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Jurisdiction Over Foreign Governments

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NOTES

JURISDICTION OVER FOREIGN GOVERNMENTS: A COMPREHENSIVE REVIEW OF THE FOREIGN SOVEREIGN IMMUNITIES ACT

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I. INTRODUCTION

From 1812 until 1952, the United States policy toward suits against foreign governments was one of absolute sovereign immunity.[1] This policy was enunciated by the United States Supreme

1. *See* Note, *Minimum Contacts Jurisdiction Under the Foreign Sovereign Immunities Act*, 12 GA. J. INT'L & COMP. L. 209, 210 (1982) [hereinafter cited as *Minimum Contacts*]. Sovereign governments could be sued only by consent or waiver of jurisdictional objections. Service of process on foreign diplomats also was a crime. Therefore, most plaintiffs seeking judgments against foreign gov-

Court in the case of *The Schooner Exchange v. McFadden.*[2] In *Schooner Exchange*, the Court recognized that United States courts had jurisdiction to hear suits against foreign sovereigns; however, the Court chose to grant immunity as a matter of international comity.[3] The *Schooner Exchange* decision reflected the Court's recognition that judicial decisions involving sensitive foreign affairs issues could cause embarrassment to the executive branch.[4]

The absoluteness of sovereign immunity was tempered by the development of certain exceptions, particularly in the area of international trade.[5] For example, in 1948 the United States and

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ernments had to rely on prejudgment attachment to obtain jurisdiction. *See* Note, *Direct Effect Jurisdiction Under the Foreign Sovereign Immunities Act of 1976*, 13 N.Y.U.J. INT'L L. & POL. 571, 574 (1981).

2. 11 U.S. (7 Cranch) 116 (1812). Sovereignty is power over persons and things within a territory. The theory of absolute sovereign immunity is reflected by the maxim: "The King can do no wrong." *See* von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 34 (1978).

3. *Schooner Exchange* 11 U.S. (7 Cranch) 116, 135-37. International comity is the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 164 (1894). Chief Justice Marshall said:

> [t]he jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. . . . This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction. . . .

Schooner Exchange, 11 U.S. (7 Cranch) at 135-36.

4. *Schooner Exchange*, 11 U.S. (7 Cranch) at 146.

5. *See* Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 FORDHAM L. REV. 543, 545-46 (1977) [hereinafter cited as *Giving the Plaintiff His Day in Court*]; Note, *The Foreign Sovereign Immunities Act of 1976: Jurisdictional Consideration in Recent Cases*, 6 SUFFOLK TRANSNAT'L L.J. 59, 61 (1982) [hereinafter cited as *Jurisdictional Considerations*].

Italy signed the Treaty of Friendship,[6] which eliminated each nation's sovereign immunity in matters of international trade between the two countries.[7] Later, by creation of statute, the United States partially abrogated its own immunity from suit in United States[8] and foreign courts.[9]

Despite these exceptions, the judiciary remained reluctant to encroach upon the executive's foreign affairs role. By the twentieth century, the Court had formally adopted the policy that separation of powers required judicial deference to the executive in matters concerning foreign sovereign immunity. For this reason, the Court looked to State Department policy for guidance in deciding immunity issues.[10] Until 1952, the State Department routinely recommended immunity for all friendly foreign sovereigns, regardless of the purpose or nature of the sovereign's activities at issue.[11]

In 1952, the Tate Letter[12] announced the State Department's

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6. Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, U.S.-Italy, 63 Stat. 2255, T.I.A.S. No. 1965.

7. *See also* Treaty of Versailles, June 28, 1919, art. 281, T.S. No. 4, 225 Parry's T.S. 188 (removed German immunity for acts involving international trade).

8. Federal Tort Claims Act, 28 U.S.C. § 1346 (1982). *See also* 28 U.S.C. §§ 1491-1508 (1982), and 28 U.S.C. § 2406 (1982).

9. 46 U.S.C. §§ 781-799 (1982); 46 U.S.C. §§ 741-752 (1982).

10. *See* Republic of Mexico v. Hoffman, 324 U.S. 30, 34-36 (1944); Ex Parte Republic of Peru, 318 U.S. 578 (1943). In *Hoffman* the Supreme Court stated that the "policy recognized both by the Department of State and the courts [is] that the national interests will be best served when controversies growing out of the judicial seizure of vessels of friendly foreign governments are adjusted through diplomatic channels rather than by the compulsion of judicial proceedings." *Hoffman,* 324 U.S. at 34. In 1974, a court of appeals deferred to the executive branch in the determination of sovereign immunity. In *Spacil v. Crowe* the court explained that "[f]or more than 160 years courts have consistently applied the doctrine of sovereign immunity when requested to do so by a particular branch. Moreover, they have done so with no further review of the executive's determination." Spacil v. Crowe, 489 F.2d 614, 616 (5th Cir. 1974).

11. As a result, foreign nations often went directly to the State Department to seek a recommendation of immunity. *See* Note, *Sovereign Immunity—Limits of Judicial Control—The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891,* 18 HARV. INT'L L.J. 429, 435-36 (1977).

12. In the Tate Letter, the acting legal advisor of the State Department informed the Attorney General of the State Department's shift from the absolute to the restrictive theory of sovereign immunity. The letter described the trend in international law away from the absolute theory of sovereign immunity and explained the State Department's reasons for adopting the restrictive theory. 26

decision to move away from a policy of absolute sovereign immunity and toward a restrictive theory of sovereign immunity. Under the restrictive theory, foreign states lose immunity from suit for private and commercial acts (acts *jure gestionis*) and retain immunity for acts of a public nature (acts *jure imperii*).[13] The State Department, recognizing the increased participation by governments in worldwide commercial activities, sought to ameliorate the injustice of prohibiting United States courts from determining the rights of persons who dealt with foreign nations in a commercial capacity.[14] Adoption of the restrictive theory evidenced a need for a mechanism to resolve disputes between governments which become, essentially, business partners.[15]

The State Department retained its procedures governing the assertion of sovereign immunity by foreign defendants. These procedures gave states the option to litigate the sovereign immunity issue in court or to seek the State Department's support for the assertion of sovereign immunity.[16] If the foreign sovereign petitioned the State Department, the State Department held an informal hearing to determine whether to support its claim of sov-

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DEP'T ST. BULL. 984-85 (1952) (letter from Jack B. Tate, Acting Legal Advisor of the Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952)).

13. von Mehren, *supra* note 2, at 33-34. Acts *jure imperii* are "acts carried out by a foreign state under its public law as a sovereign authority," and acts *jure gestionis* are "acts that a private person can carry out under private law. . . ." Badr, *Recent Developments in the Dynamics of Sovereign Immunity*, 30 AM. J. COMP. L. 678, 679 (1982). The distinction between governmental and commercial acts is difficult to articulate, *see* Tate Letter, *supra* note 12, because identical acts can be characterized as governmental in one case and as commercial in another. *Compare* Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103 (2d Cir.) *cert. denied* 385 U.S. 931 (1966) (the Greek government engaged in a private act when it entered into a contract with a private shipowner to transport grain) *with* Isbradten Tankers Inc. v. President of India, 446 F.2d 1198 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971) (the Indian government to have engaged in a public act when it contracted with a private shipowner to transport grain).

14. 26 DEP'T ST. BULL. 984-85 (1952).

15. *See*, Note, *Giving the Plaintiff His Day in Court*, *supra* note 5, at 548.

16. Ex Parte Muir, 254 U.S. 522 (1921). State Department procedures provided that if the foreign state objected to a court appearance to contest jurisdiction, the objection should be made through diplomatic channels in the State Department and an attempt should be made to have the Attorney General petition the court to afford immunity. *Id.*

ereign immunity.[17] If the State Department supported immunity, the court would defer to this decision by granting immunity and dismissing the case.[18] This was true even if the foreign sovereign initially had waived its immunity.[19] The State Department, as primary arbiter of immunity issues, occasionally yielded to diplomatic pressures from foreign nations and granted them immunity. Without the State Department's interference, a United States court would assert jurisdiction over the foreign sovereigns.[20]

If the State Department chose not to issue an opinion, then the court decided the immunity issue for itself.[21] The Supreme Court took the position that the courts would not "deny an immunity which our government has seen fit to allow or . . . allow an immunity on new grounds which the government has not seen fit to recognize."[22] However, if the asserted immunity had been recognized previously by the State Department or other courts, then a court could determine whether the character of the foreign sovereign's activity entitled it to immunity.[23] This unpredictable process of determining sovereign immunity hindered the develop-

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17. These hearings may have violated the separation of powers doctrine because the State Department considered legal issues. *See* Note, *Giving the Plaintiff His Day in Court*, *supra* note 5, at 549.

18. Ex Parte Republic of Peru, 318 U.S. 578 (1943).

19. *See* Rich v. Naviera Vacuba S.A., 295 F.2d 24 (4th Cir. 1961); Ex Parte Republic of Peru, 318 U.S. 578 (1943).

20. *See* Hall v. United States, 295 F.2d 26 (4th Cir. 1961).

21. *See Hoffman*, 324 U.S. 30; Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964).

22. *Hoffman*, 324 U.S. at 35. *But see* Berizzi Brothers Co. v. S.S. Pesaro, 271 U.S. 562 (1925) (the court allowed immunity never before recognized).

23. *Victory Transport*, 336 F.2d 354. Courts first had to determine whether a sovereign's activities were governmental or commercial. In making such a determination, some courts looked at the nature of the transaction; other courts looked at the transaction's purpose. In *Victory Transport*, the court laid out five factors to consider in determining whether an activity was a political or public act. The following were public acts entitled to immunity:

1) internal administrative acts, such as expulsion of an alien;
2) legislative acts, such as nationalization;
3) acts concerning the armed forces;
4) acts concerning diplomatic activity;
5) public loans.

The court held that unless the act fit within one of these five categories, it would deny sovereign immunity when the State Department remained neutral. *Id.* at 360.

ment of uniformity in the case law.[24]

Thus, Congress enacted the Foreign Sovereign Immunity Act (FSIA) in 1976 to standardize the law governing foreign sovereign immunity and to make it less dependent on political factors.[25] Congress intended to provide the "sole and exclusive standards to be used in resolving questions of sovereign immunity. . . ."[26] To ensure consistent treatment of foreign governments in United States courts, the FSIA places the determination of sovereign immunity exclusively in the hands of the courts.[27] The FSIA also provides procedures for obtaining in personam jurisdiction[28] and restricts the immunity of foreign governments from execution of judgments.[29]

In addition, the FSIA codifies the restrictive theory of sovereign immunity.[30] The Act grants blanket immunity to foreign governments but enumerates exceptions and conditions under which a foreign government will not receive immunity in United States courts. Section 1605(a) contains five exceptions to sovereign immunity. These are: (1) waiver of immunity; (2) commercial activity in the United States; (3) property taken in violation of international law; (4) immovable property; and (5) noncommercial torts. Section 1605(b) states that foreign governments will lose their immunity in admiralty suits in which the plantiff seeks to enforce a maritime lien. Section 1607 provides that a foreign sovereign will not be immune with respect to certain counterclaims.[31] This article provides an overview of the FSIA with par-

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24. *See* Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U.L. REV. 901, 906-12 (1969).

25. *1976 Hearings* (testimony of Bruno Ristau), *supra* note 3, at 31.

26. H.R. REP. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6610.

27. *Id.* at 7, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6606.

28. Congress eliminated quasi in rem jurisdiction because attachment of a foreign sovereign's property to obtain jurisdiction irritated foreign nations and aggravated the conduct of diplomatic relations. Also, quasi in rem jurisdiction produced litigation in which the parties had few contacts with the United States by allowing litigants to sue merely because the sovereign had property in the United States. *See*, von Mehren, *supra* note 2, at 46-47; and Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 408-09 (1982) [hereinafter cited as Kane].

29. *See*, H.R. REP. No. 1487, *supra* note 26, at 16, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6605-6606; von Mehren, *supra* note 2, at 65.

30. 28 U.S.C. §§ 1605, 1607 (1982).

31. *Id.* The FSIA brings United States' treatment of sovereign immunity in

ticular focus on the statute's exceptions to absolute immunity and the case law interpreting and defining the scope of these exceptions.

II. 1605(a)(1): WAIVER

A foreign state may not invoke sovereign immunity in a case "in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver."[32] Unlike other FSIA exceptions,[33] a section 1605(a)(1) exception does not require a nexus between the effect or interest in the United States and the conduct or transaction at issue. Thus, jurisdiction can exist even if both parties to the litigation are foreign governments.[34]

Nations may explicitly waive immunity in contracts or in treaties.[35] Section 1605(a)(1) requires express terminology for the

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accord with other foreign governments. H.R. REP. No. 1487, *supra* note 26, at 10, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6608. Also, the Act equalizes the treatment of foreign sovereigns and the United States Government in United States courts. Like the United States government, a foreign government defends its suits in federal courts and is not subject to jury trials. With the passage of the FSIA, a foreign state has the same time to answer or reply as the United States government. Both enjoy limited default judgments. *See* von Mehren, *supra* note 2, at 45-46.

32. 28 U.S.C. § 1605(a)(1) (1982).

33. *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela,* 760 F.2d 390, 394 (2d Cir. 1985); *see also, e.g.,* 28 U.S.C. § 1605(a)(2) (1982) (creating an exception for extraterritorial commercial conduct that causes a direct effect in the United States).

34. The doctrine of *forum non conveniens* limits the availability of section 1605(a)(1) as a mechanism of access to United States courts. *Proyecfin,* 760 F.2d at 394. When a defendant moves for dismissal on the grounds of *forum non conveniens,* the court must determine whether the plaintiff's choice of forum is convenient for the defendant. "[D]ismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice." Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

35. *Proyecfin,* 760 F.2d at 393. The waiver in *Proyecfin* was found in the jurisdictional provision of a loan agreement incorporated in a "Supervisory Contract" between Proyecfin (a privately owned Venezuelan development corporation) and a Venezuelan bank (whose stock was owned primarily by the Venezuelan government). The provision stated:

> To the extent that any Borrower or the Guarantor may in any jurisdiction claim for itself or its assets immunity from suit, execution, attachment

waiver to be valid.[36] In two recent cases, *S & S Machinery Co. v. Masinexportimport*[37] and *O'Connell Machinery Co. v. M.V. "Americana"*,[38] the Second Circuit found that treaties stating that the foreign state could not claim immunity "from suit, from execution of judgment, or from any other liability to which a privately owned and controlled enterprise (would be) subject" did not serve as a waiver of immunity from prejudgment attachment.[39] In *Berkovitz v. Islamic Republic of Iran*[40], the Ninth Circuit examined a treaty between the United States and Iran that waived immunity for any Iranian enterprise that engaged in commercial activities in the United States. The court held that this treaty waived immunity only for enterprises owned by the state of Iran but not for the government of Iran itself.[41] These recent cases show a judicial trend to read explicit waivers of immunity narrowly to restrict application of the waiver exception to the stated terms.

Section 1605(a)(1) allows waiver of sovereign immunity by implication. The legislative history of the FSIA provides three examples of implied waiver: (1) when a foreign state agrees to arbitration in another country; (2) when a foreign state agrees that a contract is governed by the law of a particular country; and (3) when a foreign state files a responsive pleading in a case without

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(whether in aid of execution, before judgment or otherwise) or other legal process and to the extent that in any such jurisdiction there may be attributed to itself or its assets the immunity (whether or not claimed) such Borrower and such Guarantor as the case may be hereby waives such immunity to the full extent permitted by the laws of such jurisdiction and, in particular, to the intent [sic] that in any proceedings taken in New York the foregoing waiver of immunity shall have effect under and be construed in accordance with the United States Sovereign Immunities Act [of] 1976.

Id..

36. H.R. REP. No. 1487, *supra* note 26, at 16, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6617.

37. 706 F.2d 411 (2d Cir.), *cert. denied*, 464 U.S. 850 (1983).

