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The Commercial Activity Exception under the FSIA, Personhood under the Fifth Amendment and Jurisdiction over Foreign States: A Partial Roadmap for the Supreme Court in the New Millennium

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THE COMMERCIAL ACTIVITY EXCEPTION UNDER THE FSIA, PERSONHOOD UNDER THE FIFTH AMENDMENT AND JURISDICTION OVER FOREIGN STATES: A PARTIAL ROADMAP FOR THE SUPREME COURT IN THE NEW MILLENNIUM

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The 'simplest' things are *very complicated* –
a fact at which one can never cease to marvel![1]

I. INTRODUCTION[2]

Twenty-six years after the enactment of the Foreign Sovereign Immunities Act of 1976 (FSIA),[3] the issue as to whether or not foreign states are persons for constitutional due process purposes[4] remains undetermined by the U.S. Supreme Court.[5] When the U.S. Supreme Court does determine this issue, the efficacy of the enactment of the commercial activity exception to foreign sovereign immunity under the FSIA may become a problem.[6] The problem would arise because, under the FSIA, Congress has unambiguously sought to impose jurisdiction over foreign states, and in the future, if the U.S. Supreme Court rules that for-

1. FRIEDRICH NIETZCHE, DAYBREAK: THOUGHTS ON THE PREJUDICES OF MORALITY 9 (R.J. Hollindale trans. & Michael Tanner ed., Cambridge University Press 1982) (1881).

2. In writing this paper, I join the inquiry pursued by *inter alia*, Lee M. Caplan, *The Constitution and Jurisdiction over Foreign States: The 1996 Amendment to the Foreign Sovereign Immunities Act in Perspective*, 41 VA. J. INT'L L. 369, 393 (2001); Joseph W. Glannon & Jeffrey Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act*, 87 GEO. L.J. 675, 679-80 (1999); Sarah K. Schano, Note, *The Scattered Remains of Sovereign Immunity for Foreign States After* Republic of Argentina v. Weltover, Inc.– *Due Process Protection or Nothing*, 27 VAND. J. TRANSNAT'L L. 673, 674-76 (1994); Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 490 (1987).

3. 28 U.S.C. §§ 1330, 1332, 1441, 1602-1611 (1994 & Supp. IV 1998).

4. John V. Orth, *Taking from A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 CONST. COMMENT. 337, 337 (1997) ("It should be unnecessary to remark that a guarantee of due process is a *procedural* guarantee.") (emphasis added).

5. Damrosch, *supra* note 2, at 490 ("The Supreme Court has not *directly* addressed the question of the rights, *if any*, of foreign states under the Constitution.") (emphasis added); Caplan, *supra* note 2, at 393 ("[T]he [Supreme] Court *has*, to this day, *never considered* jurisdiction over foreign states to be subject to constitutional constraints.") (emphasis added).

6. The U.S. Supreme Court did settle the issue of subject matter jurisdiction by deciding that the FSIA provides the *sole basis* for subject matter jurisdiction in foreign sovereign immunity litigation. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 437-38 (1989). *See also* H.R. REP. NO. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611; Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 497-98 (1983) (remanded for determination of subject matter jurisdiction).

eign states are persons, the exercise of jurisdiction over them must comport with the U.S. Constitution in light of the Fifth Amendment.[7]

II. FOREIGN SOVEREIGN IMMUNITIES ACT

In enacting the FSIA, Congress codified the doctrine of restrictive sovereign immunity.[8] The purpose of the FSIA is "to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity."[9] Certainly, in enacting the FSIA, Congress sought to ensure that "the requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision."[10] As a result, it may be argued that the statutory "direct effects" test, as mandated by the FSIA and its case law, provides greater protection to foreign states than that afforded by constitutional due process protection under the Fifth Amendment. That argument is

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7. Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it. . .," and "[i]t is emphatically the province and duty of the judicial department to say what the law is."). As one scholar wrote: "[F]oreign countries' links to the United States . . . are to be tested under the Fifth . . . Amendment to the Constitution (as well as under the F.S.I.A.)." Andreas F. Lowenfeld, *Nationalizing International Law: Essay in Honor of Louis Henkin*, 36 COLUM. J. TRANSNAT'L L. 121, 138-39 (1997) (emphasis added). For further discussion on minimum contacts, see Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1020 (2d Cir. 1991) (relying on Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 314 (2d Cir. 1981)) (FSIA may not confer personal jurisdiction where the U.S. Constitution forbids it); Howard B. Stravitz, *Sayonara to Minimum Contacts:* Asahi Metal Industry Co. v. Superior Court, 39 S.C. L. REV. 729 (1988) (an extensive discussion of minimum contacts).

