three categories the FSIA currently sets forth to establish the necessary nexus between a foreign sovereign's commercial activities and the United States.[177] As was described above, that framework has proved difficult for courts to apply and has yielded no consensus among the courts regarding how to apply it.

Perhaps more importantly, the revised commercial activities exception would codify that foreign sovereigns should be treated essentially like foreign private parties for purposes of constitutional due process concerns.[178] The revised commercial activities exception, though, would make clear that establishing personal jurisdiction over a foreign sovereign would involve an inquiry into only the specific jurisdiction aspect of personal jurisdiction. Sovereigns by nature are involved in international diplomacy. Thus sovereigns by their nature would almost always have sufficient general contacts with the United States to satisfy a general jurisdiction analysis, making a general jurisdiction analysis meaningless.[179] In the context of foreign sovereigns, the personal jurisdiction inquiry must be limited to a specific jurisdiction analysis in recognition of the underlying character of a sovereign.

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175 See 28 USC § 1603(d).

176 See 28 USC § 1330(b).

177 28 USC § 1605(a)(2).

178 US Const, amend XIV, § 1.

179 See generally Vázquez, 85 Am Socy Intl L Proc 257 (cited in note 26).

There is a deep well of cases that have addressed the minimum contacts analysis. One particularly relevant Supreme Court case concerning private parties is *Asahi Metal Indus Co v Super Ct of California.*[180] In *Asahi,* the Supreme Court outlined a plethora of concerns that inform a specific jurisdiction minimum contacts analysis with respect to foreign private parties.[181] It is not simply that a defendant's actions should have minimum contacts with the United States, but that those contacts be such that exercising jurisdiction over the defendant would not offend traditional notions of fairness.[182] The concerns implicit in that analysis include, but are not limited to: (i) the burden to the defendant of being called into a United States court; (ii) the interest of the plaintiff in relief; (iii) the United States' interest in hearing the case; (iv) questions of efficiency; and (v) the potential implications for United States foreign policy.[183] Courts should apply the same concerns to an inquiry into whether specific personal jurisdiction over a foreign sovereign is appropriate.

B. PROPOSED REVISION

In accordance with the preceding discussion, a revised commercial activities exception might read as follows:

> 1605 (a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case in which both subject matter and personal jurisdiction exist with respect to that foreign state in accordance with this Section. . . .
>
> (2) (i) Pursuant to 28 U.S.C. Section 1330(a), subject matter jurisdiction will exist in all cases in which the action against the foreign state is based upon such state's commercial activities; and (ii) personal jurisdiction will exist if the demands of specific personal jurisdiction are met satisfying the due process concerns of the United States Constitution and service of process has made in accordance with section 1608 of this title.

Commercial activities would continue to be defined as it is now in Section 1603(d):

> A "commercial activity" means 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.

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180 480 US 102 (1987).

181 Id at 113.

182 Id.

183 Id.

The jurisdictional grant of 28 USC § 1330(b) would have to be amended slightly as well so that personal jurisdiction is not satisfied by only showing that service of process has been made in accordance with Section 1608. A revised Section 1330(b) might read:

> *Except as section 1605 otherwise requires*, personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title. [Additional proposed language indicated in italics.]

C. *WELTOVER* AS AN EXAMPLE CASE

Two examples should help to illustrate how the revised FSIA would work and how it might yield different results from the current FSIA. First, in order to illustrate the importance of limiting the personal jurisdiction analysis to specific jurisdiction, take, for example, the facts of the *Weltover* case.[184] The plaintiffs are Panamanian and Swiss; the defendant is Argentina. The suit involves default over nonpayment of bonds issued to the plaintiffs. Imagine, however, that the bond contract never called for payment in New York. If a general jurisdiction analysis were allowed to satisfy personal jurisdiction, then a United States court could proceed to find, first, that subject matter jurisdiction was established, since Argentina was engaging in private commercial activities. Second, the court could easily find that Argentina has such general contacts with the United States that it would not offend traditional notions of justice to call Argentina into court in the United States. (The general contacts might consist of Argentina's embassy and consulates in the United States, or bank accounts that the Argentine government has in the United States.)

Exercising jurisdiction over Argentina in this example would be the wrong result. In cases such as this, the United States would end up hearing cases that did not involve the United States in any meaningful way. If general jurisdiction were allowed to be the rule, then the United States could truly become the world's commercial court.[185]

On the other hand, by restricting the personal jurisdiction analysis to specific jurisdiction, a court would not be able to establish jurisdiction over the foreign sovereign in this example. A court would still go through the two-step analysis. Under the first step, private commercial activity would still be found and subject matter jurisdiction would be satisfied. Under the second step,

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184 *Weltover*, 504 US 607.