38. 734 F.2d 115 (2d Cir.), *cert. denied* 105 S.Ct. 951 (1984).

39. Leigh, *Judicial Decisions, Foreign Sovereign Immunities Act*, 78 AM. J. INT'L L. 897-98 (1984).

40. 735 F.2d 329 (9th Cir.),*cert. denied* 105 S.Ct. 510 (1984).

41. *Id.* at 333; *see also* Gibbons v. Republic of Ireland, 532 F. Supp. 668 (D.D.C. 1982) (virtually identical treaty provision). In *Gibbons*, the court stated that "[t]his provision clearly waives the immunity of 'enterprises' of the Republic of Ireland owned by the state but is silent as to the sovereign itself." 532 F. Supp. at 672.

raising the defense of sovereign immunity.[42] Courts, however, are reluctant to find implied waiver of sovereign immunity without strong evidence of a state's intent to waive.[43]

Courts have found an implied waiver of immunity when a foreign state agrees to arbitrate without specifying a particular country or forum.[44] If an agreement provides for arbitration in a specific country other than the United States, most courts will not find an implied waiver of immunity.[45] However, if a foreign state stipulates that United States law should govern any contractual disputes, one court has determined that an implied waiver of sovereign immunity exists.[46] The legislative history of the FSIA indicates that a foreign state might waive immunity by neglecting to raise the defense in its responsive pleading.[47] In *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico*,[48] the court, upholding the Chilean government's immunity, found that even though numerous motions had been filed, including a motion to dismiss, no "pleadings" had been filed. In dictum, the court stated that district courts have jurisdiction to determine on a case-by-case basis whether the conduct of a party in litigation

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42. H.R. REP. No. 1487, *supra* note 26, at 18, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6617.

43. Frolova v. U.S.S.R., 761 F.2d 370 (7th Cir. 1985); *see, e.g.*, Birch Shipping v. Embassy of United Republic of Tanzania, 507 F. Supp. 311, 312 (D.D.C. 1980); Libyan American Oil v. Socialist People's Libyan Arab Jamahirya, 482 F. Supp. 1175, 1178 (D.D.C. 1980).

44. *Frolova*, 761 F.2d at 377.

45. *Id.*; *see also* Ohntrup v. Firearms Center, 516 F. Supp. 1281, 1284-85 (E.D. Pa. 1981) *aff'd* 760 F.2d 259 (1985) (waiver of immunity with respect to one jurisdiction is not waiver in all jurisdictions); Chicago Bridge & Iron v. Islamic Republic of Iran, 506 F. Supp. 981, 987-88 (N.D. Ill. 1980); Texas Trading & Milling v. Federal Republic of Nigeria, 500 F. Supp. 320, 323 n.3 (S.D.N.Y. 1980), *rev'd on other grounds*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1300-02 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd on other grounds*, 461 U.S. 480 (1983). *But see* Ipitrade Int'l, S.A. v. Federal Republic of Nigeria, 465 F. Supp. 824, 826 (D.D.C. 1978) (contract's choice of Swiss law and European forum to resolve disputes waived immunity in United States courts).

46. *See* Resources Dynamics Int'l, Ltd. v. General Peoples Committee, 593 F. Supp. 572, 575 (N.D. Ga. 1984).

47. *See* H.R. REP. No. 1487, *supra* note 26, at 18, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6617.

48. 727 F.2d 274 (2d. Cir. 1984).

constitutes waiver.[49]

The legislative history of the FSIA refers to waiver by treaty only in the context of explicit waivers and not in the context of implied waivers.[50] Thus, courts have limited waiver by treaty to cases in which a treaty has explicitly and intentionally waived sovereign immunity. Recently, in *Frolova v. USSR*,[51] a United States citizen argued that the USSR had waived its immunity by signing the United Nations Charter and the Helsinki Accords.[52] The court dismissed the argument of implied waiver by finding

> absolutely no evidence from the language, structure or history of the agreements at issue that implies a waiver of the U.S.S.R.'s sovereign immunity. There is no basis for finding a waiver from the vague, general language of agreements nor is there any reason to conclude that the nations that are parties to these agreements anticipated when signing them that American courts would be the means by which the documents' provisions would be enforced.[53]

Therefore, the *Frolova* court found that a nation's participation in a treaty will not be evidence of a waiver of sovereign immunity absent a specific, explicit waiver.

The *Frolova* court also found that a foreign state does not waive its sovereign immunity by implication when the state fails to appear in an action. The *Frolova* court, relying on *Verlinden B.V. v. Central Bank of Nigeria*,[54] found that a court is obligated to ascertain whether the defense of sovereign immunity is unavailable before the court can determine whether it has subject

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49. *Id.* at 278. A finding of implied waiver of immunity may allow a third party to recover against a foreign state. To recover, however, the third party must be privy to the contract. The third party has the burden of proving that the foreign state intended a waiver. *Frolova*, 761 F.2d 370 at 377; *see also* Keller v. Transportes Aereo Militares Ecuadorianos, 610 F. Supp. 787, 788-89 (D.D.C. 1985); Transamerican Steamship v. Somali Democratic Republic, 590 F. Supp. 968, 974 (D.D.C. 1984) *modified* 767 F.2d 998 (D.C. Cir. 1985); Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1100 n.10 (D.C. Cir. 1982), *cert. denied*, 464 S. Ct. 815 (1983); Ohntrup v. Firearms Center, 516 F. Supp. 1281, 1285 (E.D. Pa. 1981), *aff'd* 760 F.2d 259 (1985); Castro v. Saudi Arabia, 510 F. Supp. 309, 312 (W.D. Tex. 1980).

50. *See* H.R. REP. No., *supra* note 26, at 18, *reprinted in* 1976 U.S. CODE & AD. NEWS at 6617.

51. 761 F.2d 370.

52. *Id.* at 373.

53. *Id.* at 378.

54. 461 U.S. 480 (1983).

matter jurisdiction.[55] The *Frolova* court also found that the example in the legislative history of a sovereign waiving immunity by filing a responsive pleading without raising immunity as a defense indicated that sovereign's conscious decision to participate in litigation without the defense.[56]

The legislative history of the Act indicates that the last phrase of section 1605(a)(1), which states that "notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver,"[57] was intended to deny rescission of a waiver either before or after a dispute arises unless the agreement provides otherwise.[58] Congress intended the phrase to prevent a foreign state from revoking a waiver of immunity after inducing a private person into a contract by promising not to invoke immunity.[59]

III. 1605(a)(2): Commercial Activities

Section 1605(a)(2) of the FSIA governs suits involving a government's commercial activities.[60] Section 1605(a)(2) confers jurisdiction on United States courts for three types of activities. First, a foreign sovereign engaged in commercial acts in the United States will not be immune from a suit based on those acts. Second, a foreign government may face suit for acts performed in the United States "in connection with" its commercial activity elsewhere. Third, a foreign sovereign will not be immune from suit arising from acts outside the United States that cause a "direct effect" in the United States.[61] Terms in section 1605(a)(2)

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55. *Frolova*, 761 F.2d at 378.

56. *Id.*

57. 28 U.S.C. § 1605(a)(1) (1982).

58. H.R. Rep. No., *supra* note 26, at 18, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6617.

59. *Id.*

60. 28 U.S.C. § 1605(a)(2) (1982) provides:

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

61. *Id.*

are not strictly defined, leaving the courts great latitude.[62]

A. Commercial Activity Generally

The FSIA defines commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act."[63] Whether an act is commercial is determined by the "nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[64] Entities that usually engage in an activity for profit are presumed to be engaged in a commercial activity.[65]

Courts look at the legislative history of the FSIA, prior case law, and current standards of international law to determine whether an activity is commercial.[66] The legislative history contains statements outlining activities considered commercial.[67] The House Report indicates that contracts for goods are commercial, regardless of the nature of the goods or the purpose of the contract. If the government buys supplies for an army or embassy, the contract remains commercial in nature.[68] Courts also consider prior case law in determining commercial activity, including court decisions from other countries where the restrictive theory of sovereign immunity is applied.[69]

In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,[70] the Second Circuit held that Nigeria's entering into contracts to buy cement was a commercial act.[71] The court dismissed as irrelevant the Nigerian government's argument that the planned use of the cement was not commercial.[72] The Second Cir-

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62. *See* H.R. REP. No. 1487, *supra* note 26, at 16, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6615.

63. 28 U.S.C. § 1603(d) (1982).

64. *Id.*

65. H.R. REP. No. 1487, *supra* note 26, at 16 *reprinted in* 1976 U.S. CODE & AD. NEWS at 6615.

66. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 309-10 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

67. *Id.* at 309.

68. H.R. REP. No. 1487, *supra* note 26, at 16, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6615.

69. *Texas Trading*, 647 F.2d at 310.

70. 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

71. *Id.* at 310.

72. *Id.*; *see also* Gemini Shipping, Inc. v. Foreign Trade Organization, 647 F.2d 317 (2d Cir. 1981) (actions undertaken to buy rice and soybeans from United States government were commercial in nature).

cuit said the "relevant inquiry under the direct effect clause when plaintiff is a corporation is whether the corporation has suffered a 'direct' financial loss."[73] The court found the following direct effects in the United States: (1) plaintiff cement suppliers were to present documents and receive payment at a New York bank and Nigeria's breach of the contracts precluded this process; and (2) because each plaintiff was a United States corporation, direct financial injury to individual corporate treasuries occurred in the United States.[74]

Courts have also held that acts are commercial if undertaken in connection with contracts by a governmental agency to sell goods.[75] Activities in connection with contracts within a governmental unit, however, are not considered commercial. In *Broadbent v. Organization of American States,*[76] the court held that employment of civil servants is not a commercial activity. In *Broadbent,* plaintiffs were United States citizens or foreign nationals who were fired from their staff positions with the General Secretariat of the Organization of American States (OAS). When plaintiffs sued for breach of contract, the OAS asserted immunity.[77] The court held that the "relationship of an international organization with its internal staff is noncommercial, and, absent waiver, activities defining or arising out of that relationship may not be the basis of an action against the organization. . . ."[78]

Agreements cannot involve commercial activities if a private party could not have made the agreement. In *MOL, Inc. v. Peoples Republic of Bangladesh,*[79] the Bangladesh Ministry of Agriculture granted a United States plaintiff a license to capture and export rhesus monkeys. The agreement, which specified quantities and prices, required plaintiff to build a breeding farm in Bangladesh. The license was conditioned upon exclusive use of the

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73. *Texas Trading,* 647 F.2d at 312.

74. *Id.*

75. *See, e.g.,* Wolf v. Banco Nacional de Mexico, S.A., 739 F.2d 1458, 1460 (9th Cir. 1984), *cert. denied* 105 S.Ct. 784 (1985) (bank's sale of certificates of deposit was "clearly a commercial activity").

76. 628 F.2d 27 (D.C. Cir. 1980).

77. *Id.* at 28-29.

78. *Id.* at 35. In dicta the *Broadbent* court noted an exception to the rule that employment of civil servants is not a commercial activity. The court found that a foreign state's employment of United States citizens within the United States is a commercial activity. *Id.* at 34.

79. 736 F.2d 1326 (9th Cir.), *cert. denied,* 105 S. Ct. 513 (1984).

monkeys for medical and other scientific research. Bangladesh reserved the right to terminate the agreement without notice if plaintiff failed to fulfill its obligations. Bangladesh terminated the agreement two years after its inception because the plaintiff had not constructed the breeding farm and because the plaintiff allegedly sold the monkeys to the armed services for "neutron bomb radiation experiments."[80] The *MOL* court held that Bangladesh had sovereign immunity in the contract dispute because the activity complained of was not a commercial activity. The court said, "Bangladesh was terminating an agreement that only a sovereign could have made. This was not just a contract for monkeys. It concerned Bangladesh's right to regulate imports and exports, a sovereign prerogative."[81]

Although the purposes of a contract are generally irrelevant,[82] a contract for services may not be commercial if its purpose is to perform sovereign functions. In *Friedar v. Government of Israel*,[83] a United States citizen sued to recover for injuries suffered while serving in the Israeli army. The Israeli Government had recruited plaintiff, a New York citizen, in 1948 to join the Israeli army. The government had promised to compensate plaintiff for his losses if he were injured. Plaintiff was injured while serving in the army. The Israeli Government ratified plaintiff's claim but did not compensate him for related expenses incurred between 1948 and 1975. Friedar argued (1) that the Israeli Government breached a contract for services and (2) that because a contract's purpose is irrelevant under 1605(a)(2), a contract for services is necessarily commercial.[84] The court rejected plaintiff's arguments and held that the nature of the Israeli Government's activities was to recruit and train an army. Only governments could conduct these acts, the court said. The court, relying on *MOL, Inc.*,[85] determined that Israel's activity was not commercial and that Israel was immune from suit.[86]

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80. *Id.* at 1327-28.
81. *Id.* at 1329.
82. *See supra* note 64 and accompanying text.
83. 614 F. Supp. 395 (S.D.N.Y. 1985).
84. *Id.* at 397.
85. *See supra* text accompanying notes 79-81.
86. *Friedar*, 614 F. Supp. at 399; *see also* Practical Concepts, Inc. v. Republic of Bolivia, 615 F. Supp. 92 (D.C. Cir. 1985) (defendant did not engage in commercial activity when it exempted a corporation from taxation and granted it preferential bureaucratic treatment and diplomatic privileges as part of its

When activities are not sovereign functions, the court must determine whether the defendant acted in a private capacity. In *Transamerican Steamship Corp. v. Somali Democratic Republic*,[87] the court held that acts taken by an embassy to collect a debt within the United States were commercial.[88] The United States Government had commissioned Transamerican to carry grain from Houston, Texas to Somalia under a famine relief program approved by the Agency for International Development (AID). An agreement between AID and Somalia included a regulation requiring Somalia to admit the commodities shipped under emergency programs duty free and to exempt them from all taxes. The Somalia Shipping Agency (SSA), charged with running Somalia's seaports, detained Transamerican's ship in port following discharge of its cargo. The SSA demanded that Transamerican pay to the Somali Embassy in Washington, D.C. an amount representing taxes and duties on the goods. The Embassy refused to accept payment and directed Transamerican to transfer the funds electronically from Transamerican's bank to Somalia's commercial account at a Washington, D.C. bank. Transamerican complied and then sued Somalia and the SSA.[89]

The court viewed Somalia's participation as assisting in both the extraction of funds from Transamerican and the direction of payment. As a result, the court held that the Embassy's actions were not governmental in nature. Rather, the Embassy acted in a manner similar to debt collection agencies and private banks, the court said. Thus, Somalia had engaged in commercial activity.[90]

Courts have distinguished cases in which actions arising from commercial activities result from a government's exercise of its sovereign functions. In *Callejo v. Bancomer, S.A.*,[91] United States plaintiffs bought dollar-denominated certificates of deposit (CDs) from a privately owned Mexican bank. The certificates provided that interest was to be paid in Mexico City with United States

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contract).

87. 767 F.2d 998 (D.C. Cir. 1985), *modifying* 590 F. Supp. 968 (D.D.C. 1984).

88. *Id.* at 1003.

89. *Id.* at 1000-01.

90. *Id.* at 1003. The court also rejected the SSA's argument that its actions had no direct effect in the United States. The court stated that detention of the ship and demand for payment produced direct and substantial effects in the United States. *Id.* at 1004. For an analysis of the direct effects prong of section 1605(a)(2), see *infra* notes 118-20 and accompanying text.