8. H.R. REP. NO. 94-1487, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-06.

9. *Id.* at 6604. *See also* JOSEPH W. DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS (1988).

10. H.R. REP. NO. 94-1487, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6612. Having been educated by International Shoe Co. v. Washington, 326 U.S. 310 (1945), and McGee v. International Life Insurance Co., 355 U.S. 220 (1957), "Congress intended that substantive sovereign immunity law, in personam jurisdiction and Due Process minimum contacts analysis be determined coextensively and interdependently." Stephen J. Leacock, *The Joy of Access to the Zone of Inhibition:* Republic of Argentina v. Weltover, Inc. *and the Commercial Activity Exception Under the Foreign Sovereign Immunities Act of 1976*, 5 MINN. J. GLOBAL TRADE 81, 91 (1996).

made because the FSIA demands that plaintiffs prove contacts with the United States that *exceed* the traditional "minimum contacts" necessary to confer personal jurisdiction.[11] Moreover, when the "direct effects" test is factually and legally satisfied, the inevitable conclusion may well be that the foreign state *voluntarily* waived any rights, constitutional or otherwise, to escape personal jurisdiction.[12]

III. INTERPRETATION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT

> One commentator has proposed the following:
> [J]urisdiction over foreign states is a unique area of law, deriving its validity from international sources. Given this fact, the FSIA *did nothing more than codify* into U.S. law a body of law that was once a principle of the law of nations, and later, of customary international law. That body of law *still has little to do* with the Constitution.[13]

This statement may be true because the U.S. Supreme Court has not directly[14] interpreted and applied the U.S. Constitution in the context of jurisdiction over foreign states in light of the Fifth Amendment. If the U.S. Supreme Court eventually rules that foreign states are persons for purposes of due process under the Fifth Amendment, then

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11. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 20 (D.D.C. 1998) ("[T]he FSIA requires *something more substantial* than 'minimum contacts' with the United States in order to sustain subject matter jurisdiction under the commercial activity exception.") (emphasis added).

12. Although "a knowing and intelligent waiver of [constitutional] rights [cannot] be assumed on a silent record." Miranda v. Arizona, 384 U.S. 436, 498-99 (1965). In the context of "direct effects," the proposition would be that actions speak *louder* than words. In short, since the action taken by the foreign state is substantial enough to satisfy the "direct effects" requirement, it suffices to waive all constitutional due process rights pertinent to personal jurisdiction under the Fifth Amendment. This will, of course, depend upon the action proven to have been taken by the particular foreign state, in light of the specific facts of the given case.

13. Caplan, *supra* note 2, at 386.

14. The Supreme Court *assumed* "that a foreign state is a 'person' for purposes of the Due Process Clause." Republic of Argentina v. Weltover, 504 U.S. 607, 619 (1992). For further discussion, see *supra* note 5, Leacock, *supra* note 10, at 109, and Damrosch, *supra* note 2, at 493 ("The prevailing assumption behind the [FSIA], the principal statute *dealing with foreign sovereign as a class*, is that due process constraints *do and should apply*.") (emphasis added).

the FSIA may need to be amended in order to comport with the U.S. Constitution and the Fifth Amendment.[15] Since it is impermissible for Congress to legislatively supersede U.S. Supreme Court decisions that interpret and apply the U.S. Constitution,[16] Congress would be precluded from terminating the constitutional rights of foreign states.

