The Theory and Practice of the Foreign Sovereign Immunities Act: Untying the Gordian Knot

by
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Gérard Lacroix†

INTRODUCTION

The Foreign Sovereign Immunities Act1 [hereinafter FSIA or Act], a federal statute codifying the conditions under which foreign sovereign states may be sued, is celebrating its tenth anniversary.2 On balance, the FSIA has fulfilled its drafters’ primary objective: providing a judicial forum for resolving certain claims against foreign states.3 There is no doubt that the Act has been a great improvement over the state of the law which existed prior to its enactment.

Nonetheless, the Act is exceedingly complex in application. As one court has noted, “One would be hardpressed to exaggerate the difficulty of interpreting the [FSIA].”4 This is so initially because the doctrine of sovereign immunity is a compromise between competing interests: the forum state must weigh the advantages of providing redress for its citizens against the potentially adverse consequences that such suits may have on foreign relations. To complicate matters, the FSIA addresses a myriad of issues: subject matter and personal jurisdiction, service of process, immunity from suit and execution, prejudgment attachment, the right to jury trial, removal and venue.


The technical and practical problems created by such a comprehensive attempt to address many different issues are evident. First, the FSIA is essentially a jurisdictional statute. Since any exercise of Federal jurisdiction must comport with both due process and the Article III limitations on federal power, the FSIA encounters these delicate constitutional issues. Second, courts have experienced great difficulties in applying the Act consistently. The circuits have not applied it uniformly, and this discrepancy has led to unnecessary litigation even though one of the Act's stated purposes was to avoid this problem. Third, from the parties' standpoint, the tortuous drafting is not conducive to either judicial security or certainty. To use the cliché, the Act is a trap for the unwary.

The object of this Article is to provide a systematic guide to the theoretical and practical intricacies of the FSIA. The structure of the FSIA makes it futile to address only one of these types of problems to the exclusion of the other. To gain a proper understanding of the Act, therefore, both types of problems must be addressed concurrently. Accordingly, the discussion will focus on how courts have resolved the theoretical difficulties inherent in the Act, interpreted the Act, and applied it in the decade since its inception.

After briefly examining the provisions of the Act in Part I, Part II will deal primarily with the Act's theoretical problems and examine one court's proffered approach to resolving them.

Part III will then use the lessons learned in Part II to address the practical difficulties the federal courts have had in applying the Act. This discussion will focus on the six main exceptions to sovereign immunity which allow a litigant to bring an action against a foreign sovereign. Finally, general conclusions on how best to analyze and apply the FSIA's provisions will be drawn.

I

THE PROVISIONS OF THE FOREIGN SOVEREIGN IMMUNITIES ACT

In thirteen short sections, the drafters of the FSIA created a statute intended to be a comprehensive and exclusive statutory scheme for suing foreign sovereign defendants.

Section 1330 contains the jurisdictional requirements of the Act. Section 1330(a) grants subject matter jurisdiction to federal courts in non-jury civil trials where a foreign state is not entitled to immunity. The personal jurisdiction requirements contained in section 1330(b) are met almost entirely by the subject matter jurisdiction requirements. Simply put, where subject matter

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5. See infra note 123 and accompanying text.
jurisdiction exists, and process has been served according to the rules set out in § 1608, personal jurisdiction also exists.

Sections 1604, 1605, and 1607 codify the restrictive doctrine of sovereign immunity. First, § 1604 grants a blanket immunity from suit to foreign sovereigns, subject to certain exceptions. It is the operation of these exceptions that invokes the subject matter jurisdiction provisions of § 1330(a). Next, § 1605 provides for most of the immunity exceptions: (1) waiver of immunity by the foreign sovereign; (2) the "commercial activity exception"; (3) the expropriation of property exception; (4) the immovable property exception; (5) the non-commercial tort exception; and (6) an exception where suit is brought in admiralty to enforce maritime liens. Lastly, § 1607 withdraws immunity with respect to counterclaims.

Section 1603 defines the FSIA's important terms: "foreign state" and an "agency or instrumentality" thereof, the "United States", "commercial activity" and "commercial activity carried on in the United States."
Sections 1609, 1610, and 1611 codify the rules with respect to immunity of execution. Section 1609 extends a general immunity from execution subject to the exceptions set forth in section 1610 or 1611. Pursuant to § 1610(a), the property of a foreign state is not immune from execution in the following circumstances: if the foreign sovereign implicitly or explicitly waived immunity from execution; if the property to be levied on was used in the commercial activity from which the claim arose; in an expropriation claim, if the property is related to the expropriation; if the judgment establishes rights in property acquired by succession or gift or relates to immovable property; or if the property is an insurance policy. Unless the foreign state has explicitly waived such immunity or the execution is to satisfy an anticipated judgment against it and not to confer jurisdiction, § 1610(d) prohibits pre-judgment attachments against its property. Finally, § 1611 removes certain types of property from the § 1610 exception to immunity from execution including property held by a central bank for its own account, and property either of a military character or under military control which “is, or is intended to be, used in connection with a military activity.”

The FSIA, lastly, contains certain procedural provisions. The rules regarding venue and removal of actions against foreign states from state to federal courts are set forth in §§ 1391(f) and 1441(d), respectively. Section 1606 provides that foreign sovereigns are subject to the same liability as private individuals with the exception that punitive damages are prohibited against a foreign sovereign.


20. 28 U.S.C. § 1610(a)(1)-(5) (1982). And if the judgment is against an instrumentality of the foreign sovereign, any property owned by the instrumentality in the United States may be executed on to satisfy the judgment. Id. § 1610(b).


24. See Stevenson, supra note 2, at 46-47; Kane, supra note 6, at 393, 410.
II
JUDICIAL INTERPRETATION OF THE ACT'S CONSTITUTIONAL BASES

Prior to 1952, the doctrine of absolute sovereign immunity prevailed: a foreign sovereign could not be sued in the United States for any reason. Because of this, the framers of the U.S. Constitution did not anticipate a statute such as the FSIA. Consequently, the FSIA has potential Article III and due process infirmities. After examining these problems, the discussion will center on a judicially created analytical framework that greatly clarifies the theoretical foundations of the Act. In Part III of this Article, this framework will aid in the discussion of the practical application of the Act.

A. The Conceptual Ambiguities

The FSIA raises two separate constitutional issues. First the Constitution imposes two conditions on the proper exercise of subject matter jurisdiction by federal courts: 1) Congress must have authorized the lower court to adjudicate the controversy at hand; and 2) this statutory grant of subject matter jurisdiction must fall within the matters enumerated in Article III, § 2, clause 2 of the Constitution (the "arising under" clause). Secondly, due process issues arise. In contrast to subject matter jurisdiction (which addresses the limitation on the exercise of federal power), personal jurisdiction concerns the power of the court over the person of the defendant. The due process clauses of the Constitution shield individual defendants from the abusive exercise of either federal or state power. Personal jurisdiction, therefore, looks to the relationships between the forum and the defendant, whereas subject matter jurisdiction looks to the relationship between the forum and the cause of action.

A theoretical analysis of the FSIA is difficult because of the Act's fusion of two distinct theoretical concepts: subject matter and personal jurisdiction. As noted above, personal jurisdiction exists if there is subject matter jurisdiction and service has been properly made. Since this scheme fuses two distinct concepts, the immunity provisions serve a double function. First, they codify the restrictive principle of sovereign immunity. Second, they allow the FSIA to operate as a federal long arm statute because personal jurisdiction is extended extraterritorially by means of a fixed "nexus" requirement.


26. HOUSE REPORT, supra note 3, at 6612; 1976 Hearings, supra note 3, at 31. See also Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1062 (E.D.N.Y. 1979). The nexus provisions were purportedly modeled after the District of Columbia long arm statute.
In addition to basing personal jurisdiction on a finding of subject matter jurisdiction, Congress based the entire jurisdictional structure on the doctrine of restrictive sovereign immunity. This is somewhat confusing in principle, because sovereign immunity bears little logical semblance to subject matter jurisdiction. Nevertheless, Congress elected to base subject matter jurisdiction on the various statutory exceptions to immunity it provided in the FSIA. Of course, as long as Congress is operating within the restrictions of Article III, it may formulate subject matter jurisdiction at will.

In sum, the Act's fusion of two distinct theoretical concepts has inevitably caused uncertainty and confusion. Subject matter jurisdiction is based on the existence of an exception to immunity. Personal jurisdiction, in its turn, is bootstrapped on this needlessly complicated foundation. As shown in the following discussion, the courts have applied the Act with difficulty and have found it necessary to create judicial doctrines to iron out the constitutional ambiguities.

B. The Texas Trading Model

Faced with the structural ambiguities of the FSIA's jurisdictional scheme, the courts have struggled to find a coherent approach to the resulting interpretive problems caused by the confusion of theoretically distinct concepts. After an initial period of chaos, the Second Circuit in Texas Trading & Milling Corp. v. Federal Republic of Nigeria made the first comprehensive effort to "untie the Gordian knot." In Texas Trading, an American corporation sued the Federal Republic of Nigeria for anticipatory breach of a letter of credit and breach of contract for the purchase of cement. Nigeria raised the defense of sovereign immunity and the plaintiff responded that under the FSIA's commercial activities exception, Nigeria was not immune.

The court in Texas Trading adopted a four step approach to determine if suit could be brought against Nigeria under the FSIA. First, it examined whether the Act granted subject matter jurisdiction over the suit. This required an interpretation of the § 1605(a)(2) commercial activity exception. Second, the court considered whether this jurisdictional grant contained in the FSIA was consistent with the Article III limitations on judicial power. Third, the court addressed the issue of statutory personal jurisdiction.

29. Id. at 303-06.
30. Id. at 308, 310.
31. Id. at 308, 313.
32. Id.
Holding that the district court had subject matter jurisdiction, only an inquiry into service of process remained. Finally, the court decided that the resulting exercise of personal jurisdiction comported with the Constitution's due process requirements.

1. **Subject Matter Jurisdiction and Article III**

   With respect to the issue of subject matter jurisdiction, the court found that Article III's grant of diversity jurisdiction, i.e., to "Cases . . . between a State and Citizens of another State", allowed Congress to enact a statute enabling the federal courts to hear cases between United States citizens and foreign sovereigns.33 This reasoning based on diversity was superseded, however, by a 1983 Supreme Court decision which held that the FSIA's jurisdictional grant was consistent with Article III's "arising under" provisions.34

   In *Verlinden B.V. v. Central Bank of Nigeria*,35 the Supreme Court held that Congress had properly used its Article I powers to create comprehensive federal standards regulating suits against foreign states.36 The interpretation of these standards necessarily raises questions of federal law. Thus, the FSIA's jurisdictional grant was consistent with Article III § 2, clause 1 which confers federal jurisdiction to cases arising under "the [l]aws of the United States."37

2. **Personal Jurisdiction and Due Process**

   The second constitutional question involves due process limitations on the breadth of personal jurisdiction in FSIA suits. More complex than subject matter jurisdiction, the due process issue can be analyzed by asking four interlocking questions: 1) is there a due process question? 2) is a separate due process inquiry necessary? 3) what kind of due process standards should be applied to FSIA cases? and 4) with which forum should the defendant's contacts be measured?

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33. *Id.* at 313; U.S. Const. art. III, § 2, cl. 1.
35. The facts are identical to those in *Texas Trading*, except that the plaintiff was an alien corporation. The issue before the Supreme Court was whether Congress had the power to provide for suits between two aliens. The Court of Appeals had ruled in the negative, relying on the diversity clause of Article III which does not authorize suits between aliens. *See also* *Jackson v. Twentyman*, 27 U.S. (2 Pet.) 136 (1829); *Mossman v. Higgenson*, 4 U.S. (4 Dall.) 12 (1800).
37. U.S. Const. art. III, § 2, cl. 1. The *Verlinden* court adopted the test developed in *Osborne v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). Under *Osborne*, 22 U.S. (9 Wheat.) at 822, if the "right set up by the party, may be defeated by one construction of the . . . law[s] of the United States, and sustained by another . . . ," then the exercise of subject matter jurisdiction is consistent with that arising under Article III. It should be noted that subject matter jurisdiction, under § 1331, is much narrower.
First, is it necessary to engage in a due process analysis at all? Relying on substantial pre-FSIA authority, the court in *Texas Trading* concluded that foreign states did qualify as "persons" within the meaning of the Fifth Amendment and could therefore claim rights under the due process clauses of the Constitution.  

Next, although foreign sovereigns are protected by due process, it is unclear whether the FSIA itself provides these safeguards or if further, independent analysis is required. The FSIA's drafters suggested that no further analysis was required, and prior judicial authority confirmed this suggestion. The Second Circuit in *Carey v. Nat'l Oil Corporation* concluded that the commercial exception provision of § 1605(a)(2) had incorporated the proper due process standard. *Carey* applied a traditional *International Shoe* minimum contacts test.

Following the *Carey* example, most courts did not distinguish clearly between the statutory analysis and a separate, constitutional due process inquiry. The *Texas Trading* court, however, departed from this practice and made an independent due process analysis.

A requirement of an independent due process analysis makes sense. First, if Congress had intended to incorporate the present due process standards in the FSIA, it could have done so directly through a simple blanket provision. Second, courts have suggested that certain of the Act's nexus provisions do not even extend personal jurisdiction as far as due process would allow. Finally, a separate analysis is probably necessary if the courts use the prevailing due process test, minimum contacts. The policies underlying that doctrine require a flexible case by case approach. It would, therefore, be inappropriate for the court to permanently "freeze" the present minimum contacts standards into the Act. Most courts seem to have accepted the

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38. *Texas Trading*, 647 F.2d at 313. For post FSIA authority, see Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F. Supp 981, 985 (N.D. Ill. 1980).


41. For example, the California statute provides: "a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution . . . of the United States." *Cal. Civ. Proc. Code* § 410.10 (West 1973).

Texas Trading approach and now distinguish between the statutory and the due process analysis\textsuperscript{43} by making an independent due process analysis.

Third, the courts must decide what kind of due process standard is appropriate for the statutory exercise of personal jurisdiction in FSIA suits. The nexus provisions of the FSIA embody Congressional rules governing the exercise of personal jurisdiction subject only to Fifth Amendment due process restrictions. Unfortunately, the Supreme Court has declined to specify how these restrictions limit federal judicial power in federal question cases.\textsuperscript{44} Texas Trading (with one major modification which will be discussed below), simply transferred a Fourteenth Amendment analysis to the case at hand.\textsuperscript{45} Although this approach was unanimously adopted in subsequent decisions, no court has justified, nor even fully discussed, why Fourteenth Amendment standards should be applied to Fifth Amendment cases.

Yet, such a justification is not superfluous. The Fourteenth Amendment restricts the sister state's power to exercise personal jurisdiction, whereas the Fifth Amendment places limits on the comparable Federal power. Although the identical language of the two clauses strengthens the analogy, it cannot be assumed that the criteria for restricting sister state power are so similar to the criteria for restricting federal power that the constraints placed on both should be identical. A brief discussion of the development of the "minimum contacts" doctrine serves to illustrate this contention.

Before International Shoe Co. v. State of Washington, jurisdiction was based on the theory of in personam jurisdiction developed by the Supreme Court in Pennoyer v. Neff. In personam jurisdiction was predicated on two principles of public international law: 1) "every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory"; and

\begin{itemize}
  \item \textsuperscript{44} United States v. Scophony Corp., 333 U.S. 795, 804 n.13 (1947).
\end{itemize}
2) "no state can exercise direct jurisdiction and authority over persons or property without its territory."\(^{46}\)

The court in *International Shoe Co. v. Washington*, however, abandoned the strict *Pennoyer* formula and held that an out of state corporation could properly be sued if it had certain minimum contacts with the forum.\(^{47}\) The new standard was based on two concerns: the contacts must be such that it is reasonable "in the context of our federal system of government to require the [defendant] to defend the particular suit which is brought there"; and it is not inconvenient for the defendant to litigate in an objectionably distant forum.\(^{48}\)

The court in *World-Wide Volkswagen Corp. v. Woodson*, however, made clear that principles of federalism may sometimes prevail over fairness when the two conflict.

Even if the defendant would suffer . . . no inconvenience from being forced to litigate before the tribunals of another state; even if the forum state has a strong interest in applying its law to the controversy; even if the foreign state is the most convenient location for litigation; the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divert the state of its power to render a valid judgment.\(^{49}\)

Clearly, lacking sufficient contacts with the forum, no jurisdiction over the person under the due process clause exists.

Prior Supreme Court cases had also underscored the tension between federalism and inconvenience components of the *International Shoe* formula. It can therefore be argued that it is inappropriate to apply the Fourteenth Amendment due process test, with its attendant concerns of federalism, to the Fifth Amendment context.

