The Bay of Campeche Oil Spill: Obtaining Jurisdiction Over Petroleos Mexicanos Under the Foreign Sovereign Immunities Act of 1976

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INTRODUCTION

This Comment discusses the problem of obtaining jurisdiction over a foreign polluter whose pollution crosses into U.S. territory. A massive oil spill in the Gulf of Mexico during the summer of 1979 affords the opportunity to consider application of the Foreign Sovereign Immunities Act of 1976 (FSIA)1 as a basis for U.S. interests injured by transboundary pollution to obtain jurisdiction over a foreign state-owned polluter in this country’s courts.

In June 1979, an oil well being drilled in Mexico’s Bay of Campeche blew out and spilled approximately three million barrels of crude oil into the Gulf of Mexico.2 The oil reached the southern Texas coast in midsummer and caused extensive environmental damage.3 The Texas fishing industry, operators of tourist-related businesses, property owners, and others have since filed lawsuits seeking damages totalling $355 million against the owner and operator of the oil well, the Mexican government oil monopoly, Petroleos Mexicanos (Pemex).4 Plaintiffs are relying on the FSIA as a basis for obtaining jurisdiction

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2. Oil & Gas J., June 11, 1979, at 33; id., Mar. 31, 1980, at 54. See notes 73-76 infra and accompanying text.


This Comment will outline the development of sovereign immunity law in the United States prior to the enactment of the FSIA and describe the operation and effect of the 1976 legislation. It will then consider the application of the FSIA to the facts of the suits filed against Pemex. The Comment concludes that the plaintiffs should be able to obtain jurisdiction over Pemex in a U.S. court. The availability of jurisdiction under the FSIA to injured parties in future transboundary pollution actions is in doubt, however. Because of a reference in the legislative history of the FSIA to the District of Columbia's long-arm statute and the history of judicial caution in cases involving international disputes, courts may adopt a conservative stance in determining what minimum contacts the FSIA requires before a plaintiff may assert personal jurisdiction over a foreign state, its agency or instrumentality. Courts may interpret the reference to the District of Columbia statute to mean that a pollution injury alone will not be enough to warrant assumption of personal jurisdiction. Requiring the plaintiffs in the Pemex case and injured parties in future cases to demonstrate some additional contacts by a foreign defendant aside from the pollution injury itself would limit use of the FSIA as a basis for obtaining jurisdiction over the foreign polluter. Nevertheless, this Comment will recommend that because of ambiguity in the portion of the legislative history that concerns the scope of personal jurisdiction under the FSIA and the considerable foreign policy implications of the exercise of extraterritorial jurisdiction, U.S. courts should adopt this more restrictive interpretation of the FSIA.

I. SOVEREIGN IMMUNITY PRACTICE IN THE UNITED STATES PRIOR TO ENACTMENT OF THE FSIA

A. The Doctrine of Absolute Immunity

United States courts originally accorded foreign states absolute
immunity from jurisdiction. Chief Justice Marshall set out the classic statement of the doctrine in *The Schooner Exchange v. M’Faddon,* in which the Court sustained France’s plea of immunity in an action brought against the *Exchange,* a French naval vessel. Chief Justice Marshall argued that a “sovereign . . . can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station . . . are reserved by implication, and will be extended to him.” Therefore the *Exchange* “must be considered as having come into the American territory, under an implied promise, that . . . she should be exempt from the jurisdiction of the country.” Chief Justice Marshall stated that this grant of immunity to France was in accord with the existing “law and practices of nations.”

Later Supreme Court decisions reaffirmed the policy of allowing foreign countries absolute immunity. The more recent cases, however, justified the grant of immunity as a matter of judicial deference to the practices and policies of the U.S. Department of State rather than as a conclusion mandated by international law. Two opinions in the 1940’s made this change clear. In *Ex Parte Republic of Peru,* the Court held that a merchant ship owned and operated by the Peruvian government was entitled to immunity. The State Department had filed a statement through the Attorney General requesting such immunity. The Court stated that the judiciary must grant such requests by the executive branch of the government and noted that because these cases have important implications for United States foreign relations, the better policy is to resolve such disputes through diplomatic negotiations rather than judicial proceedings. In *Republic of Mexico v. Hoffman,* which also involved a foreign government’s merchant vessel, the Court elaborated on the need for limiting the jurisdiction of Ameri-

9. 11 U.S. (7 Cranch) 116 (1812).
10. *Id.* at 137.
11. *Id.* at 147.
12. *Id.* at 143-44.
15. 318 U.S. 578 (1943).
16. *Id.* at 800.
17. *Id.* at 796.
18. *Id.* at 800.
19. *Id.* at 588-89. The Court noted that “[o]ur national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial process.”
can courts\textsuperscript{21} and warned that judicial acceptance of the State Department’s decision for or against immunity was necessary to avoid embarrassing the executive branch in its conduct of foreign relations.\textsuperscript{22}

**B. Adoption of the Restrictive Doctrine of Immunity**

Judicial deference to the executive branch decision on questions of sovereign immunity was therefore fully established when, in 1952, the State Department issued the Tate Letter\textsuperscript{23} announcing its adoption of the doctrine of “restrictive immunity.” Under this new approach, the State Department would allow the defense of sovereign immunity in cases involving a foreign state’s public acts, but not in those arising from the foreign state’s private or commercial acts.\textsuperscript{24} The State Department believed that widespread and increasing involvement of governments in commercial activities required an immunity doctrine that would enable persons doing business with the foreign countries to have their rights determined in the courts.\textsuperscript{25} Furthermore, the State Department found that international law no longer required U.S. courts to accord absolute immunity to foreign countries, since a substantial number of foreign jurisdictions were following the restrictive doctrine of immunity.\textsuperscript{26} After the release of the Tate Letter, U.S. courts accepted the restrictive doctrine of immunity.\textsuperscript{27}

**C. Problems with Sovereign Immunity Practice Under the Tate Letter**

Despite adoption of the restrictive doctrine of immunity by both the State Department and the courts, problems remained in sovereign immunity practice. Before the State Department made an immunity decision in a particular case, it was often subjected to strong political

\textsuperscript{21} Id. at 34-38.
\textsuperscript{22} Id. at 35-36. “It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.” Id. at 35. See generally the discussion of the Schooner Exchange, Republic of Peru and Hoffman line of cases in von Mehren, The Foreign Sovereign Immunities Act of 1976, 17 COLUM. J. TRANSNAT’L L. 33, 35, 40-41 (1978); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 69, Reporters’ Note 1 (1965) [hereinafter cited as RESTATEMENT].
\textsuperscript{23} Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Phillip B. Perlman, Acting Attorney General, Department of Justice, Changed Policy Concerning the Granting of Sovereign Immunities to Foreign Governments (May 19, 1952), reprinted in 26 DEP’T STATE BULL. 984 (1952).
\textsuperscript{24} Id.
\textsuperscript{25} Id. at 985.
\textsuperscript{26} Id. at 984-85.
pressures by the government involved. Moreover, the Tate Letter failed to lay down criteria for differentiating between a government's private and public acts. Finally, under the Tate Letter regime there were no statutory procedures available for obtaining in personam jurisdiction over a foreign state, and the foreign state was granted absolute immunity from execution.

To facilitate application of the restrictive doctrine of immunity to individual cases, the State Department adopted an informal administrative procedure that provided interested litigants the chance to participate in the decisionmaking. Either party to litigation raising an issue of sovereign immunity could request a hearing from the State Department. At the hearing, either side could present oral argument and written briefs. This process proved unsatisfactory, however. The State Department was not equipped, as a court would be, "to take evidence, to hear witnesses, or to afford appellate review." Instead, the State Department found itself "in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts."

The procedure proved to be overly vulnerable to nonlegal considerations. The foreign state involved often subjected the State Department to political and diplomatic pressures. Private litigants, therefore, faced great uncertainty under the system, for it was always possible that the State Department would base its decision on political, rather than legal, considerations. Moreover, if the Department decided in favor of the foreign government, the private litigant was foreclosed from challenging the finding in court. Although the State Department was not equipped to take evidence, hear witnesses, or afford appellate review, it was expected to apply a legal standard to litigation already before the courts.

32. Id. at 651.
33. Id. at 651.
35. Id.
36. Id.
37. Id. at 9, U.S. Code Cong. & Ad. News at 6607. See also Leigh & Atkeson, Due Process in the Emerging Foreign Relations Law of the United States, Part II, 22 Bus. Law. 3, 15-23 (1966), in which the authors cite and discuss three cases where the authors feel the court based an immunity decision on political rather than legal considerations.
Department referred to its decisions under the Tate Letter as "suggestions" to the court, the judiciary treated them as final to "avert possible embarrassment to the conduct of our foreign relations." Thus, when the State Department decided to suggest immunity in a given case, the courts were left with nothing to decide.

Because foreign states could forego State Department consideration and plead sovereign immunity directly before a U.S. court, cases did arise in which the courts determined on their own whether to grant sovereign immunity. Unfortunately, the Tate Letter offered the courts no criteria for differentiating between foreign countries' commercial and public acts. Nor did the courts themselves develop conclusive guidelines. In the leading pre-FSIA case of Victory Transport, Inc. v. Comisaría General de Abastecimientos y Transportes, the court noted that initial judicial attempts to formulate a test were inconsistent. Some courts looked to the nature of the transaction involved, categorizing as public only those activities that could not be performed by private individuals. Other courts looked to the purpose of the transaction, granting immunity in cases involving activities in which the object of performance was public in nature. In Victory Transport, the court attempted to resolve this problem by adopting a third scheme of classification that combined aspects of both the "nature" and "purpose" approaches.

39. Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 358 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965). See Spacil v. Crowe, 489 F.2d 614, 616-17, 619 (5th Cir. 1974) for a helpful summary of the case law and policy considerations which required the judicial branch to grant "unquestioned discretion to the executive." Id. at 617.
40. See Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198, 1201 (2d Cir. 1971), cert. denied, 404 U.S. 985 (1971) ("[O]nce the State Department has ruled in a matter of this nature, the judiciary will not interfere."); Rich v. Naviera Vacuba, S.A., 295 F.2d 24, 26 (4th Cir. 1961) ("[T]he certificate and grant of immunity issued by the Department of State should be accepted by the court without further inquiry"); Sea Transport Corp., S/T Eagle Voyager v. S/T Manhattan, 405 F. Supp. 1244, 1247 (S.D.N.Y. 1975) ("[T]he issuance vel non of a suggestion of immunity by the United States Department of State is of critical importance").
42. 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965).
43. Id. at 359.
44. Id.
45. Id.
46. The Victory Transport court attempted to delineate definitive guidelines for determining when a grant of immunity would be appropriate by classifying those political and public acts for which courts should grant sovereign immunity. The categories included internal administrative acts, such as expulsion of aliens; legislative acts, such as nationalization; acts concerning the armed forces; acts concerning diplomatic activity; and public loans. Id. at 360. "Legislative acts" are political and public by nature, while an act "concerning
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During the Tate Letter era, private parties had no statutory procedure that would allow them to obtain in personam jurisdiction over a foreign state. Consequently, plaintiffs would attach a foreign government's property in the United States to obtain in rem jurisdiction. This procedure frequently involved U.S. courts in litigation "lacking any significant U.S. interest or any jurisdictional contacts [between the defendant and the United States] apart from the fortuitous presence of property in the jurisdiction." Such attachments tended to strain U.S. foreign relations, since attachment over a variety of foreign governmental assets in various parts of the United States was a source of significant irritation to foreign countries.

Finally, in addition to the jurisdictional problems, plaintiffs who prevailed in actions against foreign governments were not permitted to retain property that had been attached to obtain jurisdiction as a means of securing execution on judgments. Instead, foreign states were ac-


48. Id.
49. Id. at 26, U.S. CODE CONG. & AD. NEWS at 6625.
50. Id. at 27, U.S. CODE CONG. & AD. NEWS at 6626.
51. Id. at 8, U.S. CODE CONG. & AD. NEWS at 6606. See, e.g., Weilamann v. Chase Manhattan Bank, 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959). The court based its decision on the position of the State Department contained in a letter from the State Department Legal Adviser submitted to the court, and quoted in 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 711-12 (1968), as follows:

The Department has always recognized the distinction between "immunity from jurisdiction" and "immunity from execution." The Department has maintained the view that under international law property of a foreign sovereign is immune from execution to satisfy even a judgment obtained in an action against a foreign sovereign where there is no immunity from suit.

The Department is of the further view that even when the attachment of the property of a foreign sovereign is not prohibited for the purpose of jurisdiction, nevertheless the property so attached and levied upon cannot be retained to satisfy a judgment ensuing from the suit. . . .

The Weilamann court considered itself bound by the State Department's statement that execution upon accounts of the U.S.S.R. in the defendant bank would be antagonistic to U.S. foreign policy. 21 Misc. 2d at 1088, 192 N.Y.S.2d at 472. See generally RESTATEMENT, supra note 22, § 69, Reporters' Note 2, which contains a useful review of U.S. and foreign precedent in the area of immunity from execution.

Even if plaintiffs could not secure execution on their judgments, this did not mean they would not collect. Such judgments were the basis for possible enforcement outside the United States or for a request that the State Department make a diplomatic claim against the foreign state on behalf of the judgment creditor. In addition, foreign states were generally inclined to comply with judgments against them. "[S]tates, like individuals, have credit
corded absolute immunity from execution in U.S. courts, even in commercial litigation where the foreign state had sufficient commercial assets to satisfy the judgment.52

D. Congressional Response to the Shortcomings of the Tate Letter: Enactment of the FSIA

Congress addressed many of the shortcomings of sovereign immunity practice under the Tate Letter when it passed the Foreign Sovereign Immunities Act of 1976 (FSIA).53 The FSIA codifies the restrictive doctrine of immunity adopted by the State Department in the Tate Letter,54 and establishes exceptions to foreign states' sovereign immunity in actions based on commercial activities.55 Unlike the Tate Letter, the FSIA defines commercial activities56 and specifically describes those commercial activities for which foreign states are precluded from claiming immunity.57

The FSIA also removes from the State Department the power to decide questions of sovereign immunity58 and provides that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this Chapter."59 The legislative history of the FSIA makes

ratings, and outstanding judgments are always an embarassment and affect their ability to conduct commercial transactions." N. LEECH, C. OLIVER & J. SWEENEY, CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 391 (1973); von Mehren, supra note 22, at 42-43.

54. Id.
55. See 28 U.S.C. § 1605(a)(2) (1976). See also text accompanying notes 111-114 infra. In addition to the commercial-activities exception, the FSIA denies immunity in cases in which foreign states have waived immunity, id. § 1605(a)(1); certain cases involving property taken in violation of international law, id. § 1605(a)(3); cases involving rights in real property or property acquired by gift or inheritance and located in the United States, id. § 1605(a)(4); certain noncommercial tort actions, id. § 1605(a)(5) (this subsection is directed primarily at the problem of traffic accidents, HOUSE REPORT, supra note 8, at 20-21, reprinted in [1976] U.S. CODE Cong. & AD. NEWS at 6619-20. But see Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980)); and in cases brought in admiralty seeking liens against foreign states' vessels or cargo that are based on commercial activities of such states, 28 U.S.C. § 1605(b) (1976). Section 1607 provides further exceptions to immunity with respect to counterclaims made against foreign states in actions in U.S. courts in which the foreign state has either brought the suit or has intervened. Id. § 1607.
56. See id. § 1603(d), (e). See also text accompanying notes 115-124 infra.
57. See id. § 1605(a)(2).

Some commentators have expressed concern that despite the FSIA's allocation of
clear that the purpose of transferring immunity determinations from the executive to the judicial branch was twofold: to reduce the foreign policy implications of such determinations by freeing the State Department from pressure exerted by foreign governments concerning their immunity and to assure litigants that decisions on immunity would be based on "purely legal grounds and under procedures that insure due process."  

The FSIA establishes standards and procedures for obtaining jurisdiction over foreign states. Provided the jurisdictional nexus, commercial activity, and other requirements of the sovereign immunity exceptions are met, and service of process has been made in accordance with statutory procedures, the FSIA grants the federal district courts subject matter and personal jurisdiction over actions against foreign states. These sections of the FSIA, which are designed to satisfy the "requirements of minimum jurisdictional contacts and adequate notice," form a federal long-arm statute over foreign states. They replace the prior practice in sovereign immunity cases of obtaining in

power over sovereign immunity determinations to the judiciary, foreign government intercession with the State Department may still pose a problem. See Brower, Bistline, & Loomis, The Foreign Sovereign Immunities Act of 1976 in Practice, 73 AM. J. INT'L L. 200, 206 (1979); Atkeson, Perkins, & Wyatt, H.R. 11315—The Revised State-Justice Bill on Foreign Sovereign Immunity: Time for Action, 70 AM. J. INT'L L. 298, 311 (1976). The Department has stated that it will submit amicus curiae briefs in appropriate sovereign immunity cases. Public Notice No. 507 of the Department of State of the United States of America, 41 Fed. Reg. 50,883 (1976). It remains to be seen whether and to what extent foreign government pressure will influence the Department in preparing such briefs, and, further, how much weight the courts will accord the Department's briefs in their supposedly independent determination of immunity. The possibility of such State Department "guidance" may "create uncertainty as to whether courts [are] free to continue to apply the new law as they read it, regardless of the Department's interpretations, as well as a renewed prospect of making bad law in hard cases." Atkeson, Perkins, & Wyatt, supra, at 311.

62. Id. §§ 1605-1607. See note 55 supra and note 112 infra and accompanying text.
63. 28 U.S.C. § 1608 (1976). Section 1608 sets forth procedures for serving process upon, filing an answer by, and obtaining default judgments against foreign states, or their agencies and instrumentalities, that are being sued under the FSIA.
64. Id. § 1330(a), (b). These subsections read as follows:
(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.
rem and quasi in rem jurisdiction over foreign defendants by seizure or attachment of property owned by them in the United States.  

The FSIA provides exceptions to the prior practice of according the property of foreign states absolute immunity from execution. Similar in structure to its jurisdictional immunity provisions, the sections of the FSIA dealing with execution create a general presumption that the property of a foreign state is immune from attachment and execution but set forth specific exceptions under which such immunity is not granted. Finally, the FSIA contains provisions governing venue and providing for removal of actions against foreign states initiated in state courts. While the FSIA defines and limits the ability of foreign states to claim immunity from jurisdiction in U.S. courts, it was not intended to affect substantive laws of liability in suits against such states.