91. 764 F.2d 1101 (5th Cir. 1985).

dollars. During a monetary crisis, the Mexican Government nationalized the bank and offered to pay interest and principal on the CDs in Mexican pesos at the official rate of exchange.[92] When plaintiffs sought rescission or money damages, the bank claimed sovereign immunity because its action was based upon the promulgation of exchange control regulations. The court conceded that the promulgation of exchange regulations was a sovereign activity but held that the action was based on Bancomer's commercial banking activities.[93] The *Callejo* court stated that "analysis must focus on the named defendant's acts which are the basis of the action and not on the separate acts of other sovereign instrumentalities or agencies."[94] Because the gravamen of the complaint was the sale of certificates and subsequent payments in pesos, the commercial activities exception applied, the court said. The court held irrelevant that sovereign government decrees required Bancomer to breach the contract.[95]

In *De Sanchez v. Banco Central de Nicaragua,*[96] the Fifth Circuit held that a government bank's refusal to honor a check on the country's foreign exchange reserves was not a commercial activity.[97] The court distinguished the *De Sanchez* case from *Callejo* by noting that Banco Central did not enter the marketplace in commercial activities but became involved in the transaction solely because of its role in regulating sales of foreign exchange.[98] Because exchange regulation is a sovereign function in which a private party cannot engage, the commercial activities exception did not apply, the court said.[99]

To find a commercial activity exception, some courts require a nexus between the activity, the United States and the plaintiff's grievance. In *Sugarman v. Aeromexico, Inc.,*[100] the Third Circuit

92. *Id.* at 1105-06.

93. *Id.* at 1109.

94. *Id.* at 1108 (quoting Braka v. Bancomer, 589 F. Supp. 1465, 1469 (S.D.N.Y. 1984), *aff'd,* 762 F.2d 222 (2d Cir. 1985).

95. *Id.* at 1109-10; *see also* Braka v. Bancomer, 589 F. Supp. at 1469 ("The first step in evaluating a claim . . . is to define with precision the activity, and the act in connection with that activity, that gave rise to plaintiff's claim.").

96. 770 F.2d 1385 (5th Cir. 1985). For the facts of this case, see *infra* note 243.

97. *Id.* at 1393-94.

98. *Id.*

99. *Id.* at 1394-95.

100. 626 F.2d 270 (3d Cir. 1980).

held that an airline passenger's injuries resulted from the defendant airline's commercial activity in the United States. Although the passenger purchased his ticket in the United States and half the route took place in the United States, the plaintiff's injury occurred outside the United States. The court held, however, that the nexus requirement was satisfied.[101] At least one court has found that the nexus requirement is more difficult to meet when regulatory activity is at issue. In *National Expositions, Inc. v. DuBois,*[102] the court held that Venezuela's refusal to grant docking privileges to a boat and barge was not a commercial activity under the FSIA. The court concluded that the activity had no connection with the United States and that the defendant's commercial activities within the United States had no connection with the plaintiff's grievance.[103]

B. Connection with Commercial Activity

A finding that an action is based on "commercial activity carried on in the United States" does not mean that the defendant is immune from jurisdiction.[104] A court may find, however, that an act was commercial in nature but was not "commercial activity carried on in the United States."[105] A plaintiff may recover if the act (1) was performed in the United States "in connection with a commercial activity" elsewhere[106] or (2) was performed outside the United States "in connection with a commercial activity" elsewhere that caused a direct effect in the United States.[107]

Generally, courts find that an act is performed in connection with a commercial activity if the act is one link in a chain of transactions. For example, in *Gilson v. Republic of Ireland,*[108] instrumentalities of the Irish Government hired a United States citizen to develop quartz crystals in Ireland.[109] The employee later

101. *Id.* at 273.
102. 605 F. Supp. 1206 (W.D. Pa. 1985).
103. *Id.* at 1209. For a discussion of the merits of the nexus requirement, see Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algérienne de Navigation, 730 F.2d 195, 199-204 (5th Cir.), *reh'g denied,* 734 F.2d 1479 (5th Cir. 1984).
104. *See* 28 U.S.C. § 1605(a)(2) (1982).
105. *Id.*
106. 28 U.S.C. § 1603(e) (1982).
107. 28 U.S.C. § 1605(a)(2) (1982).
108. 682 F.2d 1022 (D.C. Cir. 1982).
109. *Id.* at 1024.

sued, alleging that the companies infringed upon his patents and converted his assets.[110] The court held that an "unbroken chain of events" began when the plaintiff contracted with defendants in the United States. The court said the action was based upon the enticement in the United States that was connected with the defendant's commercial activity in Ireland.[111] Thus, the court applied the commercial activities exception.[112]

One court has held that negotiations in the United States over a sale contract signed in another country may be sufficient to preclude immunity. In *Continental Graphics v. Hiller Industries, Inc.*,[113] a Mexican agency ordered books from a United States company. The agency sent representatives to the United States to inspect the printing and negotiate terms.[114] The court said those acts in the United States were a sufficient connection with the agency's commercial activities in Mexico to justify a denial of immunity.[115]

C. Direct Effect in the United States

A conclusion that an act was performed outside the United States in connection with a commercial activity also outside the United States may result in a denial of immunity only if that act has a "direct effect" in the United States. Although Congress did not define "direct effect" in the FSIA, Congress did state that courts should exercise jurisdiction consistently with the principles in Section 18 of the Restatement (Second) of the Foreign Relations Law of the United States.[116] The Restatement states that

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110. *Id.* at 1025.
111. *Id.* at 1027.
112. *Id.* at 1028.
113. 614 F. Supp. 1125 (D. Utah 1985).
114. *Id.* at 1127.
115. *Id.* at 1128-29.
116. *See* H.R. REP. No. 1487, *supra* note 26, at 19, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6618. Section 18 of the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) provides:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
>
> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
>
> (b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial;

effects in the United States should be "substantial" and "direct and foreseeable" to satisfy the direct effects requirement.[117]

In *Transamerican Steamship Corp. v. Somali Democratic Republic,*[118] the Somali Government impounded a ship chartered by a United States corporation, directed the corporation to make payments in the United States, and forced the corporation to incur additional debts to the United States vessel owner.[119] The court rejected defendant's claim that the effects were unforeseeable. The court held that the commercial activity exception applied to defeat immunity.[120]

The effects must be direct and must occur in the United States. In *Schmidt v. Polish People's Republic,*[121] the court held that the Polish government was subject to suit for treasury notes on which it had defaulted. In 1926 the Polish Government and United States businessman A. W. Mellon held negotiations in New York and Pittsburgh on the financing of the manufacture of several thousand railroad cars. Two contracts resulted from these negotiations. The first contract was between the Polish Government and the firm of Lilpop, Rau and Lowenstein. It provided that Lilpop would manufacture railroad cars and receive payment in Polish Treasury notes. The second contract was between Standard Car Finance Corporation and Lilpop. It provided that Lilpop would sell Treasury notes to Standard. Standard received Lilpop's interest in the railroad cars as security for the notes.[122] Poland made payments on the notes to a New York bank[123] until 1936 when Poland defaulted. The debt was then renegotiated in

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(iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

117. *Id.*

118. 767 F.2d 998 (D.C. Cir. 1985), *modifying* 590 F. Supp. 968 (D.D.C. 1984).

119. The corporation incurred debts of $10,000 a day. *Id.* at 1004.

120. *Id.*; *see also* Texas Trading and Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981), *cert. denied,* 454 U.S. 1148 (1982) (nonpayment of note payable in United States to a United States company caused direct effect in United States).

121. 579 F. Supp. 23 (S.D.N.Y.), *aff'd,* 742 F.2d 67 (2d Cir. 1984).

122. 579 F. Supp. at 25.

123. The notes were payable at the New York City offices of the National City Bank. 579 F. Supp. at 25.

New York. In 1937 new notes[124] with a lower interest rate were exchanged for the old notes. These new notes were also payable in New York. Poland paid on the new notes until the beginning of World War II when it defaulted again.[125] Standard received partial payment of $88,000 on these notes from the Foreign Claims Settlement Commission.[126] In 1980[127] Standard sought payment on the outstanding notes from the Polish Government, but the two parties could not agree on a settlement.[128] Standard's trustees then filed suit to recover on the remaining notes.[129]

The *Schmidt* court said the causal relationship between the default and the plaintiff's injury established a direct effect in the United States.[130] In holding that the effects were in the United States, the court noted that Poland had issued the notes pursuant to a contract negotiated in the United States and that the parties had modified the contract through later negotiations in the United States. The court also found that plaintiff, beneficiary of Standard, was a Delaware corporation and that Poland was to pay the notes in New York. Therefore, the effects in the United States were clearly foreseeable, the court said.[131]

When effects are not foreseeable, however, courts are reluctant to deny immunity.[132] In *Maritime International Nominees Es-*

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124. The remaining 426 notes were cancelled and 78 new notes were issued. *Id.*

125. Poland paid on nine of the new notes before defaulting in 1939. *Id.*

126. In 1960, Poland and the United States reached an agreement providing that Poland would pay the United States $40 million to cover the claims of United States citizens whose property had been nationalized. This money was disbursed by the Foreign Claims Settlement Commission (FCSC). The FCSC used this money to pay Standard for the 115 railroad cars that it had financed and that Poland had nationalized after World War II. In return for this payment, Standard surrendered 10 of the 69 outstanding notes. Standard also received $3,150,285.32 from the FCSC on a claim it had under Title II of the War Claims Act of 1948, 50 U.S.C. app. § 2017(a). This money, however, did not come from Poland. The funds came from the sale of Japanese and German assets in the United States. *Id.* at 25-26 & n.6.

127. In October of 1980 plaintiff's attorney submitted a memorandum of law and met with Jan Bonivk, advisor to the Polish Ministry of Finance. *Id.* at 26.

128. Fifty-nine of the original 78 notes remained outstanding. *Id.* at 26.

129. *Id.*

130. *Id.* at 26-27.

131. *Id.* at 27; *see also* Harris Corp. v. National Iranian Radio & Television, 691 F.2d 1344 (11th Cir. 1982) (payment on a letter of credit from a United States bank had direct effect in United States because it depleted bank funds).

132. Callejo v. Bancomer, S.A., 764 F.2d 1101, 1111 (5th Cir. 1985).

tablishment v. Republic of Guinea,[133] the court refused to find direct effects in the United States when a breach of contract resulted in lost profits to a third party United States corporation. The court stated that the parties could not have anticipated substantial involvement in the transaction by another corporation. Therefore, the court held that Guinea was immune from liability.[134]

Because direct effects are usually more foreseeable in contract cases than actions for personal injury, courts are reluctant to find sufficient effects in the United States in personal injury cases.[135] *Upton v. Empire of Iran*[136] involved claims arising from the collapse of a roof at the main terminal building of the international airport in Tehran. Two United States citizens were killed and one was injured in the accident. The United States District Court for the District of Columbia dismissed the wrongful death and personal injury actions. The court ruled that the direct effects occurred at the airport and that any subsequent effects in the United States, such as pain and suffering or pecuniary losses, were attenuated.[137] The *Upton* court relied on the House Report's description of the FSIA's personal jurisdiction section, 28 U.S.C. § 1330,[138] which is effectively a "federal long-arm statute over foreign states . . . patterned after the long-arm statute Congress enacted for the District of Columbia."[139] The court's examination of

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133. 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983).

134. *Id.* at 1111-12; *cf. Callejo*, 764 F.2d at 1110-12 (direct effects in United States were foreseeable when bank sold certificates of deposit to United States citizens even though certificates provided for payment in Mexico City).

135. *See Callejo*, 764 F.2d at 1111.

136. 459 F. Supp. 264 (D.D.C. 1978), *aff'd without opinion*, 607 F.2d 494 (D.C. Cir. 1979).

137. *Id.* at 266.

138. 28 U.S.C. § 1330 provides:

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

28 U.S.C. § 1330 (1982).

139. *Upton*, 459 F. Supp. at 266; *see* H.R. REP. No. 1487, *supra* note 26, at 13, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6612. The District of

case law revealed an unwillingness to extend the District of Columbia's long-arm statute to invoke jurisdiction in suits concerning damages suffered within the District that flowed from an injury that occurred outside the District.[140] Thus, the court applied the Act's personal jurisdiction section in the same manner. In addition, the court ruled that the defendant's mere ownership of an airport in Iran did not satisfy requirements of sufficient jurisdictional contacts.[141] The court held that a "common sense interpretation of a 'direct effect' is one that has no intervening element, but, rather, flows in a straight line without deviation or interruption." The court concluded that the collapse of the airport roof in Tehran caused no direct effects in the United States.[142]

Columbia long-arm statute, D.C. CODE ANN. § 13-423 (1973), as enacted by Congress, Pub. L. 91-953, 84 Stat. 549 (1970), provides:

> (a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief from the person's (1) transacting any business in the District of Columbia; (2) contracting to supply services in the District of Columbia; (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia; (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia; (5) having an interest in, using, or possessing real property in the District of Columbia; or (6) contracting to insure or act as surety for or on any person, property or risk, contract, obligation, or agreement located, executed, or to be performed within the District of Columbia at the time of contracting, unless the parties otherwise provide in writing.

D.C. CODE ANN. § 13-423 (1973).

The *Upton* court also indicated that requirements of adequate notice and minimum jurisdictional contacts as set forth in International Shoe Co. v. Washington, 326 U.S. 310 (1945), and Shaffer v. Heitner, 433 U.S. 186 (1977), are embodied in the FSIA. *Upton*, 459 F. Supp. at 266. *See infra* notes 355-63 and 374 and accompanying text.

140. *Upton*, 459 F. Supp. at 266. The court relied on Leaks v. Ex-Lax, Inc., 424 F. Supp. 413 (D.D.C. 1976) (suffering pain within District of Columbia caused by injury outside of District of Columbia insufficient to support court's jurisdiction under long-arm statute), and Norair Engineering Associates, Inc. v. Noland, 365 F. Supp. 740 (D.D.C. 1973) (financial losses suffered in the District of Columbia resulting from injury outside the District of Columbia insufficient basis for invoking jurisdiction under long-arm statute).

141. *Upton*, 459 F. Supp. at 266; *see infra* notes 351-417 and accompanying text for a discussion of personal jurisdiction.

142. *Upton*, 459 F. Supp. at 266.

A year later in *Harris v. VAO Intourist, Moscow,*[143] the United States District Court for the Eastern District of New York dismissed a similar action concerning the death of a United States tourist. The death resulted from a fire at a Moscow hotel owned and operated by the Soviet Government. As in *Upton*, the *Harris* court relied on existing interpretations of the District of Columbia long-arm statute and ruled that the instant case was "clearer than *Upton* . . . [because] [t]here was no suffering of the injured person in this country and our health care facilities were not utilized."[144] The *Harris* court admitted that under its ruling the FSIA afforded United States citizens no protection in personal injury and wrongful death actions. Nonetheless, the court noted that had Congress intended to provide broader protection, it would have imposed a lower threshold than direct effects, such as "doing business."[145] The court also emphasized the "sensitive and difficult problems presented by possible conflicts between private rights and international comity."[146] The court concluded that broadening effects jurisdiction should be left to further congressional enactment and not to judicial ruling.[147]

Four recent cases reflect a continuing reluctance by courts to allow direct effects jurisdiction under the FSIA for personal injury and wrongful death claims. In *Berkovitz v. Islamic Republic of Iran,*[148] the wife and children of Martin Berkovitz, a United States citizen assassinated by revolutionaries in Iran, brought a wrongful death action. The Ninth Circuit, in dismissing the case, rejected plaintiffs' assertion: that the claim fell within the Act because the assassination was an act of a foreign sovereign outside the United States in connection with a commercial activity of that sovereign that caused a direct effect in the United States.[149]

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143. 481 F. Supp. 1056 (E.D.N.Y. 1979).

144. *Id.* at 1065.

145. *Id.*

146. *Id.* at 1066.

147. *Id.*

148. 735 F.2d 329 (9th Cir.), *cert. denied,* 105 S. Ct. 510 (1984).