Yet a question still remains unanswered: does minimum contacts analysis, a doctrine based on the Fourteenth Amendment and at least initially on a theory of sovereignty of states, apply to cases arising under the Fifth Amendment as well? The Supreme Court in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée*, characterized the Fourteenth Amendment as restricting "judicial power not as a matter of sovereignty, but as a matter of individual liberty."\(^{50}\) This suggests that the minimum contacts analysis no longer draws its vigor from notions of federalism. There thus remains no obstacle in the way of applying minimum contacts doctrine to the Fifth Amendment and the FSIA.

Finally, in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, the court spoke to the practical application of minimum contacts analysis and adopted a method of analysis that depended on whether the plaintiff's claim "arose out" of the defendant's activities in the forum.\(^{51}\) If a controversy is related to

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48. *Id.*
the defendant's contacts with the forum, then the courts focus on the relationship between the defendant, the forum and the litigation. When, in contrast, the claim bears no connection to the defendant's forum related activity, due process requires that the defendant's contacts with the forum be "continuous and systematic." A state exercises "specific" jurisdiction when the cause of action arises out of the defendant's activities in the forum, while it exercises "general" jurisdiction when the suit bears no connection with the defendant's contacts with the forum.

It is with the standards laid down in this complex line of cases that the courts employing Fourteenth Amendment due process must judge the substantiality of a defendant's contacts.

Of necessity, the courts must decide in which forum the contacts of the defendant are to be measured. In *Texas Trading*, the Second Circuit modified the minimum contacts standard as it is traditionally applied in Fourteenth Amendment cases. Instead of evaluating the defendant's contacts with New York, situs of the court, the *Texas Trading* court considered the defendant's contacts with the United States as a whole. The court justified this approach by relying on the Act's provision for worldwide service of process. With the possible exception of the Ninth Circuit, the other circuits that have addressed this issue have generally adopted the aggregate contacts theory.

In sum, the court in *Texas Trading* made a great step in simplifying the proper mode of analysis for applying the FSIA. A twofold inquiry is made: whether subject-matter jurisdiction exists and whether an assertion of personal jurisdiction passes an independent, Fourteenth Amendment due process test. It is not surprising then that this methodology has been adopted by the

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52. *Texas Trading*, 647 F.2d at 314.

53. In Olsen v. Government of Mexico, 729 F.2d 641, 648-49 (9th Cir. 1984), cert. denied, 469 U.S. 917 (1984), the court examined the defendant's contacts with California. The courts in Wyle v. Bank Melli of Tehran, Iran, 577 F. Supp. 1148, 1159 n.6 (N.D. Cal. 1983) and Meadows v. Dominican Republic, 542 F. Supp. 33, 34 (N.D. Cal. 1982) refused to adopt the aggregate contacts approach because the Court of Appeals had not explicitly decided the issue in Kramer Motors, Inc. v. British Leyland, Ltd., 628 F.2d 1175, 1177 n.4 (9th Cir. 1980), cert. denied, 449 U.S. 1061 (1980). But in the recent case of Meadows v. Dominican Republic, 628 F. Supp. 599, 606-07 (N.D. Cal. 1986), the court unequivocally adopted the aggregate contacts theory. Moreover, the Ninth Circuit recently adopted the national contacts approach in the non-FSIA case of Securities Investor Protection v. Vigman, 764 F.2d 1309, 1315-16 (9th Cir. 1985). Thus, it is expected that the Ninth Circuit will join the mainstream.

District of Columbia, the Third and the Eleventh Circuits\textsuperscript{55} and cited with approval in the First Circuit.\textsuperscript{56} Furthermore, legal scholars have for the most part endorsed the \textit{Texas Trading} methodology.\textsuperscript{57}

III
COMMENCING AN ACTION AGAINST A FOREIGN SOVEREIGN UNDER THE ACT

As noted, the Act provides for six major exceptions to the general rule of nonimmunity: 1) waiver of immunity by the sovereign; 2) the commercial activity exception; 3) the expropriation exception; 4) the immovable property exception; 5) the non-commercial tort exception; and 6) counterclaims. The exception for suits in admiralty enforcing maritime liens will not be discussed here.

Building on Part Two’s discussion of the analytical framework used in \textit{Texas Trading}, the following discussion will focus on how the courts have applied the FSIA in practice. It will discuss how a suit under the Act is brought in a United States federal court and which circumstances would cause a foreign sovereign to lose its immunity. It can be assumed that each grant of subject matter jurisdiction meets constitutional requirements and that process pursuant to § 1608 has been properly served.

\textbf{A. Waiver}

Section 1605(a)(1) precludes foreign states from raising the immunity defense in cases “in which the foreign state has waived its immunity either explicitly or by implication.”\textsuperscript{58} Waivers, defined as intentional relinquishments of a known right or privilege,\textsuperscript{59} may generally be effected in one of two ways. A party may forego its right to immunity by prior agreement with the other party or by failing to exercise the right once litigation has commenced.\textsuperscript{60}

\begin{footnotes}
\item[56] Itek v. First Nat'l Bank of Boston, 704 F.2d 1, 12 (1st Cir. 1983).
\item[57] Kane, \textit{supra} note 6, at 405 n.104; Note, 13 N.Y.U. J. \textit{INT’L} L. & POL., \textit{supra} note 27, at 572-73.
\item[58] 28 U.S.C. § 1605(a)(1) (1982). This section further prohibits the state from withdrawing the waiver except in accordance with its terms.
\item[60] The foreign sovereign could waive immunity prior to litigation through conduct other than explicit agreements. That is to say the sovereign may be estopped from denying the waiver. \textit{See} Note, \textit{Waiver of Foreign Sovereign Immunity: The Scope of 28 U.S.C. § 1605(a)(1)}, 1 N.Y.U. J. INT’L & COMP. L. 159, 162 (1980). But the courts find no such implicit waivers outside of submission to arbitration and choice of law clauses.
\end{footnotes}
1. **Waiver Prior to Litigation**

First, the foreign sovereign may explicitly or implicitly waive its immunity defense in an agreement prior to litigation by manifesting its intent to relinquish the defense pursuant to § 1605(a)(1).

According to the House Report, a foreign sovereign may explicitly waive sovereign immunity by treaty or by contract with a private party. Explicit waivers do not present any particular difficulty apart from the usual difficulties encountered in interpreting treaty and contract provisions.

In contrast, a finding that there has been an implicit waiver poses some practical problems. The courts generally require proof that the sovereign actually intended to waive sovereign immunity. The House Report lists two broad categories of pre-litigation, implicit waivers: 1) where the foreign state "agreed to arbitration in another country" and 2) where a foreign state "agreed that the law of a particular country should govern a contract." Apart from the difficulties of showing that a foreign sovereign has waived its immunity defense, it is more important to investigate whether the waiver provisions raise due process issues. Pursuant to § 1330(b), the court may exercise personal jurisdiction over the defendant if a waiver has occurred and proper service of process has been made. Moreover, the House Report suggests that Congress did not think that due process requires any contacts in

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62. See Stevenson, supra note 2, at 137-41; Delaume, supra note 15, at 414; Von Mehren, *supra* note 19, at 55 for model waiver clause.

63. Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 378 (7th Cir. 1985) (there must be strong evidence that waiver was intended); Castro v. Saudi Arabia, 510 F. Supp 309, 312 (W.D. Tex. 1980) (intentional and knowing waiver required). For the reverse situation, where a suit against a foreign sovereign, otherwise amenable to suit, is dismissed because the plaintiff signed a forum selection clause designating the courts of the foreign sovereign, see Bankers Trust Co. v. Worldwide Transp. Serv., Inc., 537 F. Supp. 1101, 1111-12 (E.D. Ark. 1982).

Foreign Sovereign Immunities Act waiver cases: "each of the immunity provisions in . . . Sections 1605-07, requires some connection between the law suit and the United States, or implied waiver by the sovereign state of its immunity." Yet, due process requires that any judicial exercise of personal jurisdiction satisfy the International Shoe requirement that "minimum contacts" exist between the defendant and the forum state.

Thus, there appears to be conflict between the due process constraints and the broad language of the waiver exception, which does not require any contacts at all. In resolving this conflict, it is important to remember that personal jurisdiction, like sovereign immunity, protects an individual "liberty interest" and also can be waived. It is well established that a defendant may consent to the jurisdiction of American courts over her person, and that a court may assert jurisdiction on this basis without needing to satisfy the minimum contacts requirement. Therefore, the FSIA's merger of sovereign immunity and personal jurisdiction enables a court to find that a valid waiver of the first would establish a valid waiver of the second. Since Congress fused the two concepts, neither § 1605(a)(1), nor the House Report, contains a minimum contacts or nexus requirement. Nonetheless, there is no rational basis for the assumption made in the House Report that because a foreign sovereign waives its immunity, it also consents to personal jurisdiction in the United States. Sovereign immunity is not the functional equivalent of personal jurisdiction. Congress could legitimately infer that by submitting to arbitration "in another country" or by agreeing to a choice-of-law clause designating "the law of a particular country," that a foreign sovereign intended to consent to litigation in some other state. Yet, this does not mean that the foreign sovereign knowingly intended to submit to suit in the United States. Unless the foreign sovereign gives its knowing consent to be sued in the United States in particular, the court must make a minimum contacts finding in order to satisfy due process.

Although the above analysis appears compelling, a few federal courts have not taken the due process requirements into consideration when applying the waiver exception. For example, in Ipitrade International, S.A. v. Federal Republic of Nigeria, an action to confirm a Swiss arbitral award, the court, in the absence of any link between the defendant and the forum, accepted the plaintiff's contention that § 1605(a)(1) was applicable because the

65. Id. at 6612 (emphasis added).
67. Hill, supra note 2, at 222.
defendant sovereign had agreed to arbitrate "in another country" and because the contract was governed by Swiss law.69

This approach was followed in American Construction Machinery and Equipment Corp., Ltd. v. Mechanised Construction of Pakistan, Ltd. [hereinafter ACME], another action to enforce a Swiss arbitral award.70 Citing Ipite trade with approval, the court determined "that by engaging in most aspects of the arbitration, [the sovereign defendant had] waived its right to immunity under the FSIA."71

In Marlowe v. Argentine Naval Commission,72 the sovereign defendant was sued on a contract that contained a choice of law clause. The court concluded that by agreeing to such a clause the defendant had waived its sovereign immunity and, as a result, had also consented to personal jurisdiction. Rejecting the defendant's due process objection, the court held that "[t]his result [is] obtain[ed] in the absence of the normally required minimum contacts."73

The general judicial trend, however, requires some sort of affiliating circumstance between the foreign state and the forum in addition to a waiver of immunity. Perhaps the strongest judicial statement for the necessity of minimum contacts is found in Chicago Bridge and Iron Co. v. Islamic Republic of Iran.74 There, the court rejected the plaintiff's argument that Iran had waived sovereign immunity by a treaty in force between it and the United States: "[T]he waiver provision contained in the [t]reaty ... does not necessarily confer personal jurisdiction ... [T]he minimum contacts requirements of International Shoe Co. v. Washington, must be satisfied before this court can exercise jurisdiction over the Iranian defendants."75 This view was confirmed in Harris Corp. v. National Iranian Radio and Television under the same facts. Noting that neither the House Report nor § 1605(a)(1) required

71. Id.
73. Id. Nevertheless the court hedged by conducting a minimum contacts analysis. See also, Proyecfin de Venezuela, S.A. v. Banco Indus. de Venezuela, 760 F.2d 390, 395 n.4 (2d Cir. 1985); Note, Sovereign Immunity, 15 VAND. J. TRANSNAT'L L. 629, 639 (1982).
75. Id. at 985; accord Wyle v. Bank Melli of Tehran, 577 F. Supp. 1148, 1157 (N.D. Cal. 1983).
transactional contacts between the United States and the sovereign defendant, the court nevertheless felt it necessary to apply a minimum contacts analysis.

A slightly different approach was taken in *In re Maritime International Nominees Establishment v. Republic of Guinea*. In that case, both parties had agreed to submit future disputes to arbitration before the International Center for Settlement of Investment Disputes [hereinafter ICSID]. ICSID rules provide for arbitration at its seat in Washington, D.C., unless otherwise agreed by the parties and approved by ICSID. When the defendant refused to submit to arbitration to settle a dispute, ICSID issued a compulsory order to submit to arbitration before the American Arbitration Association [hereinafter AAA], which awarded the plaintiff damages in default proceedings. In an enforcement proceeding, the court agreed with the plaintiff that Guinea had waived its sovereign immunity defense. It reasoned that, although the arbitration clause failed to specify a locale, Guinea had nevertheless waived immunity because the ICSID rules made clear that proceedings on American soil were "foreseeable".

The Court of Appeals reversed because, *inter alia*, it interpreted the arbitration clause as precluding American courts from compelling ICSID arbitration: "[a]s this particular ICSID agreement concededly did not foresee such a role for United States Courts, we hold that it did not waive Guinea's sovereign immunity although the agreed to arbitration would probably take place on United States soil."

While acknowledging perfunctorily the House Report's belief that submission to arbitration in another country waived immunity and acted as the functional equivalent to consent to personal jurisdiction in the United States, the court still required some form of affiliation between the sovereign defendant and the United States.

76. Harris Corp. v. National Iranian Radio & Television, 691 F.2d 1344, 1350 (11th Cir. 1982).

77. Id. at 1352-53. This is not the only example of a court's ambivalent attempt to reconcile the House Report and the 14th Amendment. In *Proyecfin de Venezuela, S.A. v. Banco Indus. de Venezuela, S.A.*, 760 F.2d 390, 395 n.4 (2d Cir. 1985), the court stated that "[t]he minimum jurisdictional contact [in the sense of *International Shoe*] embodied in § 1605(a)(1) is the requirement that the sovereign has waived immunity." But the court also found it necessary to determine whether the sovereign had consented to jurisdiction in New York.


80. *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1104 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 815 (1983). Although the court did not decide this issue, the Department of State, in an *amicus* brief, argued that the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the treaty that created ICSID, did not contemplate the involvement of domestic courts before a final ICSID decision is to be enforced. *Id.* at 1103.

From an analytical standpoint, the minimum contacts approach adopted by the *Harris* court can be criticized on the grounds that it violates Congressional intent. An application of the waiver provision based on a literal reading of § 1605(a)(1) and the House Report would violate due process. However, one should note that although Congress included nexus requirements in other provisions, it chose to omit them from the FSIA’s waiver provision. Where Congress provided for nexus requirements, minimum contacts, by definition an exercise of non-consensual personal jurisdiction, is appropriate. One can legitimately infer, therefore, that because there is no provision for nexus requirements in § 1605(a)(1)’s language, Congress wished to provide for jurisdiction in waiver cases by consent only. Therefore, one should not use minimum contacts in waiver cases because this standard is relevant only to the exercise of jurisdiction without the defendant’s consent.

It follows then, that in order to fulfill Congressional intent and due process requirements, a court must undertake a double inquiry in waiver cases: 1) did the foreign state implicitly waive its sovereign immunity defense?; and 2) did the foreign state consent to jurisdiction in the United States? Unlike a literal reading of § 1605(a)(1) and the House Report, only an affirmative answer to both questions authorizes the court to exercise jurisdiction. By formulating the second question in terms of consent, this scheme fulfills Congressional intent in a way compatible with due process.

In practice, the advantage of phrasing the personal jurisdiction question in terms of consent rather than minimum contacts is more formal than real. Assuming an implicit waiver is found to exist, the concomitant finding of implicit consent to personal jurisdiction must rest on a finding of the foreign state’s intentions. Since implicit intent is usually inferred from the sovereign’s actions, courts in these cases ask whether a nexus exists between the defendant’s conduct and the United States. Although a minimum contacts test is similar in that it also looks for connections between the defendant and the forum, it does not follow that the constitutional standards derived from *International Shoe* should be literally superimposed on a situation where statutory jurisdiction is based on consent. Inferring that a foreign state has

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82. Kahele hints at this. Kahele, supra note 69 at 51-52.
83. See supra note 66 and accompanying text.
85. For instance, assuming a waiver of immunity by means of submission to arbitration, could a court find that the sovereign had implicitly consented to jurisdiction because the clause was so drafted as to render litigation in the U.S. “foreseeable”? A district court so held but was reversed on appeal. See Maritime Int’l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1109 (D.C. Cir. 1983), cert. denied, 464 U.S. 815 (1983). In traditional minimum contacts analysis, foreseeability alone does not satisfy minimum contacts. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980).
consented to jurisdiction signifies only that a nexus exists between the sovereign's conduct and the United States.

If minimum contacts doctrine is inappropriate as a test for intent to waive personal jurisdiction, courts need to decide what sort of nexus establishes such intent. This is a very difficult question to answer in the abstract, but in practice courts have resorted to looking for conduct that is normally recognized as an implicit waiver: 1) where the foreign state submitted to arbitration or 2) where it agreed to a choice of law clause.

The pre-FSIA rule was that consent to arbitration in the United States amounted to consent to the jurisdiction of its courts. Only the maverick ACME and the universally rejected Ipitrade case found that an agreement to arbitrate in a third country subjected the foreign state to suit in the United States. The post-FSIA cases are in accord: the sovereign's agreement to arbitrate in the United States constitutes a nexus sufficient to exercise personal jurisdiction over the sovereign defendant.