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67. The House report states that “one of the fundamental purposes of this bill is to provide a long-arm statute that makes attachment for jurisdictional purposes unnecessary in cases where there is a nexus between the claim and the United States.” \textit{Id.} at 27, U.S. \textsc{Code} Cong. \& Ad. \textsc{News} at 6626. Section 1609 of the FSIA grants foreign states immunity from attachment and execution “except as provided in sections 1610 and 1611” of the Act. 28 U.S.C. § 1609 (1976). Neither section 1610 nor 1611, which carve out exceptions to the presumption of immunity from attachment and execution, allow prejudgment attachment as a means of obtaining jurisdiction. \textit{Id.} §§ 1610, 1611. \textit{See House Report, supra} at 26, U.S. \textsc{Code} Cong. \& Ad. \textsc{News} at 6625. Section 1610(d) provides limited exceptions to the prohibition on prejudgment attachment where a foreign state has waived immunity from such attachment, but not for jurisdictional purposes. 28 U.S.C. § 1610(d) (1976). \textit{See generally Geveke \& Co. Int'l v. Kompania Di Awa I Elektrisidat Di Korsou N.V.}, 482 F. Supp. 660 (S.D.N.Y. 1979).


69. 28 U.S.C. §§ 1610, 1611 (1976). Property of a foreign state in the United States is not immune from execution under the FSIA if it has been used for commercial activity in the United States and \textit{inter alia} (1) the state has waived its immunity from attachment or execution, \textit{id.} § 1610(a)(1), or (2) “the property is or was used for the commercial activity upon which the claim is based,” \textit{id.} § 1610(a)(2). The FSIA carves out a broader exception for property in the United States owned by agencies and instrumentalities of foreign states. \textit{Id.} § 1610(b). If an agency or instrumentality of a foreign state is engaged in commercial activity in the United States, \textit{any} of its U.S. property is available for execution or attachment in aid of execution, provided it has waived its immunity from execution or the judgment relates to a claim for which it was nonimmune because (1) its actions constituted a commercial activity under section 1605(a)(2); (2) the property was taken in violation of international law within the meaning of section 1605(a)(3); (3) the activity was a section 1605(a)(5) non-commercial tort; or (4) the suit was brought to enforce a maritime lien based on a commercial activity of a foreign state under section 1605(b). \textit{Id.} Such property may be attached or executed upon “regardless of whether the property is or was used for the activity upon which the claim is based.” \textit{Id.} Finally, the FSIA states that notwithstanding the exceptions to immunity from execution contained in section 1610, the property of a foreign central bank or monetary authority held for its own account shall only be available for execution if such entity has explicitly waived its immunity in this regard. \textit{Id.} § 1611(b).


states.\textsuperscript{72}

The provisions of the FSIA relating to jurisdictional immunity will be discussed in greater detail in Section III of this Comment, in connection with their application to the Pemex oil spill litigation.

II

THE BAY OF CAMPECHE OIL SPILL AND INITIATION OF LEGAL ACTION

On June 3, 1979 an exploratory oil and gas well being drilled in the Bay of Campeche in the Gulf of Mexico by Pemex, Mexico’s government-owned oil and gas corporation, blew out.\textsuperscript{73} Over the next ten months, the well, referred to by Pemex as the Ixtoc I, released approximately three million barrels of oil into the Gulf of Mexico.\textsuperscript{74} By the time Pemex finally succeeded in capping the well in March 1980,\textsuperscript{75} the spill had surpassed the 1978 spill by an Amoco supertanker as the largest oil spill in history.\textsuperscript{76}

The oil from the runaway well created a massive slick that entered U.S. waters in August 1979.\textsuperscript{77} By December, more than a million gallons of oil had reached about 140 miles of Texas coastline.\textsuperscript{78} Despite considerable efforts by the U.S. Coast Guard and other governmental agencies to control the pollution from the Bay of Campeche oil spill, the damage to Texas interests has been substantial, although its scope has not yet been fully assessed.\textsuperscript{79}

The Mexican government has released statements denying liability on the part of Pemex for damages caused by the oil spill. In August 1979, the State Department invited Mexico to enter discussions on


\textsuperscript{73} Oil & Gas J., June 11, 1979, at 33. Ixtoc I is located in Campeche Bay near Ciudad del Carmen, Mexico. Wash. Post, Oct. 19, 1979, at 1, col. 1. See generally Oil & Gas J., Dec. 17, 1979, at 36-37, for a description of the technical causes of the blowout.

\textsuperscript{74} Oil & Gas J., March 31, 1980, at 54. Pemex initially brought the spill under control in October. Id. Oct. 29, 1979, at 71.

\textsuperscript{75} Id.; S.F. Chronicle, Mar. 25, 1980, at 3, col. 5.


\textsuperscript{77} Comment, supra note 8, at 10,218; [1980] 10 Envir. Rep. (BNA) 1796; N.Y. Times, Aug. 11, 1979, at 6, col. 2. Gulf of Mexico currents reversed to the south in the fall of 1979, so the remainder of the oil stayed in Mexican waters during the winter. Richard Griggs of the U.S. Coast Guard's environmental protection division stated in late March of 1980 that, based on scientific studies, the oil posed no further threat to the Texas coast, although some heavier than normal tar balling was expected to hit Texas coasts in the spring and summer of 1980. [1980] 10 Envir. Rep. (BNA) 2252.

\textsuperscript{78} Comment, supra note 8, at 10,218.

"various issues related to the oil spill," including liability and damage claims. The Mexican government promptly declined this opportunity, informing the State Department that it was not willing to conduct such talks "because there exists no basis in international law" for holding it or Pemex legally responsible. In October 1979, Mexican President Jose Lopez Portillo stated flatly that his country "will pay nothing" for the damage to the Texas coast.

The oil reached Texas waters during the shrimp harvest, and the trout and redfish spawning seasons. Fishermen fear that the oil pollution will reduce the growth rates of these species and upset the marine food chain, resulting in future depletion of fish stocks. In September 1979, several fishermen filed an action in the U.S. District Court in Houston on behalf of the local fishing and shellfish industry seeking damages from Pemex for business losses totalling $155 million.

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81. [1979] 10 ENVIR. REP. (BNA) 1075. In its formal statement delivered to the American embassy in Mexico City on August 23, the Mexican government said that it was "not disposed to initiate conversations with the U.S. about the question of liability and possible alternatives dealing with claims and possible damage to other states, or persons, or property that may result from the accident." Id. See Wash. Post, Aug. 24, 1979, at 1, col. 2.

82. [1979] 10 ENVIR. REP. (BNA) 1353. President Portillo also mentioned that his country has long claimed that the United States has polluted Mexican territory. He complained that the United States has never compensated Mexico for damages to the Mexicali Valley caused by excessive salinity in the Colorado River. Id.

83. [1979] 10 ENVIR. REP. (BNA) 1166. The Texas shrimp industry is valued at $500 million per year, and one of the Gulf of Mexico's largest shrimping fleets is based in the area affected by the Pemex oil spill. N.Y. Times, Aug. 5, 1979, at 1, col. 3. The Port Mansfield Seafood Plant closed as a result of economic losses suffered because of the spill. 10 ENVIR. REP., supra, at 1199.

84. [1979] 10 ENVIR. REP. (BNA) 1166.

85. The Texas Shrimp Association has stated that the oil, which is toxic to larval shrimp, will kill the larvae and otherwise disturb the shrimp hatching grounds, resulting in reduced growth rates and survivability "for many years to come." Id. (statement of Ralph Rayburn, Executive Director, Texas Shrimp Ass'n).

86. [1979] 10 ENVIR. REP. (BNA) 1166.

87. Id.; N.Y. Times, Aug. 5, 1979, at 1, col. 3.

allegedly resulting from the oil spill.89

The oil spill also severely affected the local tourism industry. Booming local and national resort enterprises at South Padre Island suffered substantial losses when oil began to reach the island's beaches at the peak of the tourist season.90 Thus, two other groups of claimants have filed actions. One group of claimants has filed a class action against Pemex on behalf of property owners on South Padre Island and the Laguna Madre; hotels, restaurants, and other businesses in Cameron and Willacy counties deriving income from tourism and fishing; employees of such businesses; and political subdivisions of those counties.91 These claimants seek $100 million in damages to cover property damage and loss of business income, personal livelihood, and tax revenues incurred as a result of the Pemex oil spill.92 Another group of claimants, representing businesses and individuals engaged locally in tourism, has also joined the litigation, seeking $100 million for "injury and damage to ocean life, beaches, and commercial and business activities."93 Finally, in addition to the three class actions, numerous individual businesses and persons have filed claims to recover property damages and loss of income caused by the oil spill.94

90. [1979] 10 ENVIR. REP. (BNA) 1659. Although much of the oil was cleaned up from the resort beaches as soon as it washed up, bad publicity also kept the tourists away. [1980] 10 ENVIR. REP. (BNA) 1796. Over $100 million had been invested in the preceding five years to develop the South Padre Island resort area and attract tourists. As a result, the community is very dependent upon tourists. N.Y. Times, Aug. 7, 1979, at 11, col. 1.

The plaintiffs in these actions are relying on the FSIA as a basis for obtaining jurisdiction in U.S. courts over Pemex. They claim that Pemex is precluded from asserting sovereign immunity by section 1605(a)(2) of the FSIA, since the matter involves a “controversy between citizens of a state and an agency or instrumentality of a foreign state engaged in commercial activity outside the territory of the United States, and such activity has resulted in acts that have caused a direct effect in the United States.” In response to these actions, Pemex has filed a motion to dismiss the class actions for lack of jurisdiction under the FSIA. The parties to the litigation have since submitted memoranda on the question of sovereign immunity. As of late January 1981, however, the court had not yet heard oral argument on the issue of jurisdiction over Pemex under the FSIA.