149. *Id.* at 332. The court also rejected plaintiffs' claims that: (1) under section 1605(a)(1), which denies immunity if "the foreign state has waived its immunity either explicitly or by implication," Iran should be deemed to have waived immunity because of the " 'private' and unfriendly nature of political assassinations," *id.* at 331; (2) that Iran is amenable to suit under section 1605(a)(5), which allows claims against foreign sovereigns for "personal injury or death . . . occurring in the United States" (the court succinctly pointed out that

The court stated that even if the decedent's employment through his company's contract with Iran satisfied the commercial activity requirement, the assassination was only remotely connected with the commercial activity. Thus, the effect within the United States was not sufficiently direct.[150] Without analysis, the court quoted dictum from *Verlinden, B.V. v. Central Bank of Nigeria*[151] and cited *Harris* and *Upton* in ruling that the direct effect of the assassination was the victim's death in Iran. The court concluded that the injury to the bereaved relatives living in the United States, though admittedly tragic and painful, was too attenuated to support jurisdiction under the Act.[152]

Four months after deciding *Berkovitz,* the Ninth Circuit reversed the district court's denial of a motion to dismiss in *Australian Government Aircraft Factories v. Lynne.*[153] The claims in *Lynne* arose from the crash in Indonesia of a plane manufactured and sold by Government Aircraft Factories, an enterprise wholly owned by the Australian Government. The plane's pilot, a United States citizen who was flying the plane for Missionary Aviation Fellowship (MAF), was killed in the crash. MAF was a California nonprofit corporation that provided radio and transportation services to missionary operations in developing nations. The pilot's survivors sought damages for wrongful death. MAF also sued for

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the death occurred in Iran, not the United States) *id.*; and (3) that through the Treaty of Amity, August 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853, Iran expressly waived immunity for injuries against foreign nationals participating in commercial activities in Iran. 735 F.2d at 333.

150. *Id.* at 332.

151. 488 F. Supp. 1284 (S.D.N.Y. 1980), *aff'd on other grounds,* 647 F.2d 320 (2d Cir. 1981), *rev'd on other grounds,* 461 U.S. 480 (1983). In *Verlinden,* a Dutch corporation sought damages for the Nigerian government's anticipatory breach of contracts for the purchase of cement. These contracts were similar to those in *Texas Trading. See supra* notes 70-74 and accompanying text. The district court, in dismissing the action for failure to establish adequate direct effects, summarized the existing case law regarding direct effects jurisdiction in personal injury and wrongful death actions:

> [W]hen the victim of a foreign state's tortious conduct is an American citizen injured abroad, the sovereign is protected by immunity and there is no jurisdiction in the American courts. In such cases the injury to the victim's bereaved relatives living in the United States is not sufficiently 'direct' or 'substantial' to support the assertion of Federal jurisdiction.

Verlinden, 488 F. Supp. at 1298.

152. *Berkovitz,* 735 F.2d at 332.

153. 743 F.2d 672 (9th Cir. 1984).

financial losses including the replacement cost of the plane.[154]

In dismissing the action, the *Lynne* court ruled that *Berkovitz* controlled the instant case. The court also recited *Verlinden* and made reference to *Harris* and *Upton* in ruling that the injury to the pilot's survivors and the financial loss by MAF were indirect consequences of the pilot's death and the plane's destruction. The court reasoned that the crash caused no direct effects within the United States. Therefore, subject matter jurisdiction did not exist under the FSIA.[155]

In *Close v. American Airlines, Inc.*,[156] the United States District Court for the Southern District of New York dismissed a personal injury claim and cross-claim against an airline owned and operated by the governments of Trinidad and Tobago. Plaintiff, a United States citizen, was a passenger on an American Airlines flight from Montego Bay, Jamaica to New York. When the plane landed in Kingston, Jamaica for a scheduled intermediate stop, plaintiff descended the movable stairs of the aircraft to speak with her sister. During their conversation near the foot of the stairs, the jet-wash of a nearby BWIA aircraft struck the plaintiff and knocked her down. Plaintiff's claim against American Airlines was based on strict liability under the Warsaw Convention.[157] Her claim against BWIA was founded on principles of common law negligence.[158] American cross-claimed against BWIA for contribution or indemnity.[159]

In analyzing whether BWIA's negligent operation of the jet-wash caused a direct effect in the United States, the court admitted that it did under a literal construction of the FSIA. The court enumerated several direct effects to the plaintiff in the United

154. *Id.* at 673.

155. *Id.* at 674-75. The *Lynne* court rejected plaintiffs' reliance on *Texas Trading*, ruling that in that case no injury occurred until a New York bank refused payment because of Nigeria's contract repudiation. According to the *Lynne* court, the direct injury in the instant case occurred in Indonesia, the site of the plane crash.

156. 587 F. Supp. 1062 (S.D.N.Y. 1984).

157. *Id.* at 1063. The Warsaw Convention, officially entitled Convention for the Unification of Certain Rules Relating to International Transportation by Air, *declaration of adherence by the United States deposited at Warsaw, Poland, July 31, 1934, proclaimed October 29, 1934*, 49 Stat. 3000, T.S. 876, is codified at 49 U.S.C. § 1502 (1982).

158. 587 F. Supp. at 1063.

159. *Id.*

States as well as effects to the United States as a nation.[160] Further, the court reasoned that because American Airlines assumed a position of strict liability under the Warsaw Convention, its treasury in the United States would be directly depleted as a result of BWIA's action in Jamaica.[161] "All these results," the court reasoned, "foreseeable at the time of the negligent conduct in Jamaica, should qualify as 'direct' to allow jurisdiction."[162]

The *Close* court ruled, however, that despite the apparent logic of a literal reading of the Act, personal injury or death inflicted on United States citizens overseas does not, for purposes of the FSIA, have a direct effect in the United States. The court said the economic loss to the victims or their survivors in the United States is not a sufficiently direct effect.[163] The court cited *Upton* and *Harris* and elaborated on the restrictive interpretation of direct effects by the District of Columbia long-arm statute.[164] The *Close* court examined the House Report's recommendation that the FSIA's direct effects provisions be consistent with principles in Section 18 of the Restatement (Second) of Foreign Relations.[165] The court stated that, under Section 18, the term "direct effect" requires a "substantial impact in this country that is a directly foreseeable result. . . ."[166] The court noted that other courts had construed the Act to allow greater access to United States courts for corporations "injured in their American pocketbooks by commercial activities of state trading companies occurring outside the United States."[167] Wrongful death or personal injury claimants similarly injured had been given less access.[168] The court, expressing discomfort with this situation, conceded that it "present[ed] a somewhat anomalous statutory construction."[169]

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160. *Id.* at 1064. The court stated: "Mrs. Close's bank accounts in the United States were diminished directly as a result of her need for medical care. Her disability diminished the available labor force in the country, thereby diminishing the national treasury and reducing the income taxes she must pay." *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 1064-65. *See supra* note 139 and accompanying text.

165. *See supra* note 116 and accompanying text.

166. *Close*, 587 F. Supp. at 1065 (quoting Harris v. VAO Intourist Moscow, 481 F. Supp. 1056, 1062 (E.D.N.Y. 1979)).

167. *Id.*

168. *Id.*

169. *Id.*

Nonetheless, the court stated that in light of *Texas Trading*,[170] it was compelled to follow *Harris* and *Upton* "without regard to its own view of what Congress intended."[171]

D. Summary of the Commercial Activities Exception

Because of imprecise definitions,[172] no clear categories exist within the FSIA to determine the types of actions that fall within the commercial activities exception. Recent case law, however, provides some guidance. Entering into contracts to buy or sell goods is a commercial act.[173] Contracts for services, however, may not be commercial, depending upon the nature of the services.[174] Regulatory actions are not commercial in nature,[175] but actions taken to conform with regulations usually are commercial.[176]

Once a court finds that an act is commercial, it must determine whether the act is performed in connection with a commercial activity carried on in the United States.[177] Generally, a claim meets that requirement only when the act is part of a series of transactions.[178]

If a court finds that an act outside the United States is commercial, it must then determine whether the act had a direct effect in the United States.[179] This requirement generally is met only in business transactions.[180] Courts are reluctant to allow actions for personal injuries, citing either the connection require-

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170. *See supra* notes 70-74 and accompanying text.

171. *Close*, 587 F. Supp. at 1065; *see also* Zernicek v. Petroleos Mexicanos, 614 F. Supp. 407 (S.D. Tex. 1985). In *Zernicek*, the court held that a United States employee's ongoing radiation sickness was not a direct effect in the United States. While working at a platform site, the plaintiff suffered an overexposure of radiation. Although plaintiff's illness continued after the plaintiff returned to the United States, the court held the effects were not direct in the United States.

172. *See* H.R. REP. No. 1487, *supra* note 26, at 16, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6615.

173. *See supra* note 68 and accompanying text.

174. *See supra* notes 82-86 and accompanying text.

175. *See supra* notes 96-99 and accompanying text.

176. *See supra* notes 91-95 and accompanying text.

177. H.R. REP. No. 1487, *supra* note 26, at 18-19, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6617-18.

178. *See supra* notes 108-15 and accompanying text.

179. *See* H.R. REP. No. 1487, *supra* note 26, at 19, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6618.

180. *Close*, 587 F. Supp. at 1065.

ment,[181] or the necessity for a direct effect in the United States.[182] This interpretation of the direct effects provisions has resulted in courts' allowing corporations a chance to recover financial losses incurred as a result of extraterritorial commercial activity of a foreign sovereign. Individuals who have suffered physical, emotional, and financial effects, however, have been denied resolution of their claims against similar entities for equally grievous harms. The Ninth Circuit in *Berkovitz*[183] and again in *Lynne*[184] failed to address this imbalance of justice, as did the Southern District of Texas in *Zernicek v. Petroleos Mexicanos*.[185] The Southern District of New York in *Close* acknowledged the inequity and voiced its disapproval. The court reasoned, however, that its status as a trial court prohibited it from altering controlling authority.[186] Nonetheless, the district court's expression of discomfort with the current state of the law should send a message to appellate courts to address these inequities.

IV. 1605(a)(3): CONVERSION OF PROPERTY

The FSIA treats noncommercial activities of foreign states with the same deference they received before enactment of the FSIA with one exception—section 1605(a)(3).[187] Under section 1605(a)(3), Congress deprives foreign states of immunity from jurisdiction in United States courts in cases involving the alleged conversion of property in violation of international law.[188] This Section covers property that a foreign government has nationalized or expropriated without compensation and conversions of property that are by nature arbitrary or discriminatory.[189] Subject matter jurisdiction under section 1605(a)(3) arises when a court finds: "(1) that rights in property are at issue, (2) that the prop-

181. *See supra* text accompanying notes 108-15.
182. *See supra* notes 116-71 and accompanying text.
183. *See supra* notes 148-52 and accompanying text.
184. *See supra* notes 153-55 and accompanying text.
185. 614 F. Supp. 407 (S.D. Tex. 1985). *See supra* note 171.
186. *See supra* notes 156-71 and accompanying text.
187. 28 U.S.C. § 1605(a)(3) (1982); *see* Carey v. National Oil, 453 F. Supp. 1097 (S.D.N.Y. 1978), *aff'd* 592 F.2d 673 (2d Cir. 1979).
188. *See* Sharon v. Time, Inc., 599 F. Supp. 538, 553 (S.D.N.Y. 1984).
189. 28 U.S.C. § 1605(a)(3) (1982); H.R. REP. No. 1487, *supra* note 26, at 19-20, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6618; Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algérienne de Navigation, 730 F.2d 195, *reh'g and reh'g en banc denied*, 734 F.2d 1479 (5th Cir. 1984).

erty was taken in violation of international law, and (3) that one of the two jurisdictional nexus requirements of the statute are satisfied."[190]

This FSIA exception subjects jurisdiction to United States "any foreign agency or instrumentality that has nationalized or expropriated property without compensation, or that is using expropriated property taken by another branch of the state."[191] Section 1605(a)(3) parallels the "Hickenlooper Exception" to the Act of State doctrine.[192] The Act of State doctrine provides that United States courts do not have jurisdiction to entertain suits that involve a foreign sovereign's activities within that sovereign's borders. According to the Hickenlooper Exception, however, courts may not invoke the Act of State doctrine in cases involving an asserted claim to property based upon "a confiscation or other taking . . . by an act of [a foreign] state in violation of the principles of international law."[193]

Neither the FSIA nor its legislative history defines the scope of "rights in property" encompassed in section 1605(a)(3). The section clearly covers rights in tangible property, but coverage of intangible rights is uncertain.[194] In *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*,[195] the expropriation of a controlling interest in company stock was deemed "rights in property."[196] The *Kalamazoo* court found an illogical distinction between expropriation of physical assets of a company and expropriation of controlling interest in a company. The determining factor in *Kalamazoo* was the state's expropriation of control over the assets and profits of the corporation.[197]

Other courts have extended the Hickenlooper Exception to the

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190. Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 616 F. Supp. 660, 663 (W.D. Mich. 1985).

191. *Vencedora*, 730 F.2d at 204.

192. 22 U.S.C. § 2370(e)(2) (1982).

193. De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1395 (5th Cir. 1985), *citing* 22 U.S.C. § 2370(e)(2) (1982).

194. *See* Friedar v. Government of Israel, 614 F. Supp. 395 (S.D.N.Y. 1985) (section 1605(a)(3) was intended to apply only to the expropriation of property, not to the failure to make payments); Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A., 528 F. Supp. 1337, *aff'd*, 727 F.2d 274 (2d Cir. 1984) (the language of section 1605(a)(3), applicable to tangible property, is on its face inapplicable to a contractual right to be paid).

195. 616 F. Supp. 660 (W.D. Mich. 1985).

196. *Id.* at 663.

197. *Id.*

FSIA and found the two compatible.[198] Several courts have interpreted the Hickenlooper Exception as not applying to conversions of intangible interests such as the contractual right to receive payment.[199]

Because no "black letter" international law exists, determining whether property was taken in violation of "international law" can be difficult. One method of determination is "whether any generally accepted norm of *international* law prohibits the defendant's actions."[200] Under this method, the expropriation or nationalization of property is not a violation of international law. In *Jafari v. Islamic Republic of Iran*,[201] the court said:

> It may be foreign to our way of life and thought but the fact is that governmental expropriation is not so universally abhorred that its prohibition commands the "general assent of civilized nations" . . . a prerequisite to incorporation in the "law of nations" [or "international law"]. . . . We cannot elevate our American-centered view of governmental taking of property without compensation into a rule that binds all "civilized nations."[202]

Thus, courts must examine the varying circumstances surrounding each case to determine whether a taking is in violation of international law. Courts face a difficult task in resolving whether a sovereign state has violated international law concerning the expropriation or nationalization of property.[203] Governments and commentators differ about the requirements imposed by international law upon a sovereign state that nationalizes or expropriates property. Generally accepted requirements, to which the legislative history of the FSIA refers, are that the expropriating nation must provide "prompt, adequate and effective" compensation. Little agreement exists, however, about the meaning of these

198. *De Sanchez*, 770 F.2d at 1395; *see also Canadian Overseas Ores*, 528 F. Supp. at 1346.

199. *See* Menendez v. Saks & Co., 485 F.2d 1355, 1372 (2d Cir. 1973), *cert. denied sub nom.* Saks & Co. v. Republic of Cuba, 425 U.S. 991 (1976) (alleged repudiation of a contractual obligation does not amount to a "confiscation or other taking"); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); Braka v. Bancomer S.A., 589 F. Supp. 1465, 1472-73 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 222 (2d Cir. 1985).

200. *De Sanchez*, 770 F.2d at 1396.

201. 539 F. Supp. 209, 215 (N.D. Ill. 1982).