Where no country is specified as the situs of arbitration, two cases have held that immunity is waived under § 1605(a)(1). In Birch Shipping Corp. v. Embassy of the United Republic of Tanzania, the parties to the contract agreed to arbitration in an unspecified forum. Following a contractual dispute, Tanzania lost the arbitration held in New York. Citing Ipitrade and the

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89. Amoco Overseas Oil v. Compagnie Nat'l Algerienne de Navigation (C.N.A.N.), 605 F.2d 648, 655 (2nd Cir. 1979) (agreement to arbitrate in N.Y. "carries considerable weight in demonstrating that it is not unfair to require the parties to litigate in the forum in which arbitration was designed to take place"). Most of the opinions state the rule in the negative mode, i.e., that there is no implicit waiver of sovereign immunity when the clause provides for arbitration in a country other than the U.S. See Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 377 (7th Cir. 1985); Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F. Supp. 981, 987 (N.D. Ill. 1980) (in rejecting plaintiff's waiver by submission to arbitration contention, the court observed: "None of the arbitration clauses in these contracts contain U.S. choice of law or choice of forum provisions"); Verlinden I, supra note 43, at 1302. Ironically, the only court opinion squarely holding that arbitration in the U.S. waived immunity was reversed on appeal. Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1103 (D.C. Cir. 1983), cert. denied, 464 U.S. 815 (1983).

House Report, the court held that Tanzania's consent to arbitration operated as a waiver of immunity pursuant to § 1605(a)(1).91

In contrast to the effect of agreements to arbitrate, no pre-FSIA case had ever held that a choice of law clause, even one designating the laws of the United States, amounted to an implied waiver of sovereign immunity and consent to personal jurisdiction. In fact, considerable authority existed to the contrary.92 Nevertheless, in Resource Dynamics International, Ltd. v. General People's Committee for Communications and Maritime Transport in the Socialist People's Libyan Arab Jamahiriya, the court relied exclusively on the House Report to hold that Libya had waived immunity by signing a contract designating Virginia state law as the governing law.93 The nexus requirement was also fulfilled by choosing American law.

2. Waiver During Litigation

Although most waivers occur prior to litigation, implicit waivers also occur during litigation. The House Report states that "[a]n implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity."94

With one exception,95 courts have routinely followed the corollary to the House Report's proposition, i.e., that a failure to appear does not operate as an implicit waiver.96 As a result, there is a gray area between the rules, in which it is difficult to precisely determine how far a sovereign can proceed

91. Id. at 312.
94. HOUSE REPORT, supra note 3, at 6617. Of course, appearance does not waive immunity with respect to claims that could not have been brought under the FSIA. HOUSE REPORT, supra note 3, at 6612. This position accurately reflects pre-FSIA law. Richardson v. Fajardo Sugar Co., 241 U.S. 44 (1916). See also Kahele & Vega, supra note 69, at 32, n.24 and the cases cited in Kahele & Vega, supra note 15, at 213 n.15. Commentators have generally approved of this rule. See, e.g., Carl, Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice, 33 Sw. L.J. 1009, 1021 (1979).
95. Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246, 251-53 (D.D.C. 1985). In Von Dardel, the District Court granted plaintiff's application for a default judgment because, inter alia, the defendant "failed to raise immunities as an affirmative defense."
with the litigation before immunity is waived. The House Report simply indicates that "Congress anticipated, at a minimum, that waiver would not be found absent a conscious decision to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so." 97

In Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico, S.A., 98 the court dealt with this precise issue. There, the plaintiff brought a breach of contract action in a New York court against a Chilean instrumentality, Compania de Acero del Pacifico [hereinafter CAP] in May 1978.99 In a successful motion for removal to federal court, CAP reserved the sovereign immunity defense. In September, CAP waived certain procedural defenses. The sovereign immunity defense was not included in the stipulation. In November, CAP raised a 12(b) motion to dismiss for failure to state a claim upon which relief can be granted.100 No sovereign immunity defense was included in this motion. Thereafter, the case lay dormant for two years pending the outcome of related litigation in Chile. In November 1980, the court ordered discovery. After the parties had engaged in preliminary discovery, CAP finally raised the immunity defense by means of a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.101

In 1982, the trial court granted the motion and rejected the plaintiff's contention that CAP had waived its sovereign immunity defense.102 Two years later the Court of Appeals affirmed.103 It held that CAP was not required to raise the defense earlier, and that CAP's participation in the litigation, including discovery, did not operate as a waiver of sovereign immunity.104 The court reasoned as follows: that the House Report focused on "responsive pleading" as the point of no return for asserting immunity;105 that the Federal Rules explicitly distinguished pleading from motions;106 and that because sovereign immunity is a question of statutory subject matter jurisdiction,107 which normally cannot be waived, "[t]he exceptional waivability of sovereign immunity suggests that the FSIA should be read to

97. Frolova, 761 F. 2d at 378.
99. Canadian, 727 F.2d at 275.
100. Id. at 276.
101. Id.
102. Id. For a discussion of the District Court's opinion, see Note, Sovereign Immunity, 15 VAND. J. TRANSNAT'L L. 631 (1982).
103. Canadian, 727 F.2d at 276. The appeal had been suspended pending the Supreme Court's review of Verlinden. See supra note 34 and accompanying text.
104. Canadian, 727 F. 2d at 276.
105. Id.
106. Id. See FED. R. CIV. P. 7(a), 12(a)-(b).
107. Canadian, 727 F.2d at 278.
modify Rule 12(h)(3) only to the extent that the FSIA automatically bars assertion of the defense once a responsive pleading has been filed."

For these reasons, the court concluded that the filing of a variety of motions, including a 12(b) motion to dismiss, did not automatically waive sovereign immunity. Limiting the holding, the court noted that just because "the failure to assert sovereign immunity in a responsive pleading is a waiver does not mean that a party may securely withhold assertion of the defense until that time in every case." This is within the trial court's discretion to deduce a waiver from the foreign sovereign's conduct in light of the circumstances of each case.

Explicit waivers seldom occur. Nonetheless, the recent case of *Hercaire Int'l, Inc. v. Argentina* presents such a case. There, Argentina explicitly waived its sovereign immunity and that of its agencies in its answer to the complaint.

The following three rules govern waivers of sovereign immunity during litigation: 1) failure to appear does not operate as a waiver of the defense; 2) failure to raise the defense in a responsive pleading automatically waives sovereign immunity; and 3) between rules (1) and (2) lies a gray area in which the judge has the discretion to find a waiver depending on the circumstances.

In sum, waivers of sovereign immunity by agreement prior to litigation (whether explicit or implicit) are examples of jurisdiction by consent. Although the *International Shoe* doctrine of minimum contacts, a due process limitation on the exercise of personal jurisdiction over unconsenting defendants, is not directly applicable to these cases, some presence or nexus between the foreign state and the United States must be shown in the types of waiver discussed here. It should be noted that waiver during litigation is considered purely consensual and no nexus showing is necessary.

In contrast, for the other exceptions to the FSIA, Congress granted to the federal courts personal jurisdiction over unconsenting defendants.

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110. *Id.* at 278.

111. The court noted that while the trial judge could have found a waiver in this case, its failure to do so was not clearly erroneous because, *inter alia*, the plaintiff had full notice that CAP had reserved the defense. *See supra* text accompanying note 100.


113. *Id.* at 128. What is truly interesting in this case is that after the explicit waiver to jurisdiction, Argentina then attempted to argue, after judgment had been entered against it and its agency, that it had not waived immunity to execution. The court rejected this claim. Instead, the court noted that a sovereign can waive immunity to jurisdiction while retaining immunity as to execution, but it must do so at the start of the proceedings so as to give the plaintiff fair warning. *Id.* at 129.


Therefore, the minimum contacts doctrine is directly applicable to these provisions. The effect of superimposing the due process clause upon the Act's statutory grant of personal jurisdiction results in complexity and uncertainty in the application of the Act. The problems created thereby are particularly well exemplified by § 1605(a)(2) — the "commercial exception" to sovereign immunity.

B. The Commercial Activity Exception

The House Report characterized § 1605(a)(2) as "probably the most important" exception to sovereign immunity.116 According to the Texas Trading model, the court must first determine under what circumstances it can assert statutory subject matter jurisdiction. The court must then determine if a subsequent exercise of personal jurisdiction comports with due process.

1. Statutory Subject Matter Jurisdiction

Section 1605(a)(2) denies immunity in three different situations: 1) where the action is based upon a commercial activity that is carried on in the United States by the foreign state; 2) where an act performed in the United States has a connection with a commercial activity of the foreign state carried on elsewhere; or 3) where an act, although performed outside the territory of the United States, has both a connection with a commercial activity of the foreign state elsewhere and causes a direct effect in the United States.117 Thus, § 1605(a)(2) permits suits against foreign states if two conditions are met: the claim must relate to a commercial activity and possess a connection with the United States.

a. Section 1605(a)(2) Clause One

The situation described in clause one is the easiest to analyze. Immunity is denied when the claim is "based upon a commercial activity carried on in the United States by a foreign state."118 The FSIA's definition section defines this phrase as "commercial activity carried on by [the foreign state] and having a substantial contact with the United States."119 The House Report included a partial list of commercial transactions that, "performed in whole or

116. HOUSE REPORT, supra note 3, at 6617.
118. Id.
119. Id. § 1603(e).
in part in the United States, would satisfy the substantial contacts" require-
ments.\textsuperscript{120} The House Report also made clear that the United States citizen-
ship or residency of the plaintiff did not satisfy the "substantial contacts" test.\textsuperscript{121}

While no court has made a clear pronouncement on what constitutes a
substantial contact, the court in \textit{Vencedora Oceania Navigación, S.A. v. Compagnie Nationale Algérie-
nienne de Navigation} clarified this issue a good deal.\textsuperscript{122} In \textit{Vencedora}, a government instrumentality, the Compagnie Nationale Algérie-
nienne de Navigation [hereinafter CNAN] demanded payment for salvage
services after it towed the plaintiff’s vessel to an Algerian port, and a dispute
arose as to the amount of the bond that should have been posted as security
for the release of the ship.\textsuperscript{123} Meanwhile, the Algerian authorities ordered
the vessel removed from the port because it constituted a safety hazard.\textsuperscript{124} While the vessel was being towed to another port, it ran aground in a storm,
causing the Algerian government to declare it a "wreck."\textsuperscript{125} After warning
the plaintiff that under Algerian law it would lose its rights in the vessel if it
was not removed from the Algerian maritime zone, the Algerian government
forfeited plaintiff’s rights in the vessel.\textsuperscript{126}

The plaintiff sued CNAN and Algeria, alleging they had tortiously de-
prived it of its vessel and that under § 1605(a)(2) clause 1 the defendants had
no sovereign immunity defense. The trial court agreed.

On appeal, the \textit{Vencedora} court reviewed how the courts in prior cases
had interpreted § 1605(a)(2) clause 1. It discussed three distinct approaches:
1) a literal approach; 2) a "doing business" approach; and 3) a "nexus"
approach.\textsuperscript{127}

The literal approach was first described in \textit{Gibbons v. Udaras}.\textsuperscript{128} Con-
cluding that a literal reading of clause one would only allow for jurisdiction
over claims based on acts occurring in the United States,\textsuperscript{129} the \textit{Gibbons} court
rejected the first approach. To reach this conclusion, it relied on \textit{Sugarman v.}

\begin{thebibliography}{99}
\bibitem{120} \textit{House Report, supra} note 3, at 6616. The House Report lists the following transac-
tions as satisfying § 1603(d)’s substantial contacts "test": 1) import-export transactions involving sales to, or purchases from, concerns in the U.S.; 2) business torts occurring in the U.S.; 3) negotiation or execution of a loan in the U.S.; and 4) financing received from a public or private lending institution located in the U.S. \textit{Id.} at 6615-16.
\bibitem{121} \textit{Id.} at 6616.
\bibitem{122} \textit{Vencedora Oceania Navigación, S.A. v. Compagnie Nationale Algérienne de Naviga-
tion}, 730 F.2d 195 (5th Cir. 1984).
\bibitem{123} \textit{Id.} at 196.
\bibitem{124} \textit{Id.}
\bibitem{125} \textit{Id.} at 196-97.
\bibitem{126} \textit{Id.}
\bibitem{127} \textit{Id.} at 200. The \textit{Vencedora} court also rejected a bifurcated literal and nexus approach set forth by the Third Circuit in \textit{Gilson v. Ireland}, 682 F.2d 1022 (D.C. Cir. 1982).
\bibitem{128} \textit{Gibbons v. Udaras}, 549 F. Supp. 1094 (S.D.N.Y. 1982). In \textit{Gibbons}, two U.S. citizens sued two industrial development agencies of the Republic of Ireland, alleging fraud and breach of contract, after the plaintiff’s joint venture with the defendants became insolvent.
\bibitem{129} \textit{Id.} at 1108 n.5.
\end{thebibliography}
Aeromexico, Inc. and Gemini Shipping, Inc. v. Foreign Trade Organization for Chemical and Food Stuffs. The court in both cases applied the clause one exception to the acts sued upon even though they occurred outside the United States.

Based on a comparison of clauses one and two, the Sugarman court concluded that the literal approach would frustrate Congressional intent. Clause two specifically calls for an act performed in the United States. If Congress had also wished to confine clause one to acts performed in the United States, it would have done so explicitly, as it did in clause two. Relying on this argument, as well as on Gibbons and Gemini, the Vencedora court rejected the "literal" approach as well.

Unlike the restrictive literal approach, a "doing business" test construes § 1605(a)(2) clause 1 in the broadest possible fashion. The doing business test was applied by the court in In re Rio Grande Transport, Inc. There, Rio Grande, a New York corporation, brought suit against CNAN after Rio Grande's cargo ship, the S.S. Yellowstone, was sunk in a collision with CNAN's M/V Ibn Batouta. While CNAN, a worldwide shipper, clearly engaged in commercial activities with the United States, the M/V Ibn Batouta serviced Algerian and North European ports exclusively and was bound for West Germany when the accident occurred. Holding that the relevant commercial activity for § 1605(a)(1) clause 1 purposes was CNAN's worldwide shipping activities, the court rejected CNAN's sovereign immunity defense. The court reasoned that § 1603(e)'s broad language indicated that Congress had not intended "to require that the specific commercial transaction or act upon which an action is based have occurred in the United States or have had substantial contact with the United States."

The Vencedora court also flatly rejected the "doing business" test and applied a "nexus" test to the appellant's clause one claim. In an overwhelming majority of cases before and since Vencedora, the "doing business"
test has likewise been rejected. Rather, the prevailing judicial trend follows Vencedora and supports the nexus approach.

The nexus test, first adopted by the Third Circuit in 1980, applies to two separate issues which are necessary for a finding of a "substantial contact" in clause one cases: whether there is a nexus between the commercial activity and the United States and whether there is a nexus between the commercial activity and the claim.

The threshold issue is how to determine what constitutes commercial activity "carried on in the United States," or, more precisely, "commercial activity having a substantial contact with the United States." It is clear from the legislative history and the cases that a contract for the sale or purchase of goods and services negotiated or executed in the United States has a sufficient nexus to constitute such activity. On the other hand, if the

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141. Id. at 272; Velidor v. L/P/G Benghazi, 653 F.2d 812, 820 (3d Cir. 1981), cert. dismissed, 455 U.S. 929 (1982); City of Englewood v. Socialist People's Libyan Arab Jamahirya, 773 F.2d 31, 35-36 (3d Cir. 1985) (although foreign state's acquisition of real estate was a commercial act, plaintiff's claim for real estate taxes was not based on the acquisition and hence not within clause 1).

142. 28 U.S.C. § 1605(a)(2), cl. 1 (1982); id. § 1603(e).

deal never materializes, mere negotiations will not trigger jurisdiction under clause one. But negotiations in the U.S. involving the presence of the foreign sovereign’s agents might.

It is more difficult to decide if advertising in the United States constitutes such activity. It is a commercial activity, but it is not so clear whether it has a sufficient nexus to be considered a commercial activity in the United States. In *Wolf v. Banco Nacional de Mexico, S.A.*, the Ninth Circuit held that advertising in California newspapers resulting in the purchase through the mails of Mexican certificates of deposit qualified as commercial activity in the U.S. In contrast, in *Tigchon v. Island of Jamaica*, the court held that the advertisement of the resort in a travel brochure published by a third party was not a commercial activity within the United States, because it was not part of a “systematic direct publicity campaign organized by Jamaica and conducted in the United States.”

If the court finds that a commercial activity in the United States exists, then it must decide the second issue: whether a sufficient nexus exists between the claim and the commercial activity. Of course, whether such a nexus will be found depends upon the circumstances of each case, but certain trends can be traced in the more frequently litigated areas.