III

ESTABLISHING JURISDICTION IN THE U.S. COURTS UNDER THE FSIA IN THE ACTIONS AGAINST PEMEX

This section of the Comment will discuss the application of the FSIA immunity provisions to the claims described above. As an initial matter, Pemex will be required to establish its status as an agency of a foreign state covered by the provisions of the FSIA, to bring into play the presumption of immunity created by the FSIA. Once it is determined that the FSIA is applicable, the court will have to decide whether Pemex’s actions fall within one of the commercial activities exceptions to the presumption of immunity and are sufficiently connected with the United States to establish jurisdiction under the FSIA.

Because it creates a presumption in favor of immunity and makes nonimmunity the exception, the FSIA appears to impose upon plain-
tiffs in FSIA cases the burden of proving foreign states' lack of immunity.\textsuperscript{100} The House report accompanying the FSIA makes clear, however, that the claim of sovereign immunity is an affirmative defense that must be specially pleaded by the foreign state.\textsuperscript{101} Thus, to obtain immunity under the FSIA, Pemex must establish its status as an agency of a foreign state and prove that those of its actions that provide the basis for plaintiffs' claims were public rather than commercial activities. When a foreign state produces prima facie evidence of immunity, the burden shifts to the plaintiff to produce evidence of nonimmunity.\textsuperscript{102} The ultimate burden of proving immunity, however, will rest with the foreign state.\textsuperscript{103}

\textbf{A. Applicability of the FSIA: Pemex's Status as a Foreign State}

The FSIA accords a presumption of immunity to foreign states not falling within the specific exceptions to immunity established in sections 1605-1607 of the FSIA.\textsuperscript{104} To qualify for this presumption of immunity, Pemex must first demonstrate that it is a "foreign state" within the meaning of the FSIA.\textsuperscript{105} The FSIA defines the term "foreign state" to include political subdivisions, agencies, and instrumentalities of foreign states.\textsuperscript{106} It defines "agency or instrumentality of a foreign state" as any entity

(1) which is a separate legal person, corporate or otherwise, and
(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.\textsuperscript{107}

Pemex falls within the statutory definition, since it is a separate legal person and an agency of the Mexican government under the laws


\textsuperscript{102} Id.

\textsuperscript{103} Id.


\textsuperscript{105} Section 1604 grants immunity only to "foreign states." See id.

\textsuperscript{106} Id. § 1603(a).

\textsuperscript{107} Id. § 1603(b).
of Mexico, and is neither a citizen of one of the United States as defined by the general diversity of citizenship jurisdictional statute nor created under the laws of a third country. Hence, as an agency of Mexico, Pemex is a "foreign state" within the meaning of the FSIA and will be entitled to immunity from suit if it does not come within the exceptions to sovereign immunity enumerated in the FSIA.

B. Commercial Activity Exception to Immunity Under Section 1605

The most important exception to foreign sovereign immunity established under the FSIA is the commercial activity exception contained in section 1605(a)(2). This provision denies immunity to foreign states in actions based on "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." The excep-


Petroleos Mexicanos, commonly known as Pemex, was organized by the Mexican government in 1938 following the expropriation of foreign-owned oil holdings by Mexican President Lazaro Cardenas. Gonzalez, Petroleos Mexicanos (Pemex), in ENCYCLOPEDIA OF LATIN AMERICA 474-75 (H. Delpar, ed. 1974); Wyggard, The Industrialization of Mexico, in LATIN AMERICA AND THE CARIBBEAN: A HANDBOOK 590 (C. Veliz, ed. 1968).

For a discussion of the "agency or instrumentality of a foreign state" provision, see HOUSE REPORT, supra note 8, at 15, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6613-14. See also text accompanying notes 104-110, supra.

Pemex has been recognized as an instrumentality of the Republic of Mexico by the U.S. courts in cases prior to FSIA. See, e.g., F.W. Stone Eng'r Co. v. Petroleos Mexicanos, 352 Pa. 12, 42 A.2d 57 (1945) (citing a letter from the U.S. Attorney General advising the court that the U.S. government considers Pemex an instrumentality of Mexico). See also D'Angelo v. Petroleos Mexicanos, 422 F. Supp. 1280 (D. Del. 1976), aff'd, 564 F.2d 89 (3d Cir. 1977).

109. 28 U.S.C. 1332 (1976). Subsection (c) of section 1332 provides that "a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business," id. § 1332(c). Subsection (d) defines "States" to include "the Territories, the District of Columbia, and the Commonwealth of Puerto Rico." Id. § 1332(d).


112. 28 U.S.C. § 1605(a)(2) (1979). For a description of the other exceptions to sovereign immunity contained in section 1605 and section 1607 of the FSIA, see note 55 supra.
tion to sovereign immunity created by clause three of section 1605(a)(2) would be the appropriate basis for establishing jurisdiction in a U.S. court over Pemex, since the claims against Pemex are based on the company's oil-drilling operations, which were conducted on the Mexican continental shelf outside of U.S. waters but caused injury to property owners, industry, and commercial and other interests within the United States.

The application of clause three of the section 1605(a)(2) commercial activity exception to preclude Pemex from asserting sovereign immunity will depend on two factors. First, the court will have to determine whether Pemex's activities were "commercial" within the meaning of the FSIA. If the court finds Pemex did engage in commercial activities, it must then determine whether those activities are sufficiently connected with the United States to warrant the assumption of jurisdiction.

I. Commercial Activity Requirement

The FSIA alleviates some of the confusion the courts experienced in formulating a definition of commercial activity. Section 1603(d) of the FSIA provides that "'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." Thus, the House report stresses, for example, the irrelevance of an intention to use for public purposes goods or services procured through a contract, emphasizing that it is instead the essentially commercial na-

113. See note 73 supra.
114. See notes 77-94 supra and accompanying text.
115. See notes 41-46 supra.
116. 28 U.S.C. § 1603(d) (1979). It should be noted that the political and public act categories used in Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965), see note 46 supra, and cases relying on it are now of limited use in determining whether a foreign state is entitled to jurisdictional immunity. For example, the nature test adopted in the FSIA, see text accompanying notes 115-120 infra, would include some of the activities excluded under the classification scheme set forth in Victory Transport, such as contracts to purchase supplies for foreign armed forces, commercial contracts by foreign diplomats in the United States, or public loans made to foreign states. Hence, Victory Transport and its progeny should no longer be relied upon as precedent in sovereign immunity cases, except to the extent their distinctions are in line with those of the FSIA. Note that the House report states that the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State Courts in the United States" (emphasis added). House Report, supra note 8, at 12, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6610. See Letelier v. Republic of Chile, 488 F. Supp. 665, 672 n.6 (D.D.C. 1980) (case law on subject of sovereign immunity analyzing distinctions between commercial and public acts persuasive only to the extent it conforms with exceptions to immunity established in FSIA). Cf. von Mehren, supra note 22, at 53.
ture of the contract that would determine nonimmunity.117

Commercial activity, as described in the legislative history, includes a wide range of conduct, from "the carrying on of a commercial enterprise" to a "single contract" provided the latter has the same character as a contract that could be made by private parties.118 If a foreign state is engaged in an activity that "is customarily carried on for profit," the House report states, "its commercial nature [may] readily be assumed."119 Simply stated, the appropriate inquiry in determining whether a course of conduct is commercial is whether the activity is one that "private persons normally perform."120

Pemex's oil explorations in the Bay of Campeche were a regular part of its business as a commercial oil producer. Its oil-drilling activities are the same as those currently conducted by private oil companies as part of their normal operations.121 In fact, most companies engaged in the production and commercial marketing of petroleum are privately-owned enterprises.122 Moreover, the House report specifically states that the phrase "regular course of commercial conduct" includes the carrying on of a commercial enterprise "such as a mineral extraction company."123 Since Pemex's activities thus are of a kind customarily carried on for profit by private businesses, the commercial nature of its operation "can readily be assumed."124

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119. Id. at 16, U.S. CODE CONG. & AD. NEWS at 6615. The House report proceeds to give examples of activities that would be embraced by the commercial-activities exception in the FSIA, including a "foreign government's sale of a service or product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation." Id.
120. See id. at 14, U.S. CODE CONG. & AD. NEWS at 6613. von Mehren writes that "the Immunities Act will be properly interpreted if the courts hold that any act which can be done by an individual is juridically private and, when that act is done by a state, 'commercial'". von Mehren, supra note 22, at 54.
121. Sedco describes Pemex as a "quasi-public, integrated oil and gas company which engages in the same full range of commercial activities carried on in this and most other countries by private industry: the exploration for and production of oil and gas; the transportation of oil and gas to Pemex-owned processing plants and refineries; the processing and refining of natural gas and petroleum; and finally, the marketing and sale of natural gas, gasoline, and their by-products to ultimate commercial and residential users." Sedco Memorandum, supra note 110, at 4. Accord, R. MANCKE, MEXICAN OIL AND NATURAL GAS 4-6, 61-62, 76-91 (1979); E. WILLIAMS, THE REBIRTH OF THE MEXICAN PETROLEUM INDUSTRY 22-36, 41-54 (1979).
122. [1978-1979] OIL & GAS INT'L Y.B. (Financial Times); but see L. TURNER, OIL COMPANIES IN THE INTERNATIONAL SYSTEM 15-16, 200-22 (1978) on the increasing number of state-owned oil companies.
124. Id. at 16, U.S. CODE CONG. & AD. NEWS at 6615.
The exercise of jurisdiction by a U.S. court over Pemex in a case involving its commercial oil-drilling operations would be consonant with one of the primary purposes of the FSIA—"to assure that American citizens are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions or who otherwise act as a private party would." When a foreign state such as Mexico, through its wholly owned agencies or instrumentalities, enters the marketplace or otherwise acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of the agreements which it may breach or the accidents which it may cause. The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties.