If the U.S. Supreme Court *does* conclude that foreign states *are* persons, for purposes of the Due Process Clause, the current "direct effects" component of the FSIA may be constitutionally unstable unless it contemplates a waiver by each foreign state of Fifth Amendment Due Process Clause rights.[17] Congress may have anticipated this eventuality and may have subtly addressed this issue in the context of its inclusion of the "direct effects" test. This follows because it is indisputable that rights granted by the U.S. Constitution can be knowingly and intentionally waived.[18] The grant by the U.S. Supreme Court of unprecedented access to United States' courts for persons seeking to file suit against a foreign state in *Republic of Argentina v. Weltover,*

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15. *See* Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 314 (2d Cir. 1981) ("To bring any defendant before the court, of course, the due process analysis must be satisfied as to him." and "[T]he relevant area in delineating contacts is *the entire United States* not merely New York.") (emphasis added). One commentator also stated:

> [F]oreign countries' links to the United States . . . are to be tested under the Fifth . . . Amendment to the Constitution (as well as under the F.S.I.A.), and the "minimum contacts" relevant to a due process analysis are contacts with the United States as a whole, not with any particular state. It would be unacceptable for a foreign nation to be amenable to suit in New York but not in Massachusetts because of differences in those states' jurisdictional statutes, and U.S. law does *not* so provide.

Lowenfeld, *supra* note 7, at 138-39 (1997) (emphasis added).

16. Dickerson v. United States, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supercede our decisions interpreting and applying the Constitution.").

17. Although, the Supreme Court has "announced a general presumption in favor of 'regulatory legislation affecting *ordinary commercial transactions.*'" Orth, *supra* note 4, at 344 (emphasis added) (citing United States v. Carolene Products Co., 304 U.S. 144, 152 (1938)).

18. Although "a knowing and intelligent waiver of [constitutional] rights [cannot] be assumed on a silent record." Miranda v. Arizona, 384 U.S. 436, 498-99 (1965). In the context of "direct effects," the record would not be silent because actions speak louder than words and the action proven to have been taken by the particular sovereign would constitute the waiver in appropriate cases.

Inc.[19] was based on the conclusion that a foreign state cannot assert sovereign immunity when it acts as a market participant. A foreign state can only assert sovereign immunity when it engages in acts peculiar to sovereigns—for example, when it acts as a market regulator.[20] When a foreign state acts as a private party and seeks access to private capital market systems via free trade in securities instruments, it also must shoulder the concomitant burdens of a private party.

In *Weltover*, the U.S. Supreme Court unavoidably approved the application of a minimum contacts analysis as the basis for determining that a U.S. court has jurisdiction over a foreign state.[21] The U.S. Supreme Court did this by *assuming* that "a foreign state is a 'person' for purposes of the Due Process Clause" and ruling that "Argentina possessed 'minimum contacts' that satisfy the constitutional test."[22] Based upon all the facts and circumstances of the case, the U.S. Supreme Court concluded that Argentina *had* satisfied the minimum contacts criteria.[23]

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19. 504 U.S. 607 (1992).

20. *Id.* at 619.

21. Thereby "[providing] foreign states with the same benefits and protections granted to foreign private parties." Victoria A. Carter, Note, *God Save the King: Unconstitutional Assertions of Personal Jurisdiction over Foreign States in U.S. Courts*, 82 VA. L. REV. 357, 360 (1996) (citing United States v. Pink, 315 U.S. 203, 228 (1941) and, with regard to foreign corporations, citing Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 113 (1987)).

22. Republic of Argentina v. Weltover, 504 U.S. 607, 619 (1992). As a result of this assumption, the U.S. Supreme Court avoided deciding this issue, which is critical to rational analysis under the FSIA (i.e. whether or not a foreign state is a person for purposes of the minimum contacts criteria).

23. *Id.* at 619-20. *But see* Carlos M. Vazquez, *The Relationship Between the FSIA's Commercial Activities Exception and the Due-Process Clause*, 85 AM. SOC'Y INT'L L. PROC. 257, 259 (1991). Vazquez asserts that *Weltover* is just one in a series of decisions, including *Walplex Navala* and *Foremost McKesson*, that have tended to misconstrue the Second Circuit's *Texas Trading* analysis by considering the direct effects and due process issues separately. *Id.* at 258-59. In applying the *Texas Trading* analysis, the activities of the foreign sovereign critical to the direct effects analysis may very well be exclusive of those activities that need to be analyzed with a view to satisfying the due process clause. Vazquez contends that this was indeed the case in *Weltover*. *Id.* at 259. In any event, "minimum contacts of a foreign . . . defendant sufficient to support the jurisdiction of courts may fairly be measured by reference to the United States as a whole." Lowenfeld, *supra* note 7, at 140.