185 Some might argue that in fact the United States should welcome the opportunity to become the world's commercial court, and that it is cases just such as these that are crucial to upholding the integrity of global financial markets. The United States Constitution simply does not ascribe that role to the courts of the United States. US Const, art III, § 2, cl 1.

however, personal jurisdiction could not be satisfied by a specific jurisdictional inquiry since nothing in the specifics of the bond deal under scrutiny was even minimally connected to the United States. Since there would be no specific minimum contacts, there could be no personal jurisdiction and the defendant would still be immune from the jurisdiction of the courts of the United States.

Under the current FSIA, it would be difficult to find a direct effect in the United States with these facts, and so the result would likely be the same under the current FSIA as it would be under the proposed revised FSIA. Consider the original facts of the *Weltover* decision, though, where payment was to have been made in US dollars and could have been made under the contract in one of several locations, including New York.[186] As the case was decided, the Court found a direct effect in that the payment that was supposed to arrive in the United States did not, and jurisdiction over Argentina was found to be proper under the FSIA.[187] Under the revised FSIA proposed here, it is very possible that the Court would have come to the opposite conclusion.

The revised FSIA would instruct the Supreme Court to engage in a specific jurisdictional analysis of this case in the way that it had undertaken that analysis with respect to foreign private parties in *Asahi*. The court would need to identify the contacts from the specific controversy and then decide whether those contacts were such that maintaining a suit against the defendant would not offend traditional notions of justice. A variety of concerns would need to be balanced in this decision. The contacts in this situation include Argentina denominating its bonds in United States currency, and money under the contract to be paid to a New York bank. Concerns include the interest of the United States in hearing this dispute. In fact, the United States' interest in the controversy would be minimal since the plaintiffs were not United States citizens. Further, the money that was supposed to arrive in New York in payment of the bonds would have quickly been transferred back out of the United States to the foreign plaintiffs. It is difficult to imagine why the interests of justice or the United States would lead to the US exercising jurisdiction under this analysis. In *Asahi*, the Court found that a foreign company's products being in the US stream of commerce and contributing to an accident that injured a US citizen was not sufficient to warrant bringing an Asian manufacturer into the courts of the United States.[188] The contacts in *Weltover* appear to be of much less interest to the United States than those in *Asahi*.[189] Since the Court refused to

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186 *Weltover*, 504 US at 609.

187 Id at 619–20.

188 *Asahi*, 480 US 102.

189 As was discussed above, the Supreme Court in *Weltover* did conduct a minimum contacts analysis just to be sure that due process was not violated in that case, assuming that such an analysis

exercise jurisdiction over the private party in *Asahi*, the Court is likely to refuse jurisdiction in cases such as the one considered here.

This case analysis shows that, in fact, the current commercial activities exception may result in jurisdiction being appropriate more often than under the minimum contacts analysis that is proposed here. As was described, the current FSIA led to the United States exercising jurisdiction over Argentina while a minimum contacts analysis might not have. To the extent that the FSIA was designed to codify deferential treatment of foreign sovereigns, this example illustrates the opposite result—that the foreign sovereign is treated less deferentially than a private party. This cannot be the result intended and illustrates another argument in favor of reform. The standard for exercising jurisdiction over a sovereign engaging in commercial activities like a private party should be the same standard applied to a private party in the same situation.

D. JUDICIAL INTERPRETATION PENDING LEGISLATIVE REFORM—SOVEREIGNS SHOULD BE GIVEN CONSTITUTIONAL DUE PROCESS PROTECTIONS.

Since Congress is not likely to amend the FSIA anytime soon, it is important that the courts move to an interpretative position on the commercial activities exception to the FSIA that is both coherent and consistent. Such a position can and should be consonant with the proposal to revise the FSIA set forth above. The appropriate judicial analysis in applying the FSIA to achieve this result would involve courts undertaking both the statutory and constitutional analysis of whether jurisdiction over a foreign sovereign is appropriate.

Both the scheme proposed and the current statute first ask whether the foreign sovereign has engaged in private commercial activity. This part of the analysis is the same under both schemes.

Under the currently enacted statute, however, courts then have to confront whether the commercial activities have the requisite nexus with the United States through the three prongs of Section 1605(a)(2).[190] Again, the first two prongs are relatively straightforward and find the required nexus where at least some of the

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needed to be made. 504 US at 619. The analysis of the Supreme Court there seems superficial and not nearly as rigorous as the one conducted with respect to the private foreign party in *Asahi*. It may be that the Supreme Court simply wanted to come up with an answer to its minimum contacts analysis that agreed with its analysis under the direct effect clause. Were the Court to be confronted with a statute that instructed it to perform a specific minimum contacts analysis, the result described here might indeed ensue.