Courts now routinely hold that contract claims and related actions against foreign states (e.g., misrepresentation, fraud, negligent performance

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145. HOUSE REPORT, supra note 3, at 6615.

146. *Id.*

147. *Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458, 1460 (9th Cir. 1984). *See also* Tucker v. Whitaker Travel, Ltd., 620 F. Supp. 578, 584 (E.D. Pa. 1985) (implicitly accepted that advertisements in U.S. were commercial activity in the U.S., but found no nexus between advertisement and plaintiff’s personal injury claim); *infra* note 205 and accompanying text.


149. At least two early cases applying the nexus test adopted a narrower view. In *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056 (E.D.N.Y. 1979), suit was brought against two state-owned Russian tourist organizations and the U.S.S.R. to recover damages for the alleged wrongful death of an American tourist in a Moscow hotel fire. The hotel was operated by Intourist, Moscow, a separate entity from Intourist, New York, whose purpose was to promote the activities of Intourist, Moscow. Travel accommodations from the United States were arranged exclusively through Intourist, Moscow. Rejecting plaintiff’s § 1605(a)(2) clause 1 argument, Judge Weinstein observed: “The commercial activity out of which plaintiff’s claim arises is the operation of the hotel in Moscow; despite the apparent integration of the Soviet tourist industry, the relationship between the negligent operation of the National Hotel and any activity in the United States is so attenuated that [§ 1605(a)(2) cl. 1] is not applicable.” *Id.* at 1061. One way to reconcile this narrow construction of the nexus requirement with the later cases is to focus on the fact that the two tourist agencies, constituted distinct legal entities. But Judge Weinstein considered this fact to be irrelevant. *Id.* at 1058. *See also* Verlinden I, supra note 43, at 1296 (even though the foreign state’s establishment of a letter of credit in favor of a foreign corporation advised and payable by the state’s correspondent bank in New York, constituted a commercial activity in the U.S., the foreign corporation’s suit for anticipatory breach of the letter of credit

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or tortious interference with a contract) present such a nexus when the contract also provides the basis for finding that the foreign state carried on a commercial activity within the United States.\textsuperscript{150} Similarly, a products liability claim brought by a plaintiff injured in the United States by a product sold in the United States possesses such a nexus, when the foreign state intended such product to be sold in the United States.\textsuperscript{151} Finally, the Fifth Circuit held that a state owned airline’s failure to warn plaintiffs before their flight departed from the United States that they would be denied entry into the Dominican Republic constituted a sufficient nexus with the airline’s commercial activity in the United States.\textsuperscript{152}

While \textit{Vencedora} \textsuperscript{153} held that admiralty claims involving state-owned vessels do not have a nexus based solely on the foreign state’s unrelated shipping activities in the United States, courts have found the prerequisite nexus between the claim and the U.S. commercial activity from the fact that the vessel sailed into American ports. This rule could lead to a rather broad reading of the nexus requirement. For instance, in \textit{Velidor v. L/P/G Benghazi}, upon the arrival of the Benghazi at port in Camden, New Jersey, Yugoslav seamen working aboard the Benghazi brought an action against the vessel and its owners, the Algerian Government, to recover wages earned during a voyage to the United States.\textsuperscript{154} The complaint alleged breach of the sailors’ Algerian employment contracts and violations of the Seaman’s Wage Act.\textsuperscript{155} Algeria conceded that sailing a ship into a U.S. port to discharge and receive cargo constituted commercial activity in the United States for the purposes of clause one. The sovereign defendants contended, however, that, since the claim involved an alleged breach of contract governed by Algerian law and executed abroad with foreign sailors, there was not a sufficient nexus between the claim and the defendants’ commercial activity.\textsuperscript{156}

The Third Circuit disagreed and held that the plaintiff’s cause of action under the Seaman’s Act had “subsumed” the contractual claims, because that Act’s provisions supercede any contrary contractual or legal provisions of the


\textsuperscript{153} \textit{See supra} note 123 and accompanying text.


law of the vessel's flag state. The court concluded that the seamen's claim formed a sufficient nexus with the defendant's commercial activity in the United States. Thus, at least in admiralty cases, the availability of a remedial statute is an important factor in the finding of a nexus.

Advertising in the United States raises delicate nexus issues. Even if advertising were to constitute commercial activity in the United States, a claim does not necessarily bear a sufficient connection with such activity to justify jurisdiction under clause one. For example, in a tort action to recover for injuries sustained while horseback riding in the Commonwealth of the Bahamas, the court rejected the plaintiff's clause one claim. The plaintiffs had alleged that the Bahamas, as a regulator of the tourist industry, had directly engaged in extensive advertising in the United States. The court held that "the relationship between plaintiff's injuries in the Bahamas and the defendant's advertisement is simply too attenuated to satisfy the requirement that plaintiff's claims be 'based upon' commercial activity in the United States."

The foregoing discussion was not meant to exhaust all possibilities of the manner in which the courts have interpreted the nexus requirement used in clause one. Although some aspects of the "nexus" test remain unclear, a decade of practice under the FSIA has clarified how the test operates in the areas of admiralty, air transportation, and international sales.

b. Section 1605(a)(2) Clause Two

Clause two has not received as much judicial attention as clause one. Under clause two, a court may exercise jurisdiction subject to three conditions. First, there must be "an act performed in the United States." Second, the plaintiff's claim must be based on this act. And third, the act must have been performed in connection with a commercial activity performed elsewhere.

Courts have progressively broadened their interpretation of what constitutes an act in the United States. In *East Europe Domestic International Sales*

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157. The Seaman's Wage Act expressly granted foreign sailors a private right of action for wages due while the vessel remained in U.S. harbors. *Id.* at 818.
158. The Seaman's Wage Act was passed to "protect from overreaching a generally impecunious class, 'and to insure that foreigners' will not be turned ashore without funds, 'so that they become a public charge . . . it also guards the interests of American seamen by equalizing the' cost of operating United States and foreign flag vessels." *Id.* at 818-19 (citations omitted).
159. *Id.*
160. *See also* Ministry of Supply, Cairo v. Universe Tankships, 708 F.2d 80, 85 (2d Cir. 1983) (C.O.G.S.A. was a considered factor in finding that the transaction fell within the scope of § 1605(a)(1) cl. 1).
Corporation v. Terra, the court held that the defendant's single telex communication, sent from Romania to the plaintiff in the United States, was not an act in the United States and could not be the basis for a clause two claim for interference with contract. 163 Similarly, in Verlinden, B.V. v. Central Bank of Nigeria, the district court held that a foreign state's breach of a letter of credit advisable and payable in New York, by means of a "repudiation instruction" sent from Nigeria to Nigeria's correspondent bank in New York, did not constitute an act "in the United States." 164

Some recent cases, however, indicate that courts are less timid in finding that the foreign state has acted in the United States. Considering the locus of a breach of a letter of credit in a situation identical to the one discussed in Verlinden, the court in Texas Trading intimated the possibility that the breach occurred in more than one jurisdiction:

Congress in writing the FSIA did not intend to incorporate into modern law every ancient sophistry concerning "where" an act or omission occurs. Conduct crucial to modern commerce — telephone calls, telexes, electronic transfers of intangible debits and credits — can take place in several jurisdictions. Outmoded rules placing such activity "in" one jurisdiction or another are not helpful here. 165

At least one other court has relied on this recent approach and held that a demand for payment of a letter of credit, made abroad by a foreign state to a California bank, constituted an act in the United States. 166 Moreover, in an aircraft disaster case, one court held that a state owned airline's failure to warn potential passengers in the United States about a defective aircraft engine constituted an act in the United States for purposes of clause two. 167

Clause two's second condition requires that the plaintiff's claim be based upon the sovereign's act in the United States. To borrow the terminology developed in Vencedora for clause one, a court may exercise jurisdiction over the sovereign only if a "nexus" exists between the claim and the act. 168 As

163. East Europe Domestic Int'l Sales Corp. v. Terra, 467 F. Supp. 383, 388 (S.D.N.Y. 1979). But the court erroneously applied some sort of doing business test: "We find no presence of Terra in the U.S. and hence, no jurisdiction under [§ 1605(a)(2) cl. 2]." Id.


165. Texas Trading, 647 F.2d at 311 n.30.

166. Wyle v. Bank Melli of Tehran, Iran, 577 F. Supp. 1148, 1159 n.5 (N.D. Cal. 1983). As with § 1605(a)(2) cl. 1, the substance of the claim may operate to broaden jurisdiction. In Wyle, the court observed that "[c]ases under the antifraud provisions of the securities and commodities trading statutes have treated mailing and other forms of communications into a district which are integral to the alleged fraud as acts which will sustain jurisdiction and venue there." Id. The same can be said for alleged antitrust violations.


168. See supra note 123 and accompanying text.
with clause one, the sovereign's unrelated activity in the United States can not sustain federal jurisdiction under clause two.\textsuperscript{169}

Again, as with clause one, the essential difficulty lies in determining how close a nexus is sufficient to exercise jurisdiction. The legislative history made clear that such a nexus should be narrowly defined: "It should be noted that the acts (or omissions) encompassed in this category [clause two] are limited to those which in and of themselves are sufficient to form the basis of a cause of action."\textsuperscript{170}

Nevertheless, the link between the act and the cause of action was loosened in \textit{Gilson v. Republic of Ireland}. There, the plaintiff brought suit against Ireland and two state-owned industrial development instrumentalities, alleging that the defendants, after enticing the plaintiff to leave the United States for Ireland, had stolen his expertise, patent rights and equipment.\textsuperscript{171} Thus, while the "enticement" occurred in the United States, the wrongs upon which the claim was based occurred in Ireland. The court held unanimously that the clause two requirements would be satisfied if the plaintiff could prove "a direct causal connection between his enticement and the misappropriation in Ireland."\textsuperscript{172} Although the court acknowledged that the plaintiff's suit was based on occurrences in Ireland, it dismissed this objection by noting that the unjust enrichment count was included in the House Report's list of acts in the United States and that Congress' goal of providing a forum for plaintiffs in suits against foreign states precluded a narrow reading of the Act.\textsuperscript{173}

This loosening in \textit{Gilson} of the nexus between a plaintiff's claim and the sovereign's acts in the United States is of dubious validity. It is contradicted by the very House Report statement upon which the court relied. The court cited a fragment of the statement, but a full reading makes clear that the foreign sovereign's acts in the forum must also constitute plaintiff's cause of action.\textsuperscript{174} Moreover, it will not be easy in practice to apply such a vague

\begin{itemize}
\item \textsuperscript{169} Hence no "doing business" test. See \textit{ supra} note 123 and accompanying text; Italian Int'l Bank, Ltd. v. Banco Indus. de Venezuela, C.A., No. 83-5288 (S.D.N.Y. June 5, 1984) (LEXIS, Genfed library, Courts file) (accepting argument that clause two does not adopt a "doing business" test). See also \textit{Verlinden I}, \textit{ supra} note 43, at 1296; Hill, \textit{ supra} note 2, at 224.
\item \textit{House Report, supra} note 3, at 6618.
\item \textit{Gilson}, 682 F.2d at 1027 n.22 (citing \textit{Velidor} v. L/P/G Benghazi, 653 F.2d 812, 819 n.12 (3d Cir. 1981), \textit{cert. dismissed}, 455 U.S. 929 (1982)). The standard is also satisfied if plaintiff could establish "that enticement is an element of the cause of action under whatever element governs his claims." \textit{Id.}
\item \textit{Bland} v. Union of Soviet Socialist Republics, 17 Av. CAS. (CCH) ¶ 17,530 (E.D.N.Y. 1982). In \textit{Bland}, a wrongful death action pursuant to an airplane crash abroad, the court held that defendants' failure to warn passengers about a defective airplane engine was an act in the United States. Relying on the House Report, the sovereign defendants argued that while one element of the cause of action occurred in the United States (failure to warn), another element (the injury) occurred abroad since the plane crashed overseas. The court rejected this argument stating: "All that Congress intended by the quoted language was that the (acts) or
standard as a "direct causal relation" between plaintiff's claim and the sovereign's acts in the United States. These difficulties are well exemplified by the problems encountered with a similar standard, the "direct effect" language contained in clause three.

c. Section 1605(a)(2) Clause Three

The third clause of 1605(a)(2) provides that a foreign sovereign shall not be immune in "any case . . . in which the action is based upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."\(^{175}\) This clause permits the exercise of statutory subject matter jurisdiction when three requirements are met.

First, the claim must be "based upon an act outside the . . . United States." As discussed in detail below,\(^{176}\) the House Report\(^{177}\) indicates that assertion of jurisdiction under clause three must be consistent with the "principles" set forth in Restatement (Second) Foreign Relations Law of the United States, § 18 [hereinafter Restatement].\(^{178}\) Superimposed upon clause three, Restatement § 18(b) would require that the foreign state's conduct abroad form the "constituent elements" of the cause of action upon which the foreign state is sued.\(^{179}\) This issue has not been litigated to date.

The second requirement, that the foreign act be "in connection with a commercial activity of the foreign state elsewhere," was addressed in *Berkovitz v. Islamic Republic of Iran*. In that case, the survivors of an American citizen murdered in Iran brought a wrongful death action against Iran and an Iranian revolutionary group,\(^{180}\) alleging that they had participated in the murder. The court held that the only commercial activity in this case was the American's employment, and that the defendants were immune because the murder bore no relation to his job.\(^{181}\)

In contrast to the first and second conditions, the requirement that the sovereign's overseas act cause "a direct effect in the United States" has been the object of frequent litigation\(^{182}\) and of considerable doctrinal attention.\(^{183}\)


\(^{176}\) See infra note 188 and accompanying text.

\(^{177}\) HOUSE REPORT, supra note 3, at 6618.

\(^{178}\) RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1985) [hereinafter RESTATEMENT].

\(^{179}\) *Id.* This does not mean that the act itself must be tortious. 1973 *Hearings*, supra note 8, at 42. *Accord Texas Trading*, 647 F.2d at 311. *See also* Gilson v. Republic of Ireland, 682 F.2d 1026, 1027 (D.C. Cir. 1982).


\(^{181}\) *Berkovitz*, 735 F.2d at 332. *Cf. Texas Trading*, 647 F.2d at 311 n.30.

\(^{182}\) There are approximately 95 cases concerning the "direct effect" condition.
Courts have had extreme difficulty in applying it: "[courts] . . . have announced widely varying definitions of the scope of the 'direct effect' language of § 1605(a)(2)."\(^{184}\)

The resulting plethora of different and sometimes contradictory approaches to the construction of clause three can be traced in part to Congress' failure to provide any concrete examples\(^ {185} \) of what it meant by the concept of "direct effect."

After a decade of case law concerning the "direct effects" clause, four standards for the interpretation of the clause's scope have emerged. The first two are broad approaches and the last two are narrow. The first standard is based on the House Report's suggestion that clause three should be applied consistently with Restatement § 18. The second standard, which is the broadest, focuses on "Congressional intent."\(^ {186} \) The two narrow standards, on the other hand, are based on "technical" criteria: the situs and type of harm (the Restatement § 18 standard); and the status of the injured party.

The House Report indicates that § 1605(a)(2) clause 3 should be applied consistently with Restatement § 18 which provides:

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either

(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or

(b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (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 (emphasis added).\(^ {187} \)

Focusing on the emphasized portions of § 18, some courts have defined "direct effect" as an "effect which is both substantial and the direct and

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185. In contrast to clauses one and two of § 1605(a)(2), the House Report, supra note 3, provides no laundry list of foreign sovereign activity abroad causing a "direct effect" in the United States. The 1973 Hearings, however, mention as "direct effects" the operation of a factory in the foreign state causing pollution in the United States, restrictive trade practices, or commercial activity resulting in the infringement of a copyright. 1973 Hearings, supra note 8, at 20. One could also add shooting a bullet across the border. See Kahele & Vega, supra note 15, at 247.

186. Restatement, supra note 179, at § 18.

187. Id.
foreseeable result of" the act outside the United States.\(^{188}\) Moreover, commentators have suggested that the use of Restatement § 18 narrows the potential scope of clause three.\(^{189}\) There is some merit to this view as § 18 would require not only that the effect be "substantial" and "direct," but also that it be "foreseeable," i.e., that the foreign state knew or should have known that its act would have a direct effect in the United States.

In Texas Trading, however, the court observed that § 18 is concerned with prescriptive jurisdiction while the FSIA is concerned with adjudicatory or enforcement jurisdiction.\(^{190}\) Prescriptive or legislative jurisdiction is the power of the State under international law to prescribe rules governing conduct occurring outside its borders,\(^{191}\) while adjudicatory jurisdiction is the power of a sovereign's courts to adjudicate disputes.\(^{192}\) Given the conceptual differences between these two types of jurisdictions, as well as the potentially different limits imposed on the exercise of each type of jurisdiction,\(^{193}\) the court decided that § 18 should not be used in the construction of clause three.\(^{194}\)

A second interpretive standard was created by the Texas Trading court and based on Congressional intent. In passing the FSIA, Congress was concerned with providing "access to the courts to those aggrieved by the commercial acts of a foreign sovereign."\(^{195}\) Therefore, the court reasoned that clause three should be construed with a broader question in mind: "Was the effect sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case? No rigid parsing of § 1605(a)(2) should lose sight of that purpose."\(^{196}\) Because Texas Trading


\(^{190}\) Texas Trading, 647 F.2d at 311.