However, by assuming that a foreign state is a "person" for purposes of the Due Process Clause, the U.S. Supreme Court inevitably left open the following substantive questions: whether a full "fair play and substantial justice" analysis[24] is required before a U.S. court can exercise jurisdiction over a foreign state[25] and whether the direct effects clause of the FSIA embodies any applicable constitutional requirements of due process. Since the U.S. Supreme Court has not definitively ruled on the matter, the various approaches used by the lower courts to justify their exercise of jurisdiction over a foreign state remain intact.[26]

IV. INTERNAL U.S. SOVEREIGN IMMUNITY AND PERSONAL JURISDICTION

The U.S. Supreme Court decision in *South Carolina v. Katzenbach*[27] has been almost the sole foundation for the conclusion that foreign states should not be treated as persons for constitutional due process analysis under the Fifth Amendment. In *Katzenbach*, the U.S. Supreme Court held that "the word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union"[28] and that "a State [does not] have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen."[29] This reasoning seems to be perceived by many courts as convincing. The decision is certainly respectable because, with regard to

24. I.e., the traditional due process test.

25. Glannon & Atik, *supra* note 2, at 680 ("In *Republic of Argentina v. Weltover, Inc.*, . . . the Court cited *South Carolina v. Katzenbach*. . . . The Court's citation to *Katzenbach* may be a subtle invitation to reexamine the applicability of the Due Process Clause to foreign sovereigns.").

26. *See, e.g.*, Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534 (11th Cir. 1993). When plaintiffs have asserted that a foreign state is not protected by immunity, under the direct effects clause of the commercial activity exception of the FSIA, courts have used a complete "fair play and substantial justice" test to determine whether they have personal jurisdiction over the foreign state.

27. 383 U.S. 301 (1966).

28. *Id.* at 323.

29. *Id.* at 324.

suits against the individual states as *defendants*, procedural sovereign immunity has been conferred on the individual states by the Eleventh Amendment[30] to the U.S. Constitution.[31] Therefore, *Katzenbach* represented an attempt at overreaching by an individual state[32] as it sought to use the Due Process Clause of the Fifth Amendment as a *sword* rather than as a *shield*.[33]

V. SOVEREIGN IMMUNITY AND PERSONAL JURISDICTION IN THE INTERNATIONAL CONTEXT[34]

Unfortunately, the reasoning of the U.S. Supreme Court in *Katzenbach* has been applied to foreign states as well,[35]

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30. The Eleventh Amendment to the U.S. Constitution provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

31. *See* Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*," 98 YALE L.J. 1, 3 (1988) (The Eleventh Amendment "has been construed to embody or recognize a broad constitutional immunity for states from being sued in federal courts."); John R. Pagan, *Eleventh Amendment Analysis*, 39 ARK. L. REV. 447, 451 (1986) ("The eleventh amendment embodies procedural . . . immunity."). *Cf.* Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*," 1996 SUP. CT. REV. 1, 7 ("[T]he [Eleventh] Amendment does not apply in suits brought by other states or by the United States.").

32. As a commentator noted:

> The Court reached its conclusion in *Katzenbach* under far different circumstances than those facing foreign states haled into U.S. courts under the FSIA. First, in *Katzenbach*, South Carolina sought to invoke the Fifth Amendment's Due Process Clause as a plaintiff seeking to invalidate an act of Congress. Foreign states invoking the Due Process Clause to defend against personal jurisdiction appear before U.S. courts as unwilling defendants. Second, South Carolina did not invoke the Due Process Clause to avoid litigating matters with little or no connection with the United States. Absent consent to personal jurisdiction, there must be some connection between the parties to the litigation and the judicial forum, regardless of the sovereign status of the parties.

Carter, *supra* note 21, at 362.

33. Which individual states already possess by virtue of the Eleventh Amendment.

34. In this context, it may be argued that "the Constitution operates more importantly as a shield than as a sword." Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1262 (1992).