202. *Id.*

203. Alberti v. Empresa Nicaraguense de la Carne, 705 F.2d 250, 255 (7th Cir. 1983).

terms.[204]

When the court must resolve factual disputes before determining whether a violation has occurred, and when the "factual issues are determinative of both the jurisdictional question and the merits, . . ., a court must assert jurisdiction unless the claim is insubstantial or frivolous."[205] Thus, the *Kalamazoo Spice* court was required to assert jurisdiction when the plaintiff alleged that the defendant violated international law by failing to compensate for the seized property and when the defendant asserted that he had made an offer that the plaintiff rejected.[206]

International law clearly encompasses both relations between sovereign states and a state's treatment of another state's national. However, the applicability of section 1605(a)(3) to the injury by a state of its own national is questionable.[207] In *De Sanchez v. Banco Central de Nicaragua*[208] the court found that section 1605(a)(3) was inapplicable to the defendant's alleged conversion of funds from the plaintiff because the plaintiff was one of the defendant state's own nationals. Any breach, therefore, was not subject to international law. The court did recognize the emerging trend in international law that provides a minimum standard for the treatment of human beings, regardless of nationality; however, this was not relevant to the *De Sanchez* case.[209] The court explained that basic human rights accepted and incorporated into international law are limited and encompass only "such basic rights as the right not to be murdered, tortured, or otherwise subjected to cruel, inhuman or degrading punishment; the right not to be a slave; and the right not to be arbitrarily detained."[210] The court said that a state's taking of its own national's property did not contravene internationally recognized

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204. *Id.*; H.R. REP. No. 1487, *supra* note 26, at 19-20, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6618; *see also* Banco National de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 888 (2d Cir. 1981); Dawson & Weston, *"Prompt, Adequate and Effective": A Universal Standard of Compensation?*, 30 FORDHAM L. REV. 727 (1962).

205. *Kalamazoo Spice*, 616 F. Supp. at 664; Bell v. Hood, 327 U.S. 678 (1946).

206. *Kalamazoo Spice*, 616 F. Supp. at 663-64.

207. *De Sanchez*, 770 F.2d at 1396.

208. 770 F.2d 1385 (5th Cir. 1985). For the facts of this case, see *infra* note 243.

209. *Id.* at 1395-98.

210. *Id.* at 1397.

human rights.[211]

The *De Sanchez* court, however, referred to the "poignancy" of the "Golden Rule" in the field of international law. Because the United States would resent foreign courts dictating the manner in which the United States should rule itself, the court stated that United States courts should be "reluctant to tell other nations how to govern themselves."[212] The court concluded that situations in which the United States interferes should be limited to cases in which a state has "engaged in conduct against its citizens that outrages basic standards of human rights or that calls into question the territorial sovereignty of the United States."[213]

If a court finds that a foreign sovereign took property in violation of international law, the court must determine whether either of the statutory jurisdictional nexus conditions are satisfied.[214] The first condition involves property, or any property that has been exchanged for that property, that is present in the United States.[215] To satisfy this condition, the presence of the property must be in connection with a commercial activity being carried on in the United States by a foreign state or by a political subdivision, agency, or instrumentality of a foreign state.[216]

The second condition does not require that the property be present in the United States. Rather, the property must be owned or operated by an agency or instrumentality of a foreign state that is engaged in a commercial activity in the United States.[217] Courts have interpreted "owned or operated" as requiring assumption of control over the property and use of the property for the benefit of the foreign state.[218] When determining whether the defendant is engaged in a commercial activity in the United

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211. *Id.*

212. *Id.* at 1398.

213. *Id.*

214. *Kalamazoo Spice*, 616 F. Supp. at 662-63.

215. 28 U.S.C. § 1605(a)(3) (1982).

216. *Id.* H.R. REP. No. 1487, *supra* note 26, at 19, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6618. The definitions of the terms "foreign state," "United States," "commercial activity," and "commercial activity carried on in the United States by a foreign state" as used within the FSIA can be found in 28 U.S.C. § 1603 (1982).

217. 28 U.S.C. § 1605(a)(3) (1982).

218. *Vencedora*, 730 F.2d at 204. Thus, when a defendant government seized a vessel for security and the vessel was subsequently wrecked in a storm, section 1605(a)(3) did not apply because the defendant had not "owned or operated" the vessel. *Id.*

States, courts look solely at the activities of the entity in question, not at the activities of the foreign state as a whole.[219]

V. 1605(a)(4): Immovable & Inherited Property

A foreign state is not immune from jurisdiction in the United States in litigation involving rights in both immovable property and inherited or gift property located in the United States.[220] Section 1605(a)(4), the "immovable property exception," codifies the generally recognized principles of international law that existed when the FSIA was enacted.

The real property exception to sovereign immunity, which was recognized by international practice prior to the FSIA, has a self-evident foundation: the primary interest in resolving disputes over the use or right to use real property within one's domain rests with the territorial sovereign.[221] An early treatise explains that a "sovereignty cannot safely permit the title to its land to be determined by a foreign power. Each state has its fundamental policy as to the tenure of land; a policy wrought up in its history, familiar to its population, incorporated with its institutions, suitable to its soil."[222] Additionally, courts are not well equipped to adjudicate property interests or rights to possession of property outside their jurisdiction.[223]

"Rights in immovable property" have been interpreted to include property interests in real estate, possessory rights, or rights to payment of money secured by an interest in land.[224] Thus, "like the traditional real property exception it was intended to codify, [this exception] is limited to disputes directly implicating property interests or rights to possession."[225] To determine if this exception is applicable, a court must ask whether title to the property, use of the real estate, present interest in the property,

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219. National Expositions v. DuBois, 605 F. Supp. 1206, 1209 (W.D. Pa. 1985).

220. 28 U.S.C. § 1605(a)(4) (1982).

221. Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517, 1521 (D.C. Cir. 1984), *cert. denied* 105 S. Ct. 1751 (1985).

222. *Id.*, *quoting* 1 F. Wharton, Conflict of Laws § 278 at 636 (3d ed. 1905).

223. *Asociacion de Reclamantes*, 735 F.2d at 1521.

224. *See id.* at 1522; H.R. Rep. No. 1487, *supra* note 26, at 20, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6618-19.

225. *Asociacion de Reclamantes*, 735 F.2d at 1522; Englewood v. Socialist Peoples Libyan Arab Jamahiriya, 773 F.2d 31 (3d Cir. 1985).

or a possessory interest in the property is at issue. This exception does not encompass compensation rights that do not affect either the property interest or right to possession of land located in the United States.[226] Thus, funds that must remain in the United States pending the outcome of litigation do not qualify as "immovable property" under this exception.[227]

When diplomatic or consular property is involved in a suit, section 1605(a)(4) does not provide immunity for the foreign state.[228] The local state is thereby allowed the right to adjudicate "questions of ownership, rent, servitudes, and similar matters," including foreclosure.[229] These premises are protected from attachment or execution, however, by other FSIA provisions and the Vienna Convention on Diplomatic Relations.[230]

A foreign state cannot claim immunity when rights in real or personal property, situated or administered in the country where the suit is brought, have been obtained by gift or inherited by the foreign state.[231] Immunity is denied in these situations because

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226. *Asociacion de Reclamantes*, 735 F.2d at 1523.

227. *In re* Rio Grande Transport, Inc., 516 F. Supp. 1155, 1160 (S.D.N.Y. 1981).

228. Diplomatic or consular property describes the land and the buildings or parts of buildings states use for their diplomatic missions in foreign countries. This property includes the residence of the head of the mission. The Vienna Convention on Diplomatic Relations and Optional Protocols, 23 U.S.T. 3227, T.I.A.S. No. 7502, Art. 22 (1972).

229. *See also Englewood* 773 F.2d 31. Gray v. Permanent Mission of People's Republic of Congo to United Nations, 443 F. Supp. 816, n.6 (S.D.N.Y.) *aff'd* 580 F.2d 1044 (2d Cir. 1978).

230. *See* H.R. REP. No. 1487, *supra* note 26, at 20, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6619. The Vienna Convention on Diplomatic Relations and Optional Protocols provides that the "premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution." 23 U.S.T. 3227, T.I.A.S. No. 7502, Art. 22 (1972). The Convention, however, seems to permit action short of attachment or execution. The FSIA's legislative history states that the Convention is consistent with the principle implied in the Tate Letter that diplomatic and consular property enjoys sovereign immunity on "questions of attachment and execution and does not apply to an adjudication of rights in that property." H.R. REP. No. 1487, *supra* note 26, at 20, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6619. Thus, a foreign state cannot deny the local state the right to adjudicate questions of ownership, rent, and servitudes as long as the foreign state's possession of the premises is not disturbed. *Id.*

231. T.R. REP. No. 1487, *supra* note 20, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6619.

when "claiming rights in a decedent's estate or obtained by gift, the foreign state claims the same right which is enjoyed by private persons."[232]

VI. 1605(A)(5): TORTIOUS ACTS

Section 1605(a)(5) is yet another exception to the FSIA's general grant of immunity. This section withdraws immunity for "tortious acts or omissions of a foreign state."[233] Although few cases have interpreted the language of section 1605(a)(5), those that have reveal two approaches, one broad and the other narrow, to the scope of this exception.

In *Castro v. Saudi Arabia*,[234] the government of Saudi Arabia claimed sovereign immunity in a negligence suit brought by one of its soldiers. The soldier, stationed at Laughlin Air Force Base in the United States, was involved in an automobile accident during off-duty hours. The plaintiff sued Saudi Arabia under section 1605(a)(5), claiming that Saudi Arabia engaged in tortious conduct by failing to prepare him for driving in the United States. The court, relying on the soldier's possession of a valid Texas driver's license, held that Saudi Arabia was immune from suit because it had deferred to United States procedures for testing drivers.[235]

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232. *Id.*

233. *Id.* 20-21, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6619. Section 1605(a)(5) states:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .
>
> (5) not otherwise encompassed in [the commercial tort exception], in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C. § 1605(a)(5) (1982).

234. 510 F. Supp. 309 (W.D. Tex. 1980).

235. *Id.* at 313.

In *Matter of Sedco, Inc.*,[236] the District Court of Texas determined that section 1605(a)(5) requires the whole tort to occur in the United States.[237] Pemex, a national oil company of Mexico, was exploring for hydrocarbon deposits in Mexican waters when the tort occurred. When oil washed up on Texas shores, Texas businesses and individuals sued for damages. The *Sedco* court found that the acts or omissions involved in the accident took place in Mexico. The court examined the legislative history of section 1605(a)(5) to determine whether the United States plaintiffs could sue the Mexican Government in the United States. The court said that the House Report states that a tort must occur within the jurisdiction of the United States. Neither the statute nor the legislative history, however, delineates the extent to which a tort must occur in the United States.[238] Thus, the court determined that *all* acts must take place in the United States. The court noted that the "primary purpose of this exception is to cover the problem of traffic accidents by embassy and governmental officials [in the United States]."[239] The *Sedco* court also examined section 1605(a)(5)(A), which confers immunity upon a sovereign's discretionary acts.[240] The court found that Pemex's actions fell within this exception to section 1605(a)(5).[241]

The language of section 1605(a)(5) was construed narrowly in *De Sanchez v. Banco Central de Nicaragua.*[242] In *De Sanchez*, Banco Central refused to redeem a certificate of deposit presented by plaintiff.[243] Sanchez sued under section

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236. 543 F. Supp. 561 (S.D. Tex. 1982).

237. *Id.* at 567.

238. *Id.*

239. *Id.*

240. For a comparison of section 1605(a)(5)(A) and the discretionary act exception of the Federal Tort Claims Act, see *infra* notes 284-88 and accompanying text.

241. *Sedco*, 543 F. Supp. at 567. At the time of the accident, Pemex was drilling a well to gather information about state-owned materials. According to the court, "Pemex . . . was executing a national plan formulated at the highest levels of the Mexican government by exploring for Mexico's natural resources." *Id.*

242. 770 F.2d 1385 (5th Cir. 1985).

243. Sanchez held a certificate of deposit with Banco Nacional de Nicaragua for $150,000. She tried to redeem the certificate in 1979. Because it lacked the funds, Banco Nacional asked Banco Central, with which it held an account, for the money. Banco Central debited Banco Nacional's account and issued a check for Sanchez on its Citizens & Southern International Bank account. Citizens &

1605(a)(5).[244] The court stated that Sanchez' misrepresentation claim fell under section 1605(a)(5)(B). Therefore, the bank was immune from suit on the claim of misrepresentation.[245] Next, the court considered Sanchez' claim of conversion, holding that this claim was one of the taking of property, not of tortious conduct.[246] Finally, the court stated that Banco Central's actions were "discretionary" within the meaning of § 1605(a)(5)(A), and, as a result, Banco Central was immune from suit.[247]

The District of Columbia District Court broadly interpreted section 1605(a)(5) in *Letelier v. Republic of Chile*.[248] In *Letelier*, relatives of the Chilean ambassador and foreign minister brought a wrongful death action against the Chilean government. Plaintiffs claimed Chile was responsible for blowing up Letelier's car in Washington, D.C. on September 21, 1976. Chile argued that assassinations, as political acts of a sovereign, were immune from suit under the FSIA. The court held that section 1605(a)(5) does not mandate a distinction between acts *jure imperii* and acts *jure gestionis*.[249] The court was not convinced by Chile's argument that an assassination was not commensurate with traffic accidents referred to in the legislative history.[250] The legislative history of section 1605(a)(5) specifically discusses traffic accidents because of their frequency, the court said. Discussion of traffic accidents does not exclude other torts from within the statute's umbrella.[251] The court then examined sections 1605(a)(5)(A) and (B) to determine whether Chile's actions fell within these exceptions to section 1605(a)(5). After determining that section 1605(a)(5)(B) was inapplicable,[252] the court turned to section 1605(a)(5)(A). The

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Southern suspended all payments from the Banco Central account at the outbreak of turmoil in Nicaragua. Following the junta, the president of Banco Central stopped payment on Sanchez' check. *Id.* at 1387-89.

244. Sanchez brought suit under four theories: breach of contract; breach of duty to honor the check; misrepresentation; and conversion. *Id.* at 1389.

245. *Id.* at 1398.

246. *Id.*

247. *Id.* at 1399 & n.19.

248. 488 F. Supp. 665 (D.D.C. 1980).

249. *Id.* at 671; *see supra* note 13 and accompanying text.

250. *See supra* text accompanying note 239.

251. *See Letelier*, 488 F. Supp. at 672.

252. The court stated that § 1605(a)(5)(B) did not apply because the claims against Chile "did not arise 'out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights'. . . ." *Id.* at 673 (quoting 28 U.S.C. § 1605(a)(5)(B) (1982)).

court stated that this section is comparable to the discretionary act[253] exception of the Federal Tort Claims Act (FTCA).[254] The court concluded that Chile had no discretion to commit illegal acts.[255] Therefore, Chile was not immune.

The Circuit Court of the District of Columbia grappled with section 1605(a)(5) language in *Persinger v. Islamic Republic of Iran.*[256] In *Persinger*, an Iranian hostage and his parents sued the Iranian government for pain and suffering resulting from the capture and detention of United States citizens in the United States Embassy in Tehran on November 4, 1979.[257] The court first dealt with the definition of "United States" in section 1605(a)(5). The court turned to section 1603(c) which defines United States as "all territory and waters, continental or insular, subject to the jurisdiction of the United States."[258] The court then determined that United States embassies do not fall within this definition.[259] The legislative history of the FSIA supports this conclusion, the court said. The court found that testimony prior to the passage of the Act emphasized the Act's "territorial limitation." The court stated that Congress wanted United States practice in this area to be similar to that of other countries. In other countries, a sovereign loses immunity only when the tort occurs within the forum's territory.[260] For these reasons the court dismissed Persinger's suit

253. *See infra* notes 284-88 and accompanying text.

254. 28 U.S.C. §§ 2671, 2672, 2674-80 (1982 & Supp. 1984).

255. *Letelier*, 488 F. Supp. at 673.

256. 729 F.2d 835 (D.C. Cir.), *cert. denied*, 105 S. Ct. 247 (1984).