\(^{191}\) See RESTATEMENT, supra note 179, at § 6 (prescriptive jurisdiction "refers to the capacity of a state under international law to make a rule of law").

\(^{192}\) See RESTATEMENT, supra note 179, at § 19.

\(^{193}\) A state may prescribe a norm in accordance with RESTATEMENT, supra note 203, at § 18 but provide that any claims arising under this rule shall be either nonjusticiable or justicia-
ble only before an international tribunal (e.g., Iran-U.S. Claims Tribunal). See Dames & Moore v. Regan, 453 U.S. 654 (1981). On the other hand, "[a] state may provide a forum for the settlement of claims even through they arise out of conduct not otherwise within its jurisdiction to prescribe." RESTATEMENT, supra note 179, at § 19.

\(^{194}\) Texas Trading, 647 F.2d at 311; Contra Note, 14 CORNELL INT'L L. J., supra note 184, at 108-110; Note, 13 N.Y.U. J. INT'L L. & POL., supra note 27, at 609-10.

\(^{195}\) Texas Trading, 647 F.2d at 312 (citing the HOUSE REPORT, supra note 3, at 6605).

\(^{196}\) Texas Trading, 647 F.2d at 313.
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dealt with harm to a corporation, the court stated that, "locating the site of the injury . . . is an enterprise fraught with artifice."\textsuperscript{197} Restatement § 18 would be of little help in that task. Therefore, the court decided that the rather broad and vague question posed by the Congressional intent standard should be answered in the affirmative.\textsuperscript{198}

Use of this standard simply allows courts to make a subjective judgment as to what constitutes a direct effect. Since Congress gave no guidance as to the meaning of direct effect, it is apparent that Congress intended to leave such matters to the principled consideration of the courts.\textsuperscript{199} In practice, the "intent of Congress" standard, just like § 18, seems to be primarily a legitimation of results arrived at by other means.\textsuperscript{200}

Conversely, the use of the two narrow standards to define "direct effect" leads to a different result. To define "direct effect" in clause three cases, the third standard involves four possible combinations of situs and type of harm: 1) physical harm in the United States; 2) physical harm abroad; 3) economic loss in the United States; and 4) economic loss abroad. Each will be examined in turn.

One example of the first combination is physical damage in the United States caused by pollutants of a state-owned commercial enterprise.\textsuperscript{201} This court in Ohntrup v. Firearms Center Inc. accepted this formulation. There, the court held that the plaintiff's injury caused by a pistol manufactured by the Turkish state constituted a direct effect.\textsuperscript{202} However, the use of clause three in such situations is likely to be limited. The plaintiff will more likely rely on clause one or clause two exceptions.\textsuperscript{203}

Turning to the second combination, courts have unanimously held that causing injury abroad to an American citizen does not constitute a direct

\textsuperscript{197} Texas Trading, 647 F.2d at 311. Moreover, the court observed that "Congress in writing the FSIA did not intend to incorporate into modern law every ancient sophistry concerning 'where' an act or omission occurs." Id. at 311 n.30. On the difficulty of "finding" intangible assets, see Lowenfeld, \textit{In Search of the Intangible: A Comment on Shaffer v. Heitner}, 53 N.Y.U. L. Rev. 102 (1978).

\textsuperscript{198} Id.

\textsuperscript{199} Texas Trading, 647 F.2d at 308-09. For a definition of "commercial activity," see \textit{House Report, supra} note 3, at 6615-16 ("[t]he courts would have a great deal of latitude in determining what is a commercial activity under this bill . . . . It will be for the courts to determine whether a particular commercial activity has been performed in whole or in part in the United States"). \textit{See also 1976 Hearings, supra} note 3, at 53.


\textsuperscript{203} Id. at 1286. The court also exercised jurisdiction under § 1605(a)(2) cl. 1.
effect in the United States. First adopted in *Upton v. Islamic Republic of Iran*, this rule was fully discussed in *Harris v. VAO Intourist*. In *Harris*, the survivors of an American tourist killed in a Moscow hotel fire brought a wrongful death action against the state-owned hotel. Although "[o]bviously the negligent operation of a hotel in Moscow causing the death of a United States resident has effects in the United States [because] it leaves aggrieved relatives in this country," the court held that the wrong sued upon, the tourist's death, was not itself a "direct effect" in the United States under clause three.

The third combination, that of economic loss incurred in the United States by an American corporation was used in *Texas Trading*. In that case, an American corporation alleged that its economic loss resulting from a foreign sovereign's extraterritorial breach of contract constituted a "direct effect." In analyzing clause three, the court gave separate consideration to the terms "direct" and "in the United States." It concluded that the financial loss to the plaintiff corporation caused by the breach of the letter of credit and the cement contract was a direct effect. It also held that the direct effect was located "in the United States" for two reasons: since the letter of credit was payable in New York, the plaintiff expected to collect in the United States, but the breach precluded him from doing so; and the plaintiff was an American corporation.


207. *Id.* at 1062.
208. *Texas Trading*, 647 F.2d at 312.
209. *Id.*
211. *Texas Trading*, 647 F.2d at 312.
According to Texas Trading, therefore, economic loss incurred in the United States by an American corporation constitutes a direct effect within the meaning of clause three. The Second Circuit still follows this rule, and courts in other circuits have at least implicitly adopted it.

Harris Corp. v. National Iranian Radio and Television is a more difficult case applying this rule. As a condition for executing a contract with Harris, National Iranian Radio and Television [hereinafter NIRT] demanded that Harris have an Illinois bank issue a letter of credit in favor of Bank Melli of Iran to cover its obligation to NIRT. After NIRT and Melli demanded payment under the arrangement, Harris obtained a preliminary injunction enjoining payment of the letter of credit.

On appeal, the court held that NIRT and Melli's demands under the letter of credit arrangement would have a "direct effect" in the United States. The court based its holding on Restatement § 18 and the "Congressional intent" standard of Texas Trading. Also important was the Texas Trading rule that economic loss in the United States was a direct effect. The defendant's demands under the letter of credit arrangement, if successful, would have forced Harris to indemnify the Illinois bank and thus caused a loss in the United States. Faced with similar facts to Harris, the court in Wyle v. Bank Melli also adopted the Texas Trading analysis and held that


215. Id. at 1346-47.

216. Id. at 1351.

217. Id. (quoting Texas Trading, 647 F.2d at 312).

if Bank Melli’s demands for payment of the letter of credit were honored, the plaintiff American corporation would experience the loss, thus causing a direct effect in the United States.

In 1986, the Texas Trading rule was expanded to include natural persons in Meadows v. Dominican Republic. There, American citizens sued to recover payment of a commission earned from a contract for arranging a loan for the defendant. In finding a direct effect under clause three, the court relied explicitly on the Texas Trading approach: “The instant case presents substantially similar facts [to Texas Trading]. Plaintiffs are United States citizens who have suffered financial injury in the United States as a direct result of defendant’s alleged breach.”

Thus, explicitly in the Second Circuit and at least implicitly in three other circuits, financial loss suffered in the United States constitutes a direct effect in the United States for purposes of clause three. It is arguable that Meadows erroneously extended to individuals Texas Trading’s analysis, an analysis that had been formulated to address financial loss by corporations.

The court in Texas Trading expressly left open the question of whether causing economic loss to an American corporation abroad is a direct effect within the scope of clause three. Other courts have split on this issue. The court in Australia Government Aircraft Industries v. Lynne decided that it was not a direct effect where Lynne, an American corporation whose airplane crashed in Indonesia, brought a products liability suit against the Australian government’s aircraft manufacturer. The court accepted the defendant’s sovereign immunity defense and held that “the alleged injury here was not a sufficiently direct effect for the assertion of . . . jurisdiction [under clause three] . . . [T]he direct injury to the American interest in this case occurred overseas where the loss of the plane took place.” Therefore, the replacement and other costs sustained by the American corporation in the United States were an indirect consequence of the aircraft’s destruction.

Two New York federal district court cases reached the opposite result. In the case of In re Rio Grande Transport v. Compagnie Nationale Algerienne de Navigation, the court held that the financial loss to an American shipping firm resulting from the sinking of its vessel on the high seas constituted a direct effect in the United States. The court stated that the issue left open in Texas Trading, whether an injury to an American corporation overseas

220. Id.
221. Texas Trading, 647 F.2d at 312.
222. Australian Gov’t Aircraft Indus. v. Lynne, 743 F.2d 672, 673 (9th Cir. 1984), cert. denied, 469 U.S. 1214 (1985).
223. Id. at 675.
224. Id. Accord Yugoexport, Inc. v. Thai Airways Int’l, Ltd., 749 F.2d 1373, 1375 (9th Cir. 1984), cert. denied, 471 U.S. 1101 (1985) (damage to foreign sovereign plaintiff’s goods in Bangkok warehouse operated by Thai instrumentality did not cause direct effect in the U.S.).
causes a direct effect in the United States, was squarely before the court. Applying Texas Trading's "Congressional intent standard," it answered in the affirmative.\(^2\)

The court reaffirmed this position in Jerushan v. Banco Mexicano Somex.\(^2\) In Jerushan, plaintiffs had bought several certificates of deposit [hereinafter CDs] issued by a state owned Mexican bank (Somex) in U.S. dollars. Before the CDs reached maturity, the Mexican government issued a decree requiring that all CDs payable in Mexico be exchanged for Mexican currency at a special rate significantly less favorable to plaintiffs than the "free market" conversion rate. The plaintiffs sued Somex to recover the value of the CDs at the higher rate. In an opinion denying both parties' motions for summary judgment, the court found that the ambiguous drafting of the CDs made it unclear where they were payable. The court nevertheless found § 1605(a)(2) clause 3 to be applicable and stated that "[e]ven if the contractual language is construed to require plaintiffs to obtain payment in Mexico, Somex's commercial activity had a 'direct effect' in the United States."\(^2\)

The fourth standard in defining "direct effect" focuses on the status of the injured party. In considering a party's status, a court may discuss legal personality or nationality. With respect to legal personality, whether the injured party is an individual, as was the victim of the Moscow hotel fire in Harris v. VAO Intourist, or a legal person as was the plaintiff corporation in Texas Trading, the distinction has no impact on the scope of clause three.

In contrast, the nationality of the injured party has received closer judicial scrutiny. In Texas Trading, the nationality of the injured party was an important factor in finding that Nigeria's breach of contract caused a direct effect in the United States.\(^3\) Although the court cited no authority for this proposition, another court, on almost identical facts, found no direct effect because the plaintiff was a foreign corporation.\(^4\) Nationality is not a settled criterion, however, because in Jerushan v. Banco Mexicano Somex,\(^5\) the court did not distinguish between the American and the foreign certificate holders.\(^6\)

\(^2\) \textit{Id.}\n
\(^3\) \textit{Id. See also} Braka v. Bancomer, S.A., 589 F. Supp. 1465 (S.D.N.Y. 1984), \textit{aff'd}, 762 F.2d 222 (2d Cir. 1985) on almost identical facts the court rejected the Mexican bank's sovereign immunity claim.

\(^4\) \textit{Texas Trading}, 647 F.2d at 312. \textit{See also supra} note 212 and accompanying text.

\(^5\) \textit{Verlinden I, supra} note 43, at 1289. This rule was first suggested in National Am. Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622 (S.D.N.Y. 1978). \textit{See also} Ministry of Supply, Cairo v. Universe Tankships, 708 F.2d 80, 83-84 (2d Cir. 1983) (approving a finding that loss suffered by foreign time charter as a result of foreign sovereign's delay in unloading wheat purchased in U.S. from vessel in Cairo was a direct effect); Yugoexport, Inc. v. Thai Airways Int'l Ltd., 749 F.2d 1373, 1375 (9th Cir. 1984), \textit{cert denied}, 471 U.S. 1101 (1985).

\(^6\) \textit{See supra} note 229 and accompanying text.
While it stands to reason that the nationality of the injured party may constitute an important evidentiary factor useful for determining "foreseeability" or the situs of the harm, the nationality of the plaintiff alone cannot constitute a decisive factor in applying the "direct effects" clause. The reason is simple. In the previously discussed case of *Verlinden v. Central Bank of Nigeria*, the Supreme Court unequivocally rejected the notion that only Americans could invoke the FSIA: "If an action satisfies the substantive standards of the Act, it may be brought in federal court regardless of the citizenship of the plaintiff."\(^{234}\)

The foregoing overview of the various criteria currently employed by the courts to guide their application of § 1605(a)(2) clause 3 demonstrates not only the present disarray of the law, but also suggests that it will be difficult if not impossible to develop a clear, uniform and fair construction of the phrase "direct effect in the United States." Among the competing standards currently used in the application of clause three, the situs of the harm and Restatement § 18's foreseeability notion seem to constitute the most promising candidates. But even these latter approaches contain serious flaws.

The situs of harm test was weakened by the holding of *Rio Grande Transport*, where a direct effect was found even when financial loss occurred abroad. The test was further criticized in the recent case of *Callejo v. Bancomer, S.A.*\(^{235}\) On almost identical facts to those in the previously discussed *Jerushan* decision, *Callejo* refused to base its finding on the situs where the certificates of deposit were to be paid.\(^{236}\) Applying Restatement § 18's "substantial, direct and foreseeable test," the court observed that when construing the FSIA, "arcane doctrines regarding the place of payment are largely irrelevant."\(^{237}\)

Moreover, while it is easy to locate physical harm, the situs of economic loss criteria smack of formalism and artifice.\(^{238}\) Courts either rely on artificial and inequitable distinctions, or broaden the applicable criteria and thereby run the risk of unduly favoring parties that have incurred economic loss over physically injured parties. This dilemma is illustrated by the results reached in some of the cases discussed above. In *Texas Trading*, the court found that the plaintiff's financial loss resulting from Nigeria's anticipatory breach of a letter of credit occurred in the United States because the letter of credit was payable in New York.\(^{239}\) The *Wyle and Harris v. NIR T* opinions extended the reasoning in *Texas Trading* by holding that the defendants' demand for payment of letters of credit (payable abroad and issued by a United

\(^{234}\) Verlinden, B.V. v. Central Bank of Nigeria, 461 U.S. 480, 490-91 n.19 (1983). Moreover, it would be unfair to permit foreign plaintiffs to sue under § 1605(a)(2) cl. 1 (see Ministry of Supply, Cairo v. Universe Tankships, 708 F.2d 80, 85 (2d Cir. 1983)) or cl. 2 and not cl. 3.

\(^{235}\) Callejo v. Bancomer, S.A., 764 F.2d 1101, 1112 (5th Cir. 1985).

\(^{236}\) Id.

\(^{237}\) Id. (citing Texas Trading, 647 F.2d at 311, n.30).

\(^{238}\) Texas Trading, 647 F.2d at 312.

\(^{239}\) Id.
States bank) would still satisfy clause three, because the plaintiffs had agreed in each case to indemnify the United States bank to the extent the bank honored the claim of the defendants. Even this minor extension of Texas Trading is dangerous, because it is the first step down a slippery slope that can only end with acceptance of the proposition that a corporation will be deemed to have incurred a loss in the United States whenever such a loss appears on that corporation's books in the United States. As all losses eventually come to rest in the corporation's books, not only would the distinction based on the situs of the harm become meaningless, but plaintiffs who incurred an economic loss would enjoy a broader right to recovery than those who incur physical injury or damage. Financial losses would always be deemed to "incur in" America, while the Harris v. VAO "injured tourist" line of cases would preclude recovery to individuals incurring physical injury abroad.

An exclusive foreseeability standard suffers from the same infirmity with the "injured tourist" cases. In an attempt to address this problem, the Callejo court held that the domestic effects of the plaintiff's injuries in the injured tourist cases were "fortuitous" (i.e., not foreseeable), while the domestic effects of the losses incurred by the plaintiffs in the Texas Trading line of cases were not.240 This distinction is of rather dubious merit. It stretches common sense to state as a general proposition that the effects in the United States consequential to the injury of an American tourist caused by, for instance, the sovereign's negligent operation of a resort hotel, are any less foreseeable than the effects in the United States of losses incurred by an American corporation from a sovereign's breach of contract abroad.241 Is such injury any less foreseeable than a collision on the high seas (where the Rio court let the American corporation sue under clause three for the loss of the vessel)? Thus, both the situs of harm and foreseeability tests lead to unfair results inasmuch as corporations "injured in their American pocketbooks by commercial activities of state trading companies occurring outside the United States enjoy greater access to American courts than personal injury or death claimants similarly injured. . . ."242

2. Personal Jurisdiction and Due Process

With the possible exception of a § 1605(a)(2) clause three itself, no question posed by the FSIA is more troublesome than this: how do the Constitution's due process clauses limit the exercise of personal jurisdiction under the commercial activities exception? The following discussion examines how

241. Distinctions drawn between "unforeseeable" tort and "foreseeable" breach of contract are equally unavailing. Most of the injured tourists were contractually linked with the sovereign defendant.
§ 1605(a)(2) and due process interact to limit the exercise of personal jurisdiction.

a. *A Narrower Standard than Constitutionally Permissible*

As noted in *Harris v. VAO Intourist*, and approved in many subsequent opinions, the jurisdictional grant embodied in § 1605(a)(2) is not co-extensive with the maximum jurisdictional reach authorized by due process. This is because the claim must bear some connection to the defendant's activities in the United States.