35. *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 21 (D.D.C. 1998) ("Given the parallels in the procedural deference granted to both the

assumptions to the contrary notwithstanding.[36] However, the authoritativeness of the U.S. Supreme Court decision in *Katzenbach* may be suspect if its reasoning is sought to be applied to foreign states generally, irrespective of the context of the pertinent controversy.[37] Indeed, however appropriate the decision may seem in the context within which it was articulated,[38] it may well be inapplicable in the altogether different context of categorizing foreign states for constitutional due process purposes.[39]

At this juncture, biological analogies may prove helpful. First, by analogy to a biological person, an internal component[40] is *not* a person; it is a sub-component of a person. Similarly, since only the United States, as a single, federal unit, is a person in international law,[41] an internal sub-

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United States and foreign states, this Court concludes that foreign states should hold comparable status to States of the Union and the federal government for the purposes of Constitutional Due Process analysis," and "[i]t would be illogical to grant this personal liberty interest to foreign states when it has not been granted to federal, state or local governments of the United States.") (citations omitted); Oklahoma v. Fed. Energy Reg. Comm'n, 494 F. Supp. 636 (D.C. Okla. 1980); City of Sault Ste. Marie, Mich. v. Andrus, 532 F. Supp. 157 (D.D.C. 1980); El Paso County Water Improvement Dist. Number 1 v. Int'l Boundary & Water Comm'n, 701 F. Supp. 121 (W.D. Tex. 1988). *See also* Will v. Mich. Dep't of St. Police, 491 U.S. 58, 64 (1989); *In re* Herndon, 188 B.R. 562, 565 n.8 (E.D. Ky. 1995); Rios v. Marshall, 530 F. Supp. 351, 372 n.22 (S.D.N.Y.1981); Palestine Info. Office v. Shultz, 674 F. Supp. 910, 919 (D.D.C. 1987).

36. *Flatow*, 999 F. Supp. at 19 ("Most courts have simply assumed that foreign states were entitled to Constitutional Due Process protections . . . at least with respect to the assertion of personal jurisdiction.").

37. Brilmayer & Norchi, *supra* note 34, at 1262 ("When asked affirmatively to apply American law to controversies having no connection with the United States, and when application of American law would be fundamentally unfair, courts should invoke the Fifth Amendment.").

38. I.e., in the context of applicability to the States of the Union.

39. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Little, Brown & Co. 1938) (1881) ("The life of the law has not been logic: it has been experience."); Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 712 (1998) (Different contexts may invoke "the dangers of attempting to derive constitutional conclusions from theories of law.").

40. E.g., the liver, heart, spleen or any other substructure.

41. Rules of international law are "created by the collective will of States with the view of regulating their mutual relations." CHRISTOPHER L. BLAKESLEY ET AL., THE INTERNATIONAL LEGAL SYSTEM, 1469 (5th ed. 2001). Other commentators on international law have stated that: "[T]he traditional theory [is] that states are the only 'subjects' of international law," BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER, 362 (3d ed. 1997), and "Indeed, at one time, the generally held view was that only fully sovereign states could be

component of the United States[42] cannot be considered to be a person[43] because of its sub-component status. This conceptual paradigm is appropriately supported by *Katzenbach*[44] in concluding that individual States of the Union are *not* persons. However, the intellectual force of this conception spontaneously disintegrates when applied to foreign states because they are not sub-components of a state in the way in which each of the fifty states is a sub-component of the United States, the single, federal unit.

VI. APPROACH OF LOWER COURTS SINCE *WELTOVER*

Analysis of the lower courts' application of the Fifth Amendment to foreign states since the *Weltover* decision indicates judicial reluctance to fully consider whether a foreign state is a person under the Fifth Amendment. Some courts implicitly assume that foreign states are considered "persons" under the Fifth Amendment.[45] The decisions do not fully discuss the issue and tend to simply treat the "minimum contacts" test as a foregone conclusion. This lack of coherence stems directly from the U.S. Supreme Court's refusal to determine whether a foreign state is a person under the Fifth Amendment and, if so, how the "minimum contacts" test affects the "direct effects" test of the FSIA.

For example, in *Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for A.W. Galadari*,[46] the United States District Court for the Southern District of New York treated personal jurisdiction as a discrete analysis, separate and

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persons in international law." LOUIS HENKIN ET AL., INTERNATIONAL LAW, 241 (3d ed. 1993).

42. E.g., an individual State of the Union.

43. By analogy to the liver, heart, spleen or any other substructure in a biological person.

44. 383 U.S. 301, 323-24 (1966).