On the other hand, to avoid extending their own jurisdiction beyond the limits contemplated by Congress, and inserting themselves into an area that because of its significant foreign policy implications traditionally has been left to the executive branch, U.S. courts should be circumspect in applying the FSIA test for commercial activity. In a recent antitrust action against members of the Organization of Petroleum Exporting Countries, the U.S. District Court for the Central District of California noted that in determining whether a particular act qualified as a commercial activity, courts "should be guided by the legislative intent of the FSIA, to keep our courts away from those areas that may touch very closely upon the sensitive nerves of foreign countries." The court stressed that "‘commercial activity’ should be defined narrowly," and consequently held that the Organization's activities in setting oil prices were public rather than commercial in nature.

Even under a narrow construction of the term, however, Pemex's oil-drilling operations in the Bay of Campeche are clearly commercial. The application of the FSIA definition of commercial activities here requires no straining of the nature test nor does it undermine the legis-

126. Id. at 27.
128. Id. at 567.
129. Id. The court stated that the OPEC countries were not engaging in a commercial activity when they fixed prices and otherwise exerted general control over crude oil production. It noted that when a sovereign state establishes the terms and conditions for removal of natural resources it is performing a regulatory and governmental function. The court distinguished between these governments' sovereign and proprietary activities. Id. at 568-69 n.14. See also Carl, Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice, 33 Sw. L.J. 1009, 1035 (1979).
2. Causing a Direct Effect in the United States

The second and more problematic step in applying the third clause of section 1605(a)(2) to the Pemex cases will be to determine whether Pemex's activities have a sufficient jurisdictional nexus with the United States. The legislative history of the FSIA does not adequately clarify what will be considered a sufficient connection between the commercial activity of the foreign state and the United States to authorize assumption of personal jurisdiction over the foreign state in U.S. courts. The House report on the FSIA refers to three separate sources of law containing standards that might govern personal jurisdiction under section 1605(a)(2). First, in its analysis of the third clause of section 1605(a)(2), the report refers to section 18 of the Restatement (Second) of United States Foreign Relations Law as setting forth the principles for an exercise of jurisdiction under that clause. The report also cites the leading cases defining the "minimum contacts" requirement for the exercise of personal jurisdiction by courts in one state over citizens of other states within the United States. Finally, the report states that the long-arm statute created by section 1330 of the FSIA, which establishes jurisdiction in the district courts over foreign states whose activities preclude them from obtaining immunity under section 1605, is patterned after a long-arm statute previously enacted by Congress for the District of Columbia.

The jurisdictional standards differ among each of the sources of law referred to in the House report—the Foreign Relations Restatement provision, the case law governing federal constitutional limits on jurisdiction, and the District of Columbia long-arm statute. Yet, in the House report, Congress did not expressly recognize these differences nor indicate which source of law will govern should the application of each produce varying results in a particular case. This section of the

130. Pemex, however, argues that its drilling of the Ixtoc I well was a noncommercial activity. It maintains that its actions "in exercising Mexico's sovereign control over its hydrocarbon resources and planning and supervising the conduct of the exploratory activities related to those resources are distinctly sovereign in nature." Pemex Memorandum, supra note 108, at 18. Pemex relies upon OPEC in support of its position. Pemex Memorandum, supra, at 21-23. For the other parties' response, see, e.g., Sedco Memorandum, supra note 110, at 9-19.


Comment will discuss the application of the three standards to the Pemex fact situation. It will first consider the Restatement provision, which allows the broadest exercise of jurisdiction, and then analyze the more substantial limits imposed by the federal jurisdictional case law and the D.C. statute.

As noted earlier, the FSIA, by adopting the principle of restrictive immunity with respect to foreign states sued in U.S. courts, limits the role of the State Department and expands the jurisdiction of federal and state courts. Thus, Congress, in enacting the FSIA, shifted power and responsibility over immunity determinations from the executive to the judicial branch. While it is clear that Congress intended to cause this shift of power and to change the prior judicial practice of deferring to executive branch decisions regarding immunity, courts nevertheless should not ignore considerations of separation of powers in determining the extent of their jurisdiction under the FSIA. In the absence of a clear congressional statement delimiting the scope of their jurisdiction over foreign states, the courts should interpret the FSIA narrowly so as not to expand their own role in resolving controversies involving foreign governments at the expense of the executive branch. By applying the most stringent of the standards suggested by the House report for the jurisdictional nexus requirement of section 1605(a)(2), the courts, without abdicating the responsibility conferred on them by Congress in enacting the FSIA, can minimize the likelihood of adverse foreign relations consequences resulting from their immunity determinations and thus avoid interfering with executive branch responsibility for foreign policy.

a. Section 18 of the Restatement (Second) of United States Foreign Relations Law

The House report states that the direct effect test of section 1605(a)(2) embraces commercial conduct outside the United States that would subject foreign defendants to the jurisdiction of U.S. courts consistent with the principles set forth in section 18 of the Restatement (Second) of United States Foreign Relations Law. That section, which establishes requirements for exercising jurisdiction over claims


136. The American Bar Association's Section of International Law is forming an Ad Hoc Committee on Revisions to the Foreign Sovereign Immunities Act. SECTION OF INTERNATIONAL LAW, AMERICAN BAR ASSOCIATION, INT'L L. NEWS 2-3 (Fall 1980).

137. For a discussion of the standards embodied in the Restatement, case law, and D.C. statute, see text accompanying notes 138-238 infra. The section concludes that the standard embodied in the D.C. statute is most stringent. See text accompanying notes 208-218 infra.

based on conduct occurring outside the forum country but “caus[ing] an effect within its territory,” provides that there is jurisdiction where “(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. . . .”

If section 18, clause (a) of the Restatement is the standard by which jurisdiction is tested, the plaintiffs in the Pemex litigation will have to show that the oil spill and the injury it caused to persons and property in Texas is a generally recognized tort. The comment to the Restatement notes that transboundary pollution is generally recognized as grounds for a tort action. Illustration six of the comment cites the following example:

X operates a refinery in State A near the border of State B that emits fumes generally known to be injurious to plant life. The fumes pollute the air in B, and Y’s trees in B stop bearing fruit as a result. B has jurisdiction to prescribe a civil remedy for damages.

This example of a transnational pollution injury is based on the United States-Canadian Trail Smelter Arbitration, in which Canada was held responsible for injuries to persons and property in Washington State caused by air pollution from a British Columbia smelting plant. In his testimony during the 1973 House hearings on the FSIA, Charles Brower, then the State Department’s Legal Adviser, also noted the applicability of the direct-effects test of section 1605(a)(2) of the FSIA to transboundary pollution cases. He cited as an example of the reach of clause three of section 1605(a)(2) “extraterritorial conduct having

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139. Restatement, supra note 22, at § 18.
140. Id. § 18(a).
141. Id., Reporters’ Note 6. Such assertion of extraterritorial jurisdiction is in accord with principles of international law. See The S.S. Lotus (France v. Turkey), [1927] P.C.I.J., ser. A, No. 10, cited in Restatement, supra note 22, at § 18, Reporters’ Note 1, in which the Permanent Court of International Justice held that the effect in a state’s territory of conduct occurring outside it provides that state with a valid basis of jurisdiction under international law.
142. Restatement, supra, note 22, at § 18, Reporters’ Note 6.
144. Immunities of Foreign States: Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 10 (1973). The FSIA of 1976 is essentially the same bill as the 1973 legislation which
effects within the United States such as an action for pollution of the air by a factory operated commercially by a foreign state.”

Section 18, clause (b) states an alternative basis for the exercise of extraterritorial jurisdiction. That clause provides that a state may exercise jurisdiction where there is conduct outside the territory that causes an effect inside the territory if:

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

Although the example given in the comment to the Restatement indicates that section 18, clause (a) would provide a basis for obtaining jurisdiction over Pemex, a recent case interpreting clause three of section 1605(a)(2) of the FSIA states that the “direct effect” language in that section is derived from section 18, clause (b) of the Restatement provision. Under this standard, the Pemex plaintiffs would have to show that the pollution damage to the Texas coast is sufficiently “substantial” and that such damage was a “direct and foreseeable result” of Pemex’s conduct. It seems clear that the plaintiffs could meet this

failed to obtain passage in the House. The current § 1605(a)(2) is identical to then § 1605(2) of the 93d Congress bill.