257. The *Persinger* court upheld the trial court's determination that President Carter's executive order dismissing the claims of former hostages against the Iranian government invalidated Persinger's claim. The court decided to examine the case under the FSIA. *Id.* at 837-38.

258. 28 U.S.C. § 1603(c) (1982).

259. *Persinger*, 729 F.2d at 839. The court stated that the "continental or insular" language in section 1603(c) was "intended to restrict the definition of the United States to the continental United States and such islands as are part of the United States or are its possessions." *Id.*

260. *Id.* at 840. The court noted that an expansive reading of section 1603(c) would cause "inconvenience," "injustice," and "embarrassment" in the foreign relations of the United States. More specifically, the court recognized that inclusion of United States embassies in the definition of "United States" under section 1603(c) would "be the 'functional equivalent' of making United States embassies part of United States territory 'for jurisdictional purposes.' " According to the court, "foreign states 'might hesitate in providing services to United States embassies or consulates' were they to be subject to suit in United States courts for negligent acts or omissions on those premises." The court stated that

for lack of jurisdiction.[261]

To determine whether Persinger's parents could maintain a suit for mental and emotional stress, the court had to decide whether section 1605(a)(5) covers a situation in which only the injury, and not the tortious conduct itself, takes place in the United States. The court noted that the language of section 1605(a)(5) does not clarify this point. After recognizing the anomaly of allowing Persinger's parents to recover solely because they suffered injury in the United States, the court concluded that both the tort and the injury must occur in the United States for the court to have jurisdiction.[262] The court also compared the language of section 1605(a)(5) with that of section 1605(a)(2), the commercial activities exception. Because section 1605(a)(5) does not contain the "direct effects"[263] language of section 1605(a)(2), the court determined that Congress intended a narrower interpretation of section 1605(a)(5). This finding supported the argument that Persinger's parents could not recover under the Act.[264] The *Persinger* dissent[265] argued that the former hostage's inability to recover did not bar his parents' suit. The dissent said the language of the statute itself leads to a conclusion that a claimant may maintain a suit if the injury alone occurs in the United States.[266]

The Ninth Circuit examined section 1605(a)(5) in *Olsen v. Gov-*

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a grant of jurisdiction over this suit might result in similar treatment of the United States with respect to foreign embassies located in the United States. *Id.* at 841.

261. *Id.* at 839.

262. *Id.* at 842-43; *see* Kline v. Republic of El Salvador, 603 F. Supp. 1313 (D.D.C. 1985). In *Kline*, parents of a United States citizen murdered in El Salvador brought a claim for intentional infliction of emotional distress. The court found that the section 1605(a)(5) exception did not apply because the tortious act did not occur in the United States. *Id.*

263. Section 1605(a)(2) grants jurisdiction to United States courts when a commercial activity of a foreign government "causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2) (1982). *See supra* notes 116-71 and accompanying text.

264. *Persinger*, 729 F.2d at 843.

265. Judge Harry T. Edwards concurred with the majority's dismissal of Persinger's claim but disagreed with its treatment of Persinger's parents' claim. *See id.* at 843-44.

266. *Id.* at 844. Judge Edwards stated that an examination of the House Report was unnecessary to the determination of the suit. He claimed that only *Sedco* requires that a tortious act or omission occur in the United States. Judge Edwards found the majority's "direct effects" argument unconvincing. *Id.*

ernment of Mexico.[267] In *Olsen*, plaintiffs[268] brought a wrongful death claim against the Mexican Government for the negligent piloting of an aircraft. Plaintiffs were the survivors of prisoners of the Mexican Government who were scheduled for transfer to the United States in accordance with the Prisoner Exchange Treaty[269] between the United States and Mexico. The plane, piloted by employees of the Mexican Department of Justice, was to travel from Monterey, Mexico to Tijuana, Mexico. Bad weather conditions forced the plane to enter United States airspace to achieve an instrument landing with the help of United States officials.[270] The pilot failed to stay on the proper course and aborted his first attempt to land.[271] On a second attempt, the pilot failed to maintain the proper altitude and the plane crashed in United States territory.[272] All passengers, including the prisoners, were killed.

Mexico advanced three arguments in its effort to establish immunity from suit under section 1605(a)(5). First, Mexico argued that the restrictive theory of sovereign immunity[273] codified by the FSIA distinguishes between public and private acts of a foreign government. Mexico claimed that the transfer of prisoners was a public act immune from the jurisdiction of section 1605(a)(5). The *Olsen* court held that the language of section 1605(a)(5)(A)[274] deprives this position of any legal force. Section

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267. 729 F.2d 641 (9th Cir.), *cert. denied* 105 S.Ct. 295 (1984).

268. Plaintiffs, United States citizens, were two minor children of the decedents. *Id.* at 643.

269. Prisoner Exchange Treaty, Nov. 25, 1976, United States-Mexico, 28 U.S.T. 7399, T.I.A.S. No. 8718.

270. Because of thick fog, the pilot requested an instrument landing pursuant to a Letter of Agreement between the United States and Mexico defining the procedure for entrance of Mexican planes into United States airspace for the purpose of instrument landings in Tijuana. The instrument landing device in Tijuana was nonfunctional, and Tijuana officials requested assistance from air control personnel in San Diego. *Olsen*, 729 F.2d at 643-44.

271. After the first aborted landing attempt, San Diego officials urged the pilot to land at an airport where visual landing was possible. The pilot rejected this advice and tried a second instrument landing. *Id.* at 644.

272. The plane crashed three-quarters of a mile inside United States territory and two and one-half miles from the runway. *Id.*

273. For a discussion of the restrictive theory of sovereign immunity, see *supra* notes 13-15 and accompanying text.

274. *See supra* note 233.

1605(a)(5)(A) provides immunity for discretionary acts[275] of a foreign sovereign. Mexico's contention that section 1605(a)(5) grants immunity for public acts would render section 1605(a)(5)(A) meaningless, the court said.[276]

Second, Mexico argued that all tortious acts or omissions must occur in the United States for the suit to fall under section 1605(a)(5). The court noted that the statute on its face requires only the injury to occur in the United States.[277] The court stated, however, that the legislative history of section 1605(a)(5) demands that both the tortious act and the injury occur in the United States. The court then determined that some of the acts causing the crash occurred in Mexico while others took place in the United States.[278] The court declined to follow the rule in *Sedco* that the whole tort must occur in the United States.[279] Instead, the court distinguished *Sedco* by stating that none of the tortious conduct in *Sedco* occurred in the United States.[280] The *Olsen* court recognized that adherence to the court's ruling in *Sedco* would result in denial of jurisdiction in the United States if the foreign government could prove that at least one tortious act occurred outside the United States. After stating that the interests of claimants and foreign sovereigns must be balanced, the *Ol-*

275. For a discussion of discretionary acts, see *infra* notes 284-88 and accompanying text.

276. *Olsen*, 729 F.2d at 645.

277. The *Olsen* court stated that section 1605(a)(5) subjects foreign governments to jurisdiction "in any case in which money damages are sought 'for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state . . . .'" *Id.* at 645 n.1 (quoting 28 U.S.C. § 1605(a)(5) (1982)).

278. The *Olsen* court found the following factors, which occurred both in the United States and in Mexico, causally related to the crash: "[p]ilot error, the absence of operational radar and navigational aids at Tijuana airport, defective aircraft instruments, the decision to forego a visual landing at another airport, [and] inaccurate data from San Diego air control. . . ." *Id.* at 645-46.

279. For an examination of *Sedco*, see *supra* text accompanying notes 236-41.

280. *Olsen*, 729 F.2d at 646. The *Olsen* court also distinguished Perez v. The Bahamas, 652 F.2d 186 (D.C. Cir.), *cert. denied*, 454 U.S. 865 (1981), by recognizing that in *Perez* both the accident and the injury occurred outside the United States. *Olsen*, 729 F.2d at 646 n.2. *Perez* involved a minor injured when Bahamian Government gunboats fired at a United States fishing vessel on which he was aboard. Both boats were in Bahamian waters when the incident occurred. *Perez*, 652 F.2d at 188. The *Olsen* court distinguished *Persinger* on the same grounds. *Olsen*, 729 F.2d at 646 n.3.

sen court concluded that claimants may maintain suits under section 1605(a)(5) if they "allege at least one entire tort occurring in the United States."[281] Therefore, the court concluded that the negligent piloting of the aircraft in the United States was sufficient to bring the case within the ambit of section 1605(a)(5).[282]

Third, Mexico argued that plaintiff's claim fell within the section 1605(a)(5)(A)[283] discretionary acts exception to nonimmunity. The court examined the exception by looking at the Federal Tort Claims Act (FTCA)[284] because the FTCA language parallels that of the FSIA[285] and because the legislative history of section 1605(a)(5)(A) points to the FTCA.[286] The court stated that the purpose of the FTCA discretionary act language is to give government officials maneuverability to determine policy without worrying about litigation.[287] The court distinguished between decisions made at the planning level of government—decisions that establish policy, and decisions made at the operational levels of government—decisions that implement policy. Unlike planning level decisions, no immunity adheres to decisions made at the operational level of government. The *Olsen*

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281. *Olsen*, 729 F.2d at 646.

282. *Id.*

283. For the language of section 1605(a)(5)(A), see *supra* note 233.

284. 28 U.S.C. §§ 2671, 2672, 2674-80 (1982 & Supp. 1984).

285. Section 2680 of the FTCA provides:

> The provisions of this chapter . . . shall not apply to—
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> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon *the exercise or performance or the failure to exercise or perform a discretionary function or duty* on the part of a federal agency or an employee of the Government, *whether or not the discretion involved be abused.*

Id. (emphasis added).

286. H.R. REP. No. 1487, *supra* note 26, at 21, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6620.

287. *Olsen*, 729 F.2d at 647. The *Olsen* court cited Dalehite v. United States, 346 U.S. 15 (1953), as "[t]he seminal case defining the scope of the discretionary function exception within the context of the FTCA. . . ." *Olsen*, 729 F.2d at 647. The *Olsen* court adopted *Dalehite*'s definition of discretion, finding that discretion involves " 'more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations. Where there is room for policy judgment and decision there is discretion.' " *Id.* (quoting Dalehite v. United States, 346 U.S. 15, 35-36 (1953)).

court found that the negligent transportation of the prisoners involved only the implementation of the policy to transfer. Thus, this was a decision at the operational level and no immunity attached.[288] The court also analyzed the "ability of United States courts to evaluate the act or omission of the state. . . ."[289] The court found that because this suit did not involve policy implications, the trial court was the proper court to entertain this action.[290] Finally, the court discussed the effect of a United States court decision on the foreign government's administrative mechanism. The *Olsen* court stated that a finding of no immunity would not impede the functioning of Mexico's penal and aviation authorities.[291] Therefore, the court found section 1605(a)(5)(A) inapplicable and found Mexico not immune from suit under section 1605(a)(5).[292]

In *Asociacion de Reclamantes v. United Mexican States*,[293] the District of Columbia Court of Appeals considered section 1605(a)(5) with respect to land grants allegedly converted tortiously by Mexico. Plaintiffs, Mexican citizens, claimed that their ancestors had received grants of land from the King of Spain and the Republic of Mexico. After the Mexican-American War, the United States allegedly ejected the landowners from their property.[294] In 1923, the Mexican Government espoused the claims and both countries agreed[295] to allow a General Claims Commission to examine the landowners' claims. The Mexican Govern-

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288. *Olsen*, 729 F.2d at 647. The tortious activities giving rise to the *Olsen* suit were "far from the centers of policy judgment," the court said. *Id.*

289. *Id.*

290. *Id.* at 648.

291. *Id.* Although the court recognized that trial in the United States meant that Mexican air traffic controllers must testify in the United States, the court determined that this requirement would not unduly burden any Mexican governmental agencies. *Id.*

292. *Id.* The court also determined that personal jurisdiction was consistent with the due process clause in this case. *See id.* at 648-51.

293. 735 F.2d 1517 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 1751 (1985).

294. The *Reclamantes* court noted that the plaintiffs' ancestors may have had actionable claims against the United States Government because the Treaty of Guadeloupe Hidalgo, Feb. 2, 1848, United States-Mexico, 9 Stat. 922, T.S. No. 207, Art. VIII, protected the owners' rights to use their Texas property. *Asociaion de Reclamantes* at 1519.

295. *Asociacion de Reclamantes*, 735 F.2d at 1519. The agreement was in the form of the Treaty on General Claims, Sept. 8, 1923, United States-Mexico, 43 Stat. 1730, T.S. No. 678.

ment filed all of the claims at issue with the General Claims Commission. When the Commission's authority expired, however, none of the claims had been examined. As a result of negotiations between the United States and Mexico in the late 1930s and early 1940s,[296] Mexico released the United States from liability on all of the land claims.[297] Each country agreed to handle the claims of its own citizens.[298] Because Mexico failed to compensate its citizens, plaintiffs claimed damages under section 1605(a)(5) for the uncompensated expropriation of the Texas land.[299]

Stating that both the tortious conduct and the resulting injury must occur in the United States, the *Reclamantes* court held that the claim did not fall under section 1605(a)(5).[300] The court cited the legislative history of the Act and the *Persinger* court's decision to support its holding that the tortious conduct must occur in the United States. The court noted that the crux of the plaintiffs' complaint was lack of compensation for the land claims. The court determined that this act occurred in Mexico. The court observed that even if the failure to compensate caused earlier acts in the United States[301] to become tortious, the entire tort would not have occurred in the United States.[302] Based on congressional language that the section 1605(a)(5) exception was designed to provide jurisdiction primarily for traffic accidents in the United States, the court "decline[d] to convert this into a broad exception for all alleged torts that bear some relationship to the United

296. The negotiations concerned Mexico's 1938 appropriation of oil-rich land from United States citizens without compensation. *Asociacion de Reclamantes*, 735 F.2d at 1519.

297. *Id.* This agreement is embodied in the Treaty of Final Settlement of Certain Claims, Nov. 19, 1941, United States-Mexico, 56 Stat. 1347, T.S. No. 980.

298. *Asociacion de Reclamantes*, 735 F.2d at 1519. In a 1941 presidential decree Mexico recognized its duty to settle its citizens' claims. In 1970, Mexico restated its intention to pay the claims. *Id.*

299. *Id.* The district court dismissed the action for lack of subject matter jurisdiction. *Id.* Plaintiffs also stated a claim under section 1605(a)(4) (the immovable property exception), but the court held that this exception did not apply to the facts of this case. *Id.* at 1520-24. *See supra* text accompanying notes 220-32 for a discussion of the immovable property exception.

300. *Id.* at 1524.

301. Other Mexican acts the court highlighted included "the espousal, presentation and settlement of the claims. . . ." *Id.*

302. *Id.* at 1525.