45. Aftam Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1362 (7th Cir. 1985) ("Countless cases assume that foreign companies have all the rights of U.S. citizens to object to extraterritorial assertions of personal jurisdiction. . . . The assumption has never to our knowledge actually been examined, but it probably is too solidly entrenched to be questioned at this late date.") (citations omitted).

46. 810 F. Supp. 1375 (S.D.N.Y. 1993), *rev'd*, 12 F.3d 317 (2d Cir. 1993)).

distinct from the direct effects analysis.[47] As the Second Circuit earlier emphasized, "the FSIA cannot create personal jurisdiction where the Constitution forbids it."[48] Consequently, in addition to each finding of personal jurisdiction made pursuant to the FSIA, the court needs to make a due process scrutiny of the court's power to exercise its authority over the defendant.[49]

In contrast, in *Flatow v. Islamic Republic of Iran*,[50] the United States District Court for the District of Columbia decided that foreign states are not persons for the purposes of

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47. As a commentator noted:

> First, under the rubric of subject matter jurisdiction, the district court considered whether the defendant's commercial activity had a direct effect in the United States. After concluding that it did, the court went on to address personal jurisdiction. The . . . court stated that personal jurisdiction under the FSIA is both statutorily defined and governed by constitutional due process requirements. The court found the statutory requirement for personal jurisdiction, Section 1330(b) of the [FSIA], satisfied in the case at hand because subject matter jurisdiction existed—the defendant's activities fell within the direct effect[s] clause of the [FSIA's] commercial activity exception—and the defendant had been properly served with process. Then, the court proceeded to determine whether sufficient minimum contacts existed between the foreign state and the forum so that maintaining the suit comported with traditional notions of fair play and substantial justice.

Schano, *supra* note 2, at 711-12 (footnotes omitted). For further discussion, see *id.* *But cf.* Fed. Ins. Co. v. Rubin, 1993 U.S. Dist. LEXIS 784 (E.D. Pa., Jan. 26, 1993), where the court based its finding of personal jurisdiction exclusively on section 1330(b) of the FSIA without analyzing constitutional issues separately, and implicitly concluding that foreign states are not entitled to due process protection or that constitutional protections are already built into the direct effects clause of the FSIA exception.

48. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2d Cir. 1981). *See also* Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 296 n.6 ("[T]he federal exercise of international personal jurisdiction must also satisfy due process standards derived from the Fifth Amendment.") (citing Brilmayer & Norchi, *supra* note 34, at 1220.).

49. *See* Transport Wiking Trader v. Navimpex Centrala Navala, 989 F.2d 572, 580 (2d Cir. 1993). *See also Texas Trading*, 647 F.2d at 313; Concord Reinsurance Co. v. Caja Nacional de Ahorro y Seguro, 1994 WL 259826, *1 (S.D.N.Y., June 6, 1994) ("more recent law makes it clear that personal jurisdiction over a foreign sovereign defendant also must be supported by constitutionally required minimum contacts with the jurisdiction"); *In re* EAL (Delaware) Corp., 1994 WL 828320 (D.Del., Aug 3, 1994) ("the Court declines to hold that foreign sovereigns are not entitled to the protections of due process when they are sued in the courts of the United States").

50. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 19 (D.D.C. 1998).

due process requirements of the Fifth Amendment.[51] The court went on, however, to indicate that "[e]ven if foreign states are invariably 'persons' for purposes of Constitutional Due Process analysis, Constitutional requirements are met in this case."[52] The court explained that the mandate of *International Shoe*,[53] that the exercise of jurisdiction comport with notions of "fair play and substantial justice," requires a case-by-case evaluation.[54] Furthermore, the global scourge of terrorism "has achieved the status of almost universal condemnation, as have slavery, genocide, and piracy."[55]

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51. In *Flatow*, the court concluded:

> Given the parallels in the procedural deference granted to both the United States and foreign states, this Court concludes that foreign states should hold comparable status to States of the Union and the federal government for the purposes of Constitutional Due Process analysis. . . . It would be illogical to grant this personal liberty interest to foreign states when it has not been granted to federal, state or local governments of the United States.

Id. at 21 (footnotes and citations omitted). The court concluded that the FSIA provided a clean slate, freeing the courts from assumptions that constitutional due process protections applied to foreign states. *Id.* at 19. However, the Supreme Court restored those assumptions in *Weltover*. Republic of Argentina v. Weltover, Inc. 504 U.S. 607, 619 (1992).