145. Id. at 20.
146. Restatement, supra note 22, at § 18(b).
147. Id.
148. Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056 (E.D.N.Y. 1979). The court stated that while “[i]t is possible . . . to argue that ‘direct effect’ is derived from the less restrictive concept of ‘effect’ as it appears in section 18(a) of the Restatement . . . [t]he use by Congress of the adjective ‘direct’ before the ‘effect’ points . . . to section 18(b) which is itself more restrictive.” Id. at 1063. The court concluded that “‘direct effect refers to an effect which is both substantial and the direct and foreseeable result of conduct outside the jurisdiction.” Id. Accord, Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1297-98 (S.D.N.Y. 1980).
149. This determination as to whether the pollution damage is “substantial” and “direct and foreseeable” will force the plaintiffs to present the merits of their action in the context of trying to establish jurisdiction. However, the courts ask for only a prima facie showing at the jurisdictional stage to avoid precipitating too extensive an investigation of the merits at this point in the litigation. 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1068, at 250 (1969).

b. Minimum contacts

Under the tests contained in both clauses (a) and (b) of section 18 of the Restatement, it appears that the court can assert jurisdiction over Pemex based on the oil spill itself. According to the House report, however, the FSIA, and thus section 1605(a)(2), embodies the requirements of minimum jurisdictional contacts and adequate notice set forth in *International Shoe Co. v. Washington* and *McGee v. International Life Insurance Co.* The Pemex fact situation must therefore be analyzed in light of *International Shoe* and *McGee* to determine whether these cases pose a stricter jurisdictional standard than the Restatement provision.

In *International Shoe*, the U.S. Supreme Court held that the due process clause requires "that in order to subject a defendant to a judgment in personam, if he 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.'" Thus, before a court may assume jurisdiction over a defendant, *International Shoe* requires that it determine whether it is fair and reasonable in view of all the relevant facts and circumstances of the case to require the defendant to come into the forum state and defend the action. Courts should focus especially on the extent to which defendants have carried on business activities within the forum state, on the quality and nature of these activities, and on whether the obligation sued upon arose out of these activities.
In *McGee*, the Court made clear that in personam jurisdiction may be allowed on the basis of very limited contacts with the forum state.156 *McGee* involved a challenge to the jurisdiction of a California court over a Texas life insurance company in an action by the beneficiaries of a life insurance policy.157 The decedent, a California resident, had purchased the policy by mail and regularly mailed his premiums to the Texas company from California.158 The Supreme Court upheld jurisdiction even though the insurers had no other contacts with California.159 The Court stated that it was sufficient for purposes of due process that the suit was based on a contract that had a substantial connection with California, noting that the state had a strong interest in providing a forum for residents seeking legal redress against nonresident insurers.160 The Court deemphasized the inconvenience to the defendant insurance company.161

After *International Shoe* and *McGee*, courts generally upheld jurisdiction whenever plaintiffs showed that defendants' conduct outside the forum state resulted in foreseeable injurious consequences within the forum state.162 In the leading case of *Gray v. American Radiator & Standard Sanitary Corp.*163 the Illinois Supreme Court upheld jurisdiction over an out-of-state manufacturer whose product injured an Illinois plaintiff. The product in question was brought into the forum state by an independent out-of-state distributor. Moreover, the defendant manufacturer conducted no business activity in Illinois.164 The court found in personam jurisdiction appropriate even though the only contact with the forum state was the injurious consequence of an act or omission committed elsewhere.165

1974) for guidelines a court should consider in light of *International Shoe*: "(1) the nature and quality of the contacts with the forum state; (2) the quantity of contacts with the forum state; (3) the relation of the cause of action to the forum state; (4) the interest of the forum state in providing a forum for its residents; [and] (5) the convenience of the parties." *Id.* at 259. *See also* 2 Moore's *Federal Practice* ¶ 4.25[5] (2d ed. 1980).

156. *See* C. Wright & A. Miller, *supra* note 149, § 1067, at 237.
158. *Id.* at 221-22.
159. *Id.* at 223.
160. *Id.*
161. *Id.* at 224.
162. *See*, e.g., Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137, 1144 (7th Cir. 1975); Jones Enterprises, Inc. v. Atlas Serv. Corp., 442 F.2d 1136, 1139-40 (9th Cir. 1971); Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F.2d 231, 234-55 (9th Cir. 1969); Kroger Co. v. Dornbos, 408 F.2d 813 (6th Cir. 1969). These cases involve federal courts applying state long-arm statutes. *See generally* C. Wright & A. Miller, *supra* note 149, § 1069, at 257-61. Special problems arising when plaintiffs seek to acquire jurisdiction over corporations are also discussed in *id.*, at 251-57, 261-62.
164. 22 Ill. 2d at 435-36, 176 N.E.2d at 762-63.
The U.S. Supreme Court has indicated that it would uphold a similar assumption of jurisdiction over a nonresident polluter where the only contact with the forum state was the harmful effect of the defendant's activity. In *Ohio v. Wyandotte Chemicals Corp.*, the State of Ohio sought jurisdiction over two out-of-state corporations to enjoin their introduction of mercury into Lake Erie. In declining to exercise such original jurisdiction, Justice Harlan stated in dictum:

The courts of Ohio, under modern principles of the scope of subject matter and *in personam* jurisdiction, have a claim as compelling as any that can be made out for this Court to exercise jurisdiction to adjudicate the instant controversy. . . . In essence, the State has charged Dow Canada and Wyandotte with the commission of acts, albeit beyond Ohio's territorial boundaries, that have produced and, it is said, continue to produce disastrous effects within Ohio's own domain. While this Court, and doubtless Canadian courts, if called upon to assess the validity of any decree rendered against either Dow Canada or Wyandotte, would be alert to ascertain whether the judgment rested upon an even-handed application of justice, it is unlikely that we would totally deny Ohio's competence to act if the allegations made here are proved true.

In the more recent case of *Illinois v. City of Milwaukee*, the Sev-
enth Circuit upheld the jurisdiction of Illinois courts over the city of Milwaukee and its Sewerage Commissions in an action brought by the State of Illinois seeking to enjoin these defendants from discharging raw and inadequately treated sewage into Lake Michigan. The defendants contended that their contacts with Illinois were insufficient to meet the requirements of International Shoe. The court cited Ohio v. Wyandotte Chemicals Corp. in support of its jurisdictional ruling, and stated that:

> [e]ach year defendants dump into Lake Michigan millions of gallons of pathogen-containing sewage, which the district court found is sometimes carried into Illinois waters and presents a substantial threat of harm to Illinois residents. Under such circumstances, we do not think it unfair or unreasonable to require the defendants to defend their conduct in . . . Illinois.

Were the courts to consider Wyandotte Chemicals and Illinois v. Milwaukee alone as the standard, the plaintiffs in the Pemex litigation could easily obtain jurisdiction since these cases allow the assumption of jurisdiction when the injury suffered in the forum state foreseeably results from out-of-state pollution. Since the Pemex cases involve a foreign polluter, however, jurisdiction in these actions would probably require a fairly strong showing of foreseeability. Courts considering the reach of U.S. securities laws have ruled that in litigation involving foreign defendants the McGee standard of foreseeability should be applied with some caution. The plaintiffs in these cases have therefore been required to meet a higher level of foreseeability to minimize international friction.

This conservative approach is also consistent with a recent case concerning the extraterritorial application of U.S. laws. In Timberlane Lumber Co. v. Bank of America, a case involving application of U.S. antitrust laws to foreign defendants, and to activities occurring for the most part in Honduras, the Court of Appeals for the Ninth Circuit ruled that the courts should determine whether jurisdiction should be...
asserted as "a matter of international comity and fairness."\textsuperscript{177} The extraterritorial application of U.S. laws

is understandably a matter of concern for the other countries involved. Those nations have sometimes resented and protested, as excessive intrusion into their own spheres, broad assertion of authority by American courts. . . . [I]t is evident that at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction.\textsuperscript{178}

The court recommended that U.S. courts carefully consider whether foreign defendants' connections with the United States are sufficiently substantial to justify assertion of extraterritorial authority.\textsuperscript{179}

The plaintiffs in the Pemex litigation could probably meet the stringent requirement of foreseeability established in the securities law cases.\textsuperscript{180} A more rigorous foreseeability standard may no longer be enough to satisfy the requirements of due process, however. The recent case of \textit{World-Wide Volkswagen v. Woodson}\textsuperscript{181} seems to indicate that the Supreme Court now requires something more than foreseeability alone before jurisdiction may be asserted. The decision casts some doubt on the continued viability of the line of cases outlined above that hold that tortious conduct outside the forum state that results in foreseeable injurious consequences within the forum state satisfies the minimum contacts test of \textit{International Shoe}.

In \textit{World-Wide Volkswagen}, the plaintiffs, who had purchased an automobile from a retailer in New York, were injured in a collision while passing through Oklahoma. They brought an action in Oklahoma against the German manufacturer, the U.S. importer, the regional distributor in New York, and the retail dealer, seeking damages under products liability theories for injuries allegedly caused by the automobile's defective design.\textsuperscript{182} The distributor and the retailer entered special appearances to challenge the Oklahoma court's assumption of jurisdiction.\textsuperscript{183} The U.S. Supreme Court held that the contacts between these defendants and the forum state did not meet the

\textsuperscript{177} \textit{Id.} at 613.
\textsuperscript{178} \textit{Id.} at 609.
\textsuperscript{180} See notes 73-94 & 149 \textit{supra} and accompanying text.
\textsuperscript{181} 444 U.S. 286 (1980).
\textsuperscript{182} \textit{Id.} at 288.
\textsuperscript{183} The U.S. importer had also entered a special appearance, but did not seek review in the Oklahoma Supreme Court or the United States Supreme Court. The U.S. importer and the foreign manufacturer remained defendants in the litigation pending before the Oklahoma district court. \textit{Id.} at 288 n.3.
The Court rejected the argument that the mobility of automobiles made it foreseeable that plaintiffs' automobile would cause injury in Oklahoma. The Court stated further that "foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." While it declared that foreseeability is not totally irrelevant, the Court stressed that:

- the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.