190 28 USC § 1605(a)(2).

action has actually occurred in the United States.[191] The third prong finds the required nexus when the action occurred outside of the United States if that action caused a direct effect inside the United States.[192] Admittedly, the inquiry into whether an action is sufficiently direct and sufficiently in the United States is a vague one and is difficult to conduct, but courts can take guidance from whether or not they can establish specific personal jurisdiction under a traditional minimum contacts analysis. The answer to both questions should be the same. If specific jurisdiction exists under the specific jurisdiction minimum contacts test, then the activities complained about that occurred outside of the United States should also be found to have the requisite direct effect in the United States. There should be no way to find sufficient minimum contacts between an action complained of and the United States, and then not find that such an action also caused a direct effect in the United States.

Secondly, courts should undertake the specific jurisdiction minimum contacts analysis regardless of which of the three prongs of the commercial activity exception is being used. This is justified on the basis that (as the *Texas Trading* court stated) the FSIA cannot provide for personal jurisdiction where the Due Process Clause would not allow it.[193] *Texas Trading* provides federal appellate court precedent that such an analysis is required. While the Supreme Court itself, in *Weltover*, avoided answering whether this analysis was required with respect to foreign sovereigns, it actually went through the analysis assuming that it might be required.[194] With the *Texas Trading* court requiring the analysis, and the Supreme Court unwilling to deny that the analysis was required, subsequent courts could easily require the inquiry. As was described above, at least one federal circuit court used the specific personal jurisdiction analysis after *Weltover* (though that court also simply assumed that it was required without ruling that it was).[195]

Further buttressing future judicial decisions finding due process protection for sovereigns is the argument that since the United States has generally treated sovereigns with more deference than private parties, the United States should provide sovereigns with at least the same protections it provides to foreign individuals. Again, where the prince lays down his crown and acts like a private party, he should be treated like one—including being given constitutional due process protections.

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191 Id.

192 Id.

193 *Texas Trading*, 647 F2d at 313.

194 *Weltover*, 504 US at 619.

195 *Vermeulen*, 985 F2d at 1545.

In their due process analyses, courts should apply to foreign sovereigns the same rigorous specific jurisdiction analysis that the Supreme Court used in *Asahi* with respect to foreign private parties. This includes weighing the interests of the United States in hearing the case against the interests of the plaintiffs and defendants in having the case heard or dismissed. Diplomatic concerns can be considered in this inquiry.[196] Thus, the result is a flexible rule that can bend to apply to the situation at hand and allow courts to come to the right result.

One critique of this approach could be that ruling that foreign sovereigns be afforded due process protection under the United States Constitution is too broad a holding and may have dangerous implications for other areas of the law not contemplated here. Such a broad holding need not be reached, however. Courts could very simply confine their holding to treating foreign sovereigns like private parties for purposes of the Due Process Clause when applying the commercial activities exception of the FSIA. The reasoning is clear—where courts would treat the foreign sovereign like a private party in a commercial law suit, then they will afford the foreign sovereign protection equal to that afforded private parties in such situations.

V. CONCLUSION

The commercial activities exception is at the heart of the FSIA. That exception basically states that if a foreign sovereign engages in private commercial activities like a private party, then it should not be granted sovereign immunity from suit in the United States. Unfortunately, the special framework set forth in the FSIA for applying the commercial activities exception to foreign sovereigns is confusing and has resulted in split opinions among several of the federal circuit courts.

This Article has argued that that framework should be thrown away. It proposes a solution that would first have courts assess whether foreign sovereigns are in fact engaging in private commercial activities. If the answer is "yes," then the FSIA should direct courts to simply treat the foreign sovereign in the same way that it would treat a foreign private party for purposes of establishing jurisdiction. Specifically, the courts should undertake the same due process minimum contacts analysis it has undertaken for decades with respect to foreign private parties. This solution avoids the complicated rubric established by the FSIA and accomplishes exactly what the FSIA had wanted to accomplish. It treats foreign sovereigns like private parties when and if they behave like them.

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196 *Asahi*, 480 US at 113.

In 1812, Chief Justice Marshall presciently wrote that where a prince acts in private commerce like a private party, the prince "may be considered as so far laying down the prince, and assuming the character of a private individual."[197] If his words had been followed early on, the confusion of the past two hundred years might have been avoided and foreign sovereigns acting like private parties would have been treated as such.

197 *The Schooner Exchange*, 11 US at 145.