52. *Flatow*, 999 F. Supp. at 21.

53. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

54. *Flatow*, 999 F. Supp. at 22 ("Each case requires evaluation in light of its own unique facts and circumstances, in order to ensure that the exercise of jurisdiction complies with 'fair play and substantial justice.'); Jay Conison, *What Does Due Process Have to do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1199 (1994) ("The law of jurisdiction is fact-specific; one case provides little guidance for the next. The Supreme Court largely rejects rules, favoring instead individualized justice.").

55. *Flatow*, 999 F. Supp. at 23. The court in *Flatow* also stated: "[T]he terrorist is the modern era's *hosti humani generis*—an enemy of mankind, this court concludes that fair play and substantial justice is well served by the exercise of jurisdiction over foreign state sponsors of terrorism which cause personal injury to or the death of United States nationals." *Id.* In response to such statements, one may ask "Should we celebrate a methodology that allows our most brilliant and intuitively wise judges to rise above the rest of us?" Paul B. Stephan III, *International Law in the Supreme Court*, 1990 SUP. CT. REV. 133, 161. Nevertheless, "[i]ncreasingly, international law applies universal jurisdiction to acts of terrorism." Brilmayer & Norchi, *supra* note 34, at 1249. The recent catastrophic events of Sept. 11, 2001 confirm and reinforce the validity of these approaches. *See* Jerry Adler, *Ground Zero*, NEWSWEEK, Sept. 24, 2001, at 72. One commentator goes even further, suggesting that:

> Rather than continue to carve out narrowly-tailored exceptions which

In *Tubular Inspectors Co. v. Petroleos Mexicanos*,[56] the Fifth Circuit merely mentioned that the U.S. Supreme Court failed in *Weltover* to determine whether Argentina is a person under the Fifth Amendment and determined that Petreos Mexicanos had sufficient contacts to grant the court personal jurisdiction.[57] Similarly, in *Vermulen v. Renault*,[58] the Eleventh Circuit followed *Weltover* and analyzed a separate "minimum contacts" test after finding an applicable exception to sovereign immunity.[59]

Other courts have taken a slightly different approach but essentially follow *Weltover*'s decision to leave the issue open. In *Southway v. Central Bank of Nigeria*,[60] the United States District Court for the District of Colorado stated that the "minimum contacts" test for personal jurisdiction under the Due Process Clause is not necessary because the test for the commercial activity exception is much stricter and requires *substantial* contacts with the forum.[61] Similarly, in *Leslie v. Lloyd's of London*[62] and *In re EAL Corp.*,[63] the Southern District of Texas and the federal District of Delaware, respectively, determined that the direct effects test of the FSIA subsumes the minimum contacts test of the Due Process Clause.[64]

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as a body lack coherence, Congress should simply acknowledge that the common denominator of the violations is that they are so serious and universally condemned that their transgression necessarily implies a foregoing of immunity whether or not the state is considered at the time to be a sponsor of terrorism. It should, in short, codify an implied waiver for violations of *jus cogens* norms.

Naomi Roht-Arriaza, *The Foreign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back?* 16 BERK. J. INT'L L. 71, 84 (1998). A contrary view is that "The 1996 amendments [to the FSIA] represent a major inroad on accepted sovereign immunity limits, and a sharp break with the limited, gradual and multinational expansion of jurisdiction over foreign states. *Such assertions of jurisdiction may violate notions of international law or international order.*" Glannon & Atik, *supra* note 2, at 706 (emphasis added).