For example, in clause one cases, the courts have overwhelmingly adopted *Vencedora's* "nexus approach" which requires a connection between the sovereign's U.S.-related activity and the controversy.

The same restriction applies in clause two cases. Congress clearly intended that the "act in the United States" constitute the plaintiff's cause of action. While some courts have this requirement, no court has ever suggested that a suit could be brought under clause two when the sovereign's act in the United States bore no connection with the controversy.

Even clause three, which permits a broader reach than clauses one or two, does not authorize jurisdiction when the direct effect in the United States bears no connection with the plaintiff's cause of action.

Since the § 1605(a)(2) claims must have some connection with the foreign sovereign's contacts with the United States, it follows that the proper due process inquiry must employ a "specific" jurisdictional analysis. Only contacts which bear some connection to the underlying controversy should be taken into account for the minimum contacts inquiry. Thus, a proper due process analysis undertaken in connection with § 1605(a)(2) must exclude any of the sovereign's contacts with the United States which are unrelated to the claim. Because due process allows for jurisdiction based on far more


245. *See supra* note 128 and accompanying text. It is clear that this approach effectively excludes general jurisdiction as a basis for minimum contacts and thus due process requirements. *See supra* note 52 and accompanying text.

246. *See supra* note 171 and accompanying text.

247. *See supra* note 172 and accompanying text.

248. *See supra* note 52 and accompanying text.

attenuated contacts, § 1605(a)(2) generally remains well within the due process limits.

Although this focusing of the due process inquiry on special jurisdiction follows inexorably from a proper construction of the Act, surprisingly little authority supporting this proposition exists.

One case which does support it is the Exchange National Bank of Chicago v. Empresa Minero Del Centro del Peru, S.A. In interpreting clause three, the court declared that the sovereign defendant’s “ongoing contacts with United States importers, purchasing agents and freight forwarders . . . are irrelevant to my inquiry since the defendant’s contacts must be in connection with the plaintiff’s cause of action.”

Although most decisions fail to clarify what type of due process inquiry they are using, only a minority of the cases in this “undeclared” category look to contacts that could be unrelated to plaintiff’s cause of action. However, these minority cases are ambiguous because some of the contacts analyzed could also qualify as a claim-related connection. For example, holding that due process was satisfied, the Texas Trading court noted that the sovereign defendant:

sent its employees to New York for training, kept large cash balances there, and maintained a custody account as well. . . . [Defendant] made it a regular practice to advise letters of credit through [Morgan Guarantee Trust Company of New York] and to use Morgan as its means of paying bills throughout the world.

The court later noted that the letter of credit at issue had been advised, amended and was payable through Morgan.

The analysis by the court in Texas Trading, however, is also consistent with a general jurisdictional inquiry. This rather imprecise approach should be compared with the more rigorous analysis in Decor by Nikkei International, Inc. v. Federal Republic of Nigeria, one of the cases decided with Texas Trading. In Decor, the court was careful to connect Nigeria’s use of Morgan with the plaintiff’s claim for anticipatory breach of the letter of credit and the underlying cement contract.

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252. Texas Trading, 647 F.2d at 314.

253. Id. at 314-15.


255. “[P]ayment was to be made to each plaintiff in New York through Morgan Guaranty Trust Company under the letters of credit. Similarly, the three cement contracts were effectively amended to provide for payment thereunder in New York by Nigeria’s unilateral establishment of the letters of credit with CBN, all of which were payable in New York . . . . Although the cement which was to be delivered to Nigeria under the cement contracts did not originate in or
Thus, while there is no recent authority except Chicago Exchange National Bank expressly requiring a specific jurisdictional analysis in § 1605(a)(2), a majority of the cases implicitly so hold.

b. Due Process Restrictions on Section 1605(a)(2)

The fact that the breadth of § 1605(a)(2)'s grant of personal jurisdiction stays within the bounds authorized by due process does not render the latter inquiry irrelevant. It is still possible that a particular exercise of statutory jurisdiction under § 1605(a)(2) may run afoul of due process limitations.

It is well established since the Supreme Court case of World-Wide Volkswagen v. Woodson that a "special" due process analysis involves at least four inquiries: 1) the extent to which defendants availed themselves of the privileges of an American forum;256 2) the extent to which litigation in the forum would be foreseeable to them;257 3) the inconvenience to the defendants of litigating in the forum;258 and 4) the countervailing interest of the forum in hearing the suit.259 There is a substantial difference between the standards currently employed in the application of § 1605(a)(2) and World-Wide Volkswagen's four due process inquiries.

For instance, while the application of § 1605(a)(2) clause one might conceivably overlap with a determination of whether the foreign sovereign defendant "purposely availed" herself of the privileges of American law, clause one does not address the other three due process questions. The same can be said for clause two. Even if a foreign state's "act in the U.S." satisfies clause two, such an act might be so fortuitous as to offend the first and second inquiries.

Not even the complex clause three standards adequately deal with the third and fourth due process inquiries. For example, exclusive use of Bancomer's foreseeable test260 as a standard for asserting statutory jurisdiction in clause three cases might violate due process. According to World-Wide Volkswagen, "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause."261

pass through the United States, payment therefore was to occur in New York at the instance of defendant Nigeria." Id. at 906. See also Exchange Nat'l Bank of Chicago, 595 F. Supp. at 504-05.

257. Id. at 295-97.
258. Id. at 292.
260. See supra note 232 and accompanying text.
The precise manner in which due process limits personal jurisdiction under § 1605(a)(2) remains largely unexplored. Nonetheless, there have been some judicial pronouncements on the issue.

The clearest illustration of the impact that due process has upon § 1605(a)(2) is found in *Exchange National Bank of Chicago v. Empresa Minera Del Centro del Peru, S.A.*

Centromin, a Peruvian instrumentality, purchased some equipment with a promissory note payable in New York and guaranteed by Banco Popular del Peru, a state-owned bank. When Centromin and Banco Popular defaulted on the note, the plaintiff brought suit and claimed jurisdiction under clause three.

Using the *Texas Trading* "situs of harm" test, the court held that, since the note was payable in New York, the defendant's default had caused a direct effect in the United States because it resulted in financial loss in the United States. The court, nonetheless, found that assertion of personal jurisdiction would violate due process. Focusing exclusively on the defendants' contacts related to plaintiff's claim, the court found "nothing to indicate that the defendants availed themselves of the 'privilege of conducting business within the forum . . . ." Centromin had no relevant contacts with the U.S.; the underlying deal for the equipment was negotiated and executed in Peru. Popular's contacts with the banks in New York were also insufficient to sustain the exercise of personal jurisdiction. While one may quibble with the factual particulars of the *Exchange* court's minimum contacts analysis, it clearly demonstrates how jurisdiction exercised in accordance with § 1605(a)(2) may offend due process.

*Magnus Electronics, Inc. v. Royal Bank of Canada* also illustrates how due process operates to limit the jurisdictional reach of § 1605(a)(2). An American corporation brought suit against the government of Argentina under clause three alleging that goods shipped to Argentina were unlawfully converted by Argentine officials. The court stated that even if the defendant's actions could be viewed as commercial activity, "due process constraints preclude such a broad sweep against private litigants . . . and it would be anomalous indeed if a foreign nation could be haled into court here on so slender a connection when a non-sovereign could not."
In conclusion for this Section, it is submitted that a proper articulation of the due process inquiry would help dissipate some of the confusion surrounding clause three as was argued above, neither a foreseeability nor a locus of injury test could convincingly reconcile the results reached in the injured tourist cases with the *Texas Trading* economically injured corporation cases. Perhaps the underlying reason for denying relief to injured tourists is that allowing such cases to be heard would open the "floodgates" of litigation and make United States courts international courts of claims.\(^{269}\) Yet a cogent and clear determination of due process constraints on clause three jurisdiction could pave the way for the elaboration of uniform, reasonable, and above all predictable clause three standards without opening the floodgates as feared. For example, in the paradigm injured tourist case of *Harris v. VAO*, no court would reasonably hold that an allegedly negligent sovereign motel operator had "purposely availed" herself of the privileges of American Law. In some instances, however, such as in the Mexican Certificate of Deposit case of *Callejo v. Bancomer*, the sovereign defendant's long history of prior dealings with the plaintiffs would satisfy the minimum contacts standard.\(^{270}\) No doubt this modification would expand the reach of clause three, but due process constraints would prevent the opening of the floodgates.

C. The Expropriation Exception

To analyze the expropriation exception properly, one must again follow *Texas Trading* and separate the statutory jurisdiction from the due process analysis. The first part of the following discussion will examine the exception's statutory basis; the second part will review the independent due process limitations.

1. Statutory Subject Matter Jurisdiction

Section 1605(a)(3) grants courts statutory jurisdiction over a foreign state when three conditions exist: rights in property are at issue; the property was taken in violation of international law; and either of two jurisdictional nexus requirements are satisfied.\(^{271}\)

\(^{269}\) Vencedora Oceania Navegación, S.A. v. Compagnie Nationale Algerienne de Naviga-
tion, 730 F.2d 195 (5th Cir. 1984), (citing the testimony of Bruno Ristau, who said: "[T]he long arm feature of the bill will insure that only those disputes which have a relation to the United States are litigated in the courts of the United States, and that our courts are not turned into small 'international courts of claims.' The bill is not designed to open up our courts to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.") 1976 Hearings, *supra* note 3, at 31.

\(^{270}\) Callejo v. Bancomer, S.A., 746 F.2d 1101, 1112 (5th Cir. 1985). By failing to raise a due process challenge in a timely fashion, the defendant waived any due process defense. Correctly denying the defense, the court nonetheless noted: "We hold that the contacts discussed are sufficient to satisfy the requirements of due process." *Id.* at 1107, n.5.

\(^{271}\) Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Ethiopia, 616 F. Supp. 660, 662 (W.D. Mich. 1985). These inquiries were first formulated in Kahele & Vega,
a. Rights in Property

The House Report provides no express guidance as to what is meant by "rights in property". Nonetheless, commentators and courts have been quick to seize on a reference in 22 U.S.C. § 2370(e), commonly known as the "Hickenlooper Amendment." The Hickenlooper Amendment precludes the use of the act of state doctrine in cases where the plaintiff's claim is based on a foreign government's expropriation of property in violation of international law. Since courts have routinely restricted the application of the Hickenlooper Amendment to tangible property, judges applying § 1605(a)(3) have reached the same result by analogy. Thus, according to Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico, S.A. and Friedar v. Government of Israel, a claim for payment pursuant to a contract does not constitute "rights in property" within the meaning of § 1605(a)(3).

The result of these decisions seems correct, but the "tangible"-"intangible" distinction tends to mislead. The real issue concerns the distinction between contract and property rights; there is no reason why intangible forms of the latter should not fall within § 1605(a)(3). Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia illustrates the problems created by an excessively narrow reading of the section.

supra note 15, at 252. See also National Expositions v. Dubois, 605 F. Supp. 1206, 1210 (W.D. Pa. 1985); Gibbons v. Udaras, 549 F. Supp. 1094, 1107 n.4 (S.D.N.Y. 1982). The language of § 1605(a)(3) provides for denial of immunity in any case "in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3) (1982).

272. The act of state defense precludes review by a court of a foreign state's sovereign acts performed in its own territory. See Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory").

273. 22 U.S.C. § 2370(e)(2) provides in relevant part: "Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the act of state doctrine to make a determination on the merits . . . in a case in which a claim of title or other right to property is asserted by any party . . . based upon . . . a confiscation . . . or other taking . . . in violation of . . . international law." 22 U.S.C. § 2370(e)(2) (1982).

274. See the cases cited in De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1395 (5th Cir. 1985). See also Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A., 528 F. Supp. 1337, 1346 (S.D.N.Y. 1982); Kahele & Vega, supra note 15, at 253; Von Mehren, supra note 19, at 60.


In Kalamazoo, the Provisional Military Government of Socialist Ethiopia [hereinafter PMGSE] expropriated a majority of the shares of an American corporation’s (Kalspice) subsidiary in Ethiopia [hereinafter ESESCO]. Kalspice sued PMGSE, claiming jurisdiction under § 1605(a)(3). Relying on Canadian Overseas, PMGSE argued that § 1605(a)(3) did not apply because it had expropriated ESESCO’s stock rather than its assets, and since shareholders under Ethiopian law had no direct right to the assets, only intangible rights were at issue. The court refused to distinguish between expropriating the assets or the majority of the stock: “[i]n either case, the foreign state has expropriated control of the assets and profits of the corporation.” Thus, Kalspice’s property claims, even though intangible, fell within § 1605(a)(3).

Given the paucity of reported cases in this area, it is very difficult to predict whether courts will expand on Kalamazoo's holding to include all forms of intangible property within § 1605(a)(3). Neither the statutory language nor the House Report expressly exclude intangibles from the reach of the expropriation exception. Moreover, there is no logical reason for such an exclusion as long as the rubric of “intangible property right” does not become a Trojan horse for contract claims.

b. Property Taken in Violation of International Law

The House Report states that the takings of property in violation of international law “would include . . . nationalization or expropriation of property without payment [or] . . . prompt effective compensation [and] takings which are arbitrary or discriminatory in nature.” This may provide a starting point, but as one court observed: “[while t]he generally accepted formulation is that the expropriating nation must provide ‘prompt, adequate and effective’ compensation, . . . there is little agreement on the meaning of these terms.”

Several decisions, nevertheless, have begun to explore the meaning of a “taking in violation of international law” within the context of the FSIA. In Alberti v. Empresa Nicaraguense de la Carne, the court held that prompt,

277. Id. at 661.
278. See supra note 270 and accompanying text.
280. Id. The court left open the question of whether § 1605(a)(3) would apply if only a minority interest in the stock had been expropriated. But foreign states rarely engage in minority nationalizations.
281. See Gibbons v. Udaras, 549 F. Supp. 1094, 1107 n.4 (S.D.N.Y. 1982) (plaintiff’s claim that § 1605(a)(3) applied because sovereign defendant had misappropriated plaintiff’s “technology and know how” was not “devoid of any merit”).
283. HOUSE REPORT, supra note 3, at 6618.
284. Alberti v. Empresa Nicaraguense de la Carne, 705 F.2d 250, 255 (7th Cir. 1983). Moreover, even the assertion that “prompt, adequate and effective” payment is a principle of customary international law is dubious. See Kahele & Vega, supra note 15, at 255.
adequate and effective payment did not mean that payment needed to be made prior to expropriation. More recently, in *De Sanchez v. Banco Central de Nicaragua* the court held that a national's expropriation claim brought against her own country was not cognizable under international law.

The imprecise nature of this standard results from the fact that while § 1603(a)(3) concerns the court's jurisdiction, the violation of international law question goes to the merits.

c. The Nexus Requirement

The last requirement of § 1605(a)(3) is that the claim satisfy one of two jurisdictional nexus conditions. The first is that the expropriated property (or property exchanged for it) be located in the United States, a relatively straightforward condition. Of course to the extent courts begin to allow claims based on the expropriation of intangible property, difficult issues will arise as to their situs. Such a development would lead to some interpretive difficulties similar to those encountered with § 1605(a)(2) clause three.

The second nexus condition, in contrast, is broader and more difficult to apply: that the expropriated property or its equivalent must be owned or operated by an agency or instrumentality of the foreign state engaged in commercial activity in the United States. Section 1605(a)(3) also permits the court to exercise jurisdiction over a foreign instrumentality where the expropriated property is located outside of the United States and where the foreign instrumentality's commercial activities in the United States have no connection with the expropriated property.

Unlike the commercial activity exceptions, § 1605(a)(3)’s second nexus provision incorporates a “doing business” approach. The plaintiff’s claim need not have any relationship with the foreign sovereign instrumentality’s United States-related activities. Courts addressing the issue have recognized that this construction necessarily follows from the language of the section and its legislative history.

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285. *Alberti*, 705 F.2d at 255. So long as the plaintiff's allegation was neither insubstantial nor frivolous, at least two courts have held that the § 1605(a)(3) requirement of a taking in violation of international law was satisfied. Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 616 F. Supp. 660, 664 (W.D. Mich. 1985); Gibbons v. Udaras, 549 F. Supp. 1094, 1107 n.4 (S.D.N.Y. 1982).