The Court noted that "the forum state's interest in adjudicating the dispute," and "the plaintiff's interest in obtaining convenient and effective relief," continue to be relevant in determining whether it is reasonable to assert jurisdiction over a defendant. The Court cautioned, however, that like foreseeability, notions of convenience and efficacy of relief would not be decisive. Instead, the Court in World-Wide Volkswagen focused on whether there were any of the "affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction." It found a total absence of such affiliating circumstances in the case under consideration, noting that the defendants did not carry on any activity in Oklahoma. The defendants sold no automobiles and performed no services there, solicited no business in the State, and did not regularly sell to Oklahoma residents or otherwise serve the Oklahoma market. The Court found the isolated occurrence of the accident involving the automobile "far too attenuated a contact" to warrant the assumption of personal jurisdiction over the defendants.

The World-Wide Volkswagen decision arguably is susceptible to two interpretations. First, it can be seen as holding that foreseeable injury within the forum state is an insufficient basis for jurisdiction,
Despite the presence of the other relevant factors such as the forum state's strong interest in the litigation, its convenient location for the litigation, and the minimal inconvenience to the defendant. The portion of the opinion discussing "affiliating circumstances" could be construed as holding that contacts other than the injury itself are constitutionally mandated. If this is the meaning of World-Wide Volkswagen, then Gray v. American Radiator & Standard Sanitary Corp., Ohio v. Wyandotte Chemicals Corp., and Illinois v. City of Milwaukee would now be questionable precedent. Alternatively, World-Wide Volkswagen may be read to simply demand a greater degree of foreseeability than previously required to satisfy the minimum contacts standard. The Court's statement that a defendant should be able to "reasonably anticipate being haled into court" in the forum state supports the inference that the Court was holding only that a high degree of foreseeability is required for assertion of in personam jurisdiction.

Under the case law prior to World-Wide Volkswagen, the plaintiffs in the Pemex litigation could have met due process requirements of minimum contacts by showing that Pemex reasonably could have foreseen the injurious consequences in Texas caused by its oil spill. More importantly, the plaintiffs should be able to obtain jurisdiction.

198. 599 F.2d 151 (7th Cir. 1979), cert. granted, 445 U.S. 926 (1980).
199. In fact, Mr. Justice Brennan in his dissenting opinion in World-Wide Volkswagen found the case under consideration to be similar to Wyandotte Chemicals. 444 U.S. at 306. He observed that "one might argue that it was more predictable that the pollutant would reach Ohio than that one of petitioners' cars would reach Oklahoma. The Court's analysis, however, excludes jurisdiction in a contiguous State such as Pennsylvania as surely as in more distant States such as Oklahoma." Id. n.10. Mr. Justice White did not mention Wyandotte Chemicals in his majority opinion.
200. The second interpretation of World-Wide Volkswagen is also supported by two recent decisions relying upon that case, which have upheld jurisdiction over foreign or out-of-state defendants primarily on foreseeability grounds. Oswalt v. Scripto, Inc., 616 F.2d 191 (5th Cir. 1980); Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902 (1st Cir. 1980). In Oswalt, a products liability case involving a defective cigarette lighter, the Court of Appeals for the Fifth Circuit held that a Japanese manufacturer who should have known or could expect that its product would reach the forum state was subject to in personam jurisdiction under World-Wide Volkswagen. 616 F.2d at 198-209. The Court stated that although the manufacturer did not conduct any business in the forum state of Texas except to make certain arrangements with its U.S. distributor, it had every reason to believe its product would be sold in a nationwide market and reasonably could have anticipated being haled into court in Texas. Id. at 200. Similarly, in Escude Cruz the court indicated that a defendant is amenable to jurisdiction under World-Wide Volkswagen when "he ought reasonably to foresee that his activities may have potential consequences in that state that would require him to defend an action there . . . ." 619 F.2d at 904. The court went on to state that "the inherent foreseeability of consequences is one of the keystones of personal jurisdiction." Id. at 905.
201. 444 U.S. at 297 (emphasis added).
202. See notes 73-99 & 149 supra and accompanying text.
based on the pollution injury under *World-Wide Volkswagen* as well, if the holding in that case is construed as requiring only a greater degree of foreseeability than did prior case law. As noted earlier, cases considering the reach of U.S. securities laws had ruled prior to *World-Wide Volkswagen* that jurisdiction in suits against foreign defendants requires a high degree of foreseeability.\(^{203}\) Even given a standard requiring more than foreseeability, the extensive damage to Texas interests caused by the Ixtoc I runaway well should provide sufficiently substantial contacts to meet the *International Shoe* and *World-Wide Volkswagen* standards. In addition, the other factors mentioned in *World-Wide Volkswagen* as relevant to the reasonableness of assuming in personam jurisdiction\(^{204}\) are present in the Pemex litigation. A federal district court sitting in Texas has a strong interest in providing a forum for Texas property owners and businesses. It would also be highly inconvenient to force such a large number of Texas residents to bring suit against Pemex in Mexico.

If the *World-Wide Volkswagen* decision is interpreted as not allowing the assumption of jurisdiction based on a reasonably foreseeable injury within the forum state, however, then the plaintiffs in the Pemex litigation would have to allege some other “affiliating circumstances” within the meaning of *World-Wide Volkswagen*.\(^{205}\) The latter requirement probably would pose no significant impediment to obtaining jurisdiction since Pemex has numerous contacts with Texas besides the pollution damage. The Ixtoc I oil-drilling platform was leased from a Texas company.\(^{206}\) This business activity in the forum state is connected with the cause of action for oil-spill pollution. In addition, Pemex maintains offices in Houston, delivers petroleum products to Texas in its own vessels, makes purchases in Texas, and sells natural gas at the Texas border to numerous companies who transport the gas in the southwestern United States.\(^{207}\) These contacts with the forum state should qualify as sufficient “affiliating circumstances.”

\(^{203}\) See notes 174-175 *supra* and accompanying text.

\(^{204}\) 444 U.S. at 292. See notes 188-190 *supra* and accompanying text.

\(^{205}\) 444 U.S. at 295.

\(^{206}\) Comment, *supra* note 8, at 10,218 (1979). Citing the lease of the rig from Sedco, a Texas corporation, as a contact with the forum state would attribute to Pemex the contractual relationship in Texas between Sedco and Permargo, since it was Permargo who leased the drilling equipment from Sedco, *id*. Sedco asserts that Pemex was a party to the Permargo-Sedco contract under an implied contract theory and under third party beneficiary concepts. Sedco Third-Party Complaint, *supra* note 88. For example, Sedco maintains that Pemex took part in meetings in Texas leading to the formulation of the contract for the Sedco 135 drilling rig. *Id.* at 10; Sedco Memorandum, *supra* note 110, at 41. Pemex denies any such contractual relationship with Sedco. See Memorandum of Third-Party Defendant Petroleos Mexicanos in Support of Motion to Dismiss Third-Party Complaint of Sedco, Inc., at 2-4, In the Matter of Sedco., Inc., No. H-79-1880 (S.D. Tex., filed Sept. 13, 1979).

\(^{207}\) Sedco Memorandum, *supra* note 110, at 43-44.
c. The District of Columbia long-arm statute

The plaintiffs in the Pemex litigation should be able to obtain jurisdiction over Pemex if the court applies either the Restatement or minimum contacts standards. As already noted, however, the legislative history of the FSIA indicates that a third source of law, which provides a more restrictive jurisdictional test, may be the appropriate standard to apply.\textsuperscript{208} The House report states that the FSIA is "patterned after the long-arm statute that Congress enacted for the District of Columbia."\textsuperscript{209} The D.C. statute does not permit the exercise of jurisdiction to the full extent allowed under the due process clause but is instead a long-arm statute of only "moderate reach."\textsuperscript{210} Although application of the D.C. standard to the Pemex fact situation should still result in a finding of jurisdiction, use of the standard could pose significant problems in future transboundary pollution cases if the injured parties are saddled with a defendant with fewer additional contacts in the forum state than those Pemex has.

The D.C. statute provides in relevant part:

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 arising from the person's—

1. transacting any business in the District of Columbia;
2. causing tortious injury in the District of Columbia by an act or omission in the District of Columbia; [or]

... 

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. ... \textsuperscript{211}

In a leading case interpreting the statute, the Court of Appeals for the District of Columbia Circuit noted the statute's limiting purpose. The court emphasized that when a legislature has enacted a jurisdictional statute that does not go to the limits of due process, the courts "may not go further and assert jurisdiction over persons not embraced within that legislation."\textsuperscript{212} The D.C. long-arm statute "draws back from the limits set by expansive opinions such as \textit{Gray} ... [and] requires, in addition to conduct outside the District which causes injury within the


\textsuperscript{209} \textit{Id.} (citing District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, § 132(a), 84 Stat. 549 (1970)).

\textsuperscript{210} Margoles v. Johns, 483 F.2d 1212, 1214 (D.C. Cir. 1973).

\textsuperscript{211} D.C. Code Ann. § 13-423(a) (1973) (emphasis added).