56. 977 F.2d 180 (5th Cir. 1992).
57. *Id.*
58. 985 F.2d 1534 (11th Cir. 1993).
59. *Id.*
60. 994 F. Supp. 1299 (D. Colo., 1998).
61. *Id.*
62. 1995 WL 661090 (S.D. Tex., Aug. 20, 1995).
63. 1994 WL 828320 (D. Del., Aug 3, 1994).
64. *Id.*

In *Flatow*, the United States District Court for the District of Columbia stated in dicta that foreign states are not persons within the meaning of the Due Process Clause.[65] Citing the disagreement between the circuits, the failure by the U.S. Supreme Court to squarely address the issue and the possible ramifications on interpretations of the "direct effects" test of the FSIA,[66] the court considered this issue in some detail. The court based its decision on two important considerations. First, the court noted that in *Rios v. Marshall*,[67] a number of foreign states were held not subject to liability as persons under various federal statutes.[68] The court simply concluded that foreign states do not merit better treatment for constitutional due process analysis than states of the union under the Due Process Clause.[69] However, this reasoning is not irrefutable because freedom from liability under the pertinent federal statutes may not be controlling where those statutes were not enacted to apply in the international context. They need not inevitably instruct the judiciary in its interpretation of constitutional due process analysis under the FSIA at all.

Second, the court perceived that it would be quite anomalous should foreign states receive protection as persons under the Due Process Clause while federal, state, and local governments in the United States did not.[70] However, the potential fallacy of this argument has already been addressed.[71] The court stated that "[w]here neither the Consti-

65. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 21 (D.D.C. 1998). The court went on to determine that, even if foreign states are persons under the Due Process Clause, Iran had minimum contacts in this case to support personal jurisdiction. *Id.*

66. *Id.* at 19-21. The court went on to say that: "'Direct effects' language closely resembles that of Constitutional Due Process 'minimum contacts.'" *Id.* at 20. Tandem consideration of these analyses as a matter of practice in several circuits has exacerbated the situation. *See, e.g.*, Hadwin. A. Cald, III, *Interpreting the Direct Effects Clause of the Foreign Sovereign Immunities Act's Commercial Activities Exception*, 59 FORDHAM L. REV. 91 (1990).

67. 530 F. Supp. 351, 371-73 (S.D.N.Y. 1981).

68. *Flatow*, 999 F. Supp. at 21 ("The only other court which has touched upon this issue has concluded that foreign states, like states of the union, are not 'persons' subject to liability under various federal statutes.").

69. *Id.*

70. *Id.*

71. *See supra* note 32 and accompanying text.

tution nor Congress grants a right, it is inappropriate to invent and perpetuate it by judicial fiat."[72]

The disparate approaches of the lower courts will probably continue in the face of continuing silence from the U.S. Supreme Court.

VII. CONCLUSION

The U.S. Supreme Court should grant foreign states the status of "persons" at least for the limited purposes of constitutional due process. Such entitlement is irrefutable for preclusion of potentially unconstitutional assertions of personal jurisdiction. Full and fair due process examination is necessary to further Congressional intent and provide balance between executive and judicial branches. Taking into account that the FSIA's commercial exception appears before courts most frequently, it is important to allow full scale due process analysis before exercising jurisdiction over a foreign state[73] because the foreign state in these situations is usually engaged in commercial activities and functions on the level of a private party. Personal jurisdiction jurisprudence in this context is similar to a number of fundamental common law doctrines.[74] It prevents waste of judicial resources because recognition of foreign states as "persons" for due process purposes will ensure that U.S. courts are not overloaded with lawsuits involving activities originating outside the United States.[75]

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72. *Flatow*, 999 F. Supp. at 21.

73. Damrosch, *supra* note 2, at 557 ("The federal courts should continue the trend of giving foreign sovereigns the benefit of constitutional jurisprudence in every case except where to do so would present irreconcilable conflict with the explicit foreign policy of the political branches."); Carter, *supra* note 21, at 357 ("The FSIA provides statutory authorization for federal courts to exercise personal jurisdiction over foreign states, but all assertions of personal jurisdiction must also comport with due process."); Schano, *supra* note 2, at 717 ("Foreign states should be given due process protections to satisfy the international law principle which requires that jurisdiction over a foreign state must be reasonable.").

74. JUDGE RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 232 (3d ed. 1986) ("Many common law doctrines are economically sensible. . . . They are commonsensical. Their articulation in economic terms is beyond the capacity of most judges and lawyers but their intuition is not.").

75. This view is not unanimously held by commentators. E.g., one commentator stated: "Foreign states . . . are not 'persons' under the Due Process

Clause and thus are not entitled to its protection. . . . As a consequence, the seemingly difficult problem of finding the appropriate minimum contacts that has troubled the federal courts disappears and jurisdiction can extend as far as international law permits." Caplan, *supra* note 2, at 426.