While the same instrumentality must both own or operate the property and engage in a commercial activity in the United States, § 1605(a)(3) may place the expropriating sovereign in a quandary when the property belonged to American interests that were actively trading with the foreign state. In such a case, the sovereign must either prevent its instrumentality from operating in the United States or risk a § 1605(a)(3) suit. The dilemma is nicely illustrated in Kalamazoo. EESCO, by virtue of its nationalization, became a state-owned corporation and thus an instrumentality of a foreign state. After the nationalization, EESCO sold $4.9 million of spice in the United States, $1.2 million of which was sold to plaintiff. The court had little difficulty in finding that EESCO had engaged in commercial activity in the United States and that consequently § 1605(a)(3) applied.

2. Personal Jurisdiction and Due Process

Since the expropriation exception incorporates two different nexus provisions, the relevant due process inquiry will vary accordingly.

First, if the plaintiff relies on the presence of the expropriated property, or its equivalent, in the United States, due process places no additional restrictions on the court's exercise of jurisdiction. Indeed, it was settled by the Supreme Court in Shaffer v. Heitner that when title to property formed the subject matter of the litigation the presence of that property within the jurisdiction constitutes a sufficient contact with the forum to satisfy minimum contacts. Since the plaintiff's expropriation claim is necessarily based on her alleged right to the property, all § 1605(a)(3) claims based on the first jurisdictional nexus fall within the Shaffer v. Heitner rule.

Expropriation claims based on the second jurisdictional nexus, in contrast, raise more delicate issues. Since § 1605(a)(3) only requires that the instrumentality be doing business in the United States, two alternative minimum contacts standards might apply.

In the first alternative, § 1605(a)(3) minimum contacts analysis could focus on the fact that the provision adopts a "doing business" standard, one which takes into consideration not only all of the instrumentality's activities in the United States, whether or not they relate to the claim, but also all of the activities in the United States of the foreign state itself. Since § 1605(a)(3) does not require any connection between the claim for expropriation and the

291. See supra note 272 and accompanying text.
294. Id.
foreign sovereign’s activities in the United States, a general jurisdiction analysis may be used. According to *Helicopteros*, the controlling U.S. Supreme Court case on general jurisdiction, assertion of jurisdiction pursuant to § 1605(a)(3)’s second nexus provision would not offend due process so long as the sovereign defendant’s contacts with the United States were “continuous and systematic.” This approach requires a greater number of contacts than do the jurisdiction requirements of the commercial activities exception, which can be satisfied with a single commercial act or transaction having a “substantial contact with the United States.” Since almost all nations entertain “continuous and systematic” contacts with the United States, it is clear that this approach to due process would not restrict the application of § 1605(a)(3) in any significant way, and would make it much broader than the second alternative minimum contacts approach adopted in *Kalamazoo*.

In *Kalamazoo*, the only case yet to apply minimum contacts analysis to a claim based on § 1605(a)(3), the court held that although defendant EESCO’s contacts with the United States certainly satisfied due process, the court still had to resolve “[w]hether the contacts of EESCO with the United States may be imputed to PMGSE.”

To resolve this issue, the court relied on *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, in which a corporate veil piercing doctrine was used to uphold jurisdiction under § 1605(a)(3). Although instrumentalities are presumed independent from the sovereign state that created them, the court named three situations in which the separate identity of the foreign state and its instrumentality would be disregarded: “where the corporation was so extensively controlled by its owner that a relationship of principal and agent is created, where recognition of the separate corporate identity would work a fraud or injustice, or where the corporate form is used to defeat legislative policies.” The court further found that PMGSE had exercised extensive control over EESCO by appointing a majority of the board of directors, by requiring that a government appointed director sign all

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296. See supra note 52 and accompanying text.
298. See supra note 291 and accompanying text.
299. General jurisdiction as a theory of *in personam* jurisdiction would not distinguish between commercial and governmental activities. Both would be taken into account.
checks in excess of $25,000 and by requiring that the government approve of all invoices over a certain amount. 303 These factors, inter alia, 304 led the court to disregard the separate juridical existence of EESCO and impute the former’s contacts to PMGSE: “To continue to recognize [EESCO’s] separate status . . . would insulate PMGSE from liability for its expropriation of [Kalspice’s] property . . . while permitting PMGSE, through EESCO, to profit from its commercial activities in the United States . . . .” 305

This second approach’s tightening of the due process analysis would restrict the potential scope of § 1605(a)(3) in two ways. First, in making the general jurisdiction due process inquiry, the court only looks at the contacts of the instrumentality owning or controlling the expropriated property. 306 This means that the contacts of the sovereign do not help in finding minimum contacts. This test, just as with the first approach, requires “systematic and continuous” contacts with the United States. Second, as shown in Kalamazoo, due process with respect to the sovereign defendant would be satisfied only if the instrumentality’s contacts could be imputed to the sovereign.

Few rational grounds exist for choosing between the broad first approach and the second which narrows the scope of § 1605(a)(3) substantially. Both are fully compatible with the language of the section and the legislative history. Perhaps the broad due process analysis is to be preferred, if only because the narrow approach merely makes more difficult an already complicated Act.

D. The Immovable Property Exception

Section 1605(a)(4) provides in relevant part that a foreign state shall not be immune in any case “in which . . . rights in immovable property situated in the United States are at issue . . . .” 307

This rarely litigated section is one of the easiest exceptions to apply. The required jurisdictional nexus, immovable property in the United States, can by its nature pose few interpretive problems. Moreover, due process places no additional restrictions on § 1605(a)(4)’s grant of statutory jurisdiction,

303. Id.
304. The court also relied on the fact that EESCO sued Kalspice to recover payment for spices shipped to Kalspice after the nationalization. Id. If the case had taken a different procedural track, Kalspice could have invoked § 1607(c), the counterclaim exception to sovereign immunity.
305. Id.
306. See supra note 291 and accompanying text.
307. 28 U.S.C. § 1605(a)(4) (1982). Section 1605(a)(4) also withdraws immunity in cases in which rights in property in the United States acquired by succession or gift are at issue. This minor exception to sovereign immunity which encompasses movables so acquired has never been litigated. The rationale behind this exception is that in claiming rights in an estate acquired by succession or obtained by gift, the foreign sovereign claims the same rights enjoyed by private persons. HOUSE REPORT, supra note 3, at 6619.
since, according to *Shaffer v. Heitner*, a dispute related to property located in the forum always satisfies minimum contacts.308

The only difficult question concerns the definition of "rights in immovable property."309 According to the House Report, such rights would encompass "questions of ownership, rent, servitudes, and similar matters."310 From the few decisions addressing the immovable property exception, "similar matters" cannot be stretched so far as to include tax claims on real property311 or an admiralty limitation fund.312 Similarly, a treaty right to compensation in the United States for expropriation of land in a foreign state was held not to fall within § 1605(a)(4).313 In contrast, some dicta in § 1605(a)(3) cases state that a foreclosure on a mortgage of real property situated in the United States would fall within the exception.314

While rights in immovable property are "susceptible of as many different meanings as there are areas of the law for which that characterization of an interest may be relevant,"315 it appears that based on Congressional intent and international practice, the scope of § 1605(a)(4) is limited to disputes directly implicating interests in the property or rights to possession.316 This formulation is no more helpful than the statutory language itself and has not yet been fully fleshed out by the courts.

E. The Non-Commercial Tort Exception

1. Statutory Subject Matter Jurisdiction

a. The Enabling Provision

Subject to the exceptions of §§ 1605(a)(5)(A) and (B) discussed below,317 § 1605(a)(5) provides that a foreign state shall not be immune in certain cases:

- in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or

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313. *Asociacion de Reclamanentes v. United Mexican States*, 735 F.2d 1517, 1520-24 (D.C. Cir. 1984) (the original property claims were extinguished by the treaty).
315. See *Asociacion de Reclamanentes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984), which contains the best discussion of this issue.
316. Id. at 1522.
317. *See infra* notes 347, 360 and accompanying text.
employee of that foreign state while acting within the scope of his office or employment . . . .

It should be noted that while drafted primarily to address the problem of traffic accidents, § 1605(a)(5)'s terms apply generally to all tort claims for money damages and include negligence and strict liability actions. This single guideline, however, provides little help in interpreting such terms as "tortious act or omission," "official or employee of the foreign state" or "acting within the scope of his office or employment."

Fortunately, the House Report indicates that § 1605(a)(5) was based on the Federal Tort Claims Act [hereinafter FTCA]. Although the House Report mentioned the FTCA only in connection with § 1605(a)(5)(A) and (B)'s exceptions, the courts have used the language when interpreting the enabling provision of this section. For example, in De Sanchez the plaintiff alleged, in addition to her § 1605(a)(3) claim, that the Nicaraguan government's refusal to honor a check constituted a tortious conversion of her property. The court relied in part on cases interpreting the FTCA to bar plaintiff from characterizing her expropriation claim as a tort claim.

Section 1605(a)(5) requires that the "personal injury or death, or damage to or loss of property occur in the United States." Thus, to the extent one can determine the situs of the harm, losses incurred overseas are excluded. But courts unanimously have applied an even stricter standard than required by the letter of the statute: according to this view, not only must the loss occur in the United States, but the foreign state's tortious act or omission must occur there as well.

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319. HOUSE REPORT, supra note 3, at 6619.
320. Id.
321. Id. at 6620. During the hearings, it was even suggested that § 1605(a)(5) could apply to collisions involving foreign warships. 1976 Hearings, supra note 3, at 96.
322. HOUSE REPORT, supra note 3, at 6620.
324. HOUSE REPORT, supra note 3, at 6620.
326. De Sanchez, 770 F.2d at 1398-99. The court also refused to "believe that Congress intended plaintiffs to be able to rephrase their § 1605(a)(3) takings claims in terms of conversion and thereby bring the claims even where the takings are permitted by international law." Id. at 1398.
327. See Berkovitz v. Islamic Republic of Iran, 735 F.2d 329, 331 (9th Cir. 1984), cert. denied, 469 U.S. 1035 (1984) (subsection (a) (5) requires "personal injury or death . . . occurring in the United States"); McKee v. Islamic Republic of Iran, 722 F.2d 582, 588 (9th Cir. 1983) (it would violate international law to apply § 1606(a)(5) to torts occurring wholly outside of the United States); accord Tel Oren v. Libyan Arab Republic, 517 F. Supp. 542, 549-50 n.3 (D.D.C. 1981).
328. Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 379-80 (7th Cir. 1985) (American spouse's mental anguish and loss of consortium caused by Union of Soviet Socialist Republics' allegedly tortious refusal to allow Soviet husband to immigrate to United States);
Three reasons have been advanced in support of this position. First, the House Report states that "the tortious act or omission must occur within the . . . United States." Second, if Congress had intended to provide jurisdiction for non-commercial torts committed outside the United States, but having an effect within its borders, it would have done so explicitly as in § 1605(a)(2) clause 3. Third, to permit judicial "review of every alleged governmental tort occurring in any foreign country . . . at the request of any member of the family of the victim who claimed to have suffered emotional distress here as a consequence of the foreign act" would create "unprecedented" and "unjustified" "international judicial interference," unless "Congressional intent to grant jurisdiction therefore were manifestly plain." A lone dissent stands against this otherwise unanimous position. In Persinger v. Islamic Republic of Iran, Judge Edwards would have allowed the American parents of an American embassy guard who had been held hostage in Iran to sue the Iranian government to recover for their emotional distress suffered in the United States: "The clear terms of the statute allow for the parents' claim. I do not think we are at liberty to decide otherwise on 'policy grounds'."

The rule narrowing § 1605(a)(5)'s scope to torts occurring and causing harm in the United States creates problems when it is difficult to locate either the situs of the tort or the harm. This is illustrated in Asociacion de Reclamantes v. United Mexican States. In Asociacion, Mexican landowners in Texas were divested from their title by the United States and Texas following the Mexican American War. After ninety-three years of negotiations, Mexico

Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517, 1524-25 (D.C. Cir. 1984) (Mexican government's failure to compensate plaintiffs for Texas land claims); Persinger v. Islamic Republic of Iran, 729 F.2d 835, 842 (D.C. Cir. 1984) (rejecting emotional suffering claim of American parents of embassy guard held hostage in Iran); Olsen v. Government of Mexico, 729 F.2d 641, 646 (9th Cir. 1984), cert. denied, 469 U.S. 917 (1984) (where court found for plaintiff in wrongful death claim by child of parents who as prisoners of Mexican government to be transferred to the United States were killed when plane crashed in United States while attempting to land at Tijuana airport); Perez v. Bahamas, 642 F.2d 186, 189 (D.C. Cir. 1981) (action for injuries suffered by son when father's boat was fired upon by Bahamian gunboats in Bahamian territorial waters); Kline v. Republic of El Salvador, 603 F. Supp. 1313, 1315-16 (D.D.C. 1985) (American citizen killed by El Salvadoran soldiers in El Salvador); In re Sedco, 543 F. Supp. 665, 674 (D.D.C. 1980) ("the tort, in whole, must occur in the United States").

Persinger, 729 F.2d at 844.


Persinger, 729 F.2d at 844.

Persinger, 729 F.2d at 844.
and the United States agreed by treaty that each government would settle the land claims of its own nationals.\textsuperscript{336} Mexico failed to pay its nationals' claims and several successors in interest to the claims brought suit under §1605(a)(5) of the FSIA. Affirming dismissal for lack of jurisdiction, the court stated that "even if the allegedly wrongful failure to compensate had the effect of retroactively rendering the prior acts on United States soil tortious, at the very least the entire tort would not have occurred here, and indeed we think its essential locus would remain in Mexico."\textsuperscript{337} Although the "essential locus" concept no doubt represents an admirable artifact of judicial creativity, it is easy to see that its generalized application would lead to endless practical difficulties.\textsuperscript{338}

Since these problems resemble the difficulties of locating the situs of harm in the §1605(a)(2) clause 3 commercial activity exception, the use of the same solution suggested there might be advisable here.\textsuperscript{339} This would entail the adoption of the broader reading of §1605(a)(5) by the dissent in \textit{Persinger} and reliance on due process restraints to guard against opening the floodgates of liability, which, as with clause three, was the main reason for adopting the narrower interpretation.

The greater flexibility of this approach is illustrated in \textit{McKeel v. Islamic Republic of Iran}. In that case, the facts of which are very similar to \textit{Persinger}, the court did not find it necessary to decide whether §1605(a)(5) provides for jurisdiction when the tort occurred outside the United States; it found assertion of jurisdiction violative of due process.\textsuperscript{340} No reasonable court could have found that, by engaging in its hostage-related activities, Iran "purposely avails itself of the privileges of conducting activities within the forum state."\textsuperscript{341} One can easily conceive of the situation where a sovereign could have purposely availed himself of American law although he committed a tort outside the United States.\textsuperscript{342}

By analogy to the FTCA, choice of law under §1605(a)(5) is determined in accordance with the \textit{lex locus delicti} conflict of law principle. Courts have consistently held that, with certain exceptions,\textsuperscript{343} §2674 of the FTCA mandates that the law of the state where the tort occurred governs plaintiff's tort

\textsuperscript{336} Id. at 1519.

\textsuperscript{337} Id. at 1525.

\textsuperscript{338} Moreover, once it is assumed, as the court did, that both the tort and the damage occurred in the United States, §1605(a)(5) should apply notwithstanding the fact that additional tortious activity occurred outside the United States. In Olsen v. Government of Mexico, 729 F.2d 641, 646 (9th Cir. 1984), \textit{cert. denied}, 469 U.S. 917 (1984), the court held that §1605(a)(5) applied if plaintiffs could allege at least one entire tort occurring wholly within the U.S.

\textsuperscript{339} See text accompanying notes 202-34.

\textsuperscript{340} \textit{McKeel v. Islamic Republic of Iran}, 722 F.2d 582, 588 n.10 (9th Cir. 1983).