\textsuperscript{212} 483 F.2d at 1220 (quoting Beaty v. M.S. Steel Co., 401 F.2d 157, 161 (4th Cir. 1968), cert. denied, 393 U.S. 1049 (1969)).
District, some other reasonable connection between the District and the defendant."^{213}

The jurisdictional standards of the D.C. statute are stricter than those set forth in *International Shoe*, *McGee*, and *World-Wide Volkswagen*. Even if courts construe *World-Wide Volkswagen* to require additional "affiliating circumstances" rather than only a reasonably foreseeable injury within the forum state,^{214} the test for such additional contacts under the D.C. statute appears to be considerably more rigorous. By its language, the statute requires contacts that are "regular and persistent." Cases construing the D.C. statute have emphasized that Congressional "use of 'persistent' and 'regularly' to describe the type of contact contemplated indicates that Congress was more concerned with a continuing contact than with the impact or substance of a single contact. . . . "[T]he minimal contacts with the District that are required should at least be continuing in nature."^{215} It is important to note, however, that the additional contacts required by the statute need not bear a relation to the tort being sued upon.^{216} According to the cases, it is sufficient for purposes of the statute that the defendant was engaged in any regular business activities or other persistent course of conduct in the District of Columbia.^{217} Similarly, jurisdiction is appropriate if the defendant was otherwise deriving substantial income from goods


214. See notes 199-201 *supra* and accompanying text.


217. *Id.*
sold or services rendered in the District, whether or not such income has a relationship to the act or failure to act that caused the injury to the plaintiff.\textsuperscript{218}

If the standard developed in cases construing the D.C. long-arm statute is applied to the Pemex litigation under the FSIA, then a greater showing of contacts between Pemex and Texas than mere injury from the oil spill will be necessary. The plaintiffs will have to produce evidence of Pemex's business activities in Texas, or evidence that Pemex was deriving substantial income from the sale of oil, natural gas, or other petroleum products in Texas.\textsuperscript{219} As noted above, the Ixtoc I oil-drilling platform was leased from Sedco, a Texas corporation. In addition, Pemex maintains offices in Houston, delivers products to Texas, makes purchases in that state, and sells gas at the Texas border to various companies who transport gas in the southwest.\textsuperscript{220} Thus, the plaintiffs in the Pemex litigation could satisfy the "regular" and "persistent" language of the statute. Absent such a showing, however, Pemex would be immune from suit in the state due to the lack of sufficient jurisdictional contacts if the court applies the standard derived from the D.C. statute.

The courts have not yet adequately resolved whether the D.C. statute is the appropriate standard to apply in interpreting the jurisdictional reach of clause three of section 1605(a)(2) of the FSIA.\textsuperscript{221} Courts construing section 1605(a)(2) have recognized the relationship between the FSIA and the D.C. statute, and have cited D.C. courts' decisions as precedent in their examination of a particular foreign state's contacts with the United States. For example, in \textit{East Europe Domestic International Sales Corp. v. Terra},\textsuperscript{222} the court relied on decisions by D.C. courts in determining that negotiations for a commercial contract conducted from Romania by a Romanian state-owned trading corporation provided an insufficient basis for in personam jurisdiction over that corporation.\textsuperscript{223} The court relied on these D.C. cases only to decide the

\textsuperscript{218} 617 F.2d at 825; 392 F. Supp. at 885.
\textsuperscript{219} \textit{See}, \textit{e.g.}, Founding Church of Scientology of Washington, D.C. v. Verlag, 536 F.2d 429, 432-33 (D.C. Cir. 1975), for a discussion of what the Court of Appeals for the D.C. Circuit considers "substantial income."
\textsuperscript{220} See notes 206-207 \textit{supra} and accompanying text.
threshold question of whether there had been a "direct effect" in the United States, however, and not whether, given such a direct effect, additional contacts within the meaning of the D.C. statute were required.\textsuperscript{224}

In \textit{Harris v. VAO Intourist, Moscow},\textsuperscript{225} which involved an action brought against two state-owned tourist services and the U.S.S.R. to recover damages for the alleged wrongful death of an American tourist in a Moscow hotel fire, the court considered at greater length the role of the D.C. statute in the proper application of clause three of section 1605(a)(2). The court noted that the legislative history of the FSIA "suggests that further guidance may be provided by the District of Columbia long-arm statute."\textsuperscript{226} It stated that "[i]n interpreting section 1605 . . . courts properly look to the interpretations given the District of Columbia long-arm provisions."\textsuperscript{227} The court pointed out that the D.C. statutory provision provides a strong analogy to the direct effect clause of section 1605(a)(2),\textsuperscript{228} and noted that the standard in the D.C. statute is more restrictive than those provided by the other sources of law cited in the legislative history of the FSIA.\textsuperscript{229} The \textit{Harris} court held only that the tortious activities outside this country must have a "substantial" impact in the United Sates, however, and did not address whether the additional contacts set forth in the D.C. statute would also be necessary.\textsuperscript{230} Having found that the tourist's death had no substantial impact in the United States, the court held that there was no jurisdiction under the direct effect clause of section 1605(a)(2) of the FSIA.\textsuperscript{231}

On the other hand, in \textit{Verlinden B.V. v. Bank of Nigeria},\textsuperscript{232} a suit for anticipatory breach of an irrevocable documentary letter of credit, the court refused to apply the D.C. statute, holding that it "is only a guide to interpreting the [FSIA], not a binding directive."\textsuperscript{233} The court noted "significant differences in language and effect between the District's statute and the [FSIA], which Congress, the author of both, could not have overlooked."\textsuperscript{234} In so holding, however, the court was ad-

\textsuperscript{224} \textsuperscript{225} \textsuperscript{226} \textsuperscript{227} \textsuperscript{228} \textsuperscript{229} \textsuperscript{230} \textsuperscript{231} \textsuperscript{232} \textsuperscript{233} \textsuperscript{234}
dressing the application of clause one of section 1605(a)(2), which applies to commercial activities carried on in the United States. When it considered whether the defendant bank's activities outside the United States passed the direct effect test under clause three of section 1605(a)(2), it did not pass on the applicability of the D.C. long-arm provision. The court in *Verlinden* held that the defendant's contacts with the United States were insufficient to meet any of the three commercial activity exceptions in section 1605(a)(2) and therefore dismissed the complaint for lack of jurisdiction under the FSIA.235

The *Harris* and *Verlinden* courts were reluctant to apply the D.C. statute because in those cases its application would have provided a broader basis for jurisdiction than that contemplated by the FSIA. In both cases, the courts noted that the D.C. statute's grant of jurisdiction under the theories of "doing business" or "transacting business" within the jurisdiction do not satisfy the requirements of the FSIA.236 In rejecting the more expansive parts of the D.C. statute, the *Harris* court emphasized that "due to the policy and language of the Immunities Act, the Act's bases of jurisdiction are less comprehensive than those found in the usual jurisdictional statutes of the states and District of Columbia."237 But, as noted above, when the *Harris* court considered the applicability of section 13-423(a)(4), which is a more restrictive approach to obtaining in personam jurisdiction, it was willing to use the D.C. provision in its analysis.238

This cautious handling of the question of requisite jurisdictional contacts indicates that if a court such as that in the *Harris* case were confronted with the specific problem at issue in this Comment, i.e. whether clause three of section 1605(a)(2) requires additional contacts aside from the tortious act having the direct effect within the jurisdiction, it may be inclined to decide in favor of incorporating the D.C. statute's stricter test into the direct effects clause of section 1605(a)(2).

**CONCLUSION**

The members of the Texas fishing industry, operators of tourist related businesses, property owners, and others who were injured by

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235. 488 F. Supp. at 1302.
236. *Id.* at 1295-96; 481 F. Supp. at 1059-61 ("Congress did not incorporate into the Immunities Act an in personam basis predicated upon presence, or as it is referred to in the District of Columbia Court Reform Act, an 'enduring relationship.' ”). 481 F. Supp. at 1059.
237. 481 F. Supp. at 1059.
238. *Id.* at 1064.
pollution from the Ixtoc I oil spill in Mexico’s Bay of Campeche should be able to obtain jurisdiction under the FSIA over Pemex, the owner and operator of the well. Pemex, a state-owned Mexican oil and gas corporation, probably will not be entitled to the presumption of immunity contained in section 1604 of the FSIA, since the facts of this case fit within the section 1605(a)(2) exception to sovereign immunity.

Pemex’s drilling operations in the Bay of Campeche were commercial, and the pollution from its oil well appears to have caused a direct effect in the United States within the meaning of section 18 of the Foreign Relations Law Restatement. In addition, the injury to Texas interests is sufficiently connected with the United States to satisfy the minimum contacts tests set forth in International Shoe, McGee, and World-Wide Volkswagen.

If the stringent standard of the D.C. statute is adopted, however, the court hearing the Pemex case may decline to assert jurisdiction unless the plaintiffs show that Pemex has engaged in regular business activities or some other persistent course of conduct in Texas. Although Pemex has these contacts, the stricter judicial interpretation of clause three of section 1605(a)(2) will not significantly enhance the ability of future plaintiffs injured by transboundary pollution to obtain jurisdiction over foreign state-owned polluters who do not have any contacts with the United States other than the injury caused by their pollution.

In light of congressional failure to outline clearly the scope of personal jurisdiction under the FSIA, the courts may view the D.C. statute as the most appropriate standard for obtaining jurisdiction over foreign states. Absent a clear statement from Congress, the policy considerations that have led to judicial restraint in cases involving extraterritorial application of U.S. laws also support a narrow definition of commercial activities and application of a stringent jurisdictional test in cases brought under the FSIA. The potential foreign policy repercussions of assuming jurisdiction over foreign states may sway U.S. courts to construe narrowly the FSIA’s exceptions to sovereign immunity by resolving the ambiguity in the legislative history of the FSIA in favor of the standard of the D.C. long-arm statute.