States."[303] Therefore, the *Reclamantes* court had no jurisdiction to hear the suit.[304]

Letelier interpreted section 1605(a)(5) broadly to allow United States courts jurisdiction over suits against foreign governments. The court noted that the distinction between public and private acts is not critical.[305]

In contrast to *Letelier*, the *Sedco*, *De Sanchez*, and *Persinger* decisions reflect a more narrow construction of section 1605(a)(5). *Sedco*'s interpretation of the legislative history of section 1605(a)(5)[306] results in the conclusion that only torts similar to traffic accidents warrant nonimmunity. *Persinger* follows the rigorous standard that the *Sedco* court adopted. *Persinger*'s restrictive definition of "United States" eliminates a class of potential claims against foreign sovereigns. The *Persinger* court further narrows the section 1605(a)(5)(A) analysis by stating that activities occurring on United States property may not "occur" in the United States for the purposes of the exception.[307]

Olsen and *Reclamantes* reflect this split in authority. *Olsen* held that both the tortious conduct and the injury must occur in the United States before a claimant can recover under section 1605(a)(5). Refusing to follow the *Sedco* ruling that the entire tort must occur in the United States, the *Olsen* court noted the irony of the *Sedco* ruling because none of the tortious activity in *Sedco* occurred in the United States.[308] The *Reclamantes* court adhered to the *Sedco* - *De Sanchez* - *Persinger* line of reasoning. The court cited *Persinger* for the proposition that both the tortious conduct and the resulting injury must occur in the United States before a claim falls within section 1605(a)(5). The courts in these three cases went beyond the merits of the case to limit the scope of section 1605(a)(5).[309] The *Reclamantes* court followed *Sedco*'s narrow interpretation of the legislative history of section 1605(a)(5)[310] to buttress its unwillingness to grant jurisdiction for

303. *Id.*
304. *Id.*
305. *See supra* text accompanying note 249.
306. *See supra* text accompanying notes 237-39.
307. *See supra* notes 258-60 and accompanying text.
308. *See supra* text accompanying notes 279-80.
309. None of the tortious conduct giving rise to the suits in *Sedco*, *Persinger*, and *Asociacion de Reclamantes* occurred in the United States. *See supra* text accompanying notes 238, 258-61 & 301-02.
310. *See supra* text accompanying note 303.

torts having "some relationship to the United States."[311]

Although case law in this area is limited, the decided cases adopt an outcome-oriented approach. If the court wants to deny immunity, it will read section 1605(a)(5) legislative history expansively. If, however, the court wants to grant immunity, then it will interpret the section narrowly.

An examination of the stated purposes and legislative history of section 1605(a)(5) warrants an approach less strict than *Sedco, De Sanchez, Persinger,* or *Asociacion de Reclamantes* advocates. First, the legislative history states that a foreign sovereign should lose immunity if it is involved in tortious conduct in the United States. Although it highlights traffic accidents, the legislative history notes that section 1605(a)(5) is "cast in general terms as applying to all tort actions for money damages, not otherwise encompassed by section 1605(a)(2) relating to commercial activities."[312] Thus, *Sedco*'s emphasis on the specific inclusion of traffic accidents in the House Report seems inappropriate. The more expansive interpretation of the courts in *Letelier* and *Olsen* is more in accordance with the legislative history.

Second, although the FSIA gives a general grant of immunity to foreign sovereigns, the House Report indicates that the burden of proving immunity rests on the foreign government.[313] This provision in the legislative history suggests that under section 1605(a)(5), a court presumes that a foreign sovereign is not entitled to immunity. A court can hold otherwise only if that sovereign places its action squarely outside one of the statute's stated exceptions. By defining the scope of section 1605(a)(5) narrowly, the *Sedco, De Sanchez, Persinger,* and *Asociacion de Reclamantes* courts eased the foreign governments' burden of proving immunity. A broader reading of section 1605(a)(5) resulted in findings that jurisdiction was proper in *Olsen* and *Letelier.*

Third, the legislative history states that international agreements take precedence over the Act when the two conflict.[314] Thus, when retention of the foreign government's immunity would best serve the interests of the United States or the foreign government, the two nations can agree to limit the jurisdiction of

311. *Asociacion de Reclamantes,* 735 F.2d at 1525.

312. H.R. REP. No. 1487, *supra* note 26, at 20-21, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6619.

313. *Id.* at 17, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6616.

314. *Id.*

United States courts.

Last, the FSIA provides the only mechanism by which claimants can seek redress for torts of foreign governments. A strict reading of section 1605(a)(5) and its legislative history would deprive plaintiffs of relief when relief is often most necessary.[315] The FSIA states that "[t]he Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would *protect the rights of both foreign states and litigants in United States courts.*"[316] The courts' approach in *Letelier* and *Olsen* best serve this purpose. These courts advocate balancing the interests of parties involved in a section 1605(a)(5) suit and require only one entire tort to occur in the United States for an action to arise under section 1605(a)(5). This liberal interpretation indicates a willingness to give serious consideration to claims of individuals against foreign governments.

VII. 1605(b): ADMIRALTY

Section 1605(b) denies immunity to a foreign state in admiralty actions brought to enforce maritime liens against vessels of a foreign state when the lien is based upon the commercial activity of the foreign state.[317] Denial of immunity is subject to compliance with notice requirements contained in the exception.[318] Section 1605(b) is designed to avoid the arrest and attachment of vessels or cargo owned by foreign sovereigns "since such seizures frequently touch sensitive diplomatic nerves."[319] Under the FSIA, a vessel no longer must be attached or arrested before a court has jurisdiction.[320]

Under section 1605(b), the normal in rem suit in admiralty, which is initiated by arrest or attachment of the vessel, is re-

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315. In most instances, plaintiffs in section 1605(a)(5) suits are individuals with no other means of recovery against foreign governments. *See* Note, *Jurisdictional Considerations*, *supra* note 5, at 78.

316. 28 U.S.C. § 1602 (1982) (emphasis added).

317. 28 U.S.C. § 1605(b) (1982); Castillo v. Shipping Corp. of India, 606 F. Supp. 497, 502 (S.D.N.Y. 1985).

318. 28 U.S.C. § 1605(b) (1982).

319. Velidor v. L/P/G Benghazi, 653 F.2d 812, 815 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1983); H.R. REP. No. 1487, *supra* note 26, at 21-22, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6620-21.

320. O'Connell Machinery v. M.V. Americana, 734 F.2d 115, 117 (2d Cir.), *cert. denied*, 105 S.Ct. 591 (1984).

placed with an in personam action initiated by the prescribed service of process.[321] The amount recoverable is limited to the value of the vessel or cargo at the time the lien arose.[322]

To prevent arrests, section 1605(b) provides that any party who initiates the seizure of a foreign state's vessel loses the right to proceed in personam unless the party is unaware of the identity of the shipowner.[323] If the party lacks such knowledge, the arrest or attachment must be dissolved immediately upon the revelation of the foreign state's interest in the ship.[324] The party who could not have known that the owner was a foreign state will not lose in personam jurisdiction.[325]

The House Report states that in personam jurisdiction may be granted only when the provisions for notice under section 1605(b)(1) and (2) are followed. Under section 1605(b)(1), service must be made on the master of the ship or other person having possession of the vessel or cargo.[326] If the ship was mistakenly arrested, the service of process of the arrest will constitute notice to the master.[327] Under section 1605(b)(2), notice must be given to the foreign state as provided in section 1608 of the FSIA within ten days of service to the master.[328]

Section 1605(b) does not alter the fundamental requirement that the ship be present in the forum when service of process is effected.[329] Thus, either defective service under section 1605(b)(1) or (b)(2) or the vessel's absence from the forum can defeat a plaintiff's claim under this exception.[330]

The legislative history emphasizes that section 1605(b) is not the exclusive vehicle for claims involving shipping.[331] Congres-

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321. China Nat'l Chem. Import & Export Corp. v. M/V Lago Haulaihue, 504 F. Supp. 684, 689 n.1. (D. Md. 1981).

322. 28 U.S.C. § 1605(b) (1982).

323. *Velidor*, 653 F.2d at 815-16.

324. Jet Line Services v. M/V Marsa El Hariga, 462 F. Supp. 1165, 1174 (D. Md. 1978).

325. *Id.* at 1176.

326. H.R. REP. No. 1487, *supra* note 26, at 22, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6620.

327. 28 U.S.C. § 1605(b)(1) (1982).

328. 28 U.S.C. § 1605(b)(2) (1982); Brazosport Towing Co. v. 3,838 Tons of Sorghum, 607 F. Supp. 11 (S.D. Tex. 1984), *aff'd per curiam*, 790 F.2d 891 (5th Cir. 1986).

329. *Castillo*, 606 F. Supp. at 503.

330. *Id.*

331. H.R. REP. No. 1487, *supra* note 26, at 22, *reprinted in* 1976 U.S. CODE

sional intent was neither to preclude suits in accordance with other provisions of the FSIA nor to preclude a second action if otherwise permissible.[332]

VIII. TECHNICAL PROVISIONS

Section 1606 of the FSIA requires that a foreign state not entitled to immunity from jurisdiction be treated as a private individual for purposes of liability.[333] The language of this section parallels that of the Federal Tort Claims Act.[334] Thus, if "state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances."[335]

This section of the FSIA distinguishes between sovereign states and their agencies or instrumentalities. Although a foreign sovereign cannot be held liable for punitive damages, an agency or instrumentality of that state is subject to punitive damages.[336] The language and legislative history of section 1606 establish that Congress did not intend to affect either the substantive law of liability or the attribution of responsibility between entities of a foreign state.[337] The statute fails to state a rule governing the attribution of liability among entities of a foreign state.[338]

Section 1607 applies to counterclaims against a foreign state that either brings or intervenes in an action in a United States court.[339] Under section 1607, immunity is withdrawn from a foreign government in three situations: (1) when the foreign state

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CONG. & AD. NEWS at 6621.

332. *Id.*

333. 28 U.S.C. § 1606 (1982); H.R. REP. No. 1487, *supra* note 26, at 22, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6621.

334. 28 U.S.C. § 2674 (1982 & Supp. 1984).

335. First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 622 n.11 (1983).

336. If the law of the state in which the act or omission occurred provides only for punitive damages in suits involving a death, then the foreign state will be liable for the plaintiff's actual or compensatory damages. A court will measure these damages by the actual pecuniary injuries resulting from the death. *See* 28 U.S.C. § 1606 (1982); Gibbon v. Republic of Ireland, 532 F. Supp. 668, 671 (D.D.C. 1982).

337. H.R. REP. No. 1487, *supra* note 26, at 12, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6610.

338. *First Nat'l City Bank*, 462 U.S. at 621.

339. H.R. REP. No. 1487, *supra* note 26, at 23, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6622.

would not be entitled to immunity under section 1605 if a claim had been brought against it;[340] (2) when the counterclaim arises "out of the transaction or occurrence that is the subject matter of the claim of the foreign state";[341] or (3) when the foreign state will not be immune from a set-off.[342]

The rationale behind section 1607 is the elimination of an unfair situation in which "[w]e have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice."[343] Therefore, this section first requires a foreign government to seek the use of a United States court.[344] A conditional claim does not satisfy this requirement.[345] Also, section 1607 does not foreclose crossclaims.[346]

Section 1608 describes the "exclusive procedures" for service of process,[347] time and filing of an answer, and the obtaining of a

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340. 28 U.S.C. § 1607(a) (1982).

341. 28 U.S.C. § 1607(b) (1982).

342. 28 U.S.C. § 1607(c) (1982); H.R. REP. No. 1487, *supra* note 26, at 23, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6622.

343. Alberti v. Empresa Nicaraguense de la Carne, 705 F.2d 250, 254 (7th Cir. 1983) (*quoting* National City Bank of New York v. Republic of China, 348 U.S. 356, 361-62 (1955)); *see also* H.R. REP. No. 1487, *supra* note 26, at 23, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6622.

344. *Alberti*, 705 F.2d at 254.

345. *In re* Rio Grande Transport, 516 F. Supp. 1155, 1159 (S.D.N.Y. 1981).

346. Ministry of Supply, Cairo v. Universe Tankships, Inc., 708 F.2d 80, 86-87 (2d Cir. 1983).

347. *See, e.g.*, Lucchino v. Brazil, 631 F. Supp. 821 (E.D. Pa. 1986) (holding that if the plaintiff does not meet the requirements of §1608, then the court cannot exercise personal jurisdiction over the defendant). Section 1608(a) provides four methods for the service of process on a foreign state:

> (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
>
> (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or
>
> (3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed or dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned; or
>
> (4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit,

default judgment against a foreign sovereign.[348] "If notice is served under section 1608 and if the jurisdictional contacts embodied in sections 1605-1607 are satisfied, personal jurisdiction over a foreign state [will] exist under section 1330(b)."[349] Sections 1609, 1610 and 1611 cover immunity and the exceptions to immunity from execution or judgment of the property of a foreign state.[350]

IX. Personal Jurisdiction

A. Background

Section 1330(b) of the FSIA gives district courts personal jurisdiction over a foreign state if subject matter jurisdiction is present and if the plaintiff has complied with the Act's service of process provisions.[351] Once statutory personal jurisdiction is established, courts determine whether their exercise of personal jurisdiction is constitutional. The FSIA's legislative history states that "[t]he requirements of minimum jurisdictional contacts . . . are embodied in [section 1330(b)]."[352] In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,[353] the court said that "each finding of personal jurisdiction under the FSIA requires . . . a due process scrutiny of the court's power to exercise its authority over a particular defendant."[354]

> together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, . . . and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state. . . .

28 U.S.C. § 1608(a) (1982). The service of process provisions for agencies and instrumentalities of foreign states are more liberal and generally allow service similar to service on United States corporations. *See* Kane, *supra* note 28, at 399.

348. 28 U.S.C. § 1608 (1982); H.R. Rep. No. 1487, *supra* note 26, at 23-26, *reprinted in* 1976 U.S. Code Cong. & News at 6622-25.

349. *Id.*; *see infra* notes 351-417 for a discussion of personal jurisdiction.

350. 28 U.S.C. §§ 1609-11 (1982).

351. 28 U.S.C. § 1330(b) (1982). The service of process provisions are contained in 28 U.S.C. § 1608 (1982). *See supra* note 347 for the text of that section.

352. H.R. Rep. No. 1487, *supra* note 26, at 13-14, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6612. The House Report compares this provision with International Shoe Co. v. Washington, 326 U.S. 310 (1945).

353. 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

354. *Id.* at 308. Although some courts have held that the requirements of

International Shoe Co. v. Washington[355] is the first in a line of cases that defines due process requirements for personal jurisdiction. In *International Shoe* the State of Washington sued a Delaware corporation for failing to pay assessments into the State's unemployment compensation fund. The corporation claimed that the Washington court did not have personal jurisdiction. Although the corporation maintained no offices in Washington, it hired salesmen in the forum state.[356] The *International Shoe* Court held that Washington had personal jurisdiction over the Delaware corporation.[357] According to the Court, the defendant did not have to be physically present in Washington for a court in that state to exercise personal jurisdiction.[358] The Delaware corporation could be sued in Washington as long as it had minimum contacts with the state.[359] The Court stated that:

> Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make a binding judgment *in personam* against an individual or corporate defendant with which the State has no contacts, ties or relations.[360]

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subject matter jurisdiction and those of constitutional personal jurisdiction are identical, most courts reason that separate analytical inquiries are necessary. *See, e.g.*, Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1105 & n.18 (D.C. Cir. 1982) (validating the distinction between the standards of subject matter jurisdiction and constitutional personal jurisdiction) *cert. denied*, 464 U.S. 815 (1983). One commentator argues that keeping subject matter and personal jurisdiction questions separate fosters increased predictability and uniformity. *See* Kane, *supra* note 28, at 387.

355. 326 U.S. 310 (1945).

356. *Id.* at 313. These salesmen resided and received payment in Washington. The company reimbursed them for expenses incurred in the process of making sales in Washington. The salesmen did not enter into or collect payments from their Washington customers. *Id.* at 313-14.

357. *Id.* at 320.

358. *Id.* at 316. The Court announced the end of the Pennoyer v. Neff, 95 U.S. 714 (1877), requirement of physical presence in the forum state.

359. *International Shoe*, 326 U.S. at 316.

360. *Id.* at 319. The Court also stated that "due process requires only that . . . if [the defendant] be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.* at 316, *quoting* Milliken v. Meyer, 311 U.S. 457, 463 (1940).

According to the *International Shoe* Court, an analysis of the corporation's inconvenience in defending a suit in Washington was necessary to determine if personal jurisdiction in the forum State was reasonable.[361] The Court concluded that the corporation's contacts with the forum state, through its Washington-based salesmen's activities,[362] were sufficient to give the Washington court personal jurisdiction.[363]

Cases after *International Shoe* have refined the Court's minimum contacts analysis. In *McGee v. International Life Insurance Co.*,[364] the Court held that the forum state's exercise of personal jurisdiction over an insurance company whose only contact with that state stemmed from a contract with a resident of the forum state was proper.[365] In reaching this conclusion, the Court stated that the forum's interest in providing claimants with access to the court system outweighed any inconvenience to the insurance company.[366] In *Hanson v. Denckla*,[367] the Court found that a Florida court could not gain in personam jurisdiction over a Delaware trustee.[368] Personal jurisdiction was improper, the Court said, because the "cause of action . . . is not one that arises out of an act done or transaction consummated in the forum state."[369] The Court stated that the trustee had not "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefit and protection of its laws."[370] In

361. *International Shoe*, 326 U.S. at 317.

362. *See supra* note 356.

363. *International Shoe*, 326 U.S. at 320.

364. 355 U.S. 220 (1957).

365. *Id.* at 223. The insurance company entered into a life insurance contract with a California resident. The company received insurance payments from the policy holder in California. These payments comprised the defendant's only contact with the forum state. *Id.*

366. *Id.* at 223-24. Some courts have applied *McGee* only to cases involving life insurance contracts. *See* Note, *Minimum Contacts*, *supra* note 1, at 214.

367. 357 U.S. 235 (1958).

368. *Id.* at 251.

369. *Id.* In *Hanson*, the beneficiaries of a trust attempted to gain in personam jurisdiction over a Delaware trustee in a Florida court. *Id.* at 241-42.

370. *Id.* at 253. The Court distinguished this case from *McGee* on two grounds. First, the cause of action in *McGee* arose out of the insurance company's contacts with the forum state. In *Hanson*, however, the trustee performed no acts in Florida similar to the insurance company's actions in California. Second, the Court noted that California had passed legislation specifically designed to protect its citizens from nonresident insurance companies. *Id.* at 251-52.

World-Wide Volkswagen Corp. v. Woodson,[371] New York residents sued a New York automobile dealer in an Oklahoma court for damages that resulted from a car accident in the forum State.[372] The Court rejected the plaintiffs' argument that foreseeability alone is sufficient to confer personal jurisdiction on a nonresident defendant.[373] According to the Court "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[374]

B. Application to FSIA Cases

Courts have applied the tests set forth in *International Shoe* and its progeny in personal jurisdiction cases involving foreign sovereigns as defendants. *Waukesha Engine Division v. Banco Nacional de Fomento Cooperatiro*[375] is an early FSIA case holding that personal jurisdiction was not proper because constitutional due process was lacking.[376] In *Waukesha,* Banfoco, a banking institution of the Mexican Government, contracted with Waukesha, a United States corporation, for the manufacture and delivery of marine engines. Waukesha claimed that Banfoco repudiated the contract.[377] The court found that Banfoco's principal contact with the forum state was "that it contracted with a Wis-

371. 444 U.S. 286 (1980).

372. *Id.* at 288. The plaintiffs bought their car from a New York Audi dealer. On their way to Arizona, plaintiffs had an accident in Oklahoma. They sued the Audi dealer in a products liability action. *Id.*

373. *Id.* at 295.

374. *Id.* at 297. The Court cited Shaffer v. Heitner, 433 U.S. 186 (1976), and Kulko v. California Superior Court, 436 U.S. 84 (1978), as support for this conclusion. In *Shaffer*, a shareholder sued the directors of a corporation in its state of incorporation. The Court found personal jurisdiction improper because the directors had no ties with the forum state. Therefore, they could not anticipate defending a suit in the forum state. 433 U.S. at 216. The *Kulko* Court gave similar reasons for disallowing personal jurisdiction over the out-of-state defendant. The Court stated that "the mere act of sending a child to California to live with her mother . . . connotes no intent to obtain or expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction." 436 U.S. at 101.

375. 485 F. Supp. 490 (E.D. Wis. 1980).

376. *Id.* at 493.

377. Banfoco contracted for the purchase of 72 marine engines that Waukesha was to deliver between 1975 and 1976. Waukesha claimed that Banfoco prevented it from delivering the 1976 engines. *Id.* at 491.

consin corporation for the production of engines which it likely knew would be produced in this state."[378] The court said this contact alone did not meet constitutional standards for personal jurisdiction.[379] Although Banfoco had also sent one of its officers to Wisconsin to make an inspection, the court held that these two contacts were insufficient for the Wisconsin court to gain personal jurisdiction over Banfoco.[380]

In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,[381] the Second Circuit devised a four-part test for determining whether a foreign state's contacts meet constitutional requirements for personal jurisdiction. The court stated that it must balance the following factors: (1) whether the defendant enjoyed the privileges and benefits of United States law; (2) whether the defendant could foresee litigation in the United States; (3) whether the defense of a suit in the United States is inconvenient for the defendant; and (4) whether the United States has an interest in providing a forum for the dispute.[382] According to the court, Central Bank, an instrumentality of Nigeria, had its officers trained in New York and kept cash balances in a New York bank. Furthermore, the New York bank performed a variety of functions in the United States for Central Bank.[383] The court found that Nigeria could anticipate litigation in the United States because Central Bank had threatened to use United States courts to sue the New York bank for failure to enforce Central Bank's letters of credit.[384] Thus, any inconvenience to Nigeria was "at least expected."[385] The *Texas Trading* court held that Congress' passage of the FSIA signaled its intention to provide a forum for United States citizens with suits against foreign sovereigns. Because Texas Trading is a United States corporation, the fourth prong of the court's test was met.[386]

The Southern District of New York adopted the *Texas Trading*

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378. *Id.* at 493.
379. *Id.*
380. *Id.*
381. 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). *See supra* text accompanying notes 70-74.
382. *Id.* at 314.
383. *Id.*
384. *Id.* at 315.
385. *Id.*
386. *Id.*

test in *Schmidt v. Polish People's Republic*[387] to determine whether its personal jurisdiction over Poland met constitutional requirements. The court said:

> Poland . . . solicited and negotiated a loan in the United States and paid for that loan by issuing notes payable in U.S. dollars through a New York bank. By engaging in such a transaction, defendant availed itself of the privileges of American law, and litigation in this country should have been foreseeable to it in the event that it failed to meet its obligations.[388]

According to the court, Poland did not claim that litigation in the United States would be a serious hardship. The court noted that the enactment of the FSIA is proof of the United States interest in providing a forum for disputes against foreign states. Thus, personal jurisdiction over Poland met due process requirements.[389]

The court in *Transamerican Steamship Corp. v. Somali Democratic Republic*[390] held that use of United States mail and telecommunications systems satisfies the minimum contacts standard.[391] The Somali Shipping Agency (SSA) had "no offices, employees, real property or bank accounts in the United States."[392] The court found that the SSA did not actively seek business in the United States. The SSA, however, did use the United States mails and other forms of communication and ordered the plaintiff to make payments through both the Somali Embassy in Washington, D.C., and United States banks. Although the court acknowledged that these contacts were slight, it held that they satisfied *International Shoe*'s minimum contacts standard.[393] According to the court, the United States had an in-

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387. 579 F. Supp. 23 (S.D.N.Y.), *aff'd on other grounds*, 742 F.2d 67 (2d Cir. 1984). *See supra* notes 121-29 and accompanying text.

388. *Id.* at 28.

389. *Id.*

390. 590 F. Supp. 968 (D.D.C. 1984), *modified*, 767 F.2d 998 (D.C. Cir. 1985). The circuit court adopted the district court's analysis of personal jurisdiction. 767 F.2d at 1004 n.6. *See supra* notes 87-89 and accompanying text for the facts of this case.

391. *Transamerican Steamship*, 590 F. Supp. at 977.

392. *Id.*

393. *Id.* This holding marks a departure from previous case law. *See* Thomas P. Gonzalez Corp. v. Consejo Nacional de Producion de Costa Rica, 614 F.2d 1247, 1254 (9th Cir. 1980), in which the court held that "use of the mails, telephone or other international communications simply do not qualify as pur-

terest in the litigation both because the dispute arose directly from a United States aid program and because the plaintiff was a United States corporation. The SSA did not prove that defending the suit in the United States would present undue inconvenience. Therefore, the court found personal jurisdiction over the SSA proper.[394]

In its personal jurisdiction analysis, the court in *Olsen v. Government of Mexico*[395] distinguished between general and limited jurisdiction. When the cause of action is unrelated to the defendant's contacts with the forum state, general jurisdiction exists only if the defendant's contacts with that state are "substantial" or "continuous and systematic."[396] If the defendant's contacts do not meet that standard, then the court determines whether it has limited jurisdiction by examining those contacts of the defendant with the forum that have a connection with the cause of action.[397]

The *Olsen* court applied a test similar to that of *Hanson*[398] to decide whether it had limited jurisdiction over Mexico. In making this determination, the court stated that it must judge the reasonableness of its exercise of jurisdiction.[399] The court set forth a seven part test[400] which includes several factors of the *Texas Trading* analysis.[401] The *Olsen* court found that Mexico intentionally created contacts with the United States.[402] Next, the court stated that Mexico's "burden of defending" a suit in the United States was slight because the physical evidence and some

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poseful activity invoking the benefits and protections of the state."

394. *Transamerican Steamship*, 590 F. Supp. at 977.

395. 729 F.2d 641 (9th Cir.), *cert. denied*, 105 S. Ct. 295 (1984). *See supra* notes 267-72 and accompanying text.

396. *Olsen*, 729 F.2d at 648.

397. *Id.* at 648-49.

398. The *Olsen* court held that because the pilot "sought and received permission to enter United States airspace pursuant to procedures negotiated for precisely those circumstances," Mexico invoked the benefits and protections of the laws of California and that the cause of action related to Mexico's acts in California. *Id.* at 649.

399. *Id.*

400. *Id.* The court based this test on the one developed in Insurance Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266, 1270 (9th Cir. 1981).

401. *See supra* text accompanying notes 381-82.

402. *Olsen*, 729 F.2d at 649. The court termed the pilot's entry into United States airspace a "purposeful interjection," one that the court found "substantial" because it was pursuant to an agreement between Mexico and the United States. *Id.*

of the witnesses were in California.[403] The court then examined the "conflict with Mexico's sovereignty"[404] if it were forced to defend its actions in the United States. The court said passage of the FSIA reflects a decision to allow suits against foreign states in the United States; and therefore, the conflict was "minimal."[405] The court discussed California's interest in hearing the suit and found that the forum state's interests included protecting its economic resources and ensuring compensation for injuries sustained by its residents.[406] Because the accident occurred in San Diego and the physical evidence was located there, the "most efficient resolution" of the suit was in California courts.[407] These considerations also made California the most "convenient and effective" forum for the plaintiffs.[408] The court stated that the plaintiffs failed to prove that no other forum was available to hear their claim.[409] After balancing all seven factors, however, the court determined that California's assertion of personal jurisdiction met constitutional requirements.[410]

In *Meadows v. Dominican Republic*,[411] the court relied on the totality of the defendant's contacts with the United States to find that the forum state's exercise of personal jurisdiction was constitutional.[412] Meadows secured loans through United States banks for the Instituto de Auxilios y Viviendas (Instituto), an executive agency of the Dominican Republic. The Instituto contracted to pay Meadows a commission for arranging these loans. When it failed to pay as agreed, Meadows sued for unpaid commissions. The court began its analysis with a reference to the direct effects exception to sovereign immunity.[413] The court then noted that if it examined only the Instituto's activities in the United States, the direct effects exception would lose all meaning because it "applies only to commercial activity outside the United States."

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403. *Id.* at 649-50.
404. *Id.* at 650.
405. *Id.*
406. *Id.* California also had an interest in deterring tortious conduct in the state and in "protecting the welfare of its minor residents." *Id.*
407. *Id.*
408. *Id.* at 651.
409. *Id.*
410. *Id.*
411. 628 F. Supp. 599 (N.D. Cal. 1986).
412. *Id.*
413. *See supra* notes 116-71 and accompanying text.

Next, the court dismissed the Instituto's reliance on *Olsen* for the proposition that a court may examine only those contacts of the defendant that relate specifically to the plaintiff's cause of action. The *Meadows* court stated that the *Olsen* court had found specific jurisdiction and, therefore, had no reason to discuss general jurisdiction. According to the *Meadows* court, the Instituto could foresee litigation in the United States because of its employment of Americans as intermediaries in negotiating its loans. The Instituto used United States communications systems and had agreed to pay Meadows in United States currency. The court also noted that the Dominican Republic had brought suits in United States courts and, as a result, it had invoked the benefits and protections of United States law. The court found that the Dominican Republic had sufficient contacts with the United States to satisfy general jurisdiction. The Dominican Republic did not show California to be an inconvenient forum, the court said. Further, Meadows had attempted unsuccessfully to obtain relief from courts in the Dominican Republic. Therefore, the *Meadows* court held that personal jurisdiction was constitutional.[414]

Like *Meadows*, *Crimson Semiconductor v. Electronum*[415] focused on general jurisdiction. Crimson Semiconductor, a United States corporation, contracted with Electronum, a Rumanian state-owned trading company, to act as an agent for selling Electronum's electric components in the United States. The contract stated that Crimson would test the United States market for Electronum's product. On two occasions, Crimson placed orders with Electronum that Electronum did not fill. Therefore, Crimson sued for breach of contract. After enumerating Electronum's contacts with the United States,[416] the court concluded that they were extensive. Electronum invoked the benefits of United States law through those activities and through its use of United States courts against Crimson. The court found that Electronum should have foreseen litigation in the United States because of its efforts to sell its goods in the United States. According to the court, litigation in the United States would not be inconvenient for Electronum because of its presence in the United States. The court

414. *Meadows*, *supra* n.411.

415. 629 F. Supp. 903 (S.D.N.Y. 1986).

416. These contacts included doing business with other United States corporations, advertising in the United States, visiting the United States to increase sales, and making payments through United States banks. *Id.*

noted that Congress designed the FSIA to provide a forum for United States citizens who engage in commerce with foreign governments. As a result of the nature and quality of Electronum's contacts with the United States, the court held that it had general jurisdiction and that its exercise of personal jurisdiction over Electronum met due process standards.[417]

To determine whether personal jurisdiction over a foreign sovereign meets due process standards, courts examine a variety of factors, including the extent to which the foreign state invoked the privileges and benefits of United States law, the foreseeability of suit in the United States, the relative inconvenience to the foreign state of defending a suit in the United States, and the interest of the United States in hearing the suit. Recently, courts have begun to focus on all of the foreign sovereign's contacts with the United States regardless of whether those contacts were related to the cause of action out of which the suit arose. If a court decides that both statutory and constitutional jurisdiction over the defendant is proper, it can then judge the merits of the case.

X. Conclusion

Passage of the FSIA in 1976 codified the restrictive theory of sovereign immunity, which provides that a foreign state will remain immune from suit for its public acts but will lose immunity for its private and commercial acts. By placing the determination of a foreign government's immunity in the hands of the judiciary, Congress attempted to standardize an area of the law that had been governed by political relations between the United States and foreign governments.

The FSIA is the exclusive mechanism through which private parties can seek redress against foreign governments in United States courts. The Act provides a general grant of immunity to foreign sovereigns, but withdraws that immunity under certain exceptions. Section 1605(a)(1) states that a foreign state forfeits its immunity from jurisdiction when it waives that immunity either expressly or impliedly. Section 1605(a)(2) removes a foreign government's immunity from jurisdiction when that government (1) performs commercial acts in the United States, (2) performs acts in the United States in connection with commercial activity elsewhere, or (3) performs acts outside the United States that

417. *Id.*

cause a direct effect in the United States. If a foreign sovereign converts property in violation of international law, section 1605(a)(3) states that the sovereign is subject to suit in United States courts. Section 1605(a)(4) provides that a foreign government loses immunity in litigation involving rights in immovable and inherited property located in the United States. Under section 1605(a)(5), a foreign state is not immune from suit for tortious acts it commits in the United States. Section 1605(b) denies immunity in certain admiralty actions. Sections 1608 through 1611 comprise the technical provisions of the FSIA.

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