\textsuperscript{342} See Olsen v. Government of Mexico, 729 F.2d 641, 646 (9th Cir. 1984), \textit{cert. denied}, 469 U.S. 917 (1984), discussed \textit{supra} note 334. For example, suppose the plane had crashed in Mexico just beyond the American border.

claim.\textsuperscript{344} For example, in \textit{Skeen v. Federative Republic of Brazil},\textsuperscript{345} the plaintiff had allegedly been shot by the grandson of the Brazilian Ambassador.\textsuperscript{346} When he tried to recover against Brazil on the theory of \textit{respondeat superior}, the court held that the law of the District of Columbia was controlling, and under it the grandson had not been “acting within the scope of his employment” when the tort occurred.\textsuperscript{347}

A FSIA-FTCA analogy mandates that certain terms in § 1605(a)(5), like “tortious act or omission” or “within the scope of his office or employment”, be construed according to the \textit{lex locus delicti}. However, the same analogy requires a different result with respect to the terms “official or employee” of that foreign state. Courts have consistently held in FTCA cases that federal law controls the issue of whether an alleged tortfeasor was an employee of the United States.\textsuperscript{348} Applied to suits under § 1605(a)(5), this requirement would mean that the foreign sovereign’s law, modified by any applicable international agreements,\textsuperscript{349} would control the question of whether any given tortfeasor was an “official or employee” of the foreign sovereign defendant.\textsuperscript{350}

\textbf{b. Two Statutory Exceptions}

There are two situations where the non-commercial tort exception does not apply. Under § 1605(a)(5)(A), the sovereign retains immunity for “any claim based on the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused.”\textsuperscript{351} As suggested by the House Report,\textsuperscript{352} courts have unanimously\textsuperscript{353} construed subsection (a)(5)(A) consistently with FTCA cases.

\begin{itemize}
  \item \textsuperscript{344} See, e.g., United States v. Muniz, 374 U.S. 150 (1963) (whether act or omission tortious); Richard v. United States, 369 U.S. 1 (1962) (same).
  \item \textsuperscript{345} Skeen v. Federative Republic of Brazil, 566 F. Supp. 1414 (D.D.C. 1983).
  \item \textsuperscript{346} The court accepted, \textit{arguendo}, that the grandson was an agent of Brazil. \textit{Id.} at 1417-19.
  \item \textsuperscript{347} \textit{Id.} at 1418.
  \item \textsuperscript{348} United States v. Becker, 378 F.2d 319, 321 (9th Cir. 1967); United States v. Hainline, 315 F.2d 153, 156 (10th Cir. 1963); Pattno v. United States, 311 F.2d 604, 605 (10th Cir. 1962), \textit{cert. denied}, 373 U.S. 911 (1963); Courtney v. United States, 230 F.2d 112, 114 (2d Cir. 1956) (“[w]hether [alleged tort feasor] was an ‘employee of the Government’ is wholly a federal question based upon federal statutory interpretation”). See cases annotated under 28 U.S.C. § 2674 (1985).
  \item \textsuperscript{349} See, e.g., The Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.
  \item \textsuperscript{350} But see Garzder v. Air India, 574 F. Supp. 134 (S.D.N.Y. 1983). In Garzder, a clause one case, plaintiff sued Air India, a foreign instrumentality, for wrongful discharge in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623 (1982). Relying on § 1606, the court held that Air India was an “employer” within the ADEA.
  \item \textsuperscript{351} 28 U.S.C. § 1605(a)(5)(A) (1982).
  \item \textsuperscript{352} \textit{HOUSE REPORT}, \textit{supra} note 3, at 6620.
These decisions relied on the leading case in the discretion area, *Dalehite v. United States*. The *Dalehite* court defined discretion as follows: "[I]t is more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion."354 Regardless of the scope of this definition, at least one court has held that the discretionary act exception does not shield the foreign sovereign’s agents from illegal acts. In *De Letelier v. Republic of Chile*, the district court rejected Chile’s “discretionary act” defense in a suit alleging that Chilean agents had assassinated a Chilean dissident leader in Washington.355

The *Dalehite* definition is a bit more difficult to apply to legal acts. In such cases, the level of government at which the tortious act occurred is significant. Most would agree with the court in *De Sanchez*, which found that Nicaragua’s decision to stop payment on a check payable in dollars was discretionary,356 since it was “made at the highest levels of government, pursuant to the critical governmental function of preserving foreign exchange resources.”357 Similarly, few would quarrel with the district court’s358 opinion in *Asociacion* that the failure of the “highest authorities” of the Mexican government to evaluate, finance and pay plaintiffs’ claims were not “ministerial matters [but raised] substantial and serious questions of fiscal policy and the allocation of limited resources.”359

When the acts at issue involve lower level agents, however, courts have differed. In the In re *Sedco* case, an action to recover damages for an oil spill caused by a Mexican instrumentality (PEMEX), the court extended immunity to lower level acts. The court stated that since the exploration for Mexico’s natural resources was a discretionary national plan decided at the highest level, “[a]ny act performed by a subordinate of Pemex in furtherance of this exploration plan was still discretionary in nature . . . To deny immunity to a foreign state for the implementation of its domestic economic policies would . . . completely abrogate the doctrine of foreign sovereign

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355. *De Letelier* v. Republic of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980) (citing *Hatahley* v. United States, 351 U.S. 173 (1956)). The court noted: “Whatever policy options may exist for a foreign country, it has no ‘discretion’ to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law.” *Id.*
357. *Id.*
358. *Asociacion de Reclamantes* v. United Mexican States, 735 F.2d 1517, 1524 n.7 (D.C. Cir. 1984). The Court of Appeals did not reach this issue.
359. *Id.* at 1198. If the treaty had been self-executing, Mexico’s discretionary act defense might have run afoul of the *De Letelier* rule.
immunity by allowing an exception to swallow the grant of immunity preserved by § 1604." Since all lawful actions of a government employee ultimately derive from national policies decided at the "highest level," it is submitted that the expansive reading given to § 1605(a)(5)(A) by the Sedco court would "swallow up" the non-commercial tort exception all together.

A more discerning approach to the actions of lower level agents was taken in Olsen v. Government of Mexico, a wrongful death suit brought by the children of American prisoners of the Mexican government. The prisoners, while flying to the United States under a prisoner exchange treaty, were killed when their plane crashed. The Olsen court relied on several Ninth Circuit cases which had refined the Dalehite definition.

These cases distinguish a "planning level," where governmental policy decisions are discretionary, from the "operational level," where decisions are actionable under the FTCA "even though such decisions or acts may involve elements of discretion." Two factors supplemented this test: "the ability of United States courts to evaluate the act or omission of the [foreign] state, and the potential impairing effect such an evaluation would have on the effective administration of the state's government." Using this analysis, the court rejected Mexico's claim that its conduct leading to the crash of the airplane was discretionary. It is true that Mexico's decision to sign the Prisoner Exchange Treaty with the United States was a discretionary policy decision made at the "planning level." However, even though the pilot and air controller had to exercise considerable discretion as to how to fly the plane, they, nevertheless, acted at the operational level and were not immune.

The other situation where immunity is retained is laid out in § 1605(a)(5)(B) which provides immunity for "any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." Except for claims for libel and...

362. Id.
363. Id.
365. In Mueller v. Diggelman, No. 82-5513 (S.D.N.Y. May 13, 1983) (LEXIS, Genfed library, Courts file), the court, pursuant to § 1605(a)(5)(B) dismissed plaintiff's libel action against the judges and clerk of the Swiss court. The Swiss District Court of Meilen had allegedly rendered an opinion denying plaintiff's appeal in the following terms: "The Federal Supreme Court as well as this Court for this particular case have qualified such behavior as mischievous and sanctioned accordingly. Moreover such a day [sic] of dealing with courts and other administrative authorities is on the long term [sic] so unreasonable and incomprehensible that the question of appellant's reasoning faculty arises. A complaint can be filed only by someone having legal capacity to act, or at least having reasoning faculty. Should appellant not abstain from filing similar complaints, the courts will have no choice but to examine his mental state of health by a specialist." Id. at n.7 (quoting the Swiss District Court opinion).
misrepresentation, the courts have not had the occasion to interpret the meaning of its language. Like the first exception, it is presumed that courts will construe § 1605(a)(5)(B) in accordance with the FTCA cases.

2. Personal Jurisdiction and Due Process

Only McKeel, discussed above, and Olsen v. Republic of Mexico addressed the due process issue in the § 1605(a)(5) context. In Olsen, the court restricted its analysis to the defendant's contacts with California. Since it was easier to apply the specific jurisdiction approach, the court did not apply the general jurisdiction approach looking for "continuous and systematic" contacts.

The Olsen court decided correctly in choosing the specific approach. Even a cursory examination of the language of § 1605(a)(5) shows that it requires that choice. The plaintiff's tort claim must have a nexus with the sovereign defendant's contacts with the forum. In other words, the tortious activity sued upon must occur, or at least cause injury or damage, in the United States. As with § 1605(a)(2), Congress rejected the "doing business" approach for non-commercial tort claims. Thus, all the reasons for requiring a special jurisdiction due process analysis in § 1605(a)(2) suits, apply with equal force to non-commercial tort cases.

It is difficult to find fault with the Olsen court for holding that the 1605(a)(5) grant of jurisdiction merely incorporated due process. After all, the pilot of the aircraft twice sought and received permission to enter United States airspace under long standing procedures between Mexico and the United States. Prior to the crash, the pilot had received extensive navigational assistance from San Diego air control. Although the Olsen court reached the correct result, it would have been preferable that these results be based on an independent due process analysis.

F. Counterclaims

Along with the immovable property exception in § 1605(a)(4), the counterclaim exception is the easiest to apply. No real due process problems exist, since there is no surer way of "purposely availing oneself of the privileges of American law" than by filing a complaint in an American court.

366. See De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1398 (5th Cir. 1985).
368. Id. at 648-49.
369. Id. at 648-49.
370. Id. at 649.
Of course, to benefit from the counterclaim exception, a private party must wait for the foreign sovereign to file a claim against her. One American corporation sought a declaratory judgment in its favor on the grounds that it could successfully base the suit on the counterclaim exception in the event the state sued it first. To the chagrin of the corporation, the Seventh Circuit took a dim view of its argument.

While the counterclaim exception poses no major conceptual problems, courts have been forced to decide whether other types of indirect actions such as cross-claims and third-party claims, fall within its scope. Section 1607 provides that a foreign sovereign shall not be immune with respect to counterclaims in three situations.

The first situation is where a counterclaim could have been brought as a direct claim under § 1605(a). At first blush, § 1607(a) appears redundant, in that it grants jurisdiction in cases already covered by § 1605(a)(2). One possible interpretation of this ambiguity is that § 1605(a)(2) only authorizes direct claims and that § 1607(a) authorizes only counterclaims concerning the commercial act exception subject matter. In other words, this interpretation would say that § 1607(a) does not remove immunity with respect to other types of indirect claims such as cross-claims or third-party claims.

This tortuous argument was flatly rejected in Ministry of Supply, Cairo v. Universe Tankships. Responding to the allegation that any other interpretation would render § 1607(a) redundant, the court surmised that since §§ 1607(b) and (c) deny immunity to situations not covered by § 1605, “Congress wished to deal comprehensively with counterclaims in § 1607 rather than, by omitting subsection (a), to create a doubt whether § 1605 applied to a counterclaim of the sort there described.” Thus § 1607(a)’s denial of immunity with respect to § 1605 based counterclaims does not exclude parties from bringing cross-claims or third-party claims based on § 1605.

Next, § 1607(b) denies immunity with respect to counterclaims “arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state.” Again, the question arises as to whether this section

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373. Section 1607 provides: “In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim — (a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or (b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or (c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.” 28 U.S.C. § 1607 (1982).


375. Id.

should be extended to other types of indirect claims, or restricted to counter-claims. The *Ministry of Supply, Cairo* opinion contains dicta indicating that § 1607(b) applies only to counter-claims. Nevertheless, the inclusive view was explicitly adopted with respect to third-party claims in the *Amoco Cadiz* litigation. Similarly, the court in *In re Rio Grande Transport*, also interpreted § 1607(b) to include cross-claims against the foreign sovereign plaintiff even though the foreign state would have been immune had they been asserted directly. No doubt such an expansive reading of § 1607(b) fully comports with the House Report’s policy that “if a foreign state brings or intervenes in an action based on a particular transaction or occurrence, it should not obtain the benefits of litigation before United States courts while avoiding any legal liabilities claimed against it and arising from that same transaction or occurrence.”

Finally, § 1607(c) has an even broader reach than the first two; it permits counterclaims “to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.” Almost identical policies underlie subsections (b) and (c). The latter was meant to codify the rule in *National City Bank of New York v. Republic of China*, in which the Supreme Court rejected China’s sovereign immunity defense for “defensive” counterclaims. In *City Bank*, the court stated: “We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice.”

Given the similar policy considerations behind subsection (b) and (c), it would be expected that if § 1607(b) includes cross- and third-party claims, so should § 1607(c). Nonetheless, in *Federal Republic of Germany v. Elicofofon*, the court specifically rejected a party’s cross-claim because it did

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377. *Ministry of Supply, Cairo*, 708 F.2d at 87. In *Federal Republic of Germany v. Elicofofon*, 536 F. Supp. 813, 826 n.18 (E.D.N.Y. 1978), aff’d, 678 F.2d 1150 (2d Cir. 1977), the court rejected a party’s cross-claim because it did not fall within § 1607(b). The Court of Appeals approved, holding that the cross-claim did not satisfy § 1607(b). The *Ministry of Supply, Cairo* court, 788 F.2d at 87, took this latter opinion to mean that the court had restricted § 1607(b) to counterclaims.


379. *In re Rio Grande Transp., Inc.*, 516 F. Supp. 1155, 1164 (S.D.N.Y. 1981). The “injured tourist” cases would have precluded cross-claimants from bringing wrongful death and personal injury claims arising out of a collision between an American and a foreign state-owned vessel on the high seas directly against the foreign state. See supra note 208 and accompanying text.


381. 28 U.S.C. § 1607(c) (1982).


384. *Id.* at 361-62.

385. See Brower, supra note 15, at 209. The authors argue that § 1607 should encompass cross- and third-party claims without distinguishing between subsection (a), (b) or (c).
not arise out of the same transaction or occurrence as the claim being litigated.\textsuperscript{386}

Thus, while § 1607(a) and (b) have been extended to cross-claims and third-party claims, it remains to be seen whether the courts will continue to exclude such claims from the scope of § 1607(c). Given the rather arbitrary nature of this exclusion, it is possible that they will not.

**CONCLUSION**

To conclude briefly, three main points about the theory and practice of the FSIA emerge from the above discussion.

The fusion of subject matter jurisdiction and personal jurisdiction causes interpretive difficulties, difficulties aggravated by the Act's twisted draftsman-ship. Personal jurisdiction, by definition, is analytically distinct from subject matter jurisdiction and problems arise when the two are linked together.

The *Texas Trading* court made enormous progress toward "untying the Gordian knot" by recognizing the utility of an independent due process inquiry and by separating the personal and subject matter jurisdiction analyses. Due process is a constitutional right guaranteed to all persons; the due process rights of each person must be determined individually. It is not a matter susceptible of generalized determinations and therefore Congress is not competent to imbed it into a statute. Each provision in the FSIA has jurisdictional requirements that, based on past Supreme Court rulings, are generally in conformity with due process requirements. Nonetheless, it is not possible in drafting a statute of general application to include provisions for the protection of a person's constitutional rights. Lastly, in order to understand and apply the FSIA in a coherent fashion, both practitioners and judges must learn the lessons of the *Texas Trading* case: the FSIA is not a statute that allows for easy interpretation and application; its provisions touch on many more complex issues than are apparent from the wording. *Texas Trading* taught us that in order to address these issues adequately one must analyze each exercise of jurisdiction under the Act to decide, first, whether the statute actually granted it, and, second, whether such a grant comports with constitutional requirements.

The discussion in Part III illustrates how courts have dealt with these issues so far and which issues remain unsettled. It is only by paying careful attention to the subtle interaction between the statutory provisions and due process restrictions that some of the remaining interpretive problems can be solved. The road paved by *Texas Trading* remains a rough one.

\textsuperscript{386} Federal Republic of Germany v. Elicofon, 536 F. Supp. 813, 826 (E.D.N.Y. 1978), aff'd, 678 F.2d 1150 (2d Cir. 1977). See also supra note 373.
Foreign Sovereign Immunities
Act of 1976

§ 1330  ACTIONS AGAINST FOREIGN STATES

(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.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

§ 1602  FINDINGS AND DECLARATION OF PURPOSE

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims 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.

§ 1603  DEFINITIONS

For purposes of this chapter—

(a) A 'foreign state', except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An 'agency or instrumentality of a foreign state' means 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.

(c) The 'United States' includes all territory and waters continental or insular, subject to the jurisdiction of the United States.

(d) A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state as having substantial contact with the United States.

§ 1604 IMMUNITY OF A FOREIGN STATE FROM JURISDICTION

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

§ 1605 GENERAL EXCEPTIONS TO THE JURISDICTIONAL IMMUNITY OF A FOREIGN STATE

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;
(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of a malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person or his agent, having possession of the vessel or cargo against which the maritime lien is asserted: but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice: and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b)(1) of this section, or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest. Whenever the notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: Provided, That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.
§ 1606  EXTENT OF LIABILITY

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607  COUNTERCLAIMS

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608  SERVICE; TIME TO ANSWER; DEFAULT

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit,
together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a ‘notice of suit’ shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request, or

(B) by any form of mail requiring a signed receipt to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4) as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or
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an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609 IMMUNITY FROM ATTACHMENT AND EXECUTION OF PROPERTY OF A FOREIGN STATE

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610 EXCEPTIONS TO THE IMMUNITY FROM ATTACHMENT OR EXECUTION

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if —

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property —

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution,
or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if —

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of a notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if —

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

§ 1611 CERTAIN TYPES OF PROPERTY IMMUNE FROM EXECUTION

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if —

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its